

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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3	* * * * *	)
4	EDWARD BANKS, et al.,	) Civil Action
5		) No. 20-CV-00849
6	Plaintiffs,	)
7		)
8	vs.	)
9		)
10	QUINCY L. BOOTH, et al.,	) Washington, DC
11		) April 7, 2020
12	Defendants.	) 10:04 a.m.
13		) (MORNING SESSION)
14	* * * * *	)

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

14	FOR THE PLAINTIFFS:	MICHAEL PERLOFF, ESQ.
15	<i>(Appearing</i>	SCOTT MICHELMAN, ESQ.
16	<i>Telephonically)</i>	AMERICAN CIVIL LIBERTIES UNION OF
17		THE DISTRICT OF COLUMBIA
18		915 15th Street, Northwest
19		Second Floor
20		Washington, DC 20005

19	STEVEN D. MARCUS, ESQ.
20	JENNA MARIE COBB, ESQ.
21	JONATHAN ANDERSON, ESQ.
22	PUBLIC DEFENDER SERVICE FOR THE
23	DISTRICT OF COLUMBIA
24	633 Indiana Avenue, Northwest
25	Washington, DC 20004

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APPEARANCES, CONT'D:

FOR THE DEFENDANTS:  
*(Appearing  
Telephonically)*

MICAH IAN BLUMING, ESQ.  
ERIC GLOVER, ESQ.  
PAMELA DISNEY, ESQ.  
OFFICE OF ATTORNEY GENERAL FOR THE  
DISTRICT OF COLUMBIA  
441 Fourth Street, Northwest  
Sixth Floor  
Washington, DC 20001

REPORTED BY:

LISA EDWARDS, RDR, CRR  
Official Court Reporter  
United States District Court for the  
District of Columbia  
333 Constitution Avenue, NW  
Room 6706  
Washington, DC 20001  
(202) 354-3269

1 THE COURT: This is Banks, et al., versus Booth,  
2 et al., 20-CV-849.

3 So I'll turn to the way we're going to be  
4 proceeding. I have some questions that I'm going to direct  
5 to Plaintiffs' counsel and to defense counsel. I'll allow a  
6 response from opposing counsel for whatever their answers  
7 are and a reply if it's appropriate if they bring up  
8 something new. Don't just repeat what you already said on  
9 first time.

10 The seriousness of the pandemic and the fact that  
11 it's highly contagious is a given. So we don't really need  
12 to get into a great deal of information relating to that  
13 other than information that would go to what the conditions  
14 are. But those are certainly a given.

15 And I understand that as of this morning that 20  
16 have tested positive at CDF, the central detention facility,  
17 as well. And there are also a number of tests that I  
18 understand that are pending.

19 If you -- those on the video and -- I'm sorry. I  
20 couldn't get everybody on the video. But if you want to  
21 refer to an answer either from the beginning of my question  
22 or after you answer part of it, if you want someone else to  
23 supplement it, simply give the person's name, and that  
24 person can then provide the rest of the answer.

25 At the end, I'll allow each side to make any

1 additional points that you want to. But what I've tried to  
2 do is to focus on some issues in your pleadings that I  
3 thought we should raise as a discussion.

4 So I've reviewed the Plaintiffs' complaint, the  
5 motion for the temporary restraining order and the  
6 preliminary injunction and all the attachments. I've also  
7 read the pleadings of the Defendants' response to the  
8 Plaintiffs' motion and all of their attachments, which  
9 are -- the attachments and all of those motions are fairly  
10 substantial.

11 My questions are going to be predominantly around  
12 legal issues. They will obviously include potentially some  
13 fact issues. But I will discuss some factual issues at the  
14 end in terms of the conditions.

15 And as part of the discussion, I'm also going to  
16 be bringing up -- I have some somewhat recent information  
17 from DC Superior Court. If I make mistakes in presenting  
18 their information, I'm sure at a later point they'll correct  
19 it.

20 So at this point, as I understand it, for  
21 Plaintiffs first, we have Steven Marcus and Jonathan  
22 Anderson. And as speakers for the Defendants, we have Micah  
23 Bluming. So then let me go ahead and start with the  
24 questions.

25 I'm going to start with some questions for the

1 Plaintiffs. In the pleading, the Defendants identified what  
2 they viewed as certain constraints on the Department of  
3 Corrections. And by that, I mean there's a national  
4 shortage of PPE, budgetary constraints and other kinds of  
5 identification. So do those constraints at the Department  
6 of Corrections and the steps taken in spite of those  
7 constraints preclude a finding of deliberate indifference?  
8 And why are the steps that they've taken to date  
9 insufficient?

10 I realize there's a dispute about whether they've  
11 implemented it; but let's look at it in the context of the  
12 steps they've indicated that they have taken. And there  
13 obviously is a distinction between pretrial in the standards  
14 and post-trial, but I'll get to that a little bit later.

15 So, Plaintiffs, do the constraints on the  
16 Department of Corrections and the steps they've taken in  
17 spite of those constraints preclude a finding of deliberate  
18 indifference? And the steps they've taken, assuming they  
19 have done them, are they to date? Are they insufficient?  
20 So whoever wants to answer from the Plaintiffs.

21 MR. MARCUS: Thank you, your Honor. Steven Marcus  
22 for the Plaintiffs.

23 A couple of points. And I'll start on the facts  
24 before moving to the law.

25 The only factual constraint identified in the

1 record by Defendants is the lack of hand sanitizer that  
2 comes from the Lennard Johnson declaration. At Paragraph 10  
3 of the Johnson declaration, he says the Department of  
4 Corrections lacks a sufficient supply of hand sanitizer to  
5 make it available to every resident.

6 Warden Johnson does not mention a lack of personal  
7 protective equipment, nor does Dr. Jordan mention a lack of  
8 personal protective equipment. The only evidence in the  
9 record is about hand sanitizer.

10 And when you take a closer look at the exhibits  
11 submitted by Defendants, the COVID-19 supply list, which is  
12 intended to be attached to Mr. Johnson's submission but is  
13 attached at Docket No. 25-2, it rebuts Warden Johnson's  
14 claim that there's a lack of hand sanitizer. That shows  
15 that the Department of Corrections currently has 864 bottles  
16 of hand sanitizer currently in stock as of March 24th, and  
17 they expect an additional 864 bottles to be delivered on  
18 April 15th. That supply would ultimately include 80 cases  
19 of Purell hand sanitizer of asserted stocks. So the only  
20 constraint identified by Defendants is actually shown not to  
21 be a constraint in fact only.

22 I also want to mention that our argument about the  
23 deliberate indifference of Defendants goes far beyond the  
24 provision of supplies like hand sanitizer and soap or  
25 personal protective equipment.

1           THE COURT: I understand that. I'm going to get  
2 to the discussion about the Fifth Amendment, the Eighth  
3 Amendment and deliberate indifference a little later. If we  
4 could just focus on this for a second.

5           Now, I assume that you, Mr. Marcus, and  
6 Plaintiffs' counsel looked at this, because they did -- I'm  
7 not sure whether -- I've been getting them, so I'm not sure  
8 where it came from, because I got this from the Center  
9 report. It may have come from Eric Glover or I may have  
10 gotten it, frankly, from the attachments. But there is a DC  
11 Department of Corrections COVID-19 response FAQs, which sets  
12 out questions and indicates different answers which talks  
13 about what they're supplying, what they're doing, et cetera,  
14 in terms of doing it.

15           Have you seen that document, Mr. Marcus or any of  
16 Plaintiffs' counsel?

17           MR. MARCUS: I believe I've seen it on the  
18 Department of Corrections website. I haven't seen it filed  
19 as an exhibit in this matter.

20           THE COURT: So in terms of looking at that, which  
21 is what they put out publicly, would you view what they've  
22 proposed doing as insufficient?

23           MR. MARCUS: Yes, your Honor. I believe that they  
24 have proposed that they are giving personal protective  
25 equipment to high-risk now. I believe "high-risk" is the

1 term they used.

2 Again, this is assuming that Defendants are  
3 actually doing that. We have substantial evidence from the  
4 record showing that even high-risk identified by Defendants  
5 are not given that.

6 THE COURT: I'll get to that later. That's why I  
7 said "assuming they do what they say they're doing."

8 My understanding is that they were -- in terms of  
9 doing it, it would be people dealing with this -- as I  
10 understand it, it would be staff that are working in  
11 isolation, quarantine units, transportation, those who  
12 perform medical or escort details with positive or suspect  
13 residents and medical staff responding to the positive  
14 screens.

15 MR. MARCUS: So let me turn -- assuming that that  
16 is happening, let me turn to the legal question, which is  
17 whether those kinds of constraints can preclude a finding of  
18 deliberate indifference.

19 They don't, your Honor. The *en banc* Ninth Circuit  
20 in the case of *Peralta versus Dillard*, 744 F.3d 1076, held  
21 that lack of resources is not a defense to a claim for  
22 relief because prison officials may be compelled to  
23 extinguish the pool of existing resources in order to remedy  
24 continuing Eighth Amendment violations.

25 And so --



1 THE COURT: Do you have a DC case?

2 MR. MARCUS: I don't have a DC Circuit case for  
3 that.

4 But the Ninth Circuit reasoning, I think, is  
5 persuasive. The idea that constraints can come into play at  
6 a damages calculation in assessing wantonness, the degree of  
7 wantonness of the Defendant's conduct, I think is  
8 established. But it should not preclude a finding of Eighth  
9 Amendment indifference.

10 And in fact, here, we think that it even greatly  
11 supports our argument that they're deliberately indifferent  
12 because it demonstrates that Defendants know their policies  
13 and procedures that they should be taking, and yet they are  
14 not doing so in fact. And I'm holding off on that because  
15 we're assuming for the moment that these policies and  
16 procedures are happening.

17 The other case that I would point you to is the  
18 Supreme Court decision in *Brown versus Plata*, where the  
19 Supreme Court held that Defendants -- that even where  
20 resources were inadequate -- that was a prison overcrowding  
21 case -- even where resources were inadequate, there was  
22 still an Eighth Amendment violation that required  
23 substantial efforts on Defendants' behalf.

24 So no. We don't think the constraints here are a  
25 finding of deliberate indifference, particularly where we're

1 seeking prospective injunctive relief and not damages.

2 THE COURT: Mr. Bluming, do you need the question  
3 again or do you want to go ahead and answer?

4 MR. BLUMING: Well, your Honor, I can address some  
5 of the points that Mr. Marcus raised. If your Honor has  
6 additional questions beyond that, I'm happy to deal with  
7 those, too.

8 Your Honor posed a question as an inquiry that,  
9 assuming that the Department of Corrections people are doing  
10 what they are in fact saying they're doing, if that  
11 precludes a finding of deliberate indifference. As your  
12 Honor noted, there's public information on the Department of  
13 Corrections website about their use of PPE. And as we noted  
14 in our -- in the declaration of Warden Johnson, it is being  
15 reserved for high-risk staff.

