UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JEAN AZOR-EL, ANTHONY MEDINA, RAMON GOMEZ, RONNIE COLE, DAKWAN FENNELL, JAMES CARTER, MAURICE BARNAR, and LANCE KELLY, individually and on behalf of all others similarly-situated,

Plaintiffs,

-against-

CITY OF NEW YORK and KISA SMALLS,

Defendants.

Case No. 1:20-cv-03650-KPF [lead]

And Related Consolidated Cases:
1:20-cv-03978-KPF
1:20-cv-03980-KPF
1:20-cv-03981-KPF
1:20-cv-03982-KPF
1:20-cv-03983-KPF
1:20-cv-03985-KPF
1:20-cv-03990-KPF

----------x

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF RENEWED MOTION FOR PRELIMINARY INJUNCTION

Dated: July 9, 2021

Respectfully submitted,

KEENAN & BHATIA, LLC

By: ___/s/ Sonal Bhatia & E.E. Keenan__

Edward (E.E.) Keenan
90 Broad Street, Suite 200
New York, NY 10004
Tel: (917) 975-5278
ee@keenanfirm.com

Sonal Bhatia (pro hac vice)
4600 Madison Ave., Ste. 810
Kansas City, MO 64112
Tel: (816) 809-2100
sonal@keenanfirm.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

We are not out of the woods yet. Despite increasing vaccination numbers and decreasing infection and death rates, COVID-19 remains a real threat to safety, health, and lives, especially as new variants of the virus emerge around the globe. Plaintiffs respectfully seek a preliminary injunction[1] appointing a Special Master with power to monitor Defendant City of New York's compliance with the law and its own policies, and further commanding the City to implement the following safety protocols, along with any other relief the Court deems appropriate: (a) re-implementing effective, live video monitoring of Rikers for compliance with mask mandates; (b) mandating that staff wear actual PPE masks; (c) providing sanitizing wipes or alcohol prep pads for high-touch areas, such as phones; and (d) keeping a register of vaccinated staff.

I. FACTS[2]

Even as vaccination rates rise and infection rates fall, the COVID-19 virus still poses an imminent threat to health and safety, especially as new variants of the virus emerge and spread. For example, the novel Delta variant has health experts and organizations worried: "According to [the World Health Organization], the Delta variant (B.167.2) is the 'fastest and fittest' variant yet—as much as 50 to 60 percent more transmissible than the Alpha variant (B.1.1.7), which was already 50 per cent more transmissible than the original strain of COVID-19."[3] One study found that "the hospitalization rate of patients with the Delta variant was about 85 percent higher than that of people with the Alpha variant."[4] And the Delta variant is not just some distant threat—the new strain is already spreading in the United States at an alarming rate. "As of July

[1] Although Petitioners have not yet moved for class certification, this Court need not rule on Plaintiffs' class certification motion or formally certify a class in order to issue the requested emergency relief. *See, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23- 397 (2d ed.1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit.").
[2] Plaintiffs incorporate all facts from their first motion for preliminary injunction here.
[3] *See* https://www.path.org/articles/new-variants-will-covid-19-tests-still-work/?gclid=CjwKCAjwoZWHBhBgEiwAiMN66bzTXFBhoj6Tl9wKqsoRXdpu-DT7XhBuGZcUqODA5zHFZ7EB--Pj3xoCSKQQAvD_BwE (last visited 7/7/21)
[4] *Id*.

3, [...] the delta variant accounted for 51.7 percent of new Covid-19 cases [...] in the country."[5] As of June 12, 2021, "[r]oughly 23 percent of new cases in New York City were identified as the Delta variant."[6] The World Health Organization claims, "Based on the estimated transmission advantage of the delta variant, it is expected that delta will rapidly outcompete other variants and become the dominant circulating lineage over the coming months."[7]

A. Vaccination Rates Among Department of Correction Staff and Detainees Continue to Lag Behind Those of the General Population.

Correctional Health Services ("CHS"), a subsidiary of NYC Health + Hospitals, acknowledges that the availability of the COVID-19 vaccine does not eliminate the major threat to life and health COVID-19 poses at the present time and in the future. Ex. B, Deposition of Ross MacDonald ("MacDonald Dep.") 20:13-19. The New York City Board of Correction, an internal city oversight agency, agrees that the need for vigilance remains. Ex. A, Deposition of Emily Turner ("Turner Dep.") 40:17-25. And while the various COVID-19 vaccines are expected to protect against variants of the virus, including the Delta variant, vaccination rates among staff and incarcerated individuals in Department of Correction ("DOC") facilities are lagging behind those of the general population, and experts fear that the Delta variant may "fuel outbreaks where gaps in vaccinations exist."[8]

Since the COVID-19 vaccine has been made available to all DOC staff and all people in DOC custody, the BOC has had concerns about low vaccination rates among both DOC staff and people in DOC custody. Ex. A, Turner Dep. 50:21-53:4. According to the BOC's most recent weekly COVID-19 update report for the week of June 19, 2021, through June 25, 2021, only

[5] *See* https://www.nbcnews.com/health/health-news/delta-variant-now-dominant-covid-strain-u-s-n1273214 (last visited 7/7/21)
[6] *See* https://www.nytimes.com/2021/06/30/nyregion/delta-variant-new-york.html (last visited 7/7/21)
[7] *See* https://www.nbcnews.com/health/health-news/delta-variant-now-dominant-covid-strain-u-s-n1273214 (last visited 7/7/21)
[8] *See* https://www.nytimes.com/2021/06/30/nyregion/delta-variant-new-york.html (last visited 7/7/21)

