

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

APR 21 2020

NICHOLAS FRAZIER, ALVIN HAMPTON,
MARVIN KENT, MICHAEL KOURI, JONATHAN
NEELEY, ALFRED NICKSON, HAROLD ("SCOTT")
OTWELL, TRINIDAD SERRATO, ROBERT
STIGGERS, VICTOR WILLIAMS, JOHN DOE,
individually and on behalf of all others similarly
situated,

Plaintiffs/Petitioners,

v.

WENDY KELLEY, Secretary of Arkansas Department
of Corrections; DEXTER PAYNE, Division of
Correction Director, Arkansas Department of
Corrections; JERRY BRADSHAW, Division of
Community Correction Director, Arkansas Department
of Corrections; ASA HUTCHINSON, Governor of
Arkansas; BENNY MAGNESS, Chairman of Arkansas
Board of Corrections; BOBBY GLOVER, Vice
Chairman of Arkansas Board of Corrections; BUDDY
CHADICK, Secretary of Arkansas Board of
Corrections; TYRONNE BROOMFIELD, Member of
Arkansas Board of Corrections; JOHN FELTS, Member
of Arkansas Board of Corrections; WILLIAM
("DUBS") BYERS, Member of Arkansas Board of
Corrections; WHITNEY GASS, Member of Arkansas
Board of Corrections; all in their official capacities,

Defendants/Respondents.

JAMES W. McCORMACK, CLERK

By: _____
DEP CLERK

Case No.

Judge:

4:20cv434-KGB
4:20cv435-KGB
4:20cv436-KGB
4:20cv437-KGB
4:20cv438-KGB

**CLASS ACTION COMPLAINT AND
PETITION FOR WRIT OF
HABEAS CORPUS**

TRO REQUESTED

This case assigned to District Judge Baker
and to Magistrate Judge Valpey

4:20cv439-KGB
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4:20cv444-KGB

Nicholas Frazier, Alvin Hampton, Marvin Kent, Michael Kouri, Jonathan Neeley, Alfred
Nickson, Harold Scott Otwell, Trinidad Serrato, Robert Stiggers, Victor Williams, and John Doe
(collectively, "Named Plaintiffs"), individually and on behalf of all others similarly situated, bring
this emergency class action lawsuit and petition for writ of habeas corpus to seek immediate relief

against the substantial risk of COVID-19 infection, illness, and death while incarcerated in facilities operated by the Arkansas Department of Corrections (“ADC”).

PRELIMINARY STATEMENT

1. Arkansas—like the rest of the United States and nations throughout the world—is facing an unprecedented public health crisis due to the COVID-19 pandemic. As of the filing of this Complaint, 786,638 Americans have been infected with the virus, leading to 42,295 deaths nationwide.¹ The risk of infection, serious illness, and possible death from the coronavirus, especially among vulnerable populations, has led Arkansas to take the extraordinary measure of declaring a public health emergency and closing public schools for the rest of the year.

2. While Arkansas is faring better than many other parts of the country, with 1,971 COVID-19 infections and 42 deaths statewide,² the situation in the state’s correctional facilities stands in stark contrast. It is not a matter of *if* or *when* the pandemic will wreak havoc in Arkansas’ state prison system: the crisis is already underway. It is now beyond debate that the measures put in place by Defendants to suppress COVID-19 are completely inadequate. Only a week ago, a single person confined at Cummins Unit tested positive for COVID-19.³ To date, Cummins Unit has about 600 confirmed infections⁴—which is a 1300% increase from only four days earlier.⁵

¹ *Arkansas COVID-19 Update*, Arkansas Dep’t of Health, <https://adem.maps.arcgis.com/apps/opsdashboard/index.html#/f533ac8a8b6040e5896b05b47b17a647> (last visited Apr. 20, 2020).

² *Id.*

³ *First inmate tests positive for COVID-19 at Arkansas prison*, KATV, Apr. 12, 2020, <https://katv.com/news/coronavirus/arkansas-department-of-correction-inmate-tests-positive-for-covid-19>.

⁴ Meghan Rhoos, *One Arkansas Prison Makes Up Almost a Third of State’s Coronavirus Cases*, Newsweek, Apr. 20, 2020, <https://www.newsweek.com/one-arkansas-prison-makes-almost-third-states-coronavirus-cases-1499045>.

⁵ Max Brantley, *Coronavirus update: Big jump in Cummins prison cases; a goal of beginning a return to work May 4*, Ark. Times, April 17, 2020, 2:19 PM,

Currently, incarcerated people make up at least one in three confirmed COVID-19 infections statewide. And these numbers are likely gross underestimates due to the lack of widespread testing in all of the correctional facilities throughout the State.

3. As we know with near certainty from the COVID-19 outbreaks in nursing home facilities, cruise ships, and a naval aircraft carrier, congregate environments like prisons are a breeding ground for this highly contagious virus. Prisoners eat together, sleep together, share restroom facilities, and have minimal control over their physical space. On a daily basis, they can have physical contact with up to hundreds of prisoners and corrections staff. There are multiple opportunities on any given day when the COVID-19 virus could spread quickly from one infected person to several more. For reasons entirely beyond their control, people in ADC facilities cannot practice social distancing, control their exposure to large groups, practice increased hygiene, wear adequate protective clothing, obtain specific products for cleaning or laundry, or avoid high-touch surfaces.

4. President Trump's Coronavirus Guidelines for America, which are now ubiquitous, highlight the importance of avoiding social gatherings of 10 or more people, washing your hands after touching a frequently used item or surface, and disinfecting frequently used items and surfaces as much as possible.⁶ These general guidelines have been translated into correctional settings in the Centers for Disease and Control and Prevention's ("CDC") Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidance"), which emphasize, *inter alia*, operational preparedness for the virus, enhanced

<https://arktimes.com/arkansas-blog/2020/04/17/coronavirus-update-big-jump-in-cummins-prison-cases-a-goal-of-beginning-a-return-to-work-may-4>.

⁶ *The President's Coronavirus Guidelines for America*, The White House, Mar. 16, 2020, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance-8.5x11_315PM.pdf.

cleaning/disinfecting and hygiene practices, social distancing, infection control with use of personal protective equipment (“PPE”), medical isolation of confirmed or suspected cases and contacts, clinical care for confirmed or suspected cases, and considerations of individuals at higher risk of severe disease from COVID-19.⁷

5. Despite the availability of the CDC Guidance since March 23, 2020, Defendants have utterly failed to comply with these guidelines through both their official policies and the actual practices of corrections staff in the prisons. Most importantly, Plaintiffs’ personal experiences demonstrate Defendants’ complete disregard for their health and safety during the crisis of this pandemic.

6. Some Plaintiffs continue to physically interact with well over a hundred people each day, often without PPE or ready access to hygiene products. Corrections officers and prisoners serving meals often do not properly use masks and gloves—if they use them at all—exposing everyone to transmission of the virus. Showers are cleaned after everyone in the barracks (dozens of people) have used them, and restroom facilities are often in unsanitary conditions. Beds are within three feet of one another, far short of the recommended six feet. Prisoners who exhibit symptoms are not immediately tested and are forced to wait days for a sick call. Those who test positive are kept in punitive isolation conditions. Through all of this, prisoners are not fully informed of any plans Defendants may have to protect them from COVID-19, nor are they adequately apprised of their medical condition and medical care should they be suspected or confirmed of infection.

⁷ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control & Prev., Mar. 23, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

7. Of particular concern is the vulnerability of prisoners with disabilities, advanced age, and/or underlying medical conditions that could easily render COVID-19 infection a death sentence. Those prisoners with chronic underlying health conditions, such as diabetes, heart disease, chronic lung and liver diseases, respiratory disease, and compromised immune systems, are at particular risk for grave outcomes from infection. Prisoners overall have a greater likelihood of infectious diseases, hypertension, diabetes, heart disease, and respiratory illness that have been found to increase the mortality of COVID-19 infection. And many of the Named Plaintiffs have severe conditions like heart disease, asthma, and cancer that would make them especially susceptible to serious illness or death from COVID-19. At the same time, prison medical facilities are limited; they lack vital equipment, expertise, and treatment mechanisms that are critical to providing adequate COVID-19 treatment and care.

8. Plaintiffs are in the custody and care of Defendants while they serve their prison sentences, and it is Defendants' responsibility to ensure that Plaintiffs' constitutional and statutory rights are protected during their confinement. Needlessly and recklessly subjecting Plaintiffs to the known risk of COVID-19 infection, with a likelihood of severe illness and possible death, is a wholesale abdication of that responsibility. Without court intervention, Plaintiffs fear that they will be left to suffer and possibly die as expendable casualties of this pandemic.

9. The outbreak of a highly infectious, deadly virus in a closed detention setting requires urgent and decisive action to protect the health and safety of those confined, those who work there, and the medical professionals who will treat the infected. A failure to take appropriate action will not only threaten all these lives, but also the lives of Arkansans far beyond prison walls, as the virus inevitably boomerangs back into surrounding communities, straining limited medical capacity, and continuing to spread across the State.

10. While this lawsuit centers on the violation of Plaintiffs' rights and the extreme suffering they will endure should immediate relief not be granted, it also raises significant public health concerns for Arkansans in communities surrounding the correctional facilities. No prison is fully isolated from neighboring communities, and any COVID-19 infection can easily pass between prisoners and corrections staff with later transmission to friends, families, neighbors, store clerks, and others. And with at least 25% of COVID-19 carriers exhibiting no symptoms, it would be impossible to screen individuals entering and leaving correctional facilities without the sort of widespread and immediate testing that is currently unavailable.

