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

OSCAR SANCHEZ, TESMOND McDONALD, MARCELO PEREZ, KEITH BAKER, PAUL WRIGHT, OLIVIA WASHINGTON, and IDEARE BAILEY, *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*; and DALLAS COUNTY, TEXAS;** ***Respondents/Defendants*.**	**Civil Action No. 3:20-cv-00832**

PLAINTIFFS' BRIEF ISO RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Under Federal Rule of Civil Procedure 56, plaintiffs Oscar Sanchez, Tesmond McDonald, Marcelo Perez, Keith Baker, Paul Wright, Olivia Washington, and Ideare Bailey (the "**Plaintiffs**") oppose the motion for summary judgment of defendants Dallas County Sheriff Marian Brown (the "**Sheriff**") and Dallas County, Texas ("**Dallas County**") because they fail to negate the ample evidence of their ongoing deliberate indifference to COVID-19's threat of serious harm to Plaintiffs and of Plaintiffs' efforts to exhaust administrative remedies.

NECESSITY FOR OPPOSITION

The Sheriff admitted under oath that "the Dallas County Jail has been a medium of COVID-19 transmission to or between detainees." App. 137. That remains the case today. The crucial questions are whether the Court has before it any evidence that the Sheriff and Dallas County (the "**Jail Defendants**") will continue to expose detainees to COVID-19 by deliberately violating professional standards and health guidelines and whether—if the Court finds exhaustion is not excused—the Plaintiffs can present sufficient evidence of their exhaustion efforts at a hearing. As Plaintiffs demonstrate in this opposition, the record contains ample evidence of the Jail Defendants' deliberate indifference and of Plaintiffs' exhaustion of remedies—though Plaintiffs also submit a Rule 56 declaration addressing Defendants' failure to produce relevant and necessary discovery. App. 641–45. The Court should deny the motion for summary judgment and decide the case on the merits after hearing the evidence at trial.

I. RESPONSE SUMMARY

Summary judgment is warranted only when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). At the outset, the party moving bears the burden to establish that no genuine issue of material fact exists, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and the Court's duty is not to weigh the evidence

and determine the truth of the matter, but to determine whether there are issues to be tried. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). In this case, Defendants Sheriff Marion Brown, in her official capacity, and Dallas County, Texas (collectively, the "**Defendants**"), have not met their burden. The record is rife with triable disputes about material facts as basic to the outcome of the case as whether or not Dallas County and the Sheriff have taken the steps they claim they have to safeguard the thousands of human beings locked up together in the Dallas County Jail (the "**Jail**") during the deadly COVID-19 pandemic. The significant and material disputes about even the most crucial health and safety measures make it especially clear that the case should not be resolved on summary judgment, where the Court is to draw all inferences in favor of the party against whom summary judgment is sought, viewing the factual assertions in the light most favorable to the opposing party. *Id.* at 255.

Defendants also argue that, if no material issues of fact are in dispute, Plaintiffs cannot establish as a matter of law that Defendants were deliberately indifferent as to the risks presented by COVID-19 to Plaintiffs and other people incarcerated at the Dallas County Jail because Defendants have adopted "well-developed" policies to mitigate the spread of COVID-19 and have, they say, reasonably relied on Parkland Correctional Health Services, which is part of Parkland Healthcare Systems in Dallas ("**Parkland**"), to do so. *See* Supporting Brief at 8, 17-18. But as Plaintiffs demonstrate, the Defendants' intentional, nearly wholesale abdication of their constitutional responsibilities to protect the lives and health of people in their custody to a private contractor in dereliction of their own duties is not justified.

Relying on *Valentine v. Collier*, 993 F.3d 270 (5th Cir. 2021), Defendants miscast Plaintiffs' claims of harm as arising only from Defendants' failure to follow Centers for Disease Control and Prevention ("**CDC**") guidance for mitigating COVID-19 in jails and prisons. The

harm alleged by Plaintiffs is not based on whether Defendants have satisfied the CDC guidance, but whether they have satisfied the most basic requirements of care imposed on Defendants by the Constitution.[1] The record in this case demonstrates that the measures taken (or consciously refused) by Defendants have permitted conditions in the Jail to exist more than one year into the pandemic that create a substantial risk of harm to detainees. There is considerable evidence that Sheriff Marian Brown and Chief Deputy Frederick Robinson ("**the Chief**"), the Sheriff's senior staff member responsible for day-to-day management of the Jail, *see* App. 200, have consistently prioritized ease and expediency over the health and safety of detainees. By failing to coordinate with Parkland and otherwise refusing to adopt clear infection mitigation measures, Defendants have not only chosen to ignore the true prevalence of COVID-19 in the Jail, they have also put Plaintiffs' lives at risk, as well as those of other medically vulnerable detainees with underlying health conditions. At best, this willful ignorance for detainees' health and safety is fueled by incomplete recordkeeping; at worst, it is fueled by intentional underreporting that decreases the urgency and attention by Jail leadership to these significant, life-threatening matters.

This case is easily distinguishable from the situation presented in *Valentine*, where the Defendants in fact had adopted mass COVID-19 testing within the prison to determine the prevalence of the virus, and had developed formal policies based on CDC guidance. *See Valentine*, 993 F.3d at 278-79. In stark contrast, the Jail Defendants in this case choose to suppress evidence of the true rates of COVID-19 infections within the Jail and any related deaths, demonstrating a conscious effort to conceal the constitutional inadequacy of their

[1]To the extent Defendants have failed to comply with CDC guidance, it is still relevant to demonstrating defendants' deliberate indifference to the health and safety of detainees. The CDC guidance is designed to assist jail administrators in protecting the health and safety of the people in their custody from COVID-19, and it is particularly relevant here because Defendants have not put into place any alternative set of vetted, comprehensive policies.

COVID mitigation efforts. The summary judgment record in this case reveals the most basic inattention to critical safety procedures regarding COVID-19 mitigation, including (1) the deliberate decision to not implement a reasonable vaccination plan and ignore high vaccine refusal rates, including by refusing to adopt more widespread asymptomatic testing; (2) the suppression and underreporting of true COVID-19 incidence rates in the Jail; (3) the failure to adequately treat detainees with COVID-19 symptoms; (4) unsanitary quarantine conditions; (5) inadequate awareness by correctional staff over which areas of the Jail were designated as "quarantined"; (6) the lack of formal training for correctional staff about COVID-19 management; and (7) the lack of coordination between correctional and Parkland medical staff regarding testing, evaluation and quarantine in the Jail. Even Defendants' assertion that they are relying on Parkland's expertise is undermined by evidence of their own refusal to cooperate with Parkland. Accordingly, summary judgment on Plaintiffs' Fourteenth and Eighth Amendment claims must be denied as a matter of law, because the evidence in this case presents genuine issues of material fact regarding Defendants' deliberate indifference to the health and safety of Plaintiffs and other detainees.

Defendants' argument for summary judgment based on failure to exhaust administrative remedies is similarly unavailing. The failure to exhaust is an affirmative defense and not a pleading requirement. Under Fifth Circuit law, Defendants must establish that the administrative remedies they claim have been available to Plaintiffs were actually available. *Jones v. Bock*, 549 U.S. 199, 204 (2007); *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010) (stating that defendants have the burden to establish "beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment"). Next, they have the burden to demonstrate that the individual Plaintiffs did not exhaust those remedies that were allegedly

available. Here, Defendants have not—and cannot—do so, and if the Court decides to make findings concerning Plaintiffs' efforts to exhaust, the Court should hold an evidentiary hearing. Similarly, Defendants' argument that some of Plaintiffs' claims are moot also must fail, as the claims of the Plaintiffs who have been released are "inherently transitory" and an exception to mootness. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Thus, summary judgment on the bases of both exhaustion and mootness is inappropriate. Accordingly, the Court should deny Defendants' Motion in its entirety.

II. SUMMARY JUDGMENT EVIDENCE

Exhibit No.	***Evidence***	***Date***	***App. Pages***
1	Relevant Excerpts of the Deposition of Ideare Bailey	12/4/2020	**1-11**
2	Relevant Excerpts of the Deposition of Ank Nijhawan, MD	12/9/2020	**12-46**
3	Relevant Excerpts of the Deposition of Ank Nijhawan, MD	12/14/2020	**47-57**
4	Relevant Excerpts of the Deposition of Patrick Jones	12/16/2020	**58-85**
5	Relevant Excerpts of the Deposition of Dianne Urey	12/22/2020	**86-102**
6	Relevant Excerpts of the Deposition of Keith Baker	12/29/2020	**103-110**
7	Relevant Excerpts of the Deposition of Kiara Yarborough	12/29/2020	**111-120**
8	Relevant Excerpts of the Deposition of Barry-Lewis Harris II, MD	12/30/2020	**121-127**
9	Relevant Excerpts of the Deposition of Marian Brown	3/31/2021	**128-191**
10	Relevant Excerpts of the Deposition of Frederick Robinson	4/6/2021	**192-240**
11	Relevant Excerpts of the Deposition of Jason Hartgraves	4/7/2021	**241-248**

Exhibit No.	*Evidence*	*Date*	*App. Pages*
12	Relevant Excerpts of the Deposition of Tesmond McDonald	4/14/2021	**249-259**
13	Relevant Excerpts of the Deposition of Tesmond McDonald	4/15/2021	**260-277**
14	Relevant Excerpts of the Deposition of Oscar Sanchez	5/13/2021	**278-296**
15	Relevant Excerpts of the 30(b)(6) Deposition of Dallas County Hospital District	5/27/2021	**297-309**
16	Relevant Excerpts of the 30(b)(6) Deposition of Dallas County	5/28/2021	**310-325**
17	Parkland Correctional Health Vaccination Summary	5/21/2021	**326-327**
18	Expert Report of Dr. Homer Venters, M.D. [redacted]	1/12/2021	**328-354**
19	Supplemental Expert Report of Dr. Homer Venters, M.D.	5/17/2021	**355-374**
20	Parkland Heath & Hospital System Intake Health Needs Assessment Note	05/03/2021	**375-382**
21	Email from A. Nijhawan to F. Robinson regarding asymptomatic test results (DALLASCO_SANCHEZ_0000616–17)	06/01/2020	**383-385**
22	Email from J.W. Price to J. Bazan regarding the cleanliness of the floors at the Jail (DALLASCO_SANCHEZ_0000891–92)	05/27/2020	**386-388**
23	Emails between F. Robinson and J. Hartgraves regarding cleaning of quarantine tanks (DALLASCO_SANCHEZ_0001015-16)	05/12/2020	**389-391**
24	Dallas County Sheriff's Department Memorandum regarding COVID-19 response (DALLASCO_SANCHEZ_0001121-30)	05/13/2020	**392-402**