33.8 percent of patients currently in custody are fully vaccinated.[9] Regarding staff vaccination rates, the DOC only has information for staff vaccinated on-site: as of July 7, 2021, only 27 percent of DOC have been fully vaccinated on-site. Ex. S, Defendants' Discovery Letter 7/9/2021. The DOC does not require staff to disclose their vaccination status, nor does it even provide for voluntary disclosure. Ex. C, Corporate Representative Deposition of Deputy Commissioner Feeney ("Feeney Corp. Rep. Dep.") 22:23-25. Even in the midst of a pandemic, the DOC does not think tracking the vaccination status of all its staff would be helpful. *Id*. at 22:20-22. By comparison, 66.1 percent of New Yorkers over the age of 18 are fully vaccinated, while 72.7 percent have received at least one dose.[10] Even if vaccination rates were higher among DOC detainees and staff, the need to remain vigilant persists. "[W]hile vaccinated people are less likely to be hospitalized because of the disease, this doesn't mean they should drop their guard: they can still get ill from the virus and can still spread it to others."[11]

CHS admits that "vaccine hesitancy is prevalent in criminal justice settings." Ex. B, MacDonald Dep. 16:1-11. The BOC notes that it "will always be a challenge" to keep the rate of vaccination among the DOC's incarcerated population comparable to that of the New York City population in general, citing that the "population in custody is transient" and that individuals "coming out and the population coming in may not just in general be as likely to access vaccines." Ex. A, Turner Dep. 52:18-53:4. The BOC was particularly concerned about accessibility of vaccines for those in restricted housing areas. Ex. A, Turner Dep. 53:20-54:24.

---

[9] *See* https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-06-19-06-25-21.pdf (last visited 7/7/21)

[10] *See* https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html?action=click&module=Top%20Stories&pgtype=Homepage (last visited 7/7/21)

[11] *See* https://www.euro.who.int/en/health-topics/health-emergencies/pages/news/news/2021/06/q-and-a-on-vaccination-and-travel-this-summer (7/8/2021)

B. Defendants' Statistics on COVID-Related Deaths In Custody Are Misleading.

The City claims that there have been only three COVID-related deaths of DOC detainees. The City has used this statistic to bolster its position, claiming that "although three incarcerated persons have sadly died in custody due to COVID-19, this number has thankfully remained constant since at least April 23, 2020" and that "this is a proportionately lower death rate than found in the wider City of New York." Ex. P, Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Even DOC Commissioner Cynthia Brann has publicly touted that "only three" deaths makes the DOC "one of the most successful correctional systems in the country" with regards to its handling of the COVID-19 pandemic.[12]

The DOC's methodology for tracking COVID-related deaths underestimates the number of individuals who have died: it is basically a system of "Disease? Let's Release." As Dr. Ross MacDonald explained it, "[E]very death of a person who's ***in custody at the time of their death*** is reported." (emphasis added) Ex. B, MacDonald Dep. 49:13-50:6. The DOC's in-custody death statistic ***does not include*** people who were recently incarcerated but died outside of the DOC's custody shortly after being released or discharged. *Id*. at 53:22-54:2. According to Dr. MacDonald, it is a "common occurrence" for the DOC to discharge detainees from custody while they are in the hospital. *Id*. at 54:12-16. In fact, CHS confirmed that there are individuals who have been discharged from custody while being treated for COVID-19 at the hospital and who have subsequently died of COVID-19. *Id*. at 55:11-16. But CHS has not tracked the health outcomes of individuals after their release from custody.[13] *Id*. at 55:23-56:11.

[12] *See* https://www.thecity.nyc/missing-them/2021/3/9/22322161/nyc-jail-covid-deaths-double-official-count (last visited 7/8/2021)

[13] CHS has also not systematically tracked "long COVID," a term used to refer to "the sequelae [...] of COVID-19 infection whereby a patient may have [...] sustained damage to different organ systems, be it the cardiac function or kidney function, or may [...] be recovering from critical illness, for example, if they spent time in the intensive care unit." Ex. B, MacDonald Dep. 64:10-65:24; *see also* https://www.economist.com/science-and-technology/2021/04/29/researchers-are-closing-in-on-long-covid

Recent press coverage has identified some of the uncounted individuals who died from COVID-19 after contracting the virus while in DOC custody. Juan Cruz tested positive for COVID-19 on April 28, 2020, while detained at the Vernon C. Bain Center ("VCBC" or "the Boat").[14] The DOC then transferred Mr. Cruz to Bellevue Hospital, where he was on a ventilator while tethered to his hospital bed until the DOC discharged him from custody in mid-May 2020.[15] On June 11, 2020, after remaining on a ventilator in the hospital, Mr. Cruz died from COVID-19.[16] Raymond Rivera died on April 3, 2020, at Bellevue Hospital after contracting COVID-19 while in DOC custody.[17] Joel Howard died on April 16, 2020, at Bellevue Hospital one day after DOC released him from custody.[18] The DOC did not include the deaths of Mr. Cruz, Mr. Rivera, and Mr. Howard in their COVID-related death statistics. *The City*, a New York digital news platform, reports "that the number who died after contracting COVID in city jails is at least six."[19] The BOC also believes that the DOC may potentially attribute COVID-related deaths to individuals' underlying conditions, even when these individuals had COVID-19 or COVID-19 contributed to their death. Ex. A, Turner Dep. 109:25-110:5.

