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,

-against-

CITY OF NEW YORK and KISA SMALLS,

Defendants.

No. 20 CV 3650 (KPF)
No. 20 CV 3978 (KPF)
No. 20 CV 3980 (KPF)
No. 20 CV 3981 (KPF)
No. 20 CV 3982 (KPF)
No. 20 CV 3983 (KPF)
No. 20 CV 3985 (KPF)
No. 20 CV 3990 (KPF)

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DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs are current and former inmates in the custody of the New York City Department of Correction ("DOC" or the "Department"). Three Plaintiffs are currently held at the Department's North Infirmary Command ("NIC"), a clinical facility on Rikers Island for inmates with disabilities and other medical conditions, whereas five Plaintiffs, now in the custody of the State of New York or released, were formerly housed at NIC. In this motion for a preliminary injunction,[1] Plaintiffs contend—ten months after the onset of the COVID-19 pandemic and on the eve of distribution of the vaccine to DOC staff—that the conditions at NIC (and, indeed, at all DOC facilities) have been and are unsafe, and that immediate judicial intervention is needed to protect the safety of the inmates.

Defendants City of New York ("City") and Kisa Smalls, the former warden of NIC (collectively, "Defendants"),[2] submit this Memorandum of Law, as well as the accompanying declarations of Patricia Feeney, Patricia Yang, and Richard C. Reilly to assure the Court that NIC (and other DOC facilities) are safe, and that conditions fall well within constitutional standards, and that there is no unreasonable risk of harm to the Plaintiffs or other incarcerated persons.[3]

[1] Although nominally a member of the cohort of Plaintiffs involved in this action, Ronnie Cole has a standalone action that has not yet been consolidated with this action: *Cole v. Smalls*, 20 CV 3981 (KPF) (S.D.N.Y.).

[2] Defendants respectfully request that the Court direct the Clerk of Court to replace Kisa Smalls in the caption with the name of the acting warden of NIC, Robin Collins, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

[3] The Department will employ the term "incarcerated persons" or similar terms to speak about persons in DOC's custody, without respect to conviction or sentencing status.

STATEMENT OF FACTS

For a complete statement of facts, the Court is respectfully referred to the accompanying declarations of Patricia Feeney, DOC Deputy Commissioner of Quality Assurance and Integrity ("Feeney Decl."); of Patricia Yang, the New York City Health and Hospitals Corporation's ("H+H") Senior Vice President for Correctional Health Services ("Yang Decl."); and of Richard C. Reilly, DOC's Senior Stationary Engineer of Facility Maintenance and Repair Division ("Reilly Decl.").[4]

Briefly, the Department was well aware of the coming pandemic in early 2020, and in preparing its response, acted in accordance with guidelines of the United States Centers for Disease Control and Prevention ("CDC"), the New York State Department of Health ("NYSDOH"), and the New York City Department of Health and Mental Hygiene ("DOHMH"). (Feeney Decl. ¶¶ 10-11; Yang Decl. ¶ 3.) The Department instituted rigorous protocols to better clean and sanitize the jails and worked closely with its medical provider, Correctional Health Services ("CHS"), which is a division of H+H, to ensure that inmates were properly monitored, quarantined when necessary, and received needed medical care. (*See* Feeney Decl. ¶¶ 11, 14-16, 22-46.) These protocols included separating confirmed and suspected cases of COVID-19 into different facilities; the Department even went so far as to reopen a closed facility to house positive cases and those with symptoms. (*Id.* ¶¶ 16, 64-65; Yang Decl. ¶¶ 7, 9-16.)

In addition, the Department reduced the inmate population with the assistance of its law enforcement and public health partners, with a selective release of approximately 1,500 inmates deemed to be at greater risk from COVID-19. (*See* Feeney Decl. ¶ 14, 36-38; Yang Decl.

[4] Any references to the numbering of documents on the ECF docket will rely on those numbers assigned to documents in the lead case, *Azor-El v. City of New York*, 20 CV 3650 (KPF) (S.D.N.Y.).

¶ 5.) The Department also instituted screening and testing protocols for newly admitted incarcerated persons, in addition to implementing daily screening of all staff entering DOC facilities and offering free testing for staff on-site or through a private healthcare provider, Northwell Health. (Feeney Decl. ¶¶ 16, 52-57, 63-65; Yang Decl. ¶¶ 6-9, 17-19.) The Department also procured more than sufficient supplies of surgical and N-95 masks, which continue to be provided to incarcerated persons and staff, in addition to encouraging social distancing while restricting movement within facilities to hinder the spread of COVID-19. (*See* Feeney Decl. ¶¶ 24, 44-45, 57, 60, 63.)

These efforts reflect a robust, thorough, and carefully thought-out response to the outbreak of COVID-19, all in an effort to provide a safe environment to incarcerated persons that compares favorably with other correctional facilities, whose efforts have been countenanced by courts in New York and elsewhere. *E.g.*, *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020); *Chunn v. Edge*, 465 F.Supp.3d 168 (E.D.N.Y. 2020); *People ex rel. Stoughton v. Brann*, 128 N.Y.S.3d 491 (App. Div. 1st Dep't 2020).

ARGUMENT

A. Legal Standard.

"[P]reliminary injunctive relief 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"·*Anderson v. Cameron*, 568 F. App'x 67, 68 (2d Cir. 2014) (quoting *Moore v. Consol. Edison of N.Y., Inc.*, 409 F.3d 506, 510 (2d Cir. 2005)). To satisfy this burden, a party "must show: (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (citation omitted).

