COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Suffolk, ss. Super. Ct. No. 20-00855-D

STEPHEN FOSTER, **MICHAEL GOMES**, **PETER KYRIAKIDES**, **RICHARD O'ROURKE**, **STEVEN PALLADINO, MARK SANTOS**, **DAVID SIBINICH**, **MICHELLE TOURIGNY**, **MICHAEL WHITE**, **FREDERICK YEOMANS**, and **HENDRICK DAVIS**, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, **GLORIANN MORONEY**, Chair Massachusetts Parole Board, and **THOMAS TURCO**, Secretary of the Executive Office of Public Safety and Security,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The COVID-19 crisis in the Massachusetts Department of Correction ("DOC") is worse now than at any time since the pandemic began and the DOC has shown that it is utterly incapable of protecting the people in its custody. In the past six weeks over 1,000 prisoners have been confirmed infected, over two thirds of the total infections to date. Five incarcerated people have died in the past month, bringing the death toll to thirteen.[1] All the measures DOC has put in place to control the spread of infection, such as lockdowns, mask use, and disinfection, have failed. Although the Supreme Judicial Court ("SJC") has stated repeatedly, starting over six months ago, that "the situation is urgent and unprecedented and that a reduction in the number of people who are held in custody is necessary," *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 445 (2020), *Foster v. Comm'r of Correction*, 484 Mass. 698, 701 (2020), Defendants have taken only the most minimal available steps to reduce the prison population.

Regardless of whether the Defendants could have reasonably believed their efforts to be sufficient in June when COVID cases were in decline and the SJC denied Plaintiffs' previous preliminary injunction motion, it is now clear that they are not doing enough. The failure to take meaningful action to expand the use of parole, medical parole, home confinement, sentence-reduction credits, and other measures has created a substantial risk of serious harm to all in DOC custody, to which Defendants have shown deliberate indifference, in violation of the Plaintiffs' rights under the U.S. Constitution and the Massachusetts Declaration of Rights.

[1] *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, Special Master's Weekly Report (Mass. December 17, 2020) ("Special Master's Report") (showing three deaths since December 3), Deborah Becker, *2 Mass. Prisoners Hospitalized With COVID-19 Die A Day After Being Granted Medical Parole*, WBUR News, updated December 4, 2020, available at https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths (reporting deaths in late November of two prisoners who were granted medical parole while hospitalized for COVID-19 and thus not reported as in DOC custody).

Urgent action is needed to enable adequate social distancing by decarcerating those who can safely rejoin the community so that they and the remaining prison population are protected from further serious illness and death.

PROCEDURAL HISTORY

Plaintiffs filed this suit on April 17, 2020, with the Single Justice, seeking emergency relief in light of the threat of COVID-19 in Massachusetts prisons and jails. At the time, 319 prisoners, guards, and staff in Massachusetts correctional facilities had tested positive for the virus. Compl. ¶ 6. The Single Justice referred the case to this Court for an expedited fact finding and to the full Supreme Judicial Court for decision on the preliminary injunction motion in the first instance. This Court conducted an evidentiary hearing between April 27 and April 29 and received affidavits and agreed-upon facts submitted by the parties. On May 1, the Court issued its factual findings. The parties then briefed the case for the SJC, which heard argument on May 7, 2020.

On June 2, the SJC issued its decision denying Plaintiffs' motion for preliminary injunction. *Foster*, 484 Mass. at 732. In the decision, the SJC reaffirmed that "a reduction in the number of people who are held in custody is necessary." *Id.* at 701 (quoting *Comm. for Pub. Counsel Servs.*, 484 Mass. at 445). It also noted the pandemic would "continue to demand extraordinary, and coordinated, efforts by all parties," and took pains to point out that the DOC had the ability to reduce the number of people incarcerated through the use of home confinement, as well as other measures adopted by other states. *Id* at 732-33; *see also id.* at 733 ("The specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction"). Nonetheless, it found in light of the emergency circumstances that the actions by Defendants at that time had met the constitutional minimum. *Id.* at 724. In a concurrence, the late Chief Justice Gants emphasized the

need for the DOC to be proactive in reducing the prison population, including through the use of home confinement, before an additional wave of infections broke in the fall and winter:

> Reducing the size of the prison population, especially the size of the elderly and infirm prison population, in a manner that is consistent with law and public safety takes time, both to identify appropriate candidates for release and to ensure that they have appropriate release plans. **But there will be time before the fall to accomplish sensible reductions in the size of the prison population**, including the release or transfer to home confinement of many elderly and medically vulnerable prisoners, to give prison superintendents the better options to protect the physical and mental health of inmates that come with fewer prisoners.

Id. at 740–41 (2020) (Gants, C.J., concurring) (emphasis added); *see id.* at 735 ("[T]here is considerably more that the DOC and the parole board can do to reduce the inmate population, consistent with law and appropriate in terms of public health and safety. . . . [A]lthough what the DOC and parole board are doing <u>now</u> may not likely demonstrate a reckless disregard for the health and safety of prisoners arising from the risk of transmission of the COVID-19 virus, continuing unchanged along that same path in the months ahead might constitute reckless disregard, especially if we are hit with a new wave of COVID-19 cases.") (emphasis in original). Despite this warning, since the SJC issued its decision the DOC has done essentially nothing to reduce the number of people in its custody. Indeed, it has resisted establishing a home confinement program, claiming that it was not required and that it would be inconvenient and inappropriate to set up during the pandemic. In the meantime, the number of confirmed COVID-19 infections among prisoners, guards, and staff has exploded to over 2,250, with more new cases every day,[2] and there is no evidence that the current approach of DOC or the Parole Board will bring the virus under control.

[2] Special Master's Report at 62.

FACTS

On June 2, 2020, when the Supreme Judicial Court issued its prior decision, 407 people in DOC custody had been reported as infected with COVID-19. In each of her interrogatory responses in this case, Commissioner Mici inserted boilerplate language touting the fact that the virus was under control and that there were no longer any cases in the DOC.[3] Indeed, the commissioner admitted that she has no plan to combat any surge of cases apart from repeating the same ones that resulted in the current outbreak.[4] But as predicted by virtually every public health official,[5] and by the SJC, the fall and winter have brought a resurgence of the virus that the Defendants remain completely unprepared for.

Beginning at the end of October, the number of positive cases among DOC prisoners, guards, and staff spiked dramatically. On October 28, there were 476 prisoners, 137 guards, and 96 other staff who had tested positive for the virus.[6] As of the most recent Special Master's report, the numbers have grown more than three-fold to 1,642 prisoners, 479 guards, and 130 staff. *Id.* Some facilities have had hundreds of positive tests in recent weeks: MCI Norfolk has had 416 new positive prisoner tests since October 29.[7] MCI Shirley has had 280.[8] NCCI Gardner

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[3] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Every Response ("The DOC's extraordinary efforts in screening, testing, identification, prevention, containment, and education enabled it to reduce the COVID-positive inmate population to zero.").
[4] *See* Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 16 ("The plans, procedures, and preparations are the same as those that have enabled the DOC to reduce the positives among the inmate general population to zero.").
[5] *See, e.g.*, Aria Bendix, *CDC director predicts this fall and winter will be 'one of the most difficult times we've experienced in American public health*,' Business Insider (July 14, 2020), available at https://www.businessinsider.com/cdc-director-robert-redfield-deadly-coronavirus-surge-fall-winter-2020-7.
[6] Special Master's December 17 Weekly Report at 62.
[7] *Id.* at 69.
[8] *Id.* at 87.

has had 162.[9] MCI Concord has had 284.[10] Five people have died in the past month alone.[11] Just in the few days since the Special Master's December 17, 2020 report, the number of cases has continued to spike, with over 125 new prisoner cases between December 17 and December 22.[12] And over 200 correctional officers currently have active COVID-19 infections.[13]

This explosion of cases shows no sign of slowing. Every single one of DOC's 16 facilities has active COVID-19 cases, and dozens of new cases are caught each time DOC implements facility-wide testing.[14] The danger will only increase with colder weather in coming months, as community spread of the virus is expected to increase, and spread among prisoners is likely to grow even further.[15] Correctional facilities, which already contain almost half of the largest clusters of infection in the state,[16] will continue to burn with infection.

Nothing the Defendants have done since the spring, from distributing and mandating masks to eliminating group programs, curtailing recreation, and ending visits with family, has stemmed the tide of the virus. Defendants have adamantly refused to do the one thing most likely to control infections: create more room for social distancing by reducing the population.

I. THE DOC STILL HAS DANGEROUSLY DENSE POPULATION LEVELS

DOC's facilities remain so crowded that prisoners are helpless to avoid constant close contact with others. On June 2, 2020, the SJC found that meaningful reduction in the prison

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[9] *Id.* at 71.
[10] *Id.* at 79.
[11] *See* n.1, *supra*.
[12] *See DOC COVID-19 Inmate Dashboard, https://www.mass.gov/info-details/doc-covid-19-inmate-dashboard*
[13] Special Master's December 17 Report at 62.
[14] *Id*. at 64-95.
[15] *See* Declaration of Amir Mohareb, MD, at 174-179.
[16] *See* New York Times, "Massachusetts Coronavirus Map and Case Count, *available at* https://www.nytimes.com/interactive/2020/us/massachusetts-coronavirus-cases.html#county. As of December 20,2020 the site showed that eleven out of 25 largest clusters in the state were at correctional facilities, seven of those DOC facilities) (colleges and universities are listed separately).

population was necessary.[17] Since then, the DOC's population has declined slightly,[18] due almost entirely to a drop in the number of admissions. However, prison populations density has not shown a meaningful decline. The DOC is required by legislation to report the total number of prisoners within each correctional facility who are housed in a cell: (i) alone; (ii) with one other person; or (iii) with two or more other people.[19] The percentage of the population housed with at least one other person was 53.3 percent on June 15, 2020; it is now 50.7 percent.[20] And the number housed in a room with three or more people has actually gone up slightly, from 18.7% to 19.2%.[21]

At the time of the SJC's ruling, five institutions were over their design capacities and the system overall was operating at 89 percent of design capacity.[22] As of December 14, 2020, the population remained at 89 percent of design capacity, and five prisons remain over their design capacities.[23] Then, as now, a majority of prisoners are housed with at least one other person,[24] and at many prisons the proportion is much higher: 91 percent at NCCI Gardner, 75 percent at the MTC, 72 percent at MCI-Concord, 63 percent at OCCC, 66 percent at Pondville Correctional

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[17] *Foster*, 484 Mass. at 701.
[18] *See* Special Master's Report at 61-62 (showing decline of approximately 6.5 percent during that period, from 7,147 to 6,664).
[19] *See* Chapter 93 of the Acts of 2020.
[20] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download; https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download
[21] *Id.*
[22] As Dr. Mohareb explains, even prisons at design capacity "may still have too high a risk of COVID-19 spread." *See* Ex. 1, Mohareb. Decl. at 143-56.
[23] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity, which show the following comparison of actual population to design capacity: MCI-Norfolk 1209/1084, or 111 percent; MCI-Shirley 1074/1019, or 105 percent; NCCI Gardner 843/598, or 140 percent; OCCC 696/580, 120 percent; Pondville 106:100, or 106 percent).
[24] *See* https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download (June 14, 2020 data); https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download (December 14, 2020 data).