C. Standard of Care for COVID-19.

The Centers for Disease Control and Prevention ("CDC") continuously updates its recommendations and guidelines on the proper standards of care, treatment, and prevention at correctional facilities as the COVID-19 pandemic has evolved. On June 9, 2021, the CDC

("Britain's Office for National Statistics (ONS) estimates that 14% of people who have tested positive for covid-19 have symptoms which subsequently linger for more than three months.") (last visited 7/9/2021)

[14] *See* https://www.thecity.nyc/missing-them/2021/3/9/22322161/nyc-jail-covid-deaths-double-official-count (last visited 7/8/2021)

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

updated its interim guidance on COVID-19 management at correctional facilities "in response to declining community transmission."[20]

Regarding hand hygiene, the CDC continues to recommend that correctional facilities "[c]onsider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting."[21] The CDC also recommends that correctional facilities "[e]nsure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies [...] are on hand and available and have a plan in place to restock as needed."[22] When it comes to mask-wearing, the CDC states:

> Ensure staff know that cloth masks should not be used as a substitute for surgical masks or N95 respirators that may be required based on an individual's scope of duties. **Cloth masks are not PPE** but are worn to protect others in the surrounding area from respiratory droplets generated by the wearer.[23]

The CDC also continues to encourage intensified cleaning, sanitation, and disinfecting measures. The CDC recommends that correctional facilities clean high-touch surfaces (such as pens, counters, shopping carts, tables, doorknobs, light switches, handles, stair rails, elevator buttons, desks, keyboards, phones, toilets, faucets, and sinks) at least once a day.[24] Importantly, the CDC notes that correctional facilities "may want to either clean more frequently or choose to disinfect (in addition to cleaning) in shared spaces if the space is a high traffic area or if certain conditions apply that can increase the risk of infection from touching surfaces."[25] The "certain conditions" that the CDC refers to include "low vaccination rates in [the] community,"

---

[20] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited 7/8/2021)
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html (last visited 7/8/2021)
[25] *Id.*

"[i]nfrequent use of other prevention measures, such as mask wearing [...] and hand hygiene," and the presence of individuals with increased risk for severe illness from COVID-19.[26]

Even as infection and transmission rates decline, the CDC urges correctional facilities to maintain baseline prevention measures like COVID-19 testing, vaccination, infection control, and quarantine strategies.[27] The CDC notes that "[s]taff vaccination coverage is particularly important given their frequent contact with the outside community, which creates the opportunity for potential introduction of SARS-CoV-2 to the facility.[28] The CDC also recommends that "[c]orrectional facilities with high proportions of people who are not fully vaccinated and at increased risk for severe illness should maintain facility-level prevention measures for longer durations."[29]

The DOC acknowledges that COVID-19 is a serious health and safety threat. Ex. D, Deposition of Deputy Commissioner Feeney ("Feeney Dep.") 24:8-14. The DOC also agrees that officers and staff *still* present the greatest risk of introducing COVID-19 into DOC facilities because of their contact with the broader community. Ex. C, Feeney Corp. Rep. Dep. 17:20-24.

The DOC says it looks to CDC guidelines, New York State Department of Health guidelines, and New York City Health Department guidelines in developing its response to COVID-19. Ex. D, Feeney Dep. 19:13-21. These agencies and departments have greater expertise in public health responses to pandemics than the DOC. *Id*. at 19:24-20:15. Moreover, the DOC agrees that it has a duty to consult national, state, and local public health guidance in responding to COVID-19. *Id*. at 21:16-19.

---

[26] *Id.*
[27] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#anchor_1623260857775 (last visited 7/8/2021)
[28] *Id.*
[29] *Id.*

D. The DOC *Continues* to Violate CDC Guidelines and Its Own Policies.

Although Defendants may cite lower infection, hospitalization, and death rates among the general population as reasons for relaxing their COVID-19 protocols, these numbers are not representative of the ongoing, unique risk within DOC facilities. First, the population of individuals in DOC custody continues to increase: as of June 25, 2021, there are a total of 5,842 people in DOC custody.[30] Second, as discussed above, vaccination rates among DOC staff and incarcerated individuals are disproportionately lower than those of the general population. Third, incarcerated individuals tend to be at higher risk of serious illness from COVID-19. An article co-authored by Dr. Ross MacDonald states:

> Incarcerated individuals should be considered at risk for serious disease at an earlier age than the general population due to premature aging and higher rates of mortality from COVID-19 in this population. People of color, significantly overrepresented in jails and prisons, are also generally at higher risk for hospitalization and death due to the disease.

Ex. B, MacDonald Dep. 41:12-25; *see also* Ex. E, CorrectCare Volume 34 Issue 4 ("CorrectCare Magazine") at p. 16. That same article also mentions that there are various challenges inherent in working with incarcerated persons, including language barriers, serious mental illness or cognitive impairment, and lack of trust. Ex. B, MacDonald Dep. 42:1-6; *see also* Ex. E, CorrectCare Magazine at p. 16. Fourth, COVID-19 mitigation strategies are more difficult to sustain during the summer—not all units at the DOC are air-conditioned, so the DOC must now work to accommodate heat-sensitive individuals while continuing to maintain low housing density and facilitating social distancing. Ex. A, Turner Dep. 99:4-100:4. As of June 25, 2021, DOC has custody of 854 individuals over 50 years old; this number has steadily increased since mid-April 2020.[31]

[30] *See* https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-06-19-06-25-21.pdf (last visited 7/8/2021)
[31] *See* https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-06-19-06-25-21.pdf (last visited 7/8/2021)

Defendants continue to cite their COVID-19 policies and procedures as evidence that they are managing the pandemic effectively. *See, e.g.,* Ex. F, Joint Status Letter Regarding Second-Round Discovery 6/4/2021 ("Joint Letter 6/4/2021) at pp. 8-9. But, as Dr. MacDonald put it, "[P]olicy is only what's written on the page;" a policy doesn't mean much if people aren't actually broadly following it. Ex. B, MacDonald Dep. 48:1-7. This Court stated on February 10, 2021, "[M]y concern is when I'm told by the plaintiffs in this case that, in fact, these great ideas are not being implemented in practice [by Defendants], that I have a concern." Ex. G, Oral Argument Transcript 2/10/2021 42:6-43:5. The evidence confirms that Defendants' "great ideas" are just that. Life on Rikers Island is not what Defendants paint it to be.