Exhibit No.	*Evidence*	*Date*	*App. Pages*
25	Email from A. Nijhawan to F. Robinson regarding issues with correctional staff (DALLASCO_SANCHEZ_0002683–85)	07/01/2020	**403-408**
26	M. White Inmate Grievance Complaint Form (22:47) (DALLASCO_SANCHEZ_0003102-03)	04/17/2020	**409-411**
27	M. White Inmate Grievance Complaint Form (22:59) (DALLASCO_SANCHEZ_0003110-11)	04/17/2020	**412-414**
28	M. White Inmate Grievance Complaint Form (23:06) (DALLASCO_SANCHEZ_0003156-57)	04/17/2020	**415-417**
29	File Folder "Policy" Contents (DALLASCO_SANCHEZ_0012338-65)		**418-446**
30	Photo of Jail showing lack of social distance [filed under seal] (SANCHEZ_00000024)	12/07/2020	**447**
31	Screenshot of video showing lack of social distance and sanitation No. 1 [filed under seal] (DALLASCO_SANCHEZ_0013132-1)	07/15/2020	**448**
32	Screenshot of video showing lack of social distance and sanitation No. 2 [filed under seal] (DALLASCO_SANCHEZ_0013132-2)	07/15/2020	**449**
33	Screenshot of video showing patient care without changing PPE (19:17:09) [filed under seal] (DALLASCO_SANCHEZ_0013433-1)	10/01/2020	**450**
34	Screenshot of video showing patient care without changing PPE (19:17:32) [filed under seal] (DALLASCO_SANCHEZ_0013433-2)	10/01/2020	**451**
35	Additional File Folder "Policy" Contents (DALLASCO_SANCHEZ_0019045-93)		**452-501**
36	Letter to the Sheriff and County from the Texas Commission on Jail Standard regarding the Jail's failure to comply with minimum standards (DALLASCO_SANCHEZ_0019094-100)	02/23/2021	**502-509**

Exhibit No.	*Evidence*	*Date*	*App. Pages*
37	Email from B. Harris to the Sheriff and County regarding the CDC's asymptomatic testing recommendation (DALLASCO_SANCHEZ_0038848-49)	10/26/2020	**510-512**
38	Email from F. Robinson to J. Jouett regarding an uptick in COVID-19 positive cases (DALLASCO_SANCHEZ_0044449)	04/15/2020	**513-515**
39	Email from J. Matchett to county staff regarding months' long delay in receiving notification of grievances (DALLASCO_SANCHEZ_0061107-11)	01/27/2021	**516-521**
40	Email from S. Bland to L. Garza regarding 2020 Disciplinary and Grievance Report (DALLASCO_SANCHEZ_0061408-09)	01/04/2021	**522-527**
41	Screenshot of Jail staff not wearing proper PPE [filed under seal] (DALLASCO_SANCHEZ_0013339-2)	08/03/2020	**528**
42	Emanuel Lewis's Original Petition and Application for Temporary and Permanent Injunctions, No. DC-20-11810, in the 162nd Judicial District Court, Dallas County, Texas	08/24/2020	**529-594**
43	Plaintiffs' First Request for Production of Documents to the Dallas County Defendants	07/30/2020	**595-605**
44	Plaintiffs' Responses to Defendants' First Interrogatories	11/27/2020	**606-622**
45	Email from F. Robinson to B. Harris regarding Compassionate Releases (DALLASCO_SANCHEZ_0067052)	05/27/2021	**623-624**
46	Plaintiffs' Rule 30(b)(6) Amended Notice of Depositions	05/10/2021	**625-632**
47	Declaration of Adam Safwat in Support of Motion for Summary Judgment	06/23/2021	**633-640**
48	Rule 56 Declaration of Adam Safwat	06/23/2021	**641-645**

III. FACTUAL BACKGROUND

A. Plaintiffs' Constitutional Claims Arise from the Undisputed Threat of Harm Posed by COVID-19 in Jail Settings.

On April 9, 2020, Plaintiffs filed their complaint in this case [ECF No. 1], and filed an amended complaint on April 17, 2020 [ECF No. 39], alleging, among other claims, constitutional harm under the Eighth and Fourteenth Amendment arising from Defendants' failure to take steps to address the threat to them and others similar situated from the harm posed by COVID-19, which was at the time spreading through the Jail. Plaintiffs' claims were asserted under 42 U.S.C. § 1983[2] on behalf of a class that included pre-adjudication detainees (all current and future detainees in pretrial custody, including those alleged to have violated probation or parole), post-adjudication detainees (all current and future detainees in post-adjudication custody, including those adjudicated to have violated probation or parole), and a subclass of both pre- and post-adjudication detainees deemed medically vulnerable to COVID-19. [ECF. No. 39 at ¶¶ 70-72]. Those claims for injunctive relief, which survived the Court's order dismissing Plaintiffs' claims for habeas relief, are presently the subject of the Defendants' motion. *See* Memorandum Opinion and Order of August 19, 2020 [ECF No. 120] (deferring ruling on Defendants' motion to dismiss Plaintiffs' section 1983 claims and vacating electronic order entered April 20, 2020 [ECF No. 71]).

As Defendants know, the Jail "has been a medium of COVID-19 transmission to or between detainees." App. 136–37, 205. Since more than a year ago, Defendants have been on notice of the need to affirmatively act to mitigate the threat posed by COVID-19 to detainees in their custody—particularly to those with pre-existing medical conditions who are even more

[2] Plaintiffs' also requested habeas relief under 28 U.S.C. § 2241 [ECF No. 39]. The Court has since dismissed the habeas claims. [ECF No. 120].

vulnerable to the disease. *See, e.g.*, Plaintiff's First Amended Complaint, [ECF No. 39 ¶¶ 3, 28-29, 40-50]; App. 349 ¶ 58. The Sheriff admits that she is obligated to ensure the healthcare of detainees at the Jail. App. 189–90. Furthermore, Defendants, in their Supporting Brief, acknowledge that managing COVID-19 requires "immense investment of time and resources, careful study, and sometimes daring scientific endeavors." *See* Supporting Brief at 18. Yet, as explained below, Defendants have knowingly permitted conditions to remain in the Jail that present a substantial risk of harm to detainees' health from COVID-19 while simultaneously attempting to suppress reporting on the true COVID-19 incidence rate in the Jail. *See, e.g.*, App. 163–167 (recognizing that, even though the Jail could receive more vaccination resources, the Sheriff chose not to take the action required to obtain additional resources); App. 384–385 (showing a 76% positive rate among asymptomatic detainees). As Plaintiffs' expert Dr. Homer Venters explained, many of the same deficiencies identified during his inspection in December 2020 still remained eight months later in mid-May 2021 when he filed his supplemental report, notwithstanding the issuance of revised CDC guidelines and the availability of additional knowledge and resources to the public—and the Jail—in the intervening period. *See* App. 364 ¶ 16; *see also id.* ¶ 22 (explaining testing supplies and kits are no longer in short supply).

B. The Sheriff and Dallas County Failed to Mitigate the Threat Posed by COVID-19 in the Jail More than a Year Since the Pandemic Began.

Defendants claim that they have developed a comprehensive COVID-19 response plan. *See* Supporting Brief at 6-9. But the evidence shows that they have simply decided that COVID-19 in the jail is someone else's problem, pointing to Parkland Correctional Health Services ("**Parkland**") as the entity responsible for the response. Depositions in this case have revealed that the Sheriff, the self-professed "keeper of the Jail," spends very little of her time on COVID-19 management at the Jail. *See* App. 136, 141 (estimating that half or more of her time is spent

on jail-related matters and describing her time spent day-to-day on jail-related matters, noting the review of the number of COVID-19 patients as her only COVID-19-related task). The Sheriff's failure to create a plan is all the more egregious because the CDC has provided an exact blueprint, created by correctional experts and updated throughout the pandemic, that she has chosen to ignore. As of her March 31, 2021 deposition, the Sheriff had not reviewed the most current guidance from the CDC for managing COVID-19 in jail settings. App. 137–39, 184, 186, 138:4-10[3]; *cf.* App. 361–62 ¶ 10 (explaining that "[w]ithout reviewing and implementing the CDC's updated COVID-19 response recommendations at the Jail, ongoing and pervasive COVID-19 outbreaks are likely to infect many detainees, staff, and people in the community outside of the Jail").

1. Defendants Have Not Participated in, Inquired about, or Otherwise Stayed Apprised of Parkland's Vaccination Planning.

It is undisputed that vaccinations are a core component of the care that Defendants must provide to those incarcerated in their Jail. *See*, *e.g.*, Supporting Brief at 7-9; *see also Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384, at *17 (D. Or. Feb. 2, 2021) (entering a preliminary injunction requiring a state prison system to offer a COVID-19 vaccine to all people incarcerated in the system). Vaccines can only be effective if they are administered according to a comprehensive, effective plan. *See* App. 365–67 ¶¶ 19-21. The evidence shows that Defendants have no such plan and have experienced shockingly poor acceptance. *See, e.g.*, App. 365–66 ¶ 19.

The Sheriff admitted that she is responsible for procuring vaccines for detainees, but neither she nor the County has created vaccination plan. App. 158, 160a–161. She has delegated

[3] The CDC issued Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities in March 2020, and has updated it several times since. *See* https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last accessed June 23, 2021).

full responsibility for that to Parkland. She knew that, even at the end of March 2021, when Texas was opening up vaccinations to all adults outside of the facility, Parkland had no finalized plan to vaccinate people in the jail. Brown Tr. 48:11-24. Despite this, Defendants never asked Parkland about its purported vaccine plan. *See* App. 158-59, 161–62.

During her deposition, the Sheriff also acknowledged that she was aware that only approximately 500 detainees had been vaccinated as of the end of March 2021 and that she "d[id]n't know" what the pace of vaccinations was or should be to allow all incarcerated people to be vaccinated. App. 159–62. She further admitted that she was not concerned about the pace of vaccinations in the Jail. App. 161–62.

The evidence shows that, even though Defendants rely on vaccinations as a justification for summary judgment, Parkland's poorly planned vaccination efforts have been glaringly unsuccessful. Defendants' medical intake paperwork includes a single question asking whether the person being booked would like to receive a COVID-19 vaccine. App. 378–79. This offer is never accompanied by educational materials. App. 308. Defendants' moving papers provide no indication that people who decline a vaccination on booking are ever reoffered one. Defendants have also refused onsite vaccination of Jail staff, who instead must seek approval for leave in order to get vaccinated, and are not compensated for their time to get vaccinated or any vaccine-related recovery time. *See* App. 215. These structural defects in Parkland's vaccination plans have caused abysmal results. For example, California state prisons have different policies—making repeat offers of vaccinations and providing materials written specifically for a carceral setting—and enjoy an acceptance rate of 66.5%. Chin, et al., *COVID-19 Vaccine Acceptance in California State Prisons*, New England J. of Medicine (May 12, 2021). In contrast, the three weeks of data that Defendants produced show that there were 2799 "Intake Offerings" and only

143 acceptances—an acceptance rate of just 5%.App. 327. At this rate of vaccination, the Jail is far from achieving population-wide vaccination—a critical preventive effort as new and more deadly variants of the virus emerge. *See* App. 360 ¶ 7, 366 ¶ 20.