11. The prison crisis in this pandemic is a ticking time bomb that will have ramifications throughout Arkansas when it fully explodes—and this time bomb will undoubtedly explode without court intervention. Importantly, the prison crisis—like the pandemic at large—will disproportionately harm Black Arkansans who are imprisoned at a rate four times that of white Arkansans. Already, the percentage of Black Arkansans who are infected with, and die from, COVID-19 is roughly double their percentage in the statewide population.⁸ The spread of COVID-19 from correctional facilities to the surrounding communities will further exacerbate this extreme racial disparity, as ADC facilities are mostly located in Southeastern Arkansas, which has a disproportionately higher population of Black residents than the rest of the state. The containment of the COVID-19 infection in ADC facilities, therefore, not only relates to Plaintiffs' rights to be free from unnecessary harm, but is also a larger racial justice issue regarding state officials' failures to equitably respond to this pandemic for all Arkansans.

12. Accordingly, Defendants must take serious, immediate action to prevent a public

⁸ *ADH COVID-19 Demographic Slide Deck*, Ark. Dep't of Health, https://www.healthy.arkansas.gov/images/uploads/pdf/Presentation_-_Demographics_PPT.pdf (last updated Apr. 19, 2020, 12:00 PM).

health crisis the likes of which have never been encountered, not only to protect persons confined to their facilities, but also for the sake of corrections staff and neighboring communities.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2241, & 1651, and 42 U.S.C. § 1983.

14. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because a substantial part of the events, acts, and/or omissions giving rise to this action occurred, and continue to occur, in this District.

PARTIES

I. Plaintiffs

15. Plaintiff Michael Kouri is 40 years old and is incarcerated in the Ouachita River Correctional Unit, an ADC prison. Mr. Kouri is housed in the 7 barracks. Mr. Kouri has been diagnosed with heart disease, specifically, aortic heart valve degeneration. He has an artificial heart valve and is on blood thinners. He also suffers from hypertension and extreme obesity. Mr. Kouri has difficulty walking more than 20 feet without stopping to catch his breath. Recently, Mr. Kouri experienced more severe shortness of breath, headaches, chills, coughing, and was diagnosed with pink eye. According to the American Academy of Ophthalmology, conjunctivitis could be a symptom of COVID-19.⁹ Mr. Kouri is critically vulnerable to complications from COVID-19 because of his significant underlying health conditions.

16. Mr. Kouri has not been tested for COVID-19. He shares a small cell with one other person and lives in a barracks unit with approximately 80 other incarcerated people. His entire

⁹ Reena Mukamal, *Coronavirus Eye Safety*, American Academy of Ophthalmology, Mar. 10, 2020, <https://www.aao.org/eye-health/tips-prevention/coronavirus-covid19-eye-infection-pinkeye>.

barracks goes to meal service together, where there are four people per table, easily within six feet of one another. At recreation, Mr. Kouri's barracks goes to the yard with another barracks, which means that approximately 150 people—separate and apart from staff—are on the yard during recreation. On an average day, Mr. Kouri closely interacts with well over 100 people during meal service, recreation, and educational classes, making social distancing impossible. Mr. Kouri has been issued one mask, which he handwashes with soap and water to clean. He is without a mask while it dries. Mr. Kouri filed a grievance related to his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. Mr. Kouri is a member of the Class and both Subclasses.

17. Plaintiff Trinidad Serrato is 33 years old and is incarcerated in the Ouachita River Correctional Unit. Mr. Serrato is a carrier for tuberculosis and suffers from asthma. He resides in a barracks unit with approximately 44 other people. Mr. Serrato is critically vulnerable to COVID-19 because of his underlying health issues.

18. He sleeps in a bed that is 2.5 feet away from neighboring beds. Mr. Serrato is assigned to work in the kitchen, where he comes into contact with approximately 2,000 other people daily. Food is delivered to the kitchen from Cummins Unit, which has the highest number of documented COVID-19 cases of all ADC facilities. Mr. Serrato has not been provided any disinfectant to wipe down food items before placing them into storage. Mr. Serrato also has not been provided gloves or a mask. Mr. Serrato's current living and working conditions make social distancing impossible. Mr. Serrato filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. Mr. Serrato is a member of the Class and both Subclasses.

19. Plaintiff Nicholas Frazier is 36 years old and is incarcerated in the Varner Supermax

facility, an ADC prison. Mr. Frazier suffers from seizures and asthma. Mr. Frazier is critically vulnerable to COVID-19 because of his underlying health conditions. Mr. Frazier interacts with other incarcerated people every day for at least an hour during yard call. Mr. Frazier comes in close contact with staff when he is escorted to yard call, sick call, and to use the phone. Mr. Frazier has not been provided a mask or any other PPE. He also has not been provided with disinfectant to sanitize his cell. Mr. Frazier filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. Mr. Frazier is a member of the Class and both Subclasses.

20. Plaintiff Marvin Kent is 39 years old and is incarcerated in the Varner Supermax facility. Mr. Kent has been diagnosed with heart failure and has a pacemaker. He suffers from chest pain daily. Mr. Kent also has hypertension and high cholesterol. Mr. Kent is currently experiencing COVID-19 symptoms, including headaches, body aches, coughing, and nausea, but has not been tested for the virus. Mr. Kent fears that his symptoms may worsen rapidly. Since staff do not check on him regularly, he is afraid he will be critically ill and alone in his cell without assistance. Mr. Kent is critically vulnerable to complications from COVID-19 because of his significant underlying health conditions. In the past, it has taken between three weeks and one month for Mr. Kent to be seen by a doctor after submitting a medical request. Despite his written and verbal requests for a mask, he has not received one.

21. Mr. Kent is in a single occupant cell. However, he interacts with other incarcerated people every day for at least an hour during yard call. Mr. Kent comes in close contact with staff when he is escorted to yard call, sick call, and to use the phone. Mr. Kent is a member of the Class and both Subclasses.

22. Plaintiff Harold Otwell is 49 years old. He is incarcerated in the Ouachita River

Correctional Unit and is housed in the Alpha barracks. Mr. Otwell is a first-time, non-violent offender who is expected to be reviewed for release in December 2020. Mr. Otwell is obese, pre-diabetic, and has osteoarthritis. He receives physical therapy for his right hip and has limited mobility. Mr. Otwell is critically vulnerable to complications from COVID-19 because of his significant underlying health conditions.

23. Mr. Otwell resides in a barracks unit with approximately 46 other people. He sleeps in a bed that is 2.5 feet away from neighboring beds. Mr. Otwell is assigned to work in the laundry and comes into contact with approximately 150-200 incarcerated people and 30 guards daily. Mr. Otwell's laundry assignment also requires frequent interaction with newly incarcerated people who have recently been committed to the facility. Despite his job of handling soiled laundry, he has not been provided with gloves. Mr. Otwell's current living and working conditions make social distancing impossible. Mr. Otwell filed a grievance regarding his vulnerability to COVID-19. His grievance was denied. Mr. Otwell is a member of the Class and both Subclasses.

24. Plaintiff Robert Stiggers is 35 years old and is incarcerated in the Cummins Unit, an ADC prison. Mr. Stiggers suffers from asthma, which makes him critically vulnerable to complications from COVID-19. He lives in a cell with another inmate, where they share a toilet and sink. Mr. Stiggers has not been provided with disinfectant to sanitize his cell. In Mr. Stiggers' housing unit, five people shower at a time. The showers are not cleaned until after everyone in the barracks has showered, which is approximately 90 people. During recreation time, Mr. Stiggers is placed outside with ten other incarcerated people.

25. Mr. Stiggers has not been provided with a mask or any other PPE. His current living conditions make social distancing impossible. Mr. Stiggers filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or

prevent the spread of the virus. Mr. Stiggers is a member of the Class and both Subclasses.

26. Plaintiff Alfred Nickson is 61 years old and is incarcerated in the Cummins Unit. Mr. Nickson suffers from diabetes, rheumatoid arthritis, and osteoarthritis. For the past two weeks, he has experienced COVID-19 symptoms, including shortness of breath, fatigue, coughing, and repeated vomiting. Despite his symptoms and age, Mr. Nickson has not been tested for COVID-19. Mr. Nickson is critically vulnerable to complications from COVID-19 because of his age and significant underlying health conditions.

27. Mr. Nickson lives in a cell with another inmate, where they share a toilet and sink. Mr. Nickson has not been provided with disinfectant to sanitize his cell. He also has not been provided with a mask or any other PPE. Since the COVID-19 pandemic, Mr. Nickson has refused communal showers because of the unsanitary conditions. Instead, he washes his body with water from the sink inside his cell. Mr. Nickson filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. Mr. Nickson is a member of the Class and both Subclasses.

28. Plaintiff Victor Williams is 56 years old. He is incarcerated in the Ouachita River Correctional Unit. Mr. Williams' lymphoma is in remission. He also suffers from a collapsed lung, hypertension, and bruised tissue surrounding his heart. Mr. Williams is critically vulnerable to complications from COVID-19 because of his significant underlying health conditions. Mr. Williams is housed with 46 other people. He sleeps in a bed that is 2.5 feet away from neighboring beds. In Mr. Williams's housing unit, multiple people shower at a time, and showers are not disinfected daily.

29. Mr. Williams is a peer counselor in his barracks. He has been exposed to a lot of people who are currently sick, and he fears that it is only a matter of time before he starts exhibiting

COVID-19 symptoms. Also, many of the same guards move throughout different barracks. Some guards have been sent home with high fevers.

30. On an average day, Mr. Williams closely interacts with numerous guards and over 100 other people on his barracks, during meal service, and during recreation; this makes social distancing impossible. Mr. Williams filed a grievance on regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. His grievance was denied. Mr. Williams is a member of the Class and both Subclasses.

31. Plaintiff Alvin Hampton is 42 years old and is incarcerated in the Ouachita River Correctional Unit. Mr. Hampton suffers from seizures, Bell's palsy, and bipolar disorder. Despite reporting having difficulty breathing in the morning, constant coughing, and congestion, Mr. Hampton has not been tested for COVID-19. Many people housed in Mr. Hampton's barracks are sick with COVID-19 symptoms. Mr. Hampton is critically vulnerable to complications from COVID-19 because of his significant underlying health conditions. He resides in a barracks unit with approximately 46 other people. He sleeps in a bed that is 2.5 feet away from neighboring beds. In Mr. Hampton's housing unit, multiple people shower at a time, and showers are not disinfected daily. He does not have access to bleach, disinfectant, or hand sanitizer.

