**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

CLIFTON BELTON, JR., JERRY BRADLEY, CEDRIC FRANKLIN, CHRISTOPHER ROGERS, JOSEPH WILLIAMS, WILLIE SHEPHERD, DEVONTE STEWART, CEDRIC SPEARS, DEMOND HARRIS, and FORREST HARDY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SHERIFF SID GAUTREAUX, in his official capacity as Sheriff of East Baton Rouge; LT. COL. DENNIS GRIMES, in his official capacity as Warden of the East Baton Rouge Parish Prison; CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE,

Defendants.

Civil Action No. 3:20-cv-000278-BAJ-SDJ

PLAINTIFFS' RESPONSE IN OPPOSITION TO CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE'S MOTION TO DISMISS

Plaintiffs, by and through counsel, file this Response in Opposition to City of Baton Rouge/Parish of East Baton Rouge's Motion to Dismiss and show the Court the following:

INTRODUCTION

Plaintiffs submit this memorandum of law in support of their opposition to the defendant, the City of Baton Rouge/Parish of East Baton Rouge's ("City/Parish" or "Defendant"), motion to dismiss. The City/Parish is responsible for funding and maintenance of the East Baton Rouge Parish Prison ("Jail"), the facility where Plaintiffs are suffering serious, escalating deprivations of their constitutional rights due to their elevated risk of exposure to COVID-19. Plaintiffs' complaint seeks two forms of relief: (1) the subclass of medically vulnerable individuals seeks

release from detention pursuant to 28 U.S.C. § 2241 because the allegations show there is no set of altered conditions, short of release, that could remediate their constitutional injury; and (2) all Plaintiffs separately seek, pursuant to 42 U.S.C. § 1983, an injunction requiring the City/Parish to make critical changes to the Jail's practices and environment to alleviate the risk of infection and danger of substandard medical care that otherwise violate the Plaintiffs' Fourteenth and Eighth Amendment rights.

Despite the force and comprehensiveness of Plaintiffs' factual showing, the City/Parish now seeks to absolve itself of responsibility for the health and safety of Plaintiffs by claiming that (i) this court lacks subject matter jurisdiction over Plaintiffs' federal constitutional claims under 28 U.S.C. § 2241; and (ii) Plaintiffs failed to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), as if this were an ordinary case brought in ordinary times. It is not. As another wave of this lethal virus is spreading throughout Louisiana and the country, the allegations plainly show that City/Parish is ill-prepared to protect Plaintiffs from ongoing constitutional injury. The City's motion should be denied so Plaintiffs can proceed with discovery and present the Court with the full evidentiary record needed to substantiate their constitutional claims and provide appropriate relief.

STATEMENT OF FACTS

The relevant factual allegations of this case were previously recited in the response to the Sheriff Defendants' motion to dismiss[1] and Plaintiff-Petitioners[2] incorporate that factual summary by reference. Plaintiffs likewise incorporate the description of the Plaintiff-Petitioners' factual

---

[1] R. Doc. 99 at 2-9.

[2] The complaint includes a habeas claim under 28 U.S.C. § 2241 as well as constitutional claims under 42 U.S.C. § 1983. The term "Plaintiff-Petitioners" is accordingly used to reflect the diversity of their claims. The terms "Plaintiffs" (for the § 1983 claims) or "Petitioners" (for the habeas claim) may also be used, particularly where a discussion invokes only one type of claim.

record – which ultimately is comprised of 45 declarations by Plaintiffs and other witnesses held at the Jail, as well as 5 declarations by expert witnesses[3] – that have already been presented to this Court (and which can be considered in evaluating the court's jurisdiction under Rule 12(b)(1)).[4]

Attached to this brief and summarized below are nine additional declarations, *see* Exhibits 1-9, demonstrating that the Jail—and the Jail medical staff under the contractual oversight and control of the Defendant—*continues* to subject Plaintiff-Petitioners to a substantial risk of illness so as to confer jurisdiction over the claims. The consistent experiences of dozens of people across cells, lines, and buildings likewise reinforces the plausibility of Plaintiff-Petitioners' claims.

The harrowing details in the attached declarations demonstrate that in the nearly three months since Plaintiffs filed their most recent responsive brief, R. Doc. 99, conditions at the Jail have not only failed to improve, but have, in critical ways, continued to worsen – and this is happening at a time when the pandemic is surging across the nation and the state of Louisiana. The initial "isolation" process, whereby detainees entering the Jail are purportedly "quarantined" before being moved to general population lines, now occurs in a large open-air dormitory of almost 120 beds on the Q9 and 10 lines without any possibility of social distancing.[5] During any two-week "quarantine" period other new detainees are regularly brought onto Q9-10[6] thereby destroying the detainees' isolation, rendering the "quarantine" meaningless, and subjecting the general population into which new detainees are moved to a substantial risk of infection. People were also regularly moved to general population from the Q9-10 line well before their fourteen

[3] R. Doc. 21-4 to 21-13; R. Doc. 67-1 to 67-18; R. Doc. 39 to 39-14; R. Doc. 98-3 to 98-16.

[4] *See* R. Doc. 21-1 at 7-23 (motion for temporary restraining order); R. Doc. 67 at 3-13 (reply in support of motion for TRO); R. Doc. 81 at 1-4 (petitioners' post-hearing brief); R. Doc. 99 at 2-9 (response to Sheriff Defendants' motion to dismiss).

[5] Ex. 1 Durousseau Decl. ¶ 12-17; Ex. 3 Kalivoda Decl. ¶ 8; Ex. 5 Supp'l Bradley Decl. ¶¶ 4, 9-10.

[6] Ex. 5 Supp'l Bradley Decl. ¶¶ 4, 9-10.

day "quarantine" period expired.[7]

The population of the Jail also continues to rise, as the number of COVID-19 cases in Louisiana rises with it. As Dr. Rottnek[8] and Dr. Hassig have explained, a rising detainee population necessarily produces a significantly higher risk of COVID-19 infection, particularly because the inability to social distance or implement other necessary preventive measures concentrates the risk.[9] The growing overcrowding of the Jail during the pandemic has apparently led to increased transfers of detainees from the Jail to other Parish prisons, including the transfers of multiple Plaintiffs and witnesses in this case.[10] As other courts have noted, transfers to and from an incarceration facility can increase the rate of infection.[11] Given such overcrowding, the Jail has even reopened condemned A lines for intake.[12] As the funder of the Jail, the City/Parish is responsible for circumstances that force the Jail's operators to house individuals in condemned sections of the facility that have been deemed not safe for human habitation.[13]

Defendants claim there is a low infection rate, yet they continue to refuse to implement

---

[7] Ex. 1 Durousseau Decl. ¶¶ 12, 21; Ex. 3 Kalivoda Decl. ¶ 8.

[8] In a footnote, the City/Parish attempts to undermine Dr. Rottnek's opinions. R. Doc. 104-2 at 7 n.4. Yet Dr. Rottnek has been admitted by this Court as an expert regarding the adequacy of correctional health facilities. *See* R. Doc. 84 at 97:11-98:22. To the extent the City/Parish now suggests that Dr. Rottnek is unqualified as an expert, that is an issue inappropriately raised in a motion to dismiss. *See, e.g.*, *Walker v. Target Corp*., No. 2:16-cv-42-KS, 2016 WL 10567631, at *2 (S.D. Miss. Dec. 12, 2016) (declining to address *Daubert* arguments until the defendant "present[s] them again with its dispositive motions after discovery has closed").