Additionally, the Second Circuit has "held the movant to a heightened standard where: (i) an injunction is 'mandatory,' or (ii) the injunction 'will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits."·*New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (quoting *Tom Doherty Assocs. Inc. v Saban Entm't. Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995)). "When either condition is met, the movant must show a 'clear' or 'substantial' likelihood of success on the merits and make a 'strong showing' of irreparable harm, in addition to showing that the preliminary injunction is in the public interest." *Id.* (internal citations omitted). A mandatory injunction is one that would "alter the status quo by commanding some positive act," as opposed to being "prohibitory" by seeking only to maintain the status quo. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund. Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010). This heightened standard is consistent with "[t]he purpose of a preliminary injunction, [which] is . . . to preserve the relative position of the parties." *N. Am. Soccer League*, 883 F.3d at 37-38 (citation omitted).

Here, the requested injunction is mandatory, as Plaintiffs[5] seek to alter current DOC protocols by adding additional requirements, which DOC deems redundant or unnecessary. Specifically, Plaintiffs seek (1) ready availability of hand sanitizers to incarcerated persons, a security risk due to its alcoholic and inflammatory properties; (2) access to disinfecting wipes, especially for telephones, which is unnecessary and redundant in light of DOC's current sanitizing protocols; (3) mandatory testing of officers which DOC believes cannot be imposed by

[5] "[A]n inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006). Only three inmates remain in the Department's custody: Azor-El, Barnar, and Cole, the remainder having been released or transferred to the custody of the State of New York before the filing of the operative Amended Complaint. (Am. Compl. ¶¶ 10-11, 13-14, 16.)

fiat (and would need to be collectively bargained); and (4) enforcement of DOC's existing mandate that staff wear masks, which DOC currently enforces through progressive discipline. (*See generally* Pls.' Mot. for Prelim. Inj. 1-2, Jan. 22, 2021, ECF No. 65.)

As discussed below, Plaintiffs flatly cannot meet their burden as it relates to the 'likelihood of success' and 'balance of the equities' prongs of the analysis, and the 'irreparable harm' analysis is less than certain from Plaintiffs' perspective, in light of DOC's robust COVID-19 protocols.

B. Plaintiffs Cannot Demonstrate That DOC Acted With Deliberate Indifference, As DOC Promulgated And Implemented Comprehensive Protocols to Combat COVID-19, And Thus Plaintiffs Cannot Show a Likelihood of Success on the Merits; In Addition, While Defendants Do Not Dispute That An Infectious Disease Can Cause Irreparable Harm, This Is Tempered By DOC's Monitoring Of Detainees And The Availability of Free Testing to All Inmates And Staff, As Well As The Availability of Comprehensive Medical Care to the Detainees In Custody.

Although only three Plaintiffs are presently in DOC custody and are housed at the NIC, (Am. Compl. ¶¶ 9, 12, 15), Plaintiffs seek a preliminary injunction requiring preventive measures beyond the Department's comprehensive measures already in place to combat COVID-19. Specifically, Plaintiffs seek: (a) provision of alcohol-based hand sanitizer to incarcerated persons who do not present a "particularized threat of misuse"; (b) provision of sanitary wipes or disposable cloth wipes with sanitizer; and (c) implementation of a mandatory daily testing regime of DOC staff; and (d) enforcement of DOC's existing requirement that staff wear masks, including through discipline. (Pls.' Mot. for Prelim. Inj. 1-2, Jan. 22, 2021, ECF No. 65.) However, these measures are either not necessary or are redundant in light of DOC's comprehensive protocols to combat COVID-19.

At the same time, Defendants do not dispute that COVID-19 presents an exceptional challenge to officials who operate detention centers, nor does the Department deny that older incarcerated persons and those with certain underlying medical conditions are at

greater risk than others. (*See* Feeney Decl. ¶¶ 12-13, 68.) To date, several courts in this Circuit have made such findings, *see, e.g.*, *Basank v. Decker*, 449 F.Supp.3d 205, 212-13 (S.D.N.Y. 2020) (collecting cases).

While other courts have passed varying judgments on the response to the COVID-19 in federal detention facilities,[6] many of which arose in the context of individual 'compassionate release' or *habeas* applications, the City of New York implemented a robust and aggressive set of protocols designed to respond to the coming crisis in February 2020. (*See generally* Feeney Decl.) As a result, DOC has been able to manage the pandemic with a wide array of services and procedures based on recommendations of the CDC and City and State health authorities. (*See id.* ¶ 11.) Perhaps most significantly, all newly admitted incarcerated persons were screened before entry, offered testing and were quarantined in separate jails pending medical clearance. (*Id.* ¶¶ 16; *see also* Yang Decl. ¶¶ 6-16.) Now that there appears to be the anticipated second wave, as discussed below, DOC has instituted further protective measures, as its officials remain attentive and responsive to changing conditions arising out of the pandemic. (*E.g.*, Feeney Decl. ¶ 37-38 (discussing opening of formerly closed housing areas to permit separation of COVID-positive or COVID-symptomatic incarcerated individuals); *see also* Yang Decl. ¶¶ 14-15.)

C. Irreparable Harm

In the Second Circuit, a "showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v.*

[6] *E.g.*, *Fernandez-Rodriguez v. Licon-Vitale*, 470 F.Supp.3d 323 (S.D.N.Y. 2020) (reviewing conditions in the federal Metropolitan Correctional Center in Manhattan); *Chunn v. Edge*, 465 F.Supp.3d 168 (E.D.N.Y. 2020) (reviewing conditions in the federal Metropolitan Detention Center in Brooklyn).

Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citation omitted). To demonstrate irreparable harm, movants must establish that "absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* In this action, because Plaintiffs seek a mandatory injunction, they must also "make a 'strong showing' of irreparable harm." *Schneiderman*, 787 F.3d at 650 (internal citations omitted).

As an initial matter, Defendants acknowledge that a vulnerable person's infection with a serious communicable disease can constitute irreparable harm and that congregate settings, such as jails, present unique concerns in the midst of a pandemic. Effective and thoughtful measures can be taken to keep jails and their occupants safe, however. In this action, the Department's wide panoply of protective measures undermines any contention by Plaintiffs that potential harm is "actual and imminent." Perhaps the most important protocol adopted was the screening and evaluating all new incarcerated individuals, offering free testing, and imposing a quarantine until cleared by medical staff. (Feeney Decl. ¶¶ 16, 57, 63-65; Yang Decl. ¶¶ 6-9.) This included opening a closed facility, the Eric M. Taylor Center, to house positive or symptomatic inmates. (Feeney Decl. ¶ 36; Yang Decl. ¶¶ 14-16.) When the numbers of positive and symptomatic incarcerated persons declined sufficiently, EMTC was again closed. (Feeney Decl. ¶ 37.) However, in response to recent additional cases, the Department again reopened EMTC and also opened additional housing areas in the Robert N. Davoren Center. (*Id.* ¶¶ 37-38; Yang Decl. ¶ 15.)

All entering inmates continue to be offered COVID-19 testing and are held in quarantine until they receive medical clearance. (Feeney Decl. ¶¶ 16, 57, 63-65; Yang Decl. ¶¶ 6-12.) In addition, on-site medical care is available and any emergency cases can be immediately

transported to a hospital. (Feeney Decl. ¶¶ 66-67; Yang Decl. ¶ 29.) The Department is also aware that staff members may serve as a potential source of viral transmission. (P. Feeney Nov. 10, 2020 Depo. Tr. 108:18-24, *attached as* Exhibit D to Pls.' Mem. of Law, ECF No. 67-4.) In response to this possibility, DOC encourages testing, offers free testing on- and off-site, requires temperature checks of staff before entering the Department's facilities, and also requires staff to complete a health screening questionnaire before reporting to work. (Feeney Decl. ¶¶ 55-56; Yang Decl. ¶ 7.) More recently, CHS began vaccinating its own staff, in addition to vaccinating certain high-risk incarcerated persons. (Yang Decl. ¶¶ 21-22.) CHS also provided COVID-19 vaccinations to DOC staff, until DOC was able to arrange for vaccinations on-site through a third-party vendor. (Yang Decl. ¶ 24; Feeney Decl. ¶ 54.) Therefore, in light of the extensive COVID-19 responses discussed in the Feeney and Yang declarations, it is clear that the harm faced by Plaintiffs is considerably tempered by the Defendants' protocols, and so, while potentially serious, is not actual and imminent such that continued incarceration in the NIC presents irreparable harm to Plaintiffs. Consequently, Plaintiffs are not entitled to a preliminary injunction.

Separately, there are factual deficiencies in Plaintiffs' assertion of irreparable harm. Aside from an unsupported assertion in the Amended Complaint that their conditions put them at "high risk of serious illness or death if they contract (or re-contract) COVID-19," (Am. Compl. ¶ 50), Plaintiffs proffer no evidence that they are particularly vulnerable to negative outcomes from an infection with COVID-19. Although they describe their sleep apnea, Plaintiffs Azor-El, Barnar, and Cole do not proffer medical documentation substantiating their diagnoses

with this condition or whether it does indeed place them at increased risk.[7] Insofar as Plaintiffs do assert that they are medically vulnerable—an assertion that goes to the heart of whether Defendants were deliberately indifferent to this vulnerability and whether Plaintiffs indeed face irreparable harm—the Court and Defendants remain in the dark. Without this fundamental information, Plaintiffs cannot be said to have made a "strong showing" of irreparable harm that would justify the issuance of their desired mandatory preliminary injunction.

D. Likelihood of Success On The Merits

As discussed above, the extensive COVID-19 protocols in place thankfully undermine the possibility of irreparable harm; and in any event, these protocols definitively rebut any contention that Plaintiffs can establish a likelihood of success on the merits, the other essential prong needed to receive a preliminary injunction.

Prison conditions can constitute "cruel and unusual punishment" if prison officials act (or fail to act) with **"**deliberate indifference to a substantial risk of serious harm to a prisoner." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); *see also Estelle v. Gamble*, 429 U.S. 97 (1976). While the Eighth Amendment does not apply to pretrial detainees, as they have not been convicted and thus may not be punished, *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (citing *Iqbal v. Hasty*, 490 F.3d 143, 168 (2d Cir. 2007)), the Supreme Court has held that

[7] Since October 2020, Defendants' counsel has repeatedly requested, in both emails and in telephone conversations (and to no avail), that they be provided with HIPAA authorizations so that Plaintiffs' medical records may be collected and reviewed. Indeed, some of the Plaintiffs have alleged that they have COVID-19 antibodies. (*E.g.*, Am. Compl. ¶¶ 51, 53.) Without knowing more from Plaintiffs' medical records, Defendants highlight that this may have bearing on the level of risk posed to Plaintiffs.

