

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

Favian Busby and Michael Edgington, *on their own behalf and on behalf of those similarly situated*;

Petitioners-Plaintiffs,

v.

Floyd Bonner, Jr., *in his official capacity*,
Shelby County Sheriff, and the Shelby
County Sheriff's Office,

Respondents-Defendants.

Case No. _____

**PETITIONERS-PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER**

Plaintiffs hereby move this Court, pursuant to Fed. R. Civ. P. 65¹ and 28 U.S.C. §§ 2241, 2243, for a Temporary Restraining Order:

1. Granting Plaintiffs' petition for a writ of habeas corpus and directing their immediate release;
2. Directing Defendants to produce, within 12 (twelve) hours of the entry of the Order, a list of all other Class and Subclass members, as defined in paragraphs 41 and 42 of Plaintiffs' Complaint, detained at the Jail, including their location, charge, and bond status;

¹ See Fed. R. Civ. P. 81(a)(4), explaining that the Federal Rules of Civil Procedure "apply to proceedings for habeas corpus . . . to the extent that the practice proceedings [are] not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases." As documented in the Certificate of Service filed herewith, Plaintiffs' counsel provided notice of the relief sought in this Motion to Defendants in accordance with Federal Rule of Civil Procedure 65 and Local Rule 65.1.

3. Directing Defendants to, within twenty-four (24 hours) of the entry of the Order, release and/or enlarge the custody pending full adjudication of the habeas petition of all members of the Class and Subclass who are incarcerated solely due to their inability to afford a financial condition of release, or solely due to an alleged technical violation of probation or parole;
4. Directing Defendants to, within twenty-four (24) hours of the entry of the Order, provide a list to the Court and to Counsel for Plaintiffs noting the basis for any objections to the release of the remaining Class and Subclass members. Such objections must be limited to evidence of a credible risk of pretrial flight or danger to others;
5. Directing Defendants to, within forty-eight (48) hours, release and/or enlarge the custody of any Class and Subclass members whose release Defendants do not note an objection to;
6. With respect to any and all remaining Class and Subclass members to whose release Defendants object, directing the parties to meet and confer within one or two business day(s) of Defendants' submission to Plaintiffs of the list of objections.

Plaintiffs further request that the Court conduct a hearing, to consider and rule upon the relief requested in Plaintiff's motion, considering:

- a. the deprivation of the petitioner's federal rights posed by the COVID-19 outbreak (including the disability discrimination for Subclass members and the necessity of providing modifications including release);
- b. any competent evidence that the individual poses a serious risk of flight or danger to others;

- c. whether, by clear and convincing evidence, any presented risk of flight of danger outweighs the threat to the petitioner's health and safety posed by his exposure to COVID-19 in the Jail, after considering alternative conditions to manage the risk(s) presented.

The grounds for this motion are set forth in the Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, filed herewith, and the accompanying Declarations in support.

Dated: May 20, 2020

Respectfully submitted,

/s/ Brice M. Timmons

Brice M. Timmons (Bar No. 29582)
Black McLaren Jones Ryland & Griffee,
A Professional Corporation
530 Oak Court Dr. Suite 360
Memphis, TN 38117
Telephone: (901) 762-0535
Facsimile: (901) 762-0527
btimmons@blackmclaw.com

Josh Spickler (Bar No. 021019)
Wesley Dozier (Bar No. 037735)
Just City
P.O. Box 41852
Memphis, TN 38174
Telephone: (901) 206-2226
josh@justcity.org

Steven John Mulroy (Bar No. 28831)
Bredesen Professor of Law
Cecil C. Humphreys School of Law,
University of Memphis
1 N. Front St.
Memphis, TN 38103
Telephone: (901) 603-8779
smulroy@memphis.edu

Andrea Woods*
Amreeta S. Mathai*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
awoods@aclu.org
amathai@aclu.org

Zoe Brennan-Krohn*
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0769
zbrennan-krohn@aclu.org

Maria Morris*
American Civil Liberties Union
915 15th Street N.W., 7th Floor
Washington, D.C. 20005
Telephone: (202) 548-6607
mmorris@aclu.org

Thomas H. Castelli (Bar No. 24849)
Stella Yarbrough (Bar No. 33637)
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Telephone: (615) 320-7142
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Joseph Bial*

2001 K Street NW

Washington, D.C. 20006-1047

Telephone: (202) 223-7300

Fascimile: (202) 223-7420

jbial@paulweiss.com

Darren Johnson*

Jonathan M. Silberstein-Loeb*

David Kimball-Stanley*

Adrienne Lee*

Avery Medjuck*

1285 Avenue of the Americas

New York, NY 10019-6064

Telephone: (212) 373-3000

Fascimile: (212) 757-3990

djohnson@paulweiss.com

jsilberstein-loeb@paulweiss.com

dkimball-stanley@paulweiss.com

alee@paulweiss.com

amedjuck@paulweiss.com

Attorneys for Plaintiffs

* Application for admission forthcoming

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

Favian Busby and Michael Edgington, *on
their own behalf and on behalf of those
similarly situated*;

Petitioners-Plaintiffs,

v.

Floyd Bonner, Jr., *in his official capacity*,
Shelby County Sheriff, and the Shelby
County Sheriff's Office,

Respondents-Defendants.

