UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OSCAR SANCHEZ, MARCUS WHITE, TESMOND McDONALD, MARCELO PEREZ, ROGER MORRISON, KEITH BAKER, PAUL WRIGHT, TERRY McNICKELS, and JOSE MUNOZ; *on their own and on behalf of a class of similarly situated persons*; *Petitioners/Plaintiffs*, v. DALLAS COUNTY SHERIFF MARIAN BROWN, *in her official capacity*; DALLAS COUNTY, TEXAS; *Respondents/Defendants*.	**Civil Action No. 3:20-cv-00832**

DETAINEE PLAINTIFFS' OPPOSITION TO
JAIL DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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NECESSITY FOR OPPOSITION

Jail Defendants concede that a "high incidence rate of COVID infection in the jail" is "a serious problem" that "endangers the health and lives of detainees in the jail" but admit "we still don't know how many asymptomatic people [who have COVID-19] are out there" in the jail.[1] Yet Jail Defendants still seek to block the only means available for Detainee Plaintiffs and the Court to determine the actual rate of infection. The absence of testing of the general population is itself evidence of deliberate indifference, contrasting with the "mass testing for *all* inmates" cited approvingly by the Fifth Circuit in *Valentine v. Collier*[2] and violating current guidance by the Centers for Disease Control and Prevention ("CDC") for testing in carceral settings.[3] Detainee Plaintiffs simply cannot obtain discoverable information about the prevalence of COVID-19 in the jail without access to the jail premises, because, of course, Detainee Plaintiffs and the members of the class they seek to represent are incarcerated, and voluntary tests therefore cannot be independently administered absent entry onto jail premises.

Accordingly, Detainee Plaintiffs seek access to jail premises to conduct voluntary testing. Detainee Plaintiffs bring that request under Federal Rule of Civil Procedure 34, which, as multiple federal courts have held, is the proper mechanism to obtain entry into jail premises to conduct voluntary medical testing. *See De'lonta v. Clarke*, No. 7:11-CV-00257, 2013 WL 4584684, at *2 (W.D. Va. Aug. 28, 2013) (ordering defendants to make inmate "available at her current place of incarceration for an evaluation and examination by a physician"); *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471, 2009 WL 1451684, at *4 (D. Colo. May 20, 2009) (citing Rule 34 and

[1] Ex. B ("Robinson Tr.") at 49:8–9, 49:11–13, 60:1–2.
[2] No. 20-20525, 2021 WL 1153097, at *1 & *6 (5th Cir. Mar. 26, 2021) (emphasis added).
[3] Center for Disease Control and Prevention, Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html (last accessed Apr. 26, 2021) ("CDC Interim Guidance").

granting motion to compel entry into prison to conduct medical examination of inmate). In seeking such access, Detainee Plaintiffs have repeatedly expressed their "eager[ness] to facilitate discussions between medical experts to work out reasonable arrangements for the testing" and willingness to develop a mutually agreeable testing protocol and agenda. *See* Dkt. No. 211 ("Defs' Mot."), Ex. A. Jail Defendants, in response, have repeatedly declined to cooperate or confer and have not even identified the specific burdens they claim testing would impose such that Detainee Plaintiffs could independently work around those constraints. Indeed, Sheriff Brown testified that if Parkland staff "have no objection" to additional detainee testing, "then I have no objection."[4]

Instead, Jail Defendants respond to Detainee Plaintiffs' motion with a barrage of misrepresentations and histrionics, characterizing the request as seeking "mass experimentation without[] fully informed consent" and as "treating [inmates] as little more than items for experimentation." Defs' Mot. at 2. All the while, Jail Defendants fail to acknowledge that the motion seeks access to the jail to undertake only *consensual* testing, conducted on an individual, rather than "mass" basis, and administered by a qualified healthcare provider in a manner consistent with CDC guidelines (and, of course, governing ethical standards in the medical profession). *See* Dkt. No. 209 ("Request") at 2. This is hardly an attempt to "gain 'entry' to [detainees'] bodies," as Jail Defendants' motion incredibly claims. Defs' Mot. at 1. If anything, it is *Jail Defendants*, not Detainee Plaintiffs, who have conducted an inhumane and macabre medical experiment by incarcerating thousands of people in conditions completely inconsistent with governing public health guidance through 13 months of a global pandemic.

