IN THE 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 MCNICKLES, AND JOSE MUNOZ, on their own behalf and on behalf of a class of similarly situated persons, ***Petitioners/Plaintiffs,***	§	**Civil Action** **Case No. 3:20-cv-00832**
v.	§	
DALLAS COUNTY SHERIFF MARIAN BROWN*, in Her Official Capacity*; DALLAS COUNTY, TEXAS, ***Respondents/Defendants.***	§	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case arises from the incredibly challenging circumstances presented by the COVID-19 pandemic since March 2020. Since the Court heard Plaintiffs' Motion for Preliminary Injunction in April 2020, Defendants and Parkland have worked together to refine the Dallas County Jail's response to COVID-19. Today, all persons booking into the Jail are given a mask and offered both COVID-19 testing and vaccination. As of the date of the filing of Defendants' Motion for Summary Judgment, 5 inmates and 2 DSOs have active COVID-19. Based on these facts and others enumerated below, Plaintiffs cannot demonstrate deliberate indifference as a matter of law. Defendants are therefore entitled to summary judgment.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Plaintiffs filed suit, and the Court denied their Motion for Preliminary Injunction and dismissed their habeas claims with prejudice.

On April 9, 2020, Keith Baker, Tesmond McDonald, Terry McNickels, Roger Morrison, Jose Munoz, Marcelo Perez, Oscar Sanchez, Marcus White, and Paul Wright filed suit. ECF No. 1. Baker, McDonald, Sanchez, and White purported to represent themselves and a class of current and future detainees in pretrial custody. ECF No. 1 at 66. Morrison, Munoz, Perez, and Wright purported to represent themselves and a class of post-adjudication inmates detained pursuant to a post-conviction sentence or a probation or parole violation. ECF No. 1 at 67.

Plaintiffs amended their complaint on April 17, 2020 to add three Plaintiffs: Ideare Bailey, Olivia Washington, and Kiara Yarborough. ECF No. 39. Bailey was a putative representative for the pre-adjudication class. ECF No. 39 at 11 ¶24. Washington and Yarborough were both putative representatives of the post-adjudication class. ECF No. 39 at ¶¶101–02.

Plaintiffs allege that the conditions of their confinement in the Dallas County Jail violate their Eighth and Fourteenth Amendment rights, and seek declaratory and permanent injunctive relief. Following a four-day hearing, the Court denied Plaintiffs' Motion for Preliminary Injunction. ECF No. 85. The Court later granted Defendants' Amended Motion to Dismiss as to Plaintiffs' habeas claims and dismissed those claims with prejudice. ECF No. 120.

II. Working together, the Jail and Parkland have developed a range of infection-control measures related to COVID-19.

A. Intake Cohorts, Early Testing, and Quarantine

Working together, the Jail and Parkland have developed a range of infection-control measures related to COVID-19 that have been tailored to the specific circumstances of the Dallas County Jail. Every person booking into the Jail is screened for COVID-19. If they demonstrate symptoms, they are immediately quarantined. App. at 402, 405.

Since June 2020, detainees entering the Jail have been cohorted in diagnostic tanks and offered testing. Jones Declaration at ¶12. Initially, this diagnostic cohorting lasted 7 days. Jones Declaration at ¶10.

Since July 2020, every person booking into the jail is offered a COVID-19 test. App. at 405–06, 690.

Since November 2020, well in excess of 90 percent of individuals booking into the Jail have agreed to be tested for COVID-19 at intake. App. at 692–93

Parkland officials worked with jail personnel to extend this diagnostic cohorting to 9 days in March 2021. Jones Declaration at ¶12. While the CDC recommends a 14-day initial hold, space limitations at the Jail prevent holding detainees in diagnostic tanks for longer than 9 days at this time. App. at 378 ¶10, 617–20.

B. Current intake cohorting, early testing, and quarantine protocol

After initial screening and booking in, detainees are placed into a diagnostic tank. When the tank fills up, usually about 24 hours after it starts filling, the tank is closed and that group of entrants into the Jail is held together in that tank for 9 days. App. at 617.

New detainees who consent to COVID-19 testing are tested. If any detainee's test comes back positive, that person is removed from the tank and quarantined. App. at 378 ¶11. The remaining persons in that tank then begin a 14-day quarantine. *Id.*

After 9 days in a diagnostic tank with no COVID-19-positive cases, the detainees in that tank are moved into the general jail population. App. at 378 ¶9.

If a detainee has consented to be vaccinated and they test negative for COVID-19, they will be added to the list of detainees scheduled to receive a vaccine. App. at 616–17.

There is no plan to stop this intake protocol at this time. App. at 620–21.

