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BY CM/ECF

February 18, 2021

The Honorable Katherine Polk Failla
United States District Judge
Southern District of New York

RE: *Azor-El, et al. v. City of New York, et al.*, 1:20-cv-03650-KPF (and related cases)
Issues Discussed at Oral Argument

Dear Judge Failla:

This firm represents various Plaintiffs in this pending set of related and consolidated cases regarding conditions at Rikers Island. We write this letter to follow up on several matters discussed at last week's argument.

Rikers Deaths in Custody

During oral argument, the Court inquired about the rate of deaths in Rikers. So far, there have been three deaths from COVID-19, according to the most recent weekly report, issued yesterday, from the Board of Correction, at page 13. For the Court's convenience, a copy is attached, but it can also be accessed electronically at this link:

<https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-02-06-02-12-21.pdf>

Plaintiffs are concerned that these death totals may be underinclusive because people may die after leaving custody, or their deaths may be attributed to underlying conditions other than COVID-19, even though COVID-19 is a precipitating factor.

As the Board of Correction notes on page 13 of this report, at footnote 4: **“The number of CHS patient deaths does not include patients who may have been diagnosed and treated while in custody and died post-release.”**

Plaintiffs understand there have been at least a few instances in which someone was “discharged” from custody at the CHS/DOC's Bellevue Prison Hospital Ward, moved to another part of the hospital, and then died shortly thereafter, and that those people are not included in the total. Plaintiffs welcome any information the City can provide.

Collective Bargaining

During oral argument and in the briefing, the parties touched on the issue of a testing regime and whether collective bargaining impacts that, and the litigation of the repeal of N.Y. Civ. Rights Law § 50-a. This week, the Second Circuit issued its decision affirming this Court's decision in *Uniformed Fire Officers Ass'n v. de Blasio*. A copy of the Second Circuit's decision is attached. On the point of whether collective bargaining agreements yield to legal obligations, the Second Circuit held: "the NYPD cannot bargain away its disclosure obligations." (Slip Op., at 9.)

Soap

The parties discussed with the Court the availability of soap. Plaintiff Maurice Barnar, who is in NIC, has informed counsel that he has access now to hand soap, but that the day after last week's oral argument, Rikers removed access to cleaning supplies for floors and bathrooms and locked them in a closet. Plaintiffs are awaiting a status update on soap availability in Rikers more generally. Inmates in other units of Rikers had reported a lack of soap before the hearing. Plaintiffs are concerned about the timing of the locking away of cleaning supplies and whether there is any element of retaliation.

Citations

At oral argument, Plaintiffs mentioned several cases not cited in the briefs. These cases are:

Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("In certain instances, a physician may be deliberately indifferent if he or she consciously chooses 'an easier and less efficacious' treatment plan.")

Brown v. Plata, 563 U.S. 493 (2011) (discussing special masters, receivers, and consent decrees as possible remedies)

Rodriguez v. Manenti, 606 F. App'x 25 (2d Cir. 2015) (following *Chance*)

In addition, Plaintiffs wish to cite the U.S. Supreme Court's decision in *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("the Eighth Amendment protects against future harm to inmates").

Order Regarding Medical Records

Finally, the parties are in the process of conferring about an agreed order to submit to the Court on medical records; we believe we may be ready to submit an order tomorrow.

We thank the Court for considering these matters.

Respectfully submitted,

KEENAN & BHATIA, LLC

By: /s/ Sonal Bhatia & E.E. Keenan
Attorneys for Plaintiffs

Cc: Counsel of Record (by ECF)

New York City Board of Correction
Weekly COVID-19 Update
Week of February 6 – February 12, 2021

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I. Population Change

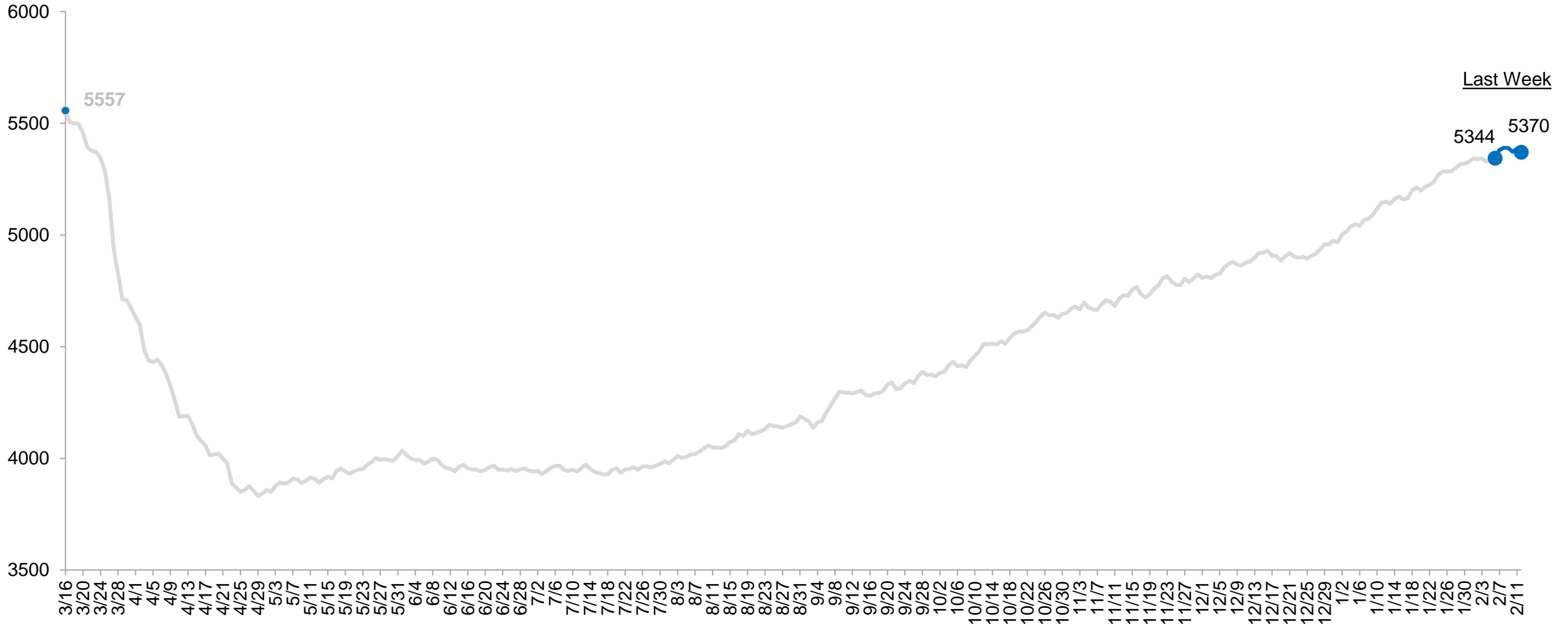
March 16, 2020 – February 12, 2021

I. Population Change: DOC Population in Custody & Breakdown by Custody Status, February 6 – February 12, 2021

BOC Analysis of DOC Population in Custody							
	02/06/2021 (Saturday)	02/07/2021 (Sunday)	02/08/2021 (Monday)	02/09/2021 (Tuesday)	02/10/2021 (Wednesday)	02/11/2021 (Thursday)	02/12/2021 (Friday)
Total Population in Custody	5344	5380	5390	5389	5373	5387	5370
Total New Admissions (on previous day)	50	55	35	31	47	52	51
Breakdown by Custody Status							
Total Pretrial (includes detainees and detainees with open cases and a violation of parole)	4749	4776	4785	4780	4754	4771	4755
Total City Sentenced (includes city sentenced and city sentenced with open cases and a violation of parole warrant)	156	161	161	161	162	164	163
Total Held on Technical Parole Violation (with no open case)	235	238	240	243	250	242	241
Other (includes newly state sentenced, state ready inmates, and state prisoners with a court order)	204	205	204	205	207	210	211

I. Population Change: Total Population in DOC Custody

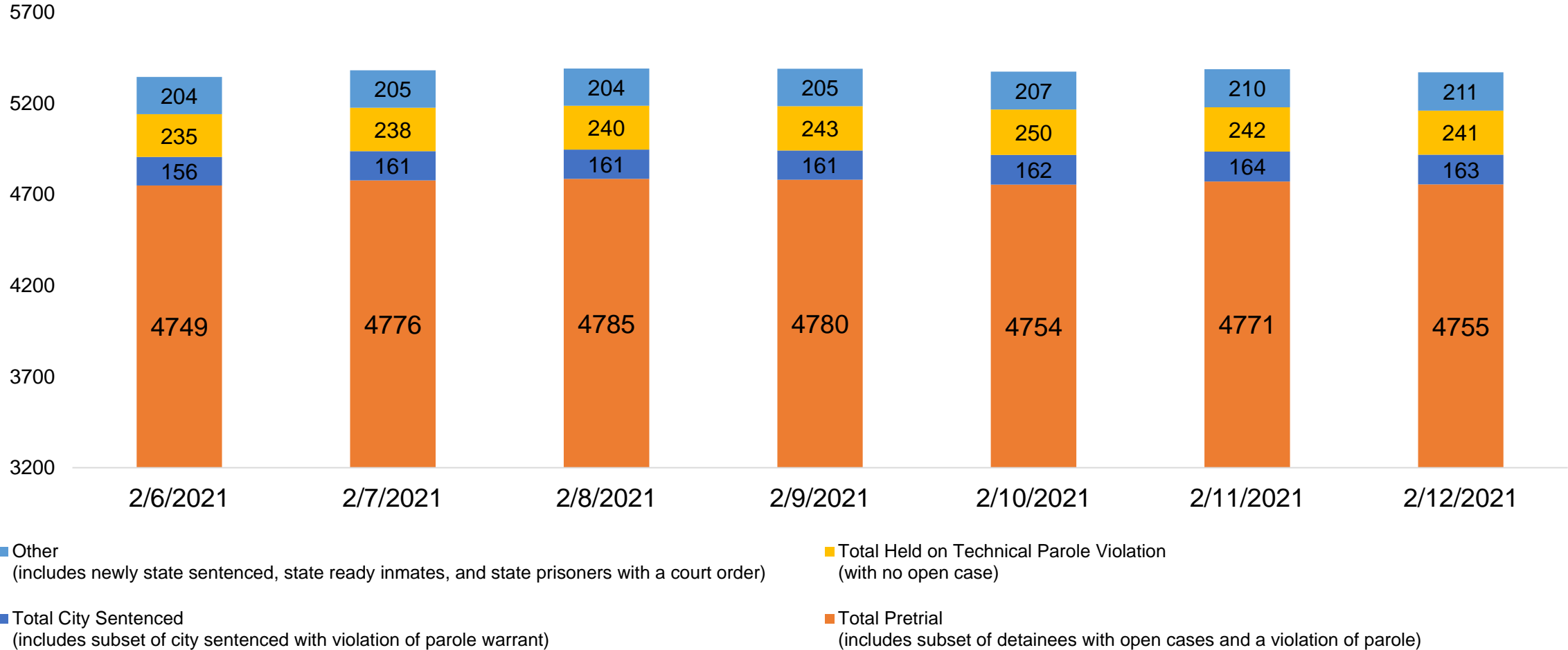
Total Population in DOC Custody March 16, 2020 – February 12, 2021



