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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 JEAN AZOR-EL, ET AL.,

4 Plaintiffs,

5 v.

20 CV 3650 (KPF)  
Remote Argument

6 NEW YORK CITY DEPARTMENT OF  
7 CORRECTIONS, ET AL.,

8 Defendants.

9 New York, N.Y.  
10 February 10, 2021  
3:07 p.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES VIA VIDEOCONFERENCE

15 KEENAN & BHATIA, LLC  
Attorneys for Plaintiffs

16 BY: EDWARD E. KEENAN  
SONAL KEENAN BHATIA

17 NEW YORK CITY LAW DEPARTMENT  
18 Attorneys for Defendants

19 BY: DAVID S. THAYER  
CHLARENS ORSLAND

20  
21 ALSO PRESENT: DR. RYAN HERRINGTON  
22  
23  
24  
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(The Court and all parties appearing via videoconference)

(Case called)

MR. KEENAN: May it please the Court. E.E. Keenan,  
from Keenan and Bhatia, on behalf of the plaintiffs.

MS. BHATIA: Sonal Bhatia on behalf of the plaintiffs.

THE COURT: Ms. Bhatia, I'm not hearing you as well.  
I am going to ask you to speak up.

MS. BHATIA: Sure.

THE COURT: I do understand that one of the early  
things that I need to do this afternoon is to admit you pro hac  
vice for purposes of this proceeding. Am I correct?

MS. BHATIA: Yes. Thank you, your Honor.

Can you hear me now?

THE COURT: I can. I thank you, and you are so  
admitted. Thank you very much.

Mr. Thayer, good afternoon to you, sir.

MR. THAYER: Good afternoon, your Honor. David Thayer  
from the New York City Law Department, on behalf of the  
defendants City of New York and Kisa Smalls. And I'm also  
joined by my colleague here in the general litigation division,  
Chlarens Orsland, who is appearing telephonically with myself.

THE COURT: Thank you. Should I be directing my  
questions to you, Mr. Thayer?

MR. THAYER: Yes, your Honor.

THE COURT: Thank you.

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1 Dr. Herrington, I see you as well. I appreciate your  
2 attendance at this proceeding. You as well, sir, I'll need you  
3 to unmute just to say hello to me.

4 DR. HERRINGTON: You're welcome, your Honor. Good  
5 afternoon.

6 THE COURT: Good afternoon, and thank you.

7 All right. Mr. Keenan and Ms. Bhatia, I do  
8 understand, at least my hope is that at least some of your  
9 clients are able to listen in to this proceeding. Am I  
10 correct?

11 MR. KEENAN: That's correct, your Honor. We have --  
12 I'll just introduce who we have on our side with us today that  
13 I know of. Of course, we have Dr. Herrington here. We also  
14 have listening in by phone, but not participating, Julia  
15 Gokhberg, who is a paralegal with our firm and also recently  
16 admitted to Stanford Law School.

17 And then we have our clinical intern this semester,  
18 Marcus Miller, who is a second-year law student at Harvard Law  
19 School.

20 And also, four of our clients are appearing today. We  
21 have Anthony Medina, who is no longer in custody, and is  
22 dialing in; also in custody at Rikers still are Jean Azor-El,  
23 Maurice Barnar and Ronnie Cole. I understand that all of them  
24 are available and (indiscernible).

25 THE COURT: Thank you. I appreciate knowing that, and

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1 I welcome them to this conference as well.

2 My plan this afternoon is to speak with each of you,  
3 and I have questions for each of you. It is not clear to me --  
4 and I didn't think that I would need testimony, but I do  
5 appreciate Dr. Herrington's participation in case I do.

6 Mr. Keenan, should I be asking my questions to you or  
7 to Ms. Bhatia in the first instance?

8 MS. BHATIA: Mr. Keenan, please.

9 THE COURT: Okay. And you will please pass off to the  
10 other as necessary.

11 Mr. Thayer, I have questions specific to plaintiffs,  
12 and I have questions specific to the defense. But if, when it  
13 is your turn to speak, there are things that you'd like to say  
14 just sort of in response to the questions that you've heard  
15 previously, you would be certainly permitted to do that. I  
16 don't know what to ask you, in certain regards, and we may not  
17 find out until we've had this conference.

18 So when we begin, I'll ask if there's something you  
19 want to add to what you've been hearing your adversary speak  
20 to.

21 MR. THAYER: Okay. Thank you, your Honor.

22 THE COURT: Okay. Let me begin with a couple of what  
23 I hope are some of the easier questions. Mr. Keenan, I am  
24 advised that there is a new warden at the facility. Is it  
25 your -- do I have your consent to substitute the new warden

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1 into the case?

2 MR. KEENAN: We were thinking about that issue, and  
3 certainly for purposes of injunctive relief, the answer is yes,  
4 the new warden should be substituted.

5 When they initiated the case, our clients pled damages  
6 claims against the prior warden, as well; so I don't think that  
7 those claims pass to the new warden. I believe that  
8 Ms. Smalls, former Warden Smalls, would remain a defendant for  
9 purposes of the retrospective damages claims.

10 THE COURT: Let me then understand, please, from  
11 Mr. Thayer, Mr. Thayer, which of the wardens have been properly  
12 served with process in this case?

13 MR. THAYER: Only defendant Smalls, your Honor, the  
14 prior warden.

15 And on the note that Mr. Keenan just said, I think the  
16 most recent amended complaint does not explicitly say whether  
17 or not the claims are against Ms. Smalls in her official and  
18 individual capacity. But if what I'm hearing right now is that  
19 plaintiffs still are intending to proceed against her in her  
20 individual capacity, then we would modify our request to, you  
21 know, keep her in the caption, but also add in Ms. Collins for  
22 the purposes of the official capacity injunctive relief.

23 THE COURT: Thank you. And, Mr. Keenan, I presume you  
24 agree to that?

25 MR. KEENAN: We do, your Honor.

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1           THE COURT: Thank you. Then the new warden will be  
2 added.

3           Mr. Keenan, secondarily, with respect to the issues of  
4 the standards for preliminary injunctive relief in this case,  
5 it seemed to me that the parties were largely in agreement as  
6 to what the standards were, and the real dispute was whether  
7 the facts supported satisfaction of each of these standards.

8           But do you disagree? Do you believe that you and  
9 Mr. Thayer have different views as to the appropriate standard  
10 for injunctive relief in this case?

11          MR. KEENAN: I don't believe so.

12          THE COURT: I don't know that I saw extensive  
13 discussion on the element that I see in some cases, of the  
14 public interest and the balance of equities, and often where  
15 the government is an entity, these merge. But I'd like to know  
16 whether you agree that that is an element?

17          MR. KEENAN: I would agree that that is an element  
18 that the Court should consider, and if the Court wants us to  
19 discuss that further, we're certainly prepared to.

20          THE COURT: Eventually, yes, we will, but I just  
21 wanted to make sure that we all had the same understanding of  
22 what the appropriate legal standard was.

23          And do you agree, as well, with your adversaries that  
24 this is a mandatory injunction and that you are asking the  
25 Department of Correction to do things that they have not done

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1 previously in certain cases?

2 MR. KEENAN: Yes. For the most part, that is correct,  
3 your Honor. There is one small issue which, of course, this is  
4 an evolving situation. We've heard from some inmates that  
5 we've gotten calls from, that soap that used to be available is  
6 no longer as widely available.

7 So I guess we would ask them to return to their prior  
8 policies of distributing soap more broadly, but I would agree,  
9 for the most part, that what we're dealing with and certainly  
10 the focus of our motion is mandatory.

11 THE COURT: Thank you. Sir, I want to make sure I  
12 understand whom you believe you represent. There are some  
13 individual defendants, and several of them have been at North  
14 Infirmary Command, but at other points, you suggest that you're  
15 representing the broader population of Rikers generally.

16 And I care about that for purposes of this motion  
17 because it seems to me that there are certain arguments that  
18 you can make with the named plaintiffs in this case that you  
19 might not be able to make with a larger, a broader class of  
20 plaintiffs.

21 MR. KEENAN: Your Honor, we're bringing this, of  
22 course, on behalf of the eight individuals who we've been  
23 retained to represent, Jean Azor-El, Anthony Medina, Ramon  
24 Gomez, Ronnie Cole, Dakwan Fennell, James Carter, Maurice  
25 Barnar and Lance Kelly.

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1           We have pled our amended complaint as a putative class  
2 complaint. Of course, this Court has discretion over whether  
3 to certify a class, whether to enter class-wide relief, even  
4 before class certification, and if so, as to what class.

5           We would seek the broadest relief, which is to  
6 implement these policies at all of Rikers, but certainly, there  
7 are some issues particular to NIC and particular to those who  
8 are medically vulnerable. And this Court would have discretion  
9 to either certify a separate class as to NIC or enter relief as  
10 to a separate class as to NIC, or to have a broader Rikers-wide  
11 class and then a subclass that would be as to NIC. So I think  
12 that's how we see it, as framed at this juncture.

13           THE COURT: In a lot of your briefing, you speak about  
14 historical data -- I might describe this imprecisely -- but  
15 basically the evolution of certain policies being implemented  
16 or not implemented at Rikers Island or at the NIC.

17           For what purpose are you asking me to look at the data  
18 from a year ago? It would seem to me that I should be  
19 concerned about what's going on right now, and that's really  
20 what I'd like to hear from the parties about.

21           But, for example, early infection rates, early  
22 occupancy rates, early efforts to reduce the occupancy rates,  
23 the selective release of inmates, things of that nature, I'm  
24 not sure if that information was included for purposes of  
25 having a complete record, or whether there's something you

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1 wanted me to do with that information in the context of this  
2 application for injunctive relief.

3 MR. KEENAN: Your Honor, we view it as going, one, for  
4 purposes of a complete record and having as full a picture as  
5 possible of what the trajectory of this has been in Rikers.  
6 But specifically, that it goes towards deliberate indifference;  
7 that the people administering Rikers, the DOC and its wardens,  
8 have long known of the threat that is posed by this pandemic.  
9 They had a reduced population and are now ramping population  
10 back up to virtually where it was at the beginning of the  
11 pandemic, and so having that historical perspective, we think,  
12 sheds light on the deliberate indifference.

13 THE COURT: One of the issues that has come up, and  
14 it's an issue in which you and your adversary have some  
15 dispute, is the question of the medical history or the  
16 conditions of the named plaintiffs in this case. Why is it  
17 that you believe this information is not relevant to the issues  
18 implicated by your injunctive application?

19 MR. KEENAN: Because the medical history of any  
20 individual human being is going to differ. All of them have  
21 different conditions, and so the fact that one individual  
22 plaintiff has a certain condition is not going to necessarily  
23 effect what condition anyone else at NIC has.

24 Certainly as they make individualized claims, and if  
25 they move forward with damages claims, the way their particular

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1 histories play out and pose a threat to them will certainly be  
2 relevant, but in terms of getting broader relief inside NIC or  
3 Rikers generally, the threat is the general threat posed by  
4 Covid-19.

5 That said, if the Court wants to enter an order  
6 compelling the production of that material, which I think is in  
7 the possession of correctional medical services, we have no  
8 opposition to that.

9 THE COURT: The issue I have is certain of the  
10 arguments that you make are that the particular sanitation and  
11 hygiene conditions at Rikers Island or at the NIC increase the  
12 risk or the possibility of the plaintiffs in this case  
13 contracting the coronavirus or having a particularly bad  
14 reaction to it.

