Supreme Judicial Court for the Commonwealth Full Court: SJC-12926 Filed: 12/18/2020 10:10 PM

**COMMONWEALTH OF MASSACHUSETTS**
**SUPREME JUDICIAL COURT**

Suffolk, ss. SJC-12926

COMMITTEE FOR PUBLIC COUNSEL SERVICES and
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
Petitioners,

v.

CHIEF JUSTICE OF THE TRIAL COURT,
Respondent.

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# AMENDED PETITION FOR RELIEF PURSUANT TO G. L. c. 211, § 3 AND FOR DECLARATORY RELIEF PURSUANT TO G. L. c. 231A, § 1

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REBECCA A. JACOBSTEIN, BBO 651048
BENJAMIN H. KEEHN, BBO 542006
Committee for Public Counsel Services
100 Cambridge St., 14th Floor
Boston, MA 021114
(617) 910-5726
rjacobstein@publiccounsel.net

*Counsel for the Committee for Public Counsel Services*

VICTORIA KELLEHER, BBO 637908
Massachusetts Association of Criminal Defense Lawyers
One Marina Park Drive, Ste. 1410
Boston, MA 02210
(978) 744-4126
victoriouscause@gmail.com

MATTHEW R. SEGAL, BBO 654489
JESSIE J. ROSSMAN, BBO 670685
LAURA K. McCREADY, BBO 703692
ACLU Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

CHAUNCEY B. WOOD, BBO 600354
Massachusetts Association of Criminal Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

*Counsel for Massachusetts Association of Criminal Defense Lawyers*

Dated: December 18, 2020

## Introduction

Petitioners submit this amended petition due to changed circumstances that have altered the human and constitutional dimensions of incarceration during the pandemic. Nine months since the Governor declared a state of emergency, and as Massachusetts braces for a deadly holiday season, the record in this case establishes that the Houses of Correction (HOCs) still are not undertaking two essential steps to mitigate the threat of COVID-19 in communal living environments: routine, comprehensive COVID-19 testing, and meaningful population reductions. Five HOCs also do not provide meaningful, timely, and confidential modes of communication between incarcerated individuals and their lawyers. These actions violate constitutional guarantees concerning cruel and unusual punishment, due process, and the right to counsel.

On March 24, 2020, at the start of the pandemic, petitioners filed an emergency petition naming the Chief Justice of the Trial Court as the respondent. By the next day, the Single Justice had added all HOCs as respondents and reserved and reported the case. Within a week—to the credit of all parties and this Court—the case was briefed and argued. And on April 3, the Court held "that a reduction in the number of people who are held in custody is necessary;" announced a presumption of release for certain pretrial detainees; and ordered data reporting via a Special Master. *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484

Mass. 431, 445, 447, 453 (2020) (hereinafter, *CPCS*). The Court did not order releases of sentenced individuals, citing the absence of constitutional claims. *Id.* at 436, 452-53. But it noted that the reporting process could "facilitate any further response necessary." *Id.* at 453.

The record generated by that process now reveals constitutional violations necessitating a further response. Most important, in two respects the HOCs are deliberately indifferent to the substantial risk COVID-19 poses to incarcerated individuals, in violation of the Eighth Amendment and art. 26 rights of sentenced prisoners and the due process rights of pretrial detainees.

First, despite some testing of non-symptomatic individuals in some counties, *none* of the HOCs routinely and comprehensively tests incarcerated individuals and staff. Since April, the total number of tests conducted by seven HOCs falls far short of their mean populations, suggesting that they have not conducted even one complete round of testing in nine months. Even if that practice had arguably been constitutional in March, it is unjustifiable now that, as explained below, *weekly or bi-weekly* non-symptomatic testing has been shown to be necessary to identify and limit COVID-19 outbreaks in congregate living environments. By failing to undertake such testing, the HOCs have unconstitutionally blinded themselves to the true number of infected individuals in their facilities, and thus what measures must be taken to protect them.