For all the bluster and hypocrisy, however, Jail Defendants' actual objections to the motion are narrow. They do not seriously argue that the information is not relevant. Nor can they: scores

[4] Ex. A ("Brown Tr.") at 118:13–20.

of federal courts have considered the prevalence of COVID-19 in deciding analogous claims—notably including the Fifth Circuit in *Valentine v. Collier*. And they do not identify any specific burdens occasioned by voluntary testing administered by a qualified medical professional. Instead, Jail Defendants lodge a series of picayune, mostly procedural objections, none of which has merit. Jail Defendants have not carried their burden on their motion for a protective order, and Detainee Plaintiffs therefore respectfully request that the Court deny Jail Defendants' motion and direct that they cooperate with Detainee Plaintiffs in promptly conducting consensual testing to determine prevalence of COVID-19 in the jail population.

LEGAL STANDARD

A protective order is warranted only for good cause—namely, that the party seeking it will suffer "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see also Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990). "[T]he burden is upon [the party seeking the protective order] to show the necessity of its issuance" with "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998) (citation omitted).

ARGUMENT

A. Detainee Plaintiffs' request is timely.

On April 16, 2021, this Court extended the fact discovery deadline in this matter to May 28, 2021. *See* Dkt. No. 238. Jail Defendants' objection to the timeliness of Detainee Plaintiffs' request is therefore moot, as the request was filed well before 30 days prior to the revised close of fact discovery.

B. Rule 34 is the proper mechanism for the request.

Jail Defendants urge that Rule 34 by its terms does not authorize entry onto jail premises for the purpose of conducting voluntary COVID-19 testing. But as numerous federal courts have held, Rule 34 is the proper mechanism to obtain access to a jail or prison in order to conduct voluntary medical testing, because Rule 35—the lone alternative—applies only to involuntary medical testing of adverse parties. *See Amos v. Taylor*, No. 4:20-CV-7, 2020 WL 618824, at *6 (S.D. Miss. Feb. 10, 2020); *De'lonta v. Clarke*, No. 7:11-CV-00257, 2013 WL 4584684, at *2 (W.D. Va. Aug. 28, 2013); *Silverstein v. Fed. Bureau of Prisons*, No. 07-CV-02471, 2009 WL 1451684, at *4 (D. Colo. May 20, 2009).

Ignoring that well-established rule—including at least one case *cited by Jail Defendants in their own brief*[5]—Jail Defendants urge that Rule 34's terms authorize only examinations of "objects," not people. This myopic reading of the Rule's text ignores the foundational interpretive principle that "[t]he discovery provisions of the Federal Rules of Civil Procedure . . . are to be broadly and liberally construed." *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973). More fundamentally, Jail Defendants' argument is wrong on the text: Rule 34 authorizes the examination not only of "object[s]" but also "any *operation*," (emphasis added), and the collection of voluntary discovery from persons on premises is "properly included as part of an inspection of 'any operation' on the prison facilities to be inspected." *Coleman v. Schwarzenegger*, No. C01-1351, 2007 WL 3231706, at *2 (E.D. Cal. Oct. 30, 2007). It is for this reason that courts regularly allow Rule 34 inspections that involve various forms of information-gathering from persons on the inspected premises, including interviews and other examinations. *See id.* (allowing interviews

[5] "As to the request for medical evaluations, the motion, in substance, seeks entry to Parchman for the purpose of conducting examinations. In this sense, the request is best considered as a Rule 34 demand." *Amos*, No. 4:20-CV-7, 2020 WL 618824, at *6.