SOURCE: DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00 am

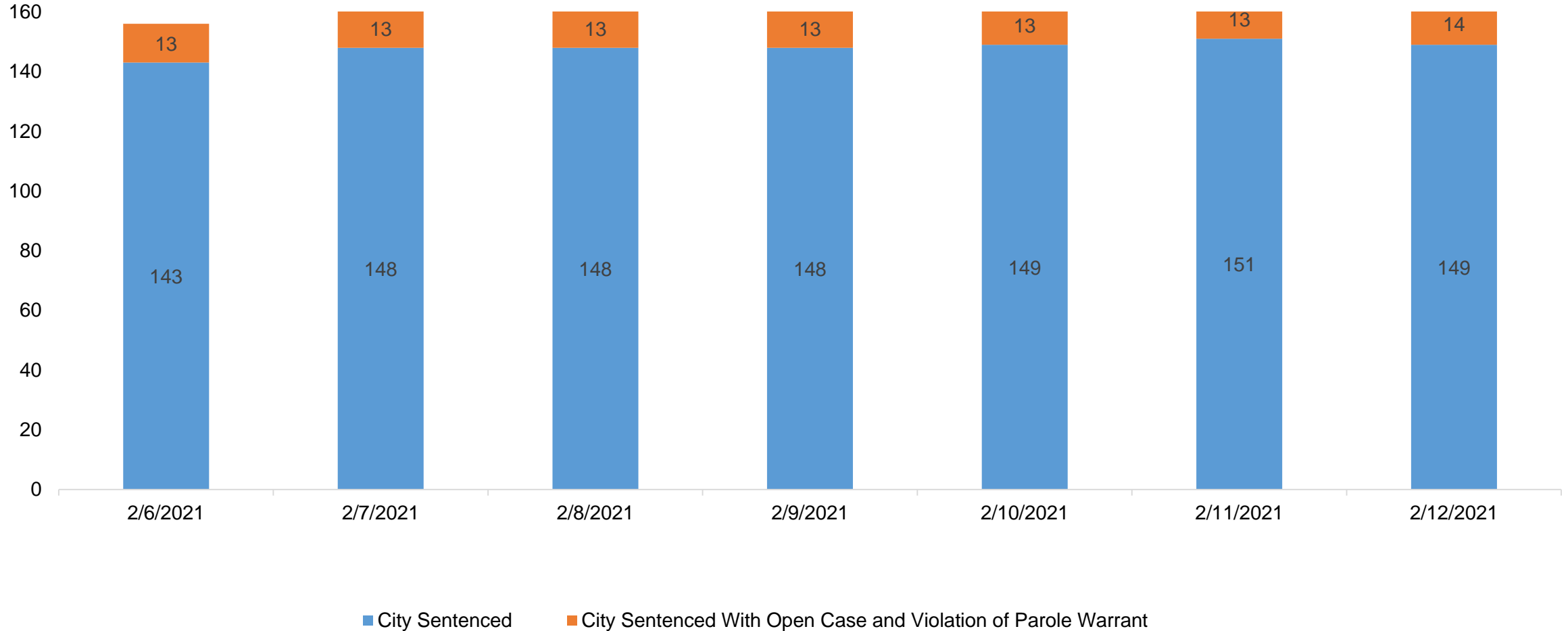
I. Population Change: DOC Population by Custody Status

Total DOC Population by Custody Status, 2/6/2021 - 2/12/2021



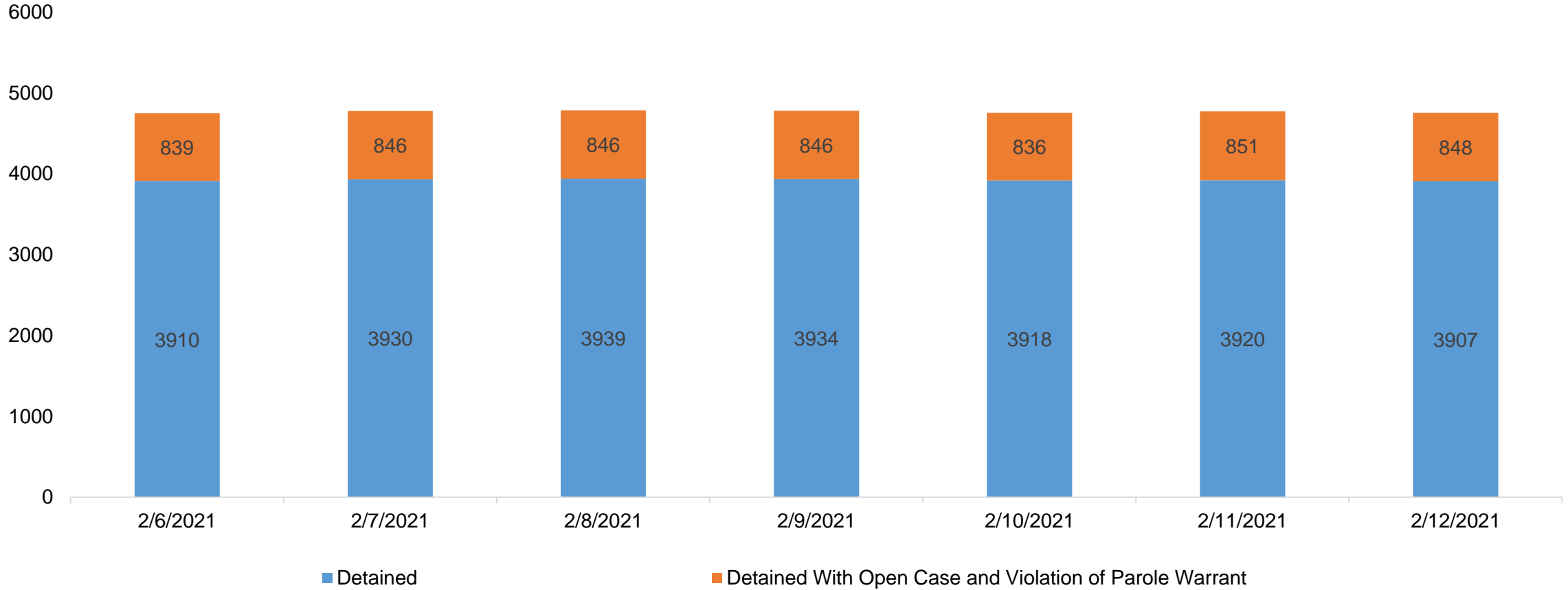
I. Population Change: City Sentenced Population by Custody Status

City Sentenced Population by Custody Status 2/6/2021 - 2/12/2021



I. Population Change: Pretrial Population by Custody Status

Pretrial Population by Custody Status 2/6/2021 - 2/12/2021



SOURCE: BOC analysis of DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00 am

I. Population Change: DOC Population in Custody & Key Demographics, February 6 – February 12, 2021

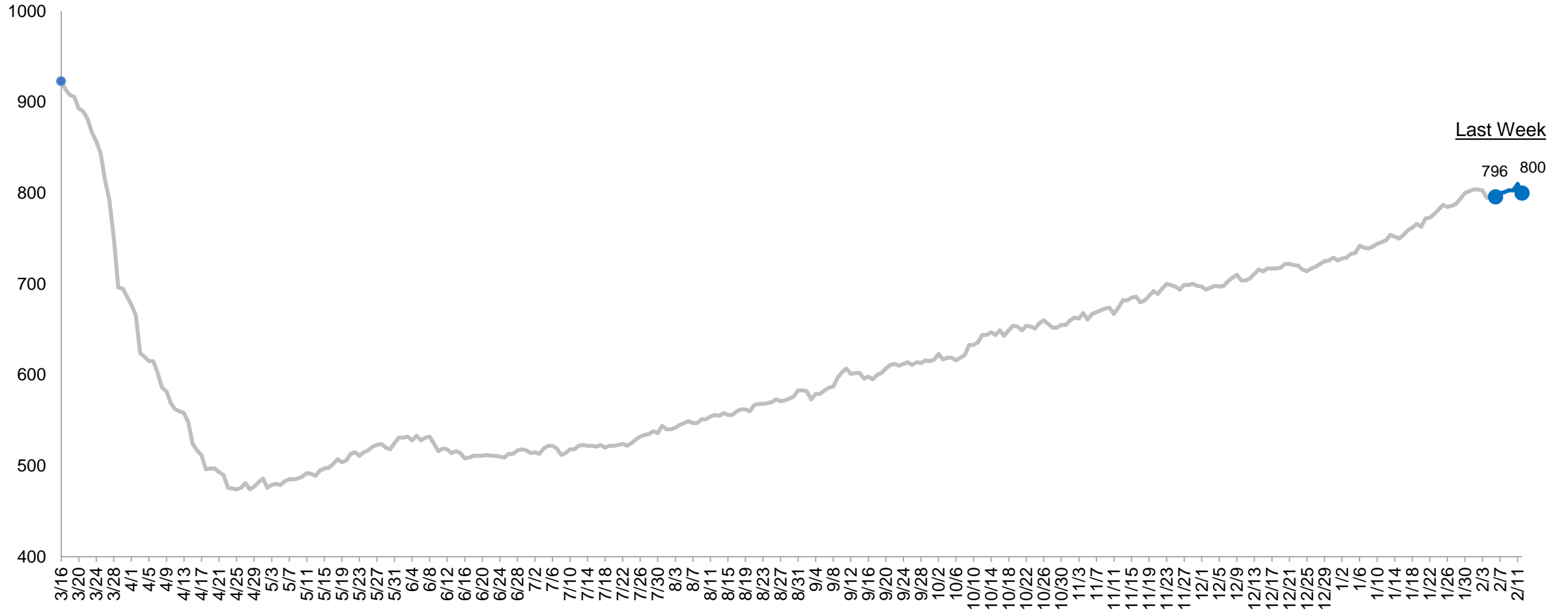
BOC Analysis of DOC Population in Custody							
	02/06/2021	02/07/2021	02/08/2021	02/09/2021	02/10/2021	02/11/2021	02/12/2021
Total Population in Custody	5344	5380	5390	5389	5373	5387	5370
Key Demographics NOTE: Categories listed below are not mutually exclusive							
Female	207	206	215	213	210	220	218
Male	4986	4977	5126	5085	5029	5116	5061
Transgender Female	38	39	39	39	40	40	39
Transgender Male	5	5	5	4	4	4	4
Gender Non-Conforming	0	0	0	0	0	0	0
Intersex	0	0	0	0	0	0	0
Unknown Gender	108	153	5	48	90	7	48
Young Adults (Ages 18-21)	445	446	447	445	444	444	444
Total 50+ yrs old	796	800	801	803	803	810	800
Total 50+ yrs old with a Technical Parole Violation	54	56	57	54	56	53	49
M Designation (Brad H/ Receiving Mental Health Services)	2787	2785	2783	2799	2796	2789	2789
Total in North Infirmary Command (NIC) (male infirmary patients)	54	54	54	54	54	56	54
Total Rose M. Singer Center (RMSC) Infirmary (female infirmary patients)	5	5	5	6	5	5	6