Even though the majority of detainees remain unvaccinated (notwithstanding the now ample vaccine supply), neither the County nor the Sheriff have sought to engage state or federal health officials for assistance in procuring more vaccinations or speeding the delivery of vaccines to detainees. *See* App. 164–65; App. 327. The Sheriff admitted she has the ability to, but has chosen not to, discuss how to secure additional vaccine doses for the Jail with Parkland. *Id*. *See also* App. 364 ¶ 16 (explaining that implementing a vaccination plan, including the pace of the vaccination rate, should be in the Jail's purview).

2. Shocking Conditions Exist in the Jail that Increase the Threat of Harm from COVID-19

Significant evidence in this case demonstrates inadequate treatment of detainees with COVID symptoms and shocking sanitary conditions, among other inadequate COVID-19 mitigation procedures. These are not isolated incidents, as discussed below.

a. Jail staff failed to provide treatment for COVID-19 and other medical treatment.

Several current and former Plaintiffs in this matter have testified that their COVID-19 symptoms, including fever and shortness of breath, were not treated by medical staff or were ignored by guards, even when the Plaintiff also had an underlying medical condition, like diabetes. *See* App. 4, 6–7 (in a 10-14 day window, Mr. Bailey, who has diabetes and presented COVID-19 symptoms, including high fever, was only seen by medical staff twice); App. 116–18 (guards ignored Ms. Yarborough's urgent requests to get medical attention for another detainee who had an extremely high fever, later tested positive for COVID-19 and was experiencing extremely low oxygen saturation, and did not receive oxygen or fluids); App. 37 (after

complaining to a nurse about a 104 degree fever and loss of taste and smell, a nurse laughed at Mr. Sanchez at told him those symptoms were not consistent with COVID-19). Ms. Kiara Yarborough, now deceased, testified that when she and 20 others were quarantined after testing positive, medical staff did not check on them daily. App. 119.

Similarly, two Plaintiffs testified that they did not receive adequate medical treatment for conditions increasing their susceptibility to COVID-19, like diabetes, and asthma, even in quarantine. *See* App. 6 (denied the insulin Mr. Bailey required and his complaints to medical staff were ignored); App. 107 (guard callously ignored Mr. Baker's request for assistance when he was suffering a severe asthma attack); App. 269; 271 (in quarantine, Mr. McDonald used the call button for assistance when he could not breathe because of asthma, but no one responded). Mr. McDonald reported that during his entire quarantine, staff only checked on him once even though they knew he had asthma and previously reported very low oxygen saturation in the infirmary. App. 254–56, 274; *see also* App. 345–46 ¶ 41. Moreover, while he was suffering from COVID-19, Mr. Bailey was restricted from using the phones to contact his wife. App. 7.. Mr. Bailey said that the procedures used at the jail were arbitrary and depended on the mood of the guards. *Id.*

Regrettably, these failures are symptomatic of Defendants' long-standing failures to provide detainees with necessary care for acute and chronic medical conditions and to treat and manage communicable diseases. As the Sheriff is aware, in November 2007, the County entered a consent ordered with the U.S. Department of Justice's Civil Rights Division. App. 182–83. The consent required the Jail, over a four-year term, to implement enhancements to medical care for detainees. *See* Agreed Order, dated Nov. 6, 2007, Case No. 301-cv-1559 (N. D. Tex.). Yet many of the same deficiencies that the Jail was required to correct under that order are recurring today.

b. Conditions in Quarantine Are Unsanitary and Inadequate.

Plaintiffs also testified to unsanitary and filthy conditions in quarantine. Ms. Yarborough and 20 other women were quarantined after testing positive for COVID-19 did not receive new laundry for over a week and their access to the commissary was reduced. App. 115–16; *see also* App. 344–45 ¶ 39.[4] Mr. McDonald testified that the walls of his quarantine cell were lined with feces and the vent, walls, and ceiling had black mold. App. 270. Mr. Sanchez, who was moved to quarantine with COVID-19 symptoms, noted that his quarantine cell on the 7th floor West tour was "trashed" with dried feces on the floor by the toilet and dried food on the doors. He was not given any rags or disinfectant to clean his cell. App. 288–90. He was also given reduced access to showers and did not receive sufficient soap and sanitizer. App. 289–91; *see also* App. 338 ¶ 25.

Contemporaneous written grievances further document unsanitary quarantine conditions. Original Plaintiffs Marcus White[5] grieved on March 25, 2020, that he was placed in quarantine and had to use dirty linen and jail issued uniforms without exchanging bed linen and clothing that was exposed to the coronavirus. *See* App. 410. In another grievance, Mr. White wrote that from March 25 through April 2, 2020, inmates were denied showers while in quarantine, and that quarantine consists of staying in the cell for 24 hours a day. *See* App. 413. These grievances are corroborated by communications amongst Jail staff on May 12, 2020, reflect that there was no process in place for cleaning out quarantined areas. Correspondence between the Chief and Assistant Chief Hartgraves reflects that there was no system for cleaning out tanks where

[4] In his complaint against the Sheriff, Officer Lewis also cited the unsanitary conditions in the Jail. *See* App. 534 ¶ 8. Plaintiffs reserve the right to subpoena Officer Lewis at trial.

[5] Plaintiffs voluntarily dismissed Marcus White, Jose Munoz, Roger Morrison, and Terry McNickels from this litigation. [ECF No. 242]. Evidence gleaned from prior Plaintiffs' experience is offered as factual evidence, and dismissed plaintiffs may still be called as witnesses at trial.

detainees with symptoms were housed. App. 390–91. There is no evidence that any system was devised to address this issue.

Beyond being unsanitary, quarantine conditions in the jail were also inadequate. In October 2020 the CDC recommended a fourteen-day quarantine period prior to transfer or release. App. 511–12. The jail, however, only quarantines incoming detainees for a maximum of nine days. App. 28–29 (explaining that the quarantine period had been lengthened recently from seven days); App. 72 (confirming a nine-day quarantine). Detainees are further quarantined in cohorts, where all detainees arriving at the jail during a particular period of time are placed together in the same tank. The CDC, Dr. Nijhawan, and Dr. Venters all agree that this is an option of last resort. *See* App. 31–33 (noting her agreement with the CDC's statement that "[c]ohorting should only be practiced if there are no other available options"); App. 370–71 ¶ 23 (noting lack of awareness of any other correctional facility that purposefully follows such a "deficient and dangerous approach" at this point in the pandemic). The jail knows the high risks of group quarantines: on one occasion when it placed a single COVID-19 positive detainee in a tank, causing the entire tank to test positive, jail officials noted that they "expected" the infection to spread this way. App. 514.

c. PPE Is Not Consistently Used, Social Distancing is Not Encouraged or Enforced, and Cleaning Supplies Are Not Available Next to High Touch Surfaces.

Plaintiffs also testified about several instances when prison guards did not enforce social distancing. Mr. Sanchez said that there was no social distancing enforced during medication distribution and during meal time. Similarly, in the hold over cell, where detainees are held for court appearances, there was no social distancing. App. 291–93. These observations were corroborated by Dr. Venters' inspection, App. 337 ¶¶ 20–22, and photographic and video tape evidence plaintiffs have obtained. *See*, *e.g.*, App. 528 [redacted]

2020, [redacted]; *See also* App. 447 [redacted]

Similarly, Plaintiffs all observed instances in which correctional staff were not wearing masks, including as late as December 2020. App. 8–9 (noting being in a holding area for 12 hours where at least 100 guards were present, none of whom were wearing masks or gloves, and that at least twenty detainees in a single room were not wearing masks or gloves); *see also* App. 336 ¶ 19; App. 340 ¶ 32. Mr. Baker noted that when he was in the West Tower, the guards initially denied detainees masks until they started complaining. App. 106. Mr. Sanchez noted that guards did not wear masks when administering medication or being in situations requiring contact with detainees, and observed guards not wearing masks even in December 2020. App. 282–83.

Access to cleaning supplies and sanitary standards at the Jail were not given the priority that they should have been during a pandemic. An April 17, 2020, grievance filed by Plaintiff Marcus White indicated that detainees were "denied cleaning supplies [mop-broom-disinfection spray-scrub brush-dust pan] to clean and protect ourselves and fight the coronavirus exposed surfaces" and that the floor was "nasty and unsanitary." App. 416. These complaints were corroborated by the observations of Dallas County Commissioner John Wiley Price, who wrote on June 3, 2020, to Jail staff that in the intake area, "the floors are nothing short of filthy." App. 387–88. Likewise, the Sheriff's staff has not developed procedures to sanitize high-traffic, commonly used surfaces. [redacted]

[redacted] App. 448–49 .

It is not clear if a more rigorous cleaning program was subsequently implemented. These complaints are a result of a systemic failure by Defendants to improve the provision of hygiene supplies to detainees. In the Annual Report on Jail Conditions of the Texas Commission on Jail Standards ("**TCJS Annual Report**"), sent on February 23, 2020 to County Judge Clay Jenkins and the Sheriff, that TCJS noted that the Jail was not in compliance with minimal standards set under Texas Law with respect to several areas, including ensuring that sufficient personal hygiene and personal care items were provided to indigent detainees and that even detainees who attempted to make commissary purchases of such items were not receiving them in a timely manner. App. 506.

Similarly, the Sheriff's staff has failed to ensure that detainees who are engaged in high risk tasks, such as handling dirty laundry, cleaning, or serving foods, have the necessary PPE for such tasks beyond just masks or have been trained in proper sanitation techniques. Evidence of such deficiencies was provided by Patrick Jones, the Vice President of Parkland Correctional Health, during his deposition on `December 16, 2020. *See* App. 75, 81. Notwithstanding Plaintiffs' requests for rolling discovery through the present and up to trial, Plaintiffs have not received any discovery that indicates that these issues have been systematically addressed. *See generally* App. 596–605.

C. The Life-Threatening Conditions Continue to Exist Because Defendants Have Abdicated Responsibility for COVID-19 Mitigation to Parkland

The Sheriff and the Chief assert reliance on Parkland to manage COVID-19 in the Jail and develop policies for this purpose. App. 317–20. However, as they acknowledge, they are ultimately responsible for the health and well-being of the detainees. App. 162, 323. Some

areas, however, are uniquely within the responsibility of the Sheriff's staff, including facilitating the role of medical staff in the Jail to evaluate and test detainees for COVID-19; educating officers and detainees about COVID-19, vaccinations and the proper use of PPE; establishing procedures to encourage social distancing; managing available bunk space; tracking the movement of infected detainees; determining quarantine areas; ensuring adequate sanitation; and managing distribution of PPE and cleaning agents. App. 364–65 ¶¶ 16-17.