16 And so it's not a question in that instance of a  
17 lack of resources; it's a question of essentially whether  
18 there are enough resources for inmates to be able to take  
19 care of themselves and enough resources for the staff to be  
20 able to basically manage the population.

21 And so as to hand sanitizer, for example,  
22 regardless of whether there is a shortage of hand sanitizer  
23 or whether the law would require DOC to procure more hand  
24 sanitizer, which I'll discuss in a moment, the warden's  
25 declaration asserts a fact, not just a policy, but a fact,

1 that the residents get a bar of soap every week.

2 So the question is: Do they have the capacity to  
3 maintain personal hygiene? And the warden's declaration,  
4 which again asserts the fact, despite the Plaintiffs'  
5 assertions otherwise, as the Department being fully on  
6 policies, that they do have access to supplies. And also,  
7 it references the fact that there actually is hand  
8 sanitizer, despite the supply issues, available in one of  
9 the facilities to residents but not in the other one. So  
10 we'll note that.

11 But in terms of the lack of resources, whether the  
12 constraints such as that could warrant a finding of  
13 deliberate indifference, we have some issues about the  
14 deliberate indifference standards for the Fifth versus the  
15 Eighth Amendment. We believe it's the same standard. We  
16 can get into that later. But I'll just take the case of  
17 *Brown versus Plata*, which the Plaintiff, Mr. Marcus, just  
18 mentioned.

19 So I believe they did find that after years of  
20 litigation that intervention was warranted under those  
21 circumstances there. But that was only after extensive  
22 factual finding, years of factual finding, pursuant to the  
23 Prison Litigation Reform Act.

24 But the point is that for that intervention to be  
25 warranted, it's not just that, you know, maybe in the

1 absence of -- there may be constraints. Notwithstanding,  
2 there has to be a robust record created involving not, you  
3 know, declarations and records that happened over six days,  
4 as we've done in the temporary restraining order, but over  
5 years.

6 So it has to be at least sufficient. It doesn't  
7 have to be years. There's no time constraint. But there  
8 has to be a sufficient process of vetting the evidence and  
9 cross-examining witnesses and procuring different kinds of  
10 evidence so that the Court can get a true and accurate sense  
11 of what's going on on the ground.

12 And Plaintiffs have stated very loud and clear  
13 that they dispute the evidence that the Department has put  
14 forward. And that's understood.

15 THE COURT: Mr. Bluming, I don't think you need to  
16 get into that. I'll have some questions and issues with  
17 that later.

18 But I will note here, this is an emergency. I  
19 mean, this is a pandemic. The numbers are increasing. I  
20 don't think there's a lot of time to -- it's going to have  
21 to be done on an expedited basis. There's not time to have  
22 a whole series and go through the usual evidentiary hearings  
23 and things back and forth. This is going to have to be  
24 faster than that. I'll just say that. I didn't want to cut  
25 you off.

1           Is there anything else you wanted to state with  
2           that argument?

3           MR. BLUMING: Well, your Honor, in response to  
4           that specific point, if I may, that too is understood; and  
5           that's why in other states, as they've pointed out, where  
6           this sort of matter has been adjudicated on a broad basis,  
7           it has been done in the state court because state court  
8           employees can present that sort of relief in a much more  
9           expedited manner because they are not constrained by the  
10          Prison Litigation Reform Act, which would prohibit --  
11          restrict the kind of relief this Court could afford on such  
12          a limited record for precisely that reason, prevent federal  
13          intervention without a very clear and fully developed sense  
14          that that's more the available remedies; and perhaps that  
15          comes additionally later.

16          THE COURT: Mr. Marcus, do you want to respond to  
17          anything that you didn't before?

18          MR. MARCUS: I wanted to add, your Honor, our  
19          strongest point on deliberate indifference is not just the  
20          lack of adequate access to hand sanitizer or soap. We have  
21          men who are coughing up blood who have not been able to see  
22          a doctor despite putting seven sick calls requests in. We  
23          have people who are working in the kitchen who are  
24          displaying symptoms of coronavirus who are being forced to  
25          work in the kitchen, where they're infecting other people in

1 the jail.

2 The provision of soap and hand sanitizer are  
3 important, and they would help mitigate the spread of the  
4 virus. But the real shocking evidence here goes far beyond  
5 the lack of hand sanitizer or soap. It is systemic  
6 indifference to people who are showing symptoms and have not  
7 been able to be tested or be treated.

8 THE COURT: In the opposition -- this is directed  
9 to the Defendants. In the opposition, you indicate that --  
10 and I'll quote this -- "DOC's medical staff has adopted  
11 policies and guidelines based on the recommendations of," I  
12 assume, "the Department of Health and CDC and outside  
13 experts."

14 Who are your outside experts? You don't indicate  
15 who they are.

16 MR. BLUMING: I believe that that is noted in the  
17 declaration of Beth Jordan to the record. And at some  
18 point -- I'll identify the paragraph. But it's the -- so  
19 Dr. Jordan, who is the medical director for the Department  
20 of Corrections, states in Paragraph 10 of her declaration at  
21 20-2 that she has been consulting regularly with the leading  
22 expert on infectious diseases and correctional health,  
23 Dr. Anne Spalding from Emory University. She's the point  
24 person for the NCCHC, which is the body of correctional  
25 facilities, and she has the expertise.

1           THE COURT: In terms of the Defendants, then, the  
2 professional opinion of some of the experts from the  
3 Defendants that have taken -- indicate that they've taken  
4 substantial steps and that what they've done has met the  
5 requirements. Is this just simply a matter of different  
6 professional judgment or is it something else? This is  
7 Plaintiffs' opportunity to answer.

8           MR. MARCUS: Your Honor, I just wanted to start by  
9 looking at what Dr. Jordan actually said at Paragraph 10.  
10 She said, quote, "We spoke" -- this is referring to her  
11 conversation with Dr. Spalding. "We spoke by phone  
12 yesterday and discussed the measures DOC has implemented."

13           Dr. Jordan does not say what information she  
14 shared with Dr. Spalding. It doesn't seem as if any of the  
15 policies were developed in consultation with her. It seems  
16 as if she was offered a chance to review them after the  
17 fact, but not that they developed any policies and  
18 procedures in consultation with them.

19           Further, Dr. Jordan does not claim to have any  
20 personal knowledge about the implementation of those  
21 policies.

22           And so this conversation with Dr. Spalding runs  
23 headlong into the same problem where neither Dr. Jordan nor  
24 Warden Johnson explain whether or not they've even been to  
25 the jail in the last three weeks or any --

1 THE COURT: Excuse me.

2 Mr. Marcus, I'm trying to go through this in a  
3 particular way because I did not want to have this taken  
4 over with how the attorneys wanted to do it, but how I  
5 wanted to do it, in order for me to make a ruling.

6 I'm aware there's a dispute here, and I'm going to  
7 get to it at the end in terms of different ways of resolving  
8 the -- resolving expeditiously the obvious gap between what  
9 Plaintiffs are saying and what the Defendants are saying in  
10 their declaration. I'll well aware of that. So let's move  
11 on the issues that I've identified and then we'll get back  
12 to that.

13 I would agree that I don't have Dr. Jordan's  
14 declaration in front of me. But let me ask Mr. Bluming, do  
15 you want to respond in terms of the consultation with the  
16 expert? Has it been just simply a phone conversation or has  
17 it been something that's been more robust?

18 MR. BLUMING: So, your Honor, Paragraph 10  
19 specifically states that -- Dr. Jordan says, quote, "I  
20 communicate regularly by phone and email with Dr. Anne  
21 Spalding."

22 And so our understanding is that they're in  
23 regular communication, even though she did reference one  
24 conversation in her declaration. And again, we had to hurry  
25 and put together a record pretty quick. So all the



1 information out there might not have made it into the  
2 record. We're happy to follow up with more details, if that  
3 would aid the Court. But the declaration on the record  
4 doesn't state all the facts.

5 THE COURT: Let me get away from the confrontation  
6 and get to what actually was involved.

7 Let me move to the Plaintiffs. Does the DC  
8 Superior Court's process that they've established to  
9 adjudicate the release of the inmates prevent Plaintiffs  
10 from showing any kind of likelihood of irreparable injury?

11 I had spoken to -- let me update you on what they  
12 are doing. I think Mr. Fowler had some information, but I  
13 think it's based on observations. And I actually contacted  
14 the court over there in terms of the chief judge as well as  
15 Judge McKenna, who is spearheading what they are doing.

16 As I understand it, it provided before the Court  
17 reduced their operations a list of each of the judges of the  
18 defendants who had a medical alert that had been sent to the  
19 jail and asked each of the judges to look at each of those  
20 cases individually to decide if there should be some *sua*  
21 *sponte* action.

22 I understand that some of those cases were  
23 reviewed.

24 On April 1st, the Department of Corrections  
25 provided an updated list of misdemeanants after they went

1 through and added -- this is an ongoing process -- of their  
2 proceeding and adding on to the credits that basically make  
3 them more eligible. As time goes by, more and more of them  
4 are eligible to be actually released.

5 The list, which I did have an opportunity to look  
6 at quickly, some have some duplicates in it because they  
7 have defendants and they have all the charges. Some have  
8 more than one. The first, which we talked about at the  
9 scheduling conference last week, the Government was provided  
10 with a list of just -- a whole series of cases that involved  
11 particular offenses where the likelihood of any danger or  
12 public safety concerns would not be present. So that would  
13 eliminate domestic violence, stalking cases, solicitation of  
14 minors, those kinds of cases. They were given two business  
15 days to look at the whole list and they came back with  
16 whatever they did in terms of their responding to that  
17 particular one.

18 What the Court did is they went ahead and made  
19 some decisions without having any hearings or contacting  
20 counsel based just strictly on the papers. Some of those  
21 were taken care of.

22 As I understand it, the Public Defender Service  
23 filed an omnibus, I guess -- I don't know whether it was a  
24 motion or a case.

25 And is it correct, Mr. Marcus, that they don't

1 have -- that those who were sentenced as misdemeanants don't  
2 have attorneys? The majority of them actually still have  
3 attorneys on the record that are listed, and so they've  
4 contacted them unless they've withdrawn. And some of it is  
5 client input in terms of whether they're looking at  
6 additional information, medical information that might make  
7 a difference as seen from the outside, those kinds of  
8 things.

9           So whether or not the Government opposed, there  
10 were certain rulings that were done on the papers.

11           In terms of C-10, which is the new arrests, the  
12 chief judge expanded greatly the use of citations at the  
13 police stations, where they're released automatically. In  
14 domestic violence, they do need to be brought to the Court.  
15 There are no three-day holds. So if the -- and the next  
16 ones need to be notified.

17           Probable cause and detention hearings would be  
18 handled in one and could be danger or safety to the  
19 community. So there's no bench warrants in these cases, no  
20 weekend jail sentences if there are any.