Center, and 55 percent at MCI-Shirley. Some prisons have actually increased density during this period,[25] while others have declined only nominally.[26]

This crowding elevates the risk of COVID-19 regardless of mask use and other infection control policies,[27] and it is no surprise that the most densely populated prisons have experienced the greatest outbreaks. Four prisons account for 1,069 new infections since October 29, nearly all of the total of 1,085 new infections during that period. MCI-Norfolk, operating at 111 percent of its design capacity, had 416; MCI-Shirley, at 105 percent of capacity, had 280; NCCI Gardner, at 140 percent capacity, had 162; and MCI-Concord, where 72 percent share a cell with at least one other person, and 108 with two or more, had 284 cases.[28]

The physical plant at these prisons exacerbates the issues posed by the ongoing density issues, amplifying the impacts of overcrowding. MCI-Norfolk, MCI-Concord, MCI-Shirley, NCCI Gardner, Old Colony Correctional Center, Pondville Correctional Center, Northeastern Correctional Center, and Souza Baranowski Correctional Center have all been cited numerous times by the Department of Public Health ("DPH") for having cells that are too small with inadequate floor space, including in double bunked cells and dorms.[29] At MCI-Norfolk, 376

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[25] Bridgewater State Hospital has gone from 90% of its design capacity (206/227) to 96% (218/227); the Massachusetts Treatment Center's population increased from 93% of design capacity (527/552) to 98% (552/561).

[26] MCI Framingham has reduced its population by three people, from 179 to 176; MCI Norfolk has reduced by 34 people, from 1,243 to 1,209; OCCC has reduced by 12 people from 708 people to 696.

[27] Ex. 1, Mohareb Decl. at 250-71.

[28] *See* Special Master's Report for infection numbers; https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers; and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity.

[29] https://www.mass.gov/doc/mci-norfolk-november-14-2019/download; https://www.mass.gov/doc/mci-concord-december-11-2019/download; https://www.mass.gov/doc/mci-shirley-december-4-2019/download; https://www.mass.gov/doc/north-central-correctional-institute-in-gardner-september-24-2019/download; https://www.mass.gov/doc/old-colony-correctional-center-december-13-2019/download;

people are housed with one other person, and 107 people are housed with two or more other people. At MCI-Concord, 260 people live with one other person, and 108 people live with two or more other people. At MCI-Shirley 470 people live with one other person, and 128 people live with two or more others. At NCCI Gardner 252 people live with one other person and 519 people live with two or more other people. At Old Colony Correctional Center 358 people live with one other person, and 82 people live with two or more others. Pondville has 76 people double bunked, Northeastern Correctional Center has 40 people double bunked, and Souza Baranowski Correctional Center has 100 people double bunked.[30] All these facilities house people in cells that fail to meet the DPH minimum cell size standard.

These crowded settings pose all of the dangers of congregate living. Prisoners live in dormitories holding from 40 to 80 people, in bunk beds so close they can touch their neighbors' beds.[31] Even those in single or double cells are jeopardized by crowded lines for medication and

https://www.mass.gov/doc/pondville-correctional-center-norfolk-december-19-2019/download; https://www.mass.gov/doc/northeastern-correctional-center-september-30-2019/download; https://www.mass.gov/doc/souza-baranowski-correctional-center-september-16-2019/download

[30] https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download

[31] Ex. 4, p. 83, Declaration of **Michael Maramaldi** ¶ 4 (Concord) (in dorm, 80 people, all day and night within 6 feet of each other; line up for medications); Ex. 4, p. 44, Declaration of **John Ecker** ¶ 3 (Gardner); Ex. 4, p. 30, Declaration of **Todd Cummins** ¶ 3 (Gardner); Ex. 4, p. 4, Declaration of **Ju-Bang Allah** ¶ 2 (Concord) (dorm with 60-70 people in it; on top of bunk bed, someone below him; within 6 feet someone 24/7); Ex. 4, p. 107, Declaration of **Miguel Rivera** ¶ 3 (Gardner) (two dorms connected, approximately 40 people bunk beds three feet from one other; can touch beds on either side of him from own bed); Ex. 4, p. 50, Declaration of **Stephen Foster** ¶ 4 (Norfolk) (in four-man cell; shared space with adjacent two-man cell; even when two-man cell became empty, they kept him and others in the four-man)

meals, and crowded common spaces;[32] double-celled prisoners bear further risk from all their cellmates' exposures.

II. THE PRISON ENVIRONMENT PRESENTS ACUTE COVID-19 RISKS

Correctional facilities have become one of the most high-risk settings for COVID-19 transmission[33] for a number of reasons, including physical design, poor ventilation, lack of natural light, the circulation of staff and visitors, and lack of ability to manage infection control.[34] Prison overcrowding is a known cause of COVID-19 spread in Massachusetts and nationally.[35] "The factors that increase COVID-19 transmission risk in correctional settings all contribute by increasing the population density and the amount of time people spend in close contact to each other within facilities."[36] It is now understood that close contact with an infected person, even if brief and intermittent, is the most common cause of infection,[37] and that infected people are most likely to spread the illness *before* they develop symptoms.[38] The CDC estimates that 50% of

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[32] *See* Ex. 4, p. 73, Declaration of **James Keown** ¶ 9 (Norfolk) (for meals, 20 men line up one foot apart; in confined space with no ability to soc distance); Ex. 4, p. 66, Declaration of **Michael Gomes** ¶ 16 (Shirley minimum) (lines up for meals; lines up for regular insulin shots); **Cummins Decl.** ¶ 8 (Gardner) (not possible to social distance, throughout day constantly within 6 feet of others; lines for food, meds; eat on beds); Ex. 4, p. 92, Declaration of **Ramon Olan** ¶¶ 5-8 (Pondville) (lines, phones, vending machines, meds, canteen); Ex. 4, p. 12, Declaration of **John Baptista** ¶ 4 (Gardner) (lines for meals, meds) and ¶ 9 ("I must come in close contact with at least 30 different prisoners every day even though I try to keep to myself."); Ex. 4, p. 7, Declaration of **Robert Anderson** ¶ 3 (Shirley) (64 prisoners, almost all in single cells, but social distance not possible—within six feet of someone else whenever out of cell, comes in contact with nearly all people in unit every day); ¶¶ 5-8 (meals, phones, meds, canteen); Ex. 4, p. 58, Declaration of **Alan Gaudreau** ¶¶ 3-7 (Norfolk) (people are in a hallway 5 feet wide all day long, with no way to socially distance; also impossible to distance in lines for medication or food); **Ecker Decl.** ¶ 3-5 (Gardner) ("Sometimes the basement is like Grand Central Station").
[33] Ex. 1, Mohareb Decl. at 101-02 and n.19.
[34] *Id*. at 102-22.
[35] *Id*. at 163-172.
[36] *Id*. at 223-25.
[37] *Id*. at 125-30.
[38] *See* Emily A. Wang, Bruce Western, Emily P. Backes and Julie Schuck, eds., *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity and Safety*, National Academies of Sciences, Engineering, and Medicine, at 2-2 (hereinafter, NASEM Report),

COVID-19 transmission occurs prior to the onset of symptoms, and further, the approximately 40% of infected people who *never* develop symptoms are still 75% as likely as those with symptoms to transmit the virus.[39] Because a crowded prison environment increases the risk of close contact with asymptomatic carriers, "depopulation has been shown to be an effective intervention" in reducing COVID-19 spread.[40]

Prisoners are also more vulnerable than the general population to complications and death from COVID-19. They are more likely to have co-morbidities increasing their vulnerability to COVID-19,[41] and they receive delayed access to medical care, arriving at hospitals at a more advanced stage of the disease than others.[42] In addition, the density of correctional facilities may increase the viral load that is transmitted, leading to more severe infection.[43] Controlling for age, sex, and race/ethnicity, the mortality rate among Massachusetts prisoners is twice the rate of the general population.[44] One study has shown that prisoners are sicker on arrival at hospitals, more likely to be admitted to the intensive care unit, and more likely to require interventions like mechanical ventilation and life support.[45] However, we now know that even mild COVID-19 cases can have severe, long-term effects, including impaired memory, limited concentration, and

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https://www.nap.edu/catalog/25945/decarceratingcorrectional-facilities-during-covid-19-advancing-health-equity-and.

[39] *See* Centers for Disease Control and Prevention, *Pandemic Planning Scenario*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html (updated September 10, 2020).

[40] Ex. 1, Mohareb Decl. at 230-36.

[41] *Id.* at 201-05.

[42] *Id.* at 194-201.

[43] *Id.* at 208-19.

[44] *Id*. at 184-86.

[45] *Id.* at 186-91 and n.40.

extreme fatigue.[46] According to the CDC, "people who are not hospitalized and who have mild illness can experience persistent or late symptoms."[47]

A vaccine will not eliminate this danger from the prison setting. Governor Baker has announced that people living and working in congregate settings will be the fourth group to receive the COVID-19 vaccine in phase one of the state's vaccination program.[48] However, completion of this phase is not expected until at least February 2021 and it "remains unclear just how officials plan to roll out a vaccination program for an estimated 22,000 people who work or are incarcerated in jails and prisons,"[49] particularly given a 20 percent shortfall in the number of doses shipped in December.[50] Furthermore, as Dr. Amir Mohareb explains, immunity is not immediate after the vaccine and outbreaks will persist after vaccine distribution begins.[51] In addition, the effectiveness of the vaccine in some populations is uncertain, and it is not known whether those who receive the vaccine can nevertheless transmit the virus to others.[52] For these reasons, "public health officials have warned against abandoning social distancing measures

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[46] See Rita Rubin, *As Their Numbers Grow, COVID- "Long Haulers" Stump Experts*, J. of Am. Med. Ass'n (Sept. 23, 2020), https://jamanetwork.com/journals/jama/fullarticle/2771111.
[47] Centers for Disease Control and Prevention, *Long Term Effects of COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/long-termeffects.html?ACSTrackingID=USCDC_425-
[48] See Press Release, *Baker-Polito Administration Announces Initial Steps for COVID-19 Vaccine Distribution* (Dec. 9, 2020) (hereinafter Phase One Press Release), https://www.mass.gov/news/baker-polito-administration-announces-initialsteps-for-covid-19-vaccine-distribution.
[49] See Laura Crimaldi, *Inmates, Correctional Workers to be Among First to get Vaccine in Mass. but Rollout Plan is Hazy*, Boston Globe (Dec. 12, 2020)
[50] *See* "Mass. Will Receive Fewer Pfizer Vaccine Doses This Month Than Expected," WBUR Common Health blog (updated December 18, 2020) *available at* https://www.wbur.org/commonhealth/2020/12/18/mass-will-receive-fewer-pfizer-vaccine-doses-than-planned
[51] Ex. 1, Mohareb Decl. 298-99.
[52] *Id.* at 300-05.

following vaccine distribution."[53] And a vaccine will be of no help to individuals who are exposed to COVID-19 from now until whenever distribution begins.