32. Mr. Hampton also closely interacts with other people during meal service, during recreation, and in the line to receive his medicine. Mr. Hampton's current living conditions make social distancing impossible. Mr. Hampton filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. His grievance was denied. Mr. Hampton is a member of the Class and both Subclasses.

33. Plaintiff Jonathan Neeley is 36 years old and is incarcerated in the Ouachita River Correctional Unit. He is housed in the Special Needs Unit. Mr. Neeley was diagnosed with rectal

cancer in January 2020, and has not received treatment or chemotherapy. Mr. Neeley is critically vulnerable to complications from COVID-19 because of his significant underlying health condition. He has traveled to three local hospitals recently related to his cancer diagnosis. He resides in the SNU barracks with approximately 46 other people. Mr. Neeley sleeps in a bed that is approximately 1.5-2 feet away from neighboring beds. Mr. Neeley does not have access to cleaning supplies or disinfectant.

34. Due to his health condition, Mr. Neeley frequently visits the medical clinic. While waiting to be seen by a clinician, he is put in a small holding cell with approximately ten other incarcerated people. On average, Mr. Neeley interacts daily with approximately 100-150 other people, 10-15 staff (program staff, nurses, etc.), and 30 officers. Mr. Neeley's current living conditions make social distancing impossible. Mr. Neeley filed a grievance regarding his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus. His grievance was denied. Mr. Neeley is a member of the Class and both Subclasses.

35. Plaintiff John Doe is in his twenties and is incarcerated in the Cummins Unit. Mr. Doe is housed in the barracks with approximately 50 other people. Mr. Doe recently tested positive for COVID-19. He suffers from severe asthma, which requires use of an inhaler throughout the day. Mr. Doe is critically vulnerable to complications from COVID-19 because of his significant underlying health condition. Mr. Doe reported feeling unwell and suffering from fatigue on April 11, 2020. Mr. Doe was placed in lock down as retaliation for disclosing the unconstitutional conditions at Cummins Unit. Mr. Doe is a member of the Class and both Subclasses.

II. Defendants

36. Defendant Wendy Kelly is the Secretary of the ADC. As such, she is the executive head of the ADC and commanding officer of all ADC correctional officers, guards, employees and contractors, and is responsible for their training, supervision, and conduct. At all times described herein, she was acting under color of state law. She is sued in her official capacity for declaratory and injunctive relief.

37. Defendant Dexter Payne is the Director of the ADC Division of Correction. As such, he is the executive and administrative officer of the Division of Correction, and is responsible for supervising the administration of all ADC correctional institutions, facilities and services; ensuring adequate staffing levels at correctional institutions; instituting training and development of correctional staff; and coordinating with judicial districts, counties, and municipalities to provide guidance and services to ensure a full range of correctional options for the State as a whole. Defendant Payne, as the Director of the ADC Division of Correction, has the power to make people incarcerated in ADC correctional facilities eligible for release. He is sued in his official capacity for declaratory and injunctive relief.

38. Defendants Benny Magness, Bobby Glover, Buddy Chadick, Tyrone Broomfield, John Felts, Dr. William Byers, and Whitney Gass are members of the Arkansas Board of Corrections (“BOC”) (collectively, “BOC Defendants”). The BOC is the governing authority of the ADC and performs all functions with respect to the management and control of ADC. The BOC, along with the Director of the Division of Correction, has the power to release people incarcerated in ADC facilities. At all times described herein, the BOC Defendants were acting under color of state law. They are being sued in their official capacity for declaratory and injunctive relief.

39. Defendant Jerry Bradshaw is the Director of the ADC Division of Community Corrections (“ACC”). As such, he is the administrative officer of the ACC, and is responsible for supervising the administration of all ACC facilities, programs and services; maintaining adequate staffing levels; providing ACC staff with training and professional development opportunities; and coordinating with judicial districts, counties, and municipalities to provide guidance and services to ensure a full range of correctional options for the State as a whole. He is sued in his official capacity for declaratory and injunctive relief.

40. Defendant Asa Hutchinson is the Governor of Arkansas. As such, he has executive power over the State of Arkansas. Defendant Hutchinson has the ultimate authority for ensuring that all executive agencies, including ADC, function in compliance with state and federal law, and has the power to release people incarcerated in ADC correctional facilities. He is sued in his official capacity for declaratory and injunctive relief.

CLASS ALLEGATIONS

41. Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, the individual Named Plaintiffs bring this action on behalf of themselves and a class consisting of people who are currently incarcerated, or will be in the future, in an ADC detention facility during the duration of the COVID-19 pandemic. Plaintiffs also propose the following Subclasses:

a) *High Risk Subclass*: People in the custody of an ADC facility aged 50 or over and/or who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including but not limited to people with respiratory conditions such as chronic lung disease or asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or for any other reason; people with chronic liver or kidney disease, or renal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy,

hypertension, blood disorders (including sickle cell disease), or an inherited metabolic disorder; people who have had or are at risk of stroke; and people with any condition specifically identified by CDC, currently or in the future, as increasing their risk of contracting, having severe illness, and/or dying from COVID-19; and

b) *Disability Subclass*: People in custody who suffer from a disability that substantially limits one or more of their major life activities and who are at increased risk of contracting, becoming severely ill from, and/or dying from COVID-19 due to their disability or any medical treatment necessary to treat their disability.

42. A class action is the only practicable means by which the individual Named Plaintiffs and the putative class members may challenge Defendants' unconstitutional actions. Many members of the Class are without the means to retain an attorney to represent them in a civil rights lawsuit.

43. The Class and Subclasses are so numerous that joinder of all members is impractical. The number of people in custody exceeds 15,000 on any given day, and each Subclass contains hundreds, and possibly thousands, of people. Disposition of this matter as a class action will provide substantial benefits and efficiencies to the parties and the Court.

44. There are questions of law and fact common to all class members and to the subclass members, including: (a) does COVID-19 present a substantial risk of harm to people in ADC custody; (b) have Defendants failed to adequately protect the Class from the immediate threat of COVID-19; (c) what practices are Defendants actually implementing with respect to COVID-19; (d) whether Defendants' actions and/or inactions constitute deliberate indifference to the rights of putative class members; (e) whether members of the High Risk Subclass are entitled to habeas corpus relief; (f) whether the rights of the Disability Subclass under the Americans with

Disabilities Act (“ADA”) are being violated by ADC’s policies and practices; and (g) whether ADC illegally discriminated against the Disability Subclass by denying their reasonable accommodations recommended by the CDC, both in policy and practice.

45. The claims of the Named Plaintiffs are typical of those of the Class, the High Risk Subclass, and the Disability Subclass. This typicality stems from Plaintiffs’ claims that Defendants have placed them at significant risk of harm by failing to take appropriate steps to address the risk of COVID-19 throughout ADC. The claims of Plaintiffs, the Class, and Subclasses arise from the same conduct by Defendants and are based not only on identical legal theories, but also seek identical relief. All members of the Class and Subclasses are similarly injured by Defendants’ wrongful conduct, and the harms Plaintiffs suffer are typical of the harms suffered by the Class and Subclasses.

46. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy, especially since joinder of all Class and Subclass members is impracticable.

47. Each class member is irreparably harmed as a result of Defendants’ wrongful conduct. Litigating this case as a class action will reduce the risk of repetitious litigation relating to the Defendants’ conduct.

48. The individual Named Plaintiffs will fairly and adequately represent the interest of the Class and Subclasses. The Named Plaintiffs have no conflicts with the unnamed members of the proposed Class and Subclasses. In addition, their lawyers are experienced in complex civil rights cases, including federal class actions against governmental entities.

49. Defendants have engaged in unlawful actions and/or inactions in a manner that applies generally to the Class and Subclasses, rendering class-wide injunctive and declaratory relief appropriate.

STATEMENT OF FACTS

I. COVID-19 is a Highly Contagious, Deadly Disease that Poses a Serious Risk of Death or Injury to Anyone Who Becomes Infected.

50. The COVID-19 pandemic has created a public health emergency of historic proportions. Currently, more than two million individuals worldwide have tested positive for COVID-19, and more than 146,000 have died from the disease.¹⁰ The pandemic has affected every corner of the world, and the United States sits at its epicenter.

51. In the United States alone, 786,638 individuals have tested positive for COVID-19, and 42,295 have died.¹¹ The number of deaths and the number of individuals who have tested positive are both increasing swiftly.¹² Every state in the country has recorded numerous positive tests, including Arkansas, where the CDC has described “widespread” “community transmission.”¹³ Arkansas has reported 1,971 positive tests and 42 deaths.¹⁴ And the official death toll in the United States “is widely believed to be an undercount” because testing has been “severely limited,” and federal officials have included only individuals with positive test results in the total.¹⁵

¹⁰ See *Coronavirus Disease 2019 (COVID-19): Situation Report—89*, World Health Organization, (Apr. 18, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200418-sitrep-89-covid-19.pdf?sfvrsn=3643dd38_2.

¹¹ *Arkansas COVID-19 Update*, *supra* n.1

¹² *Coronavirus disease (COVID-19) Situation Dashboard*, World Health Organization, <https://who.sprinklr.com/region/amro/country/us> (last updated Apr. 20, 2020).

¹³ Centers for Disease Control and Prevention, *supra* n.11.