It is apparent, however, that the Plaintiffs have varying medical conditions (a potential impediment for class certification) and determining the risk that COVID-19 poses to each of them will require a more granular analysis than has been articulated by Plaintiffs to date.

pretrial detainees' "rights are 'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" *Darnell*, 849 F.3d at 29 (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

To establish that his Fourteenth Amendment rights have been violated by his conditions of confinement, a pretrial detainee must satisfy a test with two prongs, one objective and one subjective. *Darnell*, 849 F.3d at 29. As to the objective prong, the detainee must "show that the conditions [of his confinement], either alone or in combination, pose an unreasonable risk of serious damage to his health," an analysis that "must be evaluated in light of contemporary standards of decency." *Id.* at 30 (internal quotations omitted); *see also Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996) (describing an objectively serious condition as one that poses "a substantial risk of serious harm") (citing *Farmer*, 511 U.S. at 834). This analysis also focuses on the actual conditions of the detainee's confinement after, or in the light of, the steps the facility has taken to mitigate the danger. *See Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (noting that analysis of objective seriousness of exposure to environmental tobacco smoke would change depending on facility's management of smoke). Second, with respect to the subjective prong, a correctional official must possess "a 'sufficiently culpable state of mind,"' in order to violate a detainee's constitutional rights, and "[i]n prison-conditions cases . . . [this state of mind] is one of 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). Specifically, a pretrial detainee must show that "defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the

condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35. Plaintiffs cannot establish that they are likely to prevail on either prong.

(a) Objective Prong

Given the measures that DOC has instituted to address COVID-19, Plaintiffs have not shown a clear likelihood of success in demonstrating that they face "a substantial risk of serious harm" from conditions at the NIC. *Lewis v. Siwicki*, 944 F.3d 427, 430-31 (2d Cir. 2019) (quoting *Farmer*, 511 U.S. at 834). Although Defendants do not dispute the serious nature of COVID-19 and freely acknowledge that a congregate jail setting is a challenging environment in which to combat an infectious disease, the panoply of protective measures in place—based on experience derived from prior pandemics—ensures that incarcerated persons do not face an unreasonable risk of serious harm to their health and safety. (*See* Feeney Decl. ¶¶ 12-13; Yang Decl. ¶ 31.)

As set forth in the accompanying Feeney and Yang declarations, during intake, DOC and its correctional health partner, CHS, screen all incarcerated persons at admission for COVID-like symptoms, offers them free COVID-19 testing, and if that testing is accepted, separates them until a COVID-19 test result is returned. (Feeney Decl. ¶¶ 16, 63-65; Yang Decl. ¶¶ 6-9.) If an incarcerated person refuses to be tested for COVID-19 at admission, then they are quarantined for 14 days. (Feeney Decl. ¶ 63.) If, at admission or afterwards, CHS determines that a person has COVID-19, these persons can also be quarantined in the Department's Communicable Disease Unit, which has negative air pressure rooms, until their symptoms abate. (*Id.* ¶¶ 35, 64.) CHS must then clear the incarcerated person for admission or readmission to a General Population housing area. (*Id.* ¶ 63.)

As with the incarcerated individuals, staff cannot be compelled to take a COVID-19 test, but tests are available at no charge (and staff are encouraged to get tested) on Rikers, and

staff may also elect to get tested for free at a Northwell Health urgent care center. (Feeney Decl. ¶¶ 52-53.) In addition, staff entering the Rikers Island facilities must undergo a temperature check and fill out a health screening questionnaire. (Feeney Decl. ¶ 56; Yang Decl. ¶ 7.) Also reflecting an aggressive approach to staying ahead of the COVID-19 virus is the fact that CHS received authorization to vaccinate its own staff on December 28, 2020, after securing recognition that its staff were healthcare workers as defined in Phase 1a of the State's vaccine priority groups. (Yang Decl. ¶ 21.)

To the State of New York, CHS also advocated for vaccination of its highest-risk incarcerated patients by contending that they were clinically analogous to other priority groups for which vaccination had been authorized, *e.g.*, residents of community-based facilities operated by various State of New York agencies. (Yang Decl. ¶ 22.) In light of this advocacy, on January 6, 2021, CHS secured authorization to vaccinate these high-risk incarcerated patients,[8] and to date, CHS is the first and only correctional healthcare provider in the State to have received such authorization. (*Id.* ¶¶ 22-23.) As of January 27, 2021, 259 incarcerated persons had received the first dose of a COVID-19 vaccination. (*Id.* ¶ 23.)

When the State government authorized the vaccination of persons in Phase 1b, which includes correction officers, CHS offered to vaccinate DOC staff. (Yang Decl. ¶ 24.) CHS continued to vaccinate DOC's staff, until DOC was able to secure a private vendor to provide these vaccinations. (*Id.*) Vaccinations remain available to DOC staff in Phase 1b free of charge. (Feeney Decl. ¶ 54.)

[8] Because it has not been provided with HIPAA authorizations permitting access to Plaintiffs' medical records, the Department is unaware if any of the Plaintiffs herein were among these vaccinated incarcerated persons.

In the housing areas—which may be a dormitory setting or individual cells—transfers of inmates and staff are discouraged, so as to minimize needless contact with other and potential exposure. (Feeney Decl. ¶¶ 57.) Many inmate services are now provided in the housing area themselves to further minimize travel and potential contacts. (*E.g.*, Feeney Decl. ¶ 24(e)(4).) Social distancing is encouraged, and incarcerated persons sleep with an empty bed between them, and where that is not possible, they sleep head-to-toe. (*Id.* ¶¶ 24, 32.) Sinks with water and soap are readily available, and bathrooms and housing areas are cleaned and sanitized three times a day, with at least nine captain-led audits per day, in addition to regular inspections by the Environmental Health Unit, by a special compliance unit, and by others. (*See id.* ¶¶ 19-23.) Finally, the filters used in the NIC were upgraded to MERV 13 filters, which meet the standards for filtration and air quality in correctional facilities, and the NIC's fans were set to 100% fresh air intake. (Reilly Decl. ¶ 9.)