I. Population Change: DOC Population in Custody & Population Breakdown by Race/Ethnicity

Breakdown of Population by Race/Ethnicity and Type of Housing 02/11/2021 (as of 11:00 am)						
Race/Ethnicity	Total Population in DOC Custody	% of DOC Population	Total Population in Confirmed or Symptomatic Units	% of Confirmed or Symptomatic Population	Total Population in Likely Exposed but Asymptomatic Units	% of Likely Exposed but Asymptomatic Population
Asian	91	1.7%	≤10	--	16	1.50%
Asian Hispanic	0	0.0%	≤10	--	≤10	--
Black	3033	56.3%	78	63.9%	554	51.87%
Black Hispanic	147	2.7%	≤10	--	24	2.25%
Hispanic	1362	25.3%	31	25.4%	289	27.06%
Native	8	0.1%	≤10	--	≤10	--
Native Hispanic	1	0.0%	≤10	--	≤10	--
Other	162	3.0%	≤10	--	31	2.90%
Unknown	6	0.1%	≤10	--	≤10	--
White	313	5.8%	≤10	--	91	8.52%
White Hispanic	257	4.8%	13	10.66%	63	5.90%
Declined to Self-Report	7	0.1%	≤10	--	≤10	--
Total:	5387	100%	122	100%	1068	100%

NOTE: BOC analysis is based on the housing areas for confirmed COVID-19 patients, symptomatic patients, and likely exposed but asymptomatic units reported by DOC on 02/10/2021 at 4:30 pm, the DOC Inmates in Custody File on 02/11/2021, which is automated pull from the DOC Inmate Information System (IIS) at 11:00 am, and the Cross-Section file on 02/11/2021. **Individuals housed in confirmed and symptomatic units may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDUs) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS's COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

Total Population of 50+-Year-Olds in Custody, 3/16/2020 - 2/12/2021



SOURCE: DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00 am

II. Correctional Health Services (CHS) and Department of Correction (DOC) Updates to the Board of Correction (BOC)

March 17, 2020 – February 12, 2021

II. CHS and DOC Updates to BOC: Summary Table, February 6 – February 12, 2021

Correctional Health Services (CHS) and Department of Correction (DOC) Updates to the Board of Correction (BOC)							
	Date Reported ¹						
	2/6/2021	2/7/2021	2/8/2021	2/9/2021	2/10/2021	2/11/2021	2/12/2021
Current patients with confirmed COVID-19²	485	506	509	511	511	515	511
Current patients with confirmed COVID-19 and active infection³	N/A	N/A	87	91	91	84	82
COVID-19 deaths in custody (in hospital; cumulative)⁴	3	3	3	3	3	3	3
CHS staff newly under quarantine/isolation⁵	0	1	1	3	3	1	1
CHS staff with confirmed COVID-19 (cumulative)	265	265	265	266	268	268	268
Total DOC staff with confirmed COVID-19 (cumulative)	1801	1810	1810	1819	1822	1824	1827
Uniform DOC staff with confirmed COVID-19 (cumulative)	1612	1621	1621	1630	1632	1633	1635
Non-uniform DOC staff with confirmed COVID-19 (cumulative)	189	189	189	189	190	191	192

¹ Data reported by CHS reflects data from the prior day.

² This metric includes hospitalized as well as recovered patients.

³ This metric is sourced from the "CHS COVID-19 Data Snapshot." As of August 21st, this snapshot has been posted on the [CHS homepage](#) Monday through Friday.

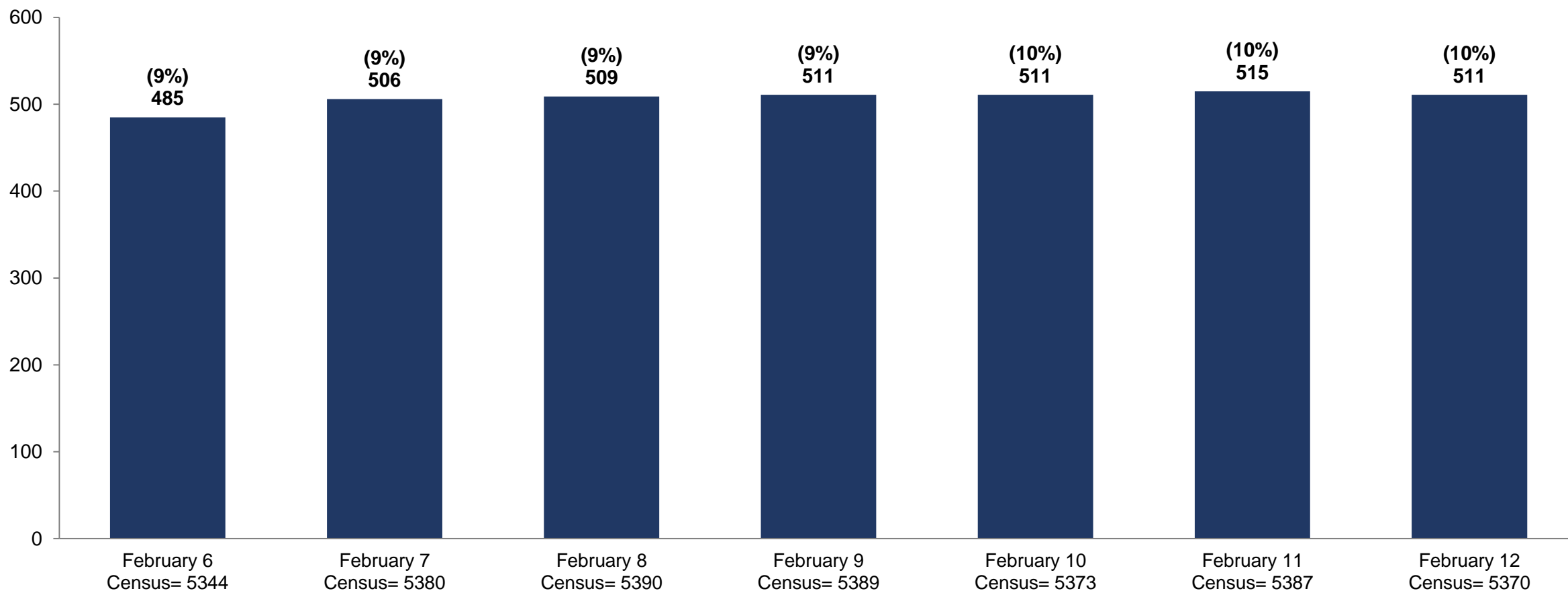
⁴ The number of CHS patient deaths does not include patients who may have been diagnosed and treated while in custody and died post-release.

⁵ This metric reflects staff newly placed in quarantine/isolation and not the total number of CHS staff currently in quarantine/isolation.

SOURCES: (1) CHS and DOC updates to BOC; (2) CHS COVID-19 Data Snapshots.

II. CHS and DOC Updates to BOC: People in Custody by COVID-19 Status¹

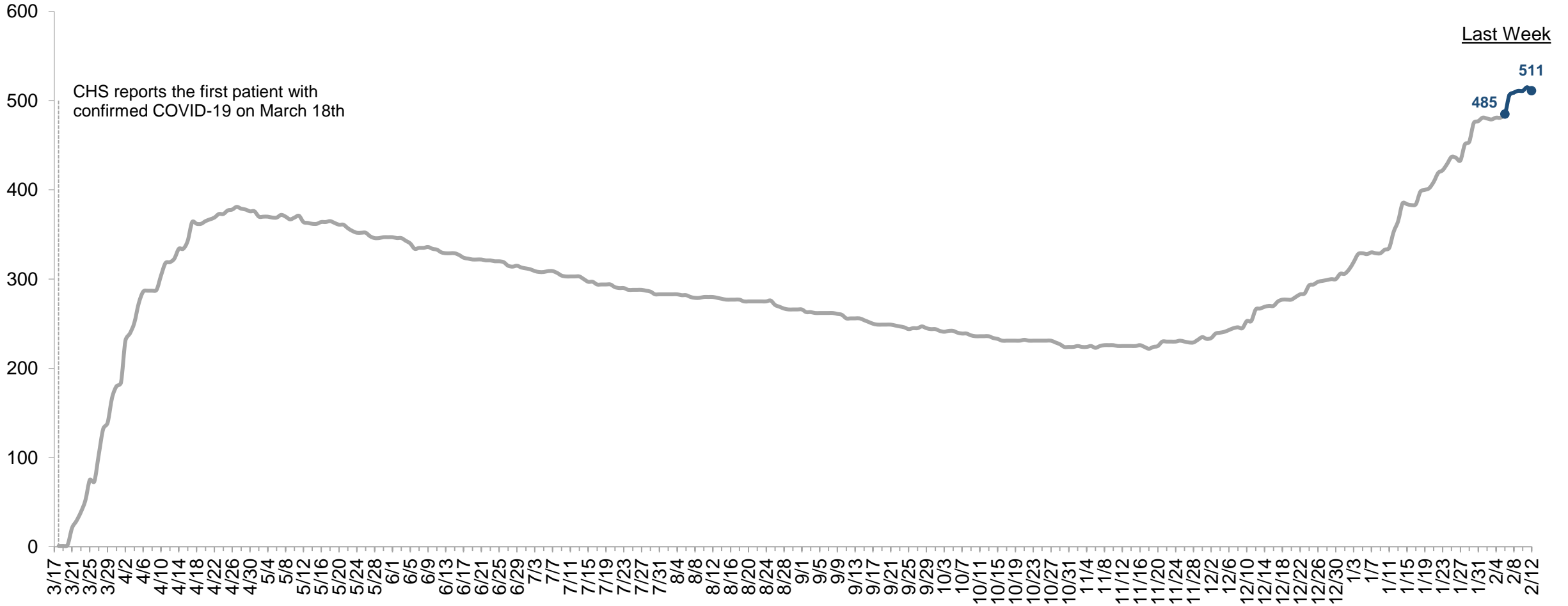
**Number and Percent of Patients with Confirmed COVID-19
February 6 – February 12, 2021**



¹ The figure above reflects the number of confirmed COVID-19 patients who were currently incarcerated as of each date. These numbers include confirmed patients who have recovered from COVID-19. The total number of people in custody with confirmed active infections can be found in CHS’s COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).

