

**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.
-----X

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

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

Dated: January 22, 2021

Respectfully submitted,

KEENAN & BHATIA, LLC

By: ___/s E.E. Keenan_____

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

and

Sonal Bhatia (pro hac vice forthcoming)
929 Walnut Street, Suite 5107
Kansas City, MO 64106
Tel: (816) 809-2100
sonal@keenanfirm.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

I. FACTS.....1

 A. Standard of Care for COVID-19.....2

 B. Rikers Violates CDC Guidelines and Its Own Policies.....4

 C. Social Distancing & Overpopulation.....11

 D. Necessary and Achievable Interventions.....14

II. LEGAL STANDARDS.....17

 A. General Standards for Preliminary Injunctions.....17

 B. Standards Applicable to Plaintiffs’ Constitutional Claim.....17

 C. Standards Applicable to Plaintiffs’ ADA and Rehabilitation Act Claims.....19

III. DISCUSSION.....20

 A. Irreparable Harm.....20

 B. Plaintiffs Have a Substantial Likelihood of Success on the Merits.....21

IV. CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Banks v. Booth,
468 F. Supp. 3d 101 (D.D.C. 2020).....23

Conn. Dep’t Env’tl. Prot. v. OSHA,
356 F.3d 226 (2d Cir. 2004).....21

Darnell v. Pineiro,
849 F.3d 17 (2d Cir. 2017).....17, 18

Farmer v. Brennan,
511 U.S. 825 (1994).....19, 22

Fernandez-Rodriguez v. Licon-Vitale,
470 F. Supp. 3d 323 (S.D.N.Y. 2020).....passim

Forest City Daly Hous., Inc. v. Town of N. Hempstead,
175 F.3d 144 (2d Cir. 1999).....19

Helling v. McKinney,
509 U.S. 25 (1993).....20, 21

Henrietta D. v. Bloomberg,
331 F.3d 261 (2d Cir. 2003).....19, 20, 25

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996).....21

JSG Trading Corp. v. Tray-Wrap, Inc.,
917 F.2d 75 (2d Cir. 1990).....20

McFadden v. Noeth,
827 F. App’x 20 (2d Cir. 2020).....19

Wilson v. Williams,
961 F.3d 829, 840 (6th Cir. 2020).....22

Statutes and Constitutional Provisions

U.S. Const., amend. XIV.....17, 21

U.S. Const., amend. VIII.....17

Americans with Disabilities Act (As Amended)
42 U.S.C. § 12101 et seq.....19, 24, 25

Civil Rights Act of 1871,
42 U.S.C. § 1983.....18, 21

Rehabilitation Act,
29 U.S.C. § 701 et seq.....19, 20, 24, 25

No one at Rikers Island has been sentenced to death. Most have not been sentenced to anything. But every person at Rikers Island, *including the Correctional Officers*, is on the equivalent of death row. COVID is surging in the New York Metro area. Rikers' population is surging too. The City has refused to take basic protective measures. Plaintiffs respectfully move this Court for a preliminary injunction¹ commanding Defendant City of New York to implement the following safety protocols:

- (a) Make alcohol-based hand sanitizer available to detainees except to detainees who have demonstrated a particularized threat of misuse;
- (b) Provide detainees sanitary wipes (such as Clorox or Lysol or equivalent wipes), or alternately disposable cloths with sufficient sanitizer;
- (c) Implement a daily testing regime among staff following reasonable public health standards to detect and trace COVID-19; and
- (d) Require enforcement of the staff mandate to wear face masks, including taking disciplinary action against staff who fail to follow the mandate; and
- (e) Any other and/or further measures the Court deems appropriate.

I. FACTS

Correctional institutions across the country have become hotbeds for COVID-19. Nationwide, at least 275,000 prisoners have been infected with COVID-19, and more than 1,700 have died.² Around one in five U.S. prisoners has contracted the virus.³

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 *See* <https://www.kansascity.com/news/nation-world/article247943635.html> (last visited 1/6/2021)

³ *See* <https://www.kansascity.com/news/nation-world/article247943635.html> (last visited 1/6/2021)

Many detainees at Rikers Island (“Rikers”) have serious health conditions that make them more susceptible to potentially deadly complications from COVID-19. For example, Plaintiff Jean Azor-El (“Azor-El”) suffers from obstructive sleep apnea (“OSA”), a disorder that is characterized by the repetitive collapse of the upper airway during sleep. Ex. A, Declaration of Jean Azor-El (“Azor-El Dec.”) ¶ 5. Plaintiff Maurice Barnar (“Barnar”) also suffers from OSA. Ex. B, Declaration of Maurice Barnar (“Barnar Dec.”) ¶ 7. Plaintiff Ronnie Cole (“Cole”) is wheelchair bound after a gunshot injury, which caused him serious nerve damage. Cole also suffers from OSA, and he must urinate using a urine bag, which increases his risk of infection. Ex. C, Declaration of Ronnie Cole (“Cole Dec.”) ¶ 6. Azor-El, Barnar, and Cole reside in Rikers’ North Infirmary Command (“NIC”), where Rikers houses residents who are sick, disabled, or require constant medical attention.⁴ Ex. C, Cole Dec. ¶ 5. All three men are **pre-trial detainees**. Ex. A, Azor-El Dec. ¶ 3; Ex. B, Barnar Dec. ¶ 3; Ex. C, Cole Dec. ¶ 3.