C. General Jail population measures

If anyone incarcerated in the Jail asks for a COVID-19 test, a test is administered to that person on a clinical basis. App. at 695, 378 ¶8. Absent a request, Parkland and Jail personnel have decided that focusing on early testing, intake cohorting, and vaccination is a better use of available resources than mass serial testing of more than 5000 inmates. As such, no asymptomatic testing is conducted in the general population of the Jail absent a request or a specific, clinical purpose. App. at 696..

Since March 2021, when both vaccines became available and the intake cohorting timeline was extended to 9 days, there have been very few instances of new COVID-19 infection in the Jail. App. at 379 ¶12.

D. Current Jail Practices

There are well-developed protocols for quarantine and isolation of appropriate inmates at the Jail. These policies and procedures result from continuous updating over the course of the last year. *See* App. at 399. Inmates all have masks and are encouraged to wear them. App. at 387. DSOs are required to wear masks while working in the facility. App. at 845 ¶5. The Dallas County Jail has added screening questions for COVID-19 to all medical forms, timely disseminated information about COVID-19 to incarcerated people in multiple languages, developed policies for screening, monitoring, and quarantining people with suspected and confirmed COVID-19, provided free soap, suspended copays for infectious disease medical visits, continued medical, mental, and behavioral healthcare. App. at 500–03.

E. Vaccination

Beginning in December 2020, DSOs at the jail were able to obtain a COVID-19 vaccination through the Parkland system. On one occasion, Parkland personnel came to the Jail and conducted a vaccine event for DSOs. A similar event is planned for the near future. App. at 615.

When vaccines became available for administration at the Jail, a team of Parkland personnel traveled throughout the Jail offering vaccines to every detainee. App. at 599–600. By now, there is a 100 percent vaccine offer rate when new detainees enter the Jail. App. at 598, 615.

As of May 28, 2021, Parkland personnel have administered COVID-19 vaccines to 1,363 inmates of the Dallas County Jail. App. at 378 at ¶4. With very few exceptions, these have been one-dose Johnson & Johnson vaccines. *Id.* It is unknown how many detainees entering the Jail decline to be vaccinated at the Jail because they have already been vaccinated against COVID-19.

III. Defendants and Parkland's efforts have yielded significant results.

This process of early testing, diagnostic cohorting, and vaccination has produced substantial results. As of June 4, 2021, 5 inmates in the Jail and 2 DSOs have an active positive test confirmation. App. at 275.

IV. The Remaining Plaintiffs

Plaintiff Kiara Yarborough died on January 1, 2021. ECF No. 197 (filed Jan. 6, 2021). No Motion for Substitution has been filed as of June 4, 2021.

The Court dismissed with prejudice all claims asserted by Plaintiffs Terry McNickels, Roger Morrison, Jose Munoz, and Marcus White on April 19, 2021. ECF No. 242. The remaining Plaintiffs whose claims have not been formally dismissed are:

Ideare Bailey	Oscar Sanchez
Keith Baker	Olivia Washington
Tesmond McDonald	Paul Wright
Marcelo Perez	Kiara Yarborough

Except for Olivia Washington, all remaining Plaintiffs have been released or transferred from the Dallas County Jail. App. at 2–3 ¶4.

V. Plaintiffs' complaints and desired protocols

Plaintiffs complain about various aspects of how the Dallas County Jail has handled the COVID-19 pandemic, including allegedly inadequate:

- Social distancing, ECF No. 39 at 22 ¶52;[1]
- Testing, isolation, and quarantine, *id.* at 23 ¶54;
- Education, *id.* at 24 ¶56;
- Personal protective equipment, *id.* at 24–25 ¶¶57–58;
- Hygiene, cleaning, and sanitation supplies and practices, *id.* at 26 ¶60.

Plaintiffs seek a permanent injunction ordering the Dallas County Jail to implement various measures, including:

- Social distancing (113 square feet) around all incarcerated persons at all times;
- Implement CDC guidelines;
- Make sanitation solutions readily available and lift ban on alcohol-based sanitizers;
- Routinely test all inmates, jail staff, and visitors for COVID-19;
- Provide PPE to all incarcerated persons;
- Educate inmates regarding Jail COVID-19 statistics and COVID-19 generally;
- Provide sufficient medical isolation and quarantine space;
- Waive all medical copays for those experiencing COVID-19-like symptoms; and
- Waive all charges for medical grievances during COVID-19 outbreak.

Id. at 30 ¶68.

[1] *But see* ECF No. 39 at 22 ¶53 (admitting that social distancing is not possible during sleep, meals, or medication distribution).

Ultimately, Plaintiffs seek the appointment of a public health expert to require and oversee specific mitigation efforts, as well as weekly reporting on medically vulnerable populations in the Dallas County Jail. *Id.* at 49 ¶¶4(a), 5(b)–(c). Plaintiffs rely on the opinions of Dr. Homer Venters regarding dozens of specific policies and procedures that, they claim, should be implemented in the Jail.