of prison employees on this rationale); *see also Alvarez v. LaRose*, No. 3:20-CV-782, 2020 WL 5594908, at *5–*6, *11 (S.D. Cal. Sept. 18, 2020) (permitting under Rule 34, in a COVID-19 case, Detainee Plaintiffs' expert "to speak in confidence to detainees at [the prison] who are willing to speak to him"); *United States v. Erie Cty.*, No. 09-CV-849S, 2010 WL 986505, at *2–*4 (W.D.N.Y. Mar. 17, 2010) (allowing interviews of non-party inmates and prison employees on this rationale); *Morales v. Tubman*, 59 F.R.D. 157 (E.D. Tex. 1972) (allowing a "participant observation study," wherein experts live within a juvenile institution for a month, on this rationale). Pursuant to Rule 34, the "operation" to be studied is the operation of the Dallas County jail under its COVID-19 protocols; the voluntary COVID-19 testing of inmates in connection therewith requires no additional textual mandate.

C. The pre-certification posture of the case does not alter the scope of Rule 34.

Citing no case law—nor even articulating any legal principle—Jail Defendants claim that because the Court has not yet certified a class, any testing of putative class members would be improper. But nothing in Rule 34 or the cases interpreting it limit the scope of permissible on-premise interactions to parties. To the contrary, courts have repeatedly approved various forms of on-premise discovery—including interviews and studies—that involve third parties. *See Alvarez*, No. 3:20-cv-782, 2020 WL 5594908, at *5–*6 (non-party inmates who consent to interviews); *Coleman*, No. C01-1351, 2007 WL 3231706, at *2 (prison employees); *Erie Cty.*, No. 09-CV-849S, 2010 WL 986505, at *2–*4; *Morales*, 59 F.R.D. 157 (non-party inmates subject to observation study).

D. The notice is not vague.

Detainee Plaintiffs' notice specified the presumptive date of the inspection and offered to cooperate in determining a mutually agreeable alternative date if necessary, *see* Request at 2; identified the location at which the inspection would occur, *id.* at 1–2; stated that any testing of

detained persons would be consensual and administered by qualified medical professionals according to the relevant CDC guidelines, *id.*; and offered to cooperate in determining mutually agreeable protocols for carrying out the testing, *id.* at 2. The notice therefore more than meets Rule 34's requirement of specifying a reasonable "time, place, and manner" of carrying out the inspection. *See also* Wright and Miller, 8B Fed. Prac. & Proc. Civ. § 2212 (3d ed.) ("There is no reason why the request cannot simply call for inspection 'at a time and place convenient to the party' to whom it is directed, leaving it to that party to designate the time and place in his response.").

Jail Defendants' complaints that the notice is "unmanageably vague" ring hollow not only because the notice explicitly meets each of Rule 34's strictures, but also because Detainee Plaintiffs offered, both in the notice itself and in the meet-and-confer with Jail Defendants' counsel, to cooperate on determining mutually agreeable parameters to any inspection. Jail Defendants refused that offer and now seek to exploit Detainee Plaintiffs' flexibility for their own gain. They should not be rewarded for that intransigence.

E. <u>The request does not seek injunctive relief.</u>

The request also does not improperly seek injunctive relief. The notice does not demand that Jail Defendants do anything at all, except permit entry to the premises and confer in good faith with Detainee Plaintiffs to determine appropriate parameters for the inspection. Those requests are wholly consistent with Defendant's obligations under Rule 34. *See Amos*, No. 4:20-CV-7, 2020 WL 618824, at *6 (cited by Jail Defendants) (distinguishing a request to provide medical treatment—a form of injunctive relief—with a request to conduct medical evaluations for discovery purposes—a proper Rule 34 request). Indeed, requiring a defendant to negotiate the parameters of and cooperate in planning a Rule 34 inspection is a routine feature of discovery. *See, e.g.*, *Chunn v. Edge*, No. 20-CV-1590, 2020 WL 1872523, at *2 (E.D.N.Y. Apr. 15, 2020)