A. Standard of Care for COVID-19.

The Centers for Disease Control and Prevention (“CDC”) has issued specific guidance on the proper standards for care, treatment, and prevention at correction/detention facilities like Rikers. The CDC asks correction/detention centers to consider relaxing restrictions on alcohol-based hand sanitizers by allowing officers and staff to carry individual-sized bottles.⁵ The CDC also recommends that correction/detention facilities intensify their cleaning and disinfecting procedures; high-touch surfaces/objects (such as door knobs, light switches, sink handles,

⁴ The other Plaintiffs have been released or transferred outside Rikers.

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

countertops, toilets, toilet handles, recreation equipment, kiosks, telephones, and computer equipment) should be cleaned and/or disinfected several times per day.⁶

The CDC instructs facilities to have officers, staff, and detainees wear surgical masks or N95 masks; cloth masks are not PPE and should not be used as a substitute for surgical or N95 masks.⁷ The CDC also encourages all individuals to “social distance,” or keep at least six feet away from others, to mitigate the spread of COVID-19.⁸ The CDC recommends that correction/detention facilities conduct COVID-19 testing for staff, officers, and detainees as much as feasibly possible, and that detention/correction facilities pursue broad testing strategies for officers, staff, and even detainees if possible.⁹ The CDC recommends that all new detainees or detainees be tested for COVID-19 and be placed in isolation until the facility can be reasonably certain that the individual does not have COVID-19.¹⁰

The New York City Department of Correction (“DOC”) acknowledges that COVID-19 is a serious health and safety threat, and that it poses a serious threat of harm or even death to people who contract it. Ex. D, Deposition of Deputy Commissioner Feeney (“Feeney Dep.”) 24:8-14.

The DOC looks to CDC guidelines, New York State Department of Health guidelines, and the 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, which is why the City looks to them for guidance. *Id.* at

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

¹⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

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.

The DOC has a duty to keep Rikers Island safe and sanitary, to keep both staff and detainees safe, to update or reconsider its protocols if circumstances change, to enforce written policies, to monitor whether staff and detainees are complying with policies, and to take action if people are not complying with DOC policies. Ex. D, Feeney Dep. 21:20-22:22. The DOC also has a duty to provide reasonable accommodation to detainees with disabilities and to include extra protective measures for detainees vulnerable to COVID-19. *Id.* at 65:8-16.

B. Rikers Violates CDC Guidelines and Its Own Policies.

During New York City's first surge of COVID-19, the infection rate of Rikers staff and detainees far exceeded that of New York City, New York State, and the United States as a whole. For example, on April 30, 2020, in the midst of the first COVID-19 surge, Rikers reported 376 COVID-19 cases with an infection rate of 9.856%, while the United States' infection rate was 0.328%.¹¹ To date, three detainees at Rikers have died from COVID-19 while in DOC custody.¹² This number does not include patients who may have been diagnosed and treated while in custody and then died post-release.¹³

As of January 1, 2021, 726 individuals over 50 years old remained in DOC custody; this number has steadily increased since mid-April 2020.¹⁴ And, as of January 1, 2021, there are 306 detainees with *confirmed* cases of COVID-19, and that number has been steadily climbing since

¹¹ See https://legalaidnyc.org/wp-content/uploads/2020/05/4_30_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf (last visited 1/7/2021)

¹² See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

¹³ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

¹⁴ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

November 2020.¹⁵ The number of detainees infected with COVID-19 is quickly approaching March/April 2020 levels. So, as New York City is battling a second surge of COVID-19, Rikers continues to put its residents, staff, officers, and people who interact with them at risk.

1. Rikers Officers and Staff Are Failing to Observe Mask Guidelines.

According to the CDC, “if everyone wears a mask in congregate settings, the risk of exposure to SARS-CoV-2 can be reduced.”¹⁶ According to Dr. Ryan Herrington (“Dr. Herrington”), a correctional facility medical director for the Washington State Department of Corrections, proper mask use prevents the spread of infectious virus particles and discourages the development of a “disease friendly” environment. Ex. F, Declaration of Ryan Herrington (“Herrington Dec.”) ¶ 17.