21           And as you know, usually the calendar is 90 to 100  
22 people a day. That is down to about 15 to 20 a day, as I  
23 understand it. And those are ones that have fallen into the  
24 category of issues relating to danger of potential public  
25 safety concerns.

1           They started, I believe, yesterday, or they  
2           intended to. So for those that have been arrested, they  
3           were releasing them from lockup directly, not bringing them  
4           up into the courtroom if there was no request. But every  
5           new arrest, an attorney is appointed in each case. At the  
6           hearings, there generally have been two stand-in attorneys.  
7           They have one courtroom, which is the 115, which is  
8           connected to the DC Jail. DC Superior has limits as to how  
9           many rooms they have with video connected that can be used  
10          by either the federal court or the local court. So 115 is  
11          one courtroom where you have an attorney on the phone, the  
12          defendant in the jail on the video and the judge on court  
13          video.

14                 And all they're doing all day long is dealing with  
15          motions, bond motions, whether they're misdemeanants or  
16          felonies.

17                 And the goal is, as I understand it -- I don't  
18          know whether they've met it -- but the goal is to have the  
19          hearings within one day of motions being filed.

20                 From the federal court side -- and I'll just touch  
21          base with you shortly on that: FPD, the Federal Public  
22          Defender, and a designated person at the US Attorney's  
23          Office has a slew of the requests; and if they're consented  
24          to, they've been presented to the individual judges that  
25          have the cases. And as far as I know, they've been granted.

1 So it's really only -- the only ones we're getting as actual  
2 motions are ones where they're being contested. And in some  
3 of those instances, we've asked for additional medical  
4 information, something to indicate that they're at risk  
5 because of their medical condition.

6 There are some cases that are obviously in both  
7 courts as well, which is an additional issue.

8 The last information that I received yesterday is  
9 that a total of 127 bond review motions had been reviewed  
10 and granted. Now, because some of these involve more than  
11 one charge for the defendants, they would have more than one  
12 case.

13 As I understand it, in terms of individuals,  
14 approximately 108 individuals have been released on bond  
15 review motions, 56 felony defendants and 52 misdemeanants.  
16 And 48 of those misdemeanants have been released to the  
17 sentence recalculation with the good-time credits. They're  
18 working on -- it's obviously a work in progress in terms of  
19 getting a better sense of the number of felony defendants  
20 that have been released on the motions.

21 As far as I know, in terms of the contested -- let  
22 me just say, a number of these cases have been held in  
23 abeyance in terms of additional progress the defendants'  
24 counsel have asked for. There also is in some instances a  
25 requirement that the victims be notified. So some of them

1 have -- the hearing has been held in abeyance so they could  
2 get this information before they could make a particular  
3 decision.

4 And so the rest of the motions are -- if they're  
5 not done in 115, then they're done specifically by the  
6 judges who have the cases. Domestic violence cases are  
7 being handled by a judge of the domestic violence division.  
8 And the number of sentenced misdemeanants have been cut in  
9 half since last week from 94 down to 46. There will be  
10 further releases as some of the attorneys discuss with their  
11 clients their willingness to be on probationary terms, which  
12 of course they have to consent to.

13 But the key feature has been to take a look at  
14 whether they pose a danger to the community and what kinds  
15 of public safety issues.

16 So from Superior Court -- and I don't know what  
17 the Department of Corrections has, but this is -- it doesn't  
18 include anybody released in parole cases. But the number of  
19 individuals that PDS has has declined by over 200 since  
20 March 13th from 1,288 to 1,083. And in CTF, by over 120  
21 since March 13th, from 545 to 424. So those are what the  
22 Superior Court has provided me through talking to the two  
23 principal judges that are involved with it.

24 And obviously, it's an evolving process, trying to  
25 get through them as quickly as possible. The principal

1 concern on their part is public safety. And they know  
2 whether the Public Defender has had any conversations with  
3 the Court, or did, so that we could set up a system to move  
4 these through as quickly as possible.

5 Mr. Marcus, do you know besides either that motion  
6 or -- have there been discussions? Mr. Marcus?

7 MR. MARCUS: I'm not sure, your Honor. I am not  
8 sure. I know about the lawsuit, but I'm not privy to  
9 informal or formal conversations.

10 THE COURT: Does anybody in the Public Defender  
11 Service that's on the phone? Do you know?

12 Okay. I'll get back to that issue shortly. But  
13 they are certainly moving, from my perspective, it would  
14 seem to be expeditiously.

15 Let me get back to the Plaintiffs.

16 Does the DC claims, what they say is public  
17 interest in permitting defendants to carry out their  
18 authorized correctional functions, prevent injunctive  
19 relief, since this injunctive relief is obviously not  
20 maintaining the status quo, but is a proactive one? And is  
21 there a circuit case that deals with any kind of deference  
22 that needs to be provided to Corrections? Do you know?  
23 Mr. Marcus or whomever?

24 MR. MARCUS: I think the leading case on that  
25 question, your Honor, is *Campbell versus McGruder*. That's a

1 DC Circuit case from 1978. That case squarely held that the  
2 federal courts there had actual -- was properly reviewing  
3 the conditions at the Department of Corrections facilities.  
4 Of course, it recognizes that the Department of  
5 Corrections -- that there is a state interest in the  
6 operation of the Department of Corrections. I think that  
7 is -- that there is no doubt about that.

8 But the case held that where, as here, there are  
9 constitutional violations as state and unconstitutional  
10 conditions alleged, that the federal court can and should  
11 review those claims.

12 THE COURT: Mr. Bluming, do you want to respond to  
13 either the Superior Court issue or the public interest  
14 argument, a response to it? Mr. Bluming?

15 MR. BLUMING: Your Honor, in terms of a Superior  
16 Court process, we would have to consult with our Public  
17 Safety Division to see if they have information to highlight  
18 for Mr. Marcus. I'm not privy to what has gone on over  
19 there. But again, I'm happy to follow up with the Court  
20 with more information.

21 In terms of the public interest, *Campbell versus*  
22 *McGruder* is actually very different, because that case is a  
23 1978 DC Circuit case. It was taken after the case was filed  
24 in 1971, went to trial, and the judge made a finding that --  
25 or the District Court make a finding in 1975 after four



1 years of discovery had a full trial.

2 So the argument that we have made, that there can  
3 never be a public interest or that the public interest in  
4 allowing the Department of Corrections to carry out its  
5 functions can never, you know -- will always preclude  
6 injunctive relief on the merits -- but this is not on the  
7 merits. This is a temporary restraining order that is being  
8 litigated in less than a week.

9 And so our argument is there's a public interest  
10 in allowing -- in not offending the institutions -- you  
11 know, state and local governments, without much more robust  
12 findings and a clear adversarial process, and the case law  
13 that we've cited in our brief supports that.

14 MR. MARCUS: Your Honor, may I briefly be heard on  
15 the Superior Court process? I think I omitted my answer  
16 there.

17 So a couple points: The first is, the process in  
18 Superior Court is only addressing a fraction of the proposed  
19 class members. As your Honor knows, we're talking about 100  
20 or 150 people who are eligible for that process and we are  
21 bringing claims on behalf of 1600 residents at the jail.

22 The second point I wanted to note about the  
23 medical --

24 THE COURT: Excuse me a minute.

25 It is a broader group, although I don't think it

1 is 1600 anymore. But anyhow, it is large and certainly is  
2 well over 1,000.

3 My point is, though, that people that are there  
4 presumably have either been sent there by Superior Court,  
5 either pretrial, post-trial or sentenced, and the federal  
6 court. And nobody's there under those circumstances as far  
7 as I know. Correct?

8 MR. MARCUS: And parole conditions.

9 THE COURT: Right. Go ahead.

10 MR. MARCUS: That's correct. But as far as the  
11 Superior Court process that your Honor referenced, that's  
12 only looking at 100 to 150 people.

13 The other point I wanted to note is with the  
14 medical alert. Those medical alerts as far as we understand  
15 are current, immediate medical emergencies. They don't  
16 cover ongoing conditions like asthma or diabetes, heart  
17 conditions or cancer that the CDC claims put people in  
18 higher risk from death or serious injury.

19 So as far as addressing the irreparable harm, we  
20 think it's sufficient and we think that we've established  
21 irreparable harm or at least the likelihood of success of  
22 irreparable harm for everyone at the jail, not just those  
23 with elevated risk, people with preexisting condition.

24 THE COURT: Let me just say, I only mentioned the  
25 medical alert because for a practical matter they at least

1 took a look at them.

2 I agree with you that the medical condition may be  
3 at a particular time. What I'm assuming is happening, as it  
4 is in the federal court, is that if people have existing  
5 conditions or problems, it's hard to get the medical records  
6 from the Department of Corrections; but they are getting  
7 records from the community, which is -- generally, the  
8 people we have from federal court are not going to be  
9 sentenced, or we have only a few people that are at the tail  
10 end of them, that the Bureau of Prisons may not have taken.

11 They've been provided with the information on  
12 medication for diabetes, asthma, those kinds of things,  
13 which we would need to do, which is why some of these  
14 hearings have been held in abeyance in order to get the  
15 information in to present it, which obviously would  
16 influence it; and you balance it in with the rest of the  
17 information that you have.

18 I only mentioned the medical alerts because they  
19 went to the trouble to at least look at those that on the  
20 way into Corrections had some medical problems.

21 Anything else?

22 MR. MARCUS: Just briefly. I have just had one  
23 additional point, your Honor.

24 There is a major -- even assuming that these bond  
25 review hearings -- and obviously, they're ongoing. There's

1 a major backlog, as your Honor knows, and the Superior Court  
2 is trying to get through them. But it's accomplishing, I  
3 believe, on the order of 10 to 15 a day. And there remains  
4 a major backlog. And our final point on this is that the  
5 Superior Court process is not addressing the conditions at  
6 the jail.

7 THE COURT: I'm not -- I didn't get into that.

8 I think that the conditions have come up, as I  
9 understand it, which they are in our court as well, is  
10 they're coming up when basically there's an issue about  
11 community safety or dangerousness, et cetera. And you're  
12 looking at balancing it against that as to what other things  
13 there are, if they're not medical conditions, other kinds of  
14 things that you take into account. You take a look at the  
15 conditions. And that's when they've been brought up both, I  
16 believe, in Superior Court as well as here.

17 My point is that some of these hearings can be  
18 done quickly. Some of them are going to require a little  
19 more time if they need to contact victims, if they need to  
20 figure out if there need to be releases; not the defendants  
21 particularly, although even those, but some of them just to  
22 make sure that they have -- that they have reporting  
23 conditions, that Pretrial Services looks and puts them into  
24 particular programs and getting other information.

25 So this is something that isn't that quick. But I

1 think the group that's left are the group predominantly that  
2 they are working their way through, are the ones where there  
3 is an issue relating to danger and the public support. It's  
4 going to take a little bit of time to do it. But frankly, I  
5 think within a week they've done a fairly decent job of  
6 getting it down.