II. CHS and DOC Updates to BOC: Currently Incarcerated Patients with Confirmed COVID-19¹

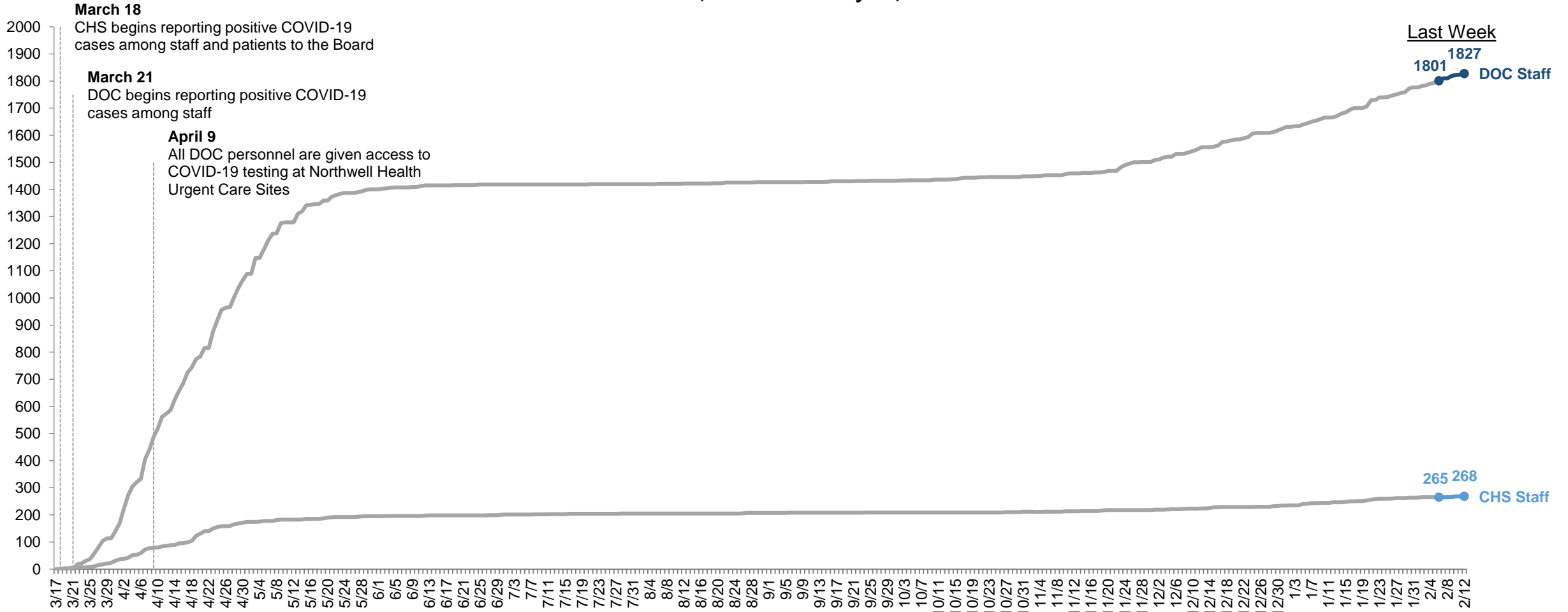
Number of Currently Incarcerated Patients with Confirmed COVID-19
 March 17, 2020 – February 12, 2021



¹ The figure above reflects the number of confirmed COVID-19 patients who were currently incarcerated as of each date. These numbers include confirmed patients who have recovered from COVID-19. The total number of people in custody with confirmed active infections can be found in CHS’s COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).

II. CHS and DOC Updates to BOC: Staff with Confirmed COVID-19 (cumulative)¹

Staff with Confirmed COVID-19
March 17, 2020 – February 12, 2021



¹ CHS and DOC report the cumulative total staff members who have tested positive for COVID-19 in their daily updates to the Board. CHS does not report the cumulative total number of incarcerated people who have tested positive for COVID-19 in its daily updates to the Board but does report this metric in weekly Local Law 59 reports published on the [CHS website](#). It would be inappropriate to compare cumulative staff totals to the number of currently incarcerated patients with COVID-19- reported in slide 15.

III. COVID-19 Designated Housing

March 16, 2020 – February 12, 2021

III. Housing: Housing Areas by COVID-19 Housing Designation, February 6 – February 12, 2021

	02/06/2021	02/07/2021	02/08/2021	02/09/2021	02/10/2021	02/11/2021	02/12/2021
Total Number of Open Housing Areas (as of 11:00 am)	253	253	254	254	256	256	257
Total Housing Areas for Confirmed COVID-19 Patients and Symptomatic Patients²	9	9	9	10	10	10	10
Total Housing Areas for Likely Exposed but Asymptomatic Individuals³	37	40	39	40	42	44	43

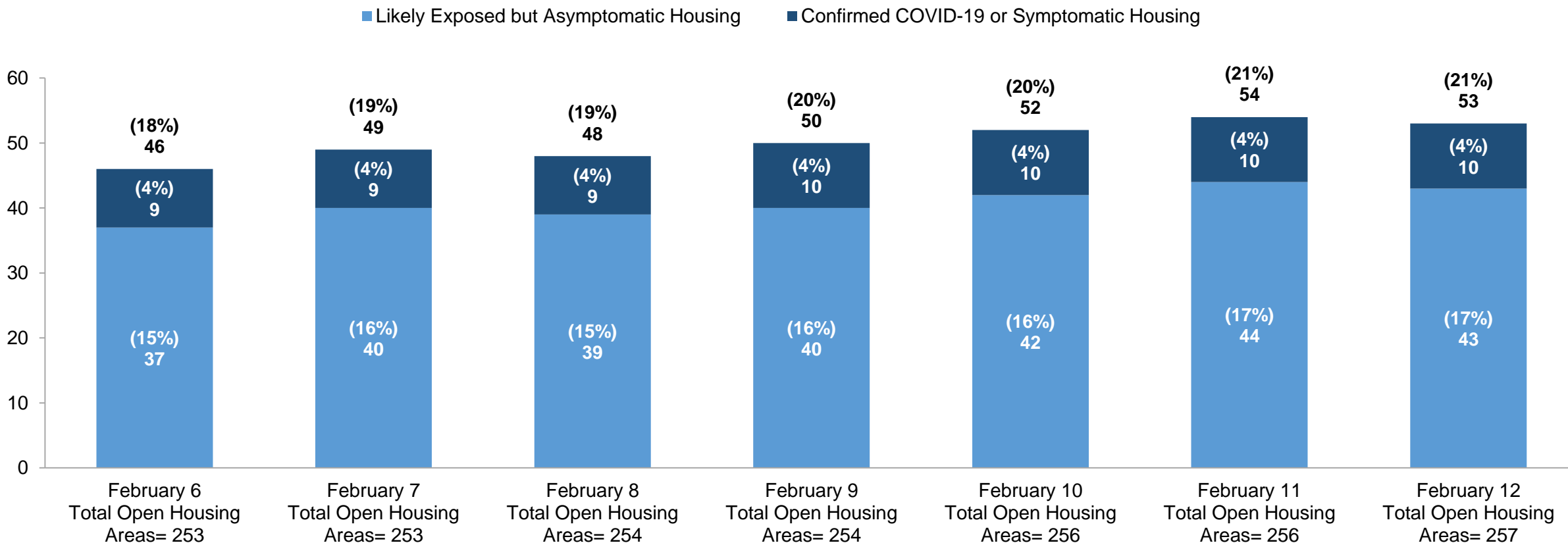
¹ BOC analysis is based on the housing areas for likely exposed but asymptomatic individuals, confirmed COVID-19 patients, and symptomatic patients reported by DOC for the previous day as of 4:30 pm.

² Confirmed and symptomatic units on these dates were in Communicable Disease Units (CDUs) at West Facility, RMSC, and EMTC. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDUs) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS's COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

³ Likely exposed but asymptomatic units on these dates were in AMKC, GRVC, OBCC, RNDC, EMTC, RMSC, NIC and VCBC.

III. Housing: Housing Areas with a COVID-19 Housing Designation¹

**Number and Percent of Open Housing Areas with a COVID-19 Designation
February 6 – February 12, 2021**



¹ DOC uses three COVID-19-related housing designations: (1) one for likely exposed but asymptomatic individuals, (2) one for exposed and symptomatic individuals, and (3) one for confirmed COVID-19 patients. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDUs) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS’s COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

SOURCES: BOC analysis of daily DOC updates to BOC & DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00am and the housing areas for exposed but asymptomatic individuals, confirmed COVID-19 patients, and symptomatic patients reported by DOC for the previous day as of 4:30pm.

