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

Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, and Jose Munoz*; on their own and on behalf of a class of similarly situated persons*; *Petitioners/Plaintiffs*, v. DALLAS COUNTY SHERIFF MARIAN BROWN, *in her official capacity*; DALLAS COUNTY, TEXAS; *Respondents/Defendants*	Civil Action No. 3:20-cv-00832 **Memorandum in Support of Motion for Temporary Restraining Order, Preliminary Injunction, and Writ of Habeas Corpus** **Class Action** **IMMEDIATE RELIEF SOUGHT**

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In accordance with Rule 7.1 of the Local Civil Rules of the Northern District of Texas, Petitioners/Plaintiffs (hereinafter "Plaintiffs") and Putative Class Members file this brief in support of their Petition for Habeas Corpus and Motion for Temporary Restraining Order and Preliminary Injunction, and would respectfully show the following:

INTRODUCTION

Oscar Sanchez has a history of severe, chronic asthma that has required hospitalization in the past. Sanchez Dec. ¶ 4. On April 5, 2020 he reported hard chest pains and difficulty breathing to the medical staff at the Dallas County Jail and was told there was nothing to be done. *Id.* Several times a day, he comes into close contact with the dozens of other men housed in his pod at the Jail, and several new people are moved into his pod each week. ¶ 6–14. In the face of the highly contagious and deadly COVID-19 pandemic that is spreading in the Dallas County Jail, Mr. Sanchez's health is at serious risk. Upon asking to be tested for COVID-19, Mr. Sanchez was told by Dallas County Jail staff that he would first have to put in a sick call costing $10: the staff member relaying this information commiserated with Mr. Sanchez by saying, "I don't know what these people want you to do. Die first?" *Id.* at ¶ 17.

Terry McNickles is a fifty-eight (58) year old man recovering from an operation for kidney cancer. McNickles Dec. ¶¶ 1–2. After his kidney removal surgery, his doctor told him he would have to take extra precautions to fight off infections—such as a special diet and increased hand-washing—because his immune system had been compromised. *Id.* ¶ 2. Mr. McNickles is unable to protect himself from a highly-dangerous infection in the Dallas County Jail environment.

Tesmond McDonald's oxygen levels recently reached a dangerously low point and he has had such difficulty breathing that on at least one occasion "he thought he was going to die." McDonald Dec. ¶¶ 4–6. Mr. McDonald's condition is critical and he requires immediate medical intervention. *Id.*

Defendant Sheriff Marian Brown (the "Sheriff") of Dallas County, Texas (the "County") is currently confining close to 5,300 people within the North, South, and West Towers of the Lew Sterrett Justice Center, Dallas County Jail (the "Jail") in conditions that threaten their lives. As of the filing of the Petition for Temporary Restraining Order and Preliminary Injunction (Petition), at least 20 detainees and seven staff members in the Jail have tested positive for the novel coronavirus that causes COVID-19.

The Defendants are not taking reasonable, appropriate measures consistent with public health guidelines to halt the further spread of this deadly and highly contagious virus, putting the lives and health of thousands of people in the Jail, and countless others in the community, at risk. The Eighth and Fourteenth Amendments to the United States Constitution forbid this.

Because of the grave risk to health and life at stake, and the viable opportunity for a remedy is "a matter of days, not weeks,"[1] Plaintiffs respectfully request the Court consider this Petition on an emergency basis and that the Court grant a temporary restraining order requiring the immediate release of all of the medically-vulnerable class members Plaintiffs seek to represent pending briefing and argument. Plaintiffs' counsel emailed counsel for the Sheriff and the County on April 9, 2020 at 2:00 p.m. central time to alert them that an emergency filing is forthcoming and have already provided defense counsel with copies of this Petition and Plaintiffs' Complaint. Plaintiffs' counsel is prepared to appear by telephone immediately. Each day—indeed each hour—that passes risks the lives of the Plaintiffs and the lives of the putative class members. Absent immediate action by this Court, some will likely face the ultimate irreparable harm: death. This case cannot wait.

[1] *See* Declaration of Eric Lofgren, Ph.D., App. 1-43, ¶ 34.

I. CLASS DEFINITIONS

Plaintiffs seek to represent two classes[2] of all individuals jailed by the Sheriff. Plaintiffs Oscar Sanchez, Marcus White, Keith Baker, and Tesmond McDonald seek to represent a class of all current and future detainees in pretrial custody, including alleged violations of probation or parole, at the Jail ("Pre-Adjudication Class"), including one subclass: (1) persons who, by reason of age or medical condition, the Centers for Disease Control and Prevention (CDC) and other public health experts have identified as particularly vulnerable to injury or death if they were to contract COVID-19 ("Medically-Vulnerable Pre-Adjudication Subclass").

Plaintiffs Marcelo Perez, Paul Wright, Jose Munoz, Roger Morrison, Terry McNickles seek to represent a class of all current and future detainees in post-adjudication custody, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole, at the Jail ("Post-Adjudication Class"), including a subclass of persons who, by reason of age or medical condition, are particularly vulnerable to injury or death if they were to contract COVID-19 ("Medically-Vulnerable Post-Conviction Subclass").

The "Medically-Vulnerable" subclasses are defined as all current and future persons held at the Jail over the age of 50, as well as all current and future persons held at the Jail of any age who experience (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other

[2] Plaintiffs' Motion for Class Certification will be filed shortly. Plaintiffs file this Petition on behalf of the putative class members, but for ease of reference, describe them as "Class members" throughout this brief. Although this is a prototypical case for which the class action vehicle was created, the Court need not rule on Plaintiffs' class certification motion or formally certify a class in order to issue the requested relief. *See, e.g.*, Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief."); Moore's Federal Practice § 23.50, at 23-396, 23-397 (2d ed. 1990) ("Prior to the Court's determination whether plaintiffs can maintain a class action, the Court should treat the action as a class suit.").

endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (last two weeks) pregnancy.

II. THE FACTS THAT NECESSITATE THIS PETITION

A. COVID-19 Presents a Lethal Threat to Detainees in the Dallas County Jail.

Lives have been upended around the world by the unprecedented health emergency caused by the rapid spread of COVID-19. The disease is highly contagious and deadly; it is thought to spread through respiratory droplets or by touching a surface or object that has the virus on it. There is no known cure, and development of a vaccine is likely at least 12 months away.[3]

On March 11, 2020, the World Health Organization announced that that the outbreak of COVID-19 is a pandemic. "[W]e are deeply concerned both by the alarming levels of spread and severity, and by the alarming level of inaction."[4] Current estimations are that between 20% and 80% of the world's population will contract the virus. The current estimations of the rate of fatality fall between 1% and 6% of those who contract the virus—several times more fatal than the common flu that kills tens of thousands of Americans each year.[5] The United States has officially declared a national emergency in the face of the COVID-19 pandemic,[6] and the World Health

[3] Saralyn Cruickshank, *Experts Discuss Covid-19 and Ways to Prevent Spread of Disease*, John Hopkins Mag. (Mar. 17, 2020), https://cutt.ly/VtKoV9N.

[4] World Health Organization, *Rolling updates on Coronavirus Disease (COVID-19)* (updated April 7, 2020), https://cutt.ly/VtKoMRK .

[5] As of April 8, 2020, there were 1,484,811 confirmed cases globally, with 88,0538 deaths and 329,876 recoveries. Johns Hopkins University of Medicine, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering at Johns Hopkins University*, https://cutt.ly/StEyn2U; *see also* "Coronavirus disease 2019 (COVID-19)", UpToDate, https://cutt.ly/GtJYSkj (as of April 7, 2020, estimated overall fatality rate of 2.3 percent globally).

[6] Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, (March 13, 2020), https://cutt.ly/EtJLZQZ.

Organization warned that the United States could well become the next global epicenter of the deadly virus[7]—a forecast that has unfortunately proved accurate. As of April 8, 2020, nearly 1.5 million people worldwide have confirmed diagnoses of COVID-19, including over 430,000 people in the United States.[8] As of April 7, 2020, confirmed cases of COVID-19 in the United States were more than double the number in any other country.[9] The Fifth Circuit noted on the same day that "'Texas faces it[s] worst public health emergency in over a century.'" *In re Abbott*, No. 20-50264, at *4 (5th Cir. Apr. 7, 2020) (quoting district court).