Case No. _____

**BRIEF IN SUPPORT OF PETITIONERS-PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER**

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| FACTS | 3 |
| I. Plaintiffs and the Class Members Are at High Risk of Severe Illness or Death from COVID-19..... | 3 |
| II. Medically Vulnerable Detained Persons Face an Imminent Risk of Substantial Bodily Harm..... | 5 |
| III. Immediate Release Is the Only Way to Protect the Medically Vulnerable. | 8 |
| ARGUMENT | 11 |
| IV. Plaintiffs Are Likely to Succeed on the Merits of Their Claims. | 11 |
| A. Plaintiffs’ Continued Detention, and that of the Class Members, Violates Their Constitutional Rights..... | 11 |
| B. Defendants are Violating the ADA and Section 504 of the Rehabilitation Act by Failing to Make Modifications for Disabled Subclass Members..... | 15 |
| V. Plaintiffs’ Risk of Exposure to COVID-19 Constitutes Irreparable Harm. | 18 |
| VI. The Balance of Equities and the Public Interest Favor Plaintiffs. | 18 |
| CONCLUSION..... | 19 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| CASES | |
| <i>Ability Ctr. of Greater Toledo v. City of Sandusky</i> , 385 F.3d 901 (6th Cir. 2004) | 16 |
| <i>Amick v. Ohio Dep’t of Rehab. & Corr.</i> , 521 F. App’x. 354, 361 (6th Cir.2013) | 13 |
| <i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)..... | 12 |
| <i>City of Revere v. Massachusetts Gen. Hosp.</i> , 463 U.S. 239 (1983)..... | 12 |
| <i>Connection Distrib. Co. v. Reno.</i> , 154 F.3d 281 (6th Cir. 1998) | 18 |
| <i>Dominguez v. Corr. Med. Servs.</i> , 555 F.3d 543 (1993)..... | 14 |
| <i>In re DeLorean Motor Co.</i> , 755 F.2d 1223 (6th Cir. 1985) | 11 |
| <i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)..... | 14 |
| <i>Frailhat v. U.S. Immigration & Customs Enforcement</i> , 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020) | 17 |
| <i>Helling v. McKinney</i> , 509 U.S. 25 (1993)..... | 12, 14 |
| <i>Hostettler v. College of Wooster</i> , 895 F.3d 844 (6th Cir. 2018) | 19 |
| <i>J.H. v. Williamson Cty.</i> , 951 F.3d 709 (6th Cir. 2020) | 12 |
| <i>Kingsley v. Hendrickson</i> , 135 S. Ct. 2466 (2015)..... | 13 |
| <i>Malam v. Adducci</i> , No. 5:20-cv-10829 (E.D. Mich. Apr. 9, 2020) | 10, 15 |
| <i>Martinez-Brooks v. Easter</i> , No. 3:20-CV-00569 (MPS), 2020 WL 2405350 (D. Conn. May 12, 2020)..... | 10 |

Mitchell v. Cuomo,
748 F.2d 804 (2d Cir. 1984).....18

Neinast v. Bd. of Trs. of the Columbus Metro. Library,
346 F.3d 585 (6th Cir. 2003)18

Nken v. Holder,
566 U.S. 418 (2009).....18

Obama for Am. v. Husted,
697 F.3d 423 (6th Cir. 2012)18

Overstreet v. Lexington-Fayette Urban Cty. Gov.,
305 F.3d 566 (6th Cir. 2002)18

Pa. Dep’t of Corr. v. Yeskey,
524 U.S. 206 (1998).....16

Pierce v. District of Columbia,
128 F. Supp. 3d 250 (D.D.C. 2015).....16

Rhinehart v. Scutt,
509 F. App’x 510 (6th Cir. 2018)18

Richko v. Wayne Cty.,
819 F.3d 907 (6th Cir. 2016)13, 14

Richmond v. Huq,
885 F.3d 928 (6th Cir. 2018)13

Rouster v. Cty. of Saginaw,
749 F.3d 437 (6th Cir. 2014)14

Tennessee v. Lane,
541 U.S. 509 (2004).....16, 17

Savino v. Souza,
No. CV 20-10617-WGY, 2020 WL 1703844 (D. Mass. Apr. 8, 2020)4

Stack v. Boyle,
342 U.S. 1 (1951).....12

Turner v. Stumbo,
701 F.2d 567 (6th Cir. 1983)12

United States v. Amarrah,
No. 17-20464, 2020 WL 2220008 (E.D. Mich. May 7, 2020)10

United States v. Hansen,
 No. 17 CR 50062, 2020 WL 2219068 (N.D. Ill. May 7, 2020).....10

United States v. Howard,
 No. 4:15-CR-00018-BR, 2020 WL 2200855 (E.D.N.C. May 6, 2020).....10

United States v. Salerno,
 481 U.S. 739 (1987).....12

Wilborn ex rel. Wilborn v. Martin,
 965 F. Supp. 2d 834 (M.D. Tenn. 2013).....18

Wilson v. Williams,
 No. 4:20-cv-00794-JG (N.D. Ohio Apr. 22, 2020).....6, 10

Winter v. Nat. Res. Def. Council, Inc.,
 555 U.S. 7 (2008).....11

STATUTES

29 U.S.C. § 794.....15

42 U.S.C. § 12101 *et seq.*.....15

42 U.S.C. § 12102(1)(A).....16

42 U.S.C. § 12102(2)17

42 U.S.C. § 12131(B)15

42 U.S.C. § 12132.....15

OTHER AUTHORITIES

28 C.F.R. § 35.102(a).....16

28 C.F.R. § 35.130(a).....16

28 C.F.R. § 35.130(b)16

28 C.F.R. § 35.130(b)(3)(i)-(ii).....16, 17

28 C.F.R. § 35.130(b)(7).....16

28 C.F.R. Pt. 35, App. B17

INTRODUCTION

Plaintiffs are persons detained pretrial who, because of their age, underlying medical conditions, or disabilities are at high risk of severe illness or death from COVID-19, yet they are being held at the Shelby County Jail (the “Jail”) in the midst of the greatest public health crisis of a century, in violation of their constitutional and federal statutory rights. Plaintiffs’ constitutional rights are being violated because, owing to their vulnerability, they cannot be housed safely at the Jail. They cannot be housed safely at the Jail because it is impossible to practice social distancing, which is compounded by inadequate testing for COVID-19 that precludes any approximation of who among the Jail population is infectious, and because it is impossible to practice vigilant hygiene within the Jail. The Court should order their immediate release.¹ Likewise, the Court should order the release of all persons who are currently being or will in the future be held in the Jail’s custody during the COVID-19 outbreak in Tennessee who are medically vulnerable (the “Class”)² and individuals who are medically vulnerable because of disabilities (the “Subclass”).³

¹ The term “release” refers to the discharge of detained individuals from the physical confines of the Shelby County Jail, not necessarily release from all forms of custody. Release options may include, but are not limited to: supervised release (including through the use of GPS or other forms of location monitoring), halfway house residential placement, transfer to a hospital or other facility, or diversion to alternative community and treatment programs. Indeed, Shelby County already maintains a Pretrial Services Department “offering alternatives to incarceration at every stage of the criminal justice system.” *See Pretrial Services*, SHELBY CTY. TENN., <https://www.shelbycountyttn.gov/250/Justice-Initiatives> (last visited May 19, 2020); *see also* Declaration of Bill Powell (“Powell Decl.”) at ¶ 11.