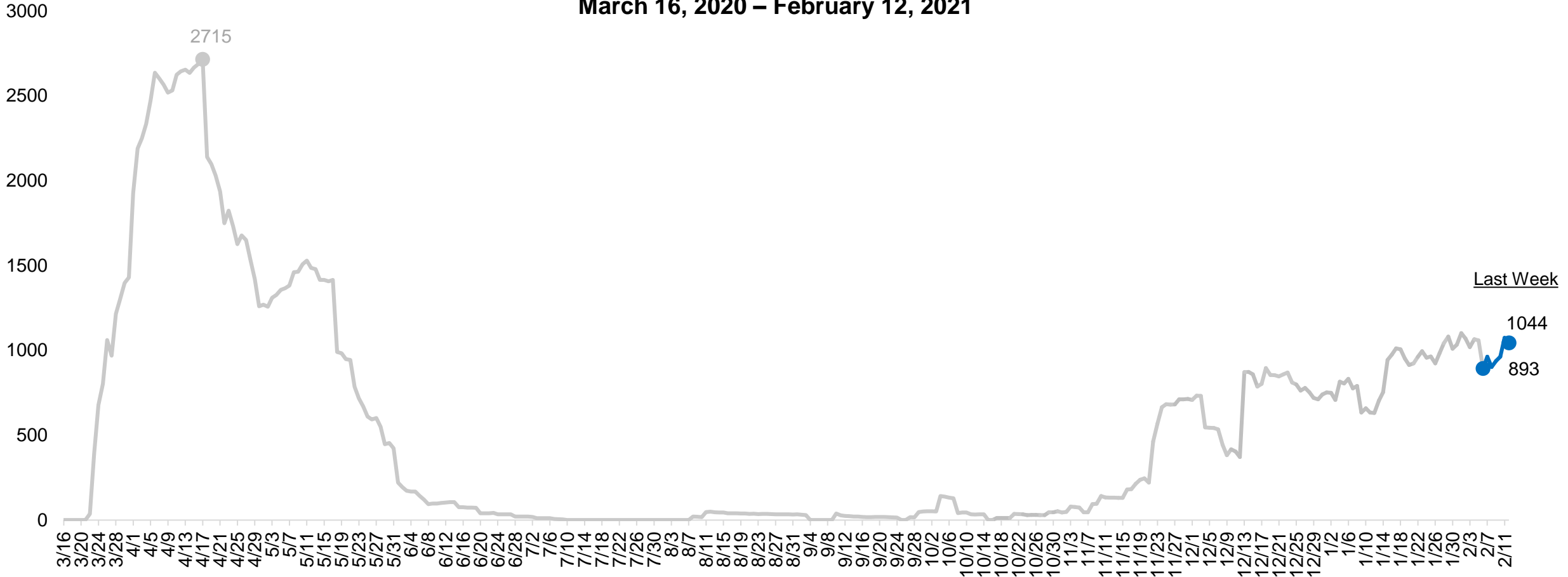
III. Housing: Key Demographics by COVID-19 Housing Designation, February 6 – February 12, 2021¹

	02/06/2021	02/07/2021	02/08/2021	02/09/2021	02/10/2021	02/11/2021	02/12/2021
Likely Exposed but Asymptomatic							
Total People in Exposed but Asymptomatic Units (as of 11:00am) Note: Categories below are not mutually exclusive.	893	963	902	938	962	1074	1044
50+ Years Old	174	188	180	186	187	212	204
Young Adults (Ages 18-21)	20	22	22	19	16	17	17
M-Designation	479	499	471	486	490	565	549
Female	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Men	885	953	893	930	955	1066	1036
Transgender Female	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Transgender Male	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Gender Non-Conforming	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Intersex	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Unknown Gender	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Confirmed and Symptomatic							
Total Patients in Housing Areas Used for COVID-19 Patients and Symptomatic Patients (as of 11:00am) Note: Categories below are not mutually exclusive.	104	116	133	141	129	139	134
50+	14	17	21	23	23	25	23
Young Adults (Ages 18-21)	≤10	≤10	≤10	≤10	≤10	≤10	≤10
M-Designation	57	62	67	70	63	65	66
Female	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Male	103	111	133	139	122	138	133
Transgender Female	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Transgender Male	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Gender Non-Conforming	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Intersex	≤10	≤10	≤10	≤10	≤10	≤10	≤10
Unknown Gender	≤10	≤10	≤10	≤10	≤10	≤10	≤10

¹ BOC analysis is based on the housing areas for likely exposed but asymptomatic individuals, confirmed COVID-19 patients, and symptomatic patients reported by DOC for the previous day as of 4:30 pm. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDUs) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS's COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

III. Housing: People in Likely Exposed but Asymptomatic Housing¹

**Number of People In Likely Exposed but Asymptomatic Housing,
March 16, 2020 – February 12, 2021**

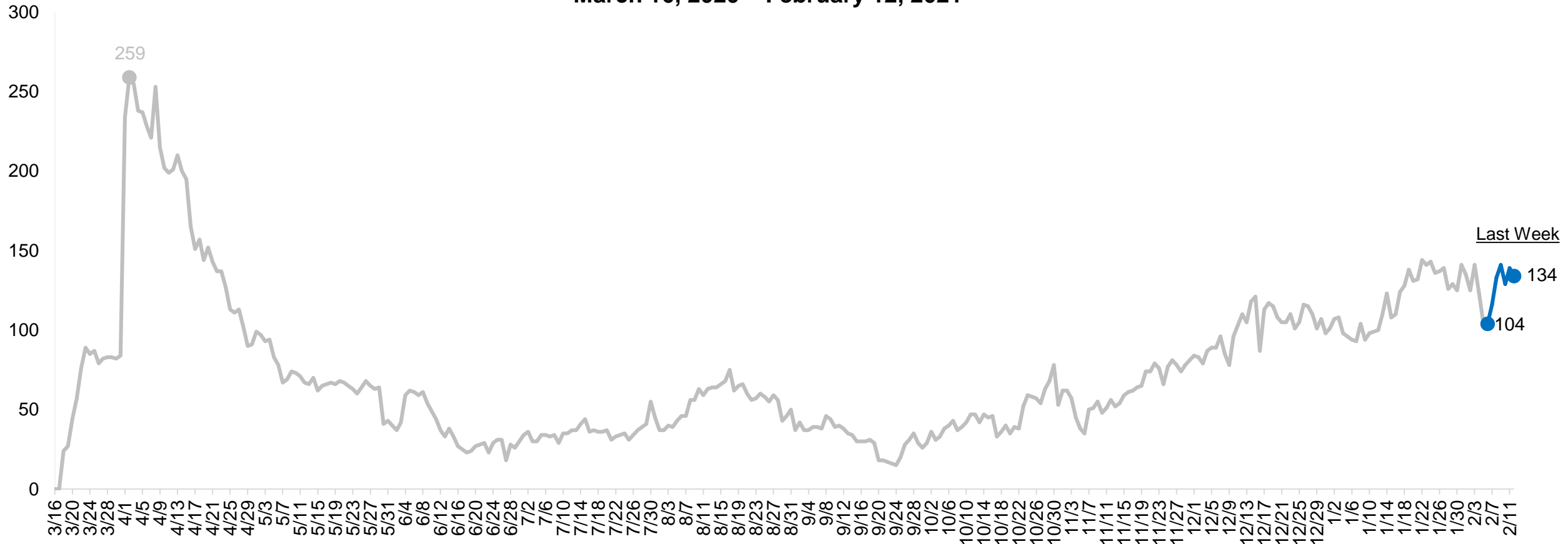


¹DOC uses three COVID-19-related housing designations: (1) one for likely exposed but asymptomatic individuals, (2) one for exposed and symptomatic individuals, and (3) one for confirmed COVID-19 patients.

SOURCES: BOC analysis of daily DOC updates to BOC & DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00am and the housing areas for exposed but asymptomatic patients reported by DOC for the previous day as of 4:30pm.

III. Housing: People in Confirmed/Symptomatic Housing¹

Total People in Housing Areas Used for Confirmed and Symptomatic Patients, March 16, 2020 – February 12, 2021

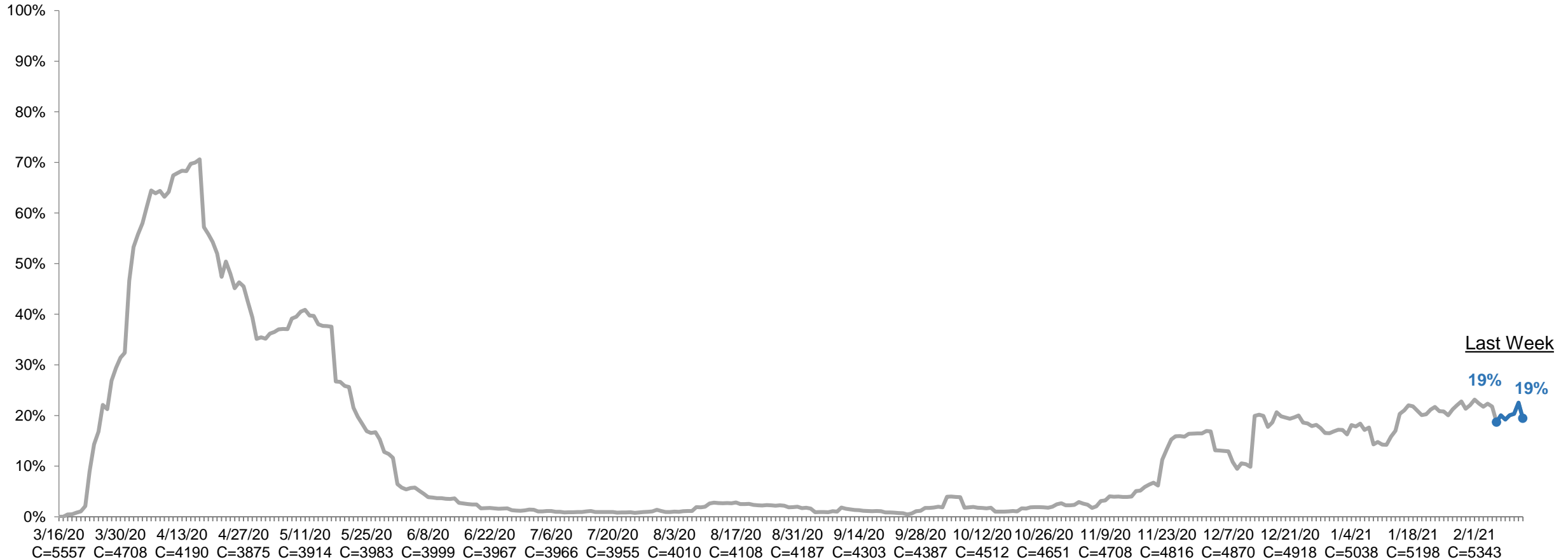


¹ DOC uses three COVID-19-related housing designations: (1) one for likely exposed but asymptomatic individuals, (2) one for exposed and symptomatic individuals, and (3) one for confirmed COVID-19 patients. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDU) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS’s COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

SOURCES: BOC analysis of daily DOC updates to BOC & DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00am and the housing areas for confirmed and symptomatic patients reported by DOC for the previous day as of 4:30pm.