The risk posed by COVID-19 is especially threatening to persons over 50 years of age, as well as persons of any age with certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and asthma. These and other health conditions make detainees "particularly vulnerable to severe illness from COVID-19." *United States v. Muniz*, No. 4:09-CR-0199, 2020 WL 1540325, at *1 (S.D. Tex. Mar. 30, 2020) (granting compassionate release to federal prisoner suffering from renal disease, diabetes, and arterial hypertension); *see* CDC, Coronavirus Disease 2019 (COVID-19): At Risk for Severe Illness.[10] These health conditions are more common among incarcerated persons[11]:

[7] Kim Bellware, et al., *White House asks everyone who left NYC area to self-quarantine for coronavirus; Trump pushes to ease restrictions by mid-April against expert advice*, Wash. Post (March 24, 2020), https://cutt.ly/xtKpjpF.

[8] Johns Hopkins University of Medicine, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering at Johns Hopkins University*, https://cutt.ly/StEyn2U.

[9] Jennifer Calfas, Chong Koh Ping, and Drew Hinshaw, *Global Coronavirus Death Toll Passes 81,000 as Some Lockdowns Tighten*, The Wall Street Journal (Apr. 7, 2020), https://cutt.ly/ztJLM0q.

[10] Available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

[11] Peter Wagner & Emily Widra, *No need to wait for pandemics: The public health case for criminal justice reform*, Prison Policy Initiative (Mar. 6, 2020), https://cutt.ly/7tJXmlC.

	Prevalence of health condition by population			
Health condition	Jails	State prisons	Federal prisons	United States
Ever tested positive for Tuberculosis	2.5%	6.0%		0.5%
Asthma	20.1%	14.9%		10.2%
Cigarette smoking	n/a	64.7%	45.2%	21.2%
HIV positive	1.3%	1.3%		0.4%
High blood pressure/hypertension	30.2%	26.3%		18.1%
Diabetes/high blood sugar	7.2%	9.0%		6.5%
Heart-related problems	10.4%	9.8%		2.9%
Pregnancy	5.0%	4.0%	3.0%	3.9%

Health conditions that make respiratory diseases like COVID-19 more dangerous are far more common in the incarcerated population than in the general U.S. population. Pregnancy data come from our report, Prisons neglect pregnant women in their healthcare policies, the CDC's 2010 Pregnancy Rates Among U.S. Women, and data from the 2010 Census. Cigarette smoking data are from a 2016 study, Cigarette smoking among inmates by race/ethnicity, and all other data are from the 2015 BJS report, Medical problems of state and federal prisoners and jail inmates, 2011-12, which does not offer separate data for the federal and state prison populations. Cigarette smoking may be part of the explanation of the higher fatality rate in China among men, who are far more likely to smoke than women.

The spread of the virus is accomplished through both airborne mechanisms (sneezing), touching of surfaces that are contaminated, and most commonly through close contact with other humans carrying the virus. The virus can remain viable on surfaces like plastic or steel for two to three days. It then enters the body through the mouth, nose, or eyes and infects the respiratory system.[12]

There is currently no vaccine or cure. The most effective strategies to prevent spread is thorough hand washing and sanitizing with alcohol-based cleaners, avoiding touching of the face, and physical or "social distancing," which requires all persons stay a minimum of six feet away from one another.[13]

"In Texas, the virus has spread rapidly over the past two weeks [as of April 7, 2020] and is predicted to continue spreading exponentially in the coming days and weeks." *In re Abbott*, No. 20-50264, at *4. Nationally, the CDC projects that over 200 million people in the United States

[12] Declaration of Dr. Robert L. Cohen In Support of Plaintiffs' Motion for a Temporary Restraining Order, App. 44-59, at ¶¶ 9–11.

[13] *Id.* at ¶¶ 2, 45.

could be infected with COVID-19 over the course of the pandemic without effective public health intervention, and that as many as 240,000 people in the U.S. will die from COVID-19 even accounting for interventions taken to date.[14]

Care around personal hygiene will not be enough to slow the spread of this disease. Public health officials in Dallas County and across the country are asking that people engage in social and physical distancing to help "flatten the curve."[15] Social and physical distancing involves avoiding human contact with all but a few other people. State and local leaders, as well as private event organizers, are cancelling group events across the country. Colleges, universities, and local public schools are cancelling classes.[16]

The same factors that make cruise ships hotbeds[17] for contagion spread, are present in jails: many people living in a closed space, shared ventilation, common food preparation space, communal living/bathing/toileting/eating, limited medical facilities, and limited ability to leave the facility when symptomatic or after potential exposure to the virus. As Judge Keith Ellison noted a week ago in granting compassionate release of a federal prisoner, "individuals housed within our prison systems nonetheless are particularly vulnerable to infection" by COVID-19. *Muniz*, No. 4:09-CR-0199, 2020 WL 1540325, at *1. Further, the jails face the additional challenge of "jail churn"[18] where members of the community, including both detainees and jail

[14] Rick Noack, et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts*, Wash. Post. (April 1, 2020, 12:02 a.m.), https://cutt.ly/5tYT7uo.

[15] Denise Chow and Jason Abbruzzese, *What is 'flatten the curve'? The chart that shows how critical it is for everyone to fight coronavirus spread* (March 11, 2020, 2:15 pm.), https://cutt.ly/wtKayjh.

[16] *See, e.g.*, , Centers for Disease Control, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, https://cutt.ly/ItRPq5n.

[17] The CDC is currently recommending that travelers defer cruise ship travel worldwide. "Cruise ship passengers are at increased risk of person-to-person spread of infectious diseases, including COVID-19." *COVID-19 and Cruise Ship Travel*, Centers for Disease Control and Prevention, https://cutt.ly/7tEEQvT.

[18] "The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside." *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009.

staff, regularly move in and out of the facility bringing illnesses with them into the jail and then, after infection, out to the community.

Numerous public health experts, including Dr. Gregg Gonsalves,[19] Ross MacDonald,[20] Dr. Marc Stern,[21] Dr. Oluwadamilola T. Oladeru and Adam Beckman,[22] Dr. Anne Spaulding,[23] Homer Venters,[24] Jaimie Meyer,[25] the faculty at Johns Hopkins schools of nursing, medicine, and public health,[26] and Josiah Rich[27] have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19. These experts are united in their recommendation that jails like the Dallas County Jail significantly downsize its population and reduce new incoming bookings.

B. Without Immediate Intervention, the Dallas County Jail will Experience a Large-Scale Outbreak of COVID-19 and Increase the Spread of COVID-19 in the Dallas Community.

The epidemiologist Eric Lofgren, Ph.D. describes the probability of massive COVID-19 infections and hundreds of deaths in the Dallas County Jail in the absence of immediate, emergency intervention. Declaration of Dr. Eric Lofgren, Ph.D. App. 1-43, ¶¶ 7–9. Dr. Lofgren used, as a model, a jail with approximately half the number of detainees as are presently confined in the

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[19] Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, Connecticut Mirror (March 11, 2020), https://cutt.ly/BtRSxCF.

[20] Craig McCarthy and Natalie Musumeci, *Top Rikers Doctor: Coronavirus 'Storm is Coming,'* New York Post (March 19, 2020), https://cutt.ly/ptRSnVo.

[21] Marc F. Stern, MD, MPH, *Washington State Jails Coronavirus Management Suggestions in 3 "Buckets,"* Washington Assoc. of Sheriffs & Police Chiefs (March 5, 2020), https://cutt.ly/EtRSm4R.

[22] Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America's Incarcerated Population – and How to Ensure It's Not Left Behind*, (March 10, 2020), https://cutt.ly/QtRSYNA.

[23] Anne C. Spaulding, MD MPDH, *Coronavirus COVID-19 and the Correctional Jail*, Emory Center for the Health of Incarcerated Persons (March 9, 2020).

[24] Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (March 12, 2020), https://cutt.ly/jtRSPnk.

[25] *Velesaca v. Decker*, 20-cv-1803 (S.D.N.Y.) at Doc. No. 42 (March 16, 2020) (Declaration of Dr. Jaimie Meyer).

[26] Letter from Faculty at Johns Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon. Larry Hogan, Gov. of Maryland, March 25, 2020, https://cutt.ly/stERiXk.

[27] Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, The Guardian (March 13, 2020 3:00 p.m.), https://cutt.ly/itRSDNH.