[9] *See, e.g.*, R. Doc. 98-3, Supp'l Hassig Decl. ¶ 9; R. Doc. 98-14, Supp'l Rottnek Decl. ¶¶ 38-39.

[10] Ex. 8 Supp'l Rogers Decl. ¶ 36; Ex. 1 Durousseau Decl. ¶ 34.

[11] *See, e.g., Garcia v. Wolf*, No. 1:20-cv-821-LMB, 2020 WL 4668189, at *1 (E.D. Va. Aug. 11, 2020) (enjoining defendants from transferring any detainees into the Farmville Detention Center), appeal pending, No. 20-2142 (filed Oct. 23, 2020); *In re Von Staich*, 56 Cal. App. 5th 53, at *3 (Oct. 20, 2020) (noting that "[t]he catalyst of the outbreak of COVID-19 infections and deaths [at San Quentin] was the transfer by [the California Department of Corrections and Rehabilitation] of 121 inmates from the California Institution for Men to San Quentin," which had been "part of an effort to control the growing number of infections at CIM").

[12] Ex. 3 Kalivoda Decl. ¶ 14.

[13] R. Doc. 4 ¶ 28.

surveillance testing or other tracing measures, such as universal symptom checks.[14] Accordingly, there is no way to know how many people in the Jail actually have the virus, though it is now known that at least one new case was confirmed at the Jail last week.[15] The City/Parish cannot stick its head in the sand, and then claim the pandemic is under control.[16] As both Dr. Rottnek and Dr. Hassig explain, the City/Parish's exclusive focus on the fatality rate ignores, among other repercussions, the serious long-term damage that COVID-19 can inflict on people well after the infection is managed.[17] People incarcerated at the Jail, including people who had no risk factors, have developed chronic complications after their infection cleared.[18]

The failures to follow CDC guidelines that Plaintiff-Petitioners identified in prior briefing persist.[19] Detainees in the Jail remain unable to socially distance, a problem exacerbated by the Jail's growing population;[20] the Jail continues to deny detainees proper cleaning supplies;[21] many

---

[14] Ex. 2, Jones Decl. ¶ 12; Ex. 4, Ortiz Morales Decl. ¶ 22; Ex. 8, Supp'l Rogers Decl. ¶¶ 17-18, 24.

[15] *See, e.g.*, R. Doc. 84 at 109:15-20 (Dr. Fred Rottnek testifying that, without surveillance testing, there is simply no way to know how many people in the Jail have COVID-19); Ex. 10 Gissel Email (Nov. 17, 2020); Ex. 3 Kalivoda Decl. ¶ 27.

[16] *See, e.g.*, *At Louisiana prison, 192 out of 195 inmates test positive for COVID-19*, Market Watch, Assoc. Press (May 5, 2020) (noting that where widespread testing was completed at a Louisiana prison dormitory, almost everyone on the dormitory tested positive, and also noting Tennessee has ordered tests for all incarcerated people and staff), *available at* https://www.marketwatch.com/story/louisana-prison-unit-has-192-of-195-inmates-test-positive-for-covid-19-2020-05-05.

[17] R. Doc. 98-14, Supp'l Rottnek Decl. ¶ 34 & n.6; R. Doc. 98-3, Supp'l Hassig Decl. ¶¶ 16-17.

[18] R. Doc. 98-14, Supp'l Rottnek Decl. ¶ 34 n.6; R. Doc. 98-3, Supp'l Hassig Decl. ¶ 17; R. Doc. 98-13, Pettice Decl. ¶¶ 39-41 (abdominal pain and potential kidney issues); R. Doc. 98-8, Suppl. Mancuso Decl. ¶ 22 (more frequent headaches, joint pain, raspy throat, fatigue); R. Doc. 98-7, Suppl. Stewart Decl. ¶¶ 9, 11 (high blood pressure in young man with no other risk factors); Ex 8, Supp'l Rogers Decl. ¶¶ 3, 9 (high blood pressure, severe headaches, dizziness).

[19] *See* R. Doc. 99 at 2-9.

[20] Ex. 7, Walston Decl. ¶¶ 6-7; Ex. 2, Jones Decl. ¶¶ 13-14; Ex. 4, Ortiz Morales Decl. ¶¶ 4-6, 8, 19; Ex. 8, Supp'l Rogers Decl. ¶ 16.

[21] Ex. 4, Ortiz Morales Decl. ¶ 7; Ex. 8, Supp'l Rogers Decl. ¶¶ 19-20.

guards and detainees regularly forego wearing personal protective equipment,[22] thereby increasing the risk of viral transmission; the guards continue to fail to enforce rules intended to protect detainees from the virus;[23] the Jail provides unacceptably poor medical care;[24] and continues to comingle COVID positive people with the general population.[25] The declarations also corroborate prior testimony regarding inadequate medical care earlier this spring, summer, and into the fall.[26]

The City/Parish's failures continue even as the pandemic enters a new, perilous phase. As of November 20, there have been more than 216,000 cases and 6,200 deaths in Louisiana since the beginning of the pandemic.[27] The recent record national surge in coronavirus cases[28] has hit Louisiana with a third wave of new cases. In mid-November, the number of reported cases nearly doubled in a single week, and hospitalization numbers are the highest they have been since Louisiana's summer outbreak.[29] In Baton Rouge, over 80% of the hospitals' available ICU beds

[22] Ex. 7, Walston Decl. ¶ 14-15; Ex. 2, Jones Decl. ¶ 22; Ex. 4, Ortiz Morales Decl. ¶ 20; Ex. 8, Supp'l Rogers Decl. ¶¶ 22-23.

[23] Ex. 7, Walston Decl. ¶¶ 14-15; Ex. 4, Ortiz Morales Decl. ¶¶ 16, 20; Ex. 8, Supp'l Rogers Decl. ¶ 22.

[24] Ex. 2, Jones Decl. ¶ 18; Ex. 4, Ortiz Morales Decl. ¶ 22; Ex. 8, Supp'l Rogers Decl. ¶¶ 11, 25-27.

[25] Ex. 8, Supp'l Rogers Decl. ¶¶ 17, 25.

[26] Ex. 7, Walston Decl. ¶¶ 6-9; Ex. 2, Jones Decl. ¶¶ 5-11; Ex. 4, Ortiz Morales Decl. ¶¶ 9-11, 14; Ex. 8, Supp'l Rogers Decl. ¶¶ 4-5, 10-12.

[27] *Louisiana Covid Map and Case Count*, N.Y. Times (updated Nov. 12, 2020, 12:04 AM ET), available at https://www.nytimes.com/interactive/2020/us/louisiana-coronavirus-cases.html.

[28] Stobbe, Mike, *US hits record COVID-19 hospitalizations amid virus surge*, Associated Press (Nov. 11, 2020), available at https://apnews.com/article/doctors-better-equipped-virus-surge-743c0448c3ada001d327d73a6f2ed9d7.