1. Defendants Have Failed to Ensure All Correctional Staff Are Apprised of COVID-19 Areas in the Jail.

The Sheriff has failed to actively participate in important decision-making meetings with key stakeholders resulting in widespread confusion regarding implementation of Defendants' purported "comprehensive COVID-19 response plan." The Vice President of Operations for Parkland, Patrick Jones, testified that he could not recall any significant conversations involving the Sheriff. *See* App. 65–66. Similarly, Dr. Ank Nijhawan, who provides clinical care at the Dallas County Jail through Parkland, and other Parkland staff could not recall having any significant conversations with the Sheriff. App. 27, 34, 43, 93. Although many important COVID-19 management issues fall well within the responsibility of the Sheriff's staff, these staff have refused to coordinate or cooperate with Parkland. *See, e.g.*, App. 38, 162, 336 ¶ 18 (Jail leadership indicated Parkland did all contact tracing and did not have any information regarding steps taken to undergo such tracing or whether CDC guidance was used for the process); *cf.* Supporting Brief at 1 (claiming, without support, that "Defendants and Parkland have worked *together* to refine the Dallas County Jail's response to COVID-19") (emphasis added). At times, correctional staff members have undermined Parkland's efforts at providing care to detainees. App. 97–99, 404–407.

Parkland staff noted that it was not apparent that correctional staff were being kept apprised of which areas of the Jail were housing COVID-19-positive detainees. App. 96, 384–85.. This comes as no surprise since the Sheriff's office refused to put signage on quarantine areas, something which both Parkland staff and Dr. Venters observed. App. 83–84, 94, 336 ¶ 19, 341–43 ¶¶ 35–36. (lack of agreement between Parkland and Jail staff about labelling quarantine tanks). The responsibility for communicating this information to correctional staff lies with the Sheriff's Department, and not Parkland. App. 25–26. Ongoing confusion also remains among correctional staff about which areas are designated for isolation of COVID-19 infected patients and which areas are designated for quarantine of detainees exposed to COVID-19. *See* App. 152–; *cf.* App. 25–26, 53. (demonstrating an inconsistency between the Sheriff's understanding of these practices and that of Parkland's and CDC guidance). The confusion further demonstrates the inadequacy of the Sheriff's policies, as the Sheriff's staff is responsible for deciding which tanks or pods will be classified as quarantined. App. 211.

2. Defendants Have Not Addressed Concerns Raised by Parkland about Correctional Staff Interactions with Medical Staff.

Parkland staff documented several instances of concern regarding their interactions with correctional staff when performing their duties in front of detainees. App. 38–39 (explaining that healthcare staff had tensions with correctional staff in which healthcare staff did not feel safe or supported in doing their job). These incidents included correctional staff refusing access to medical staff into detainee areas when they were trying to enter for evaluation and testing of detainees, physically pushing medical staff, and failing to assist medical staff when detainees began grabbing their hands. App. 405–06. A sergeant even openly contradicted medical staff regarding quarantine, which undermined the medical staff's authority before detainees. App. 97. When Parkland staff raised these specific incidents to the Chief, he simply dismissed their

concerns as having been raised too late. App. 404.. There is also no evidence that despite these concerns that any formal training has been given to correctional staff regarding appropriate interactions with medical staff on COVID-19 management. App. 100.

3. Defendants have Not Adequately Educated Jail Staff about COVID-19 Mitigation

As Parkland officials will readily state, the education of detainees and correctional staff on the correct use of PPE is an important measure in the mitigation of COVID-19. App. 67. The responsibility for doing so lies squarely within the authority of the Sheriff's department. App. 73–74. Indeed, when Dr. Nijhawan offered to assist in implementing an officer training program about COVID-19, the Chief rebuffed her and made it clear to her that DSO training about COVID-19 issues such as the use of PPE and testing should be handled by the Sheriff's Department. App. 23, 393–402; *see also* App. 533–34 ¶ 7 (citing lack of formal training for DSOs on recognizing and dealing with symptomatic detainees).

Despite the numerous instances detailed above where Jail staff were unprofessional in handling complaints about COVID-19 risks, the Jail has continued to ignore its duty to educate its staff. For example, the only information regarding COVID-19 mitigation available to staff in the Jail are purported "file folders" on the Jail floors, which contain information only as recent as August 2020—many months before vaccines were introduced. *See* App. 187, 419–446, 453–501, (purported "file folders" produced by Defendants in discovery in April 2021, reflecting information only as recent as August 2020). Further, Parkland officials have not observed any formal training for detainees regarding correct mask use. App. 77.

Equally troubling is the inconsistent use of PPE by correctional staff in clinical areas. At least one Parkland official has seen correctional staff not wearing masks in Parkland clinical areas. App. 79–80. While these incidents can be reported to supervisors, not all Parkland

medical staff are comfortable making such reports. App. 80–81. Another Parkland staff member advised the Chief that correctional staff and detainees would benefit from education about hygiene, use of masks, and social distancing. App. 384–85.

D. Defendants Are Systematically Suppressing Reporting of COVID-19 Incidents and Underreporting COVID-19 Prevalence in the Jail

The record also reveals that the County and the Sheriff have chosen to conceal the known threat posed by COVID-19 in the Jail. Defendants' Supporting Brief suggests that the low rate of COVID-19 cases in the Jail that they have ***reported*** to TCJS constitutes evidence that they are adequately responding to COVID-19. Supporting Brief at 1, 9. However, other evidence shows that those statistics underreport the true rates of COVID-19 infections and deaths.

1. The Defendants Have Refused to Adopt an Asymptomatic Testing Protocol in the Jail

Transmission from asymptomatic individuals is estimated to account for more than half of all transmissions. App. 363 ¶ 13. Yet, Defendants have deliberately resisted testing asymptomatic detainees and correctional officers. This allows them to report lower numbers of positive tests, but it also creates serious risk to the people incarcerated in the jail. The Jail only conducts regular asymptomatic testing during intake of new detainees, and only began doing so in February 2021. App. 30, 46, 54–55, 149–51; Supporting Brief at 8 (citing Defs.' App. at 696). In addition, the Jail claims to test detainees who exhibit symptoms of COVID-19, and those who affirmatively request a test. However, such limited testing means that the full universe of active or positive COVID-19 cases among all detainees remains unknown. *See* App. 361 ¶ 9 (noting that without tracking and reporting the incidence and prevalence rates of infection by testing detainees on a regular basis using randomized or mass testing protocols, it is not possible to anticipate the impact of new outbreaks or anticipate the resources required to respond to them); *see also* App. 533 ¶ 5 (noting dangers from lack of asymptomatic testing program).

The Sheriff admitted that the testing results she receives daily from the Chief only include those of new detainees and that the Jail no longer tests asymptomatic detainees in the general population. App. 30, 54–55, 149–151; Supporting Brief at 8 (citing Defs' App. at 696). Although she was generally aware of the asymptomatic tests administered by Parkland in or around May and June of 2020, the Sheriff chose not to inquire about the actual infection rate (or so she claims), which was 76% of those tested. App. 148–49; 173–75. Consequently, the Sheriff does not receive (and has not previously received) information about the true incidence rate of COVID-19 in the Jail.

Similarly, the Chief, who essentially manages the Jail, is aware of *neither* the number of new COVID-19 cases among staff or detainees *nor* the number of COVID-19 hospitalizations since January 1, 2021. App. 200, 208–10. The Chief also does not know what percentage of asymptomatic people in the general jail population are ever tested for COVID-19. App 321–22. However, unlike the Sheriff, the Chief did acknowledge being advised by Dr. Nijhawan about the results of the asymptomatic testing that was conducted at the Jail in May/June 2020 (203–04) and admits that a high incidence rate of COVID-19 endangers the lives of detainees and staff. App. 205. Despite that recognition, neither the Chief nor anyone else on the Sheriff's staff took any measures to mitigate the spread of COVID-19 in response to these alarming testing results. App. 68–69. Even after Dr. Barry-Lewis Harris, medical director for the Jail, again raised the issue of asymptomatic testing, both the jail and county leadership failed to follow up on the issue. App. 511–12 (showing no follow up on the issue of asymptomatic testing); App. 125–26 (explaining that it is his role to raise issues that need to be addressed in the Jail).

The Defendants' refusal to adopt testing is not only in contrast to those of the defendants in the *Valentine* case; it violates the spirit of a previous consent order entered with the U.S.

Department of Justice's Civil Rights Division that required the Jail to develop procedures for treating and managing communicable diseases that included testing and monitoring. See Agreed Order, Case No. 307-CV-1559, entered November 6, 2007 (N.D. Texas).

As explained by Dr. Venters, there is no valid medical reason supporting the decision to not test detainees or staff apart from the intake process, and it is inconsistent with basic CDC and public health guidelines. App 368–70. And it signals to Jail leadership and staff that COVID-19 within the Jail is not an urgent concern. App. 363 ¶ 13.

Additionally, Defendants' Supporting Brief misstates the results even of its inadequate intake testing. In addition to reporting five active, known cases among detainees, Defendants reported that as of May 31, 2021, 86 tests were pending.[6] Meaning, the "substantial results" touted by Defendants in the Supporting Brief are, at best, incomplete and, at worst, misleading.

2. The Defendants Do Not Include Individuals Infected with COVID-19 Who are Released from Custody In Their Reported Cases

The Sheriff acknowledged that individuals released into Parkland's care who are already infected with COVID-19 and subsequently released from custody before dying are not counted in the Jail's statistics for COVID-19 mortality. App. 177–80. The Sheriff has never sought to learn about the COVID-19 mortality rate among detainees infected with COVID-19 within 24 hours of their release (App. 176–80), but she continues to allow her staff to report misleadingly positive numbers to the TCJS. It is undisputed that detainees have died in the past year due to COVID-19, including at least one detainee in the Jail. App. 168–72; *see also* TCJS Annual Jail Report (App 503–09); App. 359 (citing The Marshall Project, A State-by-State Look at Coronavirus in Prisons). Parkland is similarly not tracking deaths of sick inmates released into its

[6] TCJS COVID-19 Jail Report, dated May 31, 2021, https://www.tcjs.state.tx.us/wp-content/uploads/2021/05/TCJS_COVID_Report.pdf

custody and then transferred to Parkland hospital, even though the data is readily available. App. 304. Moreover, it would be easy to track such information, given that Parkland must submit to a court a letter for compassionate release in many cases in which a detainee is extremely ill. Indeed, after Patrick Jones conceded this point (App. 304–06), the Chief, on May 27, 2021, for the first time requested such information from Parkland for all compassionate release cases since March 2020. App. 624.