15 Your adversary has suggested that to the extent that  
16 they have already contracted the virus, they may have a  
17 different reaction to it. They may have antibodies for some  
18 period of time. I don't know that we -- I'm not sure anyone,  
19 other than perhaps Dr. Herrington, has the competence as to how  
20 long such antibodies would persist. But I understood that to  
21 be one of the reasons that they were inquiring.

22 Also, let me just offer a hypothetical. If one of the  
23 individuals in the NIC were deaf, that might have implications  
24 for the manner in which prison officials would have to interact  
25 with that individual. But that wouldn't, at least so far as I

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1 know, wouldn't make them more or less likely to be susceptible  
2 to Covid-19.

3 So I'm trying to understand the interplay, if any, of  
4 the medical conditions and the relief that you seek. And in  
5 part it's because this case began, and your named plaintiffs  
6 are from the NIC, where there are particular medical  
7 vulnerabilities. And so that is my concern.

8 MR. KEENAN: Certainly, your Honor.

9 THE COURT: All right. But I appreciate, I think,  
10 where we just left off is that if I need to, I can order its  
11 disclosure. It is your view right now, sir, that I don't need  
12 to; fair enough?

13 MR. KEENAN: I'll go further than that, your Honor.

14 THE COURT: Okay.

15 MR. KEENAN: And say that if it's something that the  
16 Court would deem helpful, I will state right now, we have no  
17 opposition to the Court ordering the immediate production of  
18 those records.

19 THE COURT: Okay. Well, let me think about that.  
20 Thank you.

21 What, if anything, is the impact of the possibility  
22 that your clients and others at Rikers may be receiving  
23 vaccinations soon?

24 MR. KEENAN: I think we defer to Dr. Herrington on  
25 that, but relying on what Dr. Herrington has said in his

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1 declaration and supplemental declaration so far, as well as I  
2 think just the general experience all of us have had reviewing  
3 news about vaccinations, one, vaccinations are -- they're not a  
4 hundred percent effective. They're believed to be about  
5 95 percent effective. Meaning that out of every 100 people who  
6 get them, only 95 are going to receive some kind of immunity.

7         The other thing about vaccinations, of course, is that  
8 they take time to roll out. So far there's litigation over  
9 this. New York State has not, unlike some other states, for  
10 instance Massachusetts, given inmates the highest or near  
11 highest priority in receiving the vaccination.

12         Meaning that while some inmates have received them or  
13 will receive them, many, if not most, will not for quite some  
14 time. I think we're all aware of the media reports that the  
15 rollout of the vaccine has been slower than hoped or  
16 anticipated. And as Dr. Herrington notes in his declaration,  
17 the idea behind vaccines is to create a threshold level of  
18 heard immunity such that whatever the relative percent is --  
19 and I'll defer to him on that -- of 60, 70, 80 percent of the  
20 population is immune such that the disease can't spread. I  
21 think it will take quite some time -- months, if not longer --  
22 to get to that level of heard immunity inside Rikers.

23         The other thing is that the population of Rikers is  
24 constantly changing, both vis-a-vis inmates and vis-a-vis  
25 staff, and so it's not a controlled group that stays in one

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1 place such that, as long as 60 to 70 percent of the group is  
2 vaccinated, you're going to be okay. The group is constantly  
3 being replenished, and the science is apparently unclear on  
4 whether or not people who are vaccinated can still spread  
5 Covid-19.

6 I'll share a personal example that we've been dealing  
7 with this week. I have -- had a friend, a college friend,  
8 36-year-old orthopedic surgeon in Memphis, Tennessee, who was  
9 vaccinated against the coronavirus in December, the very first  
10 round. To his knowledge, he never had Covid. He tested  
11 regularly. Never did he have a positive test. Last week, he  
12 came down with symptoms of Covid, entered the hospital over the  
13 weekend, and died.

14 THE COURT: Oh.

15 MR. KEENAN: And was a healthy, 36-year-old, with no  
16 known underlying health conditions. And it was, apparently, a  
17 rare iteration of Covid, where someone can get infected with  
18 the virus, perhaps not even test positive, be asymptomatic and  
19 the virus stays latent for a period of weeks or months until a  
20 chain reaction is triggered and someone goes down fast.

21 So we're far from out of the woods in this virus. In  
22 fact, if somebody who was vaccinated two or three months ago  
23 can still expire from it, I think shows us just how much danger  
24 still exists.

25 THE COURT: Thank you. One moment, please.

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1           Mr. Thayer, I did want to speak with Dr. Herrington  
2 for a moment. It wasn't my intention to put him under oath  
3 today, in as much as I thought he'd know better than to lie to  
4 a federal judge, but if you have a wish that I do so, I can, of  
5 course, administer the oath to him.

6           MR. THAYER: I think the City's perspective is our  
7 relative positions are pretty clearly set forth in our  
8 respective papers, and we don't see a need to cross him at this  
9 time.

10          THE COURT: Okay. Thank you.

11          Dr. Herrington, do you want to follow on Mr. Keenan's  
12 discussion with me about vaccinations, and what I can -- what  
13 it would be overly optimistic for me to expect?

14          DR. HERRINGTON: Thank you for the opportunity to  
15 speak. And first of all, I would never misrepresent anything  
16 to a federal judge or any judge.

17          THE COURT: Very wise, sir. Very wise.

18          DR. HERRINGTON: For sure. But I would encourage the  
19 Court to look at sort of an analogy, if you will, and sort of  
20 consider the virus to be an opposing sort of adversary, if you  
21 will. And instead of implementing one intervention to suppress  
22 the virus, like a vaccine, think of the vaccine as one of  
23 several interventions, and think of the sum of those  
24 interventions as being greater than the -- than sort of the  
25 individual parts.

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1           Vaccines are a very important element in suppressing  
2 the Covid epidemic. It's not the only intervention. So I  
3 would never rely solely on the vaccine for several reasons, one  
4 of which is the -- you know, the changing population, with new  
5 people coming into the facility and also not having a  
6 sufficient percentage of the population consenting to getting  
7 the vaccine.

8           While the vaccine is helpful, if only 20 percent of  
9 the people get the vaccine, it's not as helpful as it could be,  
10 and the higher the percentage of people that agree to get the  
11 vaccine, the better chance we'll have at achieving herd  
12 immunity. So I wanted to sort of say that piece.

13           I would also say that the vaccine is new, and we don't  
14 really know how long the immunity that you get from the  
15 vaccine, we don't really know how long that is, and it's  
16 because the virus is such a new phenomenon. But I would  
17 certainly hope and encourage widespread, as widespread use of  
18 the vaccine as possible. I, myself, have received the vaccine,  
19 and I feel better that I did that, but I wanted to make the  
20 point that vaccination is a critically important intervention.

21           It just -- I don't want us to feel like we can  
22 diminish the importance of the other interventions, like hand  
23 sanitizer and social distancing and proper mask wearing. It's  
24 really, I think, best to adopt a strategy and a policy that  
25 implements just as many interventions as we can so that we get

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1 sort of a summation of effect rather than a partial effect if  
2 we limit ourselves.

3 THE COURT: Dr. Herrington, have you had an  
4 opportunity to review the defendant's papers in this matter?

5 DR. HERRINGTON: I did. I did look -- they gave us a  
6 declaration. I did review that.

7 THE COURT: One of the things that I've seen in this  
8 case, and I've seen in some other cases that have, as one of  
9 their focal points the coronavirus pandemic, is that I'm having  
10 folks argue to me, with data, that in some cases individuals in  
11 the carceral setting are fairing better than individuals in the  
12 outside world. And I'm just not sure what to make of that.

13 I mean, to the defendants' point here, it is tragic  
14 that two people have passed away from coronavirus who were  
15 detained at Rikers Island, but as I understand it, no one else  
16 has. And so should I intuit from that that measures that are  
17 being taken have some salutary effect? Should I take from that  
18 that they've just been super lucky for the past year? I guess  
19 I'm not sure. Because, you know, if we're going on statistics,  
20 the statistics at the Rikers Island facility are, in some  
21 respects, better than some non-carceral settings.

22 DR. HERRINGTON: So thank you for making that point,  
23 your Honor. I would submit, two deaths that can be prevented  
24 should be two deaths that can be prevented. And the  
25 interventions that Rikers has done -- and there's been mention

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1 of, you know, use of soap and symptomatic screening of staff as  
2 they walk in -- those are all good interventions. They're just  
3 not sufficient interventions.

4 And if we're -- if we are looking to have the best  
5 outcome, where we have minimal mortality and minimum morbidity,  
6 it would be best practice to be as aggressive as we can be with  
7 our public health interventions because what we don't want is  
8 to have our incarcerated populations at an unreasonable risk.

9 And also, I would ask the Court to consider the close  
10 contact of people that are at the facility. The probability of  
11 an explosion of cases is much higher than it would be, say --  
12 and I haven't been to New York City in years, but I remember in  
13 Central Park being relatively alone one Sunday morning. If you  
14 have a large density of people in a specific area, and then you  
15 have a similar area where the density of people is not that  
16 high, your chance of having an outbreak is much higher in the  
17 first setting.

18 And what we're trying to prevent is a situation where  
19 we have just an exponential rise in the number of cases because  
20 we know that Covid has a mortality rate associated with it. I  
21 mean, I've lost five patients in the last six weeks to Covid,  
22 and I lost one yesterday. So I can personally tell you that it  
23 doesn't make sense not to be aggressive. I mean, it doesn't  
24 make sense to be unreasonable either, but if there's some of  
25 these interventions that are low cost and can be implemented,

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1 then really it's best practice to do that.

2 I mean, you'll save morbidity and mortality. If you  
3 have a large intervention -- a large outbreak and offenders  
4 start to riot, that's a security concern that I think nobody  
5 would want to have happen. And I can tell the Court at my  
6 prison in Washington State, we've had one inmate uprising  
7 already, and that was very -- that was pretty scary.

8 I was actually kept at the facility after hours  
9 because they -- when they have an uprising, they don't even let  
10 staff go home because they worry that hostages are taken and  
11 things like that.

12 So it's really best practice to prevent an outbreak  
13 because if you can prevent an outbreak, you'll for sure enhance  
14 the security of the facility, and you'll prevent people from  
15 dying.

16 THE COURT: Thank you. I will return to you later,  
17 but just give me a moment to write a note.

18 DR. HERRINGTON: Of course.

19 (Pause)

20 THE COURT: I'm going to return to Mr. Keenan right  
21 now.

22 Mr. Keenan, there were a couple of points in your  
23 reply brief, and I have still some other points from your  
24 opening brief, but let me talk about these. I wasn't sure what  
25 you meant specifically when you were speaking about the

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1 balkanization of the parties in this case.

2 I actually -- that's, to a degree, related to my  
3 initial question to you, which is trying to figure out who you  
4 were representing and how the different folks you were  
5 representing influenced the arguments that you were making.  
6 But I understood you to be criticizing the balkanization by the  
7 defendants, and I just wanted to know what in particular you  
8 were referring to?