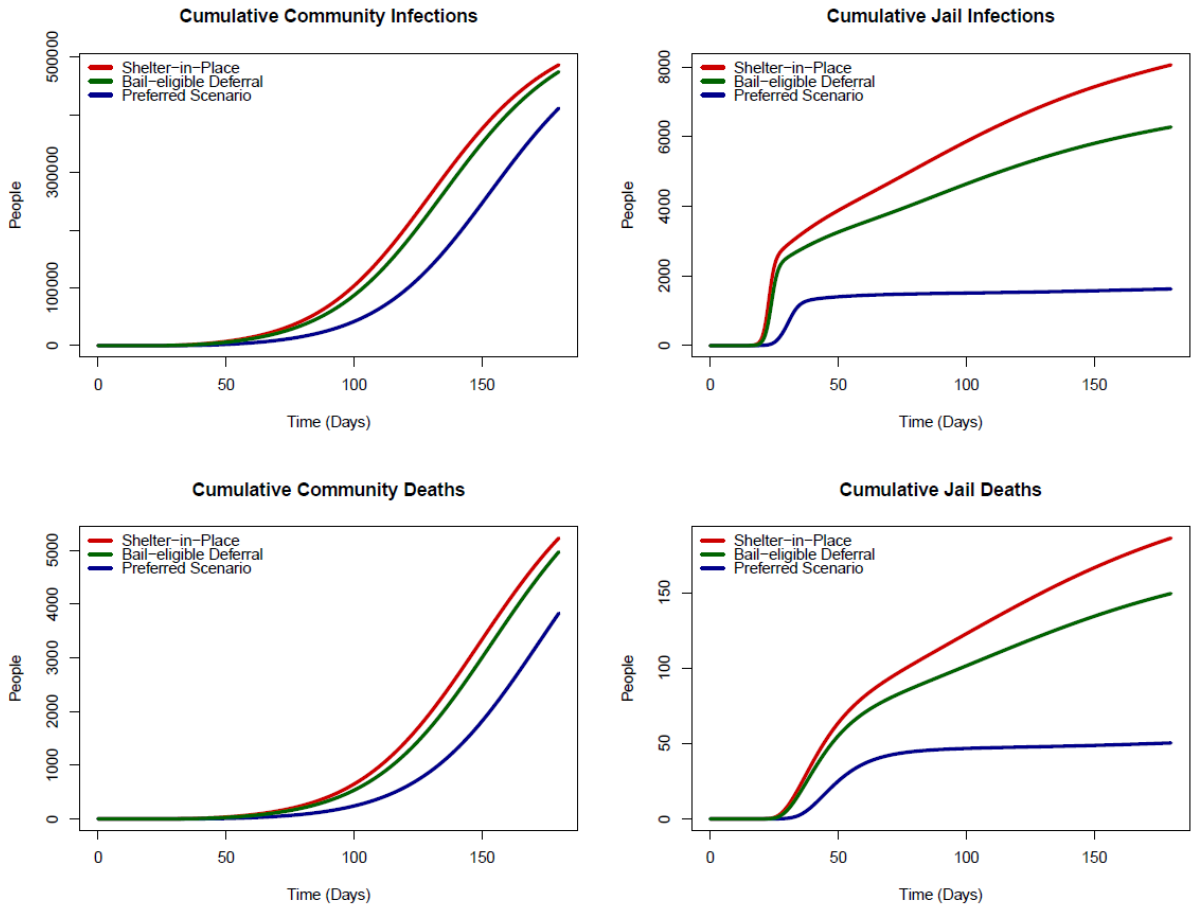
Dallas County Jail as the baseline. *Id.* ¶ 8. Dr. Lofgren provided a number of forecasts, based on (1) no intervention of any kind to slow the spread of COVID-19, (2) a community intervention of a shelter in place order, and (3) a shelter-in-place order plus a reduction in the jail population by reducing intakes by 25%. *Id.* at ¶ 10.

With a general shelter-in-place order in effect in the community but no intervention in the jail, Dr. Lofgren projects that a jail *half* the size of the Dallas County Jail would see 8,058 infections, 634 hospitalizations, and 186 deaths among incarcerated people over a six-month period. Lofgren Dec., Ex. B, App. 19-43. This would also yield 373 infections, 25 hospitalizations, and 3 deaths for jail staff. *Id.* Under this model, 486,193 infections, 25,579 hospitalizations, and 5,230 deaths would be realized in the surrounding community. With a shelter-in-place order and a reduction in the jail population by ceasing intakes for people eligible for bail (an approximately 25% reduction in intake), outcomes improve, but the results are still catastrophic: over six months, 6,273 incarcerated people would get infected (1,785 fewer), 508 would require hospitalization (126 fewer), and 149 would die (37 fewer). *Id.* Similar modest reductions would be seen among jail staff and the community. *Id.*

Put differently, a scenario of releasing bail-eligible arrestees without more would result in a 22.1 percent reduction in infections in the incarcerated population, and only a 2.7 percent reduction in infections within the community. Lofgren Dec. at ¶ 16, App. 4. Reducing jail admissions by approximately 25 percent will thus improve matters, but will not achieve the necessary public health intervention of downsizing and curbed jail admissions public health experts recommend: with "broader, more sweeping" deferrals of arrest and downsizing, far better outcomes will be achieved. *Id.* at ¶ 17 (noting that if jail admissions were reduced by approximately 83.4 percent, a 71.8 percent reduction in infections within the incarcerated

population and a 12.1 percent reduction in infections in the community could be achieved, a 90 percent reductions in arrests would yield a 76.6 percent reduction in infections in the jail and a 13.7 percent reduction in infections in the community).

Dr. Lofgren's projections are shown in the attached graphs:



Dr. Lofgren concludes that arrest deferral and release of detainees substantially improved outcomes for detainees, jail staff, and the community at large. Lofgren Decl. ¶¶ 33–35. Facilitating the release of persons who are medically vulnerable if they contract COVID-19 would also result in a 27.2 percent decrease in infections in a jail, and a 56.1 decrease in deaths in the jail. *Id.* at ¶ 17.

There is no effective way for jails to accomplish the important task of creating the recommended social and physical distance between incarcerated people. In virtually all jails, including the Dallas County Jail, people are required to share sinks and toilets, and are very unlikely to be able to maintain the requisite six feet or more of physical distance from others, let alone wear face masks, in accordance with public health guidelines.[28] While incarcerated people might have access to water, they may not have soap with which to wash their hands.[29] Hand sanitizer is often considered prohibited contraband due to its alcohol content.[30] While specifics vary by jail, the spread of COVID-19 is exacerbated by other common practices in jail administration, including: the use of communal showers and toilets; infrequent laundering of bedsheet and clothes, or laundering with water and no soap; poor ventilation and/or heat; shared cells or other over-capacity issues; or limitations on access to toilet paper, tissues, and other sanitary supplies. *See Muniz*, No. 4:09-CR-0199, 2020 WL 1540325, at *1 (pointing to "densely populated living conditions, dearth of soap, hand sanitizer, and protective gear, and impossibility of maintaining safe distance between inmates and guards as reasons prisoners are at particular risk of infection" by novel coronavirus).

None of the critical measures for mitigating the spread of COVID-19 is available for persons confined in the Dallas County Jail. The Jail is a congregate environment, in which people are confined in close proximity to one another and to Jail staff.[31] Proper hygiene, as urgently recommended by the CDC, cannot be practiced in the absence of soap, cleaning materials, and

[28] *See, e.g.*, Nathalie Baptiste, *Correctional Facilities are the Perfect Incubators for the Coronavirus* (March 6, 2020), https://cutt.ly/XtKsSRu.

[29] *Id.*

[30] *Id.*

[31] One report indicates that the highest known person-to-person transmission rate for COVID-19 to date took place in similar congregate environments: a skilled nursing home facility in Kirkland, Washington, and in the Cook County Jail in Chicago. *Coronavirus in the U.S.: Latest Map and Case Count*, NY TIMES (last visited April 8, 2020, 1:00 PM), https://cutt.ly/LtK2Xnv.

hand sanitizer. Many of those detained suffer from underlying health conditions, including, among many others, asthma, diabetes, and hypertension, that place them at elevated risk for contracting and dying from COVID-19.[32] The dangers COVID-19 presents to persons in the Dallas County Jail are illustrated by the rate of transmission in other U.S. jails once the virus was present in the jail environment: on Rikers Island in New York City, the rate of infection among incarcerated people is over seven times the rate of infection in New York City generally, and 25 times higher than the rate in Wuhan, China.[33] Reports indicate that the Cook County Jail in Chicago is currently the largest known source of U.S. infections.[34]

The Dallas County Jail consists of the North Tower Detention Facility, the West Tower Detention Facility, and the Suzanne Lee Kays (South Tower) Detention Facility.[35] They respectively hold up to 3,292, 1,530, and 2,304 detainees. The North Tower has 188 single cells, and the West Tower contains 25.[36] Each tower houses dozens of "tanks" in which multiple detainees routinely mix and use common facilities. Single cells are rare.