Venters Recommendation	CDC Guidelines? Status?
Test all newly admitted detainees at least twice during 14-day intake quarantine. App. at 736.	No. "The CDC doesn't offer any protocols about the testing." App. at 785
Test all people who are close contacts of newly identified COVID-19 cases App. at 736.	No. Contract tracing is adequate. When there is a large number of individuals with COVID-19 in the facility, the CDC advises to "consider broad-based testing."[2]
Test all staff and detainees every 2 weeks App. at 736.	Screening testing recommended at intake, before transfer, and before release. The CDC considers serial testing of all staff and detainees to be the lowest priority for testing.[3]
Test food service detainees and trustees weekly. App. at 736.	"Consider" testing.[4]
Employ infection control nurse to review PPE practices and policies and training for staff who enter medical isolation or quarantine areas 23 App. at 737.	CDC recommends to train staff and provide PPE, but not to use an infection control nurse to review practices and policies.[5] Venters admits that the Jail provides PPE. App. at 758.
Expand close contact investigations to anyone within 6 feet of a known COVID-positive person 15 minutes total from 2 days before testing until isolation. App. at 737.	CDC says 15 minutes total in a 24-hour period.[6]
Update facility roster of quarantine and medical isolation units at each change of shift 23 ¶61(c)	No. Dashboard updated every day. App. at 392

[2] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Medicalisolation

[3] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html

[4] *Id.*

[5] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#recommended-ppe

[6] https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html#contact

Venters Recommendation	CDC Guidelines? Status?
Signage regarding infection control precautions and levels of PPE required posted outside entry to all housing areas under quarantine or in medical isolation. PPE donning and doffing stations present at entry to housing area where staff are required to change PPE. App. at 737.	Venters admits there are signs happening at the Jail. Supp Rept at 18 ¶27. Signs outside specific areas abandoned in favor a dashboard because of panic and stigma created. App. at 392.
Daily health assessment of every person in medical isolation with confirmed or suspected COVID-19 App. at 737.	Yes.[7] Medical staff endeavor to perform at least a daily health assessment of every person in medical isolation. App. at 379 ¶13
Basic services and freedoms to people in quarantine and medical isolation, including phone calls, recreation, reading material, and time out of cell, as well as following CDC guidelines for being non-punitive App. at 738.	No. CDC says limit medically isolated people's movement outside the isolation space "to an absolute minimum" and to "exclude the individual from all group activities." Guidelines caution against using solitary confinement facilities,[8] but Plaintiffs do not claim this is happening.
Daily review of sick call requests; see inmates reporting COVID-19 symptoms within 12 hours; track reports by location; security leadership review this information daily. App. at 738	No.
Inmates who meet CDC criteria for being high-risk should be seen by a healthcare provider, regardless of symptoms. App. at 738.	No.
Review 2 weeks of sick call requests, chronic-care encounters, and medication-administration records by Parkland's quality committee App. at 738.	No. Dr. Venters admits that no specific standard recommends this review. App. at 786.
Train officers on how to promote social distancing; assign bunks to promote social distancing. App. at 739.	Social distancing recommended where feasible.[9]
Implement social distancing in medication, food, intake, and other lines. App. at 739.	Social distancing recommended where feasible.[10]

[7] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening

[8] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Medicalisolation

[9] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening

[10] *Id.*

Venters Recommendation	CDC Guidelines? Status?
Hold regular COVID-19 town halls in each housing area with health and security leadership. App. at 739.	Only if social distancing is feasible.[11]
Develop laundry protocols for housing areas impacted by COVID-19, including use of biodegradable laundry bags and process laundry with same frequency as other units App. at 739.	CDC guidance says that "[i]t is safe to wash dirty laundry from a person who is sick with COVID-19 with other peoples' items, if needed."[12]
Prioritize chronic-care and high-risk inmates for vaccination App. at 739.	Yes. Everyone is offered vaccination at intake and can request a vaccine at any time. App. at 378 ¶¶5–6
Defers to Parkland to create and implement vaccination plan App. at 749–50	No.
Defers to Parkland to create and implement testing policies App. at 749–50	No.
Defers to Parkland to determine whether a detainee is a Person Under Monitoring ("PUM") or a Person Under Investigation ("PUI") App. at 749–50	No.
Defers to Parkland to track COVID-19 cases and perform contact tracing App. at 749–50	No.
Vaccination program is far too slow App. at 751	No standard provided. No evidence that detainees declining vaccines have not already been vaccinated. Cites no statute or other law that authorizes the Jail to vaccinate an inmate against their wishes.
Expand screening testing when new COVID-19 cases are confirmed in the quarantine period. App. at 754.	No. In cases of known or suspected exposure, "where contact tracing is difficult, . . . , facilities may choose to conduct expanded screening testing."[13]
Test staff at least every two weeks until 0 cases in staff or incarcerated population for 4 weeks. App. at 755.	CDC recommends considering blanket screening testing as the lowest priority form of testing.[14]
When more than 2 cases detected, test all detained people every 2 weeks. App. at 755.	CDC recommends considering blanket screening testing as the lowest priority form of testing.[15]