[29] Karlin, Sam, *White House: Louisiana should increase coronavirus restrictions to combat 'aggressive' spread*, The Advocate (Nov. 19, 2020 at 11:26 AM), *available at* https://www.theadvocate.com/baton_rouge/news/coronavirus/article_50c9a876-2a8c-11eb-9c6e-2769c4efe3df.html; Adelson, Jeff, *Weekend case, hospitalization numbers show continued rapid spread of coronavirus in Louisiana*, NOLA.com (updated Nov. 15, 2020 at 6:21 PM), *available at* https://www.nola.com/news/coronavirus/article_cc951374-2798-11eb-84f5-83158cb032c0.html

are already filled with patients.[30] Experts predict that this trend will accelerate into the winter.[31] The risks to Plaintiff-Petitioners are grave.

LAW AND ARGUMENT

I. APPLICABLE LEGAL STANDARD

Under the Rule 12(b)(6) standard, the court must assume the truth of all well-pleaded facts and view inferences from those facts in the light most favorable to the plaintiff. *Hale v. King*, 642 F.3d 492, 498-99 (5th Cir. 2011) (en banc). Courts generally confine their analysis under Rule 12(b)(6) to allegations in the complaint, which "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim has facial plausibility when the factual allegations "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

When assessing subject matter jurisdiction under Rule 12(b)(1), courts are not confined to the four corners of the complaint and may consider evidence outside of the pleadings, including affidavits. *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 114 n.7 (5th Cir. 1988). But the court must nonetheless continue to "take the well-pleaded factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). And, contrary to Defendants' suggestion,[32] the Court's decision on the TRO motion in no way controls the outcome of the motion to dismiss. A TRO requires a plaintiff to

---

[30] Adelson, *supra* n.31.

[31] *See, e.g.*, Stone, Will, *What's Coming This Winter? Here's How Many More Could Die In the Pandemic*, NPR (Oct. 16, 2020, 10:52 AM ET), available at https://www.npr.org/sections/health-shots/2020/10/16/924240204/how-bad-will-coronavirus-be-this-winter-model-projects-170-000-more-u-s-deaths; Cohn, Meredith, *Winter may bring a lot more coronavirus cases, new Johns Hopkins research finds*, The Baltimore Sun (Sept. 11, 2020, 5:00 AM), available at https://www.baltimoresun.com/coronavirus/bs-hs-hopkins-weather-covid-study-20200911-svxmklsp45ex3ieo6hxjcgpkj4-story.html.

[32] R. Doc. 104-2 at 6-7.

produce evidence demonstrating that they are likely to succeed on the merits of their claims, while a motion to dismiss merely assesses the facial sufficiency of an alleged claim. *See, e.g., DGG Group, LLC v. Lockhard Fine Foods, LLC*, Case No. A-20-cv-330-RP, 2020 WL 2475821, at *4 (W.D. Tex. May 13, 2020) (noting that the legal standard governing a preliminary injunction "is much more stringent than the standard used" for a motion to dismiss).

II. PETITIONERS' § 2241 CLAIM FOR THE RELEASE OF THE MEDICALLY VULNERABLE SUBCLASS SURVIVES THIS MOTION TO DISMISS.

28 U.S.C. § 2241 grants jurisdiction over a petition for habeas corpus where the petitioner is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3). The "Great Writ" of habeas corpus permits the district court to "grant relief from unlawful imprisonment or custody," *Pierre v. United States*, 525 F.2d 933, 936 (5th Cir. 1976), and it confers "broad discretion in conditioning a judgment" granting such relief, *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)). "The typical remedy in habeas corpus is physical release." *Jones*, 600 F.3d at 541. Accordingly, where an individual "'challeng[es] the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release,' the proper remedy is a writ of habeas corpus." *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). In this case, Petitioners properly challenge the fact of their confinement by alleging there are *no* conditions under which the medically vulnerable subclass could be constitutionally detained inside the Jail during the COVID-19 pandemic, and they seek immediate release as their sole form of relief for this claim.[33] Accordingly, Petitioners' habeas claim is properly pled at this stage in the litigation.

[33] *See, e.g.*, R. Doc. 4 ¶¶ 162-64, 125-34.

A. Petitioners' § 2241 Claim Properly Sounds In Habeas Because It Challenges The Fact, Rather Than The Conditions, Of Confinement[34]

Petitioners challenge the fact of their confinement under 28 U.S.C. § 2241. In the absence of proper social distancing, the necessity of release to protect the health and lives of the medically vulnerable is undisputed: even Warden Grimes agrees that a reduction in the Jail population is required to properly allow for social distancing.[35] Although Petitioners' § 2241 challenge requires some discussion of the conditions inside the Jail, the remedy they seek (accelerated release from incarceration, rather than any changes in conditions at the Jail) as well as the nature of their challenge (that there are *no* sets of conditions inside the Jail sufficient to protect their constitutional rights) demonstrate that their claim squarely attacks the fact, rather than the conditions, of their confinement. That the Petitioners have brought separate claims arising under the Eighth and Fourteenth Amendments in addition to their §2241 claim does not strip this court of jurisdiction over their habeas claim.

As the City/Parish itself recognizes, caselaw within this circuit supports the viability of Petitioners' habeas claim.[36] As the court found in a case cited in the City/Parish's brief , *Vazquez Barrera*, 455 F. Supp. 3d at 337-38, a petitioner's claim "falls squarely in the realm of habeas corpus" where they "challeng[e] the fact of their detention as unconstitutional and seek relief in the form of immediate release"; "[t]he mere fact that [their] constitutional challenge requires discussion of conditions . . . does not necessarily bar such a challenge in a habeas petition."

[34] Contrary to the City/Parish's claim, nowhere in this Court's TRO opinion did it state that it lacks jurisdiction over Petitioners' § 2241 claim. *See* R. Doc. 104-2 at 12. Rather, the Court stated it was "not persuaded" by Petitioners' arguments with the limited factual record and case citations then before it on the motion for temporary restraining order. R. 90 at 8-10. Because the procedural posture of this case is now different the standard of review is also different. *See supra* Section (I)(A). At this preliminary stage, Plaintiff-Petitioners' allegations demonstrate that dismissal would be improper.

[35] R. Doc. 84 at 161:18-163:2.

[36] R. Doc. 104-2 at 13.

\\DC - 766730/000001 - 15792595 v4

Vazquez Barrera, 455 F. Supp. 3d at 337. *See also Dada v. Witte*, No. 1:20-cv-00458., 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (same).

The Sixth Circuit held that where, as here, petitioners "contend that the constitutional violations occurring at [the jail or prison] as a result of the pandemic can be remedied only by release," the claim falls into "the heart of habeas corpus" and "jurisdiction is proper under § 2241." *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) (internal quotation marks omitted); *Accord Hope v. Warden York County Prison*, 972 F.3d 310, 323 (3d Cir. 2020) ("Where a petitioner seeks release from detention, habeas (not a § 1983 action seeking release) is proper"). Numerous other district courts are in accord.[37]

The cases cited by the City/Parish are inapposite.[38] In *Livas v. Myers*, 455 F. Supp. 3d 272 (W.D. La. 2020), the petitioners explicitly brought a "conditions of confinement" challenge and attempted to argue that even a traditional "conditions of confinement" case could nonetheless proceed "under the habeas regime." *Id.* at 282. Similarly, in *Sacal-Micha v. Longoria*, No. 1:20-cv-37, 2020 WL 1815691, at *3-4 (S.D. Tex. Apr. 9, 2020), the petitioner failed to allege that release was necessary because there were no sets of conditions inside the jail sufficient to protect his constitutional rights, and instead alleged that certain changes in custody would resolve his constitutional claims. Here, Petitioners' claim attacks the fact of confinement in both name and substance, and the City/Parish's reliance on these cases reflect a critical misunderstanding of the nature of Petitioners' habeas claim.