¹⁴ *Arkansas COVID-19 Update*, *supra* n.1

¹⁵ Emma Brown, Beth Reinhard, and Reis Thebault, *Which deaths count toward the covid-19 death toll? It depends on the state*, Wash. Post (Apr. 16, 2020, 6:30 AM),

52. The World Health Organization (“WHO”) declared COVID-19 a pandemic on March 11, 2020.¹⁶ The same day, Governor Asa Hutchinson signed Executive Order 20-03 (“EO 20-03”) declaring a state of emergency,¹⁷ and confirmed the first presumptive case of COVID-19 in Arkansas.¹⁸ Governor Hutchinson noted, “For months, Arkansas has been well prepared to respond to COVID-19. More than two months ago, the Arkansas Department of Health, under the leadership of Dr. Nathaniel Smith, designated more than 70 of its employees to work exclusively on COVID-19 . . . [I have] asked each of my Cabinet secretaries to prepare a continuity of operation plan in the event of an outbreak of the virus.”¹⁹ EO 20-03 has since been amended to specify procedures to be undertaken across the State, encouraging social distancing, disinfecting, and other reasonable precautions.

53. On March 13, 2020, President Trump declared “that the COVID-19 outbreak in the United States constitutes a national emergency.”²⁰

54. COVID-19 is a highly contagious disease. When “unconstrained, the coronavirus

https://www.washingtonpost.com/investigations/which-deaths-count-toward-the-covid-19-death-toll-it-depends-on-the-state/2020/04/16/bca84ae0-7991-11ea-a130-df573469f094_story.html.

¹⁶ *WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020*, World Health Organization (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹⁷ Ark. Proclamation No. 20-03 (Mar. 11, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-03_1.pdf.

¹⁸ Governor Asa Hutchinson, Press Release, Mar. 11, 2020, <https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-confirms-states-first-presumptive-positive-covid-19-cas>.

¹⁹ *See id.*

²⁰ President Donald Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

spreads exponentially, the caseload doubling at a steady rate.”²¹ Infected individuals can pass the virus to others by coughing, sneezing, or talking.²² Individuals may become infected if they breathe in a respiratory droplet containing the virus, or touch a surface that has the virus on it and then touch their mouth, nose, or eyes.²³ The virus can survive in the air in droplet form for at least three hours, and it can survive up to one day on cardboard, two days on plastic, and three days on steel.²⁴ There is evidence that transmission of the virus can occur before the onset of symptoms or through infected individuals who never develop symptoms.²⁵

55. Because COVID-19 is a novel virus, no vaccine exists, and no cure has been developed.²⁶ Unlike the flu, there is no effective antiviral medication to prevent or treat infection.²⁷

56. The combination of COVID-19’s highly contagious nature and the lack of a vaccine or effective antiviral treatment mean that the disease spreads rampantly absent substantial public health interventions. Without such interventions, the CDC projects that 200 million people in the United States could become infected, and 1.5 million people could die.²⁸

57. The only known effective means of controlling the virus are social distancing—

²¹ Kenneth Chang, *A Different Way to Chart the Spread of Coronavirus*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/health/coronavirus-data-logarithm-chart.html>.

²² *Coronavirus disease 2019 (COVID-19) Factsheet*, Centers for Disease Control and Prevention (Mar. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

²³ *See id.*

²⁴ Neeltje van Doremalen et al., Correspondence, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, *New England J. Medicine* (Mar. 17, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

²⁵ Exhibit 1, Declaration of Dr. Jonathan Louis Golob (“Golob Decl.”) at ¶ 6; Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23 – March 16, 2020*, *Morbidity and Mortality Weekly Report*, 411-15 (Apr. 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm>.

²⁶ Exhibit 2, Declaration of Dr. Marc Stern (“Stern Decl.”) at ¶ 5.

²⁷ Golob Decl. at ¶ 10.

²⁸ *See id.* at ¶ 11.

remaining physically separated from known or potentially infected individuals—and the use of hygienic measures, including frequent hand washing.²⁹ For purposes of social distancing, the CDC recommends that individuals stay at least six feet away from others and “stay out of crowded places.”³⁰

58. Even maintaining a distance of six feet of separation from others is not sufficient to avoid the risk of infection. Researchers have demonstrated that particles from a cough may spread as far as 16 feet, while a sneeze may spread particles as far as 26 feet.³¹ The virus also spreads more quickly in poorly ventilated spaces. An infected person who speaks for five minutes in a poorly ventilated area can produce as many infection droplets of the virus as one infectious cough.³² That effect is magnified when multiple people share a space, which “build[s] up” the concentration of infectious droplets in the air.³³

59. The time period between when an individual becomes infected and the time that the individual exhibits symptoms varies from person to person.³⁴ The typical period is five days, but it can be as short as two days, and some people will never develop symptoms while still potentially spreading the disease.³⁵ As a result, the only way to establish the lack of risk from COVID-19 is through an aggressive testing regime.³⁶

²⁹ See *id.* at ¶ 10-11; Stern Decl. at ¶ 1.

³⁰ *Public Health Recommendations after Travel-Associated COVID-19 Exposure*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html> (last visited Apr. 19, 2020).

³¹ Yuliya Parshina-Kottas, Bedel Saget, Karthik Patanjali, Or Fleisher and Gabriel Gianordoli, *This 3-D Simulation Shows Why Social Distancing Is So Important*, N.Y. Times (Apr. 14 2020), <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html>.

³² See *id.*

³³ See *id.*

³⁴ Golob Decl. at ¶ 6.

³⁵ See *id.* at ¶ 6.

³⁶ See *id.*

60. People of all ages risk serious illness, injury, or death if they contract COVID-19.³⁷ Even mild cases of COVID-19 generally involve about two weeks of fevers and dry coughs and are more severe than the flu.³⁸

61. According to the WHO, approximately 20% of people who contract COVID-19 require treatment by a specialist, and one in six becomes seriously ill.³⁹ In serious cases, individuals' lungs "become filled with inflammatory material [and] are unable to get enough oxygen to the bloodstream."⁴⁰

62. Severe cases of COVID-19 cause acute respiratory distress syndrome ("ARDS") in which fluid displaces air in the lungs. COVID-19 patients with ARDS "are essentially drowning in their own blood and fluids because their lungs are so full."⁴¹

63. The virus frequently causes extreme symptoms, including fever and chills that can last for weeks, excruciating pain, debilitating fatigue, an unremitting cough, uncontrollable diarrhea, and an inability to keep down food and water.⁴² CNN Anchor Chris Cuomo contracted

³⁷ CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020*, Morbidity and Mortality Weekly Report (Mar. 18, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w.

³⁸ Holly Secon and Aria Bendix, *There is a wide misconception of what a 'mild' case of COVID-19 looks like. It can be ugly and brutal.*, Business Insider (Apr. 16, 2020, 2:34 PM), <https://www.businessinsider.com/mild-coronavirus-cases-high-fever-dry-cough-2020-3>.

³⁹ Graham Readfearn, *What Happens to People's Lungs When They Get Coronavirus?*, The Guardian (Mar. 24, 2020), <https://www.theguardian.com/world/2020/apr/15/what-happens-to-your-lungs-with-coronavirus-covid-19>.

⁴⁰ *See id.*

⁴¹ Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure From COVID-19 — Even in His Young Patients*, ProPublica (Mar. 21, 2020), <https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients>.

⁴² *See, e.g., id.*; Leah Groth, *Is Diarrhea a Symptom of COVID-19? New Study Says Digestive Issues May Be Common With Coronavirus*, Health (Mar. 20, 2020), <https://www.health.com/condition/infectious-diseases/coronavirus/is-diarrhea-a-symptom-of-covid-19>.

COVID-19 and explained that “[i]t was like somebody was beating me like a piñata.”⁴³ Cuomo shivered so much that he chipped a tooth, hallucinated, and experienced a fever in excess of 103 degrees.⁴⁴ And Cuomo’s illness was not one of the more serious manifestations of the illness that required hospitalization. Others have characterized the experience of COVID-19 as “the most excruciating pain I’ve ever felt.”⁴⁵

64. Even among young and healthy people, a COVID-19 infection requires supportive care, including supplemental oxygen, positive pressure ventilation, and extracorporeal mechanical oxygenation.⁴⁶

65. For a significant number of people, contracting COVID-19 will end in death. In the United States, the fatality rate continues to rise. Although the recorded death rate was 1.35% in late March, it has now increased to nearly 5%.⁴⁷

66. Beyond the initial symptoms and the risk of death, COVID-19 also causes serious long-term medical conditions.⁴⁸ It severely damages lung tissue and can cause a permanent loss of

⁴³ Quint Forgey, *‘Like somebody was beating me like a piñata’: Chris Cuomo describes coronavirus battle*, Politico (Apr. 2, 2020, 7:30 AM), <https://www.politico.com/news/2020/04/02/chris-cuomo-coronavirus-experience-161057>.

⁴⁴ *See id.*

⁴⁵ Edward Pevos, *WDIV-TV anchor, Evrod Cassimy, recovered from coronavirus, describes ‘most excruciating pain I’ve ever felt’*, MLive (Apr. 6, 2020), <https://www.mlive.com/coronavirus/2020/04/wdiv-tv-anchor-evrod-cassimy-recovered-from-coronavirus-describes-most-excruciating-pain-ive-ever-felt.html>.

⁴⁶ Golob Decl. at ¶ 5.

⁴⁷ Chris Mooney, Juliet Eilperin and Joel Achenbach, *As U.S. coronavirus fatality rate rises to 5 percent, experts are still trying to understand how deadly this virus is*, Wash. Post (Apr. 17, 2020), https://www.washingtonpost.com/health/as-officials-plan-to-reopen-the-economy-a-key-unknown-remains-how-deadly-is-the-coronavirus/2020/04/17/0bd2f938-7e49-11ea-a3ee-13e1ae0a3571_story.html

⁴⁸ Tian-Yuan Xiong et al., *Coronaviruses and the cardiovascular system: acute and long-term implications*, EURO. HEART J (Mar. 18, 2020), <https://academic.oup.com/eurheartj/article/doi/10.1093/eurheartj/ehaa231/5809453>.

lung capacity.⁴⁹ COVID-19 targets the heart muscle, causing inflammation of the muscle called myocarditis.⁵⁰ Myocarditis affects both the heart muscle and electrical system leading to heart failure that limits an individual's ability to work and exercise for the remainder of their life.⁵¹ COVID-19 also triggers an exaggerated response of the immune system called cytokine release syndrome, which can result in damage to various organs, including permanent kidney injury that requires dialysis and neurological injury.⁵²

67. Although COVID-19 can cause serious symptoms for any individual, up to and including death, its effects are much more severe for certain populations.