[11] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening

[12] *Id.*

[13] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html

[14] *Id.*

[15] *Id.*

Finally, Plaintiffs seek a declaration that the Dallas County Jail's policies and practices violate the Fourteenth Amendment rights of pre-adjudication detainees and the Eighth Amendment rights of post-adjudication inmates. ECF No. 39 at 50 ¶8.

ARGUMENT

A party seeking a permanent injunction must show: (1) that it has succeeded on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). A permanent injunction is appropriate only if a defendant's past conduct gives rise to an inference that, in light of present circumstances, there is a reasonable likelihood of future transgressions. *Id.*

I. Plaintiffs cannot succeed on the merits because they show deliberate indifference as a matter of law.

A. Deliberate indifference requires a showing of wanton disregard for inmates' safety.

Defendants are entitled to summary judgment because Plaintiffs cannot show deliberate indifference as a matter of law. Pretrial detainees' rights exist under the Due Process Clause of the Fourteenth Amendment but are subject to the same scrutiny as if they had been brought as a "deliberate indifference" claim under the Eighth Amendment. *See Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (citing *Hare v. City of Corinth*, 74 F.3d 633, 648–49 (5th Cir. 1996) (en banc)); *see also Garza v. City of Donna*, 922 F.3d 626, 634 (5th Cir. 2019) ("Our court has based its Fourteenth Amendment case law concerning pretrial detainees on the [United States] Supreme Court's Eighth Amendment precedent concerning prisoners."). The Eighth Amendment imposes duties on prison officials, who must provide humane conditions of confinement. *Farmer v.*

Brennan, 511 U.S. 825, 832 (1994). Prison officials must ensure "inmates receive adequate food, clothing, shelter, and medical care," and must take reasonable measures to guarantee the safety of the inmates. *Id.*; *see also Cleveland*, 938 F.3d at 676 (Eighth Amendment prohibits "deliberate indifference" to prisoner's medical needs) (citing *Farmer*, 511 U.S. at 834–47). Prison officials who act reasonably cannot be found liable under the Eighth Amendment. *Farmer*, 511 U.S. at 845.

Deliberate indifference to the serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by the Eighth and Fourteenth Amendments. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). Deliberate indifference requires that the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and she must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, an Eighth or Fourteenth Amendment claim requires proof of:

(1) an objective exposure to a substantial risk of harm; and

(2) deliberate indifference of a jail official where

(A) the official had subjective knowledge that the inmate faced a substantial risk of harm; and

(B) the official disregarded the risk.

Cleveland v. Bell, 938 F.3d 672, 676 (5th Cir. 2019); *Gobert v. Caldwell*, 463 F.3d 339, 345–46 (5th Cir. 2006).

"The 'incidence of diseases or infections, standing alone,' does not 'imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks.'" *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (quoting *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009)). "Instead, the plaintiff must show a denial of 'basic human needs.' " *Id.* (quoting *Shepherd*, 591 F.3d at 454). "'Deliberate indifference is an extremely high

standard to meet.'" *Id.* (quoting *Cadena v. El Paso Cnty.*, 946 F.3d 717, 728 (5th Cir. 2020)). Deliberate indifference cannot be inferred from a negligent or even a grossly negligent response to a substantial risk of serious harm. *Thompson v. Upshur Cnty., Tex.*, 245 F.3d 447, 459 (5th Cir. 2001). It requires a showing of a wanton disregard for the prisoners' safety or recklessness. *Gobert*, 463 F.3d at 346.

When there is an alleged constitutional violation that is likely to continue over time, the Court considers the evidence from the time suit is filed to the judgment. *Valentine*, 993 F.3d at 282. Deliberate indifference is determined based on officials' current attitudes and conduct. *Id.* As the Fifth Circuit explained in *Valentine*:

> The evidence must show over the course of the timeline that officials "knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.

Id.