7 But that moves into my next question.

8 Before I do, Mr. Bluming, is there anything else  
9 you wanted to add?

10 MR. BLUMING: No, your Honor. Nothing.

11 THE COURT: Now, the Plaintiffs have suggested  
12 that in reducing the inmate population that there be -- in  
13 addition to the additional good-time credits, et cetera,  
14 that there be some expert that would provide some expertise  
15 on that.

16 It's not clear to me from reading the papers,  
17 frankly, what this expert would do. Would it be assisting  
18 the Court in determining releases? Would the expert assist  
19 at DOC? Would the expert provide specific recommendations  
20 about people to be released or is it going to be sort of  
21 general recommendations? Is it that with this population  
22 you need to reduce it by X percentage in order to prevent  
23 the spread of the infection?

24 So to Mr. Marcus or to whomever on the Plaintiffs'  
25 side, what is this expert supposed to be doing?

1           MR. MARCUS: Your Honor, there are experts  
2 available, and we've contacted several of them, and they are  
3 available if the Court chooses to appoint them, who are  
4 experts in jail downsizing. Predominantly, they are experts  
5 considering public safety.

6           One of these experts is James Austin, who is a man  
7 who has developed a risk assessment tool used by CSOSA here  
8 in DC and has developed the prisoner classification tool  
9 that the Department of Corrections uses.

10           He is an expert who consults with jail and prison  
11 systems across the country, and he recommends the percentage  
12 of jail or prison reduction that's necessary to assure  
13 reasonable safety and he recommends systems that the Court  
14 can put in place to implement that kind of downsizing.

15           So we envision here the expert can review the  
16 conditions at the Department of Corrections, as they do in  
17 other cases; recommend a target number where the Department  
18 of Corrections can safely assure reasonable safety for  
19 residents; and then recommend to the Court categories of  
20 people who can be safely released and under what conditions,  
21 categories of people who could be put on home confinement or  
22 could have their jail terms suspended but then required to  
23 report back when the pandemic is over.

24           So it's a relatively common field. But the  
25 specialty involves determining the right number and then

1 implementing a system for the Court to get to that number.

2 But obviously, the Court retains the discretion,  
3 all of the authority to actually implement the  
4 recommendation. It's solely to advise the Court on the  
5 number and the process to release.

6 THE COURT: So you say he was involved in  
7 developing those risk assessments that CSOSA uses. And  
8 CSOSA would be involved in these cases in terms of making --  
9 assuming that they're using this risk assessment tool. I  
10 mean, they would be involved in -- and in release would  
11 obviously be concerned. So I'm assuming you're already  
12 using that.

13 Do you know?

14 MR. MARCUS: I know CSOSA is using the risk  
15 assessment tool that Mr. Austin has developed. I presume  
16 that they are still using it in light of people that have  
17 already been released.

18 Again, we are not suggesting that people be  
19 released wholesale without any kind of conditions. Of  
20 course, a number of people that we suggest -- that we think  
21 would be released under our proposal would be put on  
22 conditions of confinement and, of course, on CSOSA and  
23 probation; and other authorities who would be conducting  
24 that provision would be consulted as well.

25 THE COURT: Well, I'm assuming that's happening.

1 I understand from Superior Court -- and I know it certainly  
2 is true with the federal court -- that they are being  
3 consulted in terms of putting them in high-intensity  
4 programs or various other programs in terms of either that,  
5 the high-intensity program, and then there's a couple of  
6 other programs that they can put them in. And most of them  
7 are being checked with if they're pretrial to figure out and  
8 get their input as to what -- if we release them, what the  
9 conditions would need to be in order to release them.

10 So I'm just trying to see what additional thing  
11 would be added beyond what frankly is probably already  
12 taking place.

13 MR. MARCUS: Sure.

14 I think the main -- I think the main value added,  
15 your Honor, is that we are talking about a systemic and  
16 rapid problem that demands a systemic and rapid solution.  
17 And if the case -- I think that CSOSA is being consulted on  
18 these individual matters. We're talking about an expert to  
19 recommend the necessary rapid and substantial reduction that  
20 could ensure the reasonable safety of people.

21 THE COURT: I'm not sure what -- in terms of what  
22 you use -- let's assume for purposes of this discussion that  
23 the risk assessment tool was used. I mean, all of these  
24 agencies that do pretrial release, probation, et cetera,  
25 they all have risk assessment tools and they all use them,



1 especially when the offenses involve some safety concerns  
2 and danger. They're already using it.

3 So I'm trying to figure out what this person would  
4 do that would add beyond what they're already doing.

5 MR. MARCUS: Sure.

6 So first and foremost, the expert would be able to  
7 determine what number of people can safely be held at the  
8 jail, given the current crisis and conditions. And then the  
9 expert can recommend based on the risk assessment tool --  
10 I'm just giving an example here: Say all people who score  
11 below 10 on that risk assessment tool who also have a  
12 preexisting medical condition, say, asthma or diabetes, that  
13 puts them at a higher risk, that I recommend a release of  
14 all people in that category under home confinement,  
15 something like that.

16 That is not being done on any kind of systemic  
17 basis now. And it requires the Courts ultimately to balance  
18 the risk of substantial injury and death to an individual  
19 with public safety that we think can be implemented with  
20 these risk assessment tools.

21 THE COURT: Mr. Bluming, do you want to respond?

22 MR. BLUMING: Yes, your Honor.

23 I think this has to be considered in the context  
24 of relief that Plaintiffs had asked for. This is Item No. 1  
25 from that proposed order, the TRO.

1 THE COURT: I have it here. Let me just find it.

2 MR. BLUMING: Sure.

3 THE COURT: Okay.

4 MR. BLUMING: So Item No. 1 in that proposed order  
5 of which I actually -- I don't have the docket number in  
6 front of me. In the TRO application, the first thing they  
7 ask for is that the Department of Corrections be ordered to  
8 immediately take all actions within their power to reduce  
9 the inmate population of the DC Jail and staff, including  
10 but not limited to, power pursuant to the COVID-19 response  
11 and Emergency Act claims.

12 And our understanding is they want an expert to  
13 facilitate that leap.

14 The problem is, as we noted in our brief, the  
15 COVID-19 Emergency Amendment Act gives authority to DOC to  
16 release individuals from custody on their own authority;  
17 that is, what that Act authorizes is it authorizes the  
18 Department of Corrections to increase the good-time credit  
19 of individuals serving misdemeanor sentences only to  
20 effectuate a more expedient release.

21 But that current number within the DC Jail as we  
22 understand it is a number of between about 70 and 75 people.  
23 I think it was 94 people as of March 24. On April 1st, it  
24 was about 20 people released pursuant to the statutory  
25 relief mandated by the DC Council. And so that remains a

1 total of 70 -- about between 70 and 75 people.

2 And so with a current population at the DC Jail of  
3 1550 people, if the Plaintiffs' proposal of the experts is  
4 that the expert was evaluating how to release a broad swath  
5 of people, it sounds like that would be broader than DOC's  
6 actual authority to do that.

7 And even insofar as they have an expert to assist  
8 with those 70 to 75 individuals, the Department of  
9 Corrections was granted the statutory authority to assign  
10 good-time credits by the DC Council and given the discretion  
11 to make that assessment itself. It has already been using  
12 that discretion in releasing individuals. And there's no  
13 reason that they can't continue doing that, you know. And  
14 they have the expertise. In doing that, they're doing that  
15 presumably, as your Honor referenced, in coordination with  
16 CSOSA and others.

17 THE COURT: As I understand it, the expert would  
18 provide and say within the facility, the two facilities,  
19 that -- what it would require in terms of what the  
20 reductions should be.

21 Have you all either through discussions or experts  
22 or whatever determined what the population should get down  
23 to in order to be able to do a distancing and several other  
24 things? Have there been any ballpark figures or anything in  
25 terms of the corrections?

1           MR. BLUMING: No, your Honor. We have not  
2 discussed that with our clients. But we're happy to go back  
3 and speak to them and find out more information for the  
4 Court.

5           THE COURT: Mr. Marcus, do you have -- does your  
6 expert, James Austin, does he have -- I mean, I assume he's  
7 been in the jail? Or has he not?

8           MR. MARCUS: Not in the last couple of weeks, your  
9 Honor. But certainly he has been in the Department of  
10 Corrections before.

11           I want to briefly just clarify something: that  
12 the expert that we're talking about is not solely to  
13 recommend to DOC, who under their statutory authority can  
14 release the 100 or so people there. It's to recommend to  
15 the Court the type of release mechanism for the 1500 or so  
16 other people who we agree DOC does not have the ability to  
17 release, but the Court certainly does.

18           And so while -- and part of our argument is that  
19 the DOC has moved too slowly in releasing the people that  
20 they have the ability to release. But putting that aside,  
21 the release expert that we've requested is not to advise DOC  
22 on that limited population, but it's to provide to the Court  
23 a number of people that would be appropriate and could be  
24 held safely at the jail and how to reach that number, which  
25 the Court certainly has the authority through habeas to

1 release.

2 THE COURT: Do you have --

3 MR. BLUMING: Your Honor --

4 THE COURT: Do you have some figure --

5 I'll get back to you in a minute, Mr. Bluming.

6 So do you have some figure as to what you think  
7 the population needs to get back to -- to get down to,  
8 according to your expert? Or has that not been developed  
9 yet?

10 MR. MARCUS: It has not been developed yet.

11 And in our conversations with experts, there are a  
12 variety of factors that they consider. Dr. Stern talked  
13 about this in his expert declaration towards the end. I  
14 believe that one of the last paragraphs talks about how --  
15 the kinds of things that you would look at in determining  
16 how much downsizing is necessary. But it includes things  
17 like what the square footage is, can you establish six feet  
18 between people, those kinds of things.

19 But given the area of expertise, jail downsizing,  
20 it's an area for which there are a number of experts. And  
21 we've spoken to more than just Mr. Austin, and we're able to  
22 provide the Court with at least three names and résumés of  
23 people who we've consulted and are available and interested  
24 and could start immediately.

25 THE COURT: Do you want to respond, Mr. Bluming?

1 MR. BLUMING: Yes, your Honor.

2 I actually just want to rebut the point that the  
3 Court would have the authority to grant release of --  
4 releasing individuals not within the DOC's authority.

5 But we actually think that that authority -- that  
6 the parties are constrained by the Prison Litigation Reform  
7 Act, 18 USC 3626, which specifies the circumstances under  
8 which the Court can release individuals in custody pursuant  
9 to prison litigation, that it has to be pursuant to certain  
10 procedures and that the Court is specifically constrained  
11 from doing so without first -- without first imposing other  
12 remedies and ensuring that those remedies are not being  
13 followed before determining that that is the remedy.