("The Court expects the parties to negotiate in good faith regarding the parameters of an inspection to permit petitioners to obtain relevant information while minimizing the burden on respondent."); *Erie Cty.*, No. 09-CV-849S, 2010 WL 986505, at *4 ("[T]his Court strongly encourages counsel to work together to resolve any further logistical concerns . . . . Efforts are better spent preparing for the upcoming inspection than preparing for a conference with the Court.") It is perhaps for this reason that nowhere in Jail Defendants' brief do they specifically identify what "obligation" the request would impermissibly "requir[e] Jail Defendants to perform." Defs' Mot. at 5.

In fact, *Jail Defendants themselves emphasize* that the purpose of the inspection and planned testing is *not* "for any medical purpose," *id.* at 2, but instead expressly and undisputedly to collect "important information for purposes of preparing the case for trial." *Id.* This is not, therefore, a case where the use of a discovery device is mere pretext to obtain some sought-after relief, and the request is thus appropriately brought under Rule 34.

F. <u>The request is proportional to the needs of the case.</u>

Jail Defendants have entirely failed to show that the burden to them outweighs the needs of the case, because they have not identified any burden whatsoever, and the information is centrally relevant to Detainee Plaintiffs' claims.

1. Jail Defendants have not shown any impermissible burden.

Jail Defendants' proportionality argument rests on a flagrant and grotesque mischaracterization of Detainee Plaintiffs' request. Detainee Plaintiffs do not request, as Jail Defendants claim, permission to "experiment[] on the bodies of inmates," Defs' Mot. at 6, or even to conduct "one-time mass testing of everyone in the jail," *id.* at 6. Instead, as Detainee Plaintiffs' request and counsels' meet-and-confer made clear, the testing sought would be individualized and on consent only.

Stripped of its fabrications, Jail Defendants' argument offers little else to justify denying Detainee Plaintiffs' request. As to the purported burden, Jail Defendants have identified no specific burden whatsoever and have outright refused to cooperate with Detainee Plaintiffs in identifying and mitigating any such burden. Jail Defendants' handwaving and *ipse dixit* is plainly insufficient to carry their burden to show good cause.

Detainee Plaintiffs stand ready to cooperate in developing a plan that takes cognizance of and minimizes any burden on Jail Defendants, so long as the plan facilitates testing that is:

- Conducted by or with the oversight of qualified medical professionals engaged by Detainee Plaintiffs,
- Reliable,
- In accordance with CDC standards,
- Administered upon the informed consent of any inmate.

The parties additionally have the benefit of the CDC's revised Interim Guidance on testing to inform the development of an appropriate protocol that minimizes the burden on Jail Defendants while permitting access to the discoverable information Detainee Plaintiffs seek. But without Jail Defendants' fulfilling their obligation to confer in good faith, any protocol will have to be either developed and implemented unilaterally by Detainee Plaintiffs or litigated piecemeal.

2. The sought-after discovery is highly relevant to Detainee Plaintiffs' claims.

As to the relevance of the sought-after discovery, Jail Defendants advance three arguments: first, that Jail Defendants' unilateral and limited public reporting of *symptomatic* COVID-19 cases renders the proposed testing redundant; second, that the prevalence of COVID-19 in the jail is not relevant to Detainee Plaintiffs' claims; and finally, that the testing would not be probative as to the rate of COVID-19 in the jail. Each of these is unavailing.