B. The CDC Guidelines do not establish constitutional minima.

Plaintiffs' allegations and Dr. Venters' opinions both purport to test the adequacy of the Jail's response to COVID-19 using guidelines promulgated by the Centers for Disease Control and Prevention. App. at 779. The Supreme Court rejected this approach more than 40 years ago in *Bell v. Wolfish*, 441 U.S. 520 (1979). There, the Supreme Court declined to conclude that prison conditions must reflect those set forth in the American Public Health Association's Standards for Health Services in Correctional Institutions, the American Correctional Association's Manual of Standards for Adult Correctional Institutions, or the National Sheriffs' Association's Handbook on Jail Architecture. *Id.* at 543 n.27. According to the Court, "while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional

minima; rather, they establish goals recommended by the organization in question." *Id.*; see also *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020) ("The CDC Guidelines—like other administrative guidance—do not themselves set a constitutional standard.").

The CDC's guidelines are recommendations, not pronouncements. They were "not promulgated pursuant to a formal notice and comment rulemaking process," and the qualified, non-mandatory language used throughout the CDC's guidelines indicates the CDC did not intend to bind facilities through its guidance. *See A.S.M. v. Warden, Stewart Cnty. Det. Ctr.*, 467 F. Supp. 3d 1341, 1354–55 (M.D. Ga. 2020). And those guidelines have been far from static during the COVID-19 pandemic; they evolved as medical professionals learned more about the virus. *See Sanchez v. Brown*, 2020 WL 2615931, at *18 ("[O]n April 3, 2020, the CDC reversed its previous advice and began recommending the general public wear face masks to help prevent the spread of COVID-19."). Recently, the CDC began recommending that most vaccinated people need not wear masks, indoors or outdoors.

Courts should be cautious about elevating recommendations that have evolved over time and that the CDC itself acknowledges may require modification in some institutional settings to the status of a constitutional or legal standard. *See Sanchez v. Brown*, 2020 WL 2615931, at *18 ("This Court also questions the appropriateness of using its power to turn what are now CDC recommendations into orders that must be complied with under threat of contempt."); *see also Bell*, 441 U.S. at 543 n.27.

C. It is not unreasonable for Defendants to rely on Parkland's expertise in tailoring a COVID-19 response for the Dallas County Jail.

Plaintiffs filed suit six days after the CDC began recommending that the general public wear face masks to help prevent the spread of COVID-19. *Sanchez v. Brown*, 2020 WL 26155931,

at *18; ECF No. 1. Knowledge about COVID-19 was sparse. *Valentine*, 993 F.3d at 283. Policymakers in government and industry have adapted to evolving knowledge about COVID-19, its mode of transmission, and best practices for preventing its spread. Vaccines were developed in short order, and have become widely available in the United States. Managing COVID-19 has required immense investment of time and resources, careful study, and sometimes daring scientific endeavors. There were no ready answers.

In this context, it was not unreasonable for Defendants to rely on Parkland's expertise to tailor a COVID-19 response plan to the particular circumstances presented by the Dallas County Jail. *See Valentine*, 993 F.3d at 283. Parkland is responsible for the health care of the inmates at the Jail. *Brown v. Daniels*, No. 05-20-00579-CV, 2021 WL 1997060, at *16 (Tex. App.—Dallas May 19, 2021, no pet. h.). For an elected sheriff to rely on and defer to health care and infectious disease experts, such as Dr. Ank Nijhawan, should be encouraged.

The undisputed evidence is that the Jail's response to COVID-19 has evolved over the last year. Initially, there was concern about an adequate supply of PPE for medical personnel and disagreement about what kind of masks were needed. App. at 387. Now, all inmates in the Jail have masks and are encouraged to wear them. *Id.* Diagnostic cohorting at intake began in June 2020. App. at 379. Testing became widely implemented in July 2020. App. at 405. By March 2021, vaccines were available, and the diagnostic cohorting timeline was extended to 9 days. App. at 379. As of the filing of Defendants' Motion for Summary Judgment, fewer than 1 in 1,000 inmates at the Jail has a clinical case of COVID-19. *Id.*

By now, many of the items Plaintiffs seek in a permanent injunction have been implemented, so an injunction is not necessary. For example, the Jail has implemented social distancing to the maximum extent possible given Jail facilities. App. at 411. Inmates have masks

and are encouraged to wear them. App. at 387. There are signs and television broadcasts educating inmates about COVID-19. App. at 646.

For other complaints, Plaintiffs would convert guidelines meant to be adapted to individual situations into universal constitutional minima. As shown above, that approach is impermissible. Still other demands Plaintiffs make, such as lifting the ban on alcohol-based sanitizers, make little sense. The Environmental Protection Agency considers more than 500 cleaners, most of which are not alcohol-based, to be effective against COVID-19.[16] The Constitution does not require Defendants to supply Plaintiffs their choice of disinfectants.

Finally, Plaintiffs' demand for serial mass testing prioritizes guidelines in derogation of results. Given the testing, diagnostic cohorting, vaccination, education, and PPE available at the Jail, there have been very few cases of COVID-19 at the Jail since March 2021. App. at 379. Plaintiffs cannot point to evidence that the protocol Defendants and Parkland have developed for the Jail is not working or that their serious medical needs are being wantonly disregarded. There is no evidence that Defendants have failed to act reasonably. Jail officials who act reasonably in consultation with medical experts cannot be held liable under the Cruel and Unusual Punishments Clause. *Farmer*, 511 U.S. at 844.