1. Defendants' Mask Policy Is Not Adequate.

On May 5, 2021, over one year since the beginning of the pandemic, Commissioner Cynthia Brann and Chief of Department Hazel Jennings issued a directive requiring all officers and staff to wear face masks when in a shared City workplace and when they cannot maintain six feet distance from other people. Ex. H, Directive 2269R-B Wearing Masks. The previous policy only required officers to wear face coverings when within six feet of someone else. *See* Ex. N, Directive 2269R-A Wearing Face Masks. While the new directive does not explicitly state so, the DOC claims that this directive is meant to mandate mask-wearing by DOC staff and officers at all times. Ex. C, Feeney Corp. Rep. Dep. 27:17-30:8.

The DOC does not differentiate between approved PPE (i.e., surgical masks and KN95 masks) and cloth masks, which are not PPE per the CDC. Ex. O, Deposition of Chief Becky Scott Volume I ("Scott Dep. Vol. I") 87:12-87:25. Dr. MacDonald testified that there is a difference in terms of efficacy between N95, surgical, and cloth masks, with cloth masks being the least protective. Ex. B, MacDonald Dep. 24:9-25. The BOC believes that staff at the DOC

should comply with CDC guidelines by wearing surgical masks or N95 masks rather than just cloth masks. Ex. A, Turner Dep. 82:17-20, 155:7-15. But the DOC continues to treat cloth masks, which are *not* PPE, as being adequate despite the BOC's recommendations. *Id*. at 155:18-22.

2. Defendants Have No *Real* Measures to Enforce Mask Compliance.

The DOC is not imposing any real discipline for noncompliance with its mask policies. In fact, the DOC refuses to issue higher-level discipline for noncompliance with its mask policy. Ex. O, Scott Dep. Vol. I 70:16-71:07. The DOC is unaware of any instance where a DOC employee has faced a formal discipline process for mask noncompliance. *Id*. at 72:22-73:6. The BOC has raised the issue of discipline for mask noncompliance with the DOC because the BOC believes that disciplinary action is part of "an approach that is necessary to ensure staff compliance." Ex. A, Turner Dep. 163:17-164:4. The BOC agrees that mandatory discipline is an important tool to ensure that people follow the rules. *Id*. at 164:12-16. When informed that the DOC has not initiated even one formal disciplinary process on a correction officer for mask noncompliance, the BOC was not surprised, stating, "[T]here's a long history of the Department not imposing discipline on staff for far more serious violations." *Id*. at 165:1-15.

3. Rikers Officers and Staff Are *Still* Failing to Observe Mask Guidelines.

Officers and staff are *still* failing to follow the DOC's mask policy. In an email dated March 31, 2021, Dr. Bobby Cohen—who is a member of the Board of Correction and previously was a physician on Rikers—observed that "mask wearing by correctional staff at all levels was **extremely inconsistent, disturbingly so**." (emphasis added) Ex. A, Turner Dep. 64:13-65:6; *See also* Ex. M, Bobby Cohen Email 3/31/2021.

Dr. Cohen's observations mirror the experiences of most of the detainees who testified. Mr. Azor-El, who is housed in the North Infirmary Command ("NIC"), testified that in the month preceding his deposition, he observed about 70 percent of DOC officers in his housing area wearing masks improperly or not at all, even when within six feet of incarcerated individuals. Ex. I, Deposition of Jean Azor-El ("Azor-El Dep.") 10:4-17, 12:9-13:13. Mr. Azor-El interacts with correction officers who are not wearing their masks properly "pretty much every day." *Id*. at 53:24-54:18. Mr. Barnar, who is also housed in NIC, testified that just a week or two prior to his deposition, about 60 percent of correction officers were not wearing their masks properly or at all. Ex. J, Deposition of Maurice Barnar ("Barnar Dep.") 8:18-9:8. When Mr. Cole (another NIC resident) was asked whether any officers wear masks, he testified that "most of them don't" even when within six feet of detainees. Ex. K, Deposition of Ronnie Cole ("Cole Dep.") 12:8-25. Mr. Clanton, who is currently housed at the Vernon C. Bain Center ("VCBC" or "the Boat"), testified that about 70 percent of the correction officers at the facility do not wear their masks properly or at all, even when within six feet of detainees. Ex. L, Deposition of William Clanton ("Clanton Dep.") 15:05-18, 19:18-20:17. In fact, during his deposition, on a live video feed, in view of counsel, Mr. Clanton observed an officer sitting behind him was not wearing a mask. *Id*. at 12:7-21.

Throughout the course of the pandemic, the Board of Correction ("BOC") has been conducting in-person audits of DOC facilities and monitoring live surveillance footage for compliance with various COVID-related policies and directives. The BOC's findings on mask compliance at DOC facilities also paint a bleak picture. In January 2021, a BOC employee auditing live DOC surveillance footage observed that only three of eleven correctional staff were wearing their masks properly, and noted, "Particularly disturbing to observe an officer not

practicing or enforcing social distancing, which is virtually impossible, but instead is laughing and touching detainees without any PPE." Ex. A, Turner Dep. 146:22-147:10, 148:15-149:05.