On April 3, 2020, Commissioner Cynthia Brann and Chief of Department Hazel Jennings issued an order requiring all officers and staff to wear face masks and requiring all persons in custody to wear face masks in congregate settings. Ex. E, Deposition Exhibit 19. This order also required that all staff possess latex gloves. *Id.* The City requires its staff to wear face coverings when they are within six feet of others, but does not require it otherwise. Ex. D, Feeney Dep. 57:3-15.

But Rikers officers and staff are not following this policy. At NIC, members of civilian teams responsible for the sanitization of the unit do not wear masks at all, while those who are wearing masks wear them below their noses. Ex. A, Azor-El Dec. ¶ 7. Physicians’ Assistants (“PAs”), nurses, staff, and correctional officers also fail to wear masks incorrectly or not at all—correctional officers on shift often wear masks under their noses or on their chin, leaving their

¹⁵ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

¹⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

noses and mouths exposed. *Id.* at ¶ 9. The individuals delivering food to detainees do not wear masks when serving food. Ex. C, Cole Dec. ¶ 17.

Wearing masks below the nose or dangling from one ear does not suffice, and will for sure make this intervention less likely to be successful. Ex. F, Herrington Dec. ¶ 17.

2. Rikers Does Not Provide Detainees with Adequate Hand Hygiene Resources.

The City agrees that hand hygiene is critical in stopping the spread of COVID-19. Ex. D, Feeney Dep. 25:10-12. Hand sanitizer with sufficiently high alcohol content is a known and accepted intervention that kills the SARS-CoV-2 virus, which is the agent that causes COVID-19, so detainee access to hand sanitizer constitutes an important public health intervention. Ex. F, Herrington Dec. ¶ 8. Rikers allows its staff and correctional officers to carry and use hand sanitizer. Ex. D, Feeney Dep. 24:17-25-9. But Rikers does not provide detainees with hand sanitizer. Ex. A, Azor-El Dec. ¶ 12.

The City argues that alcohol-based hand sanitizer is dangerous, describing it as flammable and drinkable. Ex. D, Feeney Dep. 26:22-27:6. But the City's representative, Deputy Commissioner Feeney, could not identify any particular instance in which an individual in DOC custody drank hand sanitizer. *Id.* at 28:17-29:6. She also was unaware of any instances where any detainee anywhere assaulted a staff member or lit a staff member on fire using hand sanitizer. *Id.* at 84:13-18. Meanwhile, in March 2020, the State of New York authorized Great Meadow Correctional Facility (a maximum-security prison) to use detainee labor to cheaply and quickly make alcohol-based hand sanitizer.¹⁷

¹⁷ See <https://slate.com/news-and-politics/2020/03/new-york-prison-labor-hand-sanitizer-coronavirus.html> (last visited 1/7/21)

The City says that detainees at Rikers have ready access to soap and water “most of the time,” and that Rikers does not need to provide detainees with access to hand sanitizer. *Id.* at 25:21-26-21. But the City acknowledges that if many individuals attempt to wash their hands at the same time, bathrooms can become too crowded to allow for adequate social distancing. *Id.* at 27:12-20. Still, the DOC has not even explored the possibility of creating a hand sanitizer distribution system where correctional officers give detainees small squirts of hand sanitizer upon request. *Id.* at 45:4-9.

In reality, Rikers does not provide detainees with ready access to soap and water for handwashing. Homer Venters, former chief medical officer at Rikers, said:

Jails and prisons are often dirty and have really very little in the way of infection control [...] There are lots of people using a small number of bathrooms. Many of the sinks are broken or not in use. You may have access to water, but nothing to wipe your hands off with, or no access to soap.¹⁸

Venters is right. Soap dispensers in bathrooms at NIC often run out of soap and Rikers does not refill them in a timely manner. Ex. A, Azor-El Dec. ¶ 12. Barnar estimates that the soap dispensers in the NIC bathrooms are empty approximately 20 percent of the time. Ex. B, Barnar Dec. ¶ 8. The NIC bathrooms also get crowded at times, making it difficult for detainees to adequately socially distance. *Id.* at ¶ 11.

According to Dr. Herrington, access to soap and water alone is not enough to ensure sanitation of hands in a correctional environment. Ex. F, Herrington Dec. ¶ 11. Ease of use is another important consideration that Rikers fails to take into account: hand sanitizer is easy and quick to use, so detainees are more likely to actually use it. *Id.* at ¶ 12. The proper public health

¹⁸ See <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus> (last visited 1/7/21)

approach is to offer several methods for people to clean their hands; hand sanitizer and soap-and-water are complementary strategies, not mutually exclusive ones. *Id.* at ¶ 11.