a. *The data would not be redundant with Jail Defendants' own reporting.*

Jail Defendants do not collect or publicly report data on the actual prevalence of COVID-19 in the jail. It is undisputed that Jail Defendants administer tests to detained persons only in two extremely limited, overlapping circumstances: if the detained person (a) is observably symptomatic or (b) affirmatively requests a test. Otherwise, the jail administers no tests to inmates—a flagrant digression from CDC guidance, which describes periodic screening of asymptomatic detained persons as "essential" and a "key component of a layered approach to prevent SARS-CoV-2 transmission."[6] Asymptomatic individuals transmit more than half—59 percent—of all cases of COVID-19,[7] and not all symptomatic inmates may report their symptoms or request tests. As the CDC Interim Guidance explains, screening testing—which helps ascertain the actual prevalence of COVID-19 in a population by testing asymptomatic or randomly sampled individuals—therefore differs fundamentally from diagnostic testing, which is "intended to identify current infection in individuals and is [typically] performed when a person has signs or symptoms consistent with COVID-19."[8]

Accordingly, the jail's extremely limited diagnostic COVID-19 testing and its public "reports" do not provide insight into the *actual* prevalence of COVID-19 in the Dallas County jail, and Jail Defendants' assertion that the "incidence of COVID-19 is reported and made publicly available on a daily basis" is patently false. Defs' Mot. at 5. (Detainee Plaintiffs note that the link Jail Defendants cite for such reports leads to an error page. *See id.* (citing https://www.tcjs.state.tx.us/wp-content/uploads/2021/03/TCJS_COVID_Report.pdf). Indeed,

[6] CDC Interim Guidance.
[7] Michael A. Johansson et al., *SARS-CoV-2 Transmission From People Without COVID-19 Symptoms*, JAMA NETWORK OPEN (Jan. 7, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774707?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=010721.
[8] CDC Interim Guidance.

Defendants and their agents have expressly acknowledged that their anemic testing regime does not generate data regarding the actual prevalence of COVID-19 in the jail. For example, in her deposition, Sheriff Marian Brown testified that she neither knew nor could estimate the actual prevalence in the jail, despite the daily reporting:

> Q: Do you know what the incidence rate is as it pertains to COVID-19?
> A: No.
> . . . .
> Q: So [the report] reflects the results of actual tests; is that true?
> A: Yes.
> Q: Does it say what the—what the rate of infection for asymptomatic detainees is?
> A: No, it does not.
> Q: So if you're not tested but you have COVID, you don't show up on that report; is that right?
> A: That's correct.
> Q: And if asymptomatic detainees aren't generally tested after they're booked in and they've finished their initial period of isolation, . . . how can that report reflect what the actual incidence rate is?
> A: I don't think I said it reflects the actual rate of inciden[ce]. It tells you who has been tested from one 24-hour period to the next.
> . . . .
> Q: And is it true, Sheriff Brown, that the report you get from Chief Robinson about testing results does not include an estimate of the incidence rate among detainees who have not been tested? Is that right?
> A: That's right.
> Q: [D]o you have a—a sense of how much difference there is between the reported rate that you get from Chief Robinson and what the actual, true incidence rate is?
> A: No, sir, I don't.

Brown Tr. at 39:12–41:21. Chief Deputy Robinson gave similar testimony, as noted in the first paragraph of this brief. Jail Defendants' assertions in connection with this filing and others[9] that the incidence of COVID-19 is reported via these daily reports not only flouts basic reasoning but also Jail Defendants' own admitted understanding of those statistics, testing the boundary between zealous advocacy and knowing misrepresentation.

[9] *See, e.g.*, Dkt. No. 236 at 2 (citing the daily report for the proposition that there were "zero confirmed active cases" in the jail.)