² The Class is defined as follows: all current and future persons held at the Jail in pretrial custody during the COVID-19 pandemic who are 55 and older, as well as all current and future persons held at the Jail during the COVID-19 pandemic of any age who, by virtue of their underlying medical conditions, are at high risk of severe infection or death from COVID-19.

³ The Subclass consists of all current and future pretrial detainees in the Jail who are medically vulnerable because of a disability as defined in the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act. This includes everyone in the Class except those who are medically vulnerable solely because of age or a Body Mass Index (BMI) over 40.

COVID-19 presents an immediate threat to Plaintiffs and to the Class members they represent and they are likely to suffer irreparable harm absent injunctive relief. The disease has already infiltrated the Jail and infected a large number of people, and it continues to spread rapidly among the incarcerated population and staff. On April 17, there were only five confirmed cases of COVID-19 among detained persons at the Jail. As of May 20, 2020, 151 individuals housed at the Jail and 66 employees have tested positive for COVID-19. At least one Shelby County Sheriff's Office employee who contracted the virus has died. The disease is spreading through the Jail exponentially. Without intervention, Defendants' failures will allow COVID-19 to continue to wreak havoc not only on the health of people incarcerated at the Shelby County Jail, but also that of Jail staff and members of the broader community.

Plaintiffs' release, and that of the Class members, with adequate public health and safety measures, is in Defendants' interest and the interest of the public generally. The Jail is not separate from the broader community, and the Jail's failure to manage the COVID-19 threat will cause additional, preventable deaths in the community at large. A rapid, continued outbreak in the Shelby County Jail will have severe consequences for the people detained at the Jail and would drain the Memphis area of limited resources to fight the pandemic.

For these reasons, and for the reasons explained further below, the Court should grant Plaintiffs' Motion.

FACTS

I. Plaintiffs and the Class Members Are at High Risk of Severe Illness or Death from COVID-19.

The CDC has provided a non-exhaustive list of factors, including age and medical conditions, that put people at high risk of severe illness or death from COVID-19.⁴ Plaintiffs and the Class they seek to represent are all people at high risk of severe illness or death if they contract COVID-19. In addition, the Jail population is more than 86 percent African American,⁵ and, according to the CDC, African Americans are both statistically more likely to have the medical conditions that increase the risk of complications or death from COVID-19⁶ and 2.6 times more likely to die from COVID-19 than white Americans.⁷

⁴ See *Coronavirus Disease 2019 (COVID-19) People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (last visited May 19, 2020); *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019—United States, February 12-March 28, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm>. According to the CDC, people of any age who have certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorder (including sickle cell disease), stroke, severe obesity (as defined as a body mass index of 40 or higher), and moderate to severe asthma, are at elevated risk. See *id.*; *Coronavirus Disease 2019 (COVID-19) Groups At Higher Risk For Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited May 19, 2020).

⁵ *Shelby County, TN*, MACARTHUR FOUNDATION, SAFETY + JUSTICE CHALLENGE, <http://www.safetyandjusticechallenge.org/challenge-site/shelby-county/> (last visited May 20, 2020).

⁶ The rate of diabetes is 60 percent higher in black Americans than in white Americans. See *Diabetes and African Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF MINORITY HEALTH <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18> (last visited May 19, 2020). The rate of hypertension is also 40 percent higher. See *Heart Disease and African Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF MINORITY HEALTH <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19> (last visited May 19, 2020).

⁷ *The Color of Coronavirus: COVID-19 Deaths by Races and Ethnicity in the U.S.*, APM RESEARCH LAB (May 12, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race>.

The risk of serious illness or death from COVID-19 also increases with age. CDC data reveals that rates of hospitalization for COVID-19 are approximately *three times higher* among people age 50-64 than for younger people.⁸ Hospitalization is “a marker of ‘serious harm.’” *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844, at *7 (D. Mass. Apr. 8, 2020). And, deaths among people hospitalized with COVID-19 are three times higher for people age 50-64 (9.8 percent of people hospitalized with COVID-19 died) compared to those age 18-49 (3.4 percent of people hospitalized with COVID-19 died).⁹ Health experts agree that detained persons age 50 or older are more likely to suffer serious complications from COVID-19, particularly because incarcerated patients tend to age faster than non-incarcerated persons.¹⁰ *See* Declaration of Dr. Joe Goldenson, M.D. (“Goldenson Decl.”) at ¶ 10; Declaration of Dr. Marie Griffin, M.D. (“Griffin Decl.”) at ¶ 5.¹¹

Plaintiff Favian Busby is an African-American man who has been diagnosed with diabetes, for which he receives injections of insulin based on his blood sugar level, and hypertension, for which he takes medication daily. *See* First Declaration of Josh Spickler

⁸ *See* Shikha Garg et al., *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019—COVID—NET, 14, States, March 1-30, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 17, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm>.

⁹ *See* Jeremy Gould et al., *Characteristics and Clinical Outcomes of Adult Patients Hospitalized with COVID-19—Georgia, March 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 29, 2020, Updated May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e1.htm>.

¹⁰ Brie Williams et al., *Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care*, AM. J. PUB. HEALTH (Aug. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/> (“many estimate that prisoners’ physiological age averages 10 to 15 years older than their chronological age”).