III. Housing: Percentage of People in Custody in Housing Areas with a COVID-19 Housing Designation¹

**Percentage of People in Custody in Housing Areas with a COVID-19 Designation
March 16, 2020 – February 12, 2021**



¹ DOC uses three COVID-19-related housing designations: (1) one for likely exposed but asymptomatic individuals, (2) one for exposed and symptomatic individuals, and (3) one for confirmed COVID-19 patients. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDU) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS’s COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

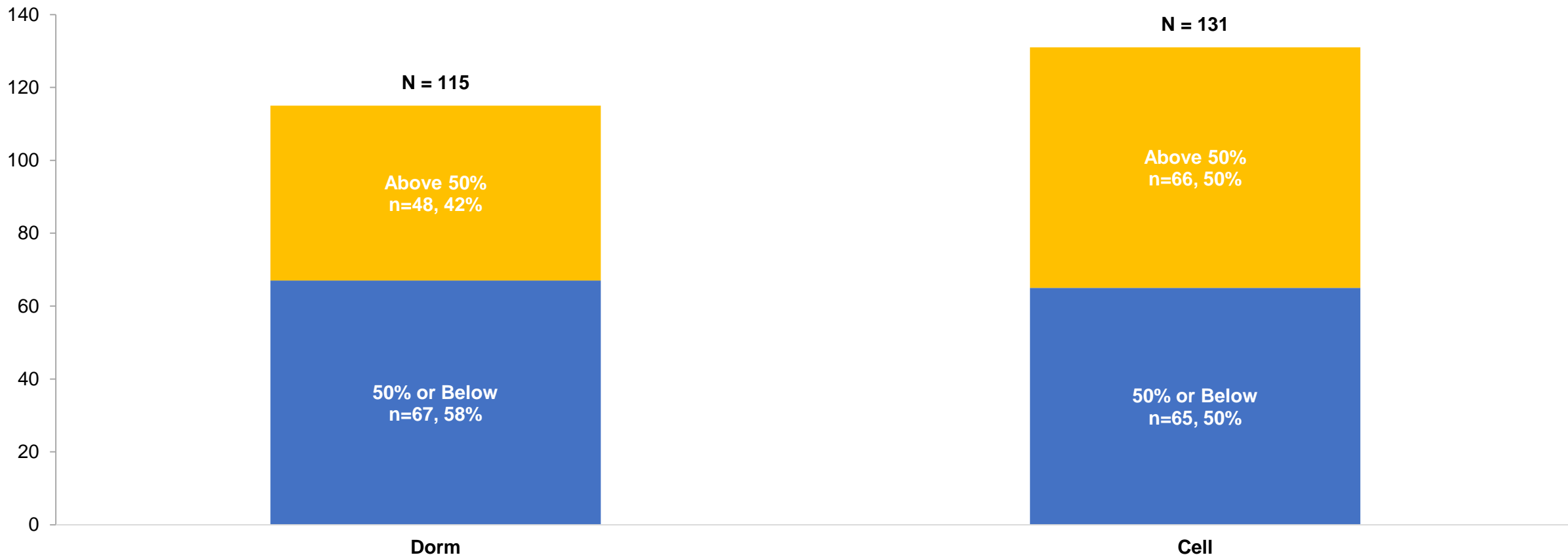
SOURCES: BOC analysis of daily DOC updates to BOC & DOC Inmates in Custody File, automated daily pull from the DOC Inmate Information System (IIS) at 11:00am and housing areas for exposed but asymptomatic individuals, confirmed COVID-19 patients, and symptomatic patients reported by DOC for the previous day as of 4:30pm.

IV. Housing Area Capacity

February 6 – February 12, 2021

IV. Housing Area Capacity

**Number and Percent of Open Cell and Dorm Units Above and Below 50% Capacity
February 11, 2021**



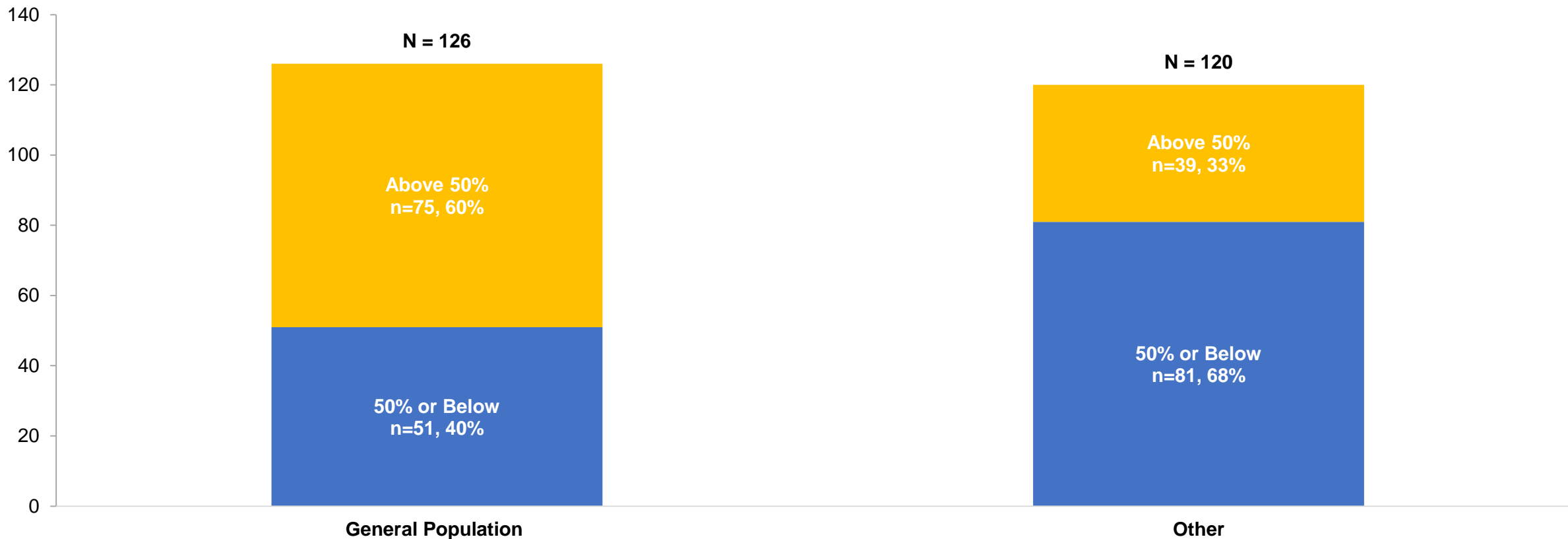
NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) Dorm count includes modular dorm units in AMKC, RMSC, and RNDC.
- 3) This analysis excludes Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

IV. Housing Area Capacity

**Number and Percent of Open Units Above and Below 50% Capacity by Housing Category
February 11, 2021**



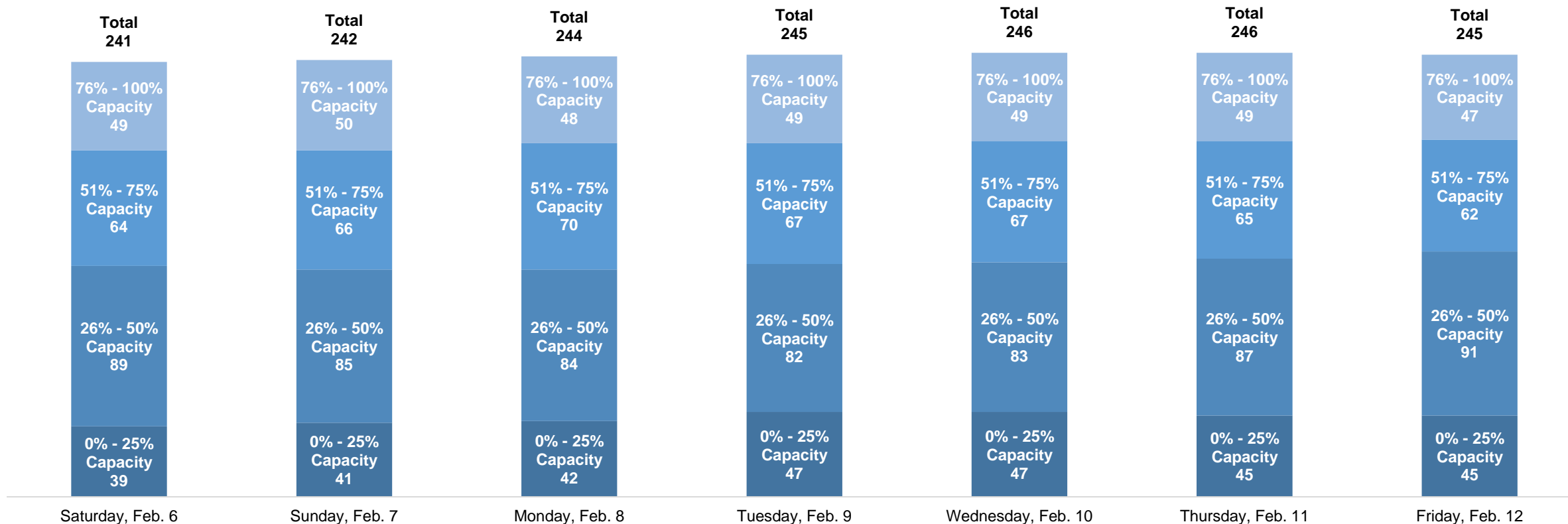
NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) General Population units have fewer staffing needs than more specialized housing units such as PACE or MO units and present an opportunity to lower housing density to facilitate social distancing.
- 3) This analysis excludes Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

IV. Housing Area Capacity

**Open Housing Areas by Capacity
February 6 – February 12, 2021**



NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) This analysis excludes Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

IV. Housing Area Capacity

Summary of Housing Area Capacity, Feb. 6 – Feb. 12, 2021

Facility	Unique Housing Areas	Minimum Capacity	Maximum Capacity	Mean Capacity	Median Capacity	Standard Deviation
AMKC	66	3%	100%	67%	70%	23%
EMTC	28	3%	42%	26%	27%	8%
GRVC	24	32%	100%	71%	70%	20%
MDC	1	71%	71%	71%	71%	0%
NIC	10	34%	100%	59%	65%	17%
NICINF	7	33%	65%	47%	50%	10%
OBCC	30	4%	96%	43%	42%	20%
RMSC	24	2%	81%	25%	21%	18%
RNDC	45	12%	92%	45%	42%	21%
VCBC	16	24%	85%	61%	65%	13%
Grand Total	251	2%	100%	51%	52%	25%

NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) This analysis excludes Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

IV. Housing Area Capacity

Count and Percentage of Open Housing Areas Above 75% Capacity, Feb. 6 – Feb. 12, 2021

Facility	2/6/2021	2/7/2021	2/8/2021	2/9/2021	2/10/2021	2/11/2021	2/12/2021
AMKC	28 (42%)	29 (44%)	27 (41%)	27 (41%)	26 (39%)	27 (41%)	25 (38%)
EMTC	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
GRVC	11 (46%)	11 (46%)	10 (42%)	11 (46%)	11 (46%)	10 (45%)	10 (48%)
MDC	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
NIC	1 (10%)	1 (10%)	1 (10%)	1 (10%)	1 (10%)	1 (10%)	1 (10%)
NICINF	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
OBCC	3 (11%)	3 (11%)	3 (11%)	3 (11%)	3 (11%)	4 (13%)	4 (13%)
RMSC	0 (0%)	0 (0%)	1 (4%)	1 (4%)	1 (4%)	1 (4%)	1 (4%)
RNDC	5 (11%)	5 (11%)	5 (11%)	5 (11%)	5 (11%)	4 (9%)	4 (9%)
VCBC	1 (6%)	1 (6%)	1 (6%)	1 (6%)	2 (13%)	2 (13%)	2 (13%)
Grand Total	49 (20%)	50 (21%)	48 (20%)	49 (20%)	49 (20%)	49 (20%)	47 (19%)

NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) This analysis excludes Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

IV. Housing Area Capacity¹

Count and Percentage of Open Housing Areas Above 50%² Capacity by COVID Designation Status³

	2/6/2021	2/7/2021	2/8/2021	2/9/2021	2/10/2021	2/11/2021	2/12/2021	Weekly Total ⁴
COVID-Designation	28 (12%)	28 (12%)	27 (11%)	28 (11%)	28 (11%)	30 (12%)	28 (11%)	33 (13%)
No COVID Designation	85 (35%)	88 (36%)	91 (37%)	88 (36%)	88 (36%)	84 (34%)	81 (33%)	101 (40%)
Daily Total	113 (47%)	116 (48%)	118 (48%)	116 (47%)	116 (47%)	114 (46%)	109 (44%)	134 (53%)

¹ The values above exclude counts of Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

² Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.