14 Now, the Court could grant a writ of *habeas*  
15 *corpus*. If the Court were to grant a writ of *habeas corpus*  
16 as to any individual in particular, that individual could be  
17 released pursuant to a writ of *habeas corpus*.

18 But again, looking at their release, both in  
19 the -- in their TRO application filing and in their  
20 complaint itself, they actually haven't requested the  
21 release of any of the named Plaintiffs. One of the named  
22 Plaintiffs, by the way, we understand has been released from  
23 custody, Plaintiff Keon Jackson. But the rest of them have  
24 not asked for their open release.

25 And so to the extent that they are seeking *habeas*

1 relief in the form of release from custody, we think that  
2 the TRO would constrain the Court from releasing others, and  
3 the fact that they haven't sought their own release would  
4 constrain the Court from releasing them as currently  
5 proposed.

6 With --

7 THE COURT: Do you want to respond to this last  
8 thing about your client?

9 MR. MARCUS: So we think that the Court does have  
10 the authority even if we have not asked for the release of  
11 our clients, although I believe our complaint does seek the  
12 writ of *habeas corpus* for all class members, which does of  
13 course include our clients.

14 But the argument that we've set up is that the  
15 overpopulation of the jail is what causes the injury to our  
16 named Plaintiffs. And the Court can take remedial action to  
17 reduce the population and thus redress the injury to our  
18 named Plaintiffs.

19 But I believe we have asked for release of our  
20 named Plaintiffs. And in any event, the Court still has the  
21 authority to grant release under *habeas* to everyone in the  
22 proposed class, not just the named Plaintiffs.

23 THE COURT: Let me move on.

24 In terms of -- this is directed to the Defendants.

25 What steps have you taken to promote social

1 distancing?

2 MR. BLUMING: Yes. So -- well, a few things, your  
3 Honor. This weekend, the jail had -- the jail had a policy  
4 of when they release individuals for recreation, for  
5 example, into a recreation area, they'd previously -- before  
6 COVID-19, they would release the entire unit into the  
7 recreation area at once.

8 And we were told I believe last week that they  
9 were instead only being released for recreation a half unit  
10 at a time to give them more space.

11 We also know that as of this weekend, as of  
12 Saturday -- and this is information on the -- we believe  
13 it's on the Department of Corrections website, but I can  
14 clarify later that that's case -- that the jail implemented  
15 a stay-in-place -- a medical stay-in-place order to ensure  
16 social distancing that included various measures that --  
17 your Honor, I apologize; I'm just reviewing the document --  
18 stating that individuals are now being moved between  
19 facilities to assess an emergency situation, that certain  
20 group activities would be -- we are told now that there are  
21 currently no house-side visitors coming into groups or  
22 anything like that in order to prevent the rate from rising  
23 and various similar measures.

24 One in particular again on this list -- and I  
25 believe it's on the DOC website. I can pull up the terms.



1 It states that they are stopping all group activities and  
2 minimizing the number of residents participating in a  
3 recreation area and allows no more than ten at a time. I  
4 think previously I believe we were -- our information was  
5 that the units vary in size, but it could be as many as 80  
6 people.

7 So pre-COVID-19, we had 80 people in the  
8 recreational area together. At the end of last week, we  
9 were down to half that, so 40 people at a time. So that is  
10 a new policy. So those are some of the specific measures  
11 that we're aware of.

12 THE COURT: Let me move on.

13 MR. MARCUS: I have a brief point on that, your  
14 Honor.

15 THE COURT: All right, Mr. Marcus.

16 MR. MARCUS: First, it speaks volumes that on  
17 April 4th, three weeks into the pandemic, the DOC was  
18 dealing with 40 people at a time in the recreation yard. We  
19 think that that goes to -- shows deliberate indifference  
20 here.

21 A second key point, though, is that staff can't  
22 practice social distancing either. And that is important  
23 because as the number of staff -- DOC staff infections  
24 rise -- and it's currently at seven -- they obviously  
25 continue to interact with residents. And so the more staff

1 that contract the virus, the more likely that residents are.

2 And finally, the vast majority of people still  
3 there cannot practice social distancing because they live in  
4 a cell with another person. Numerous of our declarants talk  
5 about their concern that their cellmate is coughing and have  
6 it and that as a result they will contract it as well.

7 THE COURT: Moving on to the next question, this  
8 is to the Defendants:

9 You've submitted various declarations, but I'll  
10 focus on Dr. Jordan and Warden Johnson. They indicated  
11 that -- they made statements about what the policies were,  
12 what was being done and presumably what's on the website,  
13 which is what was provided by Mr. Glover, that answers  
14 questions about what precisely they're doing, which relates  
15 in many instances to the conditions that the Plaintiffs have  
16 raised.

17 Do you know if that's based on personal knowledge?  
18 In other words, have they gone into the jail to see if this  
19 has happened? Or is this based on a hierarchy system of  
20 supervisors within the jail telling them that these things  
21 have been implemented?

22 MR. BLUMING: Well, our understanding, your  
23 Honor -- and this is stated in the declarations --

24 THE COURT: Sorry. There was a phone ringing  
25 there.

1           MR. BLUMING: Each of the declarations reference  
2 that. Both the declaration of Warden Johnson references  
3 that and the declaration of Dr. Jordan, 20-2, starts off on  
4 the first paragraph stating that this are based on their  
5 personal knowledge and observation and that includes -- that  
6 is information provided by the District of Columbia police  
7 in the course of official duties, that that is standard for  
8 the management of a department.

9           And so our understanding is that when, for  
10 example, Warden Johnson declared as an example in Paragraph  
11 6 in which he says that in addition to standard  
12 facility-cleaning practices, DOC cleans the common spaces in  
13 housing units and common areas of the facilities every two  
14 years, that that statement is a statement based on personal  
15 knowledge on the type of grounds and not a statement of  
16 policy.

17           Now, whether it is, you know, based on his  
18 personal, you know, visitation to every unit to see if it's  
19 cleaned every two hours or whether part of it is based on  
20 information being passed to him from other people, we'd have  
21 to follow up on that and what the specifics are personally.  
22 But it's based on his personal knowledge nonetheless. And  
23 the same is true of Beth Jordan.

24           Now, it is true that both of them do attest to  
25 certain policies that have been in place.

1           THE COURT: At the end, I'll go through what I  
2 view as the gap between what's being said for both sides.  
3 But I don't want to really get into too much detail here.

4           But I was interested to know whether they've  
5 actually gone into the jails and seen whether they -- I  
6 mean, it wouldn't be unusual for them to rely on others that  
7 are at the facility to tell them it's being implemented.  
8 But I just wanted to know if they had actually gone to the  
9 jail and checked and done some inspections or had somebody  
10 actually inspect to make sure these things were actually  
11 being implemented.

12           MR. BLUMING: Yes, your Honor. Our understanding  
13 is they are present in the facilities. Yes.

14           THE COURT: Mr. Marcus, anything you want to say?

15           MR. MARCUS: I would say we simply don't know from  
16 the declaration whether that particular paragraph that  
17 opposing counsel referenced is based on personal knowledge.  
18 The beginning says, "Some of what I'm about to say is based  
19 on what others have told me and some is based -- and some is  
20 based on personal knowledge." But there's nothing in the  
21 record that shows that that particular section or anything  
22 else in the declaration is based on personal knowledge. It  
23 might be admissible here today, but it's still hearsay  
24 nonetheless.

25           THE COURT: Well, we're going to get into this a

1 little more. But I did want to ask that.

2 The Plaintiffs contend that they have standing --  
3 and this is an issue that Defendants raised -- have standing  
4 based on their risk of contracting COVID-19.

5 So steps that may not directly affect the named  
6 Plaintiffs, such as the release of misdemeanants or certain  
7 conditions at the jail, which still redress Plaintiffs'  
8 injuries because sufficient steps reduce Plaintiffs' risk of  
9 contracting the virus.

10 So this is a theory of standing that is  
11 cognizable. In other words, since we all know it's very  
12 contagious, if you improve the conditions, they're less  
13 likely to get the virus. And so it's a different standard.  
14 It's not as narrow as you have set out. But do you view it  
15 as cognizable or not?

16 Mr. Bluming, for the Defendants, I want to know  
17 what your position is.

18 MR. BLUMING: Well, your Honor, our position is  
19 that I guess we're not exactly sure. I mean, it sounds like  
20 an unusual theory of standing, standing of specific  
21 remedies, which is the kind of standing that we're most  
22 concerned with, which is on which grounds they have  
23 requested that certain other things happen as to other  
24 people. Even in light of their position that sort of, you  
25 know, well-being and adequate provisions within the

1 facility, you know, would run to everybody's specific  
2 health, the question is still: What standing do they have  
3 to seek particular remedies?

4 And, you know, where --

5 THE COURT: Excuse me.

6 Give me an example of one that would not -- you've  
7 raised the possibility of getting the virus. I mean, all of  
8 the conditions for the most part are -- leaving aside legal  
9 access for the moment, but they're either reducing the  
10 population so you'd be able to have social distancing,  
11 et cetera. And also, you would ensure that they would not  
12 get the virus, which would include death, since this is  
13 something that is as contagious it is.

14 So from that perspective, their argument as I  
15 understand it in summary terms is that these conditions meet  
16 the risk of their contracting the virus and therefore they  
17 do have standing to request -- I mean, all of these things  
18 will benefit others, but it will benefit them specifically  
19 in very summary terms, is their argument.

20 MR. BLUMING: Yes. We understood that that's  
21 their theory.

22 I mean, I guess just as a technical matter, some  
23 of the relief about communications with counsel and --

24 THE COURT: Putting that aside for now, they've  
25 raised issues with that. But let's stick to the conditions

1 for a second.

2 MR. BLUMING: Sure. I think it's not so much  
3 that -- the argument is that it wouldn't improve conditions  
4 for everyone; it's more that -- the release of inmates, for  
5 example, a specific item. It's been a pretty expansive  
6 theory of standing that an individual could say, "Well, I'm  
7 in an overcrowded facility, and so the remedy for me is that  
8 other people be released."

9 We recognize that there is a certain theoretical  
10 sense in which, you know, they've made a point. But to  
11 release those individuals as a remedy, in no other  
12 circumstance they have standing to do that. And it ends up  
13 being a remedy as to somebody else. That's really the  
14 problem with it. It's a little bit abstract. But I think  
15 that's why it's hard to sort of conceptualize what it is  
16 they're asking for in terms of that.

17 THE COURT: Well, I have to say that this is a  
18 situation that has not come up before, and so the law  
19 doesn't address it quite strictly. We've had viruses  
20 before, but none of them quite as contagious as this one and  
21 as pervasive as it seems to be.

22 They've never been -- we've never had one -- I  
23 don't know what they did in 1918, but -- in terms of calling  
24 it a pandemic. So we're in a totally different situation  
25 where really the case law isn't directed at the kind of

1 situation we have now. So it's going to have to be looking  
2 at analogies.