9 MR. KEENAN: What I'm concerned about is -- and what  
10 that's referring to -- is that the defendants attempted, in  
11 some earlier arguments, to say that this case is just about  
12 NIC, when it's not. We've sought relief in all Rikers, and the  
13 defendants are also saying they want to, you know, go into all  
14 of the individual plaintiffs' medical histories before anything  
15 can be done to solve problems at Rikers.

16 To be clear, we have no problem going into that and  
17 getting them that information, and the Court can issue an order  
18 to Correctional Health Services to hand it over to the  
19 defendants and us right now. That's fine. But an analysis of  
20 the granular nature of each individual plaintiff's personal  
21 medical history is a distraction and a delay from securing  
22 relief that is broadly necessary to all members of this  
23 population.

24 THE COURT: I understand that better. Thank you.

25 You have claims under the Rehabilitation Act, and your

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1 adversary suggests that -- and this is an argument that might  
2 come back to bite someone at some later date. But I believe I  
3 understand them to be saying that the Rehabilitation Act claims  
4 fail because if bad things are happening, they are happening on  
5 a facility-wide basis, and there is nothing to suggest that  
6 there is any sort of discrimination for or against the folks at  
7 the NIC because of their respective disabilities.

8 It seemed to me that if you had -- because I'm not  
9 passing, at this exact moment, on the strength of claims -- but  
10 it seemed to me that you were going all in on your due process,  
11 your Fourteenth Amendment claim, and I'm not sure that the  
12 Rehabilitation Act aids you. But tell me why I'm wrong.

13 MR. KEENAN: Certainly the Fourteenth Amendment claims  
14 have been the focus of our arguments. I think there's more law  
15 on that. They also apply to all of Rikers and not just to NIC,  
16 but we respectfully disagree with the defendants on the  
17 Rehabilitation Act and ADA claims.

18 Part of the Rehabilitation Act and the ADA is the  
19 affirmative duty, excuse me, to provide reasonable  
20 accommodation. And you can't -- to use an alternate  
21 hypothetical, if someone, one of our clients -- Mr. Cole, who's  
22 on this line, is a wheelchair user. It would not be an excuse  
23 for a correctional facility to say, hey, everybody has to use  
24 the stairs here. You know, we're not discriminating in  
25 provision of our programs. We have stairs. Everybody's got to

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1 use them.

2 If there is a specific medical need or a specific  
3 health threat, the Rehabilitation Act and the ADA require  
4 correctional facilities to respond to that. It's a type of  
5 reasonable accommodation.

6 Everybody in NIC is there for a reason. They're there  
7 for different reasons, but the common thread is that they all  
8 face some level of health threat or health issues that are over  
9 and above what the ordinary member of general population faces.  
10 And so that's why we are pressing these claims, because there  
11 is an affirmative duty for them to respond to the legitimate  
12 medical needs of people who already are dealing with ongoing  
13 health situations that would bring them into NIC.

14 One of these things is something I think we might have  
15 touched on in the last conference a few months ago, when  
16 Mr. Medina was still incarcerated. He has visual impairments.  
17 So for instance, Rikers was under a duty to provide him with  
18 access to a low-light cell, where his visual impairment would  
19 not be triggered, and also to equipment necessary for him to be  
20 able to read and write and correspond with his counsel.

21 It would not be an excuse, and the city never  
22 attempted to argue the excuse of, well, all of our cells have a  
23 high level of lighting, or we only use fluorescent light here.  
24 We use that for everybody. Being an equal-opportunity offender  
25 is not an excuse under the Rehabilitation Act or the ADA

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1 because there is a duty to affirmatively respond to a medical  
2 challenge.

3 THE COURT: Okay. There have been analogous  
4 litigations filed with respect to the MCC in Manhattan and the  
5 MDC in Brooklyn. Tell me why your case is different from  
6 those?

7 MR. KEENAN: I have to confess, I didn't re-read those  
8 cases in preparation for today.

9 THE COURT: Okay.

10 MR. KEENAN: But so if the Court wants us to discuss  
11 that, I guess I'd ask for leave to submit a letter brief, but  
12 I'll do my best.

13 THE COURT: Let me focus the inquiry. Perhaps that  
14 will help.

15 MR. KEENAN: Sure.

16 THE COURT: Am I correct that Judge Ramos had the MCC  
17 case and Judge Kovner had the MDC case?

18 MR. KEENAN: I'm certain -- I know that Judge Ramos  
19 had a major case. I think it's the one you're referring to.

20 THE COURT: I'm just into -- that is my recollection  
21 also. It would make sense that the Eastern District judge  
22 would have the Eastern District facility, and the Southern  
23 District judge would have the Southern District facility.

24 But Mr. Thayer was giving you an assist with the head  
25 nodding, the vigorous head nodding that you may have noticed in

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1 your peripheral vision.

2 My recollection, sir, is that in neither of those  
3 cases was injunctive relief was imposed.

4 MR. KEENAN: I think that is correct.

5 THE COURT: So that is why my question to you is, why  
6 is the analysis in this case different from the analyses in  
7 those cases? And you may say, sir -- and I'll let you say it;  
8 I won't necessarily agree with it -- Judge Ramos got it wrong,  
9 Judge Kovner got it wrong. They may be your view, and I'll  
10 listen to you express that view. But I want to understand what  
11 is different about this situation to those that would suggest  
12 to me that I should do something different from what those  
13 judges did.

14 MR. KEENAN: I think we're dealing with different  
15 facts, and we're dealing with being at a different stage of the  
16 pandemic, where more is known about what the appropriate  
17 response measures are. We've lived with this situation for  
18 longer.

19 Those cases, I think, were decided at certainly an  
20 earlier stage of the pandemic than we are at now. Less was  
21 known about what interventions were effective and what  
22 correctional administrators could do to respond.

23 When we started off at the beginning of this pandemic,  
24 really nobody knew what the right response was, and so it  
25 stands to reason that a Court reviewing, in the very first few

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1 months of the pandemic, what correctional administrators are  
2 doing might include basically, listen, this is new to all of  
3 us; they appear to be doing their best; and under the  
4 circumstances and given the state of the knowledge that is  
5 available, so there's no deliberate indifference.

6           The time factor here is what creates the difference,  
7 is one of the major differences in the cases. We have been  
8 living with this pandemic now for almost a year, and for almost  
9 a year now, this has not been new. We have had time for  
10 correctional administrators to learn what are the appropriate  
11 measures to take. What does medical science indicate? What do  
12 we know about the dynamics of this disease?

13           And ten, eleven months into the pandemic, what we know  
14 is that hand sanitizer is not just a good idea, it's a very  
15 good idea. Wearing masks indoors is critical. It's not just a  
16 good idea. Having availability of wipes to clean high-touch  
17 surfaces is critical.

18           I remember at the beginning of the pandemic, people  
19 were going back and forth on do they think this thing is  
20 airborne or not, whatever? We didn't know enough yet. I think  
21 that the decision on MCC, for instance, was on July 2nd, we  
22 were still at a relatively early stage of this. So we know  
23 more now.

24           We also have different facts, which are that we know  
25 that Rikers has promulgated policies that in some instances it

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1 is not following. For instance, our clients have given in  
2 their declarations testimony to widespread noncompliance with  
3 mask mandates by correctional officer. I don't know that those  
4 facts existed in those other cases, that there was widespread  
5 noncompliance. I think we were just dealing with trying to  
6 roll out policies in the first place.

7 So I think we're dealing with, one, more knowledge  
8 about what is the baseline of the reasonable response to this  
9 pandemic; two, we're just dealing with different facts. This  
10 is a different facility, with different dynamics and different  
11 levels of compliance or noncompliance by staff on the ground.

12 THE COURT: Okay. Thank you.

13 I'm going to turn to Mr. Thayer now because he's been  
14 very patient, and I want to hear from him.

15 Mr. Thayer, before I ask the questions, and I have a  
16 number of questions for you, is there something that you'd like  
17 to say in response or to add on to the discussions that I have  
18 had with Mr. Keenan or Dr. Herrington?

19 MR. THAYER: Yes, your Honor. I think I'd like to  
20 start off with the question of the NIC plaintiffs here versus  
21 the wider implications for Rikers' policy. I think the  
22 defendants' position is that the preliminary injunction that is  
23 before your Honor is tailored to DOC policies at large.

24 Of course, we believe that your Honor's decision on  
25 whether or not to issue that preliminary injunction must be

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1 tied to the facts as presented to the Court, and the facts that  
2 have been presented relate solely to NIC. But in practical  
3 terms, if the Court were to issue an injunction, it would  
4 change DOC policy across all facilities.

5 Now, whether or not --

6 THE COURT: Sir, just so that I understand what you're  
7 saying -- thank you -- I think I understand you to be saying  
8 that if I suddenly mandated wipes at every facility, they  
9 wouldn't just be done at the NIC, they'd be done throughout the  
10 Rikers Island complex.

11 MR. THAYER: Correct.

12 THE COURT: Thank you. I'll let you continue, sir.

13 MR. THAYER: The question of whether or not in the  
14 future the defendants may take the position that, in discovery  
15 or at the class certification stage, that the case should be  
16 limited to NIC or that discovery should be limited to matters  
17 at NIC, is something we're still considering. And we think it  
18 doesn't need to be resolved now because, again, in effect, if  
19 the Court were to issue this proposed preliminary injunction,  
20 it would affect a system-wide change regardless.

21 THE COURT: Okay. Thank you. There's something else  
22 you wanted to tell me?

23 MR. THAYER: No. I was going to move on to the next  
24 point or the next thing to discuss. If your Honor has further  
25 questions on that, I'm happy to --

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1           THE COURT: I guess I do have a question. You know,  
2 sometimes -- look, at all times, I am a judge, or at least most  
3 times I am a judge. At all times I am a human being, and I'm  
4 just wondering, putting to the side for the moment whether  
5 something is, in fact, a constitutional violation, putting to  
6 the side for a moment whether something is an admission of some  
7 sort of failing or not, I guess the question is: Is there any  
8 sense or utility to sitting down or reviewing with care what  
9 the plaintiffs' counsel is saying, what Dr. Herrington is  
10 saying, and making some of these changes if they can be made?

11           I understand what you're saying, which is we think  
12 we're fine, and we've been very careful, and we've been  
13 thinking about this for a very long period of time. And I have  
14 no reason to dispute that, all of those things. But to  
15 Dr. Herrington's point, that the most that you can do as a  
16 preventative measure, even if that exceeds what you're  
17 obligated to do, might be something worth doing.

18           So I would hate to be in a situation, and I'm sure I  
19 wouldn't be in this situation, where you would say to me, look,  
20 Failla, no matter what, you're going to have to order us to do  
21 something because to do otherwise is going to be an admission  
22 we don't want to make in this litigation. Okay. I mean, I  
23 understand that that's a possibility.

24           But I would just hate to be in the situation where you  
25 were just about to put out the Clorox wipes everywhere, and

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1 then this litigation got filed, and you said, nope, can't do  
2 that because we don't want to be seen as exceeding or admitting  
3 to some sort of failing for the past. If you have them, for  
4 the love of God, just distribute them.

5 But my broader point is, is there anything that you  
6 folks could just talk about doing on a temporary basis, while  
7 we figure out if there are violations or are there impediments  
8 to each of the things that are being sought by plaintiffs'  
9 counsel?

10 MR. THAYER: I think -- I think I'll sort of approach  
11 this from the higher level, and then I'll dial in to try to  
12 adequately respond to your Honor.