³ DOC uses three COVID-19-related housing designations: (1) one for likely exposed but asymptomatic individuals, (2) one for exposed and symptomatic individuals, and (3) one for confirmed COVID-19 patients. **Individuals housed in confirmed and symptomatic housing may include people who have refused testing, and those who are housed in the Communicable Disease Units (CDU) for non-COVID reasons. People housed in CDUs share no communal space. The total number of people in custody with confirmed active infections can be found in CHS's COVID-19 Data Snapshots, which are posted on the [CHS homepage](#).**

⁴ The weekly total represents the total number of unique housing areas that surpassed 50% capacity at any point in the report week.

IV. Housing Area Capacity

Total Number of People in Units Above 50% Capacity, Feb. 6 – Feb. 12, 2021

Unit Type	2/6/2021	2/7/2021	2/8/2021	2/9/2021	2/10/2021	2/11/2021	2/12/2021	ADP
Cell	1,812 (35%)	1,846 (36%)	1,835 (35%)	1,850 (36%)	1,869 (36%)	1,825 (35%)	1,777 (35%)	1,831 (35%)
Above 75% capacity	1126 (22%)	1185 (23%)	1146 (22%)	1191 (23%)	1222 (24%)	1204 (23%)	1181 (23%)	1179 (23%)
Between 51% and 75% capacity	686 (13%)	661 (13%)	689 (13%)	659 (13%)	647 (13%)	621 (12%)	596 (12%)	651 (13%)
Dorm	1,582 (31%)	1,648 (32%)	1,691 (33%)	1,623 (31%)	1,610 (31%)	1,603 (31%)	1,563 (31%)	1,617 (31%)
Above 75% capacity	615 (12%)	575 (11%)	530 (10%)	486 (9%)	446 (9%)	484 (9%)	479 (9%)	516 (10%)
Between 51% and 75% capacity	967 (19%)	1073 (21%)	1161 (22%)	1137 (22%)	1164 (23%)	1119 (22%)	1084 (21%)	1101 (21%)
Grand Total	3,394 (66%)	3,494 (68%)	3,526 (68%)	3,473 (67%)	3,479 (67%)	3,428 (66%)	3,340 (65%)	3,448 (67%)

NOTES:

- 1) **Designed capacity reflects the maximum number of beds each housing area was designed to accommodate. DOC believes this metric serves as the best available proxy for housing area size. Accordingly, the capacity figures presented above are calculated by dividing housing area census by housing area designed capacity.**
- 2) The census data presented in the table above comes from DOC's 5am census, which reflects a head count conducted by DOC staff each morning. The census data presented on all other slides is sourced from DOC's Inmates in Custody files.
- 3) Dorm count includes modular dorm units in AMKC, RMSC, and RNDC.
- 4) The values above exclude counts of people in Contagious Disease Units (CDUs) (where people in custody share no communal space), intake areas (where the census changes throughout the day), and the Bellevue Hospital Prison Ward (BHPW).

SOURCE: BOC analysis of DOC 5am census reports and DOC designed capacity data.

20-2789(L)

Uniformed Fire Officers Association et al. v. de Blasio et al.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the
3 City of New York, on the 16th day of February, two thousand twenty-one.
4

5 PRESENT: AMALYA L. KEARSE,
6 PIERRE N. LEVAL,
7 RAYMOND J. LOHIER, JR.,
8 *Circuit Judges.*

9
10 -----
11 UNIFORMED FIRE OFFICERS ASSOCIATION;
12 UNIFORMED FIREFIGHTERS ASSOCIATION OF
13 GREATER NEW YORK; POLICE BENEVOLENT
14 ASSOCIATION OF THE CITY OF NEW YORK,
15 INC., CORRECTION OFFICERS' BENEVOLENT
16 ASSOCIATION OF THE CITY OF NEW YORK,
17 INC., SERGEANTS BENEVOLENT ASSOCIATION,
18 LIEUTENANTS BENEVOLENT ASSOCIATION,
19 CAPTAINS ENDOWMENT ASSOCIATION,
20 DETECTIVES' ENDOWMENT ASSOCIATION,

21 *Plaintiffs-Appellants-Cross-Appellees,*
22

v.

No. 20-2789-cv(L)
No. 20-3177-cv(XAP)

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF NEW YORK, CITY OF
NEW YORK, NEW YORK CITY FIRE
DEPARTMENT, DANIEL A. NIGRO, IN HIS
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE FIRE DEPARTMENT OF THE CITY OF
NEW YORK, NEW YORK CITY DEPARTMENT OF
CORRECTIONS, CYNTHIA BRANN, IN HER
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE NEW YORK CITY DEPARTMENT OF
CORRECTIONS, DERMOT F. SHEA, IN HIS
OFFICIAL CAPACITY AS THE COMMISSIONER
OF THE NEW YORK CITY POLICE DEPARTMENT,
NEW YORK CITY POLICE DEPARTMENT,
FREDERICK DAVIE, IN HIS OFFICIAL CAPACITY
AS THE CHAIR OF THE CIVILIAN COMPLAINT
REVIEW BOARD, CIVILIAN COMPLAINT
REVIEW BOARD,

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Intervenor-Defendant-Appellee-Cross-Appellant.

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20
21 Appeal from an order of the United States District Court for the Southern
22 District of New York (Katherine P. Failla, *Judge*).

23 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
24 AND DECREED that the order of the District Court is AFFIRMED.

25 This appeal arises from the repeal of § 50-a of the New York Civil Rights
26 Law, which for decades shielded law enforcement disciplinary records from
27 public disclosure. Shortly after the repeal, New York City (the “City”)

1 announced its intention to proactively publish certain types of disciplinary
2 records and provide other records upon request consistent with its obligations
3 under New York’s Freedom of Information Law (FOIL), N.Y. Pub. Off. Law
4 §§ 84–90. Several unions (the “Unions”) representing uniformed members of the
5 New York City Police Department (“NYPD”), the New York City Fire
6 Department (“FDNY”), and the New York City Department of Correction
7 (“DOC”) filed this action against the City, the NYPD, the FDNY, the DOC, the
8 Civilian Complaint Review Board (“CCRB”), and their principal officers. The
9 Unions moved to preliminarily enjoin any disclosure of allegations of
10 misconduct against their members that are unsubstantiated, unfounded, or non-
11 final, or that resulted in an exoneration or a finding of not guilty. The District
12 Court (Failla, L.) denied the motion in substantial part, but granted a limited
13 preliminary injunction in favor of the Unions, which we explain further below.
14 The Unions appealed from the denial of their motion, and Communities United
15 for Police Reform (“CPR”), which intervened in this case, cross-appealed from
16 the District’s Court’s limited preliminary injunction. Another panel of this Court
17 granted a stay of the District Court’s order pending disposition of this appeal.

1 We assume the parties' familiarity with the underlying facts and prior
2 record of proceedings, to which we refer only as necessary to explain our
3 decision to affirm.

4 1. The Unions' Appeal: Preliminary Injunction in Aid of Arbitration

5 We review the District Court's order for abuse of discretion. See SG
6 Cowen Sec. Corp. v. Messih, 224 F.3d 79, 81 (2d Cir. 2000).

7 Each of the Unions' collective bargaining agreements ("CBAs") contains an
8 arbitration provision, and the Unions ask the Court to enjoin the NYPD's and the
9 CCRB's planned disclosures pending adjudication of their claims in arbitration.
10 Under New York law, which governs the CBAs, a court may issue a preliminary
11 injunction in aid of arbitration if the movant demonstrates that (1) absent a
12 preliminary injunction, an award in arbitration "may be rendered ineffectual,"
13 (2) the movant is likely to succeed on the merits of the claim to be arbitrated,
14 (3) there is a "danger of irreparable harm" to the movant should preliminary
15 relief be denied, and (4) the balance of the equities "tips in the petitioner's favor."
16 Id. at 81–84.

1 Here, the Unions assert that the planned disclosures will violate two
2 provisions common to all of their CBAs. The District Court denied the Unions'
3 motion for a preliminary injunction only as it related to the first provision, which
4 states that upon an officer's "written request to the Chief of Personnel," NYPD
5 "will . . . remove from the Personnel Folder investigative reports which, upon
6 completion of the investigation are classified 'exonerated' and/or 'unfounded.'" App'x 1528. We agree with the District Court that this provision does not
7 conflict with the planned public disclosures, substantially for the reasons set
8 forth in the District Court's decision. Special App'x 19–21. Removal of such
9 records from a personnel file, as called for by the CBAs, does not require
10 eliminating them from all of the City's records. There is no contention that the
11 City has failed to adhere to its obligation to remove the records from personnel
12 files or has improperly considered them in connection with personnel decisions
13 (such as promotion or termination). Moreover, to the extent that this claim
14 implicates records that must be disclosed under FOIL, the NYPD cannot bargain
15 away its disclosure obligations. Matter of M. Farbman & Sons v. N.Y.C. Health
16 & Hosps. Corp., 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 71 (1984). The District Court

1 therefore acted within its discretion when it concluded that the Unions failed to
2 demonstrate a likelihood of success on the merits in the arbitration of this claim.