The limited insight we do have into the actual prevalence demonstrates that the rate of COVID-19 in the jail is likely much higher than that reflected in Jail Defendants' reports. In mid-2020, Jail Defendants for a short period of time *did* engage in some testing of asymptomatic inmates. The results were dramatic: For example, in June 2020, one screening test revealed that 76% of the inmates tested had asymptomatic COVID-19 infections, in addition to symptomatic cases.[10] Dr. Ank Nijhawan directly attributed the observed, dramatic spikes in reported cases at the time to the now-abandoned testing of asymptomatic inmates.[11] And at the time, Dr. Nijhawan drew precisely the conclusion urged here: she wrote to Chief Deputy Frederick Robinson, in response to the drastic results, that "[t]here is likely a lot more asymptomatic COVID disease in the jail . . . than we realize."[12] But Jail Defendants have now abandoned their testing of asymptomatic inmates—in fact, the very reason they abandoned said testing was because the high positive rates resulted in so many inmates having to quarantine together for extended periods of time.[13] Detainee Plaintiffs' request for screening testing would therefore generate information not redundant with Defendant's incomplete preexisting public reports.

b. Testing would be probative of the prevalence of COVID-19 in the jail.

Jail Defendants suggest, incredibly, that a one-time test of jail inmates would not be probative as to the prevalence of COVID-19 in the jail. In support of this position, Jail Defendants cite the testimony of Dr. Nijhawan regarding the jail's decision not to implement a mass-testing protocol. *See* Defs' Mot. at 7. But the quoted testimony states only that a one-time test of the jail population would not be sufficiently valuable to the *jail* in its prospective *policymaking*, because

[10] *See* Ex. D at DALLASCO_SANCHEZ_0002686.
[11] *See* Ex. C ("Nijhawan Tr. II") at 110:14–111:7.
[12] Ex. D at DALLASCO_SANCHEZ_0002686.
[13] *See* Nijhawan Tr. II at 116:1–18.

it would provide only a single temporal cross-section regarding prevalence, rather than long-term data; because the jail had limited testing capacity that could be better used to test incoming detainees; and because the mass housing of detainees in the jail meant that the jail simply did not have the ability to quarantine so many detainees.[14] It does not, as Jail Defendants misleadingly suggest, state that the test would not be *probative as evidence* of the prevalence of COVID-19 in the jail at any given time. In attacking the "epidemiologic" value of such "point prevalence" data, it is *Jail Defendants*, not *Detainee Plaintiffs*, who conflate prospective injunctive relief and discovery. *See id.* And though serial testing might be *more* probative and may well be warranted depending on the results of a one-time sampling, the snapshot test would nonetheless yield relevant, critical information for the purposes of finalizing discovery and trial—as Dr. Nijhawan's quoted testimony itself acknowledges. *See id.* ("It gives you some information.").

c. The prevalence of COVID-19 is highly relevant to Detainee Plaintiffs' claims.

Finally, insight into COVID-19 prevalence in the jail is plainly relevant to Detainee Plaintiffs' claims under both the Eighth and Fourteenth Amendments, as it is probative of the risk of harm posed to Detainee Plaintiffs as well as the reasons for and impact of Jail Defendants' decision to forego diagnostic testing. The Fifth Circuit in *Valentine v. Collier* and scores of other federal courts have therefore considered testing and prevalence data in assessing analogous claims. *Valentine*, 2021 WL 1153097, at *7 ("Most importantly, the district court has found that Defendants, post-trial, are mass testing each week."); *Mays v. Dart*, 453 F. Supp. 3d 1074, 1092 (N.D. Ill. 2020) (considering high COVID-19 prevalence in analyzing a Fourteenth Amendment claim); *Banks v. Booth*, 459 F. Supp. 3d 143, 153 (D.D.C. 2020) (considering COVID-19

[14] Jail Defendants continue to house up to 64 detainees in pods and up to 28 in tanks.