3 But it does seem to me it's not quite as  
4 restrictive in terms of it would have to benefit them  
5 specifically. The lower the population, the less likely --  
6 the more the social distancing, to take your argument, or  
7 that there are better sanitary conditions, et cetera, so  
8 that it doesn't spread, because it is continuing to go up in  
9 terms of when we started, of when they filed the lawsuit and  
10 where it is now, which is true in the community as well.

11 Let me give Mr. Marcus a quick response, an  
12 opportunity to respond to that.

13 MR. MARCUS: The two key cases here, your Honor,  
14 are *Helling versus McKinney*, 509 US 25, from 1993. The  
15 Supreme Court held that the risk -- that the cognizable  
16 injury is the risk of obtaining an infectious disease. In  
17 that case, the risk was the environmental tobacco smoke.  
18 Inmates brought this alleging the prison hadn't done enough  
19 to cut down on other inmates smoking tobacco.

20 And the Supreme Court held that it was -- they had  
21 alleged -- properly alleged standing where the remedy was  
22 the prison had to cut down on other people smoking tobacco  
23 because that increased the risk to particular people who had  
24 bronchitis or other diseases.

25 The other key case is *Brown versus Plata*, the



1 Supreme Court case that affirmed the downsizing of the  
2 California jail system that found exactly the remedy that  
3 opposing counsel just mentioned, that decreasing the  
4 prison -- the size of prisons redressed the injuries of  
5 people who would be remaining at the facility due to issues  
6 of overcrowding and access to medical care and things like  
7 that. And those are the two key cases that we think put us  
8 on clear grounds today.

9 MR. BLUMING: Your Honor, if I may briefly address  
10 that:

11 I actually don't know about *Helling*. I have to go  
12 back.

13 But *Brown* as I understand it was a class action  
14 with a certified class. And so, you know, it might be a  
15 little bit different if individuals are getting relief as  
16 part of a certified class. I think we would concede that  
17 it's something that we'd need to supplement for a standing  
18 issue.

19 And also, specifically as to what -- to  
20 Mr. Marcus's explanation of the cases, the question of  
21 standing, of specific remedies, it's not just standing, you  
22 know.

23 And as to *Helling*, again, you know, we can file a  
24 supplemental briefing on that.

25 THE COURT: Let me move on to another question.

1           This is directed to the Defendant again.  
2           Plaintiffs argue that the standard for success on the merits  
3           is different for pretrial detainees under the Fifth  
4           Amendment as opposed to the Eighth Amendment, which  
5           generally comes up for sentenced people. They contend that  
6           if they showed that the actions taken against pretrial  
7           detainees are objectively unreasonable, then the subjective  
8           intent of the Defendant is irrelevant.

9           Do you agree with that or not? And do you agree  
10          that there are two different standards in reading the  
11          material? Granted, this was material over a short period of  
12          time. You seem to conflate the standards for the pretrial  
13          and what I would view as the standards for post-sentence or  
14          post-trial and put them all under the Eighth Amendment. And  
15          I'm not sure that that's correct.

16          MR. BLUMING: Your Honor, our view is that it is  
17          the same legal analysis even though it's the Fifth Amendment  
18          that pertains to the pretrial detainees and the Eighth  
19          Amendment to individuals that are sentenced.

20          It's our understanding that in assessing a case  
21          like this, assessing whether the conditions of confinement  
22          can pose an unconstitutional condition, that the same legal  
23          standard in both those cases be caused -- it essentially is  
24          a question under the case law of the right to be free from  
25          deliberate indifference.

1           We cite the *Young* case that noted both standards.  
2           And there's also another case that fits very well,  
3           *Powers-Bunce versus DC*. That's 479 F.Supp. 2d.

4           THE COURT: Is that in your papers?

5           MR. BLUMING: No, it is not.

6           But we did cite the *Young* case, which is in our  
7           brief, which does note that the standards are -- apply to  
8           standing in both groups because the question is the right to  
9           be free from deliberate indifference.

10           I would say that the Plaintiffs' argument on this  
11           point, their principal cite is to *Kingsley*, to the Supreme  
12           Court's decision. That was a case cited in determining  
13           whether excessive force used on a pretrial detainee  
14           constituted cruel and unusual punishment.

15           And in that case, all that was established was  
16           that the deliberate indifference standard -- it just passed  
17           down what else is deliberate in the deliberate indifference  
18           analysis. And we have seen no case out of the DC Circuit  
19           that has analyzed this. *Kingsley* not in this particular  
20           context, the question of a detainee alleging conditions of  
21           confinement that -- I guess access to medical care. And so  
22           we believe that the DC cases that we have cited correctly  
23           state the standard for that.

24           THE COURT: Mr. Marcus, do you have anything to  
25           add?

1           MR. MARCUS: Your Honor, *Kingsley* answers this  
2 question. And the logic of *Kingsley* makes clear that people  
3 who are confined to pretrial are presumed innocent. And the  
4 purpose of confinement for people pretrial cannot be  
5 punishment.

6           In contrast, one of the purposes of confinement  
7 for people who are held post-conviction can be punishment.  
8 And so the analysis has to be different.

9           *Kingsley* was a case involving excessive force, but  
10 it was an Eighth Amendment case. And the Supreme Court held  
11 that the Eighth Amendment or at least the cruel and unusual  
12 punishment clause applied differently in the pretrial  
13 standard and specifically held that the subjective prong of  
14 deliberate indifference does not apply.

15           And I believe every circuit to have ruled on the  
16 narrow question that opposing counsel put, which is if  
17 excessive force in conditions of confinement are equivalent  
18 post-*Kingsley*, every circuit that's analyzed this issue has  
19 concluded that the *Kingsley* standard applies to conditions  
20 of confinement by the logic that I just stated, that  
21 pretrial and post-conviction are different.

22           THE COURT: Mr. Bluming?

23           MR. BLUMING: Well, I'll just say that our  
24 understanding of -- the Courts agree that pretrial detainees  
25 can't be punished.

1           But the question is not about punishment; it's  
2           about the right to be free from deliberate indifference of  
3           government officials. And while -- the right to be free  
4           from the deliberate indifference of government officials, if  
5           it applies to people who are post-conviction as well -- and  
6           it's not a question of who can be punished versus who can't.  
7           It's a question of essentially what -- I guess, what is the  
8           constitutionally acceptable environment to be in?

9           And that -- you know, in the Fifth Amendment  
10          context, you have the fact that, for example, an individual  
11          can be subject to punishment does not mean that no force can  
12          be used on them pretrial. Obviously, a person can -- if  
13          they are posing a threat to another, force can be used on  
14          them even if they have not been adjudicated guilty. The  
15          point is that that is not punishment; it is, you know,  
16          necessary precaution.

17          And that's sort of the -- we think the same  
18          context for the question about deliberate indifference.  
19          Obviously, individuals in pretrial can be confined subject  
20          to constitutional -- the constitutional environment. The  
21          question is: When did it exceed that environment?

22          THE COURT: Let me move to the legal part.

23          At this point, there have been no requirements in  
24          the legal -- that the attorneys needed to do in-person  
25          calls. And my recollection is that they are like cubicles

1 or something in terms of -- I don't know whether they've  
2 changed that in terms of cubicles. They've stopped that.  
3 They do need phones, from what I understand, in terms of it  
4 not just being the managers, but a broader set of phones.  
5 But there's two questions I have here.

6 Ten minutes is not enough to have an intelligent  
7 conversation with your counsel about whether you should be  
8 pleading; if you're doing a sentencing, if you're trying to  
9 have some discussion with them about are they are going to  
10 accept in releasing them some additional questions of  
11 release or something of that nature?

12 What about, frankly, just giving them phones, cell  
13 phones, that don't have anything else on it, no Internet,  
14 nothing? You can take them back. They don't have to keep  
15 them. But they could certainly make longer calls and have a  
16 more informed discussion with them.

17 The way it's set up now, I mean, there's really no  
18 way of having really -- you can call them and find out how  
19 they're doing and have some information, but you're not  
20 going to be able to have discussions and move your cases  
21 forward if for instance you're filing -- if you need to file  
22 motions and you need to get some additional information from  
23 them.

24 Ten minutes isn't going to be enough. You need to  
25 expand it. And I realize that trying to do extra video is

1 not simple in terms of setting it up, so I'm not going to  
2 push that.

3 But I do think -- I see no reason why you can't  
4 get phones, give them the phones, have them make a longer  
5 phone call. They are not going to be able to -- just get it  
6 so they can only make phone calls. If you get it back, you  
7 can look and see whether they've been using it in some way.

8 What about that?

9 MR. BLUMING: Well, your Honor, candidly, we have  
10 not had a full discussion with our clients about that. We  
11 can go back and find out more information about that. But  
12 we're not sure what, if anything, would be entailed with  
13 doing that. And we'd want to speak further with our client  
14 about that.

15 THE COURT: Go back and talk to them. But I do  
16 think you need to do something more.

17 It's getting slightly better; but even if they all  
18 got an opportunity to have ten minutes of calls, which I'm  
19 not sure they're having, in terms of trying to set time  
20 frames to have this happen, as a practical matter, that's  
21 not long enough. If there's no other way of talking to your  
22 lawyer, if you can't have an intelligent and informed  
23 discussion about what should be filed in the cases -- and  
24 the number of these cases -- and I certainly have them in my  
25 court, and they're sitting over at the jail. When I've set

1 out their trial cases, they've got pretrial motions and  
2 things where they need -- ten minutes isn't going to be  
3 enough. And they need to be able to consult with their  
4 client and have a discussion.

5 I have a couple of people who have pleas that have  
6 been outstanding, which they'll probably continue. You  
7 can't have a discussion about a complicated plea in ten  
8 minutes. So ten minutes is not enough.

9 If you gave them phones -- and this is just a  
10 suggestion, and we could do something else. But it seems to  
11 me you don't have to add new phones. There are phones and  
12 you hand them out. They get to have a conversation. It's  
13 not monitored. There's nothing else on it, so there's no  
14 worry about them going off on the Internet or doing  
15 something like that. And they could have a longer  
16 conversation.

17 So I'm positing that. You need to come up with  
18 something on your own. But ten minutes, even if everybody  
19 got the ten minutes that they wanted, it is simply not  
20 enough.

21 And I understand videos and stuff is not simple  
22 and not easily done. We certainly have found that out at  
23 the court. But now you've got the three rooms and they're  
24 working all in the court. So one is in 115. We have -- as  
25 well as other -- they've scheduled it in our Superior Court



1       courtrooms. We have a short period in the federal court  
2       where we can do things, where we can have the defendant on  
3       the video and then the magistrate judges in federal court in  
4       order for them to be able to handle it. So I'm not sure  
5       that the video capacity is going to be easily augmented,  
6       although the problem should be looked at.