Plaintiffs and Dr. Venters may prefer Defendants to modify certain aspects of COVID-19 management at the Jail. Even if they have identified certain imperfect aspects of the management of COVID-19 at the Dallas County Jail, the ultimate question before the Court is whether Plaintiffs have proven a constitutional violation. *Valentine*, 978 F.3d at 165; *Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) ("We simply cannot conclude that, when faced with a perfect storm of a

[16] *See* About List N: Disinfectants for COVID-19, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/coronavirus/about-list-n-disinfectants-coronavirus-covid-19-0.

contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by 'doing their best.'"). Under governing precedent, Plaintiffs' burden is "extremely high." *Domino*, 239 F.3d at 756. The Eight Amendment does not mandate perfect implementation. *Valentine*, 978 F.3d at 165. Because Plaintiffs cannot show deliberate indifference as a matter of law, Defendants are entitled to summary judgment on Plaintiffs' claims for declaratory and injunctive relief.

II. Plaintiffs have not exhausted their administrative remedies.

Defendants are entitled to summary judgment because no Plaintiff with a constitutionally live claim exhausted their administrative remedies prior to filing suit. ECF No. 115 at 15 ¶3. Under the PLRA, "no action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail . . . until such administrative remedies as are available are exhausted. 42 U.S.C. § 1997e(a); *Jones v. Bock*, 549 U.S. 199, 202 (2007); *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 632 (2002).

Exhaustion is a mandatory prerequisite to filing suit. *Booth v. Churner*, 532 U.S. 731, 739 (2001). The Fifth Circuit requires inmates to fully exhaust the applicable prison grievance procedures before filing suit in federal court. *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012). It is irrelevant whether exhaustion is achieved during the federal proceeding. Pre-filing exhaustion is mandatory, and the case must be dismissed if available administrative remedies were not exhausted. *Id.* Substantial compliance with administrative grievance procedures is insufficient exhaustion. *Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010). Courts have no discretion to excuse an inmate's failure to properly exhaust the prison grievance process, event to take "special

circumstances" into account. *Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016); *Gonzalez*, 702 F.3d at 788.

A. Grievance Procedures

The Dallas County Jail's Inmate Handbook sets out the grievance procedure applicable to Plaintiffs' claims. ECF No. 33-1 12–14. Per the Handbook, inmates may submit a grievance (1) using the jail visitation kiosks located throughout every facility; (2) on a written grievance form provided by jail staff; or (3) by any other written means.. *Id.* at 12. Once submitted, the Inmate Grievance Board reviews the grievance and provides a status response to the inmate. *Id.* at 13. The Board has 15 days to submit its initial status response and 60 days to submit a final response. *Id.* at 13. An inmate who has not received a timely response from the Board can submit a written request for the response. *Id.* at 13.

An inmate who disagrees with the Board's response may appeal. *Id.* at 13–14. The first appeal is to the Quality Assurance Commander. *Id.* The Commander has 15 days to respond. *Id.* If this does not occur, the inmate can request a response. *Id.* at 14.

If the inmate disagrees with the Commander's response, the inmate can file a second appeal, this time to the Assistant Chief Deputy for the Special Services Bureau. *Id.* The Assistant Chief Deputy has 30 days to render a decision, which is final. *Id.* The grievance procedure has not been exhausted until this final decision is rendered. *See id.* at 12–14.

B. Only Olivia Washington's claims are not moot, and she failed to exhaust her administrative remedies prior to filing suit.

The only Plaintiff who is incarcerated in the Dallas County Jail is Olivia Washington. App. at 3. The rest of the named Plaintiffs whose claims have not already been dismissed have been released or transferred from the Dallas County Jail. *Id.* Their claims are moot, they cannot serve

as putative class representatives or sue in their individual capacities, and their claims should be dismissed.

A motion to dismiss for lack of subject matter jurisdiction may be raised at any time, including in a motion for summary judgment. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 (5th Cir. 2014). Matters outside the pleadings, such as affidavits, may be considered in determining subject matter jurisdiction. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). When a motion to dismiss for lack of subject matter jurisdiction relies on evidence, "no presumptive truthfulness attaches to a plaintiff's allegations, and the xistence of disputed material facts will not preclude the trial court from evaluation of the merits of the jurisdictional claims." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

Article III's case-or-controversy requirement dictates that a plaintiff must have standing both at the outset of litigation and throughout the pendency of the litigation. *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018). A narrow exception to this requirement exists for claims that are inherently transitory, such as those claims that are distinctly capable of repetition, yet evading review. *See Genesis Healthcare v. Symczyk*, 569 U.S. 66, 76 (2013). The Fifth Circuit has articulated a two-prong test for when the exception applies: (1) there is a reasonable expectation that the same complaining party will be subjected to the same action again, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration. *Yarls*, 905 F.3d at 911.