3. Rikers Is Not Adequately Sanitizing Dorms, Common Areas, and High-Touch Surfaces.

The CDC recommends that correction/detention facilities intensify their cleaning and disinfecting procedures: high-touch surfaces/objects (such as door knobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, telephones, and computer equipment) should be cleaned and/or disinfected several times per day.¹⁹ Rikers has a Cleaning and Sanitizing Manual (issued November 2013), which the City alleges is still enforced. Ex. D, Feeney Dep. 71:20-72:10; Ex. G, Cleaning and Sanitizing Manual. In response to COVID-19, the City made only one change to the manual: Rikers applies the sanitizer an additional time so the surface stays wet for ten minutes. Ex. D, Feeney Dep. 71:20-72:10.

At the time of Deputy Commissioner Feeney's deposition, the DOC claimed to use Virex 256 ("Virex"), an ammonia-based disinfectant. Virex works by the amount of contact time that the chemical has with a surface. Ex. D, Feeney Dep. 85:24-86:6. Virex must air dry on a surface for ten minutes in order to effectively disinfect it. *Id.* at 41:12-18. At Rikers, cleaning supplies are locked in janitors' closets in every housing unit. *Id.* at 39:8-21. A trained house detail is responsible for the general cleaning and sanitizing of housing units. *Id.* If a detainee wants to clean or sanitize their cell, bed, or a high-touch surface, they must ask a correctional officer to unlock the janitor's closet and provide the supplies. *Id.* at 40:19-41:4.

At NIC, civilian teams are supposed to sanitize the dorms three times each day. Ex. A, Azor-El Dec. ¶ 7. But these teams simply sweep and mop the floors, and take out the garbage. *Id.*

¹⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

And NIC residents do not have access to Virex or any other cleaning supplies. *Id.* at ¶ 13; Ex. C, Cole Dec. ¶ 10. Rikers fails to disinfect or sanitize high-touch surfaces, such as door knobs, toilets, sinks, and bathroom stall doors, and does not provide detainees with the supplies they need to clean these surfaces themselves. Ex. A, Azor-El Dec. ¶ 14; Ex. B, Barnar Dec. ¶ 9. When NIC residents leave the facility, Rikers does not sanitize the mattresses or bed frames before assigning new residents to the same bed. Ex. B, Barnar Dec. ¶ 14.

Rikers also does not effectively sanitize the bathrooms at NIC. The civilian service team only cleans the bathrooms once a day. Ex. B, Barnar Dec. ¶ 9. There is often urine on the bathroom floor and feces on the toilet seats. Ex. C, Cole Dec. ¶ 13. Cole, who is wheelchair-bound, uses towels to clean the toilet before using it. *Id.*

Rikers also fails to adequately clean the plastic food trays it uses to serve meals. Rikers delivers food to the residents at NIC on plastic trays; detainees do not know how this food is prepared or handled. Ex. A, Azor-El Dec. ¶ 11. Rikers power-washes the plastic trays but does not sanitize them. *Id.* NIC residents often find old food residue stuck to their meal trays. *Id.*; Ex. B, Barnar Dec. ¶ 18; Ex. C, Cole Dec. ¶ 17.

On March 28, 2020, the City issued an order stating that it would replace in-person visitation with “televisiting” in light of the COVID-19 pandemic. Ex. H, Deposition Exhibit 18 p. 1. Each facility at Rikers has phones and video teleconference booths that detainees can use. At NIC, there are currently four booths. The City’s order requires that there be a thirty minute delay between each televisit session so that DOC staff can ensure that the televisit booth is sanitized, including the chair, counter, and other high-touch surfaces. *Id.* at p. 5. The City asserts that it makes a bucket of Virex and a sponge available at the phone area, so detainees can sanitize the phone before and after they use it. Ex. D, Feeney Dep. 85:3-14.

But Rikers is not providing its detainees with disinfectant for the phones and the teleconference booths. Ex. A, Azor-El Dec. ¶ 13; Ex. B, Barnar Dec. ¶ 12; Ex. C, Cole Dec. ¶ 10. Azor-El pulls a compression sock over the phone in the teleconference room in an attempt to create a barrier between himself and the phone. Ex. A, Azor-El Dec. ¶ 13. Rikers also fails to follow its own televisit procedure. Ex. H, Deposition Exhibit 18 p. 5. Rikers schedules teleconferences one after another—there is no thirty minute grace period between calls and DOC staff do not sanitize or clean the teleconference booths between users. Ex. A, Azor-El Dec. ¶ 13; Ex. B, Barnar Dec. ¶ 13; Ex. C, Cole Dec. ¶ 10.