---

[37] *See* R. Doc. 21-1 at 52; R. Doc. 48-2 at 15-18; R. Doc. 99 at 12-13 & n.48.

[38] *See* R. Doc. 104-2 at 12-13.

B. Petitioners Adequately State A Claim For Release Of Medically Vulnerable Individuals Pursuant To § 2241

The City/Parish argues that Petitioners failed to adequately plead their habeas claim because "the writ is not applicable to issues unrelated to the [petitioners'] cause(s) of detention, such as the COVID-19 pandemic."[39] This is simply a restatement of its jurisdictional challenge, but through a 12(b)(6) lens. This argument likewise has no merit.

First, contrary the City/Parish's characterization, Petitioners do not argue that the pandemic, on its own, justifies release under § 2241. Rather, Petitioners allege that due to the Defendants' inaction, and failures, as well as the limitations inherent in the Jail itself, there is *no* set of conditions inside the Jail sufficient to protect their constitutional rights, and thus immediate release is the only adequate relief. As detailed above, such a challenge to the fact of confinement properly sounds in habeas.

Second, the City/Parish claims that "[t]he entirety of the amended complaint sounds in civil claims for conditions of confinement."[40] This is plainly not so. *See, e.g.*, R. Doc. 4 ¶¶ 162-64 (alleging that, because there is no set of conditions under which an individual could be constitutionally detained, no remedy short of release can could protect their constitutional rights), ¶¶ 125-34 (alleging that release is necessary to protect the medically vulnerable, because there are no conditions under which they could be constitutionally detained).

Finally, apparently misapprehending the procedural posture of this case, the City/Parish objects to an order of release because "public safety" considerations would "require[] examination of the plaintiffs' victims . . . before release may be considered."[41] This objection is irrelevant to

---

[39] R. Doc. 104-2 at 18-19.

[40] R. Doc. 104-2 at 19.

[41] R. Doc. 104-2 at 18.

the question of whether Petitioners state a claim for habeas relief. At the point that this objection may become ripe, Petitioners will show that the Court has latitude to develop plans for bail pending habeas relief, and can consider alleged offenses to account for "public safety" concerns.[42]

C. The Exhaustion Doctrine Permits Petitioners' § 2241 Claim To Proceed

Contrary to the City/Parish's assertions, the record demonstrates that prudential exhaustion is no barrier to Petitioners' § 2241 claim. The Court's written opinion supports rather than undercuts both the extraordinary circumstances imposed by the pandemic and the unavailability of state court remedies; to the extent it relies on an informal review process for release as an available state court remedy, the Court's opinion recognizes that Petitioners have already exhausted their claims.

As the City/Parish acknowledges, exhaustion is not a statutory requirement for § 2241 habeas claims, nor is it a jurisdictional requirement; only as a matter of comity, have courts determined that § 2241 petitioners should first exhaust state court remedies before bringing a challenge in federal court. *Montano v. Texas*, 867 F.3d 540, 542 (5th Cir. 2017); *see also Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist., Santa Clara Cty., Cal.*, 411 U.S. 345, 350 (1973) (exhaustion doctrine reflects desire for "speed, flexibility, and simplicity" in habeas proceedings). Accordingly, as the City/Parish recognized, exhaustion is not required in habeas cases "where exceptional circumstances of peculiar urgency are shown to exist." *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982). However, the City/Parish fails to identify the other well-established exceptions to the exhaustion doctrine, including "where the available . . . remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action." *Montano*, 867 F.3d at 543.

---

[42] *See* R. Doc. 81 at 9-10.

Many of the above exceptions apply to this case. First, the record demonstrates that state court remedies were indeed unavailable. As this Court noted, state courts were closed for much of the pandemic.[43] Although an informal collaboration between the District Attorney, Public Defender, and 19th Judicial District Court Judges considered the possible release of certain individuals at some point during the closure, this covert process was similarly unavailable: it was neither public nor transparent, did not provide a mechanism to apply or advocate for release, did not provide notice to anyone who was considered or denied, and offered no way to file an appeal.[44] It would be unreasonable to demand that people avail themselves of an opaque and exclusive process they could neither access nor participate in, as "meaningfully available."

Second, the record demonstrates the extraordinary circumstances that Petitioners faced when they filed this case.[45] Federal courts have agreed that judge-made exhaustion requirements for § 2241 claims should be waived given the unique and urgent concerns presented by the current pandemic. *See, e.g.*, *Cameron v. Bouchard*, 492 F. Supp. 3d 746, 768 (E.D. Mich. May 21, 2020) (finding the pandemic constituted a "quintessential example of when unusual and exceptional circumstances exist"), *vacated on other grounds*, 815 F. App'x 978 (6th Cir. 2020); *Baez v. Moniz*, 460 F. Supp. 3d 78, 83 n.5 (D. Mass. May 18, 2020) (declining to apply a "providential exhaustion

[43] R. Doc. 90 at 7-8; *see also* R. Doc. 81-2, Mitchell Decl. ¶¶ 7-8. Even if state courts had been available, attempts at exhaustion would have been inappropriate and futile given the relevant statutory limitations. An individual's health is not a statutorily recognized factor to consider in bond proceedings, *see* La. Code Crim. Proc. Ann. art. 316 (listing factors to be considered in determination of bail amount), and medical releases are limited by statute to those with terminal illnesses or permanent incapacitations and are therefore inappropriate to the instant case, R. Doc. 81-3, La. Dep't of Pub. Safety & Corrs., No. HC-06, Medical Releases (2010) ¶¶ 4, 7. Further, the procedures for setting bail and modifying conditions of release do not require any review of whether Petitioners are "in custody in violation of the Constitution," as 28 U.S.C. § 2241 requires.

[44] R. Doc. 81-2, Mitchell Decl. ¶ 3.

[45] *See, e.g.*, R. Doc. 21-1 at 14-35 (outlining the surge in cases in Louisiana, and in East Baton Rouge as well as the devastating experiences of the people detained inside the Jail); R. Doc. 4 ¶¶ 2, 78 (identifying that as of May 14, at least 93 people had already tested positive for COVID-19 in the Jail, and at least one Sheriff's deputy had died from the virus); R. Doc. 84 at 148:6-14 (Sheriff Grimes acknowledging that COVID-19 posed a serious threat to "everyone").

requirement" to a habeas claim in part due to the "extraordinary circumstances and unprecedented public health risks" from the pandemic).[46]

Even if the Court finds that none of the above exceptions apply—and if it finds that the informal collaborative process provided an available state court remedy, then the factual record before this Court indicates that Petitioners' habeas claims have already been properly exhausted. As the Court noted, "Warden Grimes testified that *all* inmates at the jail have been considered for release" pursuant to this process,[47] and the record confirms that Petitioners Belton, Franklin, and Shepherd were all "considered during this informal process but were not released."[48] Plaintiff-Petitioners could have done nothing more to exhaust this informal process: even if they had somehow learned of the denial of their release, a request for reconsideration or an appeal were unavailable.[49]