1. Kiara Yarborough's claims are moot because she has died.

Kiara Yarborough died on January 1, 2021. ECF No. 197. Nearly five months have passed, and no motion to substitute a party for Yarborough has been filed. Her claims must be dismissed pursuant to Rule 25 of the Federal Rules of Civil Procedure.

2. Bailey, Baker, McDonald, Sanchez, and White cannot demonstrate that their claims are capable of repetition.

Pre-adjudication detainees Bailey, Baker, McDonald, Sanchez, and White have been released from custody. App. at 2. Their claims are moot because they cannot demonstrate that they are capable of repetition. The Court may not assume that thes released Plaintiffs will again be arrested and again subject to the conditions of which they complain. *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001) (transfer of plaintiff alleging unconstitutional conditions of confinement from detention center to correctional institute rendered claims for prospective relief moot); *Cooper v. Sheriff of Lubbock Cnty., Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991) (inmate's transfer from facility mooted claims for prospective injunctive relief); *Rocky v. King*, 900 F.2d 864, 870 (5th Cir. 1990) (holding that a sentenced inmate's complaints about pre-sentencing conditions of confinement were moot because they were not capable of repetition).

Attempting "to anticipate whether and when [released plaintiffs] will be charged with a crime . . . takes us into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The Fifth Circuit's routinely holding that released detainees cannot demonstrate that they will again be arrested and again subject to the same conditions of confinement is justified in this case for the additional reason that every arrestee who enters the Dallas County Jail is offered a COVID-19 vaccine. App. at 378.

3. Baker, McDonald, and Sanchez cannot demonstrate that their claims are capable of repetition or that they evade review.

Post-adjudication inmates Baker, McDonald, Sanchez, and Yarborough fail both prongs of the *Yarls* test. It is speculative to presume that they will again be arrested and again subject to the same challenged conditions of confinement. *O'Shea*, 414 U.S. at 494; *Yarls*, 905 F.3d at 911. And

unlike the plaintiffs in *Gerstein v. Pugh*, 420 U.S. 103 (1975), they cannot show that their claims are too transitory to be fully litigated before they expire. *Rocky*, 900 F.2d at 870 (listing cases).

The Court should therefore dismiss the claims of all Plaintiffs except Olivia Washington's for lack of subject matter jurisdiction.

4. Olivia Washington failed to exhaust her administrative remedies before filing suit.

Olivia Washington filed a grievance on March 19, 2020 regarding personal hygiene items that she claimed were hers and had not been given to her. App. at 286. The Grievance Board timely responded, telling Ms. Washington how to claim her bench warranted TDCJ property. App. at 287.

Ms. Washington did not appeal. *Id.* Washington has not filed any other COVID-19, hygiene, or cleanliness grievances. *Id.*; App. at 277.

Because Washington did not exhaust her administrative remedies on her only hygiene-related grievance before filing suit, her claims must be dismissed pursuant to the PLRA. *Gonzalez*, 702 F.3d at 788.

C. In fact, none of the remaining Plaintiffs exhausted their administrative remedies before filing suit.

Even if the Court were to consider whether the Plaintiffs whose claims are moot exhausted their administrative remedies before filing suit, it would make no difference. None of the remaining Plaintiffs exhausted their administrative remedies before filing suit, either.

Ideare Bailey did not file any grievances before filing suit on April 17, 2020. ECF No. 39; App. at 276.

Keith Baker filed three similar grievances requesting transfer from Unit 3A on March 23 and 24, 2020. App. at 291–96. Two of those grievances also allege a medical issue related to Unit 3A. App. at 293–96. All three grievances request transfer to another unit. *Id.* Baker was transferred

to another unit on March 26, 2020. App. at 296. Baker did not appeal the outcome of his grievances before filing suit on April 9, 2020. ECF No. 1; App. at 291–96.

Tesmond McDonald filed two grievances before filing suit on April 9, 2020, but neither grievance relates to hygiene, cleanliness, PPE, or infection-control practices at the Jail. ECF No. 1; App. at 316–17. Of the approximately 10 grievances Tesmond McDonald filed before his release on May 20, 2020, there is no record that he ever appealed the outcome of the grievance. App. at 298–317.

Marcelo Perez filed suit on April 9, 2020. ECF No. 1. He filed an "emergency grievance" on April 6, 2020. App. at 323–24. The Grievance Board responded on the morning of April 9, 2020, and Perez filed a document purporting to appeal that same day. App. at 321. Perez exhausted his administrative remedies on this grievance, at the earliest, on April 15, 2020, two days before he amended his complaint. App. at 322; ECF No. 39.