¹¹ *See* Gould, *supra* note 9. The CDC’s recognition that “people 65 years and older” as a discrete, high-risk group is an appropriate point to *begin* the risk analysis, but does not foreclose a lower age cutoff in light of research and the specific health factors in jail, as discussed in Dr. Nina Fefferman’s Declaration. *See* Declaration of Dr. Nina Fefferman (“Fefferman Decl.”) at ¶ 11.

(“Spickler-Busby Decl.”) at ¶ 9. Diabetes alone places Mr. Busby squarely within the CDC’s high-risk category. *See* Griffin Decl. at ¶ 14. Mr. Busby also recently had surgery to implant a new joint between his femur and hip, from which he is still recovering. Spickler-Busby Decl. at ¶ 11. Mr. Busby is a person with a disability under the ADA and the Rehabilitation Act.

Plaintiff Michael Edgington is 60 year-old African-American man who, because of his age, is also high risk. *See* Second Declaration of Josh Spickler (“Spickler-Edgington Decl.”) at ¶ 4.

II. Medically Vulnerable Detained Persons Face an Imminent Risk of Substantial Bodily Harm.

The danger of COVID-19 to Plaintiffs, and other medically vulnerable and disabled individuals, is especially acute at the Shelby County Jail. COVID-19 is transmitted by air and touch through aerosol droplets created when an infected person coughs, sneezes, or talks.¹² As a result, “congregate environments,” such as jails, are particularly dangerous due to the ease with which COVID-19 spreads.¹³ *See* Griffin Decl. at ¶ 12. Seven out of the top ten COVID-19 clusters in the United States are connected to jails and prisons.¹⁴ Social distancing, defined as keeping at least six feet of distance from other people when outside the home and avoiding group gatherings,

¹² *See Social Distancing*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 19, 2020).

¹³ The CDC has specifically noted that that “[c]orrectional and detention facilities face challenges in controlling the spread of infectious diseases because of crowded, shared environments and potential introductions by staff members and new intakes.” Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>. The CDC has similarly observed that long-term care facilities and nursing homes pose a particular risk because of “their congregate nature” and the residents served. *Preparing for COVID-19 in Nursing Homes*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://cutt.ly/7tEEITH> (last visited May 19, 2020).

¹⁴ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

and vigilant hygiene, including frequent washing of hands with soap and water, are the only known measures for preventing the virus's spread.¹⁵ See Goldenson Decl. at ¶ 14. The CDC refers to social distancing as the “cornerstone” of any effective strategy to combat the spread of COVID-19 in correctional and detention facilities.¹⁶

At the Shelby County Jail, the dorm-like structure of the facility makes social distancing impossible. About 40-42 men, including Mr. Busby, are housed in H pod, which consists of 32 cells, many of which currently hold 2 people. See Spickler-Busby Decl. at ¶ 13; Declaration of Stella Yarbrough (“Yarbrough Decl.”) at ¶ 4. In L pod, where Mr. Edgington is housed, there are 23 mostly 2-person cells holding around 30-33 men. Spickler-Edgington Decl. at ¶ 7. Detained individuals who share a cell sleep in beds only three or four feet apart. See Yarbrough Decl. at ¶¶ 5, 46. When two individuals are in a cell together, they cannot stay six feet apart. See Spickler-Edgington Decl. at ¶ 6; Yarbrough Decl. at ¶¶ 5, 46. Jail staff come in and out of multiple pods during their shifts. See Spickler-Busby Decl. at ¶ 24. Detained individuals must congregate in communal areas in close contact with each other when eating, showering, washing their clothes, receiving medication, working, and moving from one part of the Jail to another. See Spickler-Busby Decl. at ¶¶ 12, 25; Spickler-Edgington Decl. at ¶¶ 8-12, 14. People in the Jail often eat at

¹⁵ See *Social Distancing*, supra note 12; *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited May 19, 2020). The University of Tennessee Health Science Center similarly notes that “the only current advice is to avoid others who might be sick.” *Expert Responses*, UNIV. OF TENN. HEALTH SCI. CTR., <https://uthsc.edu/coronavirus/expert-responses.php> (last visited May 19, 2020); see also *Wilson v. Williams*, No. 4:20-cv-00794-JG, ECF No. 85 (N.D. Ohio May 19, 2020) (“Distancing has been, and continues to be, the institution’s best hope for sparing medically-vulnerable inmates from the serious medical consequences, and potential death, associated with COVID-19”).

¹⁶ See *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited May 19, 2020).

small circular tables with four to six other people. *See* Spickler-Busby Decl. at ¶ 16; Spickler-Edgington Decl. at ¶ 8; Yarbrough Decl. at ¶ 21. Using the phone kiosk requires a person to stand shoulder to shoulder with others. *See* Spickler-Busby Decl. at ¶ 17.

Insufficient hygiene supplies, services, and facilities exacerbate the risk associated with the impossibility of practicing social distancing. Jail staff do not consistently use masks or gloves. *See* Spickler-Busby Decl. at ¶¶ 15, 24; Spickler-Edgington Decl. at ¶ 10; Yarbrough Decl. at ¶¶ 32, 57. Detainees are given one mask at a time, and must continue to reuse the single mask for weeks at time. *See* Spickler-Busby Decl. at ¶ 23; Yarbrough Decl. at ¶¶ 30, 56. Some individuals have gloves but most do not. *See* Yarbrough Decl. at ¶¶ 31, 56. Class members must also use, and reuse, the same “high-touch” items, such as telephones, sinks, dining tables, and showers. Not all of these items are wiped or disinfected between individual uses. *See* Spickler-Busby Decl. at ¶ 17; Yarbrough Decl. at ¶ 11. The Jail provides cleaning supplies for detained individuals to clean their own cells through a pod officer, but if a pod officer is not stationed in the pod, individuals are not provided with cleaning supplies and cannot clean their cells. *See* Yarbrough Decl. at ¶ 9. There is no hand sanitizer. *See* Spickler-Busby Decl. at ¶ 22; Declaration of Michael Working (“Working Decl.”) at ¶ 18; Yarbrough Decl. at ¶¶ 17, 53. The Jail does not provide adequate supplies of soap, and detained individuals frequently run out and often go for several days without a replenished supply. *See* Spickler-Busby Decl. at ¶ 20; Yarbrough Decl. at ¶¶ 16, 52. People in the facility must use the congregate and high-touch areas to access food or use the bathroom even when there is no soap and surfaces have not been disinfected.

