UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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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,

v.

CITY OF NEW YORK and KISA SMALLS,

Defendants.

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PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Case No. 20-cv-3650 [lead]
and Consolidated/Related Cases

The City offers an upbeat report of all it claims it is doing at Rikers. It's a Potemkin Village. In the real world, detainees crowd into facilities without adequate sanitizing measures, with limited access to soap and water, and staff refusing to wear masks or take tests prior to entering the facility. This case is about lived realities, not abstract policies. Sanitizer, soap, and Clorox wipes, and masks, are not big asks in the worst pandemic in a century. The City's excuses for failing to to provide them lack any valid justification. The population numbers at Rikers are quickly approaching pre-pandemic levels--at the beginning of the pandemic, Rikers held 5557; according to the last weekly report, Rikers currently holds 5317 people--about 200 less than at the start of the pandemic. (*See* New York City Board of Correction Weekly COVID-19 Update, January 23-January 29, 2021, p. 5). The City makes a big deal of the fact that we are ten months into the pandemic as we argue for this injunction: the fact is that we've come full circle on Rikers population. Even as early as October 2020, the City was worried about the climbing housing

numbers at Rikers. (*See* "New York City Board of Correction Housing Area Capacity Data Summary, January 1 to October 31, 2020") This Court should grant an injunction that will protect inmates and staff from this dangerous health threat.[1]

A. The City's Case Is Based on Abstract Policies, Not On-the-Ground Facts.

Deputy Commissioner Feeney's declaration makes clear her understanding of ***policies.*** Feeney Decl. para. 2. But Deputy Commissioner Feeney does not demonstrate any personal knowledge regarding ***actual conditions*** at Rikers. (*Id.*) She is an official based at the Bulova Corporate Center (Feeney Dep. 8:7-10), not an inmate or officer walking around Rikers throughout the day. And Feeney fails to provide any data regarding staff compliance with Defendants' policies. Likewise, the Yang and Reilly declarations are from administrators opining on what they hope to be the case - not what is the case. Only the declarations of detainees Azor-El, Barnar, and Cole contain **personal, witnessed knowledge**.

The fact that Defendants have policies on sanitization, social distancing, and mask-wearing that correctional staff are failing to follow only strengthens Plaintiffs' argument regarding Defendants' deliberate indifference. By implementing these policies, Defendants show that they "knew [...] that the condition posed an excessive risk to health or safety." *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). But by failing to enforce these policies in reality, and by not taking steps to implement the most stringent policies possible (like mandatory mask-wearing and mandatory staff testing), Defendants have recklessly failed and continue to "recklessly [fail] to act with reasonable care to mitigate the risk that the condition [poses] to the [Plaintiffs]." *Id*.

[1] Counsel has attempted to shorten this brief, but given the matters at issue and urgency of time, seeks this Court's leave to depart from the normal 10-page limit and requirement of a table of contents and authorities.

B. The Deliberate Indifference Standard Means More than Doing "Something" - Defendants Must Do What Medical Science Calls For.

Defendants seem to argue a legal standard under which simply doing *something* to address the pandemic qualifies. But the Constitution demands more: once a serious medical risk has been established (and the City does not seem to disagree that COVID-19 is a serious medical risk), the City then has an *affirmative obligation* to "act with **reasonable care** to mitigate the risk that the condition posed to the pretrial detainee[s]." *Vega v. Semple*, 963 F.3d 259, 274 (2d Cir. 2020) (emphasis added); *see Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017). Whether the defendant has acted reasonably "is defined objectively." *Darnell*, 849 F.3d at 35.

The City is not unaware of the threat: it receives weekly reports from the Board of Correction showing detainee population and infection numbers. [2] Frighteningly, the *current* number of infections in Rikers is rising.[3]

Simply acting is not enough if those actions are inadequate to meet the threat. For instance, in *Vega*, officials installed a partial mitigation system to detect radon gas at a Connecticut prison. *Vega v. Semple*, 963 F.3d 259, 277 (2d Cir. 2020). Despite the fact that prison officials had responded to the threat, the Second Circuit allowed the inmates' damages claim to proceed, because "the mitigation effort implemented was not a reasonable measure taken to abate the risk of excessive radon exposure." *Id.*

"Reasonable care" is more than just doing something. It is an objective standard that means following current medical science. As set forth in Dr. Herrington's original and supplemental declarations, Defendants are falling well short of that and relying on guesswork and unscientific paranoia in refusing basic safety protocols.