III. The Defendants Have Failed To Make Meaningful Use Of Existing Release Mechanisms

Despite the clear dangers of housing people in congregate settings like prisons, direction from the SJC to reduce the prison population, and an explosion of COVID-19 in overcrowded DOC facilities, Defendants have done next to nothing to pursue meaningful population reduction.

A. Defendants Have Failed To Utilize Home Confinement

Commissioner Mici has wholly failed to utilize home confinement to reduce the population during the pandemic. Despite the SJC explicitly affirming Commissioner Mici's authority to release prisoners on home confinement back in June, she still has not released a single person on home confinement.[54] Incredibly, DOC has cited to the virus as a reason for *not* releasing people:

> Unfortunately, the COVID-19 pandemic, and especially the recent spike in Massachusetts cases, has made implementation of a home confinement program much more difficult. . . . For a number of reasons, placing inmates in the community at this time is potentially risky. . . . DOC expects that in 2021, either when COVID abates or a vaccine is widely available, it will expand the home confinement program for participation by eligible and suitable inmates.[55]

The DOC has never provided an explanation of why it did not implement home confinement during the summer and fall, when it was actively taking credit for the lack of active cases in DOC facilities.[56]

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[53] Ex. 1, Mohareb Decl. 305-07.
[54] Special Master's Report at 63.
[55] Defs.' Status Report on the Implementation of a Home Confinement Program (Dec. 1, 2020) at 2-3.
[56] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response Nos. 1-23 ("The DOC's extraordinary efforts in screening, testing, identification, prevention, containment, and education enabled it to reduce the COVID-positive inmate population to zero.").

B. Defendants Have Failed To Maximize Use Of Earned Good Time

Rather than ensuring that every prisoner has the opportunity to maximize sentence reduction credits ("earned good time"), the Defendants have restricted the ability to earn such credits. During the lockdown, prisoners have been unable to earn the full 15 days per month allowed by law for participation in rehabilitative, vocational and educational programs or work assignments, and which many prisoners had been receiving. *See* G.L. c. 127, § 129D. Instead, nearly all programming has been cancelled, and prisoners have been limited to paper packets that they can complete in their cell, for which the DOC is allowing a maximum of only 10 days per month.[57]

Neither have prisoners been able to earn additional sentence reductions allowed by law for completion of programs. Under § 129D, DOC prisoners are additionally eligible for 10 days credits as "Boost Time" when they complete certain programs or activities, and up to 80 days of "Completion Credit" when they finish certain longer-lasting programs or activities. In the Spring, the DOC allowed a limited number of prisoners near release to earn up to 42.5 additional days off of their sentences through boost time, completion time, and additional earned good earn time, resulting in 46 releases between April 10, 2020 and July 3, 2020.[58] No such opportunities have been announced this fall or made available to the many prisoners that counsel has heard from in

[57] *See* **Baptista Decl. ¶** 10 (earns five days for his in-unit job, unable to earn more right now); Ex. 4, p. 86, Declaration of **Emmett Muldoon ¶** 12 (only programming is journaling, for 10 days month, but he can't write the required 15-20 pages due to multiple sclerosis); **Rivera Decl. ¶** 12 (only program available is journaling, for 10 days per month); Ex. 4, p. 102, Declaration of **Ariel Pena ¶** 3 (he can only do journals for 10 days per month; was in the Boston College program before pandemic, earning 15 days per month. Got college credit for completing his class by mail, but no earned good time; has a job shoveling snow but gets no good time); **Ivey Decl. ¶¶** 16-17 (had been in Tufts college program several hours a day, and in book club every week for two hours; now only program available is journaling, for 10 days a month); Ex. 4, p. 128, Declaration of **Ethan Woodward ¶** 4 (has lost 27.5 days of earned good time to date due to lockdowns).
[58] *See* Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 1.

the course of preparing this motion.[59] Indeed, for prisoners such as Ethan Woodward, completion credits are impossible because they cannot finish the programs they are enrolled in.[60]

C. Defendants Have Failed To Utilize Furlough

Defendants have not released a single prisoner on furlough during the pandemic.[61] DOC's only justification for not using furloughs is its asserted belief "that it is bad policy to release an inmate who will need to be re-incarcerated."[62]

D. Defendants Have Failed To Utilize Medical Parole

Commissioner Mici has not made meaningful use of medical parole during the pandemic to reduce the incarcerated population. Overall the number of medical parole petitions granted remains abysmally low, particularly in light of the number of petitions filed and the age and medical condition of the DOC population.[63] According to data produced by DOC, from the beginning of March until the data cuts off in early September 2020, there were 286 medical parole petitions filed, of which only 8 had been granted.[64] Moreover, DOC has made no effort to identify and petition on behalf of medically vulnerable prisoners, despite the fact that the statute explicitly authorizes petitions by "a medical provider of the correctional facility or a member of

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[59] *See* **Maramaldi Decl. ¶** 7 (getting 15 days a month, but no boost or completion credits); **Rivera Decl. ¶** 12 (journaling restarted in November for 10 days a month, but no boost or completion credits); Ex. 4, p. 63, Declaration of **Michael S. Gomes ¶¶** 7-8 (only 69 days away from completing sentence but not able to earn completion credit).

[60] **Woodward Decl. ¶** 4 (has been enrolled in the Correctional Recovery Academy program, a six-month program, for nine months. Was supposed to graduate a while ago but has not been able to due to lockdown.)

[61] Factual Findings of the Superior Court (May 1, 2020) at p. 29.

[62] *Id.*

[63] Factual Findings of the Superior Court (May 1, 2020) at p. 23 (noting higher rate of chronic diseases and more rapid aging in prison population, and 983 prisoners in DOC custody over age 60 in 2019).

[64] *See* Ex. 8, Medical Parole Log, cited by Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 18. While the Special Master's most recent report indicates that 40 petitions have been granted, that number appears to include all medical parole petitions ever filed, including those filed years before the pandemic began. *Compare id.*

the department's staff." G.L. c. 127 § 119A(c)(1). Of the 286 petitions since March 1, 2020, not a single one was initiated by the DOC, and only one was instituted by its medical provider.[65] Contrary to Commissioner Mici's testimony that DOC "has taken numerous steps to expedite the medical parole process,"[66] the data produced by DOC in this litigation shows that they are taking *longer* to reach decisions on medical parole petitions than they did before the pandemic. Since March 1, 2020, it has taken Commissioner Mici an average of 63.4 days from the date of the request to make a decision; before March, she took an average of only 60.2 days.[67] Indeed, the average of 63.4 days is barely shorter than the statutory maximum of 66 days. G.L. c. 127 § 119A(c)(1) & (e). Lastly, Commissioner Mici has recently been granting medical parole to prisoners fatally ill with COVID-19 only hours before their deaths—too late to benefit the petitioners, but early enough to allow DOC to avoid counting them as prisoners who died in custody from COVID-19.[68]

E. Defendants Have Failed To Expand Parole

Defendants have likewise failed to utilize parole in order to reduce the population in custody in light of the pandemic. Each month this year for which the Parole Board produced data, it has held fewer parole hearings and issued fewer positive votes than it did during the same

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[65] *See id.*

[66] Factual Findings of the Superior Court (May 1, 2020) at p. 27.

[67] *See id.*

[68] Deborah Becker, *2 Mass. Prisoners Hospitalized With COVID-19 Die A Day After Being Granted Medical Parole*, WBUR News, updated December 4, 2020, available at https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths (reporting deaths in late November of two prisoners who were granted medical parole while hospitalized for COVID-19 and thus not reported as in DOC custody); Ex. 2, Affidavit of Joshua Dohan ¶ 34 (noting that Commissioner Mici only granted COVID-positive prisoner medical parole after medical director determined "that the appropriate course to take now is to end intubation, and provide end of life comfort care").

month last year.[69] In addition to the lower totals, the Parole Board has also granted parole at a lower rate since the pandemic started.[70] The only apparent explanation for the lack of a higher parole rate is that the Parole Board, despite explicit direction from the SJC, is not appropriately considering the risk to individuals from COVID-19 when making its parole decisions.[71]

In addition to granting fewer people parole, the Parole Board has also continued to hold dozens of people in custody despite a positive parole vote due to requirements it imposes before releasing people[72] that often make no sense in light of the current pandemic. For example, the Parole Board is continuing to require some people with positive parole votes to spend time at minimum security facilities despite the fact that there's no meaningful programming currently offered at them due to the pandemic,[73] or to participate in specific programs that are no longer available.[74] Although at the urging of the SJC, the Board successfully, with the help of CPCS, reduced the backlog of people with a positive vote who nonetheless remained in prison, the number of prisoners actually released on parole has been trending down since June.[75] The Parole Board also continues to hold people in custody for technical violations (*i.e.,* a violation of parole where no new crime is alleged)[76] and for new charges where the criminal court has granted

[69] Ex. 7, Def. Gloriann Moroney's Responses to Pls.' First Set of Interrogatories, Response Nos. 1 & 2 (showings chart of hearings held and positive parole votes each month from Jan. 2019 through July 2020).
[70] *Id.* (charts showing a positive parole vote rate of 60.16% from March-July 2019 and 56.44% from March-July 2020).
[71] *See* Ex. 2, Dohan Aff. ¶¶ 26-34.
[72] Ex. 7, Def. Gloriann Moroney's Responses to Pls.' First Set of Interrogatories, Response No. 4 ("As of July 31, 2020, there are 98 offenders with positive parole votes who are required to fulfill a prescription prior to release").
[73] *See, e.g.*, Pena Decl. ¶ 2 (requiring nine months at minimum facility despite no ability to participate in programming).
[74] *See* Ex. 4, p. 27, Declaration of **Jermaine Celester** ¶ 12 ("In order to get parole, I am required to do CRA, but it is impossible to attend this program during lockdown. I have completed all other programs and schooling").
[75] Ex. 2, Dohan Aff. ¶ 9-12.
[76] *See* Ex. 4, p. 41, Declaration of **William Dortch** ¶ 2 (parole revoked after friend gave him sneakers while on work assignment); Dohan Aff. ¶¶ 35-36.

release pending trial.[77] Indeed, between March and June this year, 98 people on parole were returned to prison for alleged technical violations.[78] They were then required to wait in prison, during the pandemic, for their parole hearings, which resulted in a parole revocation 61% of the time despite no new crime being alleged.[79]

The Parole Board has also been unjustifiably slow in issuing decisions following hearings for people serving parole-eligible life sentences, who make up nearly 13% of the DOC population and who are disproportionately older and therefore more vulnerable to the coronavirus.[80] While the Parole Board's prior practice was to issue decisions within two weeks of a hearing, it now takes an average of six to seven months.[81] For example, Randy Williams has been waiting on a decision from his hearing in September for over three months.[82] Since August 1, 2020, the Parole Board has issued only 17 "lifer" decisions, none of which is from a hearing in July, August, September, October, November, or December.[83] Compounding the delay, the Parole Board often requires liferstо serve time at a minimum security facility, which the DOC categorically bars until *after* they receive a positive parole vote.[84]

Lastly, though only a few dozen prisoners are eligible, DOC has not considered or recommended anyone in their custody for early parole consideration, and consequently not a single person has been granted early parole.[85]

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[77] *See* **Pope Decl.** ¶ 1 (released by court pending new charge but held by Parole Board on parole detainer).
[78] Ex. 2, Dohan Aff. ¶ 36
[79] *Id.*
[80] *Id.* ¶ 13 (noting as of January 1, 2020, there were 490 people over age 50 and 255 over age 60 serving parole-eligible life sentences).
[81] *Id.* ¶¶ 16, 20 n.3
[82] **Williams Decl.** ¶ 1.
[83] Ex. 2, Dohan Aff. ¶ 18.
[84] *Id.* ¶¶ 21-25.
[85] Ex. 6, Responses of Def. Carol Mici to Pls.' Second Set of Interrogatories, Response No. 1 ("The number of inmates considered and forwarded to the Parole Board after approval for early consideration by the DOC, and released by the Parole Board, is zero.").