3. Jail staff routinely ignore medical grievances.

Plaintiffs testified that their attempts to file grievance forms were repeatedly stymied by guards. Kiara Yarborough, now deceased, testified that a guard told her staff had been instructed to deny all requests for grievance forms in April 2020. App. 114. Mr. McDonald said that he filed several grievances in April 2020 relating to lack of medical attention for his shortness of breath, hygiene, and phone privileges, some of which were simply returned to him. App. 264, 267; *see also* 345 ¶ 40, 347–48 ¶ 50 (finding from his inspection that the Jail "appears to disregard or respond slowly to reports of COVID-19 symptoms among Detainees, which is likely to worsen their individual clinical course and also increase the spread of the virus"). One of his grievances concerned staff falsifying oxygen readings after detainees refused to allow staff to use the machine on them because, as the virus was proliferating, staff had not sanitized the machine. App. 264. McDonald's testimony is corroborated [redacted] App. 450 [redacted]; App. 451 [redacted]

While defendants refused to provide plaintiffs with grievances from the Jail population at-large, a statistical summary circulated by Lupe Garza on January 4, 2021 of the grievances from the prior year indicated that there were over 3,500 medical grievances filed in 2020 alone. *See*, App. 523–27. Subsequent correspondence on February 2, 2021, reflected that jail grievances failed to be generated out of the Securus system and did not receive a response for *up to two months* before the issue was discovered. App. 517–21. These are not isolated issues, but stem from Defendants knowing refusal to address their broken grievance system. The TCJS Annual Report advised County Judge Clay Jenkins and the Sheriff that "multiple grievances" did not receive a required fifteen-day interim response. App. 506.

4. Defendants Have Repeatedly Refused to Address Concerns Raised by Detainees about COVID-19 Jail Conditions and Officer Conduct.

Defendants have repeatedly ignored and suppressed legitimate detainee complaints about exposure to COVID-19 and quarantine conditions. Because quarantine conditions are so bad, many detainees do not report symptoms of COVID-19 to Jail or medical staff to avoid being placed into quarantine. App. 273. the Sheriff hardly inquired about a well-reported incident involving a group of women detainees who were quarantined and protested about the lack of clean laundry and cannot even remember what her staff told her prompted the incident. App. 143–46, 334–35 ¶ 39, 349 ¶ 56; Tyler Hicks, *Women in Dallas County Jail Say They Endured Nearly Two Weeks Without Clean Clothes*, DALLAS OBSERVER (Jan. 4, 2021).

The Sheriff had the same lack of interest in a brutal assault that occurred on a detainee by her staff when the detainee complained to guards that he was being housed with two other detainees who had COVID-19 symptoms.[7] The detainee was bloodied and dragged to the

[7] Affidavits of Jose Garcia, Julius Edwards and Jacorian Sauls, attached as Exhibits A [ECF No. 259-1], B [ECF No. 259-2] and C [ECF No. 259-3], respectively, to ECF No. 259; App 188.

holdover area where sick persons are held, sending a clear message to other detainees that correctional staff would punish them for complaining about being housed in COVID-19 threatening conditions. [ECF Nos. 259-1, 259-2, 259-3]. Defendants do not refute that the incident occurred. *See* Defs. Brief in Opposition to Mot. to Compel Video Evidence [ECF No. 274] at 9. Despite being on notice of the incident since the Temporary Restraining Order ("**TRO**") hearing in this matter held in April 2020 (at the latest), the Sheriff did not ask her staff about the incident. App 188. Similarly, when Plaintiff Sanchez complained of being denied a legal visit in quarantine and asked to speak to a sergeant, his request was met with the same brutal response—the sergeant came and threw him to the floor and assaulted him. App. 285–87. There is no evidence that the Sheriff's department properly investigated these incidents. Moreover, there is no evidence that Brown or her senior staff took any corrective action or developed policies and officer training about how to respond to complaints about detainees worried about infection from other inmates or quarantine conditions.

IV. ARGUMENT

A. Standard of Review for Summary Judgment

Summary judgment should only be granted if Defendants "show that there is no genuine dispute as to any material fact and [Defendants are] entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). This standard is not met, and summary judgment must be denied, if there is even a ***possibility*** that rational triers of fact could "differ on the inferences arising from undisputed facts . . . ." *Daly v. Sprague*, 675 F.2d 716, 725 (5th Cir. 1982). Thus, the stringent burden is on Defendants to show that there is no genuine dispute as to any material fact. *See id.* (explaining that summary judgment must be denied if the movant is unable to show that the facts related to all relevant legal questions are undisputed).

When evaluating a motion for summary judgment, all facts and inferences must be reviewed in the light most favorable to the non-moving party—here, Plaintiffs. *See, e.g.*, *Daly*, 675 F.2d 716 at 725; *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). And "[a]ll reasonable doubts about the facts should be resolved in favor of the non-moving litigant." *Daly*, 675 F.2d 716 at 725; *Anderson, supra,* 477 U.S. at 255. Also significant, the Court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 329 (5th Cir. 2000).

Credibility determinations are a matter for the jury and "not for the judge on a pretrial motion . . . ." *Leonard*, 828 F.2d 291 at 294. Therefore, "[s]ummary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the factual ***inferences*** that should be drawn from these facts." *Daly*, 675 F.2d 716 at 725 (emphasis added). If an issue of fact is found in the record (as present here), the Court must deny the motion for summary judgment and continue to trial. *See id.*

B. Deliberate Indifference Standard

Plaintiffs seek to certify a pre-adjudication class (into which some named Plaintiffs fall) and a post-adjudication class (into which other named Plaintiffs fall). Both classes must show deliberate indifference, but the analyses differ between the two classes.

The post-adjudication class is protected by the Eighth Amendment's prohibition against "deliberate indifference" to a detainee's medical needs. *Farmer v. Brennan*, 511 U.S. 825, 834-47 (1994). Whether a prison official is deliberately indifferent to a substantial risk is a question of fact. *Farmer*, 511 U.S. at 842 (1994). "When there is a possible constitutional violation that is likely to continue over time as in a prison injunction case, [the Court] consider[s] the evidence from the time the suit is filed to the judgment. Deliberate indifference is determined based on

prison officials' current attitudes and conduct." *Valentine v. Collier*, 993 F.3d 270, 282 (5th Cir. 2021) (quoting *Farmer*, 511 U.S. at 845).

The Eighth Amendment requires evidence of:

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

(2) "subjective knowledge" of the risk of harm; and

(3) a disregard for that risk.

Valentine, 993 F.3d at 281. A showing of "wanton disregard for the prisoners' safety or recklessness" demonstrates "deliberate indifference," and, ultimately, the inquiry "centers on whether prison officials recklessly disregarded [the] risk of COVID-19." *Id.* at 281–82 (alteration in original) (internal quotation marks and citation omitted).

The pre-adjudication class, whose members are presumed innocent, is protected by the Fourteenth Amendment. Although the facts underlying the pre-adjudication class's claims are similar to those underlying the post-adjudication class's claims, a different standard applies to the pre-adjudication class. The Supreme Court recently held that "a pretrial detainee must show only … objective[] unreasonable[ness]." *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). And, given their distinct pre-adjudication status, the Supreme Court has long recognized that those whose claims fall under the Fourteenth rather than Eighth Amendment "are entitled to more considerate treatment and conditions of confinement than [those] whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Thus, the pre-adjudication class need satisfy only

the objective prong of the deliberate indifference test.[8] Since material issues of fact exist for all three prongs, Plaintiffs analyze them together below.

Courts must deny summary judgment on deliberate indifference claims where material issues of fact are in dispute. *See, e.g., Patrick v. Martin*, No. 2:16-CV-216-D-BR, 2020 WL 4040969, *17, *18–19 (N.D. Tex. July 16, 2020) (denying summary judgment on deliberate indifference claims where fact issues existed); *See Lawson v. Dallas Cnty.*, 286 F.3d 257, 263 (5th Cir. 2002) (holding that evidence showed deliberate indifference where defendants had actual knowledge of obvious risk). As explained below, Defendants' response to COVID-19 in the Jail presents multiple disputes on issues of material facts.

C. Genuine Issues of Material Fact Prevent Summary Judgment in Defendants' Favor

Defendants describe a copacetic picture of a Jail that is smoothly managing the COVID-19 outbreak, implementing a range of "infection-control measures" and implementing "well developed protocols for quarantine and isolation." Supporting Brief at 6-9. The evidence in this case, however, reveals a starkly different reality about shocking conditions at the Dallas County

[8] Defendants contend that both the objective and subjective Eighth Amendment prongs apply to the pre-adjudication class's claims under the Fourteenth Amendment, citing *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019). Supporting Brief at 15. But the *Cleveland* court simply applied the Supreme Court's Eighth Amendment case law, in the form of *Farmer*, to a Fourteenth Amendment claim without considering that *Kingsley* expressly modifies that test for Fourteenth Amendment claims. *Cleveland*, 938 F.3d at 676 (citing *Farmer*, 511 U.S. at 837). Other circuits have considered this issue and have confirmed that, following *Kingsley*, a plaintiff proceeding under the Fourteenth Amendment need not satisfy the subjective elements of the Eighth Amendment test. *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017); *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120 (9th Cir. 2018); *see also Banks v. Booth*, 459 F. Supp. 3d 143, 152 (D.D.C. 2020) ("Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, the Court concludes that pre-trial detainee Plaintiffs . . . do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement."). Defendants may cite dicta in a footnote of a Fifth Circuit opinion stating that the Fifth Circuit would need to meet *en banc* to determine that *Kingsley* overturned its prior precedent applying the Eight Amendment standard to Fourteenth Amendment claims. *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017). But this Court should follow the Supreme Court's *Kingsley* holding—not the Fifth Circuit's dicta. *See also id.* at 425 (Graves, J., specially concurring in part) (dissenting from the dicta of the majority opinion because there are "different standards for pretrial detainees and DOC inmates").

Jail and Defendants' cruel refusal to implement policies that could have, and still could, mitigate the risk of COVID-19 to detainees.

1. Defendants know (and do not dispute) that COVID-19 presents a substantial risk of harm to detainees.

Again, Plaintiffs maintain that they need not show subjective awareness of a substantial risk of harm. But, alternatively, for an official to have subjective knowledge of a substantial risk of harm to detainees, she must (a) know of and disregard "an excessive risk to inmate health or safety"; (b) "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists"; and (c) "draw the inference." *Farmer*, 511 U.S. at 837. This is a "question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence," and "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842-43 (noting that an official's exposure to pervasive and well-documented circumstances of the risk may be sufficient for trier of fact to find that official had actual knowledge of the risk); *see also Lawson*, 286 F.3d at 262–63 (finding deliberate indifference where risk was obvious); *Hinojosa v. Livingston*, 807 F.3d 657, 667 (5th Cir. 2015) (stating that "open and obvious nature of" dangerous conditions would "support an inference of deliberate indifference"). Further, prison officials may be found deliberately indifferent by the simple fact that evidence of a serious risk has been adduced before a court and the officials thus cannot "plausibly persist in claiming lack of awareness" of the risk. *Farmer*, 511 U.S. at 846 n.9.