Further, due to inadequate testing and screening, neither Defendants nor anyone living or working in the Jail knows the full extent of who has the virus and who is infectious. The Jail does not test people when they arrive, nor does it regularly test staff, and new arrestees are generally

housed in shared quarters for days before moving to the general population without knowing whether they are carriers of COVID-19. *See* Declaration of Josie Holland (“Holland Decl.”) at ¶ 5; Working Decl. at ¶ 22. On or about April 25, 2020, the Jail tested approximately 260 detained individuals for COVID-19.¹⁷ Out of this number, 155 individuals were reported to have tested positive for the virus.¹⁸ Several people in Mr. Busby’s pod tested positive and were moved into isolation on the sixth floor. *See* Spickler-Busby Decl. at ¶ 14; Yarbrough Decl. at ¶ 36. Prior to those positive tests, Mr. Busby reports that the men were frequently in close proximity to other people in detention, they did not have masks, and they shared common surfaces with everyone else in H pod. *See* Spickler-Busby Decl. at ¶ 14. None of the individuals who tested positive at the end of April displayed symptoms. *See* Yarbrough Decl. at ¶ 37. Some individuals refused to report their COVID-19 symptoms or be tested because they did not want to be moved into isolation. *See* Spickler-Busby Decl. at ¶ 26; Yarbrough Decl. at ¶ 39. On May 15, 2020, new testing numbers were released showing 151 pretrial detainees and 66 staff had tested positive.¹⁹ The Jail does not provide universal testing for COVID-19, although individuals continue to exhibit symptoms. *See* Working Decl. at ¶ 23; Yarbrough Decl. at ¶¶ 42, 44.

III. Immediate Release Is the Only Way to Protect the Medically Vulnerable.

Because testing and screening for COVID-19 at the Jail is wholly inadequate, making it impossible to know who is likely to be infectious, the only way medically vulnerable people can avoid serious illness and death from COVID-19 is to mitigate the likelihood of contracting the

¹⁷ *Nearly 200 Detainees and Employees at 201 Poplar Test Positive for COVID-19*, WMC ACTION NEWS 5 (Apr. 29, 2020), <https://www.wmcactionnews5.com/2020/04/29/nearly-detainees-employees-poplar-test-positive-covid/>.

¹⁸ *Id.*

¹⁹ Yolanda Jones, *West Tennessee Prisons, Shelby County Jail Hit Hard by Coronavirus*, DAILY MEMPHIAN (May 18, 2020), <https://dailymemphian.com/article/14121/tennessee-department-of-correction-shelby-county-jail-covid-19-testing-positive>.

disease by practicing social distancing and vigilant hygiene. Because these measures are impossible at the Jail, only the immediate release of Plaintiffs and other medically vulnerable detained persons will protect them from contracting COVID-19 and vindicate their constitutional and statutory rights.

Numerous public health experts have strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19.²⁰ Because of the severity of the threat posed by COVID-19, and its potential to spread rapidly throughout a correctional setting, public health experts recommend the prompt release from custody of people most vulnerable to COVID-19.²¹ Release protects people with the greatest vulnerability to COVID-19 from infection, and allows for greater risk mitigation for people held or working in a jail and the broader community in which it is situated.²² Release of the most vulnerable people

²⁰ See, e.g., *Velesaca v. Decker*, 20-cv-1803 (S.D.N.Y.) at Doc. No. 42 (March 16, 2020) (Declaration of Dr. Jaimie Meyer); Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, THE GUARDIAN (Mar. 13, 2020), <https://cutt.ly/itRSDNH>; Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, CONN. MIRROR (March 11, 2020), <https://cutt.ly/BtRSxCF>; Craig McCarthy & Natalie Musumeci, *Top Rikers Doctor: Coronavirus 'Storm is Coming,'* N.Y. POST (Mar. 19, 2020), <https://cutt.ly/ptRSnVo>; Oluwadamilola T. Oladeru et al., *What COVID-19 Means for America's Incarcerated Population – and How to Ensure It's Not Left Behind*, HEALTH AFFAIRS (Mar. 10, 2020), <https://cutt.ly/QtRSYNA>; Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), <https://cutt.ly/jtRSPnk>; Anne C. Spaulding, *Coronavirus COVID-19 and the Correctional Jail*, EMORY CTR. FOR THE HEALTH OF INCARCERATED PERS. (Mar. 9, 2020), <https://cutt.ly/MyYYVc0>; Marc F. Stern, *Washington State Jails Coronavirus Management Suggestions in 3 "Buckets,"* WASHINGTON ASSOC. OF SHERIFFS & POLICE CHIEFS (Mar. 5, 2020), <https://cutt.ly/8yYYHny>.

²¹ See Goldenson Decl., at ¶¶ 39, 40 (noting that release is the “only viable course of action” for protecting medically vulnerable individuals at the Jail, and will “reduce[] the burden on the healthcare infrastructure” of the Jail and the broader community); Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, JAMA INTERN MED. (Apr. 28, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271>.

²² Eric Lofgren et al., *The Epidemiological Implications of Incarceration Dynamics in Jails for Community, Corrections Officer, and Incarcerated Population Risks from COVID-19* (May 4, 2020), <https://www.medrxiv.org/content/10.1101/2020.04.08.20058842v2.full.pdf>.

from custody also reduces the burden on the region's healthcare infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. *See* Fefferman Decl. at ¶ 9. This is because a continued outbreak in the Jail will directly cause additional, preventable deaths in the community at large. *See* Fefferman Decl. at ¶ 12.