IV. THE DOC CANNOT SAFELY ISOLATE AND QUARANTINE AT CURRENT POPULATION LEVELS

DOC's population density makes it difficult to safely quarantine those who may have been exposed to COVID and isolate those who have tested positive in many prisons.[86] For example, in MCI-Norfolk, for most of the fall those who were confirmed as positive were held in large dormitories known as the P-1 and P-2 units, which had for years been closed as housing due to their disrepair. During much of the fall, sick prisoners subsisted in these dorms with many sinks, showers, and urinals not functioning and forced to clean up their own blood and vomit and to sleep in upper bunks without ladders.[87] Those who had potentially been exposed to the virus but not confirmed positive were held in single cells on the third floor of the Restrictive Housing Unit (RHU), which also housed prisoners being held for discipline or other reasons on the lower

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[86] **Regarding MCI-Norfolk**, *see* Ex. 4, p. 131, Declaration of **Edward Wright** ¶ 1-2, 4-7 (59 year old with, diabetes and hypertension; tested negative, then one week later got cellmate transferred from unit with positives; cellmate was ill with symptoms body aches, lethargy, coughs; Mr. Wright was retested on Dec. 9 and was positive)**; Foster Decl.**¶ 3 (No cases in his unit; took test and was moved after test to building where no one had been tested; then they tested everyone in that building, and 6 positives were taken out of that building); **Woodward Decl.** ¶ 5 (people sick in unit with him, people moved from COVID-positive to negative units without, apparent reason). **Regarding MCI-Concord**, *see* **Dortch Decl.** ¶ 7 (17 men in dorm tested positive, not taken out of unit for 8 hours; Dortch then got covid, was hospitalized for 13 days); **Allah Decl.** ¶ 4, 6 (COVID positive, bad symptoms; after being moved between RHU, HSU, and Hospital, RHU nurse said to finish quarantine for 5-6 days, but the next day he was moved back to his open dormitory with 70 people, still having symptoms); Ex. 4, p. 1, Declaration of **Justice Ainooson** ¶ 8 (health services unit not isolating inmates who get sick by moving them out of unit; mostly leave them in unit and isolate them in their cells, where air can still circulate to rest of us). **Regarding the Massachusetts Treatment Center**, *see* Ex. 4, p. 18, Declaration of **Robert Brown** ¶ 12 (person in unit with symptoms tested positive for COVID and was moved out; instead of testing the rest of the unit they moved the residents to the remaining five units in the treatment center, not knowing whether they were positive or negative; about a week later, they did testing and there was an explosion of COVID in all the units, including eight in his unit); **Regarding NCCI**, *See* **Rivera Decl.** ¶ 12 (people in quarantine who hadn't tested positive were mingled with those who had).

[87] *See* **Gaudreau Decl. ¶¶** 20-22.

floors.[88] On December 14, the DOC emptied the P units. Some people were moved to the RHU, where they were mixed with those on various floors, a particularly risky move given the open-barred doors.[89] Others were sent to the 8-2 unit, so that people who had been confirmed positive with the PCR test were mixed in double cells with others who tested negative with a rapid test and were awaiting PCR test results. When those PCR results came back negative, the prisoners were sent back to their regular housing units even though they could have been infected while awaiting the results.[90]

This lack of quarantine and isolation space at MCI-Norfolk particularly endangers medically vulnerable prisoners like those in the Clinical Stabilization Unit (CSU), an open dormitory housing sick, elderly, and infirm prisoners in need of assistance in daily living. Recently, when one resident tested positive after a hospital trip, there were not enough isolation cells in the health services unit to house all of the others who subsequently tested positive, so they all remained in the CSU, and all residents of the unit became infected.[91] Declarant Gabriel Megna is one of those; with morbid obesity and heart failure, he now suffers severe COVID symptoms and fears for his life.[92]

V. THE DOC CANNOT PROVIDE ADEQUATE MEDICAL CARE OR MENTAL HEALTH CARE AT CURRENT POPULATION LEVELS

Unchecked COVID infections endanger all prisoners by overloading a privatized medical care system that provided sub-par care before the pandemic.[93] Sick-call requests, which a state audit found were not promptly or properly responded to before the pandemic, now routinely go

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[88] *Id.* ¶ 24.
[89] *Id*.
[90] *Id.* ¶ 25.
[91] Ex. 4, p. 90, Declaration of **Gabriel Megna** ¶¶ 4, 5.
[92] **Megna Decl.** ¶¶ 1, 5. Further, John Rooney attests that prison workers go directly from assisting infected people in the CSU to their regular housing units. Ex. 4, p. 113, Declaration of **John Rooney** ¶ 20 (using former name for the unit, Assisted Daily Living (ADL) Unit).

unanswered for weeks, if they're answered at all.[94] A diabetic prisoner who developed bedsores on his buttocks that caused bleeding put in a sick slip that as of last week had not been answered for two weeks.[95] Prisoners are not receiving timely or adequate treatment for chronic diseases and other serious but non-emergent conditions. For example,

- A person with Hepatitis C, who is supposed to have bloodwork done every four weeks, has not had it done since October 5.
- A 58-year-old man with pulmonary heart disease and high cholesterol who is normally seen every three months was not seen this year from February until October 28, when staff believed he was having a brain hemorrhage and he was taken to the emergency room. He got a CT scan at the hospital, but has never been told the results or seen any medical provider since.[96]
- A 67-year-old woman at MCI-Framingham with Crohn's disease and severe anemia, as well as severe spinal stenosis for which she requires surgery—in

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[93] A state audit report issued on January, 9, 2020, found that DOC sick call request forms were not processed promptly and properly, with prisoners often waiting more than a week to see a medical provider after requesting care. The State Auditor stated, "Without timely treatment for physical and mental health issues, an inmate's condition could worsen." Suzanne Bump, Office of the State Auditor, *Massachusetts Department of Correction Official Audit Report* 11-12 (Jan. 9, 2020), available at https://www.mass.gov/audit/audit-of-the-massachusetts-department-of-correction-doc. A federal court recently found that the DOC was "neither able nor willing to provide" for a prisoner's medical needs, and that as a result of its "woeful disregard" for his well-being, the DOC was "slowly killing him." *Reaves v. Mass. Dep't of Correction*, 392 F. Supp. 3d 195, 200, 210 (D. Mass. 2019). And last month a U.S. Department of Justice investigation concluded that the DOC denies adequate mental health care and supervision to prisoners experiencing mental health crises, in violation of the Eighth Amendment. U.S. Dept. of Justice, Civil Rights Division, "Investigation of the Massachusetts Department of Correction," Nov. 17, 2020, at 1, available at https://www.justice.gov/opa/press-release/file/1338071/download.

[94] *See, e.g.*, **Gaudreau Decl.** ¶ 17 (sick slips answered "sporadically"); Ex. 4, p. 38, Declaration of **Amos Don** ¶ 11 (two weeks so far without response to sick slip for worsening anemia); **Ainooson Decl.** ¶ 10 (response can take "weeks, sometimes over a month"); **Anderson Decl.** ¶ 22 (no response to sick slip describing symptoms of COVID; received response to second sick slip four days); **Foster Decl.** ¶ 12-21 (no response to approximately 9 or 10 sick slips since October 5 for prescribed medications not received and other issues); *see also* **Williams Decl.** ¶ 12;

[95] **Muldoon Decl.** ¶ 13; *see also* id. ¶ 7 (while in quarantine, not permitted to see doctor about big change in insulin dose without his knowledge, or for pitting edema).

[96] **Gaudreau Decl.** ¶ 18.

addition to her depression, anxiety, and PTSD—suffered in solitary confinement for 10 weeks without medical or mental health care.[97]

- A prisoner with diabetes is supposed to get insulin three times a day but often does not; nor does he receive the diabetic diet he requires.[98] Another prisoner has also not received his diabetic meals; instead he gets "food that makes me sick," such as cake instead of toast for breakfast. His "blood sugar has been out of control."[99]

- Medical staff have repeatedly failed to provide another prisoner with his medications for diabetes and other conditions; this person has also been denied use of his nebulizer for his chronic obstructive pulmonary disease (COPD) and asthma and has not been provided a new CPAP machine to replace the damaged one he is forced to used.[100]

- A person who requires physical therapy for his spine condition—which when untreated causes pain and weakness in his arms and legs, as well as a shooting pain and paralysis in his hand that sometimes leaves him unable to hold a pen—has not received this therapy since January, despite a reassessment in August that confirmed that he still needs it.[101]

On top of the inadequate medical care, mental health care has effectively vanished just when it is needed most. Prisoners no longer have regular one-on-one visits with mental health counselors,[102] and there is no longer any group therapy.[103] Instead, mental health staff make periodic rounds in the housing units, where prisoners wishing to speak to a counselor must do so

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[97] Ex. 4, p. 47, Declaration of **Diane Farley** ¶ ¶ 5-6
[98] Ex. 4, p. 104, Declaration of **Che Pope** ¶ 11. (Medical staff have also failed to check Mr. Pope's blood pressure in two months, even though his hypertension requires regular monitoring.) *Id.*
[99] Ex. 4, p. 98, Declaration of **Joseph Palmisano** ¶ 12; *see also* **Pope Decl**. ¶ 11 (blood sugar often too high).
[100] **Rooney Decl.** ¶¶ 15, 16.
[101] **Anderson Decl.** ¶ 19.
[102] *See, e.g.*, **Gaudreau Decl.** ¶ 15; Ex. 4, p.110 Declaration of **Paul Robinson** ¶ 15; **Cummins Decl.** ¶ 10; **Anderson Decl.** ¶ 17; **R. Brown Decl.** ¶¶ 7-8; **Maramaldi Decl**. ¶ 9
[103] **S. Brown Decl.** ¶ 6(k); **R. Brown Decl.** ¶ 7-8.

in a common area or dorm with other prisoners and COs nearby.[104] The lack of privacy deters many prisoners from speaking to mental health staff at all.[105]

The lack of treatment has had severe consequences for prisoners' psychological health.[106] A prisoner in a unit created to be an alternative to solitary confinement for men with serious mental illness stated: "All of the solitary time, lack of treatment, and lack of programming caused many men in the STP to deteriorate. . . . During the lockdowns I saw more self-harm than any other time in my 17 years of incarceration."[107] Moreover, prisoners in acute distress often do not have access to mental health staff. When a prisoner "calls crisis," the officers ask only whether they are going to self-harm, and if the answer is no, the officers do not inform mental health workers of the call for help.[108] A prisoner with serious mental illness whose requests for mental health treatment and to be placed on suicide watch went unanswered on three occasions injured himself each time, pulling out four toenails and cutting himself.[109] Other prisoners have engaged in acts of self harm.[110] These awful outcomes were foreseeable in a prison system where

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[104] *See, e.g.*, **Dutcher Decl. ¶** 13 (an officer is always at mental health workers' side); **Anderson Decl. ¶** 17; **Cummins Decl. ¶** 10; **Smith Decl. ¶** 13.