68. Among the highest risk populations, the fatality rate from COVID-19 is approximately 15%.⁵³ For high risk patients who do not die from the disease, the recovery period is prolonged, and individuals have a “profound” “need for extensive rehabilitation.”⁵⁴

69. Individuals older than 50 are more vulnerable to COVID-19, and those over 70 face a particularly serious risk of death from the disease.⁵⁵

70. Various medical conditions also increase the risk of serious consequences from COVID-19 for individuals of any age. These conditions include lung disease, heart disease, diabetes, being immunocompromised (from cancer, HIV, autoimmune disease, etc.), blood disorders (including sickle cell disease), chronic liver or kidney disease, inherited metabolic disorders, stroke, developmental delay, or pregnancy.⁵⁶

⁴⁹ Golob Decl. at ¶ 9.

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *Id.* at ¶ 4.

⁵⁴ *Id.*

⁵⁵ *See Stern Decl.* at ¶ 4; *Golob Decl.* at ¶ 3.

⁵⁶ *Golob Decl.* at ¶ 3.

71. Black individuals have faced significantly increased risks of both infection and death from COVID-19 in Arkansas, making up less than 16% of the population but accounting for 29.4% of confirmed cases and 36.8% of deaths.⁵⁷ This is consistent with the severe racial disparities with respect to the pandemic in other parts of the country. In Illinois, Black people comprise less than 15% of the population but account for 30% of the state’s cases and 40% of deaths.⁵⁸ Similarly, 40% of those who have died in Michigan from COVID-19 are Black as compared to 14% of the state’s population.⁵⁹ And the same trend is evident in Louisiana, where Black people make up 33% of the population but account for 70% of deaths.⁶⁰ COVID-19 has a disproportionately harmful effect on Black people because they are more likely to have pre-existing conditions that exacerbate the symptoms of the disease due to environmental and economic factors and because of inequalities in the health care system.⁶¹

II. Conditions in ADC Facilities Create Serious Risk of COVID-19-Related Infection, Disease, and Death.

72. On March 27 and April 15, 2020, Arkansas Secretary of the Department of Health Nathaniel Smith acknowledged that the correctional facility “setting[] pose[s] a high risk for transmission of COVID-19.”

73. Indeed, correctional facilities are epicenters for infectious diseases, like COVID-

⁵⁷ *ADH COVID-19 Demographic Slide Deck*, Ark. Dep’t of Health, https://www.healthy.arkansas.gov/images/uploads/pdf/Presentation_-_Demographics_PPT.pdf (last updated Apr. 19, 2020).

⁵⁸ Jan Wolfe, *African Americans more likely to die from coronavirus, early data shows*, Reuters, Apr. 6, 2020, <https://www.reuters.com/article/us-health-coronavirus-usa-race/african-americans-more-likely-to-die-from-coronavirus-illness-early-data-shows-idUSKBN21O2B6> .

⁵⁹ *See id.*

⁶⁰ Lauren Zannolli, *Data from US south shows African Americans hit hardest by Covid-19*, The Guardian, Apr. 8, 2020, <https://www.theguardian.com/world/2020/apr/08/black-americans-coronavirus-us-south-data>.

⁶¹ Wolfe, *supra* n.62; Colleen Walsh, *COVID-19 Targets Communities of Color*, Harvard Gazette, Apr. 14, 2020.

19, because of they have higher levels of risk factors for infection; conditions that unavoidably entail close contact in often overcrowded, poorly ventilated, and unsanitary facilities; and poor access to healthcare services relative to that available in community settings.⁶²

74. Prisons are congregate environments (i.e., places where people live and sleep in close proximity).⁶³ In such environments, infectious diseases that are transmitted via the air or touch are more likely to spread, and therefore present an increased danger for the spread of COVID-19 if and when it is introduced into the facility.⁶⁴

75. COVID-19 has been especially dangerous in areas of close confinement, such as cruise ships and assisted living facilities. In early March 2020, the highest known person-to-person transmission rates for the virus were in a nursing home in Kirkland, Washington and on cruise ships in Japan and off the coast of California.⁶⁵ More recently, the highest recorded transmission rates have been in Rikers Island, a jail facility in New York City, with a rate of transmission that is over seven times higher than the city overall.⁶⁶

76. Similarly, on March 30, 2020, the captain of the aircraft carrier USS Theodore Roosevelt, Captain Brett Crozier, raised alarms about the spread of COVID-19 infection among the thousands of sailors on board.⁶⁷ In his letter to Navy officials, Captain Crozer noted that the

⁶² Stuart A. Kinner et al., Comment, *Prisons and custodial settings are part of a comprehensive response to COVID-19*, 5 *Lancet Public Health* e188 (2020), <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930058-X>; see also Bethany Young and Katie Robertson, *How Should Prisons and Jails Prepare for COVID-19?*, Urban Institute (Mar. 20, 2020), <https://www.urban.org/urban-wire/how-should-prisons-and-jails-prepare-covid-19>.

⁶³ Stern Decl. at ¶ 9.

⁶⁴ *Id.*

⁶⁵ Golob Decl. at ¶ 12.

⁶⁶ *Id.*

⁶⁷ Matthias Gafni and Joe Garofoli, *Exclusive: Captain of aircraft carrier with growing coronavirus outbreak pleads for help from Navy*, *San Francisco Chronicle*, Mar. 31, 2020,

“environment most conducive to spread of the disease is the environment the crew of the [Theodore Roosevelt] is in right now,” including:

- a. “Large amounts of Sailors in a confined space”;
- b. “Open, shared berthing”;
- c. “Shared restroom facilities”;
- d. “Confined, shared workspaces . . .”;
- e. “Shared messing for large numbers”; and
- f. “Meals cooked / food provided by exposed personnel”⁶⁸

77. In order to “[p]revent unnecessary deaths, reduce the number of Sailors that contract COVID-19 and eliminate future virus spread,” Capt. Crozier agreed that “[e]very Sailor must be guaranteed virus-free and the ship environment must be disinfected. One infected Sailor introduced to the ship will spread the virus.”⁶⁹ Capt. Crozier further asserted that “[d]ecisive action is required. . . . Sailors do not need to die.”⁷⁰

78. As of April 17, 2020, 660 crew members (13%) tested positive for the virus,⁷¹ with one casualty—41-year-old Aviation Ordnanceman Chief Petty Officer Charles Robert Thacker Jr., who is from Fort Smith, Arkansas.⁷²

<https://www.sfchronicle.com/bayarea/article/Exclusive-Captain-of-aircraft-carrier-with-15167883.php>.

⁶⁸ *Id.*, Letter from Capt. Brett E. Crozier, U.S. Navy, Subj: Request for Assistance in Response to COVID-19 Pandemic, Mar. 30, 2020, at 2.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 3-4.

⁷¹ Matthew Impelli, *660 Crew Members on USS Theodore Roosevelt Test Positive for Coronavirus*, *Newsweek*, Apr. 17, 2020, at <https://www.newsweek.com/660-crew-members-uss-theodore-roosevelt-test-positive-coronavirus-1498612>.

⁷² Sam LaGrone, *Navy Identifies Carrier Roosevelt Sailor Who Died from COVID-19*, U.S. Naval Institute News, Apr. 16, 2020, <https://news.usni.org/2020/04/16/navy-identifies-carrier-roosevelt-sailor-who-died-from-covid-19>.

79. Because ADC prisoners are housed in close quarters, unable to maintain a six-foot distance from others, and share or touch objects used by others, the risks of contracting COVID-19 are greatly, if not exponentially, increased, as is already evidenced by the spread of COVID-19 in other congregate environments.⁷³ Indeed, despite the significant resources and discipline of the U.S. military, over 600 sailors have become infected and one sailor has died from widespread infection in a single aircraft carrier.

80. The risk of COVID-19 spreading throughout ADC facilities is exceptionally high, in part, because of the presence of outsiders and staff, who may be asymptomatic or presenting COVID-19 symptoms in these facilities.⁷⁴ Dr. Robert Redfield, Director of the CDC, has warned that as many as 25% of individuals infected with COVID-19 may not show symptoms.⁷⁵ In fact, of the 600 confirmed infections in Cummins Unit, most are asymptomatic.⁷⁶ Thus, screening outsiders, including staff and visitors, for symptoms of COVID-19, will not necessarily prevent the introduction of COVID-19 from the outside because the virus can spread “before people show symptoms.”⁷⁷

81. Arkansas has already witnessed the spread of COVID-19 in its correctional facilities. At the end of March 2020, an agricultural worker at the Cummins Unit tested positive. Subsequently, on April 12, 2020, a person incarcerated at Cummins Unit tested positive for

⁷³ Stern Decl. at ¶ 9.

⁷⁴ Stern Decl. at ¶ 9.

⁷⁵ Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times, Mar. 30, 2020, at <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

⁷⁶ Meghan Rhoos, *One Arkansas Prison Makes Up Almost a Third of State's Coronavirus Cases*, Newsweek, Apr. 20, 2020, <https://www.newsweek.com/one-arkansas-prison-makes-almost-third-states-coronavirus-cases-1499045>.

⁷⁷ See Ctrs. for Disease Control & Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

COVID-19; this was the first known positive case in the ADC incarcerated population.⁷⁸ People housed in that individual's barracks were tested in the following days, revealing that 44 of the 46 other incarcerated people housed in his barracks were positive.⁷⁹

82. The Cummins Unit now has the most confirmed cases of COVID-19 of any correctional facility in Arkansas with 600 incarcerated people testing positive as of April 19, 2020⁸⁰—a more than 1,300% increase from April 13, when fewer than 50 incarcerated people in Cummins were confirmed positive.⁸¹ In addition, 57 prisoners in a federal prison in Forrest City and 62 incarcerated parole and probation violators in Little Rock have tested positive for the virus.⁸² Currently, incarcerated people make up approximately one in three verified COVID-19 infections statewide. Even with these alarming figures, the actual number of COVID-19 infections in ADC facilities is likely much higher due to the lack of widespread testing.