To vindicate constitutional rights of detainees and to promote public health in the face of the COVID-19 pandemic, federal and state courts across the country have ordered the release of medically vulnerable individuals from confinement. *See, e.g., Wilson v. Williams*, No. 4:20-cv-00794-JG, ECF No. 22 (N.D. Ohio Apr. 22, 2020) (ordering removal of all medically vulnerable prisoners from a federal prison with a COVID-19 outbreak),²³ *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350 (D. Conn. May 12, 2020) (ordering, *inter alia*, identification of medically vulnerable detainees, and their consideration for compassionate release or home confinement, implementing a process to make full and speedy use of home confinement, and requiring elimination of certain barriers to consideration for release or transfer).²⁴ This includes decisions providing for the release of all medically vulnerable prisoners (or at least those not presenting special concerns of flight or dangerousness).

²³ *See also Wilson v. Williams*, No. 4:20-cv-00794-JG, ECF No. 85 (N.D. Ohio May 19, 2020) (order enforcing preliminary relief, noting *inter alia* that evaluating only a small handful of the 837 medically vulnerable prisoners at the Elkton federal facility for transfer to home confinement, compassionate release, or other transfer did not comply with the district court's order).

²⁴ *See also Malam v. Adducci*, No. 5:20-cv-10829, ECF No. 22, 29 (E.D. Mich. Apr. 5 2020, Apr. 9, 2020) (opinion and order) (ordering release of two detainees in Michigan at high risk for serious illness due to their age and underlying health conditions); *United States v. Amarrah*, No. 17-20464, 2020 WL 2220008 (E.D. Mich. May 7, 2020); *United States v. Hansen*, No. 17 CR 50062, 2020 WL 2219068 (N.D. Ill. May 7, 2020); *United States v. Howard*, No. 4:15-CR-00018-BR, 2020 WL 2200855 (E.D.N.C. May 6, 2020).

ARGUMENT

Plaintiffs meet the legal requirements for the Court to grant them a temporary restraining order. As explained below, (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where plaintiffs demonstrate “irreparable harm which decidedly outweighs any potential harm to the defendant,” the “degree of likelihood of success required” is less, and a plaintiff need only raise “serious questions going to the merits.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

IV. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs are likely to establish that Defendants violated—and continue to violate—Plaintiffs’ constitutional and statutory rights by condemning them, in spite of their high vulnerability to COVID-19 complications and death, to confined, close quarters, where it is impossible for them to practice social distancing and maintain good hygiene. So long as Plaintiffs remain in the Jail, Defendants *cannot* adequately mitigate the risk of serious injury or death faced by Plaintiffs as a result of COVID-19. Under even the strictest view of Plaintiffs’ burden, this risk demonstrates a high likelihood of success on the merits. Accordingly, Plaintiffs’ continued detention violates their constitutional and federal rights.

A. Plaintiffs’ Continued Detention, and That of the Class Members, Violates Their Constitutional Rights.

Because Plaintiffs are individuals who have not been convicted of any crime, their continued detention in the midst of the COVID-19 pandemic violates their Due Process right to be *free from punishment*. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detained person may not be punished prior to an adjudication of guilt in accordance with

due process of law.”). Punishment is established if the jailer’s conduct is either not rationally related to a legitimate, non-punitive government purpose or is excessive in relation to that purpose. *Id.* at 561; *see also J.H. v. Williamson Cty.*, 951 F.3d 709, 717 (6th Cir. 2020) (applying *Bell* test to pre-trial detained person’s conditions of confinement claim); *Turner v. Stumbo*, 701 F.2d 567, 572-73 (6th Cir. 1983) (same).

The Supreme Court has recognized only two legitimate government interests in pretrial detention: to prevent a credible risk of flight, *see Stack v. Boyle*, 342 U.S. 1, 8 (1951), and to prevent a credible, serious risk to public safety, *see United States v. Salerno*, 481 U.S. 739, 745 (1987). Even if Plaintiffs’ and proposed Class members’ pretrial detention were otherwise justified as the least restrictive way to mitigate a credible risk of flight or danger in normal times—which Plaintiffs do not concede to be the case—their confinement in a facility that puts their lives in danger is excessive in light of the government’s original interest in detention.

By continuing to detain Plaintiffs in an environment that exposes them to an unreasonable risk to their future health, Defendants also run afoul of substantive Due Process protections, which are at least as expansive as the protections of the Eighth Amendment against cruel and unusual punishment. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause protects pretrial detained persons to at least the same extent the Eighth Amendment protects convicted prisoners); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (recognizing an Eighth Amendment deliberate indifference claim based on unwanted exposure to a future health risk). While the Eighth Amendment analysis of deliberate indifference claims traditionally involves both an objective and subjective component, the Supreme Court has strongly indicated that pretrial detained persons need only show that defendants’ conduct was objectively unreasonable. *See Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (recognizing that the

Supreme Court’s holding in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015), which held that the appropriate standard for a pretrial detained person’s excessive force claim is “solely an objective one,” signaled a “shift in Fourteenth Amendment deliberate indifference jurisprudence [that] calls into serious doubt whether [the plaintiff] need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them”). The objective component of a deliberate indifference claim is satisfied by showing that “absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm.” *Richko v. Wayne Cty.*, 819 F.3d 907, 915 (6th Cir. 2016) (quoting *Amick v. Ohio Dep’t of Rehab. & Corr.*, 521 F. App’x. 354, 361 (6th Cir. 2013)).

The magnitude of the risk of death or severe illness from COVID-19 to Plaintiffs and other medically vulnerable detained persons is immense, and Defendants are aware of it. The disease has spread to the Jail and there are hundreds of confirmed infections. In April, over 70 percent of those tested at the Shelby County Jail tested positive for COVID-19.²⁵ It is likely that other individuals who are asymptomatic and untested are transmitting the disease unwittingly to others.²⁶ See Goldenson Decl. at ¶¶ 13, 36. Additionally, there have been several reported outbreaks of COVID-19 in correctional facilities throughout Tennessee.²⁷ And, as of May 15, 2020, at least

²⁵ See Yolanda Jones, *More Than 70% Of Inmates, Jailers At 201 Poplar Tested Positive For COVID-19*, DAILY MEMPHIAN (Apr. 29, 2020), <https://dailyMemphian.com/article/13488/201-poplar-covid-testing-70-percent-positive>.