Second, the HOCs have unconstitutionally failed to decrease their incarcerated populations. Petitioners have alleged, this Court has held, and the attached expert declaration confirms, that the number of incarcerated individuals must be reduced to limit COVID-19 transmission. See SJ-2020-0115, Dkt. #2 (Mar. 24, 2020); *CPCS*, 484 Mass. at 445; Affidavit of Dr. Yonatan Grad and Emma Accorsi, attached as Exhibit A (hereinafter Grad) ¶ 51; Affidavit of Dr. Monik C. Jiménez, attached as Exhibit B (hereinafter Jiménez) ¶ 41. And the HOCs can do this. They can remove prisoners in case of disease, see G.L. c. 126, § 26, or transfer prisoners to home confinement, see G.L. c. 127, § 49, or utilize pretrial diversion, see G.L. c. 127, § 20B. But they have not done so. While population levels dipped after this Court's decision, the incarcerated population in four counties is now at least 92% of the population at the start of reporting, and the overall pretrial population now *exceeds* the population on April 3, 2020.[1] Because "[d]ecreasing the incarcerated population is the only way to increase the ability of the remaining individuals to physically distance," which is "a cornerstone of reducing COVID-19

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[1] Compare SJC-12926, Dkt. #70 App'x 2; App'x 4; App'x 7; App'x 8 (Apr. 13, 2020) with SJC-12926, Dkt. #132 App'x 4-6; App'x 10-12; App'x 28-30; App'x 31-33; App'x 52-54 (Dec. 17, 2020); Compare Massachusetts Dep't of Correction, *Weekly Count Sheet: December 7, 2020* at 7 (listing total county jail population as 4,306) (Dec. 7, 2020), https://www.mass.gov/doc/weekly-inmate-count-1272020-0/download,with Massachusetts Dep't of Correction, *Weekly Count Sheet: April 6, 2020* at 7 (listing total county jail population as 4,193) (Apr. 6, 2020), https://www.mass.gov/doc/weekly-inmate-count-462020/download.

transmission," Grad ¶ 45, the HOCs' refusal to use their depopulation authority is unconstitutional.

Finally, the HOCs in five counties—Bristol, Essex, Hampden, Plymouth, and Worcester—are unreasonably interfering with the constitutional right to counsel because the communication options they offer fail to provide timely, confidential, and meaningful access to counsel in the midst of the pandemic.

When the pandemic arrived, the HOCs had to react quickly to an unforeseen danger. We all did. But whatever interim measures may have been appropriate in the spring, the late Chief Justice Gants cautioned that "continuing unchanged along th[e] same path in the months ahead might constitute reckless disregard, especially if we are hit with a new wave of COVID-19 cases." *Foster v. Comm'r of Correction*, 484 Mass. 698, 735, 740 (2020) (Gants, J. concurring).[2] Petitioners have worked in good faith with the Special Master and the HOCs for months—and will continue to do so—but these three issues urgently warrant the Court's intervention.

## Procedural History and Factual Background

### I. Procedural history.

On March 24, 2020, Petitioners filed an emergency petition against the Chief Justice of the Trial Court, seeking to mitigate the serious risk of COVID-19 by

[2] Petitioners join the entire legal community in mourning the loss of Chief Justice Gants and extend our condolences to the Court's members and staff.

reducing the incarcerated population in the Commonwealth's jails and prisons. See SJ-2020-0115, Dkt. #2 (Mar. 24, 2020). The Single Justice then added respondents—namely, the Department of Correction, the Attorney General, the Parole Board, and each District Attorney and Sheriff—and reserved and reported the case to the full court. See SJ-2020-0115, Dkt. #4 (Mar. 24, 2020); Dkt. #5 (Mar. 25, 2020). The full court appointed a Special Master. See SJ-12926, Dkt. #2 (Mar. 25, 2020).

Petitioners' subsequent filings reiterated that they sought "immediate reductions in pretrial and post-conviction custody." SJC-12926, Dkt. #40 at 8 (Mar. 30, 2020); see also SJC-12926, Dkt. #71 at 6 (April 17, 2020). Petitioners did not at that time raise constitutional claims, and this Court held that it could neither order the Trial Court to revise and revoke sentences, nor exercise supervision over the sheriffs, "absent a violation of constitutional rights." See *CPCS*, 484 Mass. at 442, 446, 453. The Court did conclude, however, that pretrial detainees who were neither held under G. L. c. 276, § 58A nor charged with certain offenses were entitled to a rebuttable presumption of release. See *id.* at 447-48, 453, App. A. And the Court ordered the HOCs and the DOC to provide daily reports of their incarcerated populations, releases, COVID-19