7               But the phones are easy. I don't know how  
8       expensive it is; but even a throwaway phone, it's better.  
9       You're not asking for anything else on it. All you're  
10      asking for is: Can you make a telephone call? Nothing  
11      else. And they hand them back. They don't take them back  
12      to their cells or whatever. I'm not suggesting that. But  
13      they could -- you could set it up that they could either be  
14      out in recreation making phone calls, whatever.

15             I'm going to ask you to check on that. And you  
16      need to come up with something better than just a ten-minute  
17      phone call. I'll leave it there.

18             I don't know whether, Mr. Marcus, you want to  
19      weigh in on that.

20             MR. MARCUS: The only -- I'll just state an  
21      additional piece of information, your Honor: Under the new  
22      restricted movement policies, DOC residents are only allowed  
23      out of their cells for 30 minutes; and that's the window of  
24      time that that ten-minute phone call can take place.

25             Also, during their 30 minutes, they have to shower

1 and clean their cells and eat up food. So a number of  
2 clients that we've spoken to are foregoing the ten-minute  
3 calls because they need to do a number of things during  
4 those 30 minutes. I think that further strengthens the  
5 suggestion that they be given phones to make those calls. I  
6 think that makes a lot of sense.

7 THE COURT: Well, let me have you go back and have  
8 a discussion. I'm not limiting it to just that proposal,  
9 but that seems like an easy one to do. It wouldn't be that  
10 expensive and it would immediately provide more information.  
11 You'd have to figure out what way it would be done so they  
12 can make their phone calls.

13 MR. MARCUS: Your Honor, with the policies -- it  
14 sounds like your sound is cutting out at the last sentence.

15 THE COURT: That's probably because I leaned back.  
16 I'm sorry.

17 Do you have -- beside the figures that I got from  
18 Superior Court, do you have any other figures or is that --  
19 does that roughly sound correct? I don't know whether  
20 they're figures for just Superior Court or whether they  
21 cover -- because the federal courts have been releasing  
22 people as well.

23 MR. BLUMING: Your Honor, off the top of my head,  
24 I don't have any additional figures. But I can report back  
25 to you on that.

1 THE COURT: Let me just look at my notes. This is  
2 to the Defendants:

3 The Plaintiffs talked about there being an  
4 unreasonable risk of harm in terms of the exposure and that  
5 it's substantially above those that are out in the  
6 community. And they've indicated that the infection rate  
7 there is seven times the infection rate in DC at large.

8 Do you have any response to that?

9 MR. BLUMING: No, your Honor. We're reviewing the  
10 data, obviously. And, you know, again, we're not keeping up  
11 with the numbers as they are. Our argument on this is  
12 stated in our brief. So I don't think we have anything to  
13 add right now.

14 THE COURT: The last question is on a legal issue.  
15 And it really is about -- you seem to disagree as to whether  
16 or not Plaintiffs should be held to a higher standard  
17 because they request a mandatory injunction rather than the  
18 prohibitory or the status quo.

19 I would say that, looking at the DC Circuit,  
20 unless there's something that's come down that I'm not aware  
21 of, that they have not specifically held that there is a  
22 higher standard. The cases more recently discussed looking  
23 closely and independently at success on the merits. But as  
24 far as I know, they have not set out a higher standard.

25 So do you have something that I don't know about?

1 Mr. Bluming?

2 MR. BLUMING: Your Honor, I don't have a DC  
3 Circuit case that discusses that point.

4 In our brief, several cases of the District Court  
5 here have been interpreted to lead to that conclusion for no  
6 other reason than the assessment of the -- insofar as it's  
7 much more of a burden on the administration or agency to be  
8 taking affirmative action that it was not taking before as  
9 opposed to merely discontinuing something. We think that is  
10 encompassed within that factor, and that might be where that  
11 analysis comes from. But I'm not aware of a DC Circuit  
12 holding stating anything like that.

13 THE COURT: Mr. Marcus, do you have anything to  
14 add?

15 MR. MARCUS: Judge, the *League of Women Voters*  
16 case of the DC Circuit from 2016 is the most recent case on  
17 point. It explicitly held the DC Circuit has rejected any  
18 distinction between a mandatory and prohibitory injunction.  
19 And that's, we believe, the most recent Circuit statement on  
20 that matter.

21 THE COURT: Do they say that specifically or do  
22 they sort of indicate that they're not adopting it? I don't  
23 remember looking at that particular case. I don't remember  
24 the cite.

25 My recollection is that it was actually Judge

1 Kavanaugh who is now Justice Kavanaugh who indicated looking  
2 at the merits as a separate prong, not sliding it together  
3 as they have done in other cases.

4 MR. MARCUS: The quote that I have before me from  
5 *League of Women Voters* is, quote, "The DC Circuit has  
6 rejected any distinction between a mandatory and prohibitory  
7 injunction."

8 THE COURT: All right. And is that in your  
9 papers?

10 MR. MARCUS: Yes, Judge.

11 THE COURT: We're now going to get to what I think  
12 is what I consider the thornier issue here, leaving aside  
13 the legal ones.

14 What I have is the two sets of declarations. I  
15 have the Plaintiffs' declaration, which indicates that --  
16 and I'll focus on -- this is on conditions, not other  
17 things. The declarations discuss other issue as well.

18 The declarations indicate that certain things are  
19 not being done at the jail or are not being followed at the  
20 jail.

21 The Department of Corrections has put in  
22 declarations mostly from I believe the warden and  
23 Dr. Jordan, and there may be some others that are in there,  
24 that indicate that these are the procedures and the needs  
25 being implemented. There is at least one, maybe two,

1 correctional officers that the Plaintiff has also put in its  
2 declaration.

3           So what I have is two sets of declarations  
4 factually indicating -- assuming that in looking at what was  
5 on the website for the Department of Corrections, it's  
6 certainly a good start. And it addresses many of the  
7 concerns that Plaintiff has raised about the conditions; not  
8 all of them, but certainly a number of them.

9           But the issue seems to be whether they're actually  
10 being implemented.

11           And from my perspective, I'd like to hear what you  
12 would recommend as to how I would reconcile these differing  
13 declarations as to whether the Department of Corrections has  
14 actually actively implemented them. In other words, are  
15 they actually doing this?

16           And I understand that these things are evolving  
17 and new things are coming in, because -- which they've  
18 listed as mitigating the spread of the virus. And my  
19 concern is that -- this is an emergency. I mean, it's a  
20 pandemic. The virus is continuing. We're getting more  
21 cases. I don't think we can go through and I don't think  
22 it's frankly going to be a useful way of doing it to have  
23 hearings where declarants testify as to this and somebody  
24 testifies as to something else. That works in other cases,  
25 but I don't think it's going to work here.

1           Frankly, somebody has to go in and inspect and  
2 say: Yes. They're doing the cleaning. They're given the  
3 bars of soap; they're given this; they're given that.

4           And I would like to get some idea as to how -- I'm  
5 thinking of either appointing an *amici*. I'm talking short  
6 term; I'm not discussing putting a full monitor in. We're  
7 discussing it in the context of a TRO at this point. Or  
8 perhaps some sort of an expert that will actually go in and  
9 do an inspection.

10           And one question I had is either individuals that  
11 have done inspections who would be going in at the facility  
12 or the -- you've indicated organizations that have looked at  
13 the procedures and have thought they were adequate or  
14 whatever, whatever the language was that you used. So the  
15 American Correctional Association, the National Conference  
16 on Correctional Healthcare that supposedly has looked at the  
17 actual procedures. I don't know. Do they do inspections or  
18 implementation of these or do they just look at the  
19 features?

20           Do you know, Mr. Bluming?

21           MR. BLUMING: Your Honor, that I don't know. And  
22 if they do regular inspections. I think for accreditation,  
23 perhaps they have to do regular inspections of the  
24 facilities. I don't know when the last one was done in  
25 relation to the outbreak. But I can find that out.

1 THE COURT: Are these accredited or is there a  
2 separate accreditation?

3 MR. BLUMING: Well, one is accredited and then  
4 there's a separate -- to be perfectly candid, your Honor,  
5 the distinction in my mind is a little bit fuzzy. But  
6 there's at least one accreditation body and possibly two.

7 But I would have to go -- I apologize for this --

8 MR. MARCUS: Your Honor, we've spoken --

9 THE COURT: Hold on, Mr. Marcus. Let me finish  
10 here.

11 Mr. Bluming, I do think -- I'd like your reaction  
12 to it, again, the reaction from you as to how I'm supposed  
13 to reconcile these differences. I don't see evidentiary  
14 hearings. One, they will take too long. Two, it's not  
15 going to work. You're going to have -- in terms of the  
16 people coming in, the higher-up people, and then you're  
17 going to have -- assuming we can get this all orchestrated,  
18 frankly, to have it done.

19 You need somebody to actually go in and see --  
20 unannounced, to go in and see whether these things need to  
21 be done and to work with Corrections if they're not being  
22 done as well as they could be, even though it looks like DOC  
23 has put these procedures in place that they require. They  
24 require training; they may require other kinds of  
25 assistance.



1           But do you have any suggestions in terms of how I  
2       reconcile them? There's a big gap in here, a disconnect,  
3       between what you're saying DOC people are doing, employees  
4       are doing and what they're giving the residents there, and  
5       what the Plaintiffs have come back with, which is totally  
6       and completely different.

7           MR. BLUMING: Yes, your Honor. We certainly  
8       recognize the dispute on the ground.

9           And I suppose that our view of the question is  
10      that in imposing some kind of inspector to settle on a  
11      remedy for a TRO would in essence be to credit the  
12      Plaintiffs' version of the events over the Defendants'.

13           And we of course disagree it that's --

14           THE COURT: Not necessarily. Not necessarily. I  
15      don't see why it would be favoring one over the other. What  
16      you would do is you're getting an independent person who  
17      would go in to see who's right. If it's Plaintiffs'  
18      declarations, are they correct about what they're saying?  
19      Are the Defendants correct about what they're saying? And  
20      they would come back independently.

21           I mean, there's only certain things that you'd  
22      look at in doing a whole accreditation. You're looking at  
23      certain specific conditions that have been put into place  
24      that are specifically directed at this virus. And, you  
25      know, the list isn't that long, frankly, of what they're

1 doing. But somebody independent. That's why I said an  
2 accreditation or group that's familiar with doing it or if  
3 you have suggestions of people who have worked with  
4 Corrections.

5 I know that Judge Sullivan in the federal court  
6 has the Interagency Detention Committee, which I know has a  
7 very large committee membership, both from the federal  
8 court, the local court; PDS is on it; I know Mr. Glover is  
9 on it and a number of people. And they dealt with the  
10 issues of -- for instance, last year, I believe it was, with  
11 the issue of air conditioning. And they had people in who  
12 did inspections, et cetera, unannounced.