²⁶ Nathan W. Furukawa et al., *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, EMERGING INFECTIOUS DISEASES (May 4, 2020), <https://doi.org/10.3201/eid2607.201595> (estimating that as many as half of all transmissions occur through an infected person with little to no symptoms).

²⁷ Samantha Max, *Investigation: How The Coronavirus Ran Rampant Through A Tennessee Prison*, WPLN NEWS, NASHVILLE PUBLIC RADIO (May 11, 2020), <https://wpln.org/post/investigation-how-the-coronavirus-ran-rampant-through-a-tennessee-prison/>; *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (last updated May 15, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

2,574 people incarcerated in Tennessee state prisons have tested positive for COVID-19.²⁸ The law does not require that Plaintiffs and the Class members actually be exposed before their rights are violated. Potential exposure to a future harm is sufficient to state a constitutional claim and support a finding of irreparable injury. *Helling*, 509 U.S. at 33 (finding that “a remedy for unsafe conditions need not await a tragic event”).

Although not required to do so, Plaintiffs can also demonstrate that Defendants have been, and continue to be, subjectively indifferent to the risk that COVID-19 poses to medically vulnerable detained persons. The subjective component of deliberate indifference is satisfied by showing that “(1) the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner, (2) the official did in fact draw the inference, and (3) the official then disregarded that risk.” *Richko*, 819 F.3d at 915-16 (quoting *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014)). “Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence. . . .” *Id.* at 916 (quoting *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009)). Additionally, “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer v. Brennan*, 511 U.S. at 825, 842 (1994).

It is plain that Defendants are aware of the risk to Plaintiffs and other medically vulnerable detained persons at high risk of severe illness or death from COVID-19, and their failure to implement precautions specific to medically vulnerable detained persons or to release them constitutes a blatant disregard of that risk. Defendants know there is an extremely high rate of infection among the Jail population. Defendants are aware of the age, medical histories, and

²⁸ See THE MARSHALL PROJECT, *supra* note 27.

current medical conditions of persons in the Jail. Defendants also know that older individuals and people with certain medical conditions are at high risk of severe infection or death from COVID-19. They know that social distancing is the only way to prevent the spread of COVID-19 to medically vulnerable individuals in the Jail and that this measure is not possible in the Jail. Because the necessary measures to safeguard Plaintiffs' health, and that of similarly situated medically vulnerable detained persons, cannot be implemented in the Jail, release is the only reasonable response to the deadly COVID-19 pandemic.²⁹ *See Malam v. Adducci*, No. 5:20-cv-10829, ECF No. 68, at 46-51 (E.D. Mich. May 12, 2020).

B. Defendants Are Violating the ADA and Section 504 of the Rehabilitation Act by Failing to Make Modifications for Disabled Subclass Members.

Plaintiffs are also likely to prevail on their claim that Defendants have denied Mr. Busby and the Subclass members the benefits of the services, programs, and/or activities of the Shelby County Jail by reason of their disabilities in violation of the ADA and Section 504 of the Rehabilitation Act. 42 U.S.C. § 12101 *et seq.*, 29 U.S.C. § 794. Plaintiffs in the Subclass are people with disabilities protected under the ADA and Rehabilitation Act in addition to their constitutional protections. 42 U.S.C. § 12132 states that:

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The Jail is a public entity under federal disability rights laws. 42 U.S.C. § 12131(B) (“public entity” includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government”); *see also Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). The ADA “demands more of public entities than simply refraining

²⁹ On March 19, 2020, Defendants were also asked by the former director of Shelby County Pretrial Services to pursue all available options to release vulnerable people from the jail in light of the threat posed by COVID-19. *See Powell Decl.* at ¶ 6, Ex. A.

from intentionally discriminating against disabled individuals.” *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004). Put another way, public entities have an affirmative duty to accommodate disabled individuals. *Id.* at 910. This requires public entities to take affirmative steps to ensure that people with disabilities can participate in all of the entity’s programs, benefits, and services on an equal and equally safe basis as people without disabilities. 28 C.F.R. §§ 35.102(a), 35.130(a), (b); *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266, 269 (D.D.C. 2015). A failure to make accommodations or modifications necessary to ensure that people with disabilities can participate equally is a type of disability discrimination. 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 511 (2004) (noting that Congress recognized “that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion” or discrimination). The ADA also prohibits public entities from “utiliz[ing] criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability” or “[t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” 28 C.F.R. § 35.130(b)(3)(i)-(ii). By continuing to detain Plaintiffs with disabilities, Defendants’ policies and practices violate the ADA; they have failed in their duty to make modifications so Plaintiffs can benefit on an equal basis from the services, programs, or activities to which they are entitled.

Mr. Busby and the members of the Subclass are individuals with disabilities. The ADA defines disability as an impairment that substantially limits “major life activities.” 42 U.S.C. § 12102(1)(A).³⁰ They are “qualified” to participate in the Jail’s programs, services, and activities.

³⁰ “Major life activities” include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder,

This means that people in the Jail are entitled to equal access to adjudication of their criminal cases, as well as adequate medical care and basic life necessities during incarceration.