[2] See https://www1.nyc.gov/site/boc/reports/board-of-correction-reports.page
[3] See Board of Correction report, attached.

Defendants also bang the drum of "deference." But deference does not mean obeisance. "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Bacon v. Phelps*, 961 F.3d 533, 543 (2d Cir. 2020). There is no right more fundamental than the right of prisoners who have not been sentenced to death to remain living. The Due Process Clause's very first guarantee is to "life." U.S. Const. Amend. XIV, s. 1.

The City cites to *Overton v. Bazzetta* in support of its deference argument. *Overton* dealt with post-sentence inmates, who may constitutionally be "punished" and therefore have fewer constitutional protections than the pretrial inmates here. And the constitutional rights at issue were First Amendment rights to speech and association, not the highest-order right to life itself.

Regardless, *Overton* bolsters the Plaintiffs' case for an injunction, because the City's explanations fail *Overton*'s balancing test. The Court must weigh the City's explanations for its choice to deny sanitizer, wipes, and an effective mask policy against the consequences of those decisions. Under *Overton*, "[f]our factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are ready alternatives to the regulation." *Overton*, 539 U.S. at 132.

While the City has a legitimate interest in maintaining a safe and orderly environment, its failure to take appropriate and scientifically-supported measures does not rationally advance these objectives. The inmates here have no ability to get sanitizer, wipes, and effective mask wearing

by guards through another means: they are confined. The measures proposed here would protect both guards and inmates by reducing the spread of COVID-19. And there are no ready alternatives: mask wearing, social distancing, and sanitation are the only known protections against COVID-19 until the pandemic ceases and the American population is widely vaccinated - which will not happen until a long time from now.

C. All Detainees Are Vulnerable to COVID-19.

Defendants question whether or not the named Plaintiffs in this case are actually medically vulnerable, claiming that they need to first get access to all of their individual medical records. The City seems to ignore the import of its own custody classification decisions: the named Plaintiffs in this case are or were in North **Infirmary** Command—Defendants would not have placed them in housing meant specifically for medically vulnerable individuals if these Plaintiffs were not indeed medically vulnerable.

Regardless, the City's red-herring argument is just another iteration of the City's desire to make this case about individual inmates' situations, and not the wider situation. The Court has already recognized that this case is about Rikers as a whole. (Doc. 72.) Plaintiffs seek classwide relief as to all Rikers detainees. So the risk at issue here for purposes of analysis is the risk faced by the typical inmate. The City's attempt to derail scrutiny of its policies by balkanizing this case with individual issues misses the point.

Incarcerated people "in correctional facilities are among the unhealthiest and most medically underserved in society" because they are more likely to suffer from physical and mental maladies, compounded by the fact that "correctional facilities are unhealthy environments, where individuals are exposed to a range of conditions that are detrimental to physical and mental

health."[4] COVID-19 is a threat to ***all*** inmates, not just those who are medically vulnerable or have preexisting conditions:

> There can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition. The point need not be belabored in this case. Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to inmates, and its presence at the prison equates to an "unsafe, life-threatening condition" endangering "reasonable safety."

People ex rel. Stoughton v. Brann, 67 Misc. 3d 629, 631, 122 N.Y.S.3d 866, 870 (N.Y. Sup. Ct. 2020) (citing *Helling v. McKinney*, 509 U.S. at 33).

In addition, several new variants of COVID-19 have been identified in the United States and in New York City. The B.1.1.7. variant, which was first identified in the United Kingdom, has already been identified in New York City;[5] this variant is predicted to be more transmissible than the original COVID-19 strain that originated in Wuhan, China. The P.1 variant, which has been identified in Brazil, has also already been detected in the United States; this variant may also be more easily transmissible, and more resistant to an immune response.[6] These emerging strains of COVID-19 put ***all*** incarcerated persons at higher risk of contracting the virus.