Rikers does not provide detainees with any sanitizing or disinfecting wipes, such as Clorox or Lysol wipes; the City believes that detainees will use them to clog toilets. Ex. D, Feeney Dep. 41:23-42:6. The DOC claims to provide each detainee with a towel, and to stock bathrooms in non-housing areas with hand towels. *Id.* at 49:21-50:4. In order to be effective, Virex must be left on a surface for ten minutes. Ex. D, Feeney Dep. 41:12-18. Commercially available disinfectant wipes work much faster. Clorox disinfecting wipes can kill COVID-19 in four minutes.²⁰ Lysol disinfectant wipes can kill COVID-19 in as little as two minutes.²¹

Many items, including towels, clothing, and toilet paper, can be used to clog toilets, but detainees still must have access to them. During a pandemic, access to sanitizing wipes is also essential. Ex. F, Herrington Dec. ¶ 15. One of the reasons sanitizing wipes are valuable is because they are quick, simple, and easy to use, and since they can come from a dispenser or simply be made available for picking up by hand, they do not require detainees to sanitize ancillary equipment like spray bottles or storage closets where spray would be kept. *Id.* at ¶ 16.

²⁰ See <https://www.cloroxpro.com/products/clorox/clorox-disinfecting-wipes/> (last visited 1/8/2021)

²¹ See <https://www.lysol.com/products/disinfecting-wipes> (last visited 1/8/2021)

C. Social Distancing & Overpopulation.

According to the CDC, social distancing is critical in preventing the spread of COVID-19.²² Social distancing strategies prevent the spread of infectious virus particles and discourage the development of a “disease friendly” environment. Ex. F, Herrington Dec. ¶ 21.

On March 16, 2020, 5,557 individuals were in DOC custody.²³ After that, the City depopulated its detention centers and jails to attempt to mitigate COVID-19 outbreaks. By April 2020, the number of people in DOC custody was under 4,000 detainees.²⁴

During the first wave of the COVID-19 pandemic, Rikers instructed detainees housed in dormitories to sleep head-to-toe. Ex. D, Feeney Dep. 29:22-30:10. But as of Deputy Commissioner Feeney’s deposition on November 10, 2020, detainees still were not sleeping at least six feet apart from one another in every Rikers dormitory. *Id.* at 31:6-10. While counsel understands from Messrs. Cole, Barnar, and Azor-El that NIC now is generally spacing dormitory detainees by having them sleep in every other bed, overcrowding remains a problem.

Overpopulation at Rikers is contributing to the DOC’s failure to ensure social distancing. On September 22, 2020, the DOC assured that it would “continue to make sure that [it does] not have the housing capacity of each housing area over 50% so that [it] can achieve the social distancing.”²⁵ But the DOC has not kept its promise. As of November 2, 2020, twenty dorms in AMKC were at or above 90 percent density, every dorm in VCBC was at or above 75 percent

²² See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

²³ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

²⁴ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

²⁵ See <https://legalaidnyc.org/news/nyc-jails-increase-density-levels-second-wave-of-covid-19/> (last visited 1/8/2021)

density (twelve of the dorms were at or above 90 percent density), and four dorms in RNDC were above 75 percent density.²⁶

Despite the second surge of COVID-19 in New York City, populations in the City's jails are climbing, COVID-19 cases are on the rise among staff and detainees. As of January 1, 2021, there are 4,967 individuals in DOC custody, and 306 confirmed COVID-19 patients at Rikers.²⁷ The number of DOC and CHS staff with confirmed COVID-19 cases is also on the rise.²⁸ The City is closing facilities rather than reopening them. The City is in the process of closing the Manhattan Detention Center ("MDC") as well as the Otis Bantum Correctional Center ("OBCC") on Rikers Island.²⁹ Ex. D, Feeney Dep. 16:22-17:3. These facilities currently house about 750 individuals combined.³⁰ These detainees will be transferred to Rikers Island or the Vernon C. Bain Center ("VCBC") in the Bronx. Ex. D, Feeney Dep. 18:7-10. Rikers has the option of opening EMTC, one of the jails on Rikers Island, which was open during the first surge of COVID-19 but is presently closed. *Id.* at 33:19-34:6. Even though not all individuals are sleeping at least six feet apart and COVID-19 cases are on the rise again at Rikers, the City does not feel the need to reopen EMTC. *Id.* at 34:7-19.

In NIC, Rikers does not enforce social distancing in the day room. Ex. B, Barnar Dec. ¶ 17. The room is very closed-in and individuals rarely follow the social distancing guidelines. *Id.*

²⁶ See <https://legalaidnyc.org/news/nyc-jails-increase-density-levels-second-wave-of-covid-19/> (last visited 1/8/2021)

²⁷ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

²⁸ See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf> (last visited 1/8/2021)

²⁹ See <https://newyork.cbslocal.com/2020/10/10/manhattan-detention-complex-closing/> (last visited 1/8/2021)

³⁰ See <https://newyork.cbslocal.com/2020/10/10/manhattan-detention-complex-closing/> (last visited 1/8/2021)

1. Ventilation.

In order to “increase air exchanges and to expedite removing infectious particles” the CDC recommends that correctional facilities “adopt protective engineering control ventilation techniques [...] such as negative pressure testing rooms, local exhaust source control, directional airflows, adequate ventilation, and/or the use of portable HEPA filters.”³¹ Strategic filter placement in specific rooms or cells of the facility is a recognized measure to mitigate against aerosolization of virus particles. Ex. F, Herrington Dec. ¶ 26.