83. Along with facing greater risk of infection, prisoners in Arkansas are also more likely to have underlying medical conditions that render them especially vulnerable to severe illness and even death from COVID-19. The Department of Justice has found that “[b]oth prisoners and jail inmates were more likely than the general population to report ever having a chronic

⁷⁸ John Moritz, *Arkansas prison farm worker has covid-19, official says*, Arkansas Democrat Gazette, Apr. 1, 2020, <https://www.arkansasonline.com/news/2020/apr/01/prison-farm-worker-has-covid-19-officia-1/>.

⁷⁹ Max Brantley, *Coronavirus update: Big jump in Cummins prison cases; a goal of beginning a return to work May 4*, Ark. Times, April 17, 2020, <https://arktimes.com/arkansas-blog/2020/04/17/coronavirus-update-big-jump-in-cummins-prison-cases-a-goal-of-beginning-a-return-to-work-may-4>.

⁸⁰ Meghan Roos, *One Arkansas prison makes up almost a third of State's coronavirus cases*, Newsweek, Apr. 20, 2020, <https://www.newsweek.com/one-arkansas-prison-makes-almost-third-states-coronavirus-cases-1499045>.

⁸¹ Max Brantley, *Coronavirus update: Big jump in Cummins prison cases; a goal of beginning a return to work May 4*, Ark. Times (Apr. 17, 2020), <https://arktimes.com/arkansas-blog/2020/04/17/coronavirus-update-big-jump-in-cummins-prison-cases-a-goal-of-beginning-a-return-to-work-may-4>.

⁸² *Id.*

condition or infectious disease.”⁸³ “[H]alf of state and federal prisoners and local jail inmates reported ever having a chronic condition,” such as “cancer, high blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and cirrhosis of the liver,” and “[t]wenty-one percent of prisoners . . . reported ever having an infectious disease,” including “including tuberculosis, hepatitis B and C, and other sexually transmitted diseases (STDs).”⁸⁴

84. Health profiles of incarcerated people show that they are significantly sicker and more vulnerable to COVID-19 than the general population.⁸⁵ For example, incarcerated people are more likely to have medical conditions such as asthma, tuberculosis, hypertension, diabetes, and heart disease, as compared to the general population.⁸⁶ Also, the prevalence of tuberculosis is 12 times higher in state and federal prisons compared to overall U.S. population.⁸⁷

⁸³ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Medical Problems of State and Federal Prisons and Jail Inmates, 2011-12* p. 1 (2016), <https://www.bjs.gov/content/pub/pdf/mpsfjji1112.pdf>.

⁸⁴ *Id.*

⁸⁵ 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://www.prisonpolicy.org/blog/2020/03/06/pandemic/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

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.

Source: Prison Policy Initiative, <https://www.prisonpolicy.org/blog/2020/03/06/pandemic>

85. Like tuberculosis, the hazardous combination of overcrowding and poor ventilation, along with prisoners living in close quarters and without available means to ensure preventative hygiene practices, causes correctional facilities to become a known breeding ground for a highly infectious respiratory illness like COVID-19.

86. “Chronic health conditions, such as diabetes, hypertension, and asthma, . . . [are a] growing proportion of correctional health care needs” due to “two trends: the aging prison population and the nation’s general obesity epidemic. About 40% of all inmates are estimated to have at least one chronic health condition. With a few exceptions, nearly all chronic health conditions are more prevalent among inmates than in the general population.”⁸⁸

87. The Department of Justice has reported 74% of prisoners to be overweight, obese,

⁸⁸ Alexandria Macmadu and Josiah D. Rich, *Correctional Health Is Community Health*, 13 Issues in Science and Technology, Vol. XXXII, No. 1 (2015), <https://issues.org/correctional-health-is-community-health/>.

or morbidly obese.⁸⁹ Problems with obesity within the prison population is especially troubling in this pandemic because obesity may be an important predictor of severe COVID-19-related illness, especially among younger people.⁹⁰ This is because people with obesity may already have a compromised respiratory system, and “[a]bdominal obesity, [which is] more prominent in men, can cause compression of the diaphragm, lungs and chest capacity.”⁹¹

88. In addition, a growing elderly prison population is especially at risk of serious COVID-19 disease or death. In fact, the “percentage of people in state prisons who are 55 and older more than tripled between 2000 and 2016,” and, “[f]or the first time, older adults make up a larger share of the state prison population than people from 18 to 24.”⁹²

89. Because individuals in jails and prisons are considered physiologically comparable to individuals in the community several years older, many state departments of corrections and the Federal Bureau of Prisons define “elderly” or “older” variously between 50 and 60 years of age.⁹³ Accordingly, people over the age of 50 in correctional settings are considered vulnerable to the COVID-19 virus.⁹⁴

⁸⁹ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Medical Problems of State and Federal Prisons and Jail Inmates, 2011-12* p. 1 (2016), <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>.

⁹⁰ Roni Caryn Rabin, *Obesity Linked to Severe Coronavirus Disease, Especially for Younger Patients*, N.Y. Times (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/health/coronavirus-obesity-higher-risk.html>.

⁹¹ *Id.*

⁹² Weihua Li and Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, Marshall Project (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

⁹³ Stern Decl. at ¶ 9.

⁹⁴ *Id.*

III. The Spread of Covid-19 In ADC Facilities Jeopardizes the Public Health of Surrounding Communities, Especially Black Communities.

90. Prisons are not fully closed environments. When the COVID-19 virus is introduced to a prison, all persons within the facility—whether they are staff or a incarcerated people—are at heightened risk of contracting the virus and, in turn, spreading the virus to others with whom they live or come into contact with in their own homes and neighborhoods.⁹⁵ The harm caused by a COVID-19 outbreak in a correctional facility, therefore, is not confined to those who are incarcerated or work in that facility. Instead, this harm poses a serious health risk to the surrounding community.⁹⁶

91. For example, scarce community health resources like emergency departments, hospital beds, and ventilators would inevitably become more scarce in the event of a COVID-19 outbreak in a detention facility, because incarcerated people are more likely to have underlying medical conditions that carry a significantly increased risk of severe complications from COVID-19.⁹⁷

92. A COVID-19 outbreak would exceed the capacity of the local health infrastructure because treatment for serious cases requires significant medical intervention, including ventilator assistance and intensive care support.⁹⁸ If the need for ICU beds and life-saving medical equipment exceeds supply, the death rate will increase for the entire population of Arkansas.

93. The distribution of correctional facilities also poses a substantial risk that a COVID-19 outbreak in ADC facilities will create a dangerous shortage of ICU beds in surrounding areas.

⁹⁵ 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://www.prisonpolicy.org/blog/2020/03/06/pandemic/>.

⁹⁶ Stern Decl. at ¶ 11.

⁹⁷ Stern Decl. at ¶ 9.

⁹⁸ *See id.* at ¶ 8.

Of the 20 ADC facilities, nine are located in counties with no ICU beds in surrounding communities.⁹⁹ Six more are located in Jefferson County, which has only 34 ICU beds.¹⁰⁰ All three of the facilities with the largest detention capacities—Cummins Unit, East Arkansas Regional Unit, and Varner Unit—are in counties with no ICU beds.¹⁰¹

94. The geographic distribution of ADC facilities greatly increases the risk of a COVID-19 outbreak in communities surrounding those facilities, which would disproportionately impact Arkansas’s Black residents.

95. The ADC runs twenty detention facilities across the State.¹⁰² These facilities are not evenly distributed across Arkansas. Instead, they are concentrated in the southeastern part of the State, near Pine Bluff.¹⁰³

96. Black people make up 15.7% of the Arkansas population.¹⁰⁴ Yet eight of the 20 ADC facilities are located in counties where Black individuals comprise a majority of residents.¹⁰⁵ In total, 16 of the 20 ADC detention facilities are located in counties that have a higher percentage

⁹⁹ These facilities are Cummins Unit, Delta Regional Unit, East Arkansas Regional Unit, Grimes Unit, McPherson Unit, North Central Unit, Texarkana Regional Corrections Center, Varner and Varner Supermax Unit, Wrightsville Unit. *See Facilities*, Ark. Dep’t of Correction, , <https://adc.arkansas.gov/facilities> (listing facilities and locations) (last visited Apr. 20, 2020); Ninette Sosa, *A Closer Look: Arkansas and ICU Beds by County*, KNWA Fox (Mar. 27, 2020), <https://www.nwahomepage.com/lifestyle/health/coronavirus/a-closer-look-arkansas-and-icu-beds-per-county/> (listing ICU beds by county).

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *Facilities*, Ark. Dep’t of Correction, <https://adc.arkansas.gov/facilities> (last visited Apr. 20, 2020).

¹⁰³ *See id.*

¹⁰⁴ *Quick Facts: Arkansas*, United States Census, <https://www.census.gov/quickfacts/AR> (last visited Apr. 20, 2020).

¹⁰⁵ *See Facilities*, Ark. Dep’t of Correction, , <https://adc.arkansas.gov/facilities> (last visited Apr. 20, 2020) (listing facilities and locations); Arkansas Demographics, <https://www.arkansas-demographics.com/counties-cities-that-begin-with-A> (last visited Apr. 20, 2020) (providing demographic data for all Arkansas counties).

of Black people than the State—usually by a significant margin.¹⁰⁶

97. If COVID-19 spreads throughout ADC's facilities, Black Arkansans will disproportionately suffer consequences from that spread, as compared to their percentage of the Arkansas state population.

IV. Defendants Intentionally Fail to Adopt and Implement Adequate Policies and Procedures to Prevent and Mitigate the Spread of COVID-19.