---

[46] The City/Parish relies on four inapposite district court cases in its attempt to argue that Petitioners cannot demonstrate "exceptional circumstances." In *Chandler v. Davis*, No. 3:20-cv-86-K, 2020 WL 3510728, at *2 (N.D. Tex. June 29, 2020), the court denied the requested relief in part because he did *not* have an underlying health condition that "cause[d] him to be at an elevated risk of harm from the virus." *Id.* By contrast, § 2241 subclass here is medically vulnerable to serious harm or death from this disease. *See* R. Doc. 4 ¶¶ 161-64. In *Risner v. Fowler*, 458 F. Supp. 3d 495, 504 (N.D. Tex. 2020), the petitioner rested his claim on system-wide problems in the Bureau of Prisons but "provide[d] no information about the conditions" in his particular prison. By contrast, the allegations and preliminary factual record in this case are specific to the Jail and the Defendants. The third case is inapposite because, unlike here, state courts were open and available to provide relief *Evil v. Whitmer*, No. 1:20-cv-343, 2020 WL 1933685, at *3-4 (W.D. Mich. Apr. 22, 2020). The last case was pre-pandemic and includes *no* discussion of the types of exceptional circumstances that waive the exhaustion requirement. *Ray v. Quarterman*, No. 3:06-cv-850-L, 2006 WL 2842122 (N.D. Tex. July 24, 2006).

[47] R. Doc. 90 at 8 (emphasis added).

[48] R. Doc. 81-2, Mitchell Decl. ¶ 5.

[49] *Id.* ¶ 3. If the Court dismisses Petitioners' § 2241 claims for failure to exhaust, the dismissal should be without prejudice to allow Petitioners to return once state court remedies are exhausted. *See Farris v. Allbaugh*, 698 F. App'x 950, 958 (10th Cir. June 22, 2017) (dismissal of a petitioner's § 2241 claim should be without prejudice "to provide [him] the opportunity to exhaust his remedies in the [state] courts"); *Bataldo-Castillo v. Bragg*, 678 F. App'x 166, 166 (4th Cir. Mar. 3, 2017) (same).

III. BECAUSE PLRA EXHAUSTION IS AN AFFIRMATIVE DEFENSE, DISMISSAL OF THE § 1983 CLAIMS IS INAPPROPRIATE

The City/Parish argues that Plaintiffs' independent § 1983 claim should be dismissed because there are "no assertions of fact demonstrating how [they] exhausted administrative remedies."[50] This reflects a critical misunderstanding of PLRA exhaustion. Exhaustion under the PLRA is an affirmative defense, so the burden rests on the *defendant* to demonstrate that the plaintiff failed to exhaust available administrative remedies. *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010). Detainees are "'not required to specially plead or demonstrate exhaustion in their complaints,'" and where, as here, a complaint "is silent as to exhaustion," "[a]ny failure to exhaust must be asserted by the defendant" or it will be waived. *Carbe v. Lappin*, 492 F.3d 325, 327-28 (5th Cir. 2007). Because Plaintiff-Petitioners had no obligation to plead PLRA exhaustion in their complaint, the absence of factual allegations does not—and cannot—warrant dismissal.

Whether the plaintiff "has exhausted administrative remedies is a mixed question of law and fact." *Dillon*, 596 F.3d at 266. Given that judges may be required to resolve factual disputes concerning exhaustion with evidence beyond the pleadings, "the nonmoving party should be granted the protections of Rule 56" during that process. *Id*. Accordingly, the City/Parish made a procedural error when it raised this affirmative defense in a motion to dismiss rather than in a motion for summary judgment – which would have to have been supported by evidence demonstrating that administrative remedies were meaningfully available – but not exhausted – during the relevant time period. Moreover, because the parties would inevitably contest the availability of administrative remedies, discovery would be required before attempting to ultimately resolve the question at summary judgment. *See Dillon*, 596 F.3d at 266 n.4 (discovery is appropriate "where the availability of administrative remedies [under the PLRA] is contested").

---

[50] R. Doc. 104-2 at 9.

Given the City/Parish's failure to adequately raise and support this affirmative defense, the motion should be denied.[51]

IV. PLAINTIFFS ALLEGATIONS AND SUPPORTING EVIDENCE ARE SUFFICIENT TO CONFER STANDING

The City/Parish's meandering challenge to Plaintiff-Petitioners' standing conflates the low showing required for jurisdiction with the high standard for the merits. At the same time, it confuses the procedural posture of this motion to dismiss with the categorically different framework governing the prior TRO. The City/Parish simply ignores the wealth of evidence showing Plaintiff-Petitioners have faced and continue to face a substantial risk of harm.

Plaintiff-Petitioners' allegations of harm satisfy the injury-in-fact requirement where the "threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019); *see also Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004) (prisoner "does not need to show that death or serious illness has yet

[51] The City/Parish also argues that Plaintiffs have not adequately pled a demand for a three-judge panel, which it asserts is a prerequisite for release under the PLRA. *See* R. Doc. 104-2 at 9. While it is unclear what claims the City/Parish attacks with this argument, broadly speaking, the argument reflects a misunderstanding of the distinction between the sufficiency of a constitutional claim and an independent, and subsequent request for release. First, Plaintiffs' habeas request for release under § 2241 is explicitly outside the scope of the PLRA. *See* 18 U.S.C. § 3626(g)(2). Second, a careful reading of the relevant statute demonstrates that the procedures for release are not part of the threshold pleading requirement: in a civil action regarding prison conditions, if Plaintiff provides "materials sufficient to demonstrate that the requirements of subparagraph (A) have been met," the plaintiff "shall file" a request for a three-judge court; the federal judge before whom the civil action is pending may then "sua sponte request the convening of a three-judge court." 18 U.S.C. § 3626(a)(3)(C)-(D). Therefore, an eventual request for prisoner release is not a standalone claim, but is instead a unique form of relief that can be triggered if, while a conditions case is otherwise pending, relevant evidence surfaces that satisfies the prerequisites for release. Indeed, courts have clarified that a plaintiff seeking a prisoner release order "need not prepare an amended complaint, but must simply 'file . . . a request for such relief'" along with the proper evidentiary materials, in the pending case. *See, e.g., Coleman v. Schwarzenegger*, 2008 WL 4813371, at *2 (E.D. Cal. Nov. 3, 2008). The Plaintiffs here have not yet filed such a request. The City/Parish does not explain how it expects Plaintiffs to make the *evidentiary* showing required under 18 U.S.C. § 3626(a)(3) at the initial outset of a lawsuit without meaningful discovery, and it would be unreasonable to so interpret the statute. Moreover, Plaintiffs' Eighth and Fourteenth Amendment claims contain requests for other forms of relief, including declaratory relief, which the City Defendant does not (and cannot) argue have not been sufficiently pled. Finally, to the extent the City Defendant intended this argument to attack Count IV of the Amended Complaint, Plaintiffs note that the requested relief in that claim—to transfer the form of custody, for example to a transfer to home confinement, R. Doc. 4 ¶ 168—is not the physical release contemplated by a 18 U.S.C. § 3626(a)(3) prisoner release order.

occurred to obtain relief. He must show that the conditions pose a substantial risk of harm."); *M.D. v. Perry*, 294 F.R.D. 7, 34 (S.D. Tex. 2013) ("plaintiff does not need to wait until actually harmed, until the risk of harm is realized"). And, where plaintiffs show "an unsafe, life threatening condition in their prison," an injunction cannot be denied on the ground that "nothing yet has happened to them." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Contrary to the City/Parish's odd interpretation of the facts, Plaintiff-Petitioners' risk of injury is far from "speculative," nor is it based on "unfounded fear."[52] Plaintiff-Petitioners' well-pleaded allegations and supplementary declarations (which may be considered in evaluating the court's jurisdiction, *see supra* Section (I)(A)) clearly demonstrate a substantial risk of injury because, among other reasons: (1) the rate of COVID-19 infections in East Baton Rouge Parish is accelerating dangerously;[53] (2) social distancing—which the consensus of public health opinions concludes is the only mechanism to prevent the spread of coronavirus,—is not possible at the Jail;[54] (3) the prison population and transfers into the prison are increasing, which exacerbates the risk of coronavirus transmission and contravenes the leading guidance on managing epidemic crises in the Jail;[55] (4) the Jail continues to provide inadequate sanitation, and other remedial measures that would reduce the risk of transmission;[56] and (5) medical care is substandard, so as to subject an infected individual to a substantial risk of harm.[57]

---

[52] R. Doc. 104-2 at 4.