[105] *See, e.g.*, **Maramaldi Decl. ¶** 9 (have not spoken to mental health since lockdown because of lack of privacy); **Cummins Decl. ¶** 10; **Gaudreau Decl. ¶** 15; **Smith Decl. ¶** 13; **Anderson Decl. ¶** 17 ("[T]o talk to mental health, you have to stand in the middle of the unit with guys lined up behind you, people walking by, and with officers standing two or three feet away. There is no privacy or confidentiality. I had this experience once and I refuse to do it again because there is no privacy.").

[106] *See, e.g.*, **Ecker Decl. ¶** 2 (mental health of a prisoner with Autism Spectrum Disorder and schizoaffective disorder worsening); **S. Brown Decl. ¶** 6(j) ("Between my severe back injury (for which surgery has been delayed) and lack of mental health treatment, I have gone through waves of severe anxiety, depression, and stress.").

[107] **S. Brown Decl. ¶** 4(g).

[108] **Palmisano Decl. ¶** 14; *see also* **Gaudreau Decl. ¶** 16; **Anderson Decl. ¶** 18; Ex. 4, p. 121, Declaration of **Jonathan Westgate ¶** 10 ("It took putting a razor blade to my neck for them to have a clinician come see me while in crisis.").

[109] **Anderson Decl. ¶** 18.

[110] **R. Brown Decl. ¶** 8 (noting "serious mental health crises going on in the [Massachusetts] [T]reatment [C]enter," including "three people who attempted suicide by people slicing their throats"); **S. Brown Decl. ¶** 4(g).

24 percent of prisoners have serious mental illness, and where the Department of Justice recently concluded treatment of suicidal prisons fell far below constitutional standards even before COVID.[111]

VI. The DOC Cannot Protect The Prisoners Most Vulnerable To Complications Or Death From COVID-19 At Current Population Levels.

Prisoners with medical vulnerabilities are harmed not just by the stress on the prison medical system, but also by DOC's failure to identify those at risk of severe illness from COVID and provide them with additional protection. As this Court found, based on Defendant Mici's testimony, at least 50 percent of all in her custody are over age 60 or have a medical condition putting them at high risk from COVID.[112] Yet she acknowledged that it would be impossible (at current population levels) to give these people the relative safety of a single cell.[113] Rather, she has asserted, "[t]he DOC treats all inmates as if they are at increased risk."[114] This is cold comfort now that over 1,600 COVID cases have been reported in DOC, equal to nearly one in four of the current population. Those most likely to suffer complications or death are left to risk infection just like the others.

VII. The DOC Has Resorted To Cruel And Harmful Lockdown Measures In An Attempt To Control The Virus At Current Population Levels

The population density in DOC has forced the use of draconian lockdowns in an attempt to control the spread of infection. Lockdowns have continued despite the DOC's

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[111] U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Massachusetts Department of Correction*, Nov. 17, 2020, at 3 ("DOC fails to provide adequate mental health care to prisoners in mental health crisis"), available at https://www.justice.gov/opa/press-release/file/1338071/download

[112] *See* Factual Findings of the Superior Court (May 1, 2020) at p. 8.

[113] *Id*.

[114] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response Nos. 3, 4.

acknowledgement that they create a serious risk of harm to prisoners,[115] and the SJC's description of the dangers of the practice:

> The CDC's interim guidance notes that measures taken by correction facilities to reduce transmission of COVID-19, such as canceling activities and visitation, may be deleterious to the mental health of inmates. These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more hours per day.

Foster, 484 Mass. at 731.

> Many are confined to small cells for some 23 hours a day, often with a cellmate.[116]

Across the board, prisoners are deprived of indoor and outdoor recreation,[117] library,[118]

[115] "[A]s the commissioner's counsel acknowledged at oral argument, while the pandemic continues, the lockdown conditions instituted by the DOC to prevent a serious risk of harm themselves risk becoming Eighth Amendment violations." *Foster*, 484 Mass. at 731.

[116] *See, e.g.*, **Ivey Decl. ¶** 12 (shares small cell with one other person; spends most of time lying or sitting on top bunk; can only pace so much; "I am stiff as a board and my joints ache"); **Don Decl. ¶** 9 (stuck in a tiny cell with no room to move); Ex. 4, p. 55, Declaration of **James Garry ¶¶** 5, 10, 11 (in cell at least 23 hrs/day with no recreation, programs, or jobs; "Essentially this is 'seg' status except I'm in a double. It has essentially been this way for 8 months.").

[117] *See, e.g.,* **Maramaldi Decl. ¶** 3 (can't exercise, library, gym); M. **Gomes Decl. ¶** 21 (no gym, basketball court); **Ecker Decl. ¶** 6-9 (no rec yard); **Ainooson Decl. ¶¶** 4, 6 (23 hrs a day in cell, with only, 30-60 minutes recreation indoor rec and no outside rec; everyday must choose between cleaning cell and showring, can't do both);

[118] *See* **Ecker Decl. ¶** 8 (no law library or regular library); **Smith Decl. ¶** 4 (no law library access for 1.5 months, now very limited); **Brown Decl. ¶** 11 (no library; has been to library once in last nine months, used to go once a week or more).

educational and rehabilitative programs,[119] and group religious services.[120] "The most difficult restriction to deal with is not being able to leave the unit or be in programs. There is nothing to keep us occupied, and every day feels the same."[121]

This isolation can be akin to the suffering induced by solitary confinement, as the SJC has recognized,[122] and indeed some such as Eugne Ivey experience it as such.[123] Joseph Palmisano describes "excruciating isolation"; he has attempted suicide twice in the last four months, and was twice sent for psychiatric evaluation.[124] Randy Williams describes the desperation he sees all around him: "Inmates are cutting up, swallowing things, and hurting themselves in other ways. There is so much pressure on us that you don't know what to do with yourself. There are guys that are a lot worse off than I am, and you can see the effect on them.

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[119] *See* Ex. 4, p. 81, Declaration of **John Little** ¶ 8-9 (no programming; handouts and worksheets "are not at all a good substitute for real programming"); **M. Gomes Decl.** ¶ 20 (is in Correctional Recovery Academy; now it's just one reading packets once a week and a written quiz on Friday); **Ecker Decl.** ¶ 9 (taking computer course but can't access computers during lockdown, just gets booklets); **R. Brown Decl.** ¶¶ 9, 10 (all programming canceled; in-cell pamphlets "not effective when we are left to do it by ourselves without feedback from treatment providers or other group members"); **Ainooson Decl.** ¶ 9 (no programming, just journals – not nearly as good as regular programming); **Olan Decl.** ¶ 10 ("I am given a packet or booklet for programming but there are no mentors or counselors to help answer questions.");
Williams Decl. ¶ 11 (no programming; getting pamphlets "doesn't compare to real programming-,"); **Gaudreau Decl.** ¶ 8 (was in CRA, in person canceled so they get 1 packet, 1 test per week "This is not useful; it's just a dog and pony show."); **Ivey Decl.** ¶ 17 (no in-person programs, just journaling).

[120] **Farley Decl.** ¶ 11; **Robinson Decl.** ¶ 12 (used to be very involved in religious services, going two or three times a week, but now hasn't been to services since March).

[121] **Westgate Decl.** ¶ 7; *see also* **Don Decl.** ¶ 9 (locked in with "nothing to keep my mind off of the stress and anxiety of my situation keeps me up all night, reliving trauma, worrying about my family").

[122] *See Foster*, 484 Mass. at 731-732 (citing CDC guidance that cancelation of activities and visits may be deleterious to mental health, and noting, "These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more hours per day. Solitary confinement, even when imposed for good reason, "bears 'a ... terror and peculiar mark of infamy.') (quoting *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2209, (2015) (Kennedy, J., concurring)).

[123] Ivey says that it brings back traumatic memories of his many years in solitary confinement, and that he can't sleep and his thoughts race. **Ivey Decl.** ¶ 13.

[124] **Palmisano Decl.** ¶ 11.

They don't know what to do but hurt themselves."[125] Severe anxiety, depression, and trauma are common byproducts of the lockdown, with physical effects such as weight changes and high blood pressure.[126] The lack of exercise and access to the outdoors only worsens the physical and emotional effects of the lockdown.[127]

Compounding the isolation, contact with loved ones is difficult or impossible, as in-person visits have stopped, and the ability to make telephone calls is limited by competition for the phones during the short period out of cell and by the cost of calls.[128] It is hard to overstate

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[125] Ex. 4, p. 125, Declaration of **Randy Williams** ¶ 9.

[126] *See* **Celester Decl. ¶ 9** (Lockdown is "very difficult to deal with mentally. I am depressed: I am not sleeping, I am anxious, I am worried about family members, and I am worried about getting COVID again. . . . I haven't been taking care of myself the way I normally do – I've gained 30 lbs., and I haven't cleaned my cell or gotten my haircut. The stress of this experience is making my blood pressure dangerously high."); **Don Decl.** ¶ 6 ("Being stuck in a tiny cell with no room to move, and nothing to keep my mind off of the stress and anxiety of my situation keeps me up all night, reliving trauma, worrying about my family"); **Pope Decl.** ¶ 12 ("We are people, we are humans, and we have been left to sit and stare at walls and wonder if we're going to die"; had been playing chess before COVID which had been helping with depression' can't play now; "Now, I just sit in my cell and sleep."); **Ainooson Decl.** ¶ 11 ("The stress level in here is very high. People are losing family members to COVID and aren't able to see loved ones.").