Dr. Robert L. Cohen, an expert in public health in jails and prisons, notes in support of this motion, "the current conditions in the Dallas County Jail create a high risk of contributing to an outbreak of COVID-19… Everyone who lives and works in a jail is at the highest risk." *See* Declaration of Robert L. Cohen, M.D., Regarding the Spread of COVID-19 in and from the Dallas County Jail (Cohen Dec. ¶ 4-5, App. 46). This is due to a number of factors, including, among

[32] *See Are You at Higher Risk for Severe Illness?*, Centers for Disease Control (Mar. 20, 2020), https://cutt.ly/stKs4ty.

[33] These numbers likely underestimate the infection rate on Rikers Island, as they do not include the number of people contracted COVID-19 on Rikers Island but who have already been released. The rates of infection rely on publicly released data collected by the Legal Aid Society. *See* LEGAL AID SOCIETY, *Analysis of COVID-19 Infection Rate in NYC Jails* (last visited March 30, 2020, 11:00 AM), https://cutt.ly/RtYTbWd.

[34] NBC Chicago, *Report: Cluster of COVID-19 Cases at Cook County Jail the Largest in the Nation*, (April 7, 2020 4:40 p.m.), https://cutt.ly/HtLmMDs.

[35] *See* Dallas County Sheriff: Detention Centers, https://cutt.ly/mtKdwj2.

[36] *Id.*

others, the inability to engage in physical distancing inside the jail, the inability to isolate and manage known and suspected cases of COVID-19, and the endemic problems of hygiene and sanitation that universally plague contemporary U.S. jails and prisons. *Id.* ¶¶ 6–10, 19, 27–28.[37]

As a result of these stark realities, the CDC has issued Guidance on the Management of COVID-19 in Correctional and Detention Facilities, specifying steps that must be taken in light of the "unique challenges for control of COVID-19 transmission" that are present in correctional and detention settings.[38] These steps include, among many others, specified actions to ensure sanitation of frequently touched surfaces, the provision of protective gear to staff and to infected persons, screening of those entering the facility, isolation of those with COVID-like symptoms, and quarantine of those who are known to be infected.[39] The Guidance states that "adequate levels of custody and healthcare staffing must be maintained to ensure safe operation of the facility." *Id.*

These steps are by no means the equivalent of the precautions recommended for those in the free community. They are the absolute bare minimum that must be done to prevent a severe outbreak of contagion within the Jail. The Guidance recognizes the well-known facts that options for medical isolation of COVID-19 patients are "limited" in a carceral setting and the ability to sanitize is compromised. *Id.* at 2. Further, as Drs. Cohen and Lofgren emphasize, these measures

[37] *See also* Matthew Impelli, *Alcohol-Free Sanitizer Given to Prisoners to Prevent Them from Making 'Moonshine,'* Newsweek (Mar. 16, 2020), https://cutt.ly/0tKdQoX (reproducing comments of Sherif Sultan, president of the International Society of Vascular Surgery); Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from Coronavirus*, New Yorker (Mar. 20, 2020), https://cutt.ly/ttKdW16; Amanda Klonsky, Opinion, *An Epicenter of the Pandemic Will Be Jails and Prisons, If Inaction Continues* (Mar. 16, 2020), https://cutt.ly/VtKdTeA ("The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside."); *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; *see also* Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://cutt.ly/ztKdY6B.

[38] Centers for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (March 23, 2020), https://cutt.ly/atJPt5B.

[39] *Id.*, at 9-22, e.g.

must be taken *in addition to* a downsizing of jail populations, including at the Dallas County Jail: no intervention will be effective without the release of the Medically-Vulnerable Subclass Members and additional persons as needed to achieve physical distancing. Cohen Dec. at ¶¶ 30–31, App. 55 (noting that "less urgent action" than "considerable downsizing" will not be sufficient); Lofgren Dec. at ¶¶ 29 – 34, App. 8-9 (noting that immediate decrease of population density, as well as reduced intake, is "both necessary and urgent").

Any outbreak within the Jail cannot be confined to those incarcerated there. Jails are not—and cannot become—isolated facilities. Each day, jail staff enter the facility, touch detained individuals or surfaces which detained individuals have touched, and return home to their families and communities. *See* Lofgren Dec. ¶ 35, App. 9. A sudden influx of serious COVID-19 cases from the Jail risks overwhelming the County's public hospital. The outbreak in the Jail cannot be contained. And it puts the wider community at risk.

C. Medically -Vulnerable Plaintiffs are at Extreme Risk of Harm Given the Likelihood of Exposure to COVID-10 in the Dallas County Jail; They Should be Immediately Released.

Seven of the nine Named Plaintiffs are at high risk of injury or death if exposed to COVID-19 due to their medical-vulnerability.

Oscar Sanchez has a history of severe, chronic asthma that has required hospitalization in the past. Sanchez Dec. ¶ 4. On April 5, 2020 he reported hard chest pains and difficulty breathing to the medical staff at the Dallas County Jail and was told there was nothing to be done. *Id.* Mr. Sanchez's condition could become very serious in the coming day.

Tesmond McDonald has tested positive for COVID-19 and should be released immediately to receive proper medical care. McDonald Dec. ¶ 5. Mr. McDonald suffers from asthma and high blood pressure, and his COVID-19 symptoms are extremely serious. ¶ 2. Mr. McDonald recently developed body aches, has difficulty breathing and on multiple occasions had

so much trouble catching his breath that he "thought he was going to die." ¶ 6. His oxygen levels were recently tested at a dangerously low level. ¶ 5.

Marcelo Perez has high blood pressure and diabetes. Perez Dec. ¶ 2. He has not had his sugar levels tested recently, and his metformin doses now keep him awake at night. *Id.*

Roger Morrison suffers from severe allergies, high blood pressure, hepatitis C, and cirrhosis of the liver. Morrison Dec. ¶ 2. These conditions cause Mr. Morrison to have a weakened immune system. *Id.* Mr. Morrison knows that he is at a high risk if he were to contract COVID-19 but does not know how to prevent himself from getting the virus while incarcerated in the Dallas County Jail. *Id.* ¶ 3.

Keith Baker suffers from severe asthma and required frequent use of an inhaler prior to his incarceration and the outbreak of COVID-19. Baker Dec. ¶ 2. On March 26, 2020, Mr. Baker suffered a severe asthma attack and could not breathe. *Id.* The only assistance the jail staff offered Mr. Baker was a sleeping pill. *Id.*

Paul Wright will turn forty-eight years old in two days, April 11, 2020. Wright Dec. ¶ 1. He has Hepatitis C, and comes into frequent contact with numerous people each day who increase his risk of illness through the coronavirus, including staff that has been in contact with detainees with confirmed COVID-19 cases. *Id.* ¶ 3.

Terry McNickles is a fifty-eight (58) year old man recovering from an operation for kidney cancer. McNickles Dec. ¶¶ 1–2. After his kidney removal surgery, his doctor told him he would have to take extra precautions to fight off infections—such as a special diet and increased hand-washing—because his immune system had been compromised. *Id.* ¶ 2.

In support of this motion, Plaintiffs also submit declarations from others—proposed class members—detained in the Dallas County Jail. Their stories further illustrate the urgency of

identifying and releasing all Medically-Vulnerable Subclass Members. *See, e.g.*, Yarborough Dec., App. 76-78, (Detainee susceptible to kidney infections housed in the South Tower of the Dallas County Jail); Hinojosa Dec., App. 61-62 (Detainee with high blood pressure, compromised kidney housed in the South Tower).