NIC is one of the oldest buildings on Rikers Island. Ex. D, Feeney Dep. 87:1-14. Rikers has not installed any air filtration systems at NIC. Ex. A, Azor-El Dec. ¶ 16; Ex. B, Barnar Dec. ¶ 19. Rikers does not clean the air vents. Ex. B, Barnar Dec. ¶ 19. Mr. Barnar recently complained to Rikers officers and staff because the exhaust in the bathroom NIC Dorm 3 stopped working entirely. *Id.* Dozens of people are going in and out of the bathroom and the air is standing still. *Id.*

The Office of Compliance Consultants (“OCC”) Report on Environmental Conditions (May through August 2020) contains an attachment that discusses ventilation issues at Rikers. Ex. I, Deposition Exhibit 27; Ex. J, Deposition Exhibit 31. OCC reported finding dozens of dirty, dusty, occluded, and missing vents at Rikers. Ex. J, Deposition Exhibit 31.

2. COVID-19 Testing.

The CDC recommends that correction/detention facilities conduct COVID-19 testing for staff, officers, and detainees, and that detention/correction facilities pursue broad testing strategies

³¹ See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/broad-based-testing.html> (last visited 1/2/2021)

for officers, staff, and even detainees.³² The CDC recommends that detainees be tested for COVID-19 and be placed in isolation until the facility can be reasonably certain that the individual does not have COVID-19.³³ A testing regime for DOC staff would identify individuals carrying the virus, who could then be removed from the correctional environment until no longer contagious. Ex. F, Herrington Dec. ¶ 20.

The City agrees that the biggest risk for a Rikers detainee contracting COVID-19 would come from exposure to staff bringing COVID-19 in from outside the facility. Ex. D, Feeney Dep. 108:18-24. Staff go home and have contact with the general public, and may bring the disease back into the facility, where it can spread quickly. Ex. F, Herrington Dec. ¶ 18. In the month preceding Feeney's deposition on November 10, 2020, approximately ten to fifteen DOC staff tested positive for COVID-19. Ex. D, Feeney Dep. 52:5-7. Some if not all of these individuals worked one or more shifts prior to testing positive, possibly exposing detainees to the virus. *Id.* at 52:8-53:1.

But Rikers has not implemented any regular, mandatory testing regime for staff even though the DOC has an agreement with Northwell Health to conduct COVID-19 testing for their officers and staff. Ex. D, Feeney Dep. 108:25-109:19, 36:25-37:6. Even hair salons and barber shops in New York State are required to test all employees every two weeks for COVID-19.³⁴

D. Necessary and Achievable Interventions.

Implementing a public health intervention in a correctional environment is similar to a medical intervention such as a prescription or procedure: there is a risk and benefit that must be

³² See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

³³ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 1/6/2021)

³⁴ See <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/HairSalonsAndBarbershopSummaryGuidance.pdf> (last visited 1/8/2021)

considered, the ultimate strategy being to minimize risk and maximize benefit. Ex. F, Herrington Dec. ¶ 9.

New York's DOC is lagging behind. Other correctional facilities have implemented measures to contain and control COVID-19 that DOC could easily implement here. Plaintiffs' expert, Dr. Ryan Herrington, points to how his employer, the Department of Corrections for the State of Washington, has implemented several preventive measures with respect to COVID-19 that Rikers can also implement. Ex. F, Herrington Dec. ¶ 4. With regards to hand hygiene, the proper public health approach is to offer several methods for people to clean their hands: hand sanitizer and soap-and-water are complementary strategies, not mutually exclusive ones. *Id.* at ¶ 11. Hand sanitizer is easy and quick to use, so detainees are more likely to actually use it; ease of use is an important consideration in public health interventions. *Id.* at ¶ 12.

The proper course of action is not to blanket deny the detainee population access to hand sanitizer, but to mitigate any potential risk by implementing a distribution strategy that is responsible and safe, such as dispensing in small quantities only or dispensing from a common container under the supervision of correctional officers. Ex. F, Herrington Dec. ¶ 13. This risk of this strategy is minimal to none compared to the benefit. *Id.*

During a pandemic, access to sanitizing wipes is also essential. Ex. F, Herrington Dec. ¶ 15. COVID-19 is not a benign disease, and it is understood by the medical community that a certain percentage of COVID-19 patients will not recover, or have recoveries that are complicated. This risk is even more significant in correctional environments designed for medically vulnerable detainees, such as NIC. *Id.* A better solution would be to make disinfecting wipes available in small quantities only and under correctional officer supervision; as with hand sanitizer, the risk of such an approach is minimal to none compared to the benefit in preventing the spread of COVID-

19. *Id.* One of the reasons sanitizing wipes are valuable is that they are quick, simple, and easy to use, and since they can come from a dispenser or simply made available for picking up by hand, they do not require detainees to sanitize ancillary equipment like spray bottles or storage closets where spray would be kept. *Id.* at ¶ 16.