[127] *See* Ex. 4, p. 95, Declaration of **Anthony Olszewski** ¶ 11 ("The difference with access to outdoors is night and day. I have a traumatic brain injury which affects my gait and my speech. I used to try to walk on flat surfaces outdoors for therapy, to keep strengthened for walking. My inability to walk outside during COVID has harmed my strength, stability, and balance."); **Foster Decl.** ¶ 17 (has gained 40 pounds in past 6-7 months from not being active; bad for heart condition); Ex. 4, p. 15, Declaration of James **Bowen** ¶ 12 (used to work out 5x/week, but very difficult in cell; health has declined, has lost 20 lbs); **Robinson Decl.** ¶¶ 13, 17 (decline in physical and mental health due to lack of exercise; exercise helps manage high blood pressure and anxiety); **Garrey Decl.** ¶ 13 (hasn't been outside since September); **Ivey Decl.** ¶ 10 (has only been outside for 90 minutes since late October); **Maramaldi Decl.** ¶ 3 (has not been out of dorm room since October); **Lavin Decl.** ¶ 5 (hasn't been out in over a month and a half).

[128] *See* **Maramaldi Decl.** ¶ 5 (visits have been suspended for months); **Lavin Decl.** ¶ 10 (no in-person visits since March. Mother and son used to visit; not being able to see them has had negative effect on MH); **M. Gomes Decl.** ¶ 22 (only 1 free call per week and 1 free "text message" a day, half of what it was during the last lockdown; last in person visit was 1 year ago); **Foster Decl.** ¶¶12- 13, 15 (used to get 1-2 visits 1a month visits from father and visits from close friends; has not had a visit since February; misses family; not having personal contact takes emotional toll; is supposed to have phone access 30 minutes a day, but you have to choose between calling your attorney and family); Ex. 4, p. 30, Declaration of **Todd Cummins** ¶¶ 6-7 (no visits; only 1 phone call and if answering machine picks up, that's the free call); **Palmisano Decl.** ¶ 15 (no visits, even with daughter who lives 20 minutes away); **Rivera Decl.** ¶¶ 6-7

what this means to many of those incarcerated. Says Edward Wright: "Because we cannot see family members, there is a constant state of anxiety here with everyone worrying about their loved ones. We do not know if they are sick or will get sick. It is nerve wracking."[129] James Bowen last saw his wife in person a year ago; he used to see his sons monthly and now hasn't seen them in 9 months, nor has he seen any of his 8 grandchildren. "I miss my family and get upset a lot," he says, "I find myself teary eyed more often."[130] Steven Brown cannot see his mother or siblings, even though "maintaining our connection is the most important thing in my life."[131] Without family contact or mental health support, Robert Anderson says he was "cutting up and self-injuring a lot" during the lockdown last spring; he feels even more cut off from his family now.[132]

Visits from lawyers are also being hindered, as attorneys are now required to show a negative COVID test within the past 72 hours.[133] This requirement is a severe barrier to attorney visits,[134] further increasing prisoners' isolation. And while DOC is facilitating Zoom calls between prisoners and their counsel, the inability to meet in person seriously compromises legal representation in criminal and other cases.[135] It is also irrational because DOC fails to require equivalent testing of officers and staff members who roam the facility during eight-hour shifts

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(family usually visits every week, difficult not to see them; length and number of phone calls have been cut); **Don Decl. ¶** 5 (connection to loved ones, particularly 12 year-old son, severely disrupted); **Gaudreau Decl. ¶** 12-13 (one 20-min call per day, so you have to choose between loved one or an atty; "[T]he lack of visits is affecting my marriage."); **Pope Decl. ¶** 10 (MCI-Norfolk has not allowed in-person visits since I got here in June and there are no video visits here yet. Not being able to see my fiancee and other family has made me even more depressed).

[129] **Wright Decl. ¶** 17.

[130] **Bowen Decl. ¶** 13.

[131] Ex. 4, p. 21, Declaration of **Steven Brown ¶** 6.

[132] **Anderson Decl. ¶¶** 12-13.

[133] *See* Ex. 3, Declaration of Randy Gioia, ¶ 2.

[134] *See Id.* ¶¶ 3-15.

[135] *Id.* ¶¶ 16-17.

with much greater prisoner contact than attorneys have, but who nevertheless have been subjected to only one round of asymptomatic testing during the fall pandemic.

ARGUMENT

To issue a preliminary injunction the court must determine (1) that the moving party has demonstrated a likelihood that it would prevail on the merits; (2) that denial of the injunction would result in irreparable harm; and (3) that the risk of irreparable harm outweighs the any similar risk of harm to the defendants. *Doe v. Worcester Pub. Sch*., 484 Mass. 598, 601 (2020). Where a public entity is a party, the court may also consider whether granting preliminary relief is in the public interest. *Id*.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

There is no doubt that Plaintiffs face a substantial risk of serious illness and death from COVID-19 infection now that it is clear that all the measures DOC has taken to contain COVID-19 have failed to protect them. The virus has infected prisoners and staff in every DOC facility and is raging out-of-control in multiple institutions, with no sign of abating. Despite Defendants' knowledge that the virus has overpowered all their efforts to contain it, they continue to disregard the SJC's warning that releases are necessary. And they still refuse to take readily available steps to reduce the prison population to a level necessary to remedy the unsafe and unconstitutional conditions that now exist inside our correctional facilities. As a result, plaintiffs continue to live, sleep, and eat in conditions that force them to go without the social distancing that virtually all medical and scientific experts say is essential for their safety.

A. Confining Plaintiffs Under Current Conditions Where COVID-19 Is Rampant And Out-of-Control Subjects Them To A Substantial Risk Of Harm

The SJC has already concluded in *Foster* that the "plaintiffs almost certainly will succeed in establishing the objective component of their claims under the Eighth Amendment." 484

Mass. at 718. Indeed, the same risk of contracting COVID-19 that exists in Massachusetts prisons, where physical distancing is not feasible, has been recognized by the CDC and by courts across the country. *See, e.g.*, *Baez v. Moniz*, U.S. Dist. Ct., 460 F.Supp.3d 78, 89 (D. Mass. 2020) ("There is, and can be, no meaningful dispute that COVID-19 presents a substantial risk of serious harm to health, to the proposed class of petitioners in this case as well as to members of society at large"); *Refunjol v. Adducci*, U.S. Dist. Ct., 461 F. Supp. 3d 675, 707 (S.D. Ohio 2020) ("The objective component of the inquiry is beyond debate. Nobody can dispute that COVID-19 is a sufficiently serious medical need"); *Frazier v. Kelley*, U.S. Dist. Ct., No. 4:20-cv-00434-KGB, 2020 WL 2110896, at *6 (E.D. Ark. May 4, 2020) ("[I]t cannot be disputed that COVID-19 poses an objectively serious health risk to named plaintiffs and the putative classes given the nature of the disease and the congregate living environment of the ... facilities").

Plaintiffs face more than an abstract risk of COVID-19 infection. Since the end of October, more than 1,200 prisoners have contracted COVID-19, and the number of positive cases among DOC prisoners, officers, and staff continues to soar.[136] There is now an active COVID-19 case in every single one of DOC's 16 correctional facilities.[137] Some facilities have had hundreds of confirmed cases in recent weeks: Since October 29, MCI Norfolk has had 416 prisoner cases.[138] MCI Shirley has had 280.[139] NCCI Gardner has had 162.[140] And MCI Concord has had 284.[141] Five people have died in the past month alone.[142] Over 200 correctional officers have active COVID-19 infections that that have been reported to the DOC, and many other staff

[136] Special Master's Report at 62.
[137] *Id.* at 64-95.
[138] *Id.* at 69.
[139] *Id.* at 87.
[140] *Id.* at 71.
[141] *Id.* at 79.
[142] *See* n.1, *supra*.

members are infected,[143] As the SJC recently pointed out in *Commonwealth v. Nash*, "we have seen that the COVID-19 virus spreads rapidly, and that a few cases, or even no reported cases, on any given day or in any given place can quickly change to many cases." 2020 WL 7364784, at *9. This is largely because the people in DOC custody continue to live in crowded congregate settings where it is literally impossible for them to practice the social distancing that everyone knows is essential for their safety. This extraordinarily perilous situation demands that DOC take immediate action to reduce population to a level that does not place the lives of prisoners in jeopardy.

B. The DOC's Harsh Lockdown Restrictions Place Prisoners At Substantial Risk Of Serious Harm

While COVID-19 presents a serious danger to prisoners, the measures used to control infection at current population levels are themselves causing severe harm. In an attempt to contain infection amongst prisoners living in close quarters, DOC has imposed cell confinement, suspended group rehabilitative and educational programs, severely limited indoor and outdoor exercise, and barred in-person visits with loved ones. In June, the SJC noted that this restrictive environment itself "risk[s] becoming an Eighth Amendment violation." *See Foster*, 484 Mass. at 731. The deprivations have now clearly crossed that line and are causing substantial harm to prisoners. While some of the restrictions eased somewhat over the summer, as the infection rate slowed in the community and in prisons, they have now resumed in force in the wake of new COVID-19 outbreaks that started in late October, with no prospect of abatement over the winter.

In June, the Court warned, "[C]ancelling activities and visitation may be deleterious to the mental health of inmates. These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more

[143] Special Master's Report at 62.

hours per day." 484 Mass. at 731-32 (quoting *Davis v. Ayala*, 576 U.S. (2015) (Kennedy, J., concurring), and other cases). Six months later, this is precisely the situation that many plaintiffs painfully describe in their current declarations. Eugene Ivey compares his cell confinement to his time in long-term solitary confinement;[144] Joseph Palmisano describes "excruciating isolation" resulting in two suicide attempts and psychiatric evaluations;[145] and a host of others describe the extreme emotional effects of enforced idleness and inability to leave their cells.[146] As the SJC recognized, deprivation of visits is similarly harmful. *See* 484 Mass. at 731. Here, too, class members poignantly describe the emotional toll of having visitors barred during this time of extreme stress for both prisoners and family members.[147]

The SJC also warned that although "deprivation of exercise may be reasonable in certain situations, such as during a state of emergency[,] . . . [l]ong-term deprivation of exercise on the other hand, may constitute an impairment of health forbidden under the [E]ighth [A]mendment." *Foster*, 484 Mass. at 732 (citations and internal quotations omitted). Here, too, the deprivation has become extreme. Some prisoners have not been outdoors for weeks or months.[148] Lack of access to indoor or outdoor exercise has taken a physical as well as an emotional toll on many.[149]