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[4] *See* David H. Cloud et al, Addressing Mass Incarceration: A Clarion Call for Public Health, AM J PUBLIC HEALTH, 2014 March; 104(3):389-391, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953768/.

[5] *See* U.S. COVID-19 Cases Caused by Variants, CENTERS FOR DISEASE CONTROL AND PREVENTION (January 28, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html; *see also* O'Connell-Domenech, "Two NYC residents reported to have new COVID-19 variant first identified in the UK," AMNY, January 13, 2021, available at https://www.amny.com/news/two-nyc-residents-positive-for-uk-covid-19-strain.

[6] *See* Bill Chappell, Moderna Finds COVID-19 Vaccine Still Protects Against Variants, NATIONAL PUBLIC RADIO (January 25, 2021), available at https://www.npr.org/sections/coronavirus-liveupdates/2021/01/25/960341384/moderna-finds-covid-19-vaccine-less-effective-against-variant-found-in-south-afr; Michaeleen Doucleff, Why Scientists Are Very Worried About the Variant From Brazil, NATIONAL PUBLIC RADIO (January 27, 2021), available at https://www.npr.org/sections/goatsandsoda/2021/01/27/961108577/why-scientistsare-very-worried-about-the-variant-from-brazil.

The long-term effects of COVID-19 also pose a huge health risk to those who have contracted the virus, even if they have recovered. Even if a patient survives, long-term complications from COVID-19 include cardiovascular inflammation, lung function abnormalities, acute kidney injury, neurological impairments, and psychiatric effects.[7] The fact that Rikers is failing to protect inmates has resulted in long-term health effects - as outlined in an op-ed in the *New York Times* this past week, describing one former Rikers inmate's COVID-related renal failure.[8]

D. Specific Remedies Sought[9]

1. Sanitization

In her declaration, Deputy Commissioner Feeney states: "Under our procedures, housing areas are to be cleaned and sanitized by trained incarcerated individual work crews three times a day, and showers and bathrooms are to be cleaned and sanitized three times a day." Feeney Dec. ¶ 18. She goes on to state: "Sanitation and cleaning measures the sanitation work details are **expected to take** include: cleaning and sanitizing DOC housing units, dayrooms, and common spaces three times per day [and] cleaning shower areas three times per day[,]" and that "[t]able top surfaces and high touch areas are **expected to be** sanitized every two hours." *Id*. at ¶ 26-27 (emphasis added).

But expectations do not equal reality. Defendants fail to provide any evidence that the policies outlined by Deputy Commissioner Feeney are actually being followed. Plaintiffs, on the

[7] *See* Long-Term Effects of COVID-19, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited February 5, 2021).
[8] *See* "I Got Covid At Rikers: I'm Still Suffering," describing Michele Evans' Stage 3 kidney failure after getting COVID at Rikers, available at https://www.nytimes.com/2021/02/04/opinion/rikers-jail-covid.html (last visited February 7, 2021)
[9] Plaintiffs' motion seeks any appropriate remedies, and this discussion is intended to focus on several key points, not to limit the remedies sought.

other hand, provide ***direct, personal testimony*** that Defendants are not following their policies: the sanitation teams merely sweep and mop floors and take out garbage, Defendants fail to disinfect or sanitize high touch surfaces, and Defendants only clean the bathrooms once a day.[10] Azor-El Dec. ¶ 7, 14; Barnar Dec. ¶ 9, 14.

This same disconnect between Defendants' "expectations" and reality can also be seen in regards to the availability of sanitization supplies, the sanitization of beds/sheets, ready access to soap and water, food service, and the sanitization of video conference rooms between uses (which Defendants do not even address in their Memorandum). *Compare* Feeney Decl. with Azor-El Decl., Barnar Decl., and Cole Decl.

2. Hand Sanitizer and Soap.

The City refuses to provide hand sanitizer, saying that inmates should just wash their hands a lot. That argument assumes that detainees will have ready access to soap and hot water to wash their hands in a non-crowded environment. Undersigned counsel has been receiving alarming reports from inmates over the past week or two that soap has run out and correctional officers are failing to issue new soap; inmates must buy their own soap at the commissary. It has not been provided, and is not in the bathroom dispensers.