Ms. Turner, the BOC's corporate representative, testified that in the two months preceding her deposition, she was personally concerned "to see staff operating without wearing masks properly" in intake areas at the Robert N. Davoren Complex ("RNDC"). Ex. A, Turner Dep. 68:15-69:10. The BOC considers it important to wear masks in intake areas where officers encounter "people who have yet to be screened or yet to have completed a screening process because there's potential to be exposed and then travel around [...] the facility and transmit the virus once they are exposed." *Id*. at 71:12-72:01.

Despite current rates of mask noncompliance among DOC staff and issuance of a seemingly more stringent mask directive, Defendants have *decreased* their efforts to monitor and audit staff behavior. At the beginning of the pandemic, the BOC had a dedicated "Genetec team"[32] that monitored COVID-related issues, including mask compliance and sanitation. Ex. A, Turner Dep. 13:9-15:15. In January 2021, the BOC conducted a Genetec pilot program where BOC staff generated reports specifically pertaining to PPE usage and sanitation supply availability, but the BOC dropped the endeavor because it claims it does not have the staff capacity to consistently implement the monitoring strategy. Ex. A, Turner Dep. 144:9-145:21. Chief Becky Scott, who oversees mask-related discipline at Rikers, testified that the technology exists for management to view video anywhere in Rikers remotely and in real-time. Ex. R, Deposition of Chief Becky Scott Volume II ("Chief Scott Dep. Vol. II") 160:18-161:3. Until recently, the DOC had a unit called the Compliance and Safety Center ("CSC") that used this technology to monitor video 24/7 and call DOC staff who were not wearing masks properly. *Id.* at 160:6-17; *see also* Ex. C, Feeney Corp. Rep. Dep. 7:5-12. The DOC found the CSC helpful in

[32] Genetec is the name of the video technology inside Rikers.

monitoring mask compliance and increasing adherence. Ex. C, Feeney Corp. Rep. Dep. 15:14-21. But the DOC eliminated the unit effective March 30, 2021. *Id*. at 8:14-21. Despite issuing its more stringent mask policy on May 5, 2021, the DOC has made no effort to reinstate the CSC to ensure staff compliance. *Id*. at 13:10-16.

4. The DOC Is *Still* Not Adequately Sanitizing Dorms, Common Areas, and High-Touch Surfaces.

Defendants continue to fail to make cleaning/sanitation supplies readily available to detainees, and to sanitize high-touch surfaces. Civilian cleaning crews (aside from not wearing masks while in the housing area) do not sanitize high-touch surfaces—they simply mop and sweep the floors. Ex. I, Azor-El Dep. 30:18-34:11; Ex. J, Barnar Dep. 14:12-20. The DOC is *still* not providing detainees with sanitizing solutions or wipes to disinfect phones. Ex. I, Azor-El Dep. 39:17-22. Mr. Barnar has never observed anybody sanitizing or cleaning phones or video booths. Ex. J, Barnar Dep. 18:22-25. And while Virex is available near the slop sink, Mr. Barnar testified that the DOC has never given him any guidance on how to use Virex or what is necessary to use Virex effectively. *Id*. at 34:21-35:15.

Giving sanitizing wipes to detainees to clean high-touch surfaces is feasible and safe: the DOC *itself* gives out wipes to some detainees. For the past three or four months, the DOC has provided detainees at VCBC with wet wipes before they enter the video conference booths. Ex. L, Clanton Dep. 28:8-25, 29:17-30:22. The DOC has not pointed to any problems that have arisen at VCBC. Ex. C, Feeney Corp. Rep. Dep. 42:10-43:1. But the DOC has yet to make sanitary wipes widely available inside other facilities. Ex. A, Turner Dep. 43:13-17. Even at VCBC, the DOC only makes wipes available for computer video conference booths; it does not sanitize traditional phones at all, so detainees use a mildew remover and soap solution to clean phones themselves. Ex. L, Clanton Dep. 27:14-28:7.

As a practical matter, the BOC believes that for interventions to prevent COVID-19 to be effective, it is important to make them easy to use. Ex. A, Turner Dep. 47:13-17. The BOC does not see any immediate downside to providing detainees with alcohol prep pads to wipe down phones. *Id*. at 168:10-24. In fact, the BOC has recommended that the DOC provide detainees with sanitary wipes rather than buckets of Virex and sponges to clean phones. *Id*. at 168:25-169:9. The DOC did not implement the BOC's recommendation. *Id*. at 169:5-9.

The BOC has also recommended that, in its sanitation audits, the DOC not only record whether sanitation supplies are available, but also record whether sanitation is actually occurring. Ex. A, Turner Dep. 156:16-158:1. But the DOC has failed to implement the BOC's recommendation. *Id*. So, the BOC does not have access to information on whether or not phones are being consistently sanitized. *Id*. at 158:5-14.

5. Social Distancing & Overpopulation.

Despite efforts at the beginning of the pandemic to decarcerate New York City jails, the current population in DOC custody now exceeds pre-pandemic levels. As of June 25, 2021, the BOC reported that there are 5,842 people in DOC custody; prior to decarceration efforts in March 2020, that number was 5,557.[33] The rising population in DOC custody makes it increasingly difficult for DOC staff and detainees alike to effectively social distance. Ex. A, Turner Dep. 72:16-73:21. The BOC notes that the COVID-19 mitigation efforts employed by the DOC at the beginning of the pandemic when jail populations decreased "may not be as effective with the population where it currently stands." Ex. A, Turner Dep. 72:16-73:6.

[33] *See* https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-06-19-06-25-21.pdf (last visited 7/7/21)

II. LEGAL STANDARDS

A. General Standards for Preliminary Injunctions.

A district court "may grant a preliminary injunction where a [movant] demonstrates irreparable harm and meets either of two standards: (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in the movant's favor." *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 347–48 (S.D.N.Y. 2020).[34] Plaintiffs "must demonstrate a substantial likelihood of success on the merits." *Id.* Further, Plaintiffs must show that "the balance of equities tips in [their] favor, and that an injunction is in the public interest;" these two factors merge when, as here, the government is a party. *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 58–59 (2d Cir. 2020).