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[144] **Ivey Decl. ¶** 13
[145] **Palmisano Decl. ¶** 11
[146] *See supra* n.126.
[147] *See supra* pp. 26-27 and n.128.
[148] *See* **Gerry Decl. ¶** 13 (hasn't been outside since September); **Ivey Decl. ¶** 10 (has only been outside for 90 minutes since late October); **Maramaldi Decl. ¶** 3 (has not been out of dorm room since October); **Lavin Decl. ¶** 5 (hasn't been out in over a month and a half).
[149] *See* **Olszewski Decl. ¶** 11 ("The difference with access to outdoors is night and day. I have a traumatic brain injury which affects my gait and my speech. I used to try to walk on flat surfaces outdoors for therapy, to keep strengthened for walking. My inability to walk outside during COVID has harmed my strength, stability, and balance."); **Foster Decl. ¶** 17 (has gained 40 pounds in past 6-7 months from not being active; bad for heart condition); **Bowen Decl. ¶** 12 (used to work out 5x/week, but very difficult in cell; health has declined, has lost 20 lbs); **Robinson Decl. ¶¶** 13, 17 (decline in physical and mental health due to lack of exercise; exercise helps manage high blood pressure and anxiety);

Compounding these harms, the lockdown also prevents prisoners from fully accessing medical and mental health care. Prisoners confined to their cells or dormitories cannot visit the health services unit and are reliant on sick slips to get attention for medical needs. Yet as discussed *supra* at pp. 19-21, these can go unanswered for weeks, if they are answered at all. The need to limit prisoner movement and interactions with non-correctional staff also contributes to the lack of access to chronic care, physical therapy, and specialty care, and to the cancellation of group and individual mental health counselling just when it is most needed.[150]

Each of these harms—cell confinement, isolation, lack of activity, cancellation of visits, lack of exercise, and denial of medical and mental health care—by itself endangers prisoners and can violate the Constitution. *Foster*, 484 Mass. at 731-32. When they are imposed in combination, during a time of unparalleled fear and anxiety caused by the pandemic, they constitute "serious deprivation[ ] of basic human needs," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

C. The Defendants' Failure To Reduce The Prison Population Demonstrates Deliberate Indifference To Plaintiffs' Health And Safety

In *Foster*, the SJC ruled that plaintiffs had not established that they were likely to be able to show deliberate indifference to prisoner health or safety on the part of the defendants. 484 Mass. at 724. Prison officials are deliberately indifferent when they "fail[] to take reasonable measures to abate" a known, substantial risk of harm. *See Farmer v. Brennan*, 511 U.S. 825, 829, 847 (1994); *see also Zingg v. Groblewski*, 907 F.3d 630, 635 (1st Cir. 2018) (deliberate indifference established by a "fail[ure] to take steps that would have easily prevented" a known harm); *Ahearn v. Vose*, 64 Mass. App. Ct. 403, 417 (2005) (correctional staff violate the Eighth

[150] *See supra* pp. 21-23 and nn.102-105.

Amendment when they "fail[] to take 'easily available measures' to reduce the known risk to the plaintiffs' health").

As the late Chief Justice Gants stated in his *Foster* concurrence, the essence of the SJC's holding was that DOC was doing "the best it can" to manage the COVID emergency. 484 Mass. at 735. The Court considered it particularly significant that the DOC was in compliance with the guidelines recommended by the CDC for correctional facilities, and that it had put into place various protective measures, such as requiring all prisoners and staff to wear masks, barring visits except from lawyers; isolating people who are symptomatic; increasing cleaning and the distribution of PPE; suspending most group programming and work releases; and severely restricting contact with other prisoners. *Id* at 721-22. The SJC also observed that DOC had begun to implement a system-wide testing plan which "will provide much of the testing relief that the plaintiffs, and the amicus American Civil Liberties Union, urge this court to order." *Id* at 723-24.

The timing of the SJC's conclusion in *Foster* that DOC was doing enough in June to satisfy its constitutional obligation is significant. As this Court recently recognized, when the SJC issued its opinion, the number of COVID-19 cases in the DOC had dropped dramatically, going from a high of 101 new cases in the week of May 4-10, 2020 to 11 new cases in the week of May 24-31, 2020. *See* Mem. of Decision and Order on Pls.' Mot. for an Order Requiring Implementation of a Home Confinement Program (Dec. 18, 2020) at p. 3. Furthermore, the overall DOC population had declined by over 400, going from 7,642 to 7,233. *Id*. Even though this constellation of facts suggested there was reason to believe that DOC might have the virus under control, the SJC nonetheless took pains to reiterate that, due to the COVID-19 pandemic, the situation inside the Commonwealth's jails and prisons "is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary." *Foster* 484 Mass. at

701 (quoting *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 445, (2020)). To drive home this point, it also remarked that "[e]ven the commissioner acknowledged at oral argument that reducing the number of incarcerated individuals being held in any given facility, if it can be done lawfully, is a desirable goal for controlling the spread of communicable diseases such as COVID-19." 684 Mass. at 732. And it cited to the "numerous measures . . . undertaken in other States to reduce prison populations, among them release to home confinement, enhanced good time sentence deductions, and early parole," clearly expressing its belief that Defendantsshould consider similar actions. *Id*. Although it declined to order Defendants to do so, the Court commented that the "specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction." *Id.* at 733.

The SJC did not give the Defendants a free pass to do nothing. Significantly, it declared that "it appears that the COVID-19 pandemic will continue to demand extraordinary, and coordinated, efforts by all parties," including the courts and the executive branch. *Id.* at 732. It also warned that if it were to conclude at a later point that the measures taken by Defendantsto mitigate the spread of COVID-19 prove to be inadequate, then it has the obligation to devise a remedy, which might include an order that Defendants to release people from custody. *Id* at 733. Since its *Foster* decision, the SJC has continued to emphasize the vital importance of decreasing the prison population. Earlier this month, it again explained that "we must take such steps as are open to us to reduce the number of incarcerated individuals, and to protect those who remain incarcerated from the dangers of COVID-19". *Commonwealth v. Nash,* -- Mass. --, 2020 WL 7364784 at *9 (December 14, 2020). It also stated that requiring judges to take COVID-19 into account in making release decisions helps in "achieving the objective" it announced in *Christie*

v. Commonwealth, 484 Mass. 397 (2020)—"to safely and responsibly reduce the population of prisons and jails in the face of the pandemic." *Id* at *8.

As discussed *supra*, the steps DOC has taken to mitigate the spread of the virus have proven to be patently insufficient to protect prisoners from COVID-19. The fact that DOC may have implemented protective measures inside the prisons does not excuse Defendants' failure to do what the SJC said they should have been doing all along, and what is now obviously necessary: reduce the prison population to a level where prisoners can practice effective social distancing.

The deliberate indifference standard "does not mandate perfect implementation, but it also does not set a bar so low that any response by officials will satisfy it." *Valentine v. Collier*, 141 S. Ct. 57, 2020 WL 6704453, *4 (Nov. 16, 2020) (Sotomayor, J., dissenting) (internal citations omitted). Because the Constitution prohibits not just a complete absence of treatment, but also inadequate treatment, prison officials cannot insulate themselves from liability by taking steps that are clearly insufficient to address a serious risk of harm. *See Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985); *see also Savino v. Souza*, 459 F. Supp. 3d 317, 329 (D. Mass. 2020) (holding that detainees were likely to establish deliberate indifference notwithstanding steps the jail had taken to attempt to protect them from COVID-19 where detainees identified "cavernous holes in the government's mitigation strategy"); *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990) (affirming district court's determination that jail's response to a tuberculosis outbreak, while not non-existent, was inadequate and therefore unconstitutional) (cited with approval in *Foster*, 484 Mass. at 719-20).

Thus, courts have found that the failure to reduce a prison population reflects deliberate indifference when other measures have proved "insufficient" or "ineffectual" to adequately

protect prisoners' health and safety. *See Brown v. Plata*, 563 U.S. 493 (2011) (ordering release of thousands of California prisoners after state officials were unable to provide constitutionally adequate health care due to severe overcrowding); *see also Harris v. Angelina Cty., Tex*., 31 F.3d 331, 335-36 (5th Cir. 1994) (rejecting the County's argument that it lacked deliberate indifference because it had done "everything in its power" to remedy overcrowding, including construction, transfers, and alternatives to incarceration). Courts have also ordered releases to protect prisoners from COVID-19. *See In re Von Staich*, 56 Cal. App. 5th 53, 270 Cal. Rptr. 3d 128, 149-50 (Cal. App. 2020) (ordering 50 percent reduction in the population of San Quentin prison to remedy deliberate indifference to risk of substantial harm to prisoners); *Campbell, et al. v. Barnes*, Case No. 30-2020-1141117, Order on Writ of Habeas Corpus and Writ of Mandamus (Cal. Orange Cnty. Super. Ct. filed Dec. 11, 2020) (ordering jail to reduce population in congregate living areas by 50 percent to ensure proper social distancing); *Valenzuela Arias v. Decker*, No. 20 CIV. 2802 (AT), -- F.Supp.3d --, 2020 WL 1847986, at *4 (S.D.N.Y. Apr. 10, 2020) (ameliorative measures would "likely result in some reduction of risk of infection, but . . . are far from sufficient" where social distancing was impossible); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 449 F.Supp.3d 205, 215 (S.D.N.Y. Mar. 26, 2020) (finding measures "patently insufficient" when respondents "could not represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another").

D. The DOC's Current Population Levels And Housing Practices Make It Impossible For Plaintiffs To Protect Themselves By Social Distancing

As explained in detail in the Facts section, *supra* at pp. 5-9, DOC's facilities remain so crowded that effective social distancing remains impossible for most of the people incarcerated in DOC prisons. They continue to sleep, eat, recreate, use the bathroom facilities and stand in line to receive medications, all while within six feet of other prisoners. Although the overall

DOC population has declined slightly, the reduction has obviously been insufficient to prevent the massive spread of COVID-19 in DOC prisons. This is not surprising given that the small drop in the number of prisoners has produced no meaningful change in housing practices or population density. The percentage of the population housed with at least one other person was 53.3 percent on June 15, 2020; it is now 50.7 percent.[151] And the number housed in a room with three or more people has actually gone up slightly, from 18.7% to 19.2%.[152] Furthermore, cells and dorms in numerous DOC institutions fail to comply with minimum cell size and floor space standards that the DPH has established to safeguard the well-being of prisoners[153] independently of any need to protect against contagious diseases.[154]

As of December 14, 2020, the overall DOC population remained at 89 percent of design capacity, and five prisons remained over their design capacities.[155] A majority of prisoners are still housed with at least one other person,[156] and at many prisons the proportion is much higher: 91 percent at NCCI Gardner, 75 percent at the MTC, 72 percent at MCI-Concord, 63 percent at

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[151] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download; https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download

[152] *Id.*

[153] https://www.mass.gov/doc/mci-norfolk-november-14-2019/download; https://www.mass.gov/doc/mci-concord-december-11-2019/download; https://www.mass.gov/doc/mci-shirley-december-4-2019/download; https://www.mass.gov/doc/north-central-correctional-institute-in-gardner-september-24-2019/download; https://www.mass.gov/doc/old-colony-correctional-center-december-13-2019/download; https://www.mass.gov/doc/pondville-correctional-center-norfolk-december-19-2019/download; https://www.mass.gov/doc/northeastern-correctional-center-september-30-2019/download; https://www.mass.gov/doc/souza-baranowski-correctional-center-september-16-2019/download

[154] *See* Ex. 1, Mohareb. Decl. at 143-56.