D. The Jail Is Not Taking Sufficient Precautions; an Uncontrolled Outbreak Is In Progress.

There is an escalating public health emergency in the Jail. Despite the public health guidelines issued by the national, state, and local government to prevent widespread transmission of COVID-19, the Jail has failed to take sufficient precautions to safeguard the Plaintiffs or putative class members and they face an immediate risk of harm as a result. Known conditions in the Dallas County Jail include a jump in a week's time from five reported COVID-19 infections of detainees and Jail employees to almost 30 as of April 7, 2020,[40] a general lack of testing for COVID-19 infection of detainees during detention or upon release,[41] failure to begin "checking the temperatures of employees assigned to the jail" or asking detainees during the intake process "a set of preliminary questions recommended by Dallas County's healthcare partners" until March 27, 2020,[42] failure of Jail employees to report for work, and routine use by Jail employees of single-use disposable surgical masks for a week or more. The number of known infections will

[40] Dallas County Health and Human Services, 2019 Novel Coronavirus (COVID-19) Table 4 (Apr. 7, 2020), https://cutt.ly/ztJZwXa. Editorial, *COVID-19 spreads with close contact, so what do we do about those in jail?*, The Dallas Morning News (Apr. 5, 2020), https://cutt.ly/8tJOi67 ("At the time of this writing, 20 inmates had tested positive for the virus, along with six detention officers and one deputy."); Ashley Paredez, *Confirmed COVID-19 cases at Dallas County Jail now up to 28*, Fox 4 (April 4, 2020), https://cutt.ly/0tJSenr ("The number of coronavirus cases at the Dallas County jail has increased from five cases last week, to now a total of 28" and noting that "six [of those testing positive] are detention officers and two are clerks"); *COVID-19 Live Updates*, KERA News (quoting Director of Dallas County Health and Human Services on April 5, 2020 as saying "the jail has 24 cases, which includes 22 inmates and two detention officers," presenting approximately 25% of all new cases in Dallas County that day), https://cutt.ly/itJSsiy.

[41] Dallas County Sheriff's Office, "COVID-19 Initiatives," (March 27, 2020), https://cutt.ly/NtJO7zY (stating that "COVID-19 tests are administered after meeting the Dallas County Health and Human Services criteria" but not at intake or release and apparently only if potentially infected person comes to attention of "health care professionals").

[42] *Id.*

continue to rise. Indeed, there are likely now many more infections in the Jail than are known because of the limited availability of COVID-19 tests.

Staff are also falling ill. At least six detention officers and one deputy have tested positive for COVID-19.[43] As infections continue to rise in the Jail, the CDC COVID Prison Guidance is not being implemented, and it will continue to become increasingly ignored.

1. Physical and Social Distancing is not Possible

The Jail is failing in its responsibility to enable social distancing. The Jail continues to house detainees in dormitory-style settings (or "tanks") and in multiple-person cells where detainees are in close physical contact with one another. Many of the detainees sleep in shared bunk dorm "pods" with up to 64 beds. Sanchez Dec. ¶ 2 (all pods in the South Tower have 64 beds in a common room); Perez Dec. ¶ 3; McNickles Dec. ¶ 1. Even though the bunks are only between 1 and 4 feet apart, far closer than the recommended six or more feet, the shared bunk rooms have been almost full to capacity with between 48 and 60 men at any given time in the last few weeks in a single common dorm. Wright Dec. ¶ 6; Morrison Dec., ¶ 4, Munoz Dec., ¶ 8; Perez Dec. ¶ 3; Sanchez Dec. ¶. 2; McKnickles Dec. ¶¶ 1. 5. Neither the detainees nor the staff practice—or are able to practice—social distancing. Sanchez Dec. ¶ 7; McKnickles Dec. ¶ 4.

2. Insufficient Measures to Quarantine and Cohort Detainees.

There are also multiple reports that the Jail's system for quarantine and medical isolation is flawed. Detainees who tested positive remained in group dorms next to detainees who did not have symptoms and who had not been tested. See Baker Dec. ¶ 4 (describing Plaintiff Baker's repeated requests to be moved when held next to individuals with confirmed cases of the virus). Even when the Dallas County Jail officials determined that positive cases required movement of

[43] Dallas County HHS, 2019 Novel Coronavirus (COVID-19), *supra* note 40 at Table 4. *Dallas Morning News* Editorial, *supra* note 40; Paredez, *supra* note 40; KERA News Updates, *supra* note 40.

exposed detainees, they transferred the individuals who had been exposed in closed proximity with persons with confirmed cases to different dorms without any testing. *See* Sanchez Dec. ¶ 3 (describing his transfer to from the dorm with a number of confirmed cases to a new dorm without testing); Baker Dec. ¶¶ 4-5 (describing being transferred to a new cell, connected to two other cells, after being in proximity with the confirmed cases and not receiving testing despite the fact that he had a sore throat and cough).

3. Insufficient Provide Personal Protective Equipment.

Further, the Jail has no functioning system to enable prisoners to protect themselves from exposure. *See* Perez ¶ 6 ("When Mr. Perez asked for a mask, he was told that the jail staff have to buy their own masks, so they would not give him one."); Sanchez ¶ 5 ("When Mr. Sanchez asked guards for a facemask, he was told the only people that need masks are the guards."); McKnickles ¶ 7 ("He also asked for face masks. The jail staff haven't. . . given him any personal protective gear."). *See also*, Morrison ¶5; Munoz ¶ 3; White ¶ 3. Those that are denied staff masks are also prevented from creating their own from materials they have access it in their cells. Perez ¶ 6 ("Some detainees tried wrapping bath towels around their heads to cover their faces, but the jail staff told them they were not allowed to do that."). When detainees are given masks, they are expected to wear the same mask for the remaining period of their detention, regardless of how long. Baker ¶ 9 ("Mr. Baker was provided with a mask only after he asked for one. He has had to use the same one repeatedly because he was not given replacements."). Most egregiously, when a detainee is removed from a pod because he is sick, the guards require his cellmates to collect the sick man's belongings and clean his bunk without first providing them with any personal protective gear. Sanchez Dec. ¶ 3; Perez Dec. ¶ 9.

4. Insufficient Hygienic and Cleaning Supplies.

The Dallas County Jail has also fallen far short of ensuring sufficient stocks of hygiene and cleaning supplies or providing detainees with no-cost access to these supplies. Wright Dec. ¶8. ("Sometimes the guards just don't have the soap and other cleaning agents.") Some detainees are given 3-4 single use bars of soap once a week that don't last one day. McDonald ¶ 11. Others are not given any soap at all. White ¶ 6. The only way to obtain additional soap is to purchase it through commissary, which is either irregularly available or shut down completely, depending on the Tower. Mcdonald ¶ 11; Baker ¶ 6; Sanchez 11. *See* Munoz ¶6, "Mr. Munoz requested soap today and was told that the detainees were using excessive soap. He did not want to argue with the guards, so he did not receive any soap." As a result, detainees and the cells in which they are forced to live are anything but clean. *See* Morrison ¶6 ("The pod is filthy"); McDonald ¶10 ("The walls in his cell are so dirty that he is afraid to touch them."). While some pods have access to shower daily, detainees in pods holding people who have either tested positive for COVID-19 or are suspected of exposure to COVID-19 have been denied showers for up to ten days in a row. Baker par 8. White ¶8. Sick detainees are therefore forced to either "take a bird bath in the sink" or forego bathing altogether. When they are finally allowed to take a shower, the water is cold. Baker ¶8.

The Dallas County Jail has failed to enforce adequate policies for disinfecting surfaces to prevent the spread of the virus. First, large numbers of detainees share a small number of phones, yet the phones are not regularly cleaned. Sanchez p7 ("All 60 men in both A and E pods share 8 phones, none of which are disinfected between use.") Additionally, detainees themselves are responsible for cleaning the pods, including the toilets and showers. Volunteers are rewarded with larger portions of food regardless of the quality of their work. Because the jail has not adequately informed detainees about the virus and how to prevent its spread, cleaning volunteering often do

an insufficient job which goes unchecked. Sanchez par 8. ("Mr. Sanchez started volunteering because his bunk is 3 feet from the toilets and the other volunteers usually do not clean properly.").

In the face of this dysfunction, COVID-19 will continue its unrelenting spread through the Jail. Lofgren Dec. ¶¶ 22–28, App. 6-8. Under accepted standards of medical care and the CDC COVID Prison Guidance, quarantine will be necessary for greater and greater numbers of detainees. As this happens, it will become more and more difficult to separate those who are infected (or might be infected) from those who are not. Cohen Dec. ¶ 22, App. 52. Necessary monitoring of the temperature and other symptoms of those who are or are suspected to be infected will become overwhelming. To the extent that medical management of these quarantined individuals is not already impossible, it will soon become so. *See* Cohen Decl. ¶¶ 17, 23, 28, App. 50, 53-55.