prevalence in assessing Fourteenth Amendment and Eighth Amendment claims); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 439 (D. Conn. 2020) (considering prevalence in assessing Eighth Amendment claim); *Maney v. Brown*, No. 6:20-CV-00570, 2021 WL 354384, at *13 (D. Or. Feb. 2, 2021) (same); *Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 156 (D.N.H. 2020) (deferring decision on a deliberate indifference claim until more data about the prevalence of COVID-19 in the facility was available); *see also Malam v. Adducci*, 469 F. Supp. 3d 767, 778, 791 (E.D. Mich. 2020) (considering high COVID-19 prevalence in assessing a conditions-of-confinement claim in the civil detention context); *Yanes v. Martin*, 464 F. Supp. 3d 467, 474 (D.R.I. 2020), *appeal dismissed*, No. 20-1762, 2020 WL 8482783 (1st Cir. Oct. 6, 2020) (same); *Prieto Refunjol v. Adducci*, 461 F. Supp. 3d 675, 704 (S.D. Ohio 2020), *reconsideration denied*, No. 2:20-CV-2099, 2020 WL 3026236 (S.D. Ohio June 5, 2020) ("There is no dispute that Butler has at least two confirmed COVID-19 infections, and we do not know the real infection rate given the paucity of tests. This lack of systematic testing leaves an evidentiary void regarding the scope of the spread of the virus.").

Finally, although 691 people are dying each day on average in the United States from COVID-19,[15] new variants are proliferating, and infection and death rates are skyrocketing in some places,[16] Jail Defendants argue that the "world has moved on" from the COVID-19 pandemic, and that they will present evidence that inmates are being vaccinated "at a promising rate" (though they do not specify what percentage of inmates have been vaccinated, nor what they consider a "promising" rate). Titillating as that vaccine prophecy may be, it is utterly unsubstantiated,

[15] CDC COVID Data Tracker, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last accessed Apr. 26, 2021).
[16] Jeffrey Gettleman, Sameer Yasir, Hari Kumar, and Suhasini Raj, N.Y. Times, "As Covid-19 Devastates India, Deaths Go Undercounted," https://www.nytimes.com/2021/04/24/world/asia/india-coronavirus-deaths.html (Apr. 26, 2021).

contrary to the available evidence,[17] and immaterial to the present motion, which relates to a live dispute. And if, as Jail Defendants intimate, COVID-19 is a thing of the past as far as the Dallas County jail is concerned, they should welcome the opportunity to show the Court and the public that is so, via a one-time test.

CONCLUSION

COVID-19 remains a serious threat to the lives and health of detainees in the Dallas County jail, but Jail Defendants have deliberately chosen, contrary to CDC guidance, not to test asymptomatic detainees in the general population for infection with COVID-19 and now seek to block Detainee Plaintiffs from using the only means available, under Rule 34, to determine the prevalence of COVID-19 among those detainees. Frequent "mass testing" of "all inmates" was crucial to the Fifth Circuit's decision in *Valentine v. Collier*, and the utter lack of it in the asymptomatic general jail population is strong evidence of deliberate indifference. Detainee Plaintiffs respectfully request that the Court deny Jail Defendants' motion for a protective order, direct Jail Defendants to cooperate in conducting testing to determine prevalence of COVID-19 in the jail, and award Detainee Plaintiffs all other appropriate relief.

Dated: April 26, 2021

Respectfully submitted,

/s/ Henderson Hill	/s/ Brian Klosterboer	/s/ Barry Barnett
AMERICAN CIVIL	ACLU FOUNDATION OF TEXAS	SUSMAN GODFREY L.L.P.

[17] As of March 29, 2021, fewer than 500 detainees—a small fraction of the roughly 5,600 total—had received vaccinations for COVID-19, *see* Defs Mot. Ex. C, and vaccines were progressing at a rate of fewer than 20 a day. At that time, Sheriff Brown had not attempted to obtain additional doses or spoken to anyone in the state or federal government about securing a larger supply, but she admitted that she would be the logical person to make such a request. (Brown Tr. at 70:2–22; 71:9–19.) And because the Jail Defendants have made no plans to administer the two-dose mRNA vaccinations, they have been unable to administer any vaccines during the Johnson & Johnson pause. Counsel for Detainee Plaintiffs understand that vaccinations may resume in the coming week.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 26, 2021.

/s/ Barry Barnett
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