There can be no dispute that COVID-19 presents a substantial risk of harm, especially in the context of jails and prisons. *Valentine*, 993 F.3d at 281 (acknowledging same); App. 359 (citing The Marshall Project, A State-by-State Look at Coronavirus in Prisons) (noting that across the country, more than 2,500 incarcerated people have died in U.S. prisons from COVID-

19 related illness and almost 400,000 cases have occurred). The Sheriff has conceded that COVID-19 poses a substantial risk to detainees (App. 136), acknowledged that "the Dallas County Jail has been a medium of COVID-19 transmission" among detainees (App. 137, 155–57), and admitted that detainees have died in the Jail in the past year due to COVID-19 (App. 168–72, 205); TCJS Annual Jail Report (App. 503–09).[9] Defendants have been on notice of this substantial harm since, at least, the date when Plaintiffs filed this action. *See generally* Complaint [ECF No. 1]; TRO Transcript [ECF Nos. 90-93]; TRO Court's Witness and Exhibit List [ECF No. 94]; App. 349 ¶ 58.

Likely for these same reasons, Defendants do not contest—in the Motion, Supporting Brief, or otherwise—the substantial risk posed by COVID-19 or Defendants' knowledge of the same. *See generally* Supporting Brief. Thus, the summary judgment record reflects that the first two of the three essential elements of Plaintiffs' deliberate indifference claim are undisputed.

2. At a minimum, there are issues of fact as to whether Defendants have deliberately disregarded the substantial risk of COVID-19.

To raise an issue of material fact and defeat summary judgment, Plaintiffs need not prove that Defendants "believ[ed] that harm would befall an inmate," only that "the official acted or ***failed to act*** despite [his or her] knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842 (emphasis added). More specifically, the inquiry centers "on whether prison officials 'recklessly disregarded [the] risk of' COVID-19." *Valentine*, 993 F.3d at 281–82. Such deliberate indifference may be established by proof that unconstitutional conditions are "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past," or

[9] The Sheriff has also read the CDC COVID-19 Guidance early on in the pandemic (App. 137–38), which recognizes the severity of COVID-19 and recommends specific guidelines and policies that should be implemented and maintained in correctional facilities.

based on "the very fact that the risk was obvious." *Farmer*, 993 F.3d at 842–43 (emphasis added).

a. The Sheriff has Failed to Act Despite Acknowledging the Risk

Despite being aware of the substantial risk posed by COVID-19 and admitting that she is obligated to assure the healthcare of detainees (App. 189), the Sheriff—the "keeper of the Jail" and the County representative who controls and operates the Jail (App. 136)—has consistently chosen not to act. She has admitted that very little of her time on Jail-related matters is spent on COVID-19 management (App. 141–42), and as the summary judgment record reflects, Defendants have knowingly refused to take affirmative steps that would substantially mitigate the risk of COVID-19 to detainees, including, among other things, failing to:

- Request available resources for detainee vaccinations, despite knowing such resources existed and acknowledging that it was the Sheriff's role to procure them (App. 158, 164–67);
- Inquire about Parkland's vaccination plan or, when learning that there was no vaccination plan in place at the end of March 2021, failing to secure more resources (App. 158–59, 161–62, 165–67);
- Educate detainees and staff about the vaccine in order to reduce declination rates upon learning that only 500 detainees had been vaccinated by the end of March 2021 (App. 161–62) or otherwise inquire about the low vaccine acceptance rate (App. 301–02, 303);
- Update the purported "file folders"—the only information available in the Jail regarding COVID-19 mitigation—more frequently than *August 2020*, almost one year ago (App. 187, 419–46, 453–501);
- Take *any* action after learning of the 76% positive rate resulting from the May/June 2020 asymptomatic testing (App. 68–67, 147–49, 173–75, 384–85);
- Create a policy to encourage staff to get vaccinated or otherwise providing paid time off for the same (App. 215); and
- Train detainees on how to use masks correctly (App. 77);
- Ensure detainees handling dirty laundry, cleaning, or serving foods in high-risk tanks have the necessary PPE (App. 75–76, 81);

- Work with Parkland to develop any plans, procedures, or policies related to COVID-19 management (App. 161–62, 206, 220–21, 336 ¶ 18).

Defendants misleadingly suggest that, under *Valentine*, Plaintiffs' claims must fail because they rest on the proposition that the CDC guidelines establish the constitutional minimum of conduct required by the Defendants. Defendants are mistaken. As noted above, Plaintiffs do not argue that the CDC guidelines are mandatory or the legally required minimum. To the contrary, all the law requires is for Defendants to make—and ensure compliance with—an adequate plan to ensure safety in the Jail. Defendants have chosen to ignore this obligation, and a triable issue of fact exists as to whether Defendants have undertaken even the most basic prescriptions toward mitigating the spread of COVID-19 and protecting detainees under the minimal standard acknowledged by *Valentine*.

That is not to say, however, that the failure to consult with CDC guidance cannot help prove such failures, and create the existence of a triable issue of fact regarding Defendants' subjective intent. Reflecting her complete indifference to the health and safety of detainees, the Sheriff has failed to stay apprised of the periodic updates to the CDC Guidance (App. 137–40, 184, 186). Without understanding and implementing the CDC Guidance or anything like it, Defendants create additional risk of COVID-19 outbreaks in the Jail. *See* ¶ 10; *see also Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020) (recognizing relevance of CDC guidelines in "historic global pandemic"); *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, *3–4 (9th Cir. 2020) (recognizing importance of CDC guidelines in evaluating defendants' response to COVID-19); *United States v. Avalos,* No. 20-3194, 2021 WL 1921847, *2–4 (10th Cir. 2021) (recognizing relevance of CDC guidelines in light of global COVID-19 pandemic); *United States v. Hood*, No. 20-6243, 2021 WL 1423617 (6th Cir. 2021) (applying CDC guidelines in evaluating motion

for compassionate release); *United States v. Jaramillo*, No. 20-3240, 2021 WL 2224370, *1–2 (2d Cir. 2021) (relying on CDC guidelines in evaluating merits of the case); *United States v. Kibble*, 992 F.3d 326, 332–33 (4th Cir. 2021) (Gregory, J. concurring) (recognizing CDC guidance as benchmark for evaluating COVID-19). The foregoing lack of action demonstrates a "wanton disregard" for Plaintiffs' safety in light of the substantial risk posed by COVID-19 and prevents summary judgment in Defendants' favor. *Valentine v. Collier*, 993 F.3d 270, 281 (2021).

Equally probative of the deliberate indifference of the Defendants is the fact that, notwithstanding having been admonished by both the U.S. Department of Justice and the TCJS over issues such as the failure to have plans for the management of communicable disease (including testing), adequate medical care for detainees, and the failure to timely respond to detainee grievances, the Defendants have pursued policies that, in fact, appeared designed to suppress COVID-19 grievances and conceal the true prevalence of COVID-19 in the Jail.

b. There is a Triable Issue of Fact As to Whether Defendants' Abdication of Responsibility to Parkland Is Reasonable

Defendants admit that they are ultimately responsible for the health and well-being of detainees. App. 323. Mistakenly relying on *Valentine*, Defendants take the position that they can wash their hands of all responsibility for Plaintiffs' health and safety with respect to COVID-19 by deferring wholly and unconditionally to Parkland. *See* Supporting Brief at 18; *see also* App. 181, 185, 317–20. But Defendants' actions (or lack thereof) are strikingly different than those of the defendants in *Valentine*. The Sheriff cannot delegate ***all*** responsibility for COVID-19 management to Parkland without ***any*** coordination, oversight, or action in the areas within her purview. Triable issues of fact exist, therefore, as to whether Defendants' wholesale outsourcing of their own duties to Parkland in this case is reasonable.

First, the Fifth Circuit merely acknowledged in *Valentine* that it is not "unreasonable for Defendants to rely" on healthcare experts in responding to COVID-19 or in creating policies. 993 F.3d at 283. But in *Valentine*, the policies at issue "set forth safety measures in accordance with CDC guidelines" and even included additional measures from "the CDC nursing home guidance." *Id.* at 283. The policies were, for the most part, in detailed and in writing. *Id.* at 282–83. They were also updated "at least six times" in keeping with "new information and experience with the virus." *Id.* at 283. The *Valentine* court also considered that defendant negotiated and secured additional testing supplies and, after acquiring additional tests, implemented mass testing of class members. *Id.* at 284–85, 289 (finding no deliberate indifference when there was only a "delay in scheduling mass testing").

As the record reflects here, Defendants have not taken any actions to secure additional resources (App. 165–67), have refused to implement mass testing despite indications from their meager testing that the infection rate was high (App. 30, 54–55, 149–51, 247; Supporting Brief at 8 (citing Defs' App. at 696)), and the purported "policies" at the Jail are not in accordance with CDC Guidance (App. 364 ¶ 15, 365 ¶ 17). And unlike the written, regularly updated policies in *Valentine*, the Jail's written policies here consist only of items found in the "file folders" which have not been updated in nearly a year and do not contain any information regarding vaccination. *See* App. 187, 419–46, 453–501.

Second, Defendants' deliberate indifference is a question of fact, *Farmer*, 511 U.S. at 842, and as Defendants acknowledge, their response to the risk posed by COVID-19 must be ***reasonable***, regardless of whether such response involves reliance on, or deference to, healthcare experts. *See* Supporting Brief at 19 (claiming there is "no evidence that Defendants have failed to act reasonably"). Defendants do not (and cannot) cite precedent to support their contention that a

prison official may abdicate ***all*** responsibility and defer entirely to a third party or that such degree of deference is reasonable as a matter of law. *See generally,* Supporting Brief; *Valentine*, 993 F.3d at 281 (noting the court considers the "reasonableness of [defendants'] response"); *Sanchez v. Oliver*, 995 F.3d 461, 473 (5th Cir. 2021) (an "official shows a deliberate indifference . . . 'by failing to take reasonable measures to abate [the risk]'"). Nor can Defendants explain how relying on Parkland—an entity with limited staff members to oversee these important issues— without any assistance from the Jail is reasonable. *See* App. 71.