Rikers staff and officers must wear masks properly in order for them to be effective in preventing the spread of COVID-19. Wearing masks below the nose or dangling from one ear does not suffice. Ex. F, Herrington Dec. ¶ 17. For this reason, the DOC should promote and encourage this intervention, including with discipline if that is what is required. *Id.*

Social distancing measures also decrease the risk of transmission of COVID-19. Ex. F, Herrington Dec. ¶ 21. Ordering detainees to sleep head-to-toe does not create six feet of distance and is therefore insufficient in comparison. *Id.* at ¶ 24. If a correctional facility or detention center has additional facilities that are not in use, like Rikers, it should open these facilities and spread residents out within them to ensure social distancing. *Id.*

Rikers has failed to establish a regular testing regime for officers and staff. Ex. D, Feeney Dep. 108:25-109:19, 36:25-37:6. In Washington State, there is a testing regime for correctional staff at high-risk facilities: at the prison where Dr. Herrington works, the Stafford Creek Corrections Center, staff (including Dr. Herrington) are tested weekly. Ex. F, Herrington Dec. ¶ 19. A testing regime for DOC staff would work to interfere with the spread of COVID-19 because testing would identify individuals carrying the virus, who could then be removed from the correctional environment until no longer contagious. *Id.* at ¶ 20.

The fact that a vaccine is now available does not reduce the urgency of taking the measures set forth here. Ex. F, Herrington Dec. ¶ 28. It is unknown when detainees will get the vaccine and how many will get it. *Id.* Further, these interventions are still essential for preventing COVID-

19; vaccines take time to work and to create “herd immunity,” and this will not likely happen until well into 2021, and even then, it is important to take precautionary measures against a serious disease. *Id.*

II. LEGAL STANDARDS

A. General Standards for Preliminary Injunctions.

In the Second Circuit, 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) (citing *Trump v. Deutsche Bank AG*, 943 F.3d 627, 635 (2d Cir. 2019), *cert. granted*, — U.S. —, 140 S. Ct. 660, 205 L.Ed.2d 418 (2019) (quotation marks and internal citation omitted)). Plaintiffs “must demonstrate a substantial likelihood of success on the merits.” *Id.* (quoting *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013)) (further marks omitted).

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) (further citations and marks omitted).³⁵ “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.*

³⁵ 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.

“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 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 v. Licon-Vitale*, 470 F. Supp. 3d 323, 348 (S.D.N.Y. 2020). “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.* “In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.” *Id.*

Since Plaintiffs are considered pretrial detainees, the subjective prong asks whether the City 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)).

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.* (citing *Weixel v. Bd. of Educ.*, 287 F.3d 138, 146 n. 6 (2d Cir. 2002)).

“[T]he ADA and the Rehabilitation Act prohibit all disability-based discrimination by a public entity or recipient of federal financial assistance, and these statutes require reasonable accommodations that are necessary for an equal opportunity to receive benefits from, or participate in, programs run by such entities.” *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 150–51 (2d Cir. 1999).

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. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (citing *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998)). “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. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

“[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. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003).

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 a mandatory testing regime, distribution of hand sanitizer, and distribution of sanitary wipes and cleaning solution.

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 condition - 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). Money cannot remedy death or permanent, long-term health issues.

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) (“It would be odd to deny an injunction to detainees who plainly proved an unsafe, life-threatening

condition in their prison on the ground that nothing yet had happened to them.”) Furthermore, alleged violations of constitutional rights, such as those made here, amount to irreparable injury. *See, e.g., Conn. Dep’t Env’tl. Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996).

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 testing, hand sanitizer, and cleaning items.

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 Claim. 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.

Defendants acknowledge COVID-19 as a serious risk to detainees’ health; regardless, it is a risk they should know about. “[I]t is beyond debate that COVID-19 is a disease that can seriously sicken and even kill those who suffer from it. The novel coronavirus has indiscriminately infected hundreds of thousands throughout the United States, with New York City in particular experiencing an outsized number of deaths as a result of the virus. Put simply, COVID-19 stands with the roster of infectious diseases from which ‘correctional officials have an affirmative obligation to protect detainees.’” *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 349 (S.D.N.Y. 2020) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (examining duty to

protect detainees from tuberculosis)). *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.

The City acknowledges that COVID-19 is a serious health and safety threat, and that it poses a serious threat of harm or even death to people who contract it. Ex. D, Deposition of Deputy Commissioner Feeney (“Feeney Dep.”) 24:8-14.³⁶ 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’ failure to implement common-sense protective measures can only be described as unreasonable. Each of the measures Plaintiffs propose is common-sense, and widely implemented in other settings and even in society at large. But the City simply fails to take common-sense and easily-implemented measures.