B. Standards Applicable to Plaintiffs' Constitutional Claim.

Plaintiffs are pretrial detainees. "A pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). "A pretrial detainee's claims are evaluated under the Due Process Clause because, [p]retrial detainees have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.*

"A pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions." *Id.* "This means that a pretrial detainee must satisfy two prongs to prove a claim, an 'objective prong' showing that the challenged conditions were sufficiently serious to

[34] Because of the extensive number of citations in this case, any internal marks or references in a citation are omitted without further reference unless otherwise stated.

constitute objective deprivations of the right to due process, and a 'subjective prong'—perhaps better classified as a 'mens rea prong' or 'mental element prong'—showing that the officer acted with at least deliberate indifference to the challenged conditions." *Id.* "The reason that the term 'subjective prong' might be a misleading description is that . . . the Supreme Court has instructed that 'deliberate indifference' roughly means 'recklessness,' but 'recklessness' can be defined subjectively (what a person actually knew, and disregarded), or objectively (what a reasonable person knew, or should have known)." *Id.*

As applicable to this situation, "[t]he objective prong asks whether the conditions of which the detainees complain, either alone or in combination, pose an unreasonable risk of serious damage to [their] health, which includes the risk of serious damage to physical and mental soundness." *Fernandez-Rodriguez*, 470 F. Supp. 3d at 348. "In a case where detainees complain of an elevated risk of being harmed by the allegedly unconstitutional conditions, the Court must determine whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Id.* This Court ruled in its decision on Plaintiffs' earlier preliminary injunction motion that Plaintiffs have met the objective prong. Ex. T, Oral Order on Plaintiffs' Initial Motion for Preliminary Injunction 2/19/2021 ("Oral Order") 8:7-14, 12:21-23.

Since Plaintiffs are considered pretrial detainees, the subjective prong asks if defendants "knew, or should have known, that the condition posed an excessive risk to health or safety." *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 349 (S.D.N.Y. 2020). "In this context, 'disregard' means 'failing to take reasonable measures to abate' the unconstitutional condition."

Id. (quoting *Farmer v. Brennan*, 511 U.S. 825, 847 (1994)).[35] It is this prong where the Court found Plaintiffs had not met their burden. Ex. T, Oral Order 15:15-17:25.

C. Standards Applicable to Plaintiffs' ADA and Rehabilitation Act Claims.

"[T]he standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 [of the Rehabilitation Act] of federally assisted programs and activities." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (internal quotes and marks omitted). "[U]nless one of those subtle distinctions is pertinent to a particular case, [district courts] treat claims under the two statutes identically." *Id*.

To establish a violation under the ADA or Rehabilitation Act, "the plaintiffs must demonstrate that (1) they are 'qualified individuals' with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities." *Henrietta D.*, 331 F.3d at 272. "Discrimination under the third prong can include 'failure to make a reasonable accommodation' for the detainee." *McFadden v. Noeth*, 827 F. App'x 20, 27–28 (2d Cir. 2020). "To establish a violation under the Rehabilitation Act, a plaintiff must show that the defendants receive federal funding." *Henrietta D.*, 331 F.3d at 272.

"[I]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits," and that "[o]nce the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant." *Henrietta D.*, 331 F.3d at 280.

[35] Not every circuit follows this test, and Plaintiffs advocate for a test that is more protective of their rights, but recognize that at this juncture, Second Circuit law is clear in requiring deliberate indifference. *See Mays v. Dart*, 974 F.3d 810 (7th Cir. 2020).

III. DISCUSSION

The Plaintiffs meet the standards for a preliminary injunction because they can demonstrate irreparable harm and a substantial probability of success on the merits. This Court should order the remedies requested by Plaintiffs, including but not limited to the appointment of a Special Master, re-implementation of live-feed mask-compliance programs, mandating PPE masks, distribution of sanitary wipes, and the creation of a staff vaccination registry.

A. Irreparable Harm.

No one can question that if Plaintiffs contract or re-contract COVID-19, they will suffer irreparable harm because even if Plaintiffs—who are vulnerable detainees with preexisting conditions—survive COVID-19, other permanent bodily issues or grave damage to their health can remain. Now, with new, more virulent strains of COVID-19 spreading, the harms Plaintiffs will suffer if they contract COVID-19 are unknown. "Harm is irreparable when money damages after the matter is resolved will not be adequate redress." *JSG Trading Corp. v. Tray-Wrap, Inc*., 917 F.2d 75, 79 (2d Cir. 1990). The Supreme Court has determined that substantially increased risk of serious illness and death always constitutes irreparable injury. See, e.g., *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

B. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

Plaintiffs demonstrate a substantial likelihood of success on the merits, because COVID-19 poses a substantial risk to health and safety, and Defendants have failed to take reasonable measures to abate the risk, such as mask-wearing, sanitation, and social-distancing.

1. Plaintiffs Show a Substantial Likelihood of Success on their Constitutional Claim.

Plaintiffs' Section 1983 claim centers on deliberate indifference to serious medical needs in violation of the Fourteenth Amendment's Due Process Clause. Plaintiffs show a substantial

likelihood of success on the merits because they can demonstrate both the objective and subjective prongs of a Fourteenth Amendment violation.

a. Plaintiffs Fulfill the Objective Prong on their Constitutional Claim Because COVID-19 Is a Dangerous Health Risk.