All of these problems are magnified by the risks to the health and safety of medical workers in the Jail, which will limit the Jail's ability to manage and monitor those who are in quarantine and those in medical isolation. Cohen Dec. ¶¶ 5, 21, App. 46, 52. As the virus spreads and healthcare staff are increasingly infected, Dallas County's public healthcare system will be stretched to its breaking point.[44] The Jail has limited facilities for isolating and caring for acutely ill detainees. The urgent necessity of focusing on the spread of COVID-19 and the treatment of those who are infected will limit the Jail's ability to provide medication and other needed treatment to non-COVID-19 patients. Cohen Dec. ¶ 21–22, App. 52. If immediate action is not taken, Plaintiffs and members of the putative class, jail staff, and members of the broader Dallas County community may die as a result.

[44] *See e.g.*, Fox 4, *Dallas Hospitals Report having more than 2,00 beds, 563 ventilators available* (Apr. 5, 2020) https://cutt.ly/ztJVCs1.

III. ARGUMENT

A preliminary injunction is warranted if the movant demonstrates: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The same factors apply to a motion for temporary restraining order (TRO). *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). Plaintiffs satisfy each of these requirements.

Moreover, where circumstances are such that even the time needed to hear a request for a preliminary injunction is too long to prevent irreparable harm, a TRO may issue while a court considers a request for a preliminary injunction. *See* Charles Alan Wright, et al., *Temporary Restraining Orders*, 11A Federal Practice and Procedure § 2951 (3d ed. 2019); *see also Callet v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974) (Courts are authorized to enter habeas relief pending a full disposition on the merits of a petition). Such is true here – as Dr. Lofgren notes, the critical window to prevent both disastrous medical fallout and a violation of proposed Class Members' constitutional rights is "a matter of days, not weeks." Lofgren Dec. ¶ 34, App. 9.

Because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," and "given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Id.* (citation omitted). Instead, to "show a likelihood of success, the plaintiff must present a prima facie case"—"not prove that he is entitled to summary judgment." *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d

579, 582 (5th Cir. 2013). Indeed, the U.S. Supreme Court has cautioned against "improperly equat[ing] "likelihood of success" with "success" when considering requests for preliminary injunctions. *See Camenisch*, 451 U.S. at 394.

A. There is a Substantial Likelihood that Petitioners/Plaintiffs will Prevail on the Merits.

1. The Constitution is Violated by an Unreasonable Risk of Future Harm from Contagious Disease.

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. As the Supreme Court has made clear,

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment . . . .

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989).[45] Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass.

> That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." . . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.

[45] Many of the cases discussed in the Motion involve the protections of the Eighth Amendment, which applies to convicted prisoners. As explained below, members of the Pre-Adjudication Class are entitled to even greater protection; as pretrial detainees they may not be punished at all, and are protected by the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *id.* at n.16 (pretrial detainees retain greater protections than convicted counterparts); *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473-74 (2015) (requiring pretrial detainees need only show the objective prong of the "deliberate indifference" test in excessive force context); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415 (5th Cir. 2017) (concurring opinion suggesting that *Kingsley* should be extended to all pretrial detainee medical claims). Because the legal protections for the Pre-Adjudication Class are stronger, as a practical mater if they too satisfy the Eighth Amendment test outlined here, Pre-Adjudication Plaintiffs will have necessarily also met their burden under the Fourteenth Amendment.

Helling, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S. at 200). The Court in *Helling* specifically recognized that the risk of contracting a communicable disease could constitute such an "unsafe, life-threatening condition":

> In *Hutto v. Finney*, 437 U.S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed . . . . Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Id. at 33; *see also id*. at 34 (citing with approval *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, *inter alia*, "the mingling of inmates with serious contagious diseases with other prison inmates").

In this case, Plaintiffs and the Medically-Vulnerable Subclass members they seek to represent are at serious risk of severe illness or death from COVID-19. Non-Medically-Vulnerable Class members are at risk of serious illness, injury, death, and/or transmission to family members and loved ones.

2. Defendants Have Shown Deliberate Indifference to the Medical Needs of Both Pre- and Post-Adjudication Class Members.

Corrections officials have a constitutional obligation to protect incarcerated people from a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Indeed, under both the Eighth and Fourteenth Amendments, jail officials "must provide humane conditions of confinement; . . . must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates[.]" *Id.* at 832 (internal quotation marks omitted). This obligation also requires corrections officials to address detainees' serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*,

563 U.S. 493, 531-32 (2011); *Hinojosa v. Livingston*, 807 F.3d 657, 666 (5th Cir. 2015) (plaintiff stated an Eighth Amendment claim when Defendants subjected him to conditions "posing a substantial risk of serious harm" to his health).

This obligation requires corrections officials to protect incarcerated people from infectious diseases like COVID-19; officials may not wait until a petitioner tests positive for the virus and an outbreak further spreads. *Helling*, 509 U.S. at 33-34; *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) ("It is also important to note that [an] inmate need not show that death or serious illness has [already] occurred."); *see also Farmer*, 511 U.S. at 833 ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

Government officials violate this affirmative obligation by showing "deliberate indifference" to the substantial risk of serious harm. *Farmer*, 511 U.S. at 828. With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," even when "the complaining inmate shows no serious current symptoms." *Helling*, 509 U.S. at 33, 36 (holding that a prisoner "*states a cause of action* . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health") (emphasis added); *see also Ball v. LeBlanc*, 792 F.3d 584, 594 (5th Cir. 2015) (court "may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (citing *Farmer*, 511 U.S. at 842); *Hinojosa*, 807 F.3d at 667 ("open and obvious nature" of dangerous prison conditions supported an inference of deliberate indifference); *Johnson v. Epps*, 499 F. App'x 583, 589-92 (5th Cir. 2012) (allegations that prisoner was exposed to "serious, communicable diseases"

and that prison officials were aware of the risk and did nothing to prevent it were sufficient to state a claim for violation of Eighth Amendment rights); *Gates*, 501 F.2d at 1300-03 (affirming district court's holding that allowing "[s]ome inmates with serious contagious diseases . . . to mingle with the general prison population," alongside maintaining a host of other unsanitary and inhumane conditions, "constitute[d] cruel and unusual punishment") (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352 n.17 (1981)).

Here, COVID-19 is "sure or very likely to cause serious illness," and even waiting until "next week" to attempt internal mitigation efforts may be too long. *See supra* Part II(D) (describing the Dallas County Jail's failures to implement social distancing, quarantining, and hygienic practices thus far). COVID-19 is a "serious, communicable disease," *Epps*, 499 F. App'x at 589-92 that is already present in the Dallas County Jail, and spreading as the Court reads this brief. The risk to the health and lives of Plaintiffs and Class Members is "open and obvious." *Hinojosa*, 807 F.3d at 667.

3. Further, Defendants are Unconstitutionally Punishing Members of the Pre-Adjudication Class.

In the case of the Pre-Adjudication Class, Defendants' inaction further constitutes unconstitutional punishment. *See, e.g.*, *Bell*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); *id.* at n.16 (pretrial detainees retain greater protections than convicted counterparts); *Parker v. Carpenter*, 978 F.2d 190, 193 (5th Cir. 1992) (ordering evidentiary hearing on whether transfer to more violent wing was punitive). Punishment—and therefore deliberate indifference—is established if the jailer's conduct is either not rationally related to a legitimate, nonpunitive government purpose or excessive in relation to that purpose. *Bell*, 441 U.S. at 561; *Kingsley*, 135 S. Ct. at 2473–74; *see also Alderson*, 848 F.3d at 424. Both elements are satisfied here. Even if the

Jail's current spacing of detainees and provision of healthcare would serve the legitimate purpose of jail health and safety in normal times, those procedures, are now endangering health and safety in the wake of COVID-19 by keeping people in the Jail. Hence, continuing to detain Plaintiffs and putative class members is not rationally related to the goal of health and safety (both the Jail's and the public's) and is indeed excessive in relation to the course of conduct that would achieve that goal: release with any necessary supports identified according to a public health expert's plan . *See Plata*, 563 U.S. at 531-32 (ordering release of inmates to correct overcrowding that violated Eighth Amendment); Memorandum and Order, *Thakker v. Doll*, No. 20-CV-0480 (M.D.Pa. Mar. 31, 2020) (categorically releasing petitioners who "suffer[] from chronic medical conditions and face[] an imminent risk of death or serious injury if exposed to COVID-19).

4. Faced with the Impossibilities of Safely Detaining Plaintiffs, a Temporary Restraining Order Releasing Medically-Vulnerable Class Members and Further Injunctive Relief is the Only Option.