Maintaining hand hygiene is one of the most effective ways to stop the spread of COVID-19. But in a correctional setting, access to soap and water alone is insufficient to ensure proper hand hygiene for detainees. Ex. F, Herrington Dec. ¶ 11. Hand sanitizer is inexpensive, effective, and easy to use. The fact that, in normal circumstances, hand sanitizer is considered contraband in correctional settings is immaterial. These are not normal circumstances. Instead of blanket denying hand sanitizer to detainees, Rikers can have officers distribute pumps of hand sanitizer in small quantities to individuals who ask for it, and officers can spare a few moments to make sure

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.

the individual uses the hand sanitizer as intended. *Id.* at ¶ 13. Alternatively, Rikers could set up hand sanitizer stations with automatic, single-use dispensers that use foam, not gel.

The City offers no excuse for its failure to provide basic sanitary wipes, products that any civilian could get at a corner bodega and that will save lives in this high-density environment. Plaintiffs come into constant contact with high-touch surfaces, especially when using telephones. Defendants have access to sanitary wipes - such as alcohol wet-wipes - but do not distribute them widely to detainees. Disinfecting wipes play a key role in stopping the spread of COVID-19. *Ex. F, Herrington Dec.* ¶¶ 14-16. As Dr. Herrington describes, “[o]ne of the reasons sanitizing wipes are valuable is because they are quick, simple, and easy to use.” *Id.* ¶ 16. The City only appears to have one objection to them - that detainees might use them to clog toilets. But this speculative assertion does not outweigh the benefit of making wipes available during a pandemic. *See id.* ¶ 15. Correctional facilities must and do distribute plenty of items, such as clothing and toilet paper, that might conceivably clog toilets - but that does not allow Rikers to leave detainees naked or without toilet supplies. *See id.* At least one other court during COVID-19 has directly ordered that a correctional system provide sanitary solutions to detainees to clean surfaces. *See Banks v. Booth*, 468 F. Supp. 3d 101, 126 (D.D.C. 2020) (“Defendants shall ensure that detainees have access to the necessary materials to clean their cells, including cleaning solutions which protect against COVID-19 and adequate cleaning textiles and tools.”).

Why not test the correctional officers and other Rikers staff - people who live in all five boroughs of the City and beyond, and travel to and from their homes to Rikers? Testing for detainees is widely available³⁷, is easy, and is inexpensive: why not test the people traveling in and

³⁷https://auburnpub.com/news/local/govt-and-politics/test-them-all-advocates-families-urge-ny-to-expand-covid-19-testing-in-prisons/article_bed8b68e-f043-5c13-ab4d-ed7c8ddc9ea3.html

out of the facility? Staff are the people most likely to spread COVID-19 to vulnerable detainees because they interact with the wider world (on the subway, family, friends) every day. Common sense, science, and following the lead of other facilities would slow the spread of COVID-19 from the outside in. Washington State utilizes a weekly testing regime for correctional staff at high-risk facilities like the NIC at Rikers. Ex. F, Herrington Dec. ¶ 19. A testing regime for DOC staff would identify staff members carrying the virus and remove them from the correctional environment. *Id.* at ¶ 20. New York City should lead the nation in virus prevention and intervention, given its large and growing prison population and sophisticated medical capabilities, yet facilities nationwide have long implemented staff and officer testing on a weekly basis, and New York City has not. With rapid testing popping up in empty storefronts on every street in SoHo, surely implementing testing in Rikers should be easy and a priority for the City.

The City also needs to take seriously its duty to enforce mask mandates, ensure social distancing, and provide correct ventilation. Ex. F., Herrington Dec. ¶ 17-27. The Court should direct the City to meaningfully enforce its already-existing, and unquestionably essential, mandate that correctional officers properly wear their masks at all times.

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 Infirmity 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.*

Sanitary wipes, hand sanitizer, testing, and other measures proposed here would substantially reduce the risk of COVID-19 transmission at Rikers. *See generally* Ex. F, Herrington Dec. The benefits greatly outweigh any costs. *See id.* The City has not come forward with anything other than fantastical speculation about how something as basic as a Clorox wipe could pose a risk of harm. 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.

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: January 22, 2021

Respectfully submitted,

KEENAN & BHATIA, LLC

By: ___/s E.E. Keenan_____

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

and

Sonal Bhatia (pro hac vice forthcoming)
929 Walnut Street, Suite 5107
Kansas City, MO 64106
Tel: (816) 809-2100
sonal@keenanfirm.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify service of the foregoing by filing it through the Court's CM/ECF system, which will simultaneously transmit notice to all case participants through their counsel of record on the date of filing.

By: /s/ E.E. Keenan
An Attorney for Plaintiffs