Masks are available to inmates and staff, and staff members are required to use them when within six feet of someone. (Feeney Decl. ¶ 41.) Incarcerated individuals can request masks from the officers and staff in their housing areas, where masks are available in plentiful supply (indeed, the Department currently has six months' worth of PPE in reserve and has not had a shortage of PPE at any point during the pandemic), should they wish a mask or if their mask is soiled or worn out. (*See id.* ¶¶ 44-45.) DOC instituted a progressive disciplinary system for officers who do not wear a mask, and also employs a mentoring program to encourage compliance with DOC's directives on mask-wearing. (*See id.* ¶¶ 41-42.) The Department primarily provides surgical masks to staff and inmates, though staff who are working with incarcerated persons with COVID-19 or with symptoms of COVID-19 are provided N-95 masks, which have greater filtration properties. (*See id.* ¶ 44.)

Moreover, in state-court *habeas* proceedings brought by incarcerated persons seeking release on the grounds of allegedly unconstitutional conditions of confinement, courts have noted that the Department created an environment in which the risk facing incarcerated individuals was not unreasonable. *E.g.*, *People ex rel. Stoughton v. Brann*, 128 N.Y.S.3d 491, 494-96 (App. Div. 1st Dep't 2020). In fact, although three incarcerated persons have sadly died in custody due to COVID-19, this number has thankfully remained constant since at least April 23, 2020. *Compare* N.Y.C. Bd. of Corr., *Weekly COVID-19 Update: Week of Jan. 16 – Jan. 22, 2021* 3 (Jan. 26, 2021), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-01-16-01-22-21.pdf, *with* N.Y.C. Bd. of Corr., *Daily Covid-19 Update: Thursday, Apr. 23, 2020* 1 (Apr. 23, 2020), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_4_23_2020.pdf, *and* N.Y.C. Bd. of Corr., *Daily Covid-19 Update: Wednesday, Apr. 22, 2020* 1 (Apr. 22, 2020), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/May-11-Updates/Board%20of%20Correction%20Daily%20Public%20Report_4_22_2020%20-%20FINAL.pdf. This a proportionately lower death rate than found in the wider City of New York. *Stoughton*, 128 N.Y.S.3d at 495. Coupled with the fact that each jail has a medical clinic on-site (and the NIC facility where all of the Plaintiffs were housed is itself a clinical-level facility with additional medical staffing), this reveals that the conditions of Plaintiffs' confinement compare favorably to the conditions at large in the general public. Plaintiffs thus fail to establish a show a 'clear' or 'substantial' likelihood of success on the merits because they cannot satisfy the requisite objective prong.

ii. Subjective Element

Plaintiffs must also show a 'clear' or 'substantial' likelihood of success in establishing the subjective prong of a Fourteenth Amendment conditions-of-confinement violation. To do so, Plaintiffs must show that DOC officials "acted intentionally" in subjecting Plaintiffs to their conditions of confinement or that DOC officials "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the [Plaintiffs] even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35.

In this case, the DOC's chief official for COVID-19 response, Deputy Commissioner Feeney, has submitted a declaration demonstrating the Department's commitment to providing a safe and healthy environment for inmates in its care. The Department's senior staff was well aware of the significance of COVID-19, having experienced prior public health emergencies, and far from turning a blind eye, immediately began implementing a robust preventive program to address the issue, as described above and in Deputy Commissioner Feeney's Declaration.

Deputy Commissioner Feeney reveals that the Department began planning for COVID-19 in February 2020, by relying on its experience navigating other public health emergencies like avian flu and H1N1. (Feeney Decl. ¶ 9-14) After enhancing its sanitization requirements, the Department also established several layers of auditing, in which facility supervisors and command staff would be notified of any lapses or short comings in the course of the pandemic. (*See id.* ¶¶ 22-24.) The Department also ensured that all inmates and officers were (and are) given masks, and DOC currently has a six month supply of PPE in its storehouse. (*Id.* ¶¶ 41-45.) The Department also worked in tandem with its health provider, CHS, to develop protocols whereby new admissions to DOC's custody were screened for COVID-19 symptoms,

could be tested on consent, and quarantined until cleared by medical staff. (*Id.* ¶ 64; Yang Decl. ¶¶ 6-9.) Incarcerated persons who tested positive or were symptomatic were separately housed in facilities that were designated to house these individuals, including facilities that had previously been closed and were brought back online in response to the pandemic. (Feeney Decl. ¶¶ 36-38; *see also* Yang Decl. 10-16.) At the same time, DOC worked with CHS to determine if incarcerated persons who were particularly at risk to complications from COVID-19 could safely be released to reduce the population in DOC facilities, and a number of incarcerated persons were released as a result of this review. (Feeney Decl. ¶ 14; Yang Decl. ¶ 5.)[9]

While social distancing remains a difficult containment method in a jail setting, DOC continually advises inmates to socially distance where possible. For example, in dormitory areas where an empty bed cannot be placed between sleeping incarcerated individuals, detainees are told to sleep head-to-foot, so they do not directly face each other. (Feeney Decl. ¶ 32.) These efforts to maintain social distancing in housing areas (to which, again, potential exposure to COVID-19 is already controlled through the use of PPE, CHS-supervised testing at admission, and regular sanitization), have proven effective, if not perfect.