[53] *See supra* at n.24 & 25.

[54] R. Doc. 4 ¶ 38; R. Doc. 4-10 Rottnek Decl. ¶ 46, R. Doc. 4-28; Ex. 2 Jones Decl. at ¶¶ 13, 17-19; Ex. 7 Walston Decl. at ¶ 7.

[55] Ex. 8 Suppl. Rogers Decl. ¶ 36; Ex. 6 Graham Decl. ¶ 7.

[56] Ex. 4 Morales Decl. ¶ 7; Ex. 6 Graham Decl. ¶¶ 14-20.

[57] Ex. 8 Suppl. Rogers Decl. ¶ 3, Ex. 7 Walston Decl. ¶¶ 9-13.

The City does not substantively challenge the overwhelming factual content of Plaintiffs' allegations and their evidence showing that social distancing is impossible and that dangerous conditions persist. Instead it globally classifies the consistent and reinforcing declarations as "self-serving." Yet, the factual attestations are self-serving only insofar as they convincingly prove the truth of the claims Plaintiffs' have asserted. Perhaps the City's failure to assess Plaintiffs' allegations against the relevant motion-to-dismiss standard or otherwise contest the content of supporting declarations and expert reports stems from the fatally mistaken belief that, as a result of the Court's denial of Plaintiffs' motion for a TRO, "it has been proven the plaintiffs' allegations . . . are untrue."[58] This Court made no such evidentiary finding, and a denial of emergency injunctive relief on the *merits* says nothing about whether, on a motion to dismiss, Plaintiffs' allegations plausibly demonstrate a substantial risk of harm sufficient to confer standing.

The City's heavy reliance on *Sacal-Micha v. Longoria*, No. ****, 2020 WL 1518861, at *5-6 (S.D. Tex. Mar. 27, 2020) – a case denying relief on the merits because the plaintiff offered "no evidence to support [risk of transmission] other than conclusions extrapolated from general information" – is obviously inapposite given the wealth of *specific* allegations and supporting evidence Plaintiffs produced based on in-person observation and expert opinion. Courts routinely find standing based on far fewer allegations and less evidence than that proffered by Plaintiffs here. *See Matos v. Lopez Vega*, No. 20- CIV-60784-RAR, 2020 WL 2298775, at *4-7 (S.D. Fla. May 6, 2020) (finding injury-in-fact based on the "highly contagious nature of the virus," despite the absence of any suspected COVID-19 cases at the facility and even with the possibility that petitioners may never contract COVID-19); *see also Pimentel-Estrada v. Barr*, No. C20-495

---

[58] R. Doc. 104-2 at 7.

RSM-BAT, 2020 WL 2092430, at *9 (W.D. Wash. Apr. 28, 2020) (finding injury based on plaintiffs' inability to follow social distancing and hygiene measures, given the public health consensus that such measures are the "only defense against the virus"); *see also Helling*, 509 U.S. at 33 (finding an Eighth Amendment violation where detainees were crowded in cells with "infectious maladies," "even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.").[59] Plaintiffs' allegations and wealth of supporting evidence regarding the "substantial risk" and consequences of exposure to COVID-19 in the Jail is sufficient to demonstrate injury-in-fact.

V. PLAINTIFFS' FACTUAL ALLEGATIONS PLAUSIBLY STATE VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS AND A CONCOMITANT RIGHT TO RELIEF UNDER 42 U.S.C. § 1983

The City/Parish is responsible for funding the Jail's operations and maintenance of its facility.[60] This responsibility includes a mandate to ensure that people who are held at the Jail receive proper medical care, food, clothing, and other basic necessities.[61] As the Mayor-President of East Baton Rouge Parish acknowledged, "[m]ost people in the parish prison have not been convicted and [are] innocent until proven guilty . . . . [w]e have a duty to look out for their well-being."[62] Plaintiffs who are in pretrial detention are, under the Fourteenth Amendment, entitled to be free from an excessive risk of harm, while Plaintiffs post-conviction are entitled under the

---

[59] The City's insistence that Plaintiffs are required to show that conditions inside the Jail are "more threatening than outside the jail," is nowhere based in the law. In any event, even if it somehow related to the redressability prong of standing, Plaintiffs have shown through numerous allegations and expert evidence that, because social distancing is impossible inside the jail, the risk of infection is more likely than in Plaintiffs' respective residences where they can socially distance.

[60] R. Doc. 4 ¶ 28.

[61] R. Doc. 4 ¶ 28.

[62] R. Doc. 4 ¶ 68.

Eighth Amendment to be free from Defendant's deliberate indifference to a known medical risk. The City/Parish has fallen woefully short of these fundamental constitutional duties.

A. Plaintiffs' Allegations Demonstrate that the City/Parish Fails to Provide Adequate Care.

The City/Parish contracts with CorrectHealth East Baton Rouge, LLC ("CorrectHealth"), a private for-profit business, to provide medical and mental health care at the Jail.[63] The City/Parish oversees CorrectHealth's conduct and remains responsible for the health and safety of the detainee population.[64] Since it was hired, CorrectHealth has *decreased* the number of people who provide care for the over one thousand detainees trying to survive waves of COVID-19.[65] Under CorrectHealth's management since 2017, the Jail's already comparatively high detainee death rate climbed to three times the national average.[66]

The daily reality for people inside the Jail places these statistics in an appalling context. The City/Parish has no coherent strategy to identify and isolate COVID-19 cases among the detainee population. The Jail's staff did not begin conducting universal temperature checks until around mid-April, approximately two weeks after its first detainee tested positive for COVID-19 and almost one month after the Sheriff publicly declared that the Jail was ready to combat the virus.[67] Individuals whose temperature exceeded 100.4 degrees were often left on the general population lines for up to twelve hours, allowing potentially contagious individuals to infect other detainees.[68] After approximately just one month of universal temperature checks, CorrectHealth

---

[63] R. Doc. 4 ¶¶ 28; 72.

[64] R. Doc. 4 ¶¶ 28, 68, 72.

[65] R. Doc. 4 ¶ 73.

[66] R. Doc. 4 ¶ 73 at n.149.