13 I think in terms of deliberating and considering other  
14 avenues of approaching how to keep our detainees as safe as  
15 possible, I think that, as your Honor referenced, the DOC has  
16 done that and continues to do that with, I will add, the  
17 contributions of the Board of Correction, which is the entity  
18 that sits over DOC and promulgates minimum standards and rules  
19 and regulations that govern DOC.

20 And in the DOC process, there are representatives from  
21 Legal Aid Society, there are representatives from the public,  
22 and as I believe Mr. Keenan sent to the Court last night, you  
23 can see from the DOC meetings, that they can be at times  
24 contentious and that there are -- there is pressure and  
25 discussion on what we're doing and how we can improve. And I

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1 think DOC remains very much willing to do what it can to ensure  
2 that our detainees are safe.

3 I think that the specific question of, you know, can  
4 we do wipes right now, or can we do sanitizers right now, I  
5 don't feel that I'm in a position here today to say that we  
6 could do any one thing in the interim while this case is going  
7 on because it has been made fairly clear to me, and I think  
8 I've tried to convey this in our papers, that DOC believes that  
9 it has adequate alternatives to those requested changes right  
10 now.

11 Though, I will add, at least with respect to the  
12 mandatory mask -- or excuse me, the mandatory testing  
13 assertion, I do really want to put out there that, you know, as  
14 the Commissioner said in the excerpts from the DOC meeting that  
15 Mr. Keenan referenced to the Court, you know, the idea of  
16 requiring all staff to wear -- to undergo mandatory testing is  
17 not, you know, a completely out-there suggestion.

18 But we would suggest to the Court that if your Honor  
19 were inclined to go down that route, that we really ought to  
20 hear from the unions that represent the corrections officers on  
21 that front because we think that they will have something to  
22 say about the bodily integrity issues.

23 THE COURT: So let's talk about that.

24 MR. THAYER: Sure.

25 THE COURT: I don't want to derail you from what you

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1 were saying, but we've gone down this path and I think I'd just  
2 like to complete this path.

3 MR. THAYER: Yup.

4 THE COURT: I understood from the recording that I  
5 viewed this morning, that there might be labor issues. I  
6 believe that's how it was described. And then, someone said  
7 something about we'll consider mandatory testing, but then  
8 there was information that was not provided in the meeting, and  
9 I don't know whether it can be provided to me now.

10 So let me ask this question. You've suggested that  
11 the unions want to be heard. Has someone told DOC that the  
12 unions are opposed to mandatory testing, or is this a situation  
13 where everybody thinks that they must be opposed but no one's  
14 actually asked them to find out?

15 MR. THAYER: No, your Honor. I don't know that COBA  
16 has reached out to my office and said we are opposed, but I  
17 think as your Honor may be aware, there was significant  
18 litigation between the correction officers union and the  
19 department early on in terms of -- sorry, I'm not sure if that  
20 was me or -- but there was a significant amount of litigation  
21 between COBA and DOC about steps that DOC was taking to ensure  
22 that its staff were safe earlier in the pandemic.

23 And we anticipate that any further discussions around  
24 those areas are likely to result in additional litigation, and  
25 in order to sort of streamline that step is why we suggested to

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1 the Court that it hear from COBA on the question of mandatory  
2 testing.

3 THE COURT: I see. Right now, the tests that are  
4 available -- because what I'm told is that they are plentiful,  
5 they are available, they are free, and there are multiple  
6 places where you can get them.

7 MR. THAYER: Yes.

8 THE COURT: Are these the nasal swab tests or  
9 something else?

10 MR. THAYER: They are the PCR, the polymerase chain  
11 reaction test. They are not the rapid tests. They are the  
12 nose swab variety. I understand, this is anecdotal, but it's  
13 my understanding that there are two types of the nasal swab  
14 tests, one is the polymerase chain reaction, and I think has  
15 less volatility in its reactivity and the other one is a more  
16 rapid test. That's my understanding.

17 THE COURT: Okay.

18 MR. THAYER: And we do the PCR.

19 THE COURT: So the tests that are made available, if  
20 folks want to take them, are tests for which the results would  
21 be given to them a day or two later?

22 MR. THAYER: Yes. The current test turnaround right  
23 now is zero to three days.

24 THE COURT: Is there any sense of there being -- I  
25 thought I understood that there was a new test that might be

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1 coming out that involved, if I may be graphic, spitting into a  
2 cup, rather than having the nasal swab.

3 Dr. Herrington, am I mistaken about that? Or was  
4 there not authorization given for a new type of test, rapid  
5 test? Sir, you just need to unmute yourself, please. Thank  
6 you.

7 DR. HERRINGTON: Your Honor, the only tests that I am  
8 familiar with is the PCR. There are actually three versions of  
9 that, and then also the rapid antigen. The PCR can be done  
10 with a sort of more uncomfortable, deep nasopharyngeal swab.  
11 It can also be done with a turbinate swab, and also an anterior  
12 nares swab. And those, the last two ones, the turbinate and  
13 the nares, those can be patient administered. And a lot of  
14 people feel more comfortable when they're sticking it up their  
15 nose, rather than having somebody like me do it. And then  
16 there's the rapid antigen test, which is also a swab.

17 The PCR is the gold standard. That's the one whose  
18 accuracy we trust and have the most faith in. It does take a  
19 little more time for results to come back. The rapid test, the  
20 antigen test, that rapidity that you get a result back from,  
21 that's at the -- that's sort of at the cost of accuracy; so you  
22 lose a little bit of accuracy. We have more false positives  
23 than false negatives, which have their own ramifications. So  
24 there's indications to do the rapid test, but the PCR is still  
25 the gold standard.

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1           THE COURT: Thank you. But it sounds like all of them  
2 do require an invasion of one's bodily integrity.

3           DR. HERRINGTON: Well, that is true, your Honor.  
4 There are way worse invasive things you can have done to you,  
5 like an endotracheal tube. So I understand it is a little  
6 invasive. It's pretty minimally invasive, though.

7           When I see patients, I, as a standard of care, I  
8 frequently look in their nose with my otoscope, and I don't  
9 do -- that just simple examination technique, that's comparable  
10 to the anterior nasal swab. And it's minimally invasive, your  
11 Honor. It's -- I find it, as a clinician, if a patient of mine  
12 says: Dr. Herrington, I'm just not comfortable with this test,  
13 I would have to respond -- professionally, of course -- but in  
14 my mind I would be thinking: Come on, it's not bad. It's  
15 like, if you can have a thermometer put under your tongue, you  
16 can have a nasal swab. It's just -- it's not that invasive.

17          THE COURT: I won't dispute you on this because you  
18 have the medical training and I do not, but twice I've had  
19 tests that felt like I was having my brain stem scratched.  
20 So --

21          DR. HERRINGTON: Sure, for sure.

22          THE COURT: -- I should have had you administer it.  
23 Thank you, sir.

24          Let me please go back to Mr. Thayer. Mr. Thayer, so I  
25 don't know that I want to go through each and every one of

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1 these, but one thing was the testing and whether there was any  
2 flexibility on that. And I appreciate what you're saying,  
3 which is, everything suggests to you and to your clients that  
4 it's going to have to be by court order, and even then, I  
5 should hear from COBA before doing anything about it. I hear  
6 you. I don't know what to make of that, but I understand that.

7 Another thing that you spoke about was a pilot program  
8 regarding disinfectant wipes and, you know, that's a very sad  
9 thing. I'm sorry to hear that they ended up clogging the  
10 plumbing at the facility at which the pilot program was  
11 initiated, but I just wonder if the passage of time, the fear  
12 of contracting the coronavirus might make detainees at Rikers  
13 Island more receptive.

14 You know, they might -- and if maybe more bins were  
15 placed out there because I -- again, not to make myself a  
16 witness here, but on those occasions where I may have flushed  
17 wipes down, it may have been because I had nowhere else to put  
18 them. Perhaps there is something that could be done.

19 I'm just not sure that you want to say definitively  
20 that an episode that took place sometime prior to the pandemic,  
21 in some other facility that had bad results would lead to the  
22 same thing here. And I understand what you're saying, which is  
23 we shouldn't have to find -- you know, there shouldn't have to  
24 be some major plumbing disaster just to prove us right.

25 But I am just wondering if that is something that

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1 might possibly be reconsidered, and I don't know if there has  
2 been any discussion about that.

3 MR. THAYER: To my knowledge, I am not aware that  
4 the -- that after the pilot program, there has been a  
5 reconsideration of whether or not the wipes would be effective.  
6 I think the department's position is still that that  
7 demonstrated that it would pose basically too much risk to the  
8 institutional plumbing.

9 That being said, your Honor, I mean, I'm happy to  
10 raise that with my client and to float that. But I think I  
11 would still come back to the, of course, wider point that we  
12 were making in our papers, which is that it's not  
13 constitutionally required. But I certainly hear what your  
14 Honor is saying.

15 THE COURT: All right. And then again, proceeding  
16 down the list, you and many people here in the SDNY court  
17 complex have explained to me why we can't or shouldn't or will  
18 not have hand sanitizer solution at the prison facilities.

19 I had heard previously about the possibility of it  
20 being consumed, which is amazing to me, but I suppose not  
21 beyond the realm of possibility. I hadn't really thought about  
22 the possibility of it being used to start a fire in the  
23 facility, which caused me a bit more of a concern.

24 So let me, if I can, just turn to Dr. Herrington  
25 again. Dr. Herrington, people really drink hand sanitizer, and

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1 it doesn't kill you?

2 DR. HERRINGTON: Thank you for the question, your  
3 Honor. So I know of one instance of offenders drinking hand  
4 sanitizer. That's really all that I'm aware of. They do --  
5 you know, they do make their own alcohol products. You know,  
6 they'll take fruit from the kitchen and they'll hide it and  
7 steal some sugar, too, and they'll add water and they'll put it  
8 in a trash bag and hide it under their mattress for six months,  
9 and it comes out with this toxic home brew that we refer to as  
10 "pruno" out here. On the East Coast, it's called "hooch." But  
11 it does cause intoxication. It also causes metabolic  
12 imbalances.

13 The drinking hand sanitizer would likely do the same  
14 thing. I only know of it happening one specific time in my  
15 state agency. There will always be some individuals who take  
16 too much liberty when -- you know, when things of that nature  
17 are given to them. My response is that you give it like  
18 responsibly, in a way that deters people from trying to consume  
19 it. Either, you know, like a foam sort of, rather than a gel;  
20 large dispensers, like where the correctional officer is  
21 posted; and not sort of, you know, individual, large bottles.

22 Those are interventions, like having a jug of hand  
23 sanitizer, that's a very responsible risk averse decision. And  
24 I say "risk averse" because if you have an outbreak and you  
25 lose a bunch of offenders, you'll look back on that, and when

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1 you do your quality assurance investigations, you'll say, well,  
2 what else could we have done? And somebody is going to say,  
3 well, we could have put out jugs of hand sanitizers.

4 So I've been involved with Covid outbreaks. I've seen  
5 patients die from it. I've talked to family members, and I've  
6 consoled them personally when they lose loved ones. We've lost  
7 two correctional officers at our facility. Our staff is  
8 frequently in tears in morning meetings. It is appropriate in  
9 these very straining, difficult circumstances to be as risk  
10 averse as you can be without being, you know, grossly  
11 irresponsible with your, you know, correctional security  
12 obligations.