Additionally, while DOC cannot compel testing of its staff—due to collective bargaining obligations[10]—it urges staff to get tested, and offers free on-site testing on Rikers

[9] Other incarcerated individuals availed themselves of *habeas* petitions, including some of the Plaintiffs in this action. Indeed, Ronnie Cole unsuccessfully sought release based on the conditions of his confinement. *People ex rel. Coleman v. Brann*, 260197/20, 2020 N.Y. Misc. LEXIS 5696, at *3-6, 13-15 (Sup. Ct. Bronx Cnty. Apr. 9, 2020) (holding that DOC not deliberately indifferent to conditions of Cole's confinement and finding that his "substantial violent criminal history, the nature and seriousness of the crimes for which he is currently charged, and his recent history of repeatedly defying the terms of his parole" made him a "serious flight risk").

[10] As intimated below, given the issues of bodily integrity that would accompany any injunction directing mandatory testing or vaccination, the Department respectfully submits that the labor

Island, and off-site at Northwell Health urgent care centers. (Feeney Decl. ¶¶ 52-53.) In addition, DOC does take temperatures of staff entering the facility, and requires completion of a health screening form before entry. (*Id.* ¶ 56; Yang Decl. ¶ 7.) DOC requires masks when staff is within six feet of another person, and staff assigned in areas that do not have nearby bathrooms and sinks (such as corridors or outside yards), are given hand sanitizer. (*Id.* ¶¶ 41, 48.)

The foregoing represent both existing policies and practices that have continued through the COVID-19 pandemic and those that DOC has modified as conditions changed, demonstrating the Department's attentiveness and focus, rather than a deliberate indifference. Other instances where DOC has adjusted its approach include the introduction of disciplinary consequences for officers who fail to comply with DOC's mask requirement[11] and the reliance on a mentoring unit to foster peer-to-peer monitoring of compliance. (Feeney Decl. ¶¶ 41-42.) These coercive and persuasive approaches to staff non-compliance with mask-wearing mandates evidence that DOC is not indifferent to the risks that staff may pose to incarcerated persons, and to the extent that there may continue to be intransigent staff, DOC mitigates these risks by screening them at entry to facilities, regularly sanitizing surfaces, and providing masks to incarcerated persons.

DOC's lithe responsiveness also demonstrates that it has not been deliberately indifferent to the risks posed by COVID-19. DOC reopened the EMTC facility—twice—in order to manage and to separately house ascendant numbers of COVID-symptomatic or -positive

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organizations that represent correction officers and other DOC staff should, as a matter of equity, be heard before any mandate to this effect is issued.

[11] The Department notes that Plaintiffs only seek to compel DOC staff to wear masks, rather than incarcerated persons.

incarcerated individuals. (Feeney Decl. ¶¶ 36-39.) Clearly, this cannot fairly be characterized as intentional or reckless disregard to the risk of introduction of COVID-19 into housing areas.

While Plaintiffs cite several purported deficiencies they believe constitute evidence of deliberate indifference, Deputy Commissioner Feeney's Declaration highlights why these allegations do not establish the unconstitutional conditions of Plaintiffs' confinement, but rather amount to a description of Plaintiffs' preferred response to the COVID-10 pandemic. For example, Plaintiffs believe disinfecting wipes should be available at telephone stations, yet DOC has already attempted to use disinfecting wipes and has found that they result in clogged toilets, thus posing a sanitation issue (and a potential security issue if incarcerated individuals must be moved to clean or fix the toilets). (Feeney Decl. ¶ 59.) In any event, located near the telephones is a bucket of Virex sanitizer and sponges for inmate use, and if sanitizer is not within arm's reach, it may be accessed by incarcerated individuals. (*Id.*)

Plaintiffs also criticize DOC for purportedly inadequately issuing PPE to kitchen staff and pantry aides and generally operating in an unsanitary manner. (*E.g.*, Azor-El Decl. ¶ 11.) However, as a threshold matter, COVID-19 is not a food-borne illness, thus Plaintiffs allegations seem misplaced. In any event, under DOC procedures, kitchen workers with direct hand contact with food must (and do) wear gloves as required by the Health Code. (*See* Feeney Decl. ¶¶ 60-61.)

Plaintiffs also contend that inmates should be given personal bottles of hand sanitizer. However, DOC notes that hand sanitizer is deemed contraband in the jails, as alcohol can be ingested or used to set fires. (Feeney Decl. ¶ 48-50.) And in any event, because each dormitory area has multiple sinks with soap, there is no need for hand sanitizer, and the CDC notes that hand washing with soap is preferable. (*Id.* ¶ 48 (citing Ctrs. for Disease Control &

Prevention, *Interim Guidance on Mgmt. of Coronavirus Disease 2019 (COVID-19) in Correctional & Detention Facilities*, "Operations, Supplies, and PPE Preparations" section (last updated Jan. 19, 2021), *available at* https://perma.cc/L3LC-FVAB).) In addition, each celled area has a sink with running water in each cell. (*Id.* ¶ 28.)

While Plaintiffs may wish for the Department to take a different tack on each of the foregoing responses to COVID-19, the Department deserves deference to the exercise of its discretion in determining, for example, whether the provision of potentially dangerous sanitizer is unwarranted given incarcerated individuals' ready access to soap and water. The Supreme Court has urged that courts provide such deference, *see Overton v. Bazzetta*, 593 U.S. 126, 132 (2003), and this Court should follow suit.