[67] R. Doc. 4 ¶¶ 66; 102.

scrapped the measure and checked only individuals who displayed known coronavirus symptoms.[69] To make matters worse, approximately one week before universal temperature checks were discontinued, the Jail also stopped testing all but the most severely ill detainees for COVID-19, thereby allowing potential COVID-19 cases to go undetected and spread throughout the Jail.[70]

The "cornerstone" of any effective remedial measure against COVID-19 is effective social distancing.[71] The general population housing lines are made up of two large dorm rooms holding up to 100 people each or rows of cells holding between two and four people each.[72] Detainees sleep no more than a few feet and at times mere inches apart from one another.[73] The twice daily pill call requires detainees to line up closely behind one another to receive their prescribed medications from CorrectHealth's nurses.[74] The Jail even refused a donation of N-95 masks for detainees in April of this year as the pandemic spread throughout the facility.[75]

The City/Parish fares no better in its mandate to ensure proper maintenance of the Jail's facility. The Jail's decrepit structure has not been renovated since the 1980s.[76] The A, B, and C wings were condemned in 2018 as not fit for human habitation—they now warehouse detainees

[68] R. Doc. 4 ¶ 103.

[69] R. Doc. 4 ¶ 104.

[70] R. Doc. 4 ¶ 105.

[71] R. Doc. 4 ¶ 8.

[72] R. Doc. 4 ¶ 86.

[73] R. Doc. 4 ¶¶ 87.

[74] R. Doc. 4 ¶ 88.

[75] R. Doc. 4 ¶ 77.

[76] R. Doc. 4 ¶ 82.

who have tested positive for COVID-19.[77] The non-condemned portions of the Jail suffer from roof leaks, moldy and rusty walls, rat and insect infestation, and blood and other bodily fluid stains throughout.[78]

In light of these and other well-pleaded factual allegations, the City/Parish's motion to dismiss attempts to short-circuit the adversarial process and prevent Plaintiffs from discovering evidence in support of their constitutional claims. Under these circumstances, dismissal would be drastically premature. *See St. Martin v. Jones*, No. 08-1047, 2008 WL 4412267, at *6 (E.D. La. Sept. 17, 2008) ("[w]ithout discovery, one cannot know the extent to which, if at all . . . the Parish of St. John fostered an environment conducive to [the alleged misconduct]").

B. Plaintiffs' Amended Complaint States A Valid Fourteenth Amendment Claim Upon Which Relief May Be Granted.

Plaintiffs challenge their unconstitutional treatment under the Fourteenth Amendment on both a conditions-of-confinement theory and an episodic-act-or-omission theory and are authorized to plead them in the alternative. *Estate of Henson v. Wichita Cty., Tex.*, 795 F.3d 456, 462-64 (5th Cir. 2015).

The Constitution guarantees Plaintiffs "rights to basic needs such as medical care and safety." *Cleveland v. Gautreaux*, 198 F. Supp. 3d at 733. "The medical care a prisoner receives is just as much a 'condition' of his [or her] confinement as the food he [or she] is fed." *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). Conditions-of-confinement challenges are "attacks on general conditions, practices, rules, or restrictions of pretrial confinement." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996). In the Fifth Circuit, plaintiffs must allege facts that "demonstrate a pervasive pattern of serious deficiencies in providing for [Plaintiffs'] basic human needs."

[77] R. Doc. 4 ¶¶ 82; 109.

[78] R. Doc. 4 ¶ 82.

Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009). These Plaintiffs clearly do.[79] Plaintiffs' allegations "reflect an unstated or de facto policy, as evidenced by a pattern of acts or omissions 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [Jail] officials, to prove an intended condition or practice.'" *Shepherd*, 591 F.3d at 452 (quoting *Hare*, 74 F.3d at 645).

Under a Fourteenth Amendment conditions-of-confinement theory, Plaintiffs do not need to affirmatively plead that Defendants acted with malice, "for even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices." *Hare*, 74 F.3d at 644. While true that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to `punishment,' . . . if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Hare*, 74 F.3d at 640. Plaintiffs allege, *inter alia*, that the City/Parish knew as far back as 2015 that the Jail is inadequate for providing health care to Plaintiffs, yet did nothing except contract with a for-profit health care provider who proceeded to make things worse, not better.[80] Because Plaintiffs' allegations show that subjecting these Plaintiffs to a serious risk of exposure, illness, or death to serve that interest—particularly

[79] *See* R. Doc. 4 ¶¶ 71-73, 82-83 (since at least 2015, City/Parish officials knew the Jail failed to provide safe conditions and adequate health care to detainees); *id.* at ¶ 71 (elected City/Parish official describing the health care situation as "catastrophic").

[80] R. Doc. 4, ¶¶ 71-73; R. Doc. 4 ¶¶ 1-6, 109-111 (alleging that, in the midst of a global pandemic from the novel coronavirus, the City/Parish Defendant maintains a jail that detains Plaintiffs and putative Class Members in conditions of confinement that expose them to the virus, fail to permit them to protect themselves, and house individuals infected with the virus in solitary confinement cells that were closed years ago due to their unsuitability for humans beings).

where there exist non-bail alternatives to detention—they plainly "nudge[]" the claim "across the line from the conceivable to plausible." *Iqbal*, 542 U.S. at 680.

The City/Parish's argument that the "effective management of a detention facility is a valid objective that may justify [the] imposition of conditions and restrictions on pretrial detention"[81] fundamentally misapprehends the governing constitutional framework. No one disputes that, *all things being equal*, "effective" management of a facility is a valid objective; what Plaintiffs' have alleged in detail, however, is that Defendant's *actual* management -- rife as it is with conditions that fail to assure the prevention of the coronavirus and adequately care for individuals who are exposed -- is so deficient that Plaintiffs' exposure to such risk is excessive in relation to any assertedly legitimate government interest.[82] The Defendant's statement of its general penological goals does not displace its constitutional duty to take specific measures to ensure that Plaintiffs do not face an unreasonable risk of harm.

Under the alternative episodic-act-or-omission theory of Fourteenth Amendment liability, Plaintiffs may base their claims on a "particular act or omission of one or more officials," *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) and "must establish that an official acted with subjective deliberate indifference." *Hare*, 74 F.3d at 649 n.4. The detainee must also sufficiently allege that the actions or omissions that caused harm "resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the detainee's constitutional rights." *Id.* The definition of a "policy" sufficient to trigger such municipal liability includes:

---

[81] R. Doc. 104-2, at 17.

[82] While the Sheriff is responsible for the effective management of the Jail, *LA R.S. § 15:704*, the City/Parish is responsible for funding those operations and the facilities, *LA R.S. § 15:702*; *Amiss v. Dumas*, 411 So. 2d 1137, 1141 (La. Ct. App.) writ denied, 415 So. 2d. 940 (La. 1982). Crucially for this case, the City/Parish's funding obligations include the duty to provide constitutionally adequate healthcare services to detainees at parish jails, *LA R.S. § 15:703*, something Plaintiffs allege the City/Parish fails to do. R. Doc. 4 ¶¶ 71-73, 82-83. The City/Parish has clear responsibility and hence liability for the Jail conditions and lack of health care at the Jail under Plaintiff's conditions of confinement theory.

> A persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority

Pineda v. City of Houston, 291 F.3d 325, 328 (5th 2002).