13 So it's been done. But it seems to me it would  
14 make it easier.

15 My whole point is, I'm not crediting one side or  
16 the other. I need to have an answer. And it's a fact  
17 answer. It's something where somebody goes and looks.  
18 Someone has to go in and actually look at it. So this isn't  
19 something where, you know, you can do it in any other way.  
20 And it would be these very limited issues that seem to be in  
21 contention.

22 MR. BLUMING: Sure.

23 And to the extent that your Honor would be  
24 inclined to order some kind of relief like that, we would  
25 certainly, you know, maintain that it should be an

1 independent individual appointed by the Court, ideally with  
2 the agreement of the parties, and that it would provide us  
3 time to go back and to discuss with our client what kind of  
4 individual is proposed and the right kind of individual that  
5 would do that.

6 THE COURT: It's an emergency. It would be in the  
7 context of a TRO and potentially a PI in terms of resolving  
8 some of these issues.

9 So we're talking about an emergency appointment.  
10 We're not talking about a permanent monitor that they've  
11 also asked for, or a more permanent monitor. I'm talking  
12 about someone who would come in as an emergency who could do  
13 this who would take a look at it and see whether it's being  
14 implemented or make suggestions about how to implement it if  
15 it's not being implemented perfectly. You could have that  
16 taken care of.

17 MR. BLUMING: Yes. And the conversation with our  
18 client and with counsel would have to take place quickly if  
19 that were the Court's decision on it.

20 But yes. Our position would certainly be  
21 beneficial and appointed by the parties.

22 THE COURT: I agree. I was trying to get  
23 organizations which would be viewed as neutral or if there's  
24 somebody that both can agree to. I don't know whether there  
25 have been people that were connected to the committee that

1 Judge Sullivan had that have done this kind of work, because  
2 I know they have people who came in and looked at the air  
3 conditioning system and ventilation and whatever else is  
4 going on with it. I don't know whether any of those people  
5 would be available or appropriate.

6 Mr. Marcus?

7 MR. MARCUS: We agree with your Honor. An expert  
8 is important here. And the timing is urgent, and so there's  
9 not a ton of time for deliberations.

10 We have spoken with one potential expert whose  
11 name is Dr. Ronald Waldman at George Washington. He has  
12 extensive expertise in public health, has worked for the CDC  
13 and the WHO, and is available again on an emergency basis.  
14 And we think the Court should require a report in hand as  
15 soon as possible, within 48 hours or so, we would recommend.

16 MR. BLUMING: Your Honor, if I may be heard.

17 THE COURT: We need to do it quickly because we  
18 need to figure out how this is working, because it does make  
19 a difference in terms of going forward or not going forward  
20 or what is involved with it. And I would be inclined to  
21 make it a fairly limited thing so we could get a quick  
22 report that everybody would be in a position to take a look  
23 at.

24 Mr. Bluming?

25 MR. BLUMING: If I may be heard on that. We're

1 obviously happy to move quickly, if you'd like a  
2 recommendation from the client in an expeditious manner.

3 One constraint actually is it's 12:00 in a few  
4 minutes. There is an oral argument in the *Williams* case,  
5 and so we'll have to proceed to that. I'm trying to stay  
6 here. Co-counsel on the phone might move over to that.

7 But immediately following this hearing, this again  
8 is if your Honor -- if this is the relief that your Honor is  
9 requesting, we'd be happy to talk to our client and get back  
10 to the Court as expeditiously as possible. We wouldn't need  
11 a lot of time. But we'd just want a moment to be able to  
12 propose something before accepting the Plaintiffs' proposed  
13 expert.

14 THE COURT: I would want something that frankly  
15 both of you could agree on. And I know Judge Contreras is  
16 waiting or -- not waiting, but will be having the next  
17 hearing.

18 The only other question that I had is in -- and  
19 this is to the Defendant: In the screening of new people  
20 coming in, and I understand -- including staff, that staff  
21 is coming in, as I understand it, they are doing daily  
22 screenings. In the pleadings, it says the temperature is  
23 taken in the material that was on the website. It's not  
24 clear that temperatures are being taken of people coming in,  
25 including staff. It talked about the questionnaire or

1           whatever the CDT or some other group has suggested. So I  
2           was wondering if you knew whether they actually were taking  
3           the temperatures.

4                       MR. BLUMING: This is our understanding, your  
5           Honor, and in Dr. Jordan's declaration at 20-2, Paragraph 5.  
6           So first, you take the policy as implemented on March 15th  
7           that everyone that is entering a new facility is screened  
8           for symptoms, using a thermometer and a screening survey,  
9           and the following sentences: A nurse takes temperatures and  
10          staff members take the written surveys. The staff conduct  
11          the screening format in gloves and maintain a written  
12          record.

13                      So yes. The record is that that is what's  
14          happening for each visitor as they come in, that everyone is  
15          screened.

16                      THE COURT: From what you put on the website, it's  
17          not clear that you're doing that. The questionnaire is  
18          not -- I forgot what -- you don't have them numbered, so I  
19          can't tell you where it is. But you should take a look at  
20          it, because that was -- when I read it, I was a little  
21          surprised they didn't say anything about temperature,  
22          because my understanding is you were taking it.

23                      Okay. I've finished with -- let me just look to  
24          make sure you've asked all my questions.

25                      Yes.

1           I think what I'd like to do is, if you could go  
2 back, the two I think -- the two issues that have been sort  
3 of left out there for you to go back for, Mr. Bluming, is  
4 one is the phone issue about the legal access or whatever  
5 other suggestion you've got, since it is just a suggestion  
6 on my part that this needs to be done rather quickly.

7           The other question is to have a discussion -- and  
8 I think it would help if the two of you, both Plaintiffs and  
9 the Defendants, had a conversation about whether there are  
10 people that mutually -- either an individual or an  
11 organization that you mutually could agree to have somebody  
12 go in as an emergency.

13           It would be limited to -- I'm not looking at legal  
14 calls for that person; I'm not looking at the misdemeanants  
15 and credits, but just looking strictly at the conditions  
16 that have been set out that you've indicated, DOC, that the  
17 DOC has indicated they actually do. It's not going to cover  
18 everything that Plaintiffs have requested, because you've  
19 indicated on some of these you're not doing it. I'm not  
20 asking for that.

21           All I'm asking for is for somebody to go in and  
22 resolve the factual issue of whether that has been  
23 implemented or has actually been followed through. I'm not  
24 suggesting bad faith here. I'm suggesting that in putting  
25 it in, it takes time in a large organization to get it done.

1 And so I want to make sure that it's pointed out if things  
2 are not working as they should, that you get -- that you  
3 make sure that you actually are doing it. Okay?

4 MR. BLUMING: Understood, your Honor. We're happy  
5 to confer with our client and with Plaintiffs' counsel.

6 THE COURT: So what I'd like is, I think I'd like  
7 a telephone call at the end of the day. I'm trying to think  
8 what is the best way to communicate. Hopefully, it would be  
9 nice if you could agree on somebody. It would make my job  
10 easier. And I do think conversations with each other would  
11 be helpful.

12 And I might not immediately, but along the way  
13 here, I might very well set up a small working group to have  
14 a discussion of trying to resolve some of these issues by  
15 having discussions about suggestions on how to do it or not  
16 having it all done. We could do the litigation on a track.  
17 I'm not suggesting that you not do that. So perhaps have  
18 discussions about some practical issues about how things can  
19 get done. But I'll get back to you about that.

20 But the phones and the issue of the two sides on  
21 somebody who -- and the other question is if the person  
22 wants to be compensated, how that is taken care of. That's  
23 always an issue.

24 So what is the best way to communicate back to me?  
25 Do you want to have a phone call? Do you want to --



1 probably it would be -- I think it would be best to do a  
2 phone call instead of fooling around trying to file notices  
3 and stuff. So does that work?

4 I have a 4:30 judges' meeting.

5 Mr. Bluming, you've got to get over there. But do  
6 you think you'd know by 4:00? Is that too soon?

7 MR. BLUMING: I think that's appropriate, your  
8 Honor.

9 MR. MARCUS: Your Honor, we --

10 THE COURT: You can tell me where you are at that  
11 point.

12 MR. BLUMING: Your Honor, we could definitely  
13 update the Court at 4:00. And again, we're not sure how  
14 long Judge Contreras's hearing will go. And we won't be  
15 able to have either the contemplated discussion until that  
16 hearing is over.

17 And --

18 THE COURT: As I understand it, you've got some --  
19 Eric Glover has been providing a lot of information to  
20 the -- we've been getting daily reports. And there's a  
21 whole series of other individuals that perhaps they could  
22 start it.

23 I take it you're expected to be in Judge  
24 Contreras's -- the next conference, is that correct, or  
25 video?

1           MR. BLUMING: Your Honor, the next hearing is  
2 totally telephonic. I'm not the one arguing. My colleague  
3 is arguing. But I was going to be present where -- I think  
4 the same arrangement, where she could identify the people  
5 and ask questions.

6           THE COURT: No problem.

7           But you do have other people. Maybe one of those  
8 could start the process of talking. I mean, you all must  
9 have had different experts or different people that have  
10 done inspections over the years that could be contacted. As  
11 I said, I know that Judge Sullivan's committee did have  
12 people do some inspections about the air conditioning and  
13 ventilation.

14           Now, that's obviously a different issue than what  
15 we're talking about here. But it may be that some of these  
16 people would be appropriate. I'll leave it to you.

17           Okay. I will host it at 4:00. Hopefully, it'll  
18 be short, since I have to then be on the other phone for our  
19 executive session with the Court.

20           I did not ask, but let me just ask now, are there  
21 any Plaintiffs' attorneys on the phone that want to add  
22 anything?

23           I don't hear anything, so I'm assuming no.

24           Is there any attorney on the Defendants' side  
25 that's on the phone that wishes to add anything?

1 All right. I hear silence.

2 I'm assuming that we're done. I thank you all. I  
3 appreciate the time that you've taken to give me the  
4 pleadings and declarations. Both sides have been able to  
5 get this together. And hopefully, we can move on this and  
6 make sure that what's happening in the community does not  
7 happen at DOC.

8 All right. Take care. Be well.

9 MR. BLUMING: Thank you, your Honor.

10 MR. ANDERSON: Thank you, Judge.

11 MR. MARCUS: Thank you, your Honor.

12 (Proceeding concluded.)

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**CERTIFICATE**

1  
2  
3 I, LISA EDWARDS, RDR, CRR, do hereby  
4 certify that the foregoing constitutes a true and accurate  
5 transcript of my stenographic notes, and is a full, true,  
6 and complete transcript of the proceedings produced to the  
7 best of my ability.  
8  
9

10 Dated this 7th day of April, 2020.  
11

12 /s/ Lisa Edwards, RDR, CRR  
13 Official Court Reporter  
14 United States District Court for the  
15 District of Columbia  
16 333 Constitution Avenue, NW, Room 6706  
17 Washington, DC 20001  
18 (202) 354-3269  
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