13 And I think putting large jugs of sanitizer, there is  
14 no -- there's no reasonable reason not to do that, and what you  
15 don't want to do is put your population at an unacceptable risk  
16 for an outbreak without having done everything that you could  
17 have done to prevent it. And that's a very reasonable  
18 intervention to entertain.

19 THE COURT: Dr. Herrington, two points, though. The  
20 foam that you mentioned, can that be ingested as well?

21 DR. HERRINGTON: Well, the foam is going to be way  
22 less dense. I mean, who is to stop an offender from putting a  
23 dollop of foam in the palm of their hand and then licking it  
24 like an ice cream cone, or whatever. But the idea is to put it  
25 under areas where they're supervised by the officers, and so

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1 the officer's duty is to make sure they're using the foam  
2 responsibly. And if they're not doing it, well, then maybe you  
3 intervene and you take the foam away.

4 I'm just speaking as a clinician, and my training is  
5 to be risk averse, especially when the cost of not being risk  
6 averse is so high.

7 THE COURT: Sir, why I'm asking that question is I  
8 don't know what happens if one drinks hand sanitizer. I don't  
9 know what happens if one ingests hand sanitizing foam. But in  
10 my eight years as a judge, I've had some pretty extraordinary  
11 fact patterns in terms as to what folks in prison can do with  
12 abundant free time and a desire for mischief.

13 So I would be very upset if my actions led to a mass  
14 fire at the Rikers Island facility because people could set a  
15 light the hand sanitizing foam. That's why I'm asking these  
16 pragmatic questions that I simply don't know the answer to.

17 DR. HERRINGTON: Sure. And I'm not like a pharmacist;  
18 so I can't tell you, like, the flammable -- what the ignition  
19 point of hand sanitizer is, but what I will say is it  
20 clinically makes sense to make that available to people.

21 I do see that it reduces the risk of an outbreak, and  
22 if it's dispensed in a responsible manner, under supervision,  
23 then you're responsibly mitigating against the risk of people  
24 misusing the hand sanitizer, vis-a-vis drinking it or lighting  
25 it on fire or licking it like an ice cream cone.

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1           There are -- you know, there's always going to be one  
2 or two people that misuse privileges. That's just sort of  
3 human nature. But I would also submit that if you have a  
4 substantial outbreak at Rikers, you'll have mortality. And  
5 what I think as responsible, you know, citizens and clinicians  
6 and people that make decisions about, you know, prison  
7 healthcare policy, we want to, at the end of the pandemic, to  
8 say that we did everything that we responsibly could to make  
9 sure that whatever suffering does happen, that's at least  
10 minimized. Because if they have a substantial outbreak, there  
11 will be mortality, and you'll always wonder if you did  
12 everything you could to prevent it.

13           THE COURT: Thank you, sir.

14           Mr. Thayer, returning to you. Do you want to be heard  
15 on this issue of hand sanitizer? There may be a whole lot of  
16 things that I just don't know, and I will concede that. For  
17 example, I don't know if foaming hand sanitizer is one thousand  
18 times the price of the other stuff. I don't know if the  
19 responsibilities of the corrections officers are such that  
20 there is no way that any sort of distribution mechanism can be  
21 set up that could be done without there being an officer who  
22 needs to be there 24-seven.

23           So I recognize that Dr. Herrington has ideas about  
24 prevention. You can tell me, from your discussions with your  
25 clients, what your clients believe can be done, can't be done,

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1 should or should not be done, and what the ramifications are to  
2 their jobs of preserving order in the facilities.

3 MR. THAYER: I think that I would start sort of the  
4 legal level here, and I'll say that I think that the -- my  
5 first response is about -- to the extent we're getting into a  
6 discussion about foam hand sanitizer versus gel, I think this  
7 is the type of micro-management of carceral facilities that  
8 Federal Courts typically will try to avoid. And I think that  
9 would be my first response to this level of scrutiny of the  
10 department's, you know, determinations about what works for our  
11 security environment versus what may work in a clinical setting  
12 or in a different security environment.

13 I think my understanding with the -- and I'm not sure  
14 that there's been a robust discussion about foam versus gel,  
15 but that the foam hand sanitizers still poses flammability  
16 issues, and that the department is reluctant to create a  
17 position of a correction officer whose job it is to watch  
18 sanitizer.

19 You know, that being said, I think -- I would like to  
20 just comment that I think the department, when hand sanitizer  
21 was initially raised, seriously considered this as a viable  
22 alternative. I don't think anyone, certainly -- I don't think  
23 anyone is saying that responding to Covid or determining which  
24 is the best route to take in terms of preventative measures is  
25 an easy decision or one that we might have, you know,

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1 completely reasonable disagreements on but that, you know, our  
2 decisions on that front are -- deserve deference, and that our  
3 decisions were reasonable in this setting. And, yes, I think  
4 that's all I would say on that front.

5 THE COURT: Thank you. Let me just take a note on  
6 that. I think you've actually led into the next set of  
7 questions I wanted to ask you, and again, if you have things  
8 that you want to raise to me, I'll let you do it at some point,  
9 but we seem to be in the right point in our conversation to  
10 have this discussion.

11 The biggest disconnect to me between your submissions  
12 and your adversary's submissions is that you speak in terms of  
13 thoughts and considered decisions. And you've asked me,  
14 understandably, to respect the institutional knowledge and the  
15 professionalism of your clients and the decisions that they  
16 have made.

17 But I am met -- I'm sorry, I'm being advised,  
18 Dr. Herrington, was there something you wanted to say? My  
19 deputy said you may have raised your hand. I didn't notice  
20 that because my eyes were focused on Mr. Thayer.

21 DR. HERRINGTON: It's okay. I wasn't sure if it was  
22 proper form to raise my hand anyway. So I just wanted to add  
23 that these interventions, you know, the hand sanitizer, they're  
24 not permanent. It's not like, you know, you would be saying  
25 that Rikers has to do hand sanitizer, you know, for the next

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1 200 years or whatever.

2 It's only until the pandemic is sufficiently  
3 controlled, where transmission is reduced to a level that is  
4 not prone to promote an outbreak. That was the last point I  
5 wanted to make.

6 THE COURT: And that is now noted. Thank you.

7 Mr. Thayer, returning to you, sir. It should be  
8 obvious that I have enormous respect for the decisions that are  
9 being made by your clients, and I wouldn't presume to know the  
10 various policy issues that have to be balanced in making those  
11 decisions, and that's exactly why I'm having the conversations  
12 I've been having with you and everyone in this conference.

13 The concern that I have is your clients have given me  
14 some submissions that tell me all of the ideas that they've  
15 had, the reasoned decisions that they have made, and the  
16 policies that they've implemented, but meeting that are a  
17 series of declarations and statements from plaintiffs and their  
18 counsel saying that these are great ideas, except they're not  
19 being followed.

20 And so if what you're saying to me is, don't  
21 micromanage. I respect that. I may ultimately disagree with  
22 you someday, but I understand the argument. And I don't want  
23 you to think that I'm just interested in traipsing on the  
24 authority afforded to your clients.

25 But my concern is when I'm told by the plaintiffs in

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1 this case that, in fact, these great ideas are not being  
2 implemented in practice, that I have a concern. And so could  
3 you please speak to me about the interplay of what your clients  
4 are saying should be done and what Mr. Keenan's clients are  
5 saying is, in fact, happening?

6 MR. THAYER: Yes, your Honor. I think the -- I  
7 anticipated that your Honor might pose this question to me, and  
8 I think that our response is, essentially, that the incidences  
9 of -- that are put forth in these three declarations of, you  
10 know, inconsistent mask wearing by staff members and  
11 inconsistent sanitization, it's not clear when this happened  
12 or -- when this happened.

13 But I think our position is that our asking of the  
14 Court to still give deference to the response that we have had  
15 to the Covid-19 epidemic is consistent with the case law that  
16 your Honor was referencing in *Fernandez-Rodriguez*, in *Swain* out  
17 of the Eleventh Circuit. There were discussions in those cases  
18 too about assertions of inconsistent follow through of  
19 departmental policies, and the courts in those cases still felt  
20 that, given the response, the plaintiffs had failed to show or  
21 make a showing on a preliminary injunction standard of a  
22 substantial likelihood of success on the merits. And I think  
23 we would take the same tact, that these allegations of, you  
24 know, individual instances of noncompliance we don't think  
25 amounts to deliberate indifference.

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1           And to the extent that there are instances where  
2 sanitizing materials aren't available or, you know, somebody  
3 doesn't have soap, there are a number of different ways for an  
4 incarcerated individual to get access to that stuff. They can  
5 ask their housing officer. They can put in a complaint. We  
6 have mechanisms to deal with those omissions, the types of  
7 mechanisms that I'm sure your Honor is familiar with from the  
8 many 1983 cases that are before you.

9           And I think that that is how we would approach those  
10 declarations. I came across, in the course of preparing for  
11 this argument, a case called *Johnson v. Goord*, which was before  
12 Judge Castel. I believe he issued a decision in 2004. And in  
13 that case it was about environmental tobacco smoke, and the  
14 allegation was that a number of inmates were being unreasonably  
15 exposed to environmental tobacco smoke. And the jail facility,  
16 I don't believe it was New York City, but the jail facility was  
17 doing -- was not taking adequate steps to abate that.

18           And I seem to recall that there were allegations that,  
19 you know, correction officers were smoking on the job, that  
20 sort of thing. And Judge Castel noted that perfect compliance  
21 with a policy, of a departmental policy is not what's mandated  
22 here. What's mandated is that the department is responsive to  
23 the threat it faces and takes steps and changes how it  
24 approaches things when it learns new information. And I think  
25 our declarations set forth that we have indeed done that.

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1           And finally, I'll end on a more practical note on this  
2 point. If there are particular issues that plaintiffs' counsel  
3 is aware of, I'm happy to take those to my client if they're  
4 brought to my attention. And I would encourage, I think, some  
5 more communication on that front, and I would be happy to try  
6 and direct those issues to the appropriate persons in DOC.

7           THE COURT: Mr. Thayer, I am asking you to direct the  
8 soap issue to your clients that was raised at the very  
9 beginning of this hearing. I'm sure there is an explanation  
10 for it, and I accept everything that you've said about housing  
11 officers and complaints, but since we've heard about it, since  
12 we're all together, I'm asking you to short circuit the process  
13 on that one point. Especially because you've said to me that  
14 soap is an equivalent for the hand sanitizers, let's just make  
15 sure that they are -- that soap is plentiful.

16           MR. THAYER: Yes, your Honor. I had actually written  
17 that down already.

18           THE COURT: Well, then we were on the same page.

19           But, sir, to your point -- and please understand, I  
20 take no offense by being told what lane I should stay in  
21 because that's also part of my job. There's a bit of a tension  
22 that you run into, and that is, to the extent you want to show  
23 me or you want to stand on these policies, on these  
24 regulations, on these things that DOC and its affiliated bodies  
25 are putting forward, that's fine.

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1 But for me to start looking into them, and then be  
2 accused of micro-managing is the tension. So if you're telling  
3 me we have all these policies, I say, great, and I want you to  
4 make sure that these policies are being followed. I don't  
5 think that is micromanaging. It may be, if I start asking you  
6 to do something different or if I supplant the committees that  
7 DOC has in order to make the changes, as changes need to be  
8 made.