Plaintiffs' allegations demonstrate that the City/Parish is liable under both a conditions-of-confinement theory and an episodic-act-or-omission theory. The Complaint alleges that the Jail's conditions of confinement and health care delivery system violate Plaintiffs' constitutional rights to relative safety from COVID-19 and access to adequate health care.[83] Moreover, Plaintiffs have alleged that CorrectHealth's nurses routinely force detainees to closely congregate during pill call in violation of social distancing recommendations adopted by an overwhelming majority of public health experts.[84] *See Scott*, 114 F.3d at 53 (5th Cir. 1997) (in an episodic-act-or-omission claim, "an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission"). Since at least early 2015, City/Parish policymakers have been made personally and publicly aware of the need for a new jail.[85] Plaintiffs' Complaint alleges that City/Parish policymakers were told by Sheriff Defendants that the "old part of the prison is really in deplorable condition. We have issues with ventilation; with plumbing."[86]

The conditions alleged by Plaintiffs—"walls and floors are filled with mold and rust, the showers and toilets are broken or bug infested, . . . rats have overrun some dorm areas, requiring

---

[83] R. Doc. 4 ¶¶ 71-73, 82-83.

[84] R. Doc. 4 ¶ 88.

[85] R. Doc. 4. ¶ 71.

[86] R. Doc. 4 ¶ 71.

detainees to sleep with their food to prevent it from being eaten by vermin" and blood streaked walls[87]—violate the Constitution. *See, e.g.*, *Gates*, 376 F.3d at 338 (filthy cell conditions may constitute a violation of the constitution (citations omitted)); *Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987) ("Allegations of a cold, rainy, roach-infested jail cell, with inoperative toilet facilities, stated a cause of action under the eighth and fourteenth amendments." (citations omitted)). Plaintiffs further detail how those conditions caused and continue to cause harm to all detainees and impose a constitutionally intolerable exposure to a deadly virus.[88] Under both theories of liability, the City/Parish Defendants expose Plaintiffs to COVID-19 and refuse to allow Plaintiffs to take the precautions necessary to avoid this serious illness.

C. Plaintiffs' Amended Complaint States A Valid Eighth Amendment Claim Upon Which Relief May Be Granted.

To allege an Eighth Amendment violation, Plaintiffs must show that the City/Parish "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Plaintiffs' Complaint demonstrates that the City/Parish's response to the pandemic, as the funder and operator of the Jail, has been a catastrophic failure. Plaintiffs' allegations – which is all the Court is permitted to consider on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) – are replete with graphic examples of deliberate indifference: overcrowding;[89] unsanitary conditions;[90] inadequate provision of hygiene supplies;[91] lack of

[87] R. Doc. 4 ¶ 82.

[88] R. Doc. 4 ¶¶ 86-88, 95-96, 100, 109-113, 116-118; *see also* R. Doc. 21-1 at 7-23 (summarizing declarations).

[89] R. Doc. 4 ¶ 5 (over one thousand detainees are forced to sleep less than three feet apart); R. Doc. 4 ¶ 86 (dorm style housing lines holding up to 100 people).

[90] R. Doc. 4 ¶ 82 (roof leaks, moldy and rusty walls, and bug infested toilets); R. Doc. 4 at ¶¶, 86, 87, 88, 109 (living areas infested with rats and insects).

[91] R. Doc. 4 ¶115 (one bar of soap once a week).

COVID-19 testing and screening;[92] and inadequate medical care.[93] Further, new detainees arrive at the Jail every day without adequate screening, while the Jail's existing detainee population continues to be forced into close quarters.[94] Sections of the Jail that were found to be unfit for human habitation now house infected individuals under CorrectHealth's direction.[95] CorrectHealth also actively flaunts social distancing requirements by forcing detainees to line up closely together while awaiting their prescription medications and not allowing them to wash their hands before taking the medications they receive.[96]

That such conditions are unacceptable in the midst of a lethal pandemic is no obscure medical secret. The risk of COVID-19 to the health and lives of medically vulnerable individuals is front-page national and local news on a daily basis, confirmed by the unanimous opinion of public health experts and, at this point, utterly obvious. *See Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) ("A prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk"). Even the Sheriff of East Baton Rouge admits that a single case of COVID-19 could spread rapidly throughout the Jail given its close confines.[97] Councilwoman Banks-Daniel of the East Baton Rouge Parish Metro Council is on record describing the health care situation inside the Jail as "catastrophic," and Warden Dennis Grimes has admitted that part of the Jail is in "deplorable condition."[98] By characterizing these detailed

[92] R. Doc. 4 ¶¶ 104-105 (discontinuance of universal temperature checks and limited COVID-19 testing).

[93] R. Doc. 4 ¶ 104 (no treatment for coronavirus on general population housing lines).

[94] Ex. 5 Suppl. Bradley Decl. ¶ 9; Ex. 8 Suppl. Rogers Decl. ¶ 16.

[95] R. Doc. 4 ¶¶ 82, 109.

[96] R. Doc. 4 ¶ 88.

[97] R. Doc. 4 ¶ 66.

[98] R. Doc. 4 ¶ 71.

and devastating allegations as nothing more than "colorful descriptions of the [Jail's] physical structure,"[99] the City/Parish doubles down on its deliberate indifference.

Having sufficiently alleged the requisite quantum of knowledge and indifference, Plaintiffs' 168-paragraph Amended Complaint and corresponding 27 exhibits raise a "reasonable expectation that discovery will reveal evidence of" the elements of an Eighth Amendment claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552 (2007). "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. To make the requisite showing, Plaintiffs should be permitted to bring their well-pleaded constitutional claims through the adversarial process.

Respectfully submitted, this 23rd day of November, 2020.

/s/ David J. Utter
David J. Utter (LA Bar No. 23236)
William R. Claiborne (GA Bar No. 126363)
FAIR FIGHT INITIATIVE
410 East Bay Street
Savannah, Georgia 31401
(912) 236-9559 Telephone
(912) 236-1884 Facsimile
david@fairfightinitative.org
will@fairfightinitative.org

/s/Miriam R. Nemeth
Thomas B. Harvey (MBE #61734MO)
Miriam R. Nemeth (DC Bar No. 1028529)**
Tiffany Yang (DC Bar No. 230836)
ADVANCEMENT PROJECT NATIONAL OFFICE
1220 L Street NW, Suite 850
Washington, DC 20005
(202) 728-9557 Telephone
tharvey@advancementproject.org
mnemeth@advancementproject.org
tyang@advancementproject.org

/s/ Lillian S. Hardy
Lillian S. Hardy (DC Bar No. 991282)
Hogan Lovells US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5884 Telephone
lillian.hardy@hoganlovells.com

/s/ William P. Quigley
William P. Quigley (LA Bar No. 00769)
Loyola University New Orleans
7214 St. Charles Avenue
Campus Box 902
New Orleans, LA 70117

[99] R. Doc. 104-2 at 14.

*/s/ Robert L. Toll*_____________
Robert L. Toll (DC Bar No. 1021934)
Hogan Lovells US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-307 Telephone
robert.Toll@hoganlovells.com

*/s/ Baher Azmy*____________
Baher Azmy (NY Bar No. 2860740)
Omar Farah (NY Bar No. 4641247)
Brittany Thomas (NY Bar No. 5683834)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 11201
(212) 614-6427 Telephone
bazmy@ccrjustice.org
ofarah@ccrjustice.org
bthomas@ccrjustice.org

Attorneys for Plaintiffs
** *Lead Attorney for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, a copy of the foregoing was filed electronically with the Clerk of the Court, using the CM/ECF system. Notice of this filing will be sent by operation of the court's electronic filing system and/or via U.S. Postal Service to counsel of record.

/s/ *David J. Utter*____
David J. Utter