98. On March 11, 2020, Defendant Kelley issued a memorandum outlining ADC's protocols to reduce the risk and combat the spread of COVID-19 within ADC facilities. This memorandum only encouraged regular hand washing, covering coughs and sneezes, avoiding handshakes, *continuing* cleaning (instead of intensifying it), and telling staff members to stay at home if ill.¹⁰⁷

99. On March 23, 2020, the CDC published the CDC Guidance.¹⁰⁸ The purpose of the CDC Guidance is, in part, to help correctional facilities ensure the protection of the health and safety of incarcerated people. The ADC leadership, including Defendant Kelly, were made aware of the CDC guidance on March 23, 2020.

100. Defendants' departures from the CDC Guidance are many and have placed incarcerated people in ADC facilities at a significant and unnecessary heightened risk of infection, severe illness, and/or death despite widespread knowledge of the highly contagious nature of COVID-19 and the severe consequences of infection, especially among older people and people with underlying health and medical conditions.

¹⁰⁶ *See id.*

¹⁰⁷ Wendy Kelley, Sec. of Corrections, Memorandum (Mar. 11, 2020), [https://ssl-adc.ark.org/images/uploads/Coronavirus Notice for Web - 3-11-2020.pdf](https://ssl-adc.ark.org/images/uploads/Coronavirus_Note_for_Web_-_3-11-2020.pdf).

¹⁰⁸ The CDC is a federal agency and the leading national public health institute of the United States. It is charged with protecting public health and safety through the control and prevention of disease.

101. Defendants' failures to adopt and implement adequate policies and procedures to prevent and mitigate the spread of COVID-19 fall into seven broad categories, which are discussed below.

102. *First*, Defendants failed to adequately plan to prevent or mitigate the spread of COVID-19 in ADC facilities. Importantly, the CDC Guidance recommends that correctional facilities should develop contingency plans for reduced workforces due to staff absences.

103. As a result of Defendants' failure to adequately plan for staff shortages, ADC facilities are experiencing unmitigated staffing shortages amid the COVID-19 pandemic. These shortages place Named Plaintiffs and the putative class members at great risk. For example, some Ouachita River Unit staff are not being screened for COVID-19 symptoms, because the facility is desperate for staff due to staffing shortages amid the COVID-19 pandemic. Notably, this failure to screen staff is also in contravention of the CDC Guidance.

104. The CDC Guidance also calls for the provision of PPE and contingency planning for shortages of PPE, but Defendants do not have any such plans. Consequently, several of the Named Plaintiffs and the putative class members are being housed with incarcerated people who have symptoms of COVID-19 but have not been provided face masks to protect others in their barracks.

105. Other Named Plaintiffs have not received any masks, despite having severe underlying medical conditions, reporting symptoms of COVID-19, and repeatedly requesting PPE. For example, Mr. Kent, who has reported having COVID-19 symptoms, has not received a mask even though he submitted his request for one over three weeks ago.

106. When a mask is provided, any attempt to clean the mask requires incarcerated people being without the mask for an unsafe period. After a mask is handwashed, it cannot be worn

while it is drying. Also, an incarcerated person who sends their mask to the laundry goes without the mask until it is returned to them, and even then, they risk their mask being damaged by the laundry machines. Alarming, many of the masks that are provided to incarcerated people were made by incarcerated people in Cummins Unit, which has the greatest known COVID-19 infection rate of any ADC facility. Some of the incarcerated people making the masks at Cummins Unit are known to have COVID-19.

107. *Second*, Defendants have failed to implement the training and educational interventions necessary to prevent the spread of COVID-19 in correctional facilities. The CDC Guidance states that correctional staff and incarcerated people should be trained on donning, doffing, and disposing of PPE. However, Plaintiffs and the putative class members have not been instructed on how to properly don, doff, or dispose of PPE. Many ADC staff members wear their face masks below their nose—if they wear them at all—and do not change their protective gloves regularly, in contravention of the CDC Guidance for the use of PPE. Moreover, those class members who have received face masks only have one, which, as mentioned above, they are required to wash themselves, leading to frequent handling of contaminated masks or no mask at all while it is drying.

108. Whereas the CDC Guidance recommends correctional facilities post signage informing staff and incarcerated people how to report COVID-19 symptoms and telling staff to stay at home when sick, Defendants do not require any such signage. Also, the limited signage required by Defendants is only directed towards visitors to correctional facilities and staff, but not incarcerated people. Many Named Plaintiffs and putative class members are therefore being deprived of needed reminders of how they can protect themselves and others from infection. For

example, Mr. Kent, who is incarcerated in the Varner Unit, reports not seeing any signage related to COVID-19 in the prison.

109. *Third*, Defendants have not implemented the heightened hygienic, cleaning, and disinfecting practices called for by the CDC Guidance. Named Plaintiffs also do not have access to the cleaning supplies necessary to sanitize themselves, their personal items, or their living areas. Indeed, ADC rules continue to restrict access to such crucial cleaning supplies, even in the midst of the COVID-19 pandemic.

110. Defendants' failures are also reflected in the unsanitary conditions of ADC facilities. ADC has not intensified cleaning and disinfecting its facilities amid the pandemic. For example, Mr. Otwell's bathroom in Ouachita River Unit is only cleaned once a week, at the most. Mr. Nickson's shared showers in Cummins Unit is similarly filthy, which is why he chooses to clean himself using the sink in his cell instead of the prison's shared showers.

111. Notably, a man who works in sanitation at Ouachita River Unit has confirmed that the sanitation work crew does not clean the prison's kitchen. Indeed, Mr. Serrato believes the kitchen at Ouachita River Unit is the dirtiest place in the prison. Food from this unsanitary kitchen is served on dining tables that are washed with recycled and soiled brownish water.

112. In addition, the ADC has not followed the CDC's recommendation that staff clean shared surfaces several times a day. Even though Mr. Serrato shares a barracks with over 40 people, frequently touched surfaces in his barracks are only disinfected bi-monthly, instead of several times a day as recommended by the CDC.

113. These unsanitary conditions and inadequate levels of cleaning and disinfecting, which are in contravention of the CDC Guidance, place Named Plaintiffs and the putative class members at an inexcusably higher risk of contracting COVID-19.

114. *Fourth*, Defendants have failed to adequately implement measures to reduce crowding, minimize interpersonal contact, and encourage social distancing. The ADC has not heeded the CDC's caution against unnecessarily transferring incarcerated people from one facility to another. As was the case before the COVID-19 pandemic, dozens of incarcerated people are currently being transported from Ouachita Unit to other ADC facilities daily. Similarly, the transfer of incarcerated people into Varner Unit from other ADC facilities has continued unabated amid the pandemic.

115. Dozens of incarcerated people are currently engaging in recreational activities and having meals together in the same place, at the same time. For example, Mr. Kouri and Mr. Serrato have spent recreation time with incarcerated people from other barracks amid the COVID-19 pandemic. Also, people incarcerated in ADC facilities sit within two feet of each other while dining; this is in contravention of the CDC's recommendation of six feet of social distancing.

116. Named Plaintiffs and the putative class members are similarly unable to social distance in their barracks, where they sleep. Mr. Otwell is housed in a barracks in which the beds are located within 2.5 feet of each other. Mr. Serrato's bed is similarly situated within 2.5 feet of the beds of men around him.

117. This inability to social distance, paired with a failure to adequately implement measures to reduce overcrowding, place Named Plaintiffs and the putative class members at a heightened risk of contracting COVID-19.

118. *Fifth*, Defendants do not adequately address suspected cases of COVID-19. If an incarcerated person exhibits symptoms of COVID-19, the CDC Guidance calls for them to be immediately given a face mask, placed in isolation, provided a medical evaluation and treatment,

and evaluated for possible testing. In contrast, the ADC is not providing symptomatic people a mask, are not medically evaluating or treating them, and/or do not evaluate them for testing.

119. Named Plaintiffs have firsthand experience with ADC's inadequate treatment of incarcerated people exhibiting symptoms of COVID-19. For example, Mr. Kent has informed prison staff that he has symptoms of COVID-19, but has not received medical treatment, despite being especially vulnerable to contracting COVID-19 due to his serious heart condition. When Mr. Kouri, who is severely obese and therefore vulnerable to COVID-19, reported COVID-19 symptoms, such as shortness of breath and a cough, he was not evaluated for testing. Instead, he was provided eyedrops and sent back to his regular barracks. Alarming, Mr. Kouri comes into contact with over a hundred people in the prison per day, including people in his barracks, some of whom are bedridden and exhibiting symptoms of COVID-19. Similarly, Mr. Nickson—who, as a 61-year-old diabetic, has an increased risk of contracting and dying from COVID-19—was not placed in isolation, despite his reporting symptoms of COVID-19. Instead, he is still being housed with his non-symptomatic roommate.

120. Defendants' cavalier, unconstitutionally inadequate manner of handling suspected COVID-19 cases places Named Plaintiffs and the putative class members at a heightened risk of contracting COVID-19.

121. *Sixth*, Defendants do not adequately handle incarcerated people or staff who have had contact with people known to have tested positive for COVID-19 ("Close Contact Case"). In contravention of the CDC Guidance, Defendants have not implemented a 14-day quarantine of Close Contact Cases (with the exception of positive incarcerated people's cellmates), nor does it call for monitoring Close Contact Cases for COVID-19 symptoms. Defendants also depart from the CDC Guidance by not requiring ADC staff who have had close contact with a COVID-19-

positive person to not return to work unless they are asymptomatic 14 days after their exposure to COVID-19. Instead, Defendants permit staff members who actually test positive to go to work, provided they only come into contact with infected incarcerated people. These omissions place Named Plaintiffs and the putative class members in great peril.