An amended complaint does not cure the failure to exhaust administrative remedies prior to filing suit. *Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998), *overruled by implication on other grounds*, *Jones v. Bock*, 549 U.S. 199 (2007). To conclude otherwise would flout the plain meaning of the PLRA, particularly where the claims in an amended complaint track the prior claims rather than raise new bases for relief so unrelated to the original complaint that they stand alone as a separate lawsuit. *Neal v.* Goord, 267 F.3d 116, 123 (2d Cir. 2001); *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999). Because the Amended Complaint continues and refines Perez's previous claims and does not state wholly unrelated claims, any exhaustion after the filing of the original complaint is irrelevant. *Gonzalez*, 702 F.3d at 788.

Oscar Sanchez filed a COVID-related "emergency grievance" on April 6, 2020 at 8:34 am. App. at 333. He filed what he called an "appeal" to the Quality Assurance Commander fewer

than 12 hours later, at 10:38 pm., having not received a response to his original grievance. App. at 331. Having received no response to the "appeal," Mr. Sanchez filed what he called a "second appeal" barely 24 hours later. App. at 329. On April 8, 2020, the day before this lawsuit was filed, Mr. Sanchez received a response to his grievance indicating a shortage of masks. App. at 330.

While the Inmate Handbook provides that emergency grievances will be processed "immediately," ECF No. 33-1 at 13, there is no similar provision for appeals from emergency grievances. Mr. Sanchez could not, by repeated filings separated by scarcely more than 24 hours, rewrite he grievance process to suit his own timeline. And Mr. Sanchez did not appeal the April 8, 2020 response to his grievance within the 10 days provided by the grievance policy. App. at 330. Accordingly, he failed to exhaust his administrative remedies before filing suit on April 9, 2020.

Olivia Washington also failed to exhaust her administrative remedies before filing suit on April 17, 2020, as shown above.

Paul Wright filed a COVID-related grievance on April 6, 2020, and two additional COVID-related grievances on April 7, 2020. App. at 347, 349–50. The Grievance Board responded to the April 6, 2020 grievance and to one of the April 7, 2020 grievances on April 10, 2020, the day after Wright filed suit. App. at 348; ECF No. 1. The Grievance Board responded to the other April 7, 2020 grievance on May 7, 2020. App. at 351. Wright did not appeal from these three initial decisions in the grievances he had filed. App. at 347–51. Therefore, he failed to exhaust his administrative remedies before filing suit and his claims must be dismissed.

Kiara Yarborough filed two COVID-related grievances on less than 8 hours apart on April 7, 2020: one as 12:53 pm and another at 8:35 pm. App. at 355–57. The Grievance Board responded to those grievances in the 9:00 hour on the morning of April 10, 2020. App. at 356, 358.

Yarborough also filed a COVID-related grievance about noon on April 8, 2020. App. at 353. On April 11, the Grievance Board told her that her grievance had been received and addressed. Yarborough appealed from this grievance that same day, and received a first-level appeal response on April 13, 2020. App. at 354. Yarborough did not appeal further.

Like Sanchez, Yarborough cannot file the same grievance in rapid succession—3 in the 24 hours following 12:30 pm on April 7, 2020—as a way to rewrite the timeline of the grievance appellate process to suit her. Substantial compliance with grievance procedures is inadequate; dismissal of Yarborough's claims is required. *Wright v. Hollingsworth*, 260 F.3d 357, 358–59 (5th Cir. 2001).

Because all claims except Olivia Washington's are moot, those claims should be dismissed. Because Olivia Washington failed to exhaust her administrative remedies before filing suit, her claims should be dismissed as well pursuant to the PLRA. In the alternative, if the Court finds that some claims are not moot, none of the named Plaintiffs exhausted their administrative remedies prior to filing suit. As such, all of Plaintiffs' claims must be dismissed pursuant to the PLRA.

CONCLUSION AND PRAYER

In light of the evolving challenge presented by managing Dallas County Jail during the COVID-19 pandemic, and the careful development and implementation of a plan to address these challenges reasonably, guided by the CDC's recommendations, and tailored to the specifics of the Dallas County Jail, Plaintiffs cannot show deliberate indifference as a matter of law, and Defendants are entitled to summary judgment.

Defendants respectfully pray that the Court grant their Motion, enter judgment that Plaintiffs are not entitled to any relief, and award Defendants all other and further relief to which they are justly entitled.

Dated: June 4, 2021

Respectfully submitted,

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COUNSEL FOR DEFENDANTS

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 on June 4, 2021.

/s/ *Kate David*
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