As outlined in both the Cohen and Lofgren declarations, there are no mitigation efforts that the Jail could undertake that would better prevent the risk of contraction—and possible later spread to the non-jail community—than immediate release of the Medically-Vulnerable Subclass and additional Class Members to ensure physical distancing is maintained for those who remain in the Dallas County Jail. Cohen Dec., App. 44-59, at ¶ 30 – 31 ("less urgent action will not be sufficient"); Lofgren Dec., App. 1-43, at ¶ 34. In addition to the immediate release of all Medically-Vulnerable Class Members, the Jail must provide the additional conditions outlined by Dr. Cohen and the CDC (e.g., physical distancing, testing, quarantine, hygiene, medical care, personal protective equipment, public health information, etc.); including granting further release for additional class members to ensure sufficient physical distancing, if public health expertise so requires.

With more than 5,000 detainees in the North, South, and West Towers of the Lew Sterrett Justice Center, dozens of employees failing to report for work, the delay in starting to screen employees and detainees for COVID-19 until March 27, 2020, the general unavailability of COVID-19 test kits for detainees and employees, the shortage of N95 masks and other personal protective equipment (PPE) even for employees much less for detainees, the routine mingling of large groups of detainees (50 or more) within dozens of pods, and the impossibility of implementing social and physical distancing for detainees and employees, the Dallas County Jail cannot do the things necessary to protect detainees, employees, and the larger community against the racing spread of COVID-19. Thus, (1) immediate release of the most medically vulnerable persons, followed by (2) frequent reporting, improved health protocols, and—if public health still mandates—(3) further release of additional Class Members, are the necessary and least intrusive means of vindicating Class Members' constitutional rights and preventing grave irreparable harm for the proposed Classes and the Dallas community.

Despite the unquestionable risk posed by COVID-19 to Plaintiffs and Class Members—and by extension, the public at large and its healthcare providers who will be required to care for more and more detainees who become seriously ill from COVID-19—Defendants have not taken such steps. These facts easily support "an inference of deliberate indifference." *Id.*; *Ball*, 792 F.3d at 594; *Epps*, 499 F. App'x at 589-92; *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996) ("[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices."); *Gates*, 501 F.2d at 1300-03 (affirming district court's holding that allowing "[s]ome inmates with serious contagious diseases . . . to mingle with the general prison population," alongside maintaining a host of other

unsanitary and inhumane conditions, "constitute[d] cruel and unusual punishment") (cited with approval in *Rhodes*, 452 U.S. at 352 n. 17). As Dr. Cohen notes, the conditions in the Dallas County Jail "create a high risk of contributing to an outbreak of COVID-19," as the jail is not operationalizing public health guidance and is not equipped to slow transmission of the disease. Cohen Dec. at ¶¶ 4, 13–22, App. 46, 49-52.

B. A Substantial Threat Exists that Petitioners/Plaintiffs Will Suffer Substantial Irreparable Injury if the Court Does Not Issue the Requested Injunction.

Failing to grant Petitioners/Plaintiffs their requested injunction would result in a substantial threat of irreparable injury to them (and by extension, the public at large in north Texas)). As Dr. Lofgren notes, continuing to book, process, and incarcerated Class Members into the Dallas County Jail in the usual course of business, without releasing Class Members, will yield substantial additional cases of COVID-19 and deaths in the Dallas County over a six month period. Lofgren Dec. at ¶ 22–23, App. 6-7.

The need for immediate relief to prevent irreparable harm could not be clearer. Plaintiffs allege injuries that are irreparable and, therefore, not suitable for resolution in the ordinary course of litigation. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States*, 549 F.3d 1079 (7th Cir. 2008). Injuries do not get more paradigmatically irreparable—that is any more truly beyond repair—than death. And even in non-fatal cases, COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, cause permanent loss of breathing capacity.[46] COVID-19 may also target the heart, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can reduce the heart's ability

[46] *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 5, Declaration of Dr. Jonathan Louis Golob ¶ 7.

to pump.[47] This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work.

Courts across the country, accordingly, have recognized that risk of exposure to the coronavirus constitutes an irreparable harm. *See* Petition/Complaint at ¶ 40 (collecting examples of jails responding to the COVID-19 crisis with emergency release of incarcerated people).

Further, the status quo deprives Plaintiffs and Class Members of an established liberty interest without procedural and substantive due process. The record clearly indicates that this constitutional deprivation is ongoing and wide-spread. Those currently detained under the current conditions in the Jail risk severe illness and the potential loss of their life. Without an injunction, the risk of these injuries will continue and likely increase, as discussed above.

C. The Threatened Injury to Plaintiffs/Petitioners and Class Members Outweighs the Potential Injury Posed by the Requested Injunction to Defendants, and the Public's Interest Favors the Requested Injunction.

Plaintiffs and Class Members seek relief to limit the spread of COVID-19 between and among them. The Jail is not an isolated environment. It cannot be contained or separated from the community at large. Moreover, it is in both the Defendants' and the broader public interest to provide the remedies Plaintiffs seek. Uncontrolled infection within the Jail therefore risks the health and safety of every person connected directly or indirectly to the many correctional officers, healthcare workers and other necessary staff who enter and leave the Jail environment on a daily basis. Therefore, any remedy that will protect the Petitioners/Plaintiffs and Class Members benefits the wider community as well and serves the public interest.

[47] *Id.*

D. The Balance of Injuries and the Public Interest Favor the Immediate Release of the Medically Vulnerable Subclass Members.

The members of the Medically Vulnerable Subclasses all have conditions that render them exceptionally vulnerable to death or serious harm if exposed to COVID-19. Because of their medical vulnerability, there is no practicable way to ensure that they receive reasonable medical treatment[48] within the Jail and, therefore, their continued detention violates the U.S. Constitution and they must be released.

Each class member faces a heightened risk of contracting a deadly virus merely because they are incarcerated, and additionally they face a heightened risk of dying if they do. Early reports estimate that the mortality rate for those with cardiovascular disease was 13.2 percent, 9.2 percent for diabetes, 8.4 percent for hypertension, 8.0 percent for chronic respiratory disease, and 7.6 percent for cancer. Cohen Dec. ¶ 26, App. 53. The World Health Organization estimates that one in five people who do require hospitalization.[49] and older people and those with underlying medical conditions, such as lung disease, heart disease, or diabetes, are more likely to develop serious illness.[50] In a February 29, 2020 preliminary report, individuals age 50-59 had an overall mortality rate of 1.3 percent; 60-69-year-olds had an overall 3.6 percent mortality rate, and those 70-79 years old had an 8 percent mortality rate.[51]

The number of cases and deaths from COVID-19 is increasing exponentially. This exponential growth is straining the health care system, which is struggling to care for the current and imminent influx of serious COVID-19 patients. An outbreak in the Jail will spread rapidly and

[48] As explained above, Plaintiffs need not show that the Defendants acted with deliberate indifference to their needs. But there can be no dispute that the Defendants are aware that an uncontrolled outbreak is threatening the jail and that people within it may die imminently as a result.

[49] World Health Organization, *Q&A on Coronaviruses (COVID-19), "Should I Worry About COVID-19?,"* https://cutt.ly/YtEyrxl.

[50] World Health Organization, Q&A on coronaviruses (COVID-19) (Mar. 9, 2020), https://cutt.ly/WtKhCcO.

[51] *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths* Chart, https://cutt.ly/ytEimUQ (data analysis based on WHOChina Joint Mission Report).

further strain health care resources, resulting in a catastrophic loss of life, making it more likely that even people who may have ordinarily recovered from the virus will die.[52] Lofgren Dec. ¶¶ 22; Cohen Dec. ¶¶ 23, 26, App. 53.

As a practical matter, there is no way to constitutionally confine Medically Vulnerable Subclass members in the Jail under present conditions. Cohen Dec. ¶ 17, 21, 30–31, App. 50, 52, 55. It is not possible for a jail to implement the social-distancing, sterilization, and other protective practices that the CDC requires in a jail without sufficiently reducing its population density and flow of new intakes. Cohen Dec. ¶ 30 – 31, App. 55; Lofgren Dec. ¶¶ 21–34, App. 6-9. While there are, in theory, a number of methods the Jail could take to adopt these measures, and some preliminary release requests have been granted, the Medically Vulnerable Subclass members are so vulnerable to death and serious injury from the disease that there is no time to await alternate methods to those measures now. And regardless, as explained below and in the contemporaneously filed Petition/Complaint, the Defendants have failed to implement those procedures to date. The Medically Vulnerable Subclass members, then, are jailed in conditions that will inevitably threaten their lives at least in the near term. They must be removed from those conditions.