9 But just note that the more that you rely on what you  
10 have out there, the more I get to ask you and probe what you  
11 have out there. That's not micro-managing. Understood, sir?

12 MR. THAYER: Yes, your Honor. And I think this is a  
13 sort of an interesting dynamic of Monell, as well, here, in  
14 that I think one of the ways, you know, that we could discuss  
15 Monell liability would be if there are issues, are we being  
16 responsive and are we taking steps to ensure that issues with  
17 compliance are remediated.

18 And that's why in the declarations we made sure to  
19 point out the various -- I lose track every time I read the  
20 description of it, but there are several layers of audits with  
21 regard to sanitization, the provision of materials and so on  
22 and so forth. And then, of course, we have the risk of  
23 disciplinary action with regard to the masks.

24 And I think those, speak to the more minute issues  
25 that your Honor is referencing about what the plaintiffs may be

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1 seeing in their facilities, that we have ways to catch that  
2 very conduct, if it is going on. And I think that ultimately  
3 inures to our benefit.

4 THE COURT: Sir, earlier I spoke to Mr. Keenan about  
5 some things that caused me a little bit of confusion in the  
6 briefing. I have one for you as well, and that is, at page 22  
7 of your brief -- you don't need to look at it, don't worry --  
8 what you say is, I believe you say something to the effect of,  
9 coercion should be sparingly wielded, and I understand what  
10 each word means.

11 I want to make sure I understand the principle that  
12 you're vindicating or seeking to vindicate. Are you suggesting  
13 to me that -- it sounds like you're saying, we need to pick our  
14 battles with what we enforce, and that's what caused me  
15 concern. Because I think, especially now in the pandemic here,  
16 everything should be enforced if these policies are what you're  
17 telling me is the way in which your clients are meeting their  
18 constitutional obligations. So what did you really mean there?  
19 What did I misunderstand?

20 MR. THAYER: Yes, your Honor. The notion is that the  
21 department, of course, has the disciplinary -- the disciplinary  
22 policy for failure to comply with the mask-wearing mandate.  
23 The point I was trying to -- or the dichotomy I was trying to  
24 set up for your Honor in that section was that the department  
25 also has a more persuasive, less, you know, we are going to

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1 bring -- you know, do a corrective or issue a command  
2 discipline for your failure to wear a mask.

3 The department also has a persuasive component, where  
4 they have mentoring units where a correction officer's peer  
5 will reach out to them and say, hey, come on, man, you really  
6 should be wearing a mask or you should be putting that on. I  
7 was trying to establish that the department is attacking this  
8 from both fronts. We don't want to, as I think we all may be  
9 familiar with in our own lives where the Governors and other  
10 elected officials deal with mask-wearing mandates in our own  
11 lives, we don't want to rely solely on coercion. We want to  
12 encourage, you know, self-organic compliance with the  
13 mask-wearing mandate, and that's why we approach it from both  
14 sides.

15 THE COURT: Thank you. Mr. Thayer, to the extent I  
16 did derail you earlier, are there other issues that you'd like  
17 to raise based on the conversation I was having with Dr. Keenan  
18 or Dr. Herrington?

19 MR. THAYER: The other -- so two issues, your Honor.  
20 One was about the medical history of the plaintiffs. We are --  
21 you know, we would like HIPAA authorizations for the medical  
22 records, but if the Court is inclined to issue an order  
23 directing that the materials be turned over, I have been  
24 informed by my liaisons at CHS that that will do the trick. So  
25 if the Court is going to go that route, we would certainly have

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1 no objection to that.

2 THE COURT: Well, wait. And I'm saying this without  
3 being facetious. Why should I order this information?

4 MR. THAYER: Well, your Honor, I think the -- I think,  
5 first of all, it's discoverable regardless of the necessity for  
6 this particular -- this motion.

7 THE COURT: Okay.

8 MR. THAYER: And I also think separately, the  
9 defendants' position is that it's difficult for us to  
10 adequately argue about, you know, if one plaintiff sees  
11 deficient sanitization in his or her housing area, if that  
12 person is completely vaccinated and maybe has the Covid  
13 antibodies in addition to being vaccinated, I don't think  
14 there's any such plaintiff at this moment, but I'm  
15 hypothesizing that, you know --

16 THE COURT: Yes.

17 MR. THAYER: -- or I'm trying to propose that there  
18 may be inmates who have other elements that we may think may be  
19 significant with regard to the risk posed to them by Covid. I  
20 understand that the plaintiffs have set forth a purported  
21 class, and that they want this to be a case that is about  
22 Rikers at large, but we also think that any remedies that are  
23 going to be issued in this case will need to concede to  
24 representatives who are representative of the class, who have,  
25 you know, conditions that are consistent with many other

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1 members of the class.

2 And certainly on the ADA and Rehabilitation Act claim  
3 side, I struggle to see how I am supposed to talk about what is  
4 a combination that is an appropriate condition that I do not  
5 know anything about. I think that is why we are hammering home  
6 a little bit the HIPAA issue.

7 I think the second point I wanted to raise with your  
8 Honor actually went to the ADA, Rehabilitation Act claim. The  
9 idea that the policies apply to all housing areas and not just  
10 to those that house individuals who may have disabilities, that  
11 argument was to point out that there is no allegation or  
12 there's no evidence that has been put before the Court to show  
13 that these policies are in place at NIC because of those  
14 individuals' disabilities.

15 In other words, this was a policy that was implemented  
16 across the department at large, and I don't think that  
17 plaintiffs have made a showing of likelihood of success on the  
18 merits that these policies were put in place as a form of  
19 discrimination against the plaintiffs because of their  
20 disability. And, you know, maybe that was unartfully done in  
21 the memorandum, and I apologize for that.

22 THE COURT: No, no. Don't apologize just yet. Do you  
23 want to speak to the discussion that I was having with  
24 Mr. Keenan about the idea that there are instances in which  
25 class-wide or facility-wide discrimination might be

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1 particularly visited upon folks with disabilities, and to that  
2 end, might support a Rehabilitation Act or an ADA claim?

3 Do you simply disagree with the analysis that he was  
4 giving to me, and do you recall the discussions that we were  
5 having?

6 MR. THAYER: I'm not sure I entirely followed, your  
7 Honor, to be completely honest.

8 THE COURT: I understand. Let me just see if I --  
9 Mr. Medina with his visual impairments, needing a low-light  
10 cell, and arguing all cells have the same not-low light, that  
11 it is something that is specific to the -- it is something  
12 uniform to the facility and, yet, it, nonetheless, may operate  
13 as a violation of his rights under the Rehabilitation Act and  
14 the ADA.

15 MR. THAYER: I think I'd have to think about this a  
16 little bit more. I think, of course, there are circumstances  
17 where, you know, policies that apply to everyone may need to be  
18 accommodated for individuals with disabilities. But I think  
19 I'd have to think about or maybe speak with Mr. Keenan a little  
20 bit more about his argument to fully grasp his theory of  
21 liability on that front.

22 THE COURT: Okay. Thank you.

23 Mr. Keenan, I've asked the questions that I wanted to  
24 ask, and just as I gave the opportunity to Mr. Thayer to  
25 respond, if there are things that you would like to respond to

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1 in the questions that I've just asked of Mr. Thayer, you may do  
2 so. Otherwise, I'd like your argument, please.

3 MS. BHATIA: I just wanted to bring up the fact, your  
4 Honor, that inmates are given toilet cleaners and are given  
5 other cleaning agents to use to clean the bathrooms and to  
6 clean floors, and nobody has argued that they'll be swallowing  
7 those flammable cleaners or using them to set the jail on fire.

8 But in the hand sanitizer context, it's allegedly a  
9 threat, and I'm having trouble understanding that, given the  
10 small quantity of hand sanitizer an inmate would get every time  
11 they squeeze it or try to get some foam and, you know, that  
12 they would be watched by correctional staff, as Dr. Herrington  
13 pointed out, which is what happens in his facility.

14 So I'm having trouble understanding that dichotomy,  
15 and I wanted to bring that up, that they do use cleaning  
16 supplies on a regular basis.

17 THE COURT: Understood. I mean, I'm not going to  
18 argue for Mr. Thayer, whose, I think, overarching point is that  
19 we're getting to a level of granularity that we ought not in  
20 this motion. But I don't know that there are that many  
21 detainees who are interested in ingesting Drano and, yet,  
22 might, upon learning that the hand sanitizer was made with  
23 alcohol, might, in some strange belief that this might aid in  
24 their intoxication, might consume that.

25 But also, your argument in your questioning

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1 presupposes that there is going to be a correction officer who  
2 stands guard while people take what they need from a dispensary  
3 of sanitizer. And I think his point is DOC isn't committing or  
4 doesn't believe it needs to have that person standing guard in  
5 each unit for the distribution of sanitizer. But if you have a  
6 different -- let me just pause right there to make sure I've  
7 understood Mr. Thayer's arguments. I have a nod.

8 MR. THAYER: Yes.

9 THE COURT: I'll take that as a yes. Thank you.

10 So, Ms. Bhatia, is there in something else you wanted  
11 to raise about that? You may simply disagree with him, and  
12 that's fine. But I think those were the points he was making  
13 to me.

14 MS. BHATIA: I just want to say that there are many  
15 different ways to do it, but we are only asking for this to be  
16 in common areas. As Dr. Herrington has -- I don't know if it  
17 was in his declaration or not, I just can't remember, but he  
18 has talked with us extensively about how it's only in common  
19 areas in his facility and it works.

20 And so that's all we're asking for. And I think in  
21 their arguments, the Department of Corrections talks about  
22 handing out individual bottles and how that would work. We  
23 don't disagree with that at all. All we're saying is that this  
24 should be available in common areas.

25 THE COURT: Okay. Thank you. Other things that you

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1 want or you want to respond to Mr. Thayer?

2 MR. KEENAN: Yes, your Honor. Thank you very much. I  
3 did -- I think your Honor had a question earlier, as well, for  
4 Dr. Herrington that I wanted to loop back to, to make sure that  
5 we have clarity in the record.

6 I think there's a genuine concern of, you know, if an  
7 inmate were to ingest hand sanitizer, what would happen. So I  
8 might want to direct the medical question to Dr. Herrington of,  
9 can't -- you know, are you aware of anybody ever dying from  
10 ingestion of hand sanitizer? And if somebody ingests hand  
11 sanitizer, what is the probable medical outcome of that?

12 THE COURT: Dr. Herrington, very briefly. I'm sorry.  
13 I'm not able to hear you, sir. We'll try that again. No, I'm  
14 still not able to hear you.

15 DR. HERRINGTON: Can you hear me now?

16 THE COURT: Yes. Thank you.

17 DR. HERRINGTON: Sorry. I must have hit a button.

18 So the question was, what would happen if somebody  
19 ingested hand sanitizer, and have I ever seen anyone die from a  
20 hand sanitizer overdose? So I've never seen anyone die of a  
21 hand sanitizer overdose.

22 What would happen if you ingested it would, obviously,  
23 depend on the volume that you ingested, first and foremost. If  
24 you drink a gallon of it, that's going to be a lot different  
25 clinical outcome than if you ingested like a teaspoon, for

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1 example.