122. *Seventh*, Defendants have woefully inadequate policies and procedures for addressing the presence of a person who has tested positive for COVID-19 in an ADC facility. In the event of an incarcerated person or staff member testing positive for COVID-19, the CDC Guidance calls for the facility to close off the areas used by the person who contracted COVID-19. These areas are to be well ventilated for at least 24 hours before they are disinfected by people equipped with proper PPE. Defendants, however, have not implemented any of these measures.

123. In addition, Defendants have departed from the CDC Guidance by not informing incarcerated people that someone in their correctional facility has tested positive for COVID-19, thereby foregoing an opportunity to encourage incarcerated people to exercise more vigilance in their hygiene and cleaning habits when such extra vigilance is needed most. Not even people incarcerated at Cummins Unit, with its alarmingly high COVID-19 infection rate, have been informed of the extent of the outbreak in the prison.

124. ADC has policies concerning precautions that can be taken when dealing with incarcerated people diagnosed with diseases that can be transmitted via air, respiratory droplets, or contact with surfaces containing a virus, but these years-old policies do not explain when these precautions should be taken.

125. Defendants know that the above-mentioned failures to adequately prevent and mitigate against the risk of COVID-19 spreading throughout ADC facilities unnecessarily heighten the risk of Plaintiffs and the putative class members contracting COVID-19.

126. On April 8, 2020, the Arkansas Civil Liberties Union sent a letter to Governor Hutchinson, emphasizing the need to comply with the CDC Guidance in ADC facilities, in part, by mandating social distancing and minimizing the transfer of incarcerated people from one detention facility to another. This letter was also sent to Defendant Kelley. Despite receipt of the serious warnings in this letter, Defendants have failed to implement any of the recommendations.

CAUSES OF ACTION

COUNT ONE

Violation of the Eighth Amendment

(42 U.S.C. § 1983)

All Plaintiffs/Petitioners versus All Defendants

127. Plaintiffs/Petitioners incorporate by reference all allegations contained in the preceding paragraphs as if set forth fully herein.

128. The Eighth Amendment to the Constitution of the United States, as incorporated through the Fourteenth Amendment, provides that individuals who are incarcerated following a conviction have the right to be free from cruel and unusual punishment. That right entails, among other things, the State's obligation to protect incarcerated individuals from a substantial risk of serious harm to their health and safety. *See generally Farmer v. Brennan*, 511 U.S. 825 (1994).

129. The State's failure to provide adequate protection and, if necessary, medical care in response to the rapid spread of a deadly virus constitutes deliberate indifference to the serious medical needs of incarcerated individuals in violation of the Eighth Amendment.

130. Plaintiffs/Petitioners, and the class they represent, suffer a substantial risk of serious harm to their health and safety due to the spread of COVID-19 in ADC facilities.

131. Defendants/Respondents have acted with deliberate indifference to the risks posed by COVID-19 to Plaintiffs/Petitioners.

132. Defendants/Respondents knew, and know, of the obvious and well-established

risks to Plaintiffs/Petitioners caused by COVID-19.

133. Defendants/Respondents have failed to act with reasonable care to mitigate the risk posed by COVID-19.

134. As a result of Defendants/Respondents' actions, Plaintiffs/Petitioners and members of the proposed Class are suffering irreparable injury.

135. At all times, Defendants/Respondents acted under color of state law.

COUNT TWO
Petition for Writ of Habeas Corpus
Violation of the Eighth Amendment
(28 U.S.C. § 2241)
High Risk Subclass versus All Defendants

136. Plaintiffs/Petitioners repeat and re-allege the preceding paragraphs as if set forth herein.

137. 28 U.S.C. § 2241(c)(3) permits this Court to order the release of incarcerated individuals like Plaintiffs/Petitioners who are being held “in violation of the Constitution or laws . . . of the United States.” *See also Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“It is clear, not only from the language of §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.”).

138. Defendants/Respondents are currently holding Plaintiffs/Petitioners in custody in violation of the Eighth Amendment. Given the highly contagious nature of COVID-19 and the deadly and debilitating threat that it poses to Plaintiffs/Petitioners, Defendants/Respondents cannot currently mitigate the risks to Plaintiffs/Petitioners sufficiently to satisfy the Eighth Amendment by any means short of release from custody.

COUNT THREE
Violation of the Americans with Disabilities Act

(42 U.S.C. § 12101 et seq.)
Disability Subclass versus All Defendants

139. Plaintiffs/Petitioners repeat and re-allege the preceding paragraphs as if set forth herein.

140. Defendants/Respondents have intentionally discriminated against Named Plaintiffs and the members of the Disability Subclass by denying them reasonable accommodations that have been recommended by the CDC and are necessary to protect them from COVID-19.

141. Reasonable accommodations necessary to protect incarcerated individuals with disabilities include, but are not limited to:

- a. Access to alcohol-based sanitizer;
- b. Provision of cleaning supplies, including products containing bleach, adequate to clean individuals' housing areas;
- c. Provision of PPE;
- d. Access to antibacterial hand soap and towels to enable individuals to wash their hands as necessary;
- e. Implementation of social distancing measures in all locations where incarcerated people are required to congregate; and
- f. Release or transfer to home confinement if social distancing is not practicable.

142. The failure to provide these accommodations constitutes illegal discrimination under the ADA and entitles Plaintiffs/Petitioners to injunctive and declaratory relief.

143. Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42

U.S.C. § 12132.

144. ADC is a public entity covered by Title II of the ADA. 42 U.S.C. § 12131.

145. For purposes of the ADA, medical treatment and safe conditions of confinement are programs or services that ADC facilities provide to Plaintiffs/Petitioners.

146. Named Plaintiffs/Petitioners and other members of the Disability Subclass have a physical impairment that substantially limits one or more of their major life activities.

147. Named Plaintiffs/Petitioners and other members of the Disability Subclass are qualified individuals with a disability under the meaning of both the ADA and the Rehabilitation Act.

148. The ADC knows that Named Plaintiffs/Petitioners and other members of the Disability Subclass are qualified individuals with a disability. The ADC knows that individuals with disabilities are in especially acute need of access to accommodations during the COVID-19 pandemic, including without limitation hand sanitizer and the other items identified above, yet it has denied these reasonable accommodations to Named Plaintiffs/Petitioners and other members of the Disability Subclass.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs/Petitioners and proposed class members respectfully request that this Court:

- a. Certify the proposed Class and Subclasses;
- b. Enter an order declaring that Defendants/Respondents' policies and practices regarding COVID-19 violate the Eighth Amendment to the United States Constitution;
- c. Enter an order declaring that the Defendants/Respondents have violated the

ADA by failing to reasonably accommodate incarcerated individuals with disabilities;

d. Enter a temporary restraining order, preliminary injunction, permanent injunction, and/or writs of habeas corpus requiring Defendants/Respondents to immediately release members of the High Risk Subclass and Disability Subclass or transfer them to home confinement;

e. Appoint a special master or an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding the number of incarcerated people that each ADC facility can house while following the CDC guidance on best practices to prevent the spread of COVID-19.

f. Enter a temporary restraining order, preliminary injunction, permanent injunction, and/or writs of habeas corpus requiring that Defendants/Respondents:

i. Ensure that incarcerated individuals can remain six feet apart to practice social distancing in compliance with CDC Guidance;

ii. Ensure that each incarcerated individual receives a free and adequate personal supply of: hand soap sufficient to permit frequent hand washing, paper towels, facial tissues, cleaning implements such as sponges or brushes, and disinfectant products that are effective against COVID-19.

iii. Ensure that all individuals have access to hand sanitizer containing at least 60% alcohol;

iv. Provide daily access to showers and clean laundry, including clean towels after each shower;

v. Require that all ADC staff wear PPE consistent with the CDC Guidance, including masks and gloves, when interacting with visitors and

incarcerated individuals or when touching surfaces in common areas;

vi. Provide an anonymous mechanism for incarcerated individuals to report staff who violate these guidelines so that appropriate corrective action may be taken;

vii. Take each incarcerated person's temperature daily (with a properly disinfected and accurate thermometer) to identify potential COVID-19 infections;

viii. Assess each incarcerated individual daily through questioning to identify potential COVID-19 infections;

ix. Conduct immediate testing for anyone displaying known symptoms of COVID-19;

x. Immediately provide clean masks for all individuals who display or report potential COVID-19 symptoms until they can be evaluated by a qualified medical professional or placed in non-punitive quarantine and ensure the masks are properly laundered with replacements as necessary;

xi. Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, commissary, phone and video visitation with loved ones, communication with counsel, and personal property;

xii. Clean and disinfect frequently touched surfaces with disinfectant products effective against the virus that causes COVID-19 (at the manufacturer's recommended concentration), as well as surfaces in common areas, every two hours during waking hours, and at least once during the night;

xiii. Ensure incarcerated people are provided guidance on how to protect

themselves from COVID-19 and reduce COVID-19 transmission;

xiv. Assure incarcerated people are told that they will not be retaliated against for reporting COVID-19 symptoms;

xv. Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;

xvi. Provide incarcerated individuals with sufficient and effective cleaning supplies free of charge so that they may clean frequently touched items, such as phones, before use;

xvii. Indefinitely waive all medical co-pays for individuals experiencing possible COVID-19 symptoms;

xviii. Provide frequent communication to all incarcerated individuals regarding COVID-19, measures taken to reduce the risk of infection, best practices for incarcerated people to avoid infection, and any changes in policies or practices;

xix. Appoint an independent monitor with medical expertise to ensure compliance with these conditions, and provide the monitor with unfettered access to medical units, confidential communication with detained individuals in and out of quarantine, and surveillance video of public areas of the facilities; and

g. Retain jurisdiction over this case until Defendants/Respondents have fully complied with the orders of this Court, and there is a reasonable assurance that they will continue to comply in the future, absent continuing jurisdiction;

h. Issue an order granting reasonable attorneys' fees and costs pursuant to 42 U.S.C. §§ 1988 and 12205; and

i. Grant any further relief that this Court deems necessary.

Dated: April 21, 2020

Respectfully submitted,

By:  _____

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**Pro hac vice* motions forthcoming

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