For these reasons, in recent weeks, courts across the country have granted emergency habeas petitions ordering the release of medically vulnerable people from confinement. *See, e.g.*, *Hernandez v. Wolf*, 20-cv-617 (TJH), Dkt. No. 17 (C.D. Cal. Apr. 1, 2020); *Thakker v. Doll*, No. 20-cv-480 (JEJ), Dkt. No. 47 (M.D. Pa. Mar. 31, 2020) ("Social distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19. Petitioners have shown that, despite their best efforts, they cannot practice these effective preventative measures in the

[52] Sarah Kliff, *There Aren't Enough Ventilators to Cope With the Coronavirus* (Mar. 18, 2020), https://cutt.ly/htKhNOK; Austin Frakt, *Who Should Be Saved First? Experts Offer Ethical Guidance* (Mar. 24, 2020), https://cutt.ly/XtKh12y.

Facilities. Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces."); *Fraihat v. Wolf*, 20-cv-590 (TJH), (C.D. Cal. Mar. 30, 2020) ("This is an unprecedented time in our nation's history, filled with uncertainty, fear, and anxiety. But in the time of a crisis, our response to those at particularly high risk must be with compassion and not apathy. The Government cannot act with a callous disregard for the safety of our fellow human beings."); *Castillo v. Barr*, 20-cv-605 (TJH)(AFM), Dkt. No. 32 (C.D. Cal. Mar. 27, 2020); *Coronel*, 2020 WL 1487274; *Basank v. Decker*, 20-cv-2518 (AT), Dkt. No. 11 (S.D.N.Y. Mar. 26, 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO."); *Jovel v. Decker*, 12-cv-308 (GBD), Dkt. No. 27 (S.D.N.Y. Mar. 26, 2020).

E. The Balance of Injuries and the Public Interest Favor a Temporary Restraining Order Requiring the Defendants to Implement Constitutionally Sufficient Conditions at the Jail.

In addition to their request for a Temporary Restraining Order and Writ of Habeas Corpus requiring Defendants to immediately release all Medically-Vulnerable Subclass Members in both the Pre- and Post-Adjudication Classes, Plaintiffs and proposed class members seek a TRO requiring a plan be submitted to the Court in three (3) days and overseen by a qualified public health expert appointed by the Court under Fed. R. Evid. 706. This plan should outline:

a. Specific mitigation efforts, in line with CDC guidelines, to prevent, to the degree possible, contraction of COVID-19 by all Class Members not immediately released;

b. A housing and/or public support plan for any released Class or Subclass Members whose testing confirms have been exposed to or infected with COVID-19 and who do not readily have a place to self-isolate for the CDC-recommended period of time (currently 14 days).

c. An evaluation of whether the release of the Subclass Members permits adequate social distancing and whether other categories of prisoners must be released to provide for compliance with CDC guidelines.

F. The Balance of Injuries and the Public Interest Favor a Preliminary Injunction Requiring the Defendants to Implement Constitutionally Sufficient Conditions at the Jail.

Finally, Plaintiffs and proposed Class Members seek a preliminary injunction:

a. Requiring the continued release of any Medically-Vulnerable Subclass Members, including future members, during the pendency of this litigation;

b. Requiring Defendants to release additional Class Members, including those not considered "Medically-Vulnerable" as defined in Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, as needed to ensure that all remaining persons incarcerated in the Dallas County Jail are under conditions consistent with CDC and public health guidance to prevent the spread of COVID-19, including requiring that all persons be able to maintain six feet or more of space between them;

c. Enjoining Defendants from configuring more than one person in a cell in the Dallas County Jail during the period of time in which contagion of COVID-19 presents a danger;

d. Requiring Defendants to maintain the actions set forth in the medical expert plan described above; and

e. Requiring Defendants to regularly report to Plaintiffs and the Court the numbers of Medically-Vulnerable Subclass Members in the Dallas County Jail and their justification for continuing to detain them.

All Class members are currently at imminent risk of death or serious injury from exposure to COVID-19, and they are accordingly entitled to relief imminently. If this litigation is decided in the ordinary course, many Class members may die before final judgment is entered, and countless others will suffer severe pain or permanent lung damage. Class members are highly likely to succeed on their claims because, through the operation of the Jail under current conditions in the midst of the COVID-19 pandemic, the County and the Sheriff are knowingly exposing Plaintiffs to a severe risk of harm.

These steps are neither more nor less than what is required to mitigate the spread of COVID-19 within the Jail. Because the Jail is not an isolated environment—infections within the Jail can and will spread beyond the Jail's walls—implementing these steps is essential to mitigate the spread of the Coronavirus and serves the public interest. As the Court has noted previously, "it is always in the public interest to prevent the violation of a party's constitutional rights."[53]

CONCLUSION

For the foregoing reasons, this Court should grant the Classes' Petition for writs of habeas corpus; grant the Classes' request for a temporary restraining order and a preliminary injunction against Defendants and those in active concert or participation with them, and grant the following relief:

1. Certification of this action as a Class Action;

2. A temporary restraining order, preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring Defendants to identify all Medically-Vulnerable Subclass Members in both the Pre- and Post-Adjudication Classes within six (6) hours of the Court's order and release within twenty-four (24) hours after that all such persons absent proof of judicially-recorded findings by clear and convincing evidence that the individual poses such a serious risk of flight or danger to others that no other conditions can mitigate;

3. A temporary restraining order, preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring Defendants to provide all persons released with educational resources on COVID-19 including instructions that they should self-isolate for the CDC-recommended period of time (currently 14 days) following release;

4. Following immediate release of all Medically-Vulnerable Subclass Members, a plan, to be submitted to the Court in three (3) days and overseen by a qualified public health expert agreed upon by the parties or ordered by the Court pursuant to Fed. R. Evid. 706, which outlines:

   a. Specific mitigation efforts, in line with CDC guidelines, to prevent, to the degree possible, contraction of COVID-19 by all Class Members not immediately released;

   b. A housing and/or public support plan for any released Class or Subclass Members whose testing confirms have been exposed to or infected with COVID-19 and who

[53] Court's Memorandum Opinion and Order in *Daves v. County of Dallas*, Case No. 3:18-CV-00154-N, at 14 (citing *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1159 (S.D. Tex, 2018).

do not readily have a place to self-isolate for the CDC-recommended period of time (currently 14 days).

c. An evaluation of whether the release of the Subclass Members permits adequate social distancing and whether other categories of prisoners must be released to provide for compliance with CDC guidelines.

5. A preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring Defendants to:

a. Continue to release all current and future Medically-Vulnerable subclass members absent proof of judicially-recorded findings by clear and convincing evidence that the individual poses such a serious risk of flight or danger to others that no other conditions can mitigate;

b. Report weekly on the population of persons in the Dallas County Jail who are Medically-Vulnerable as defined in this action;

c. Follow the terms of the public health expert plan submitted pursuant to Fed. R. Evid. 706;

d. Release additional Class Members, including those not considered "Medically-Vulnerable," as needed to ensure that all remaining persons incarcerated in the Dallas County Jail are under conditions consistent with CDC and public health guidance to prevent the spread of COVID-19, including requiring that all persons be able to maintain six feet or more of space between them.

6. If immediate release is not granted on the basis of this Motion alone, then expedited review of the Motion, including oral argument, via telephonic or videoconference if necessary;

7. Any further relief to which Plaintiffs and Class Members may be entitled.

Dated: April 9, 2020

Respectfully submitted,

/s/ Barry Barnett

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ATTORNEYS FOR PETITIONERS/PLAINTIFFS
**pro hac vice application forthcoming*
***N.D. Texas admission application forthcoming*

CERTIFICATE OF CONFERENCE

On April 9, 2020, I spoke by telephone and communicated by email with Kate David, counsel for defendants Dallas County Sheriff Marian Brown and Dallas County, Texas in *Daves v. Dallas County, Texas*, No. 3:18-cv-00154-N (N.D. Tex.), about the subject matter of and relief requested in this motion for temporary restraining order. Ms. David advised me that her clients are considering whether or not they will oppose the relief requested.

/s/ Barry Barnett
Barry Barnett

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 9, 2020.

/s/ Barry Barnett
Barry Barnett