2 I've never consumed hand sanitizer. I can't imagine  
3 that it actually tastes good, but I would say that the alcohol  
4 would cause an intoxicating, cerebral intoxicating effect. It  
5 would also cause some metabolic derangements, and the sort of  
6 the acid-based balance of the body, the pH of the body, that  
7 would be adversely impacted. That, in turn, effects like your  
8 kidney and your lung functions. Because, believe it or not,  
9 your acid-base balance is regulated by your lungs and your  
10 kidneys working together.

11 So there are a number of adverse effects that can  
12 happen if you ingest that because it's a toxin, just like --  
13 you know, just like antifreeze, for example. And the treatment  
14 would be largely supportive. You'd be hospitalized. If you  
15 stopped breathing, you'd get a breathing tube. You get fluids.  
16 Your vital signs are monitored until the alcohol gets  
17 metabolized.

18 So I have never seen anyone die from it. Having said  
19 that, you always, as a clinician, think about being risk averse  
20 in your decision making, and you weigh the benefit of an  
21 intervention against the cost. And if the cost is not too much  
22 and the benefit is real, you kind of go with the intervention.

23 And the last point I wanted to make about the hand  
24 sanitizer is it's kind of like a -- kind of a public health  
25 sort of belief that the easier you make something, the better

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1 compliance you get from your patients. That's why, as doctors,  
2 we like to give medicines that are taken once a day, as opposed  
3 to three times a day, because the chance of your patient  
4 forgetting one of your doses is three times higher.

5 So the -- if you think about it, the easier you make  
6 something for someone, and in this case what we're interested  
7 in is good hand hygiene. Whether it's soap or whether it's  
8 hand sanitizer, what we want is good hand hygiene to prevent  
9 transmission. And so having the hand sanitizer at least  
10 available, you'll probably have cleaner hands, which means  
11 you'll have less of a chance of an outbreak, which is good  
12 clinical, risk-averse public health thinking.

13 THE COURT: All right. Thank you.

14 Mr. Keenan, I'll let you continue, sir.

15 MR. KEENAN: Thank you, your Honor. Just a few. I  
16 might jump around a bit, if I can, your Honor.

17 THE COURT: That's fine.

18 MR. KEENAN: But I think the overarching observation  
19 we have is that there's a factor present in this case that is  
20 not present in a lot of the case law concerning correctional  
21 facilities and deference and things like that that the  
22 defendants rely on, which is time and consequences of not  
23 taking the appropriate measures.

24 When you're dealing, for instance, with secondhand  
25 smoke, as Mr. Thayer mentioned in the *Johnson v. Goord* case,

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1 which we did not have the opportunity to review, but there's  
2 case law out there about secondhand smoke in correctional  
3 facilities. It's a known hazard, and there is time to see if  
4 certain interventions or if certain methods that a correctional  
5 facility might take to mitigate that risk work.

6 And if someone is exposed to secondhand smoke for a  
7 month or two extra that they don't need to be, I'm no  
8 clinician, but I'm not aware of a significant increase in  
9 probability of contracting lung cancer, emphysema because  
10 you're exposed to secondhand smoke an extra month.

11 We know that this disease is different, that when  
12 someone gets it, a certain percentage of people will die, and  
13 another percentage of people will not die but will have very  
14 severe health consequences. I think there was an op-ed in the  
15 times last week about a woman, who I think had a renal failure  
16 as a result of her confinement at Rikers and catching Covid  
17 there. Other people have had other severe complications, and  
18 frankly, we're just starting to learn what some of those  
19 complications are for survivors.

20 So we don't have the luxury of time to see how DOC's  
21 response, you know, how they might want to change things.  
22 Giving them more time to be more persuasive to their  
23 correctional staff, or something like that, we've had ten  
24 months to get that working.

25 A voluntary approach of, you know, tapping on your

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1 neighbor's shoulder, or hey, coworker, why don't you wear your  
2 mask, it's really important; that type of hands-off approach  
3 and educational approach may work for the first month or two of  
4 a pandemic. It is not appropriate in the correctional facility  
5 in month ten. There has to be a mandate with teeth, that  
6 people will face consequences if they do not engage in this  
7 most basic public health measure.

8 And what's worrisome is, from what we can tell in the  
9 defendants' brief, as well as in Deputy Commissioner Feeney's  
10 declaration, is that they're really, from what we can tell, not  
11 disciplining correctional officers at all. It's basically,  
12 from what we read, is, yeah, we can discipline correction  
13 officers, we have a policy that says we can, but we just don't.  
14 And that's not good enough given the time factor and the  
15 consequences of not taking action.

16 On the issue of hand sanitizer, as with any other  
17 intervention, we can always think of some theoretical  
18 possibility that could happen that would be a reason to not do  
19 it. Inmates are known to hang themselves with items of  
20 clothing or bed sheets. That doesn't mean that we don't give  
21 them clothing or bed sheets. If there's an inmate who has  
22 shown a specific tendency to attempt suicide, we might put them  
23 in a cell where there are few were things that they can attempt  
24 that with or something like that.

25 But we don't deny a common sense and needed measure to

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1 inmates because of the theoretical, one-in-a-million  
2 possibility that something might go wrong. As Dr. Herrington  
3 said, everything in life, and certainly everything in a  
4 correctional facility, is a cost-benefit analysis.

5 Hand sanitizer, we've not heard testimony from anyone,  
6 Dr. Herrington, any of the defendants' declarants, any doctor  
7 working for the city, anybody at all, that any inmate anywhere  
8 in the world has ever weaponized hand sanitizer. I've seen it  
9 in one place, your Honor. I remember about midway through the  
10 movie "In The Name Of The Father," an inmate at a correctional  
11 facility who, I guess, was characters in the IRA decides he  
12 wants to get back at a correctional officer by throwing some  
13 flammable material on him. In Hollywood is the only place that  
14 any of us has ever seen it happened. There is no reported  
15 incident at any correctional facility in the world of an inmate  
16 weaponizing this material.

17 As to drinking it, we did a quick Google search here,  
18 and I think the CDC or other public health entity, the likely  
19 result of someone ingesting hand sanitizer are an upset  
20 stomach, nausea, vomiting, symptoms of intoxication. We've not  
21 heard any testimony -- blurry vision. We've not heard any  
22 testimony that anybody has ever died from drinking hand  
23 sanitizer.

24 We know that people have died from coronavirus. Three  
25 people in Rikers have already died, and in New York State

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1 correctional facilities, including at the Great Meadow  
2 facility, which is a maximum security facility, they  
3 manufactured the stuff. Inmates, max inmates are manufacturing  
4 it. So the risk does not outweigh the benefit here.

5 As to clogging plumbing, and I think Dr. Herrington  
6 could attest to this, I don't know about -- I'm not a plumbing  
7 expert, but my understanding is that correctional facilities  
8 often have plumbing that is designed to basically withstand  
9 more abuse because of the fact that inmates are sometimes known  
10 to goof around with the plumbing. And so I would hope that  
11 Rikers' toilets can maybe take a little more than a lockup at  
12 Bronx Criminal Court.

13 But as your Honor observed earlier, what the pilot  
14 program that the city had a year and a half ago, at a different  
15 place, under different conditions, with very different threats,  
16 at that point a year and a half ago, did the benefits outweigh  
17 the costs of giving hand wipes? That may be arguable, the  
18 costs outweigh the benefits, but not now. Not when we're  
19 dealing with a pandemic. The change in time is a very relevant  
20 factor here.

21 Some other case authority that I wanted to point the  
22 Court to is the Second Circuit's decision -- and I don't think  
23 this is cited in either of the parties' briefs. I came upon  
24 it, our team came about it -- I want to thank them -- this  
25 morning. The case of *Chance v. Armstrong*, it's 143 F.3d 698.

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1 I believe it was a decision from Judge Calabresi in 1998. And  
2 what the Second Circuit observed in *Chance v. Armstrong* is that  
3 there can be deliberate indifference if, in light of the  
4 medical situation, a correctional facility or treatment  
5 provider chooses an easier and less efficacious treatment.

6 And the Second Circuit has recently repeated that in  
7 the case of *Rodriguez v. Manenti*, that's 606 F.App'x 25 -- 606  
8 F.App'x 25 (S.D.N.Y 2015). The situation there was that  
9 somebody had a knee condition and wanted to get knee surgery,  
10 and the facility said, no, we think you should just do physical  
11 therapy instead. The Second Circuit said, on those facts, that  
12 case could move forward. Just choosing a plan that may have  
13 some benefit -- and surely some of the interventions the city  
14 has implemented here have had some benefit -- but having a plan  
15 that has some benefit is not adequate if it doesn't meet the  
16 circumstances.

17 And under *Darnell v. Pineiro*, the issue is whether a  
18 correctional facility has responded in an objectively  
19 reasonable manner to the threat at hand. And what we would  
20 encourage the Court to analyze is to look at each of these  
21 interventions that we've proposed, that the city has refused,  
22 were not adequately implemented at this point in the pandemic,  
23 knowing what we know, and ask the question: Is it objectively  
24 reasonable for them to refuse this intervention?

25 Hand sanitizer is not objectively reasonable to

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1 refuse. There are many ways of mitigating even the theoretical  
2 kind of nail-biting-type risks that the city expresses. Put it  
3 only in common rooms. Distribute it in the form of foam  
4 instead of in the form of gel. I would think foam is a lot  
5 harder to drink than gel. Have it in single-dose dispensers  
6 that are automatic, like many of us have encountered in public  
7 buildings.

8           These are all ways that you can distribute the stuff  
9 while mitigating the risk. The benefit is clear, and they  
10 distribute this to correctional officers; so we know the city  
11 has used the stuff.

12           In terms of wipes, you know, some clogged toilets a  
13 year and a half ago somewhere else, the benefits of wipes are  
14 clear. And what we've seen in the declarations we've received  
15 from the people who are still in Rikers, is that even the  
16 proposal that the city offers, which is a solution with bucket  
17 and sponges, they lock that bucket in a closet, where it's  
18 difficult for inmates and especially inmates with mobility  
19 limitations like Mr. Cole, to access.

20           And they have to go interact with a human being to go  
21 access it, which increases the risk of spread. Using sponges  
22 that are reused, that other people have touched. And this  
23 material they're using takes ten minutes to clean a surface.  
24 We've heard from the declarants in this case, the inmates who  
25 are still incarcerated, that phone booths, for instance, the

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1 city doesn't even put Virex in these phone booths. And if they  
2 did, it would be ineffective because the turnover rate in phone  
3 booths is too fast. It's not enough time to use it to  
4 sanitize.

5 Having something like wipes that can be distributed on  
6 an as-needed basis would be an effective intervention, and  
7 there is virtually no realistic downside to it. If something  
8 did happen, we address it and this Court could address it at  
9 the time.

10 As to mandatory testing, at this point in the  
11 pandemic, we know that testing and tracing is the most -- one  
12 of the most important ways of ensuring that we can stop the  
13 spread of this disease. I think this Court encountered the  
14 situation of the idea that a collective bargaining agreement  
15 trumps statutory or constitutional obligations in the cases  
16 this Court had this past summer concerning the repeal of 50(a).

17 And the idea that the collective bargaining agreement  
18 trumps a constitutional duty to provide reasonable protection  
19 in the midst of a pandemic is something that lacks any legal  
20 basis. As the Supreme Court recognized in the *Janus v AFSCME*  
21 case, a collective bargaining agreement with a public employee  
22 union is inherently a public policy. And to the extent it is  
23 incompatible with constitutional or statutory mandates, it must  
24 yield.