D. DOC Compares Favorably with Other Jails found to be Acting Constitutionally

In similar recent challenges to detention systems, Courts have denied injunctive relief based on findings that the systems implemented sufficient protocols to belie any findings of deliberate indifference to the risks of COVID-19. These protocols are comparable to those used by DOC. For example, in *Chunn v. Edge*, 465 F.Supp.3d 168 (E.D.N.Y. 2020), the Court found that the following protective measures refuted any suggestion that officials at the Metropolitan Detention Center ("MDC") in Brooklyn acted with deliberate indifference:

> The evidence shows that MDC officials have been acting urgently to prevent COVID-19 from spreading and from causing harm. They have imposed dozens of measures, such as (i) enhancing intake screening procedures for all inmates and staff, (ii) providing soap and other cleaning products to inmates at no cost, (iii) increasing cleaning of common areas and shared items, (iv) isolating symptomatic inmates, (v) broadly distributing and using PPE to prevent transmission of the virus, and (vi) modifying operations throughout the facility to facilitate social distancing to the greatest extent possible and abate the risk of spread. Taken together, these and other measures indicate that prison officials are "trying, very hard, to protect inmates against the virus and to treat

> those who have contracted it," and belie any suggestion that prison officials "have turned the kind of blind eye and deaf ear to a known problem that "would indicate" deliberate indifference.

465 F.Supp.3d at 202-03 (quoting *Money v. Pritzker*, No. 20-cv-2093, 2020 U.S. Dist. LEXIS 63599, 2020 WL 1820660, at *18 (N.D. Ill. Apr. 10 2020) and *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020)).

Similarly, in *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020), the Eleventh Circuit upheld a district court finding that certain COVID-19 measures were sufficient to stave off allegations of deliberate indifference. The Court concluded that, because "the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures," the defendant Miami-Dade Corrections and Rehabilitations Department's response likely did "not amount to deliberate indifference." 958 F.3d at 1090.

So too has DOC instituted these or similar measures—and more. As repeatedly set forth *supra*, the Department screens and isolates incoming inmates; offers free testing to inmates and staff; employs a rigorous sanitizing regimen with multiple levels of oversight; makes available ample PPE supplies and ready access to soap and water and sanitizing fluid; minimizes movement between facilities and housing areas and cohorts inmates and their assigned officers; uses best efforts to allow social distancing; provides services to inmates within the housing area; provides masks to inmates and staff and encourages their use; and offers free vaccinations to staff. (*See generally* Feeney Decl.)

E. Dr. Herrington's Declaration.

Plaintiffs submit a declaration of Dr. Ryan Herrington, a medical director for the Washington State Department of Corrections (Harrington Decl., ECF No. 67-6.) The key point of contention in this Declaration seems to be availability of hand sanitizer inside the jails. (*See*

Herrington Decl. ¶¶ 8-13.) Specifically, Dr. Herrington believes that access to soap and water alone is not enough to ensure sanitization of hands, (*id.* ¶ 11), but this is inconsistent with CDC guidelines that recommends sanitizer when soap and water is not available and if security conditions permit. (Feeney Decl. ¶ 48 (citing Ctrs. for Disease Control & Prevention, *Interim Guidance on Mgmt. of Coronavirus Disease 2019 (COVID-19) in Correctional & Detention Facilities*, "Operations, Supplies, and PPE Preparations" section (last updated Jan. 19, 2021), *available at* https://perma.cc/L3LC-FVAB).) Nevertheless, Dr. Herrington offers various strategies to dispense sanitizer, (*id.* ¶ 13), which he believes alleviates security issues, but that judgment is not his to make. Congress has specifically instructed federal courts to be highly conscious of the unique security needs of prisons and, accordingly, to be deferential to the judgment of administrators who have unique expertise. *E.g.*, 18 U.S.C. § 3626(a)(2) (instructing courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief"); *see also Overton*, 593 U.S. at 132 ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."); *Carolina v. Feder*, No. 3:20-CV-658 (SRU), 2021 U.S. Dist. LEXIS 14102, at *19-20 (D. Conn. Jan. 26, 2021) (holding that substantial deference due to prison officials during COVID-19 and declining to find that the decision of healthcare professionals to quarantine an inmate amounted to deliberate indifference).

Here, Deputy Commissioner Feeney has pointed out that inmates who set fires and splash officers with various fluids are longstanding issues in detention systems like DOC's. (*See* Feeney Decl. ¶ 50.) Her judgment on whether sanitizer is necessary is entitled to deference

over that of Dr. Herrington, whose correctional system may be considerably different from that in New York City.

Similarly, Dr. Herrington's suggestion that sanitizing wipes be doled out under close supervision, (Herrington Decl. ¶ 15), is a largely unremarkable one, but frankly amounts to micromanaging the quotidian operation of a large correctional system, which courts often avoid. Furthermore, DOC ran a pilot program with sanitizing wipes and found that it resulted in incarcerated individuals flushing them down toilets rather than throwing them away, thus clogging toilets. (Feeney Decl. ¶ 59.) DOC's judgment is that sanitizing wipes are not worth the downside, especially as sanitizing fluids are readily available to incarcerated individuals. (*Id.* ¶ 58.) The Department is entitled to utilize its resources in the manner it deems most appropriate, and its determination of such is entitled to this Court's deference. *See Overton*, 593 U.S. at 132.