This Court has already concluded that Plaintiffs can meet the objective prong of the constitutional analysis. Defendants acknowledge COVID-19 as a serious risk to detainees' health; regardless, it is a risk they should know about. It is beyond debate that COVID-19 is a constitutionally serious health risk "from which correctional officials have an affirmative obligation to protect inmates." *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 349 (S.D.N.Y. 2020). *See also Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (COVID case; objective prong "easily satisfied" in correctional setting).

b. Plaintiffs Fulfill the Subjective Prong on their Constitutional Claim Because Defendants Continue to Fail to Take Reasonable Measures to Abate the Risk.

Plaintiffs meet the subjective (or more properly, "mens rea") prong of the constitutional analysis. COVID-19 is still a major threat to life and health at this present time and in the future, and the fact that there are now vaccines available does not eliminate that threat. Ex. B, MacDonald Dep. 20:13-19.[36] Where correctional officials know or should know of a serious risk to detainees' health or safety, they must "take reasonable measures to abate" the risk. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Defendants are not doing what they claim they are doing, and are not responding adequately in light of the ongoing threat.

The more time the DOC has had to respond to the problem posed by COVID-19, the more incumbent it is upon the DOC to respond. *See, e.g.*, *Banks v. Booth*, 468 F. Supp. 3d 101,

[36] While the City admits actual knowledge of the threat posed by COVID-19, for pretrial detainees, it suffices to show that the defendant "should know" about the threat. There is no serious question at this point that any correctional system—indeed, almost any human being alive at this time—knows that COVID-19 poses a serious risk to health and safety.

112 (D. D.C. 2020) ("However, for purposes of establishing an unreasonable risk to Plaintiffs' health, the Court notes that Defendants' policies, and the delayed and insufficient implementation of many of those policies, has prevented Plaintiffs from being able to take the preventative and precautionary steps that the larger, non-detained population has been able to take to slow the spread of COVID-19."); *Maney v. Brown*, --- F. Supp. 3d ---, 2021 WL 354384, at *16 (D. Or. Feb. 2, 2021) (granting preliminary injunction after initially denying preliminary injunction due, in relevant part, to the DOC's failure to timely provide COVID-19 vaccines).

In the Joint Status Letter to the Court filed on June 4, 2021, Defendants cite decreased COVID-19 positivity rates (as well as a self-serving report authored by CHS officials) in an attempt to further their position that injunctive relief is not necessary. But as the Supreme Court put it in *Helling*, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). As discussed above, the increasing population in DOC custody, low vaccination rates among DOC staff and detainees, and lack of compliance and enforcement of COVID-19 protocols, combined with the recent spike in positive cases in the United States,[37] are all factors that point to the need for injunctive relief now, especially since DOC infection rates have mirrored those of the general public in the past. Ex. C, Feeney Corp. Rep. Dep. 54:20-55:9.

The City trumpets its policies. But policies mean nothing when they're observed in the breach. "[T]he existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced." *Ware v. Jackson Cty., Mo.*, 150

[37] In the past two weeks, there has been a 39 percent increase in positive COVID-19 cases in the United States, and a 20 percent increase in positive COVID-19 cases in New York State. *See* https://www.nytimes.com/interactive/2021/us/covid-cases.html (last visited 7/9/21)

F.3d 873, 882 (8th Cir. 1998) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) ("Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced.")). And, as this Court stated in its oral order denying Plaintiffs' initial motion for injunctive relief:

> [T]he more the defendants rely on their development and implementation of these policies to stave off constitutional challenges by detainees to the conditions of their confinement, the more appropriate it is for this Court to consider whether those policies are merely aspirational or have actually been put into place with appropriate penalties for non-compliance.

Ex. T, Oral Order 22:6-18. The Court also noted in its oral order: "Should it turn out that evidence reveals DOC's knowing or reckless failure to implement the very policies on which they rely as evidence of no deliberate indifference, the Court's conclusions [regarding injunctive relief] could be very different." Ex. T, Oral Order 13:2-9.

Unfortunately, what this Court foreshadowed is exactly what the evidence reveals. Defendants' failure to comply with and enforce their own written COVID-19 policies creates a stronger inference of deliberate indifference. It's not just detainees complaining about officers doffing masks: Dr. Bobby Cohen, a former Rikers doctor and member of the City's Board of Correction, calls Rikers staff "disturbingly" noncompliant on masks. Ex. M, Bobby Cohen Email. In the two months prior to her deposition, Ms. Turner, the BOC's corporate representative, recalled being "personally concerned to see staff operating without wearing masks properly" in the intake areas at RNDC. Ex. A, Turner Dep. 68:15-69:10. *See also* Ex. Q, Safyer Letter (expressing concern over noncompliance). One officer was brazen enough to show up on video in Mr. Clanton's deposition without a mask. In the face of all of this, the City has not just stayed stagnant—it's taken a step back, *eliminating* its peer mentoring unit, which had observed video footage to encourage mask compliance. Only judicial intervention will work.

2. Plaintiffs Have a Substantial Probability of Success on their ADA/Rehabilitation Act Claims.

The City has also violated the ADA and Rehabilitation Act by failing to protect medically-vulnerable prisoners in the North Infirmary Command (NIC). All three of the detainees still in NIC describe the serious health conditions they face. Ex. A, Azor-El Dec.; Ex. B, Barnar Dec.; Ex. C, Cole Dec. The City has admitted in its Answer that it is an entity subject to the Rehabilitation Act and the ADA. *See Azor-El,* Case No. 1:20-cv-03650-KPF, Docs. 58 and 64, ¶¶ 180, 188 (alleging coverage, and admitting coverage).