25 The Fourteenth Amendment and the Rehabilitation Act

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1 and ADA, under these circumstances, require effective and  
2 objectively reasonable interventions, and that includes a  
3 mandatory testing and tracing strategy. Deputy Commissioner  
4 Feeney admitted in her deposition that the primary way that  
5 Covid comes into Rikers is via staff because they come in and  
6 out of the facility, they circulate, and they encounter the  
7 population outside the facility, where they can pick it up most  
8 easily.

9 And I think Dr. Herrington submitted in his  
10 supplemental declaration that in his facility in Washington  
11 State, they do have mandatory testing in a unionized  
12 environment, and it's effective. It can be implemented.

13 The final specific measure I'll talk about is masks,  
14 and this is an issue where not only is the implementation a  
15 problem, the policy is a problem too. The idea that mask  
16 wearing should only be mandatory if a correction officer is  
17 indoors and believes themselves to be -- to not come within six  
18 feet of contact with another human being is not a reasonable  
19 policy for at least two reasons. One, medical, and the other  
20 practical.

21 One reason is that we know now that this is an  
22 airborne disease, and as people put particles out into the air  
23 and breathe them in, even if people are more than six feet away  
24 from each other, they contribute to the total viral load in the  
25 air. And people can pick that up in a confined space, even if

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1 they're more than six feet away from each other.

2 The other reason is that a prison is a very dynamic  
3 environment. You can think that you're not going to come  
4 within six feet of another person but actually come within six  
5 feet of them momentarily, or because you're responding to a  
6 situation that comes up quickly, as tends to happen in a prison  
7 environment.

8 And so even if a guard were acting in good faith they  
9 could be making many, quote, mistakes throughout the day in  
10 terms of how closely they're coming into contact. And that's  
11 why it's imperative that mask wearing be mandatory indoors,  
12 unless of course a correctional officer has a valid medical  
13 reason why they cannot wear a mask, or something like that.  
14 And that can be dealt with on a case-by-case basis, but the  
15 default needs to be that people wear masks indoors.

16 There's no rational basis for refusing that because  
17 the city and state of New York mandate mask wearing indoors in  
18 any number of other environments that are equal or less of a  
19 threat, for instance, the subway or bus. And so there's no  
20 rational basis -- I'm not seeing the rational basis review  
21 here, I'm making the argument there is not a rational basis for  
22 the city to refuse this intervention.

23 I do want to also respond to what the city is saying  
24 about the particular health histories of the named plaintiffs  
25 in this case. I'll repeat again. We have no opposition to --

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1 in fact, we will join in -- a request that those records be  
2 ordered produced.

3 That said, those records, and whatever they may or may  
4 not contain, are not relevant to the pressing issue that is  
5 before us right here, which is: How do we stop the spread of  
6 this disease inside this facility? The fact that somebody  
7 might have a history of asthma, for instance another individual  
8 might have a history of, you know, having to use a wheelchair,  
9 something like that, there's nothing in medical records that's  
10 going to stop the need for facility-wide relief for all of the  
11 inmates at NIC and Rikers at large.

12 So once again, we have no problem with the medical  
13 records being handed over. We have nothing to hide. We don't  
14 know why the city would question the plaintiffs' declarations  
15 of the medical histories that they have. The city has given no  
16 reason to question that, and the city, obviously, classified  
17 them into NIC for a reason. They want to look at medical  
18 records? Have at it.

19 But time is a crucial factor here, and there is  
20 nothing the city could find in there that could create a reason  
21 to deny otherwise appropriate facility-wide relief. Even if  
22 every plaintiff here had been vaccinated, in a class action  
23 context or putative class action context, individualized  
24 defenses do not undermine class-wide relief.

25 We also know that the vaccine is not one hundred

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1 percent effective, and we're becoming to learn that more and  
2 more recently. We're in very unusual times, in unusual  
3 circumstances, and the Fourteenth Amendment and the  
4 Rehabilitation Act and ADA demand a response. We have waited  
5 long enough for the city to consider and learn about this  
6 pandemic and learn what are the medically appropriate  
7 interventions.

8 At this point, the question is, knowing what we know  
9 now, what is a reasonable and objectively reasonable  
10 intervention rather than, as the Second Circuit would put it,  
11 an easier and less-efficacious intervention. And what the city  
12 has been doing is an easier and less-efficacious intervention.  
13 That's not what the Fourteenth Amendment and relevant federal  
14 law calls for.

15 And there is no reasonable cause for the city not to  
16 implement the measures that we have proposed. And when a  
17 government fails to do so, it is not just the right but the  
18 duty of the Federal Court to intervene as the Supreme Court set  
19 forth in the *Brown v. Plata* case in 2011, involving  
20 California's correctional system. And in that case, the  
21 Supreme Court and the three-judge District Court had no  
22 hesitation getting into the nitty-gritty of how California was  
23 failing to provide the medical care necessary to inmates, and  
24 how overcrowdedness was impinging on that.

25 Doing something or even doing some good things is not

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1 enough, in light of the information we have. Under *Darnell v.*  
2 *Pineiro*, and under *Chance v. Armstrong*, and there's one other  
3 case I'd like to cite to the Court, and that is the *Vega v.*  
4 *Semple* case that we mentioned in our briefs, where a  
5 correctional facility put up a radon monitor in a common room,  
6 but the Second Circuit said that's not enough. You need to do  
7 a more effective plan. That's 963 F.3d 259 from last year,  
8 2020. *Vega v. Semple*.

9 Action needs to be taken, and there is no need or  
10 reason to chance what additional lives or health might be lost  
11 if we don't take that action, your Honor. We stand open to any  
12 other questions the Court has. Obviously, some of our clients  
13 are on the line, if your Honor wants to hear what the state of  
14 things is inside Rikers right now. And we want to thank the  
15 Court and counsel for the city for their time today and the  
16 opportunity to have us here.

17 THE COURT: Thank you very much. Thank you to your  
18 clients as well. Thank you for the work that you've done in  
19 this case, having been appointed to represent these  
20 individuals.

21 Mr. Thayer, I don't have additional questions for  
22 Mr. Keenan or his colleague. I would offer you the same chance  
23 to give me your argument. The issue that I have, and it's in  
24 part because I'm sometimes inconsiderate without meaning to be,  
25 is that we've gone two hours without a break for the court

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1 reporter. And I think it makes sense to give her that break.  
2 I mean, if you told me, sir, you had one minute of summing up,  
3 then I'd say, well, okay, I think I could ask her to just stay  
4 for the minute, but I suspect you have a bit more than that.  
5 Is that correct?

6 MR. THAYER: I'd say between one and three minutes,  
7 your Honor, in all fairness. And, otherwise, we would mostly  
8 rely on our brief. I just want to make some overarching notes,  
9 and then provide the Court with a few pieces of information.

10 THE COURT: Okay. Going off the record.

11 (Pause)

12 We're going back on the record, and, Mr. Thayer, I do  
13 not have the proverbial stopwatch, but I am holding you to your  
14 word about the brevity of your response.

15 MR. THAYER: Yes, your Honor. I think I will start by  
16 saying the majority of what Mr. Keenan has just referred to, I  
17 think our response and our perspective, in response to those  
18 assertions is set forth in our briefs and our declarations; so  
19 we would refer the Court to those.

20 I did want to make a more general, overarching  
21 argument, and that is that we've heard a lot today, some buzz  
22 word phrases like taking the most aggressive as possible  
23 responses, the most clinically risk averse responses, is DOC's  
24 response objectively reasonable, and I think we're sort of  
25 losing sight of the fact that this is not a negligence case.

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1           And I am reminded of *Chase v. Armstrong*. I believe  
2       there's two of them, but the *Chase v. Armstrong* citation I  
3       usually see is mere disagreement with the course of treatment  
4       does not amount to a constitutional violation. And it sounds  
5       to me like what we have here is DOC has taken X, Y and Z steps  
6       to respond to what is, obviously, a very difficult and evolving  
7       pandemic, and what plaintiffs would prefer is an A, B and C  
8       response.

9           And I think *Chance v. Armstrong* would stand behind us  
10      in saying that mere disagreement over our response is not  
11      sufficient to amount to a constitutional violation.

12          I think, more generally, I wanted to just provide the  
13      Court with a little bit of updated information with regard to  
14      vaccinations. Last Friday, the Governor issued an order or  
15      press release, you know, otherwise informed that eligibility  
16      for vaccinations was going to be extended to certain persons  
17      with co-morbidities, enumerated co-morbidities. I can provide  
18      that list to the Court separately, if your Honor would like.

19          Again, I don't know if any of these plaintiffs have  
20      any of those co-morbidities. There is one that is pulmonary  
21      issues. I don't know if sleep apnea fits under that, but they  
22      may have other conditions that I'm unaware of with respect to  
23      their medical histories. But again, I make that comment with,  
24      of course, our perspective on the need for the plaintiffs'  
25      medical histories in mind.

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1           Otherwise, I think, again, I would refer the Court to  
2           our briefs, and I will respect the court reporter's wishes.  
3           And if anything -- the Court wishes for any information, we of  
4           course remain ready and willing to respond to that. Thank you,  
5           your Honor.

6           THE COURT: Thank you, and thank you for being a  
7           person of your word.

8           I am going to ask you, Mr. Thayer, to obtain a  
9           transcript of this conference in the ordinary course, and if  
10          you order it, I will receive it automatically.

11          Separately, sir, I'm going to ask you to speak with  
12          Mr. Keenan and Ms. Bhatia about the language of an order  
13          regarding the disclosure of these medical records. Assuming  
14          you all can agree on such an order, I will sign such an order  
15          because I prefer that to simply saying on the record, your  
16          motion is granted. I think there needs to be some definition  
17          to it. I'll let you have the opportunity to do that.

18          If there is disagreement, you'll come to me with your  
19          competing proposals, and I will decide.

20          We have now been doing this for two hours. You have  
21          my deepest thanks for the work that you've done, for the  
22          investigation that you've done, for the concerns that you have,  
23          and the principles that you're trying to vindicate, and for  
24          coming prepared today, to all of you. I thank you for that.

25          Dr. Herrington, I've kept you from your day job, and I

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1 do appreciate your time, in particular.

2 To those of you who have told me of your losses during  
3 this pandemic, you have my sympathies. I'm sure you have  
4 everyone on this conference's sympathies. It has touched all  
5 of us, and I'm sorry it's touched each of you.

6 My expectation, to my attorneys in this case, is that  
7 in the next week, approximately, you'll hear from me. I think  
8 we'll probably do a telephonic decision. Although it would be  
9 lovely to see you again, I think it's easier to do it that way.  
10 I'll let you know as soon as I know, but I do want to think  
11 about what you've said to me today.

12 And none of this, none of our discussions today  
13 prevents the two sides from talking to each other about issues  
14 that have arisen, suggestions that can be made, issues that  
15 might merit further discussions in stuff that you've learned  
16 today. So with that, and with my deep appreciation and thanks,  
17 we are adjourned. Thank you.

18 MR. KEENAN: Thank you, your Honor.

19 MR. THAYER: Thank you, your Honor.

20 DR. HERRINGTON: Thank you.

21 (Adjourned)  
22  
23  
24  
25