Mr. Busby and other medically vulnerable people with disabilities detained at the Jail are facing exclusion and denial of equal participation in the Jail's programs, services, and activities, including the adjudication of their criminal cases, because of the Jail's violation of disability rights laws. Subclass members cannot benefit equally from the Jail's medical care, or provision of food and other basic necessities—or even benefit equally in the Jail's system of ensuring that people survive in good health to the adjudication of their cases—because of the high risks they face from COVID-19 and the Jail's failure to make modifications to mitigate those risks. *See* 28 C.F.R. Pt. 35, App. B (“[T]itle II applies to anything a public entity does.”); *Fraihat v. U.S. Immigration & Customs Enf't*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570, at *26 (C.D. Cal. Apr. 20, 2020) (disabled people in ICE detention entitled to reasonable accommodations in order to participate in the “programmatically ‘benefit’” of the removal process). Subclass members cannot access these services or any others if they are severely ill, unconscious, or dead. Placing Plaintiffs and Subclass members at an extreme risk of severe illness, injury, or death has “the same practical effect of exclusion,” *Lane*, 541 U.S. at 531, and has the “effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” 28 C.F.R. § 35.130(b)(3)(i)-(ii). Given the fast-moving, life-threatening nature of the COVID-19 pandemic, and its effect on the Subclass, immediate release is the only reasonable modification that can bring Defendants into compliance with the ADA and Section 504.

neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2).

V. Plaintiffs' Risk of Exposure to COVID-19 Constitutes Irreparable Harm.

Plaintiffs have experienced, and continue to experience, irreparable injury in the form of being subjected to substantial and unreasonable risk of harm from COVID-19, in violation of their Fourteenth Amendment rights. “When constitutional rights are threatened or impaired, irreparable injury is presumed.” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Overstreet v. Lexington-Fayette Urban Cty. Gov.*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)); *see also Rhinehart v. Scutt*, 509 F. App’x 510, 514 (6th Cir. 2018) (suggesting that allegations of “continuing violation of . . . Eighth Amendment rights” would trigger a finding of irreparable harm). Because Plaintiffs are likely to succeed on the merits of their constitutional claims, which themselves stem from exposure to an unacceptable risk of serious illness or death, “no further showing of irreparable injury is necessary.” *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). Even so, Plaintiffs can show an additional and obvious risk of irreparable harm in the form of serious illness or death should they contract COVID-19 and be forced to cope with infection while housed in the Jail.

VI. The Balance of Equities and the Public Interest Favor Plaintiffs.

When the government opposes the issuance of a temporary restraining order, the final two factors—the balance of the equities and the public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The public has an interest in preserving Plaintiffs’ constitutional rights and in protecting public health. *See Neinast v. Bd. of Trs. of the Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests). The public interest is also “served by the enforcement of the ADA.” *Wilborn ex rel. Wilborn v. Martin*, 965 F. Supp. 2d 834, 848 (M.D. Tenn. 2013). The public interest thus requires that a TRO be granted in order to effectuate the ADA’s broad “remedial purposes.” *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018).

Significantly, releasing vulnerable individuals will reduce the burden on the local community and health infrastructure and release is clearly in the public interest. *See* Goldenson Decl. at ¶ 40; Fefferman Decl. at ¶¶ 8-9. Releasing vulnerable individuals also reduces the degree to which the Jail serves as a vector for further infections among others living and working at the Jail and the communities they return home to.³¹ Plaintiffs' release, subject to appropriate public health and safety precautions, will also promote Defendants' interest in ensuring the safety of others held at the Jail, as well as the staff there, and the community at large. *See* Goldenson Decl. at ¶ 41. In structuring their relief request, Plaintiffs have accounted for the prospect of public safety concerns and suggested a process by which any credible public safety risks may be addressed prior to release.³²

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion.

Dated: May 20, 2020

Respectfully submitted,

/s/ Brice M. Timmons

³¹ *See* Lofgren, *supra* note 22; Powell Decl. ¶ 17.

³² As noted further in the Declaration of Bill Powell, there exist a number of alternatives to incarceration to mitigate any public safety risk posed by the release of any individual class member. Powell Decl. ¶¶ 11, 16.

Brice M. Timmons (Bar No. 29582)
Black McLaren Jones Ryland & Griffee,
A Professional Corporation
530 Oak Court Dr. Suite 360
Memphis, TN 38117
Telephone: (901) 762-0535
Facsimile: (901) 762-0527
btimmons@blackmclaw.com

Josh Spickler (Bar No. 021019)
Wesley Dozier (Bar No. 037735)
Just City
P.O. Box 41852
Memphis, TN 38174
Telephone: (901) 206-2226
josh@justcity.org

Steven John Mulroy (Bar No. 28831)
Bredesen Professor of Law
Cecil C. Humphreys School of Law,
University of Memphis
1 N. Front St.
Memphis, TN 38103
Telephone: (901) 603-8779
smulroy@memphis.edu

Andrea Woods*
Amreeta S. Mathai*
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
awoods@aclu.org
amathai@aclu.org

Zoe Brennan-Krohn*
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0769
zbrennan-krohn@aclu.org

Maria Morris*
American Civil Liberties Union
915 15th Street N.W., 7th Floor
Washington, D.C. 20005
Telephone: (202) 548-6607
mmorris@aclu.org

Thomas H. Castelli (Bar No. 24849)
Stella Yarbrough (Bar No. 33637)
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Telephone: (615) 320-7142
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Joseph Bial*

2001 K Street NW

Washington, D.C. 20006-1047

Telephone: (202) 223-7300

Fascimile: (202) 223-7420

jbial@paulweiss.com

Darren Johnson*

Jonathan M. Silberstein-Loeb*

David Kimball-Stanley*

Adrienne Lee*

Avery Medjuck*

1285 Avenue of the Americas

New York, NY 10019-6064

Telephone: (212) 373-3000

Fascimile: (212) 757-3990

djohnson@paulweiss.com

jsilberstein-loeb@paulweiss.com

dkimball-stanley@paulweiss.com

alee@paulweiss.com

amedjuck@paulweiss.com

Attorneys for Plaintiffs

* Application for admission forthcoming

CERTIFICATE OF SERVICE

I, Brice M. Timmons, certify that on May 20, 2020, I caused a true and correct copy of the foregoing document to be filed electronically via the ECF system. I also caused a true and correct copy of the foregoing document to be served by hand on the Defendants.

Respectfully submitted,

/s/ Brice M. Timmons