Has the City failed to reasonably accommodate the Plaintiffs? Yes. In an ADA and Rehabilitation Act case, "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003). "[O]nce the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant." *Id.*

The measures proposed here are reasonable, and do not pose any undue burden to Defendants. Every day that goes by without proper risk mitigation, medically-vulnerable detainees face impairment of their participation in virtually every activity in the prison, because every activity—be it going to the bathroom, using the phone, or interacting with other detainees and staff—poses an unnecessary risk of infection. The City has a duty to provide reasonable accommodation, and has no excuse for failing to provide the basic measures proposed here.

3. The Balance of Equities and the Public Interest Favor an Injunction.

Here, the balance of equities and the public interest favor relief. *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 58 (2d Cir. 2020). As the Second Circuit has

recognized, the public interest weighs in favor of injunctions when they would prevent "[w]orse health outcomes" and "[i]ncreased prevalence of communicable diseases." *Id.*

C. Plaintiffs' Requests for Injunctive Relief.

As part of Plaintiffs' renewed Motion for a Preliminary Injunction, they respectfully request that this Court appoint a Special Master or Court Monitor with power to monitor the Defendants' compliance with the law and their own policies. "Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees." *Brown v. Plata*, 563 U.S. 493, 511 (2011). The appointment of a Special Master or Court Monitor in this case would be limited and unintrusive. For one, this pandemic is (hopefully) finite—a Special Master or Court Monitor would not be needed indefinitely. The Court may even opt to create a schedule for phasing out the Special Master's or Court Monitor's duties as relevant milestones are reached. The appointment would also be unintrusive since the DOC already has the technological infrastructure to allow for a Special Master or Court Monitor to tap into live video surveillance feed across all DOC facilities. As the situation currently stands, Plaintiffs' counsel is essentially performing the duties of a Special Master by monitoring compliance through discovery. But the discovery process is slow, inefficient, and burdensome to both Plaintiffs and Defendants. A Special Master would actually conserve resources.

Plaintiffs further request that this Court command the City to (a) re-implement effective, live video monitoring of Rikers for compliance with mask mandates; (b) mandate that staff wear actual PPE masks; (c) provide sanitizing wipes or alcohol prep pads for high-touch areas, such as phones; and (d) implement a register of staff who can show documentation of vaccination. Each of these interventions are vital in protecting detainees *and* staff from falling seriously ill or dying

from COVID-19 while being easy to implement. Re-implementing the BOC's and DOC's live video monitoring for mask compliance would simply require Defendants to reappoint staff to their respective surveillance teams—again, the infrastructure is already in place. Mandating that staff wear actual PPE masks would bring Defendants in line with CDC guidance at virtually no additional expense; surgical masks are already readily available at DOC facilities by Defendants' own admission. Procuring sanitizing wipes or alcohol prep pads to detainees for high-touch surfaces, like the previous request, would be inexpensive since such wipes are already available at DOC facilities. The DOC is already providing sanitary wipes at VCBC and has not had any reports of misuse of sanitary wipes by detainees. Finally, implementing a register of staff who can show documentation of vaccination is a vital tool in controlling the spread of COVID-19 (even voluntary self-reporting is better than no reporting at all) and, according to the DOC, it is possible to implement. Ex. C, Feeney Corp. Rep. Dep. 22:23-23:3. Having basic information on staff vaccination rates will help guide the Court, the DOC, and anyone else involved in this matter on the appropriate responses.

Courts have found correctional facilities/officers to be deliberately indifferent in their responses (or lack thereof) to COVID-19 and granted injunctive relief to Plaintiffs. *See, e.g., Malam v. Adducci*, 459 F. Supp. 3d 867 (E.D. Mich. 2020); *Seth v. McDonough*, 461 F. Supp. 3d 242 (D. Md. 2020); *Banks v. Booth*, 468 F. Supp. 3d 101 (D.D.C. 2020); *Savino v. Souza*, 459 F. Supp. 3d 317 (D. Mass. 2020); *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174 (D. Colo. May 11, 2020); *Cristian A.R. v. Decker*, 453 F. Supp. 3d 670 (D.N.J. 2020).

While Defendants will again call the cry of "deference", it does not get them out of oversight—especially where, as here, they have had plenty of time to take easy measures and have failed to. "Courts [...] must not shrink from their obligation to enforce the constitutional

rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

Likewise, the fact that some detainees have not received vaccines cannot pose a barrier to enforcement of their rights. Many detainees have in fact taken a vaccine: others distrust the prison health system or have medical/religious reasons for not taking it. It is *Defendants* who have a constitutional duty to protect persons in their custody. Prison is not an every-person-fend-for-themself environment.

Defendants will point to all the measures they have taken. Simply acting is not enough if those actions are inadequate to meet the threat. For instance, in *Vega v. Semple*, officials installed a partial mitigation system to detect radon gas at a prison. *Vega v. Semple*, 963 F.3d 259, 277 (2d Cir. 2020). The Second Circuit still allowed the inmates' damages claim to proceed, because "the mitigation effort implemented was not a reasonable measure taken to abate the risk of excessive radon exposure." *Id*. Much as some measures the City has taken might help, there are other, reasonable measures the City has failed to take.

IV. CONCLUSION

Why wait for more Rikers detainees to perish or develop more serious health conditions that will likely follow them for the rest of their lives? Easy solutions exist and are widely used nationwide. The Court should grant this motion.

Dated: July 9, 2021

Respectfully submitted,

KEENAN & BHATIA, LLC[38]
By: ___/s/ Sonal Bhatia & E.E. Keenan__
Sonal Bhatia (pro hac vice)
Edward (E.E.) Keenan

[38] Plaintiffs' counsel gratefully acknowledge the dedicated work on this matter by Julia Gokhberg, a pre-law Litigation Manager at the firm who will soon be departing to begin her first year at Stanford Law School.