Third, even assuming Defendants could legally rely wholly on Parkland without any oversight (they cannot), Defendants' claim that the Jail's protocol is "working" rings hollow. *See* Supporting Brief at 19. The Jail's refusal to implement mass, broad testing of asymptomatic individuals can result in (and likely has resulted in) underreporting active and positive COVID-19 cases. *See* Supporting Brief at 8 (citing Defs.' App. at 696); App. 30, 54–55, 149–51, 361 ¶ 9, 368 ¶ 22. This can be inferred from, among other things, the high incidence rate reported last summer from the single asymptomatic testing effort. *See* App. 147. Coupled with Defendants' failure to include post-release COVID-19 cases in their TCJS reporting (App. 168–72, 176–80, 503–09; *see* TCJS COVID-19 Jail Report, dated May 31, 2021, *supra n.5*) and active efforts to discourage reporting by assaulting incarcerated people who report issues and by housing people who report symptoms in quarantine dorms with terrible conditions, the Court need not take Defendants' contention that the purported policies "work" at face value and, in fact, must disregard anything "the jury is not required to believe." *Thomas*, 233 F.3d at 329; *Leonard*, 828 F.2d at 294.

Fourth, rational triers of fact could find, based on the evidence in this case, that the Sheriff and her staff at times were aware of Parkland's recommendations yet chose not to

cooperate with Parkland on critical issues, undermining any argument that her total reliance on Parkland was reasonable and precluding summary judgment for Defendants as a matter of law. *See Daly*, 675 F.2d at 725; *Thomas*, 233 F.3d at 329. Defendants claim, without evidentiary support, that they worked "together" with Parkland to refine the COVID-19 response policy in the Jail. *See* Supporting Brief at 1. But the record instead shows otherwise. The Sheriff and Jail leadership have no knowledge about Parkland's vaccination plan or the rate of vaccinating detainees. App. 159–62; *cf.* App. 364–65 ¶¶ 16-17 (explaining the pace of vaccinations, among other things, should be in the Jail's purview). Nor is there any evidence that Defendants educate or provide subsequent vaccination offers to detainees following the initial intake process. App. 302. Defendants likewise are unaware of the true incidence rate of COVID-19 in the Jail. *See, e.g.*, App. 148–49, 307, 624. And they do not know the number of new COVID-19 cases among staff or detainees or the number of COVID-19 hospitalizations since January 1, 2021. App. 208–10. Defendants simply have not been active participants in developing or implementing any COVID-19 protocols at the Jail and have disavowed all responsibility. App. 181, 185, 317–20. Their contention that they are fulfilling their constitutional responsibilities, in the face of this weighty evidence, certainly presents a triable issue of fact.

This lack of cooperation and oversight has resulted in confusion surrounding key areas of COVID-19 management, including where those with suspected or confirmed COVID-19 positive cases are quarantined or isolated (App. 25–26, 53, 94–96, 152–55, 384–85), where to wear PPE and masks (App. 78–80), and who is in charge of quarantine procedures at the Jail (App. 83–84, 97). Similarly, the Sheriff's staff took no steps to address the concerns raised by Parkland about the conduct of some correctional officers that undermined Parkland staff in the presence of detained people on issues such as quarantine without intervention by correctional staff. Yet

Defendants dismissed these concerns (App. 404–06) and have not addressed them by any formal training (App. 100).

Defendants have also rebuffed Parkland's attempts to assist the Sheriff's staff in developing educational programs about COVID-19 mitigation for correctional staff, asserting that this lies within the responsibility of the Sheriff. *See, e.g.*, App. 19–24, 35–43, 207, 219, 384–85, 393–402. These very actions make Plaintiffs' point by demonstrating that Defendants—not Parkland—are the final decision makers on issues involving the management of COVID-19, yet the Defendants have chosen to take no action to oversee this important mandate. For all the foregoing reasons, genuine issues of material fact exist regarding Defendants' wanton disregard of Plaintiffs' health in light of COVID-19, and support an order denying Defendants' Motion in its entirety. *See, e.g.*, *Daly*, 675 F.2d at 725.

c. There are Triable Fact Issues About Whether Defendants Disregarded Plaintiffs' Concerns About COVID-19 Risks

A trier of fact could also decide that Defendants have acted in wanton disregard of the health and welfare of Plaintiffs by failing to address Plaintiffs' concerns about COVID-19. The evidence shows that Defendants (a) were deliberately indifferent to the suffering of Plaintiffs and others who were suffering symptoms of COVID-19, (b) were aware of the administration of temperature checks using soiled and unsanitary equipment and gloves, (c) ignored grievances about the treatment of underlying medical conditions that made the complainant more susceptible to COVID-19, (d) were aware of unsanitary conditions in quarantine and a lack of proper cleaning of quarantine areas, and (e) ignored the brutal actions taken by the Sheriff's staff to silence complaints raised by detainees concerned about potential exposure to COVID-19. These are not isolated cases, as several Plaintiffs have all shared the same experiences regarding medical attention, staff hygiene, and quarantine conditions. Moreover, Defendants are on notice

of these issues through Plaintiffs' grievances, this litigation, and through their own observations of conditions in the Jail. And, as Defendants are aware, two government agencies – the TCJS, through its Annual Report, and, previously, the U.S. Department of Justice, through a consent agreement with the County, also found and notified the County of deficiencies relating to hygiene, grievances, medical treatment and the management of communicable diseases.

There is no evidence, however, that Defendants have in any way addressed the issues raised by Plaintiffs, demonstrating complete indifference to the risk posed to Plaintiffs and other detainees from COVID-19 because of the Defendants' conduct. The inference against the Defendants drawn from the evidence provided by Plaintiffs weighs against summary judgment. *See, e.g.*, *Daly*, 675 F.2d 716 at 725; *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). Nor can Defendants attack the credibility of Plaintiffs' testimony on summary judgment. *See Leonard*, 828 F.2d 291 at 294.

There is also evidence of a pattern of suppression of detainees' COVID-19 related grievances through deliberate neglect and even intimidation. Defendants have been on notice since the TRO hearing in this matter about the conduct of staff officers, particularly the brutal assault by correctional officers on a detainee complaining of the risk of COVID-19 from staff policies. Plaintiff Sanchez experienced a similarly brutal response to his complaints about quarantine. There is no evidence that Defendants responded to these issues either through direct discipline or formal training of correctional staff, which would have sent a message to correctional staff that such conduct would not be punished. Instead, the record demonstrates a choice made by Defendants to suppress and ignore COVID-19 grievances, including allowing the use of physical violence against detainees complaining of COVID-19 issues to be

unpunished. The suppression of grievances is corroborated by the 2020 TCJS Annual Report that noted the Jail had failed to timely respond to grievances. A rational trier of fact could view the Defendants' inadequate responses to these incidents, along with their deposition testimony, as probative of their deliberate indifference to the health and safety of plaintiffs.

These and other triable issues of material fact should preclude a grant of summary judgment in Defendants' favor.

D. Defendants' Exhaustion of Administrative Remedies Argument Is Incorrect

Defendants contend that "no Plaintiff with a constitutionally live claim" fulfilled the PLRA's requirement that they exhaust administrative remedies before suing. [ECF No. 272 at 20]. This, they say, entitles the Jail and the Sheriff to have the case dismissed via summary judgment. Even though many Plaintiffs attempted to file and appeal grievances, they were not required to, as explained below, because exhaustion would be futile due to the urgency of the COVID-19 pandemic, and administrative remedies were effectively unavailable to them. Defendants have not met their burden, thus the Court should not dismiss any Plaintiff's claims for failure to exhaust administrative remedies.

1. Defendants Must Prove Non-Exhaustion and Have Not Done So.

Failure to exhaust is an affirmative defense and not a pleading requirement, so the burden of proof of both the availability of a remedy and of non-exhaustion is on Defendants. *Jones v. Bock*, 549 U.S. 199, 204 (2007); *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010) (stating that defendants have the burden to establish "beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment"). Defendants here have not come close to proving "beyond peradventure" that the administrative remedies they say have been available were actually available to the Plaintiffs.

Because the exhaustion requirement applies only to "available" remedies, Defendants must produce evidence showing there was an available remedy at the relevant time and place for the specific complaint made by the detainee, they must establish what the remedy was, and that it was made known to the detainee. *Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015); *see, e.g.*, *Walker v. Fisher*, 730 F. App'x 100, 101-02 (3d Cir. 2018) (per curiam) (unpublished) (defendants failed to produce enough evidence of availability of grievance forms to the plaintiff to show availability); *Brown v. Valoff*, 422 F.3d 926, 940 (9th Cir. 2005) ("Establishing, as an affirmative defense, the existence of further 'available' administrative remedies requires evidence, not imagination."). Next, the movant must prove that each detainee failed to exhaust. *See Dupry v. Gehrig*, 2009 WL 2579055, *3 (W.D. La., Aug. 20, 2009); *Kiger v. Clairborne*, 2009 WL 2222710, *4 (W.D. La., July 24, 2009) (noting absence of affidavit upon personal knowledge describing grievance system's operation and records search, accompanied by policy and documentation of plaintiff's grievance records). Defendants here, by contrast, fail to submit individualized proof that each Plaintiff both could have exhausted and failed to do so. Plaintiffs, as set forth below, found the grievance process unavailable and unworkable, despite repeated efforts to register complaints and have their urgent concerns addressed.

2. If Required to Show Exhaustion, Plaintiffs are Entitled to an Evidentiary Hearing.

Even if the Court determines that Defendants have met their burden of proof and requires Plaintiffs to prove exhaustion, Plaintiffs should have a hearing. A motion for summary judgment may be granted under Fed. R. Civ. P. 56(a) only when there is no "genuine dispute as to any material fact." If there is such a dispute, ordinarily the factual dispute would be resolved at trial. The circuits that have ruled on the question, however, have held unanimously that factual disputes over exhaustion are for the court to hear and determine before trial. *See Dillon*, 596 F.3d

at 273 (stating "the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary.").

In the Fifth Circuit, courts have held evidentiary hearings in such circumstances. *See Cowart v. Erwin*, 2013 WL 6188731, *5 (N.D. Tex., Nov. 26, 2013) (declining to dismiss after an evidentiary hearing; finding facts in favor of plaintiff), *aff'd*, 837 F.3d 444 (5th Cir. 2016); *Busher v. Taylor*, 2012 WL 3637138, *3 (E.D. Tex., Aug. 22, 2012) (finding factual dispute on summary judgment motion, then finding non-exhaustion by "a preponderance of the credible evidence" after an evidentiary hearing), *aff'd*, 548 F. App'x 280 (5th Cir. 2013) (per curiam) (unpublished); *Garner v. Richland Parish Detention Center*, 2010 WL 2804313, *5 (W.D. La., Apr. 20, 2010) (ordering hearing pursuant to Dillon where non-exhaustion appeared likely but was not established "beyond peradventure"), *report and recommendation adopted*, 2010 WL 2803082 (W.D. La., July 15, 2010). At such a hearing, the Plaintiffs in this action would put forward evidence, as previewed below, as to their extensive efforts to exhaust administrative remedies and the futility of attempting to do so because of the urgency of receiving relief during the COVID-19 crisis and the effective unavailability of those remedies.