[155] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity, which show the following comparison of actual population to design capacity: MCI-Norfolk 1209/1084, or 111 percent; MCI-Shirley 1074/1019, or 105 percent; NCCI Gardner 843/598, or 140 percent; OCCC 696/580, 120 percent; Pondville 106:100, or 106 percent).

[156] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download (December 14, 2020 data).

OCCC, 66 percent at Pondville, and 55 percent at MCI-Shirley. Some prisons have actually increased density during this period,[157] while others declined only nominally.[158]

This crowding elevates the risk of COVID-19 regardless of mask use and other infection control policies,[159] and it is no surprise that the densest prisons have experienced the greatest outbreaks. Four prisons account for 1,069 new infections since October 29, nearly all of the total of 1,085 new infections during that period. MCI-Norfolk, operating at 111 percent of its design capacity, had 416; MCI-Shirley, at 105 percent of capacity, had 280; NCCI Gardner, at 140 percent capacity, had 162; and MCI Concord, where 72 percent share a cell with at least one other person, and 108 with two or more, had 284 cases.[160] Yet DOC has done nothing to reduce the number of individuals housed in these institutions.

E. The Defendants Have Failed To Take Reasonable And Necessary Measures To Reduce The Prison Population

As explained in detail in the Facts section above, DOC has granted no furloughs, made little if any increase in the use of medical parole, and there has been a significant *decrease* in the ability to earn good time deductions as a result of the suspension of work and programming opportunities. And, as the Court is aware, DOC is still resisting implementation of a home confinement program, claiming that it would be irresponsible to release prisoners in the midst of the COVID-19 crisis despite the SJC's recommendations and the opinions of medical and

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[157] Bridgewater State Hospital has gone from 90% of its design capacity (206/227) to 96% (218/227); the Massachusetts Treatment Center's population increased from 93% of design capacity (527/552) to 98% (552/561).

[158] MCI Framingham has reduced its population by three people, from 179 to 176; MCI Norfolk has reduced by 34 people, from 1,243 to 1,209; OCCC has reduced by 12 people from 708 people to 696.

[159] Mohareb Decl. at 250-271.

[160] *See* Special Master's Report, December 17, 2020 for infection numbers; https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers; and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity.

correctional experts.[161] Defendants' hostility to releases is further illustrated by Governor Baker's recent veto of language approved by the Legislature in the FY2021 Budget requiring monitoring and oversight of DOC's utilization of release mechanisms.[162] DOC's intransigence and excuses for its failure to use all available release mechanisms defy reason and demonstrate the need for judicial intervention.

II. WITHOUT THE RELIEF SOUGHT, PLAINTIFFS WILL SUFFER IRREPARABLE HARM

The danger to incarcerated persons posed by COVID-19 is immediate and impossible to remedy after the fact, as courts across the country have routinely recognized. *See, e.g., Rafael L.O. v. Tsoukaris*, No. CV 20-3481 (JMV), 2020 WL 1808843, at *8 (D.N.J. Apr. 9, 2020) ("Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement."); *Thakker v. Doll*, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020) ("[C]atastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities."); *Arias v. Decker*, No. 20 CIV. 2802 (AT), 2020 WL 2306565, at *4 (S.D.N.Y. May 8, 2020) ("Petitioners have shown irreparable harm by establishing the risk of injury to their health and constitutional rights."). This is particularly true for those that are already medically vulnerable. *See Coronel v. Decker*, 449 F. Supp. 3d 274, 281 (S.D.N.Y. 2020) (finding that "[d]ue to their serious underlying medical conditions" and their placement in immigration detention, where they are "at significantly higher risk of contracting COVID-19," the petitioners "face a risk of severe,

[161] See Emily A. Wang, Bruce Western, Emily P. Backes and Julie Schuck, eds., Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity and Safety, National Academies of Sciences, Engineering, and Medicine, at 2-2 (hereinafter, NASEM Report), https://www.nap.edu/catalog/25945/decarceratingcorrectional-facilities-during-covid-19-advancing-health-equity. The National Academy of Science Decarceration Report recommends that correctional authorities assess the optimal population level of their facilities to adhere to public health guidelines during the pandemic, and identify candidates for release from prison and jail in a fair and equitable manner and engage other officials outside the correctional system as necessary to expedite decarceration to the optimal level.

[162] *See* Conference Report H. 5164, Section 8900-0001, https://malegislature.gov/Budget/ConferenceCommittee

irreparable harm"). But, as the SJC has recognized, the risk is not limited to only prisoners who are older or who have underlying conditions. *Commonwealth v. Nash*, No. SJC-12976, 2020 WL 7364784, at *10 (Mass. Dec. 14, 2020) ("Even healthy individuals incarcerated in facilities with little or no COVID-19 outbreaks at a given moment still remain at risk").

The harm from the widespread isolation imposed by the DOC in their attempt to contain the virus is similarly irreparable. *See, e.g.*, *V.W. by & through Williams v. Conway*, 236 F. Supp. 3d 554, 588–89 (N.D.N.Y. 2017) ("continued use of solitary confinement" and "deprivation of education services" created risk of irreparable harm); *Reynolds v. Arnone*, 402 F. Supp. 3d 3, 45 (D. Conn. 2019) (depriving prisoner "of contact social visits and meaningful social interaction" and preventing ability to engage in "educational and recreational programming" threatened irreparable harm); *Larocque v. Turco*, No. SUCV202000295, 2020 WL 2198032, at *15 (Mass. Super. Feb. 28, 2020) (denial of constitutional rights during one-week lockdown constituted irreparable harm).

Averting the harm from the virus requires "extraordinary, and coordinated, efforts by all parties, as well as the courts." *Foster*, 484 Mass. at 732. As Chief Justice Gants observed in the spring, it takes time "both to identify appropriate candidates for release and to ensure that they have appropriate release plans." *Foster*, 484 Mass. at 741 (Gants, C.J. concurring). Despite this exhortation, Defendants have done nothing to identify such candidates or effectuate their releases, and the virus is now raging again through DOC facilities. Because DOC has shown no willingness to undertake this process on its own, this Court must issue the preliminary injunction to avert the irreparable harm.

III. AN INJUNCTION IS IN THE PUBLIC INTEREST AND WILL NOT HARM DEFENDANTS

Incarcerated people are members of the public and have an obvious interest in the requested relief. *Cf. Christie v. Commonwealth*, 484 Mass. 397, 401 (2020) (in considering "danger to other persons and the community" in stay of execution pending appeal, a court should consider "not only the risk *to others* if the defendant were to be released and reoffend, but also the health risk *to the defendant* if the defendant were to remain in custody") (emphasis in original); *see also Commonwealth v. Nash,* 2020 WL 7364784 *8 (explaining that because of COVID-19, courts should consider releasing people who do not qualify for release using conventional criteria). The non-incarcerated public also has a strong interest in the requested relief. As the SJC has recognized, "an outbreak [of COVID-19] in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic" because it "will further burden the broader health care system that is already at risk of being overwhelmed." *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 437 (2020). Indeed, during just the first wave of infections in the spring, dozens of prisoners required beds in local hospitals.[163] Dozens more will doubtless be needed as the number of infections in DOC facilities have nearly quadrupled since then. The SJC also saw the danger that prison contagion will spread through correctional, medical, and other staff entering prisons daily who "risk bringing infections home to their families and broader communities." *Committee for Pub. Counsel Servs.*, 2020 WL 1659939, at *4. Empirical studies have since confirmed the SJC's prediction that spread of the virus within prisons fuels spread in the communities that surround them.[164] Accordingly, the public interest in dampening the explosion of COVID-19 in DOC

[163] Ex. 9, Hospitalizations - Covid Spreadsheet (showing 48 hospitalizations as of September 2020), cited by Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 6.
[164] Gregory Hooks and Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, Prison Policy Initiative (December 2020), available at https://www.prisonpolicy.org/reports/covidspread.html ("The number of people in prisons and

facilities is even stronger today than it was in the spring, when the number of infections was lower both in the community and in prisons.

With respect to the Defendants, there is no potential harm. Granting the preliminary injunction will merely further an objective that they themselves have endorsed in sworn testimony before this Court, as well as reduce the fiscal and operational burden of incarcerating so many people during the pandemic, and free up resources to house and care for those who remain imprisoned.

REQUEST FOR RELIEF

In light of the foregoing, urgent relief is needed to protect class members in DOC facilities from COVID-19 and the deprivations caused by DOC's recurring lockdowns. Specifically, Plaintiffs seek the following relief, in addition to all other relief the Court deems just and proper:

For the duration of the COVID-19 emergency, enjoin Defendants and their agents, officials, employees, and all persons acting in concert with them from:

a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;
b. Housing any prisoner in a cell, room, dorm, or other living area that does not meet the minimum size standards established by the Department of Public Health in 105 CMR 451.320-322.
c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person.

jails has led to more COVID-19 cases, among those working or confined in these facilities and among those who simply live near them.").

Further, the Court should order the Defendants to immediately reduce the number of people confined in DOC facilities by at least a sufficient number to ensure compliance with the relief requested above, prioritizing release for members of the medically vulnerable subclass. Mechanisms for population reduction should include but not be limited to:

a. Immediate implementation of a home confinement program to consider prisoners at all DOC institutions for possible release on home confinement, regardless of any statutory exclusions, and with a presumption in favor of home confinement for members of the medically vulnerable subclass;
b. Use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;
c. Maximizing the award of good conduct deductions, including completion credits and "boost time" under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D, including sufficient credits to accomplish the immediate release of all prisoners who are now within three months of their discharge date, and giving one year of good time credit to all those currently incarcerated;
d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, considering the risk of COVID-19 in making medical parole decisions in accordance with the SJC's directives in *Christie v. Commonwealth,* 484 Mass. 397, 401-402 (2020) and *Commonwealth v. Nash*, 2020 WL 7364784 (December 14, 2020), and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed.

Further, the Court should order Defendant Moroney and the Parole Board to:

a. Consider the dangers posed by COVID-19 to potential parolees when assessing whether their "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130, and, consistent with the SJC rulings in *Christie v. Commonwealth, supra,* and *Commonwealth v. Nash*, 2020 WL 7364784 (December 14, 2020), explain in its written decision how it weighed those dangers, on an individualized basis for each petitioner,in making its parole decisions;

b. Issue written decisions within two weeks of all lifer hearings;

c. Presumptively grant parole to all parole-eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;

d. Cease revoking parole for technical violations or issuing parole detainers to hold people in custody pending parole revocation hearings for technical violations or when a court has released the person pending trial on new charges.

In order to promptly effectuate compliance with this relief, Plaintiffs ask that the Court order Defendants to report weekly on the status of implementation.

CONCLUSION

For all the above reasons, the Court should allow Plaintiffs' Emergency Motion for Preliminary Injunction forthwith.

Dated: December 23, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on December 23, 2020 by email to the counsel of record.

/s/ Michael J. Horrell
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