As to Dr. Herrington's recommendations about imposing discipline for non-compliance with mask-wearing mandates, this is a moot point, as DOC staff are already subject to discipline when they fail to wear a mask within six feet of an individual. (Feeney Decl. ¶ 41.) However, the Department, in the exercise of its discretion, believes that coercion should be sparingly wielded to garner compliance with public health efforts. (*Id.* ¶ 42.) As noted above, the case law grants broad deference to the discretion of jail officials in how they manage their institutions.

As to mandatory testing, Dr. Herrington notes that "there is a regimen for correctional staff at high risk facilities" in the State of Washington. (Herrington Decl. ¶ 19.) Notably, Dr. Herrington does not state if this regimen is mandatory or voluntary, or how this regimen differs in the facilities where he does not work. In any event, an attempt in the City of New York to implement a mandatory testing regimen would likely implicate "bodily integrity"

issues under the Due Process Clause and, if deemed a condition of employment, would require collective bargaining; governmental employees do not lose their rights simply because there is a pandemic. For these reasons, DOC believes that the wiser policy is to make testing freely available to staff and to repeatedly encourage them to use the Department's on-site testing or the Northwell Health urgent care centers. (Feeney Decl. ¶¶ 52-53.)

DOC agrees with Doctor Herrington about the value of social distancing, and does what it can to encourage its implementation in practice: The Department has released inmates, restricted internal travel and activities, and posts messages to remind all of the benefits of social distancing. (Feeney Decl. ¶¶ 14, 24, 57.) Although social distancing is more easily accomplished in DOC's celled facilities, (*id.* ¶ 34), DOC's anti-transmission efforts through the use of sanitization, PPE, and close coordination with CHS in the dormitory settings appropriately mitigates any risks posed by the difficulties of maintaining distance in a congregate correctional setting.

Finally, as to Dr. Herrington's concerns about good ventilation, the DOC does not dispute that ventilation is important. As set forth in the accompanying declaration of Richard C. Reilly, the NIC facility has been renovated in recent years, and DOC has installed MERV 13 filters, which have correctionally appropriate filtration and air quality ratings, and also set the NIC fans to "100% fresh air intake." (Reilly Decl. ¶ 9.) In addition, DOC has a Communicable Disease Unit with double-doored, negative air pressure rooms for a capacity of up to 98, with 88 rooms currently operable, and in which a COVID-positive or -symptomatic person may be housed. (Feeney Decl. ¶¶ 35-36.)

F. Anti Disability Discrimination Claims.

Plaintiffs claim that they have been discriminated against under the Americans with Disabilities Act ("ADA") and Rehabilitation Act "by failing to protect medically-vulnerable prisoners in the… NIC." (Pls.' Mem. of Law 24.) These claims appear to be an afterthought and subsumed by Plaintiffs' Section 1983 claim, as Plaintiffs devote about a page of their brief to the topic, which is conclusory and does not even describe the Plaintiff's disabilities. (*Id.* at pp. 24-25.)

According to their Declarations, the three inmates who remain in NIC all have Obstructive Sleep Apnea ("OSA") which requires use of a C-PAP machine while sleeping, (Azor-El Decl. ¶ 5; Barnar Decl. ¶ 7; Cole Decl. ¶ 6); hence they are housed in the Department's infirmary facility. As with their Section 1983 claim, they claim that they are at risk by the general lack of good sanitation and failure to provide wipes and sanitizer and by the failure to mandate testing of officers, and they appear to contend that these alleged shortcomings constitute a denial of reasonable accommodations. (Pls.' Mem. of Law 25.) However, they do not offer a causal connection between their disabilities and the alleged lack of good sanitation, or describe what accommodation would alleviate their condition.

To establish that their rights have been violated under the ADA and the Rehabilitation Act, each Plaintiff must show that that "'(1) he is a qualified individual with a disability; (2) the defendant is subject to one of the Acts; and (3) he was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant *because of his disability*.'" *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 196-97 (2d Cir. 2014) (emphasis added) (quoting *McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir. 2012)). In other words, to establish that the denial of "sanitary wipes, hand sanitizer, testing, and other measures," (Pls.' Mem. of Law 25), was

discrimination because of Plaintiffs' disability, Plaintiffs must show that the Department provided these things to some incarcerated individuals but denied them "to disabled [incarcerated individuals]" like Plaintiffs. *See Forziano v. Indep. Group Home Living Program*, 613 F.App'x 15, 18 (2d Cir. 2015) (citing *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999)). Yet by asserting that their desired anti-COVID measures are denied to all incarcerated individuals in the Department's custody, Plaintiffs defeat their own claims under the ADA and the Rehabilitation Act. Defendants "cannot have unlawfully discriminated against plaintiffs by denying a benefit that they provide to no one." *Id.* (citing *Rodriguez*, 197 F.3d at 618). Plaintiffs' self-defeating argument does not establish a strong likelihood of Plaintiffs' success on the merits of these anti-discrimination claims.

Furthermore, it is difficult to conceptualize better sanitation procedures as an "accommodation." The appropriate accommodation would instead seem to be the provision of the C-PAP machines and placement in a medically suitable facility, where clinical staff is available to treat them for any issues that may arise from their OSA—the exact type situation in which Plaintiffs find themselves, as they are housed at the NIC. To the extent that Plaintiffs contend that the general sanitization of their housing could be improved, that is quintessentially a Section 1983 claim, rather than one tied to any Plaintiff's particular disability.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that Plaintiffs' motion for preliminary injunctive relief should be denied.

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