3. The Living Plaintiffs Need Not Exhaust.

The law is clear that incarcerated people need not exhaust administrative remedies where exhaustion would be futile or where administrative remedies were effectively unavailable to them. 42 U.S.C. § 1997e(a) (PLRA requirement); *Booth v. Churner*, 532 U.S. 731, 741 (2001) (futility); *Ross v. Blake*, 136 S. Ct. 1850 (2016) (unavailability).

Here, efforts to exhaust at the time Plaintiffs filed their claims were futile because of the urgency of the COVID-19 pandemic. In April 2020 and the preceding months, the COVID-19 pandemic was raging and killing people around the world, and infections at the Dallas County Jail were confirmed in the dozens. There was no vaccine, no testing at the Jail, inadequate

personal protective equipment for staff or detainees, and it was unclear to medical and public health professionals what, if any, measures could be taken to slow or stop the often-deadly virus. [ECF No. 1]. Other courts have waived the exhaustion requirement in this context. *See, e.g.*, *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *18–19 (D. Conn.) (finding exhaustion waived on § 2241 class action habeas request for release to home confinement based on threat of COVID-19 exposure because Petitioners likely to suffer irreparable harm if required to exhaust, given the rapid spread of COVID-19 at Danbury prison and the length of the administrative remedy process); *cf. United States. v. Paige*, 369 F. Supp. 2d 1257, 1259–60 (D. Mon. 2005) (finding exhaustion waived in the context of a § 2241 claim).

Exhaustion is also not required under the PLRA because administrative remedies were "effectively unavailable" at the Jail in early 2020. As the U.S. Supreme Court has explained, the circumstances in which an administrative remedy is unavailable include "when (despite what regulations or guidance may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates" or "when prison administrators thwart inmates from taking advantage of a grievance process." *Ross v. Blake*, 136 S. Ct 1850, 1859–60 (2016). In *Valentine*, Justice Sotomayor addressed the availability of administrative remedies during the pandemic: "if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like COVID-19, the procedures may be "unavailable . . . much in the way they would be if prison officials ignored the grievances entirely. . .in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed." *See Valentine v. Collier*, 590 U.S. ___ (2020), 2020 WL 249751, at *3 (Mem) (Sotomayor, J.).

At the Dallas County Jail, the grievance procedures that exist are utterly incapable of addressing the critical health and safety needs of the detainees in Defendants' care during the pandemic. As noted above, even the TCJS Annual Report cited the Defendants for deficiencies with their response to grievances. If required to prove this at a hearing, Plaintiffs will show, among other things, that the grievance process was not clearly made known to them, was not readily accessible, and did not work as Defendants say it does. For example:

Olivia Washington: The Jail and the Sheriff note that Ms. Washington filed a grievance related to hygiene, received a response, and did not appeal. They say that she did not file any other grievance related to her claims in this case. Ms. Washington raised multiple complaints to officers or nurses about her COVID-19 symptoms. She also placed sick calls because she was experiencing chest and throat pain. Beyond giving Ms. Washington ibuprofen and Tylenol for her chest pain, despite the fact that she had a respiratory issue, Defendants did not respond to her complaints. Plaintiffs' Responses to Defendants' First Interrogatories, dated November 27, 2020 at 4.

Ideare Bailey: Ideare Bailey testified that it was difficult to obtain grievance forms because certain officers were unwilling to assist detainees, that he didn't know about the electronic grievance process, and that he tried nonetheless, writing "statements on paper because the officer wouldn't . . . give me the grievance. So I went another way." App. 5–6.

Keith Baker: Defendants acknowledge that Mr. Baker pursued three grievances, two of them medical, and then was transferred pre-filing. Mr. Baker testified at his deposition that on one occasion when he was crying out to a sergeant, he wrote a note on the back of a used grievance form and "I put it on my window. I used some soap and I put it on paper and I put it on the window. And they never just acknowledged it." App. 108.

Tesmond McDonald: Defendants acknowledge that Mr. McDonald filed ten grievances. At deposition, Mr. McDonald testified that he made a number of grievances to which he does not recall receiving responses to; he was unable to appeal responses he never received. He explained that the staff don't pick up grievances, that the Jail says one thing but does another, and that he feels like grievances don't work so he does what he needs to do and "stay[s] out of the way." App. 265–66, 268.

Marcelo Perez: Defendants concede that Mr. Perez filed a grievance before suing, received a response and appealed, prior to amending his complaint; they argue that amending a complaint does not cure the failure to exhaust prior to filing. [ECF No. 272 at 25]. Mr. Perez complained verbally and often that the DSOs were not responding to detained people's COVID-19 symptoms or to grievances.

Oscar Sanchez: Defendants acknowledge that Mr. Sanchez filed an emergency grievance, appealed after it was not processed "immediately" as promised in the Inmate Handbook, [ECF No. 33-1 at 13], and received a response to his appeal regarding a shortage of masks before filing. They claim he did not appeal the response before filing this case. At his deposition, Mr. Sanchez testified that the grievance system was not working as promised, with all of his grievances at one point being taken off his kiosk profile without responses, and that he was warned by an officer to be careful because people were "looking at my every move [] trying to retaliate on what I was going in regards to letting my lawyers know what was going on in the jail." App. 294–95. He also testified that he pursued steps 1-3 of a grievance asking for release from jail because of COVID-19, attempting to follow the procedure he was aware of. App. 284.

Paul Wright: Mr. Wright wrote of the difficulty of filing grievances and appeals because they do not have any paper, so they have to get the guards to print out the forms or give them

something to write on. Sometimes the guards simply will not do it. The guards are not interested in getting them the papers to file the grievances. Decl. of Adwoa Asante on behalf of Paul Wright [ECF No. 1-8 at ¶ 10].

4. Plaintiffs' Claims are Not Moot.

Defendants believe that only Olivia Washington could proceed as a Plaintiff because she is incarcerated in the Jail at this moment; they assert that the other Plaintiffs' claims are moot regardless of exhaustion efforts and ask for dismissal on the ground of mootness. [ECF Nos. 270, 272 at 21]. Yet the other living Plaintiffs' claims are not moot, and all Plaintiffs are legally exempt from exhausting because administrative remedies were not available to them and would have been futile in the face of the fast-moving and deadly COVID-19 pandemic.

In support of their mootness argument, Defendants acknowledge that Plaintiff Kiara Yarborough died in January 2021, and ask that her claims be dismissed as moot. *Id.* at 22. Defendants suggest that the other Plaintiffs, because they are currently released from custody, cannot show their claims fall into a mootness exception, arguing that the Court would have to "assume that thes[e] released Plaintiffs will again be arrested and again subject to the conditions of which they complain." *Id.* at 23. Each of the living Plaintiffs, however, has a pending motion for class certification and, if the class is certified and they are approved as representatives, their claims may proceed. *See* [ECF No. 224]. Defendants asked the Court to find the Plaintiffs to be inadequate class representatives under the same mootness theory. [ECF No. 269 at 21-23]. Yet the claims of Plaintiffs who have been released are not moot; they may still serve as class representatives and pursue their claims because they might be jailed again at the Dallas County Jail (as is Ms. Washington who was released and re-detained at the Jail).

The nature of being detained in a jail is short-term and may recur, thus detainees' claims are "inherently transitory" and an exception to mootness. *Gerstein v. Pugh*, 420 U.S. 103 (1975)

(addressing pretrial detention); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (post-adjudication class representative could appeal denial of class certification despite the mootness of his individual claim). In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court found jurisdiction through Gerstein's "relation back" doctrine in a class action addressing probable cause determinations where "the class was not certified until after the named plaintiffs' claims had become moot." And in *Ward v. Hellerstedt*, the Fifth Circuit reaffirmed the Supreme Court's holdings to find that claims brought by people challenging unconstitutional practices or conditions while in jail (whether pre- or post-adjudication) do not become moot even if named plaintiffs are transferred or released before a class is certified. 753 F. App'x 236, 241–43 (5th Cir. 2018). *See also Caliste v. Cantrell*, 937 F.3d 525, 527 n.3 (5th Cir. 2019) (rejecting mootness claim even where named plaintiffs' criminal cases had resolved); *Daves v. Dallas County,* 984 F.3d 381, 393 (5th Cir. 2020), *reh'g en banc granted, order vacated*, 988 F.3d 834 (5th Cir. 2021) (in cases involving pretrial arrestees detained on unaffordable bail, "the capable-of-repetition-yet-evading-review doctrine precludes mootness" notwithstanding detainees' later release from Dallas County Jail "[b]ecause the Plaintiffs had standing when they filed their original complaint[.]")In discussing the four post-conviction Plaintiffs, Defendants here say that *Gerstein* does not apply because Plaintiffs Baker, McDonald and Sanchez (and Kiara Yarborough) "cannot show that their claims are too transitory to be fully litigated before they expire." [ECF No. 272 at 24]. The latter argument is illogical—it is precisely because their sentences were known and relatively short that three of these people have already been released, and this case has not yet reached trial, much less the entry of a permanent injunction. Further, many members of the post-adjudication class, including Plaintiffs Wright, Washington, and former Plaintiff Yarborough, were detained in the Jail awaiting a transfer to prison or a treatment

facility at the time of filing—their detention in the Dallas County Jail lasted only for the indefinite amount of time as a transfer took to materialize. [ECF No. 137 at 15]. Defendants cite *Herman* and *Cooper*, both of which were individual actions, not putative class actions. In a class action, even if no class has yet been certified, "the constant existence of a class of persons suffering the deprivation is certain." *Gerstein* 420 U.S. at 109 n.11. Defendants also incorrectly rely on *O'Shea v. Littleton*, 414 U.S. 488 (1974), which is not the controlling case concerning mootness and class actions, having been superseded by *Sosna v. Iowa*, 419 U.S. 393 (1975). *Sosna*, along with *Gerstein*, established the "inherently transitory" exception to mootness.

V. CONCLUSION

Faced with systemic failures in the Jail concerning the provision of medical care and the management of transmissible diseases, the Sheriff and Dallas County have chosen to suppress evidence of the prevalence of COVID-19 while attempting to delegate all responsibility for COVID-19 to Parkland, without meaningful oversight. Where they cannot delegate to Parkland, the Sheriff and the County have chosen to pursue policies and practices that failed to mitigate, and even increased, the risk in the Jail from COVID-19. The record in this case thus establishes numerous issues of triable fact with respect to the deliberate indifference of the Defendants to the threat posed to thousands of people detained in the Jail from COVID-19, in violation of their duties under the Eighth and Fourteenth Amendments. There are also triable issues as to whether Defendants can establish the affirmative defenses of exhaustion and mootness. Accordingly, Plaintiffs respectfully request the Court to deny Defendants' motion for summary judgment in its entirety.

Dated: June 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on June 23, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all counsel registered with that system.

/s/ Adam Safwat
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