But even if soap and hot water were widely available, it is unrealistic for detainees to wash their hands every time they touch a potentially contaminated surface. The City recognizes as much in its policies: the City calls for correctional officers to carry hand sanitizer *for themselves* when

[10] Defendants' failure to adequately sanitize bathrooms is especially troubling given that medical research has shown that COVID-19 can be transmitted through fecal matter. *See* Wang, Xiaoming et al. "Fecal viral shedding in COVID-19 patients: Clinical significance, viral load dynamics and survival analysis." Virus research vol. 289 (2020): 198147, available at doi:10.1016/j.virusres.2020.198147 (last visited February 5 2021); *see also* Knowlton, S.D., Boles, C.L., Perencevich, E.N. et al. Bioaerosol concentrations generated from toilet flushing in a hospital-based patient care setting. Antimicrob Resist Infect Control 7, 16 (2018), available at https://doi.org/10.1186/s13756-018-0301-9 (last visited February 5, 2021).

it is infeasible to wash their hands. Why don't inmates get the same treatment? Deputy Commissioner Feeney speculates, based in nothing more than a news article about a civilian with no connection to Rikers mishandling sanitizer, that inmates will somehow weaponize it and turn it into prison napalm. Feeney does not point to any real instance of an inmate ***anywhere*** weaponizing this material. And even if that were a risk, it could be mitigated by distributing limited quantities, or using foam-based sanitizer.

Defendants also refuse to distribute sanitary wipes to clean high touch surfaces. They claim that they are using a cleaner called Virex, and that it is available with sponges. But Virex takes 10 minutes to disinfect a surface, and Rikers locks it in janitors' closets. Ex. D to Memorandum in Support, Feeney Dep. 85:24-86:6; 41:12-18; 39:8-21. And that is assuming Rikers is even following its own policies. Again, this case centers on reality, not policy. And the detainees who have submitted declarations have confirmed that Virex is not available in areas such as the phone booths - instead, inmates are sent into these areas one after the other, and have to use workarounds like putting a sock over the phone to avoid touching potentially contaminated surfaces. *See, e.g.*, Azor-El Decl. para. 13. Undersigned counsel has had trouble hearing detainees during calls, and inmates have explained that it is because the phones are not sanitized and they do not want to be too close to them.

The sole excuse the City offers for not giving sanitary wipes appears to be that the City handed them out at a holding pen in Bronx Criminal Court (not Rikers) a year and a half ago - before the pandemic - and apparently they got flushed and clogged toilets. Feeney Decl. p. 59. Deputy Commissioner Feeney offers no specifics on this incident, but it pales in comparison to the threats faced by a global pandemic. If the City worries about toilet clogging, the first step would be to put a trash bin out and direct inmates to throw the wipes in the trash. As with any situation,

if inmates clog toilets too much, then the problem can be addressed then. But in the midst of COVID-19, the City's handwringing over an isolated instance of clogged toilets in the Bronx a year and a half ago simply does not justify its position. Dead staff and detainees or staff and detainees with long-term post-COVID health issues are far more serious than the possibility of clogged toilets. Even asserting that clogged toilets are a more serious concern than health displays deliberate indifference.

3. Testing

Defendants' current testing and screening protocols for correctional staff are insufficient to prevent COVID-19 from being introduced into Rikers. Even Feeney, in her deposition, admits that staff are the vectors of disease. All staff reporting for work must undergo a temperature check as well as a questionnaire to determine whether or not they may enter the facility. However, medical research has confirmed that anywhere from 30 to 50 percent of people who have COVID-19 are asymptomatic, meaning they would successfully pass a temperature screening and questionnaire.[11]

Defendants do not cite any public health guidance to support their stance regarding mandatory testing of staff. Instead, Defendants claim that imposing mandatory staff testing would require collective bargaining with the relevant union. But Defendants have not provided any evidence that they have made any attempt to collectively bargain with the union regarding mandatory staff testing despite Defendants being "well aware of the coming pandemic in early

[11] *See* Buitrago-Garcia D, Egli-Gany D, Counotte MJ, Hossmann S, Imeri H, Ipekci AM, et al. (2020) Occurrence and transmission potential of asymptomatic and presymptomatic SARS-CoV-2 infections: A living systematic review and meta-analysis. PLoS Med 17(9): e1003346, available at doi:10.1371/journal.pmed.1003346 (last visited February 5, 2021); *see also* Ben Guarino, *People without symptoms spread virus in more than half of cases*, CDC model finds, The Washington Post, January 7, 2021, available at https://www.washingtonpost.com/science/2021/01/07/covidasymptomatic-spread (last visited February 5, 2021).