3 See SG Cowen, 224 F.3d at 84.

4 2. The Unions' Appeal: Preliminary Injunction Pending Resolution of
5 Remaining Claims

6 “[D]istrict courts may grant a preliminary injunction where a plaintiff
7 demonstrates irreparable harm and meets either of two standards: (a) a
8 likelihood of success on the merits, or (b) sufficiently serious questions going to
9 the merits to make them a fair ground for litigation, and a balance of hardships
10 tipping decidedly in the movant’s favor.” Trump v. Deutsche Bank AG, 943 F.3d
11 627, 635 (2d Cir. 2019) (quotation marks omitted), vacated and remanded on
12 other grounds, 140 S. Ct. 2019 (2020). We do not decide whether the Unions
13 must satisfy one standard or the other here because we conclude that the District
14 Court did not abuse its discretion under either standard.

15 A. Irreparable Harm

16 The Unions assert that law enforcement officers will have fewer
17 employment opportunities in the future if records of the allegations against them
18 that prove to be unfounded or unsubstantiated are disclosed, even though each

1 record will reveal the outcome of the investigation. But the District Court noted
2 that future employers were unlikely to be misled by conduct records that
3 contained “dispositional designations” specifying that allegations of misconduct
4 were unsubstantiated, unfounded, or that the accused officer was exonerated.
5 See Special App’x 14–15. As the District Court also noted, despite evidence that
6 numerous other States make similar records available to the public, the Unions
7 have pointed to no evidence from any jurisdiction that the availability of such
8 records resulted in harm to employment opportunities. Id. For these reasons,
9 the District Court did not abuse its discretion when it determined that the
10 asserted harm was speculative and that the Unions had failed to demonstrate on
11 this record that the officers will suffer irreparable harm to their employment
12 opportunities that cannot be remedied by an award of lost wages. In general,
13 “irreparable harm is not shown in employee discharge cases simply by a
14 showing of financial distress or difficulties in obtaining other employment
15 ‘however severely they may affect a particular individual.’” Stewart v. INS, 762
16 F.2d 193, 199 (2d Cir. 1985) (quoting Sampson v. Murray, 415 U.S. 61, 92 n.68
17 (1974)).

1 We also address the Union’s more general assertion of heightened danger
2 and safety risks to police officers. We fully and unequivocally respect the
3 dangers and risks police officers face every day. But we cannot say that the
4 District Court abused its discretion when it determined that the Unions have not
5 sufficiently demonstrated that those dangers and risks are likely to increase
6 because of the City’s planned disclosures. In arriving at that conclusion, we note
7 again that many other States make similar misconduct records at least partially
8 available to the public without any evidence of a resulting increase of danger to
9 police officers. See App’x 1035–36, 1163, 2140–42.

10 B. The Merits

11 The Unions also have not raised sufficiently serious questions on the
12 merits of their claims. First, the Unions assert a “stigma-plus” claim under the
13 Federal and New York State Constitutions. Under both federal and state law,
14 stigma-plus claims require the plaintiff to adequately demonstrate an “injury to
15 one’s reputation (the stigma) coupled with the deprivation of some ‘tangible
16 interest’ or property right (the plus), without adequate process.” DiBlasio v.
17 Novello, 344 F.3d 292, 302 (2d Cir. 2003); see Matter of Lee TT. v. Dowling,

1 87 N.Y.2d 699, 708, 642 N.Y.S.2d 181, 187 (1996). The Unions fail to demonstrate
2 that any officer will be deprived of a tangible interest or property right. We have
3 held that diminished future employment opportunities resulting from a
4 damaged reputation, as opposed to some independent legal detriment, are not
5 sufficient. See Sadallah v. City of Utica, 383 F.3d 34, 38–39 (2d Cir. 2004).¹

6 The Unions’ equal protection claims fare no better. Because law
7 enforcement officers are not a protected class for equal protection purposes, they
8 must show that there is no rational and nondiscriminatory basis to treat their
9 records differently from the records of other public employees. See Sensational
10 Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015). Even the Unions
11 recognize that “the unique responsibilities of law enforcement officers set them
12 apart.” Unions Br. 56. Because the public has a stronger legitimate interest in the
13 disciplinary records of law enforcement officers than in those of other public
14 employees, the District Court correctly determined that there was a rational,
15 nondiscriminatory basis for treating the two sets of records differently.

¹ We assume, without deciding, that the protections provided by the New York State Constitution are equivalent to their federal counterparts, as no party has suggested otherwise.

1 Next, the Unions contend that when officers entered plea agreements in
2 disciplinary proceedings, those agreements implicitly incorporated § 50-a of the
3 Civil Rights Law. Again, we disagree. The New York Court of Appeals has
4 cautioned that a contract “does not transform all statutory requirements that may
5 otherwise be imposed under [the governing] law into contractual obligations,”
6 and it has “decline[d] to interpret [a contract] as impliedly stating something
7 which [the signatories] have neglected to specifically include.” Skanska USA
8 Bldg. Inc. v. Atl. Yards B2 Owner, LLC, 31 N.Y.3d 1002, 1007, 74 N.Y.S.3d 805,
9 807–08 (2018) (quotation marks omitted). “[R]ead[ing] into . . . contracts terms
10 that do not exist based on then-existing statutory language, . . . would protect
11 against all changes in legislation, . . . [and] severely limit the ability of state
12 legislatures to amend their regulatory legislation.” Am. Econ. Ins. Co. v. State of
13 N.Y., 30 N.Y.3d 136, 154, 65 N.Y.S.3d 94, 107 (2017) (quotation marks omitted).
14 The Unions do not point to any legislative history in support of their argument,
15 or to any evidence that the parties to the plea agreements intended to incorporate
16 § 50-a as the Unions suggest. Nor do the Unions argue that § 50-a “affect[s] the
17 validity, construction, and enforcement” of the plea agreements. Id.

1 The Unions also argue that the City's decision to publish certain
2 disciplinary records without individualized review is arbitrary and capricious
3 under Article 78 of the New York Civil Practice Law and Rules. See N.Y.
4 C.P.L.R. §§ 7801, 7803(3). Substantially for the reasons provided by the District
5 Court in its order, we reject their argument. As the District Court observed, the
6 City appears to still recognize those specific FOIL exemptions that are designed
7 to protect against unwarranted invasions of personal privacy or endangering a
8 person's safety. See N.Y. Pub. Off. Law § 87(2)(b), (f).

9 Alternatively, the Unions assert that it was arbitrary and capricious for the
10 City to change without explanation its established practice of asserting that
11 records relating to unsubstantiated allegations should be withheld under FOIL's
12 exemption for documents whose disclosure would constitute an unwarranted
13 invasion of privacy. See Unions Br. 48–51; Matter of Charles A. Field Delivery
14 Serv., Inc., 66 N.Y.2d 516, 520, 498 N.Y.S.2d 111, 115 (1985). But that practice, if it
15 ever existed, appears to have ended no later than 2017. See App'x 1614, 1643.
16 And any change in the CCRB's position was adequately explained by the
17 Mayor's public remarks following the repeal of § 50-a. See Transcript: Mayor de

1 Blasio Holds Media Availability, NYC.gov (June 17, 2020), available at
2 [https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-](https://www1.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-
3 blasio-holds-media-availability)

4 C. Balance of the Equities

5 As for the balance of the equities, the Unions argue that the equities favor a
6 preliminary injunction because disclosure of information is permanent, while
7 those who seek information will suffer only delay if an injunction is entered. We
8 do not doubt the sincerity of the Unions' concerns. As several amici point out,
9 however, delay for victims unable to obtain information about the status of their
10 complaints is itself costly both for them and for various other stakeholders in the
11 criminal justice system, see, e.g., Brief for Former Prosecutors as Amici Curiae
12 Supporting Intervenor-Defendant-Appellee-Cross-Appellant 6–10, as well as the
13 press, see Brief for The Reporters Committee for Freedom of the Press & 31 News
14 Media Organizations as Amici Curiae Supporting of Intervenor-Defendant-
15 Appellee-Cross-Appellant 15–21. Because the Unions' stated interests are
16 counterbalanced by other important policies, the District Court did not abuse its

1 discretion in determining that the balance of the equities does not tip in their
2 favor.

3 3. CPR's Cross-Appeal

4 The District Court granted the Unions' motion for a preliminary injunction
5 in aid of arbitration as it related to the second provision of the CBAs relevant to
6 this appeal, Section 8.² Under Section 8, a police officer who has "been charged
7 with a 'Schedule A' violation as listed in [the] Patrol Guide," proceeds to a
8 disciplinary trial on such charge, and is not determined guilty may "petition the
9 Police Commissioner for a review for the purpose of expunging the record of the
10 case." App'x 1528. On its cross-appeal, CPR argues that the District Court's
11 decision to enjoin the disclosure of these records was an abuse of discretion
12 because the NYPD cannot bargain away its FOIL obligations. See CPR Br. 22–29,
13 70–73.³ But on this record, we conclude that enforcing Section 8 would not affect

² The relevant provision appears in Section 8 of most, but not all, CBAs. Like the District Court, we refer only to its usual location for ease and clarity.

³ We are not persuaded by the Unions' contention that CPR lacks standing to appeal because it is not a signatory to the CBAs. CPR is injured by the injunction because it prevents the NYPD from fulfilling CPR's FOIL request for documents covered by this provision. CPR argues that the CBAs impermissibly deprive it of rights guaranteed by FOIL.

1 those obligations. As the City notes, “Schedule A” lists “technical violations,”
2 City Br. 16, such as “[i]mproper uniform or equipment” and “[r]eporting late for
3 duty,” N.Y. Police Dep’t Patrol Guide 206-03 Schedule A (effective April 20,
4 2017). And under New York law, “a law enforcement agency may redact records
5 pertaining to technical infractions . . . prior to disclosing such records” pursuant
6 to FOIL. N.Y. Pub. Off. Law § 89(2-c). Accordingly, we conclude that the District
7 Court did not abuse its discretion in preliminarily enjoining disclosure of these
8 records. If CPR can show that “Schedule A” violations include anything other
9 than “[t]echnical infraction[s]” as defined by New York law, see N.Y. Pub. Off.
10 Law § 86(9), it may move the District Court for appropriate relief, see Weight
11 Watchers Int’l, Inc. v. Luigino’s, Inc., 423 F.3d 137, 141 (2d Cir. 2005).

12 We have considered the Unions’ remaining arguments and conclude that
13 they are without merit. For the foregoing reasons, the District Court’s order is
14 AFFIRMED.

15 FOR THE COURT:
16 Catherine O’Hagan Wolfe, Clerk of Court