2020." *See* Defendant's Brief p. 2. It has been eleven months since the pandemic was recognized: surely that's enough time to bargain for testing. In fact, the Corrections Officers' Benevolent Association (COBA) had to sue the City to even obtain free off-site testing at Northwell for corrections staff, and Legal Aid supported this suit.[12]

Regardless, the collective bargaining agreement cannot block a governmental entity from performing its constitutionally-mandated duties. The City's argument would turn the CBA into a "Super Constitution" that trumps even the Fourteenth Amendment's protections. There is no basis for such an argument. For what it's worth, Plaintiffs' expert, Dr. Ryan Herrington, serves at a unionized prison facility, and the facility has implemented mandatory testing without any of the parade-of-horribles the City seems to throw up here.

4. Mask Wearing

New York State mandates mask wearing in public spaces, including on public transportation.[13] But not at Rikers, where officers get to choose to doff their masks, even *indoors*, so long as they decide they aren't within six feet of anyone else. Leaving aside the irony that correctional officers have to wear a mask on the bus and subway to and from work, but not at work, there are at least two problems with the City's position on masks: the policy on the surface fails to protect inmates (and staff), and even then, staff are routinely flouting it.

The City's policy falls well short of "reasonable." It appears that the policy violates state law and goes against the very same dicates the City and state have been imposing in less risky settings, like subways and retail shops. Deputy Commissioner Feeney fails to even attempt to explain why the City has adopted a policy allowing guards to take their masks off indoors. As

[12] https://www.cobanyc.org/news/correction-officers-union-settles-suit-nyc-coronavirus-testing-sites-masks
[13]https://regs.health.ny.gov/volume-1a-title-10/content/section-66-32-face-coverings#:~:text=(a)%20Any%20person%20who%20is,when%20not%20maintaining%2C%20social%20distance.

Dr. Herrington explains in his supplemental declaration (Doc. 78), "Because COVID-19 is an airborne disease, in indoor congregate settings, it is essential that all persons present wear a mask to reduce the total number of airborne droplets being emitted into the environment or breathed in by others." *Id.* para. 6.

And as deficient as this policy is, officers are not even following it. The Plaintiffs' declarations describe widespread refusal or failure to wear masks. The City acknowledges that it has had issues with compliance, but then claims that it will not use "coercion" to enforce the mask mandate and instead wants to rely on reminders and encouragement. *See* Feeney Decl. para. 41-42. Just as with testing, it appears the City basically doesn't want to offend correctional officers. But failing to discipline non-compliant officers when lives are on the line is almost the definition of reckless indifference: the City knows officers aren't following the rules, and it just keeps on letting them.

The City's mask policy does not comply with the most basic public safety guidance - to always wear a mask indoors. And the City has failed to take any effective action against officers who refuse to wear a mask. Rikers' population is now approaching pre-pandemic levels,[14] making the need for effective mask-wearing even more urgent.

CONCLUSION

The City has a duty to respond in an objectively reasonable manner to this pandemic, which will continue to rage well into this year and is still killing thousands of Americans every day. The City's responses have relied on guesswork and a desire to do what's easy. But that is not enough when human lives are at stake. Injunctive relief will save lives and health, and make clear to the

[14] See Board of Correction weekly report, attached.

City that it must take the necessary measures to ensure the safety of the people it has chosen to keep at Rikers during this pandemic.

Dated: February 7, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify service of the foregoing on the date of filing by filing it through the Court's CM/ECF system, which will automatically transmit notice to counsel of record for Defendants.

By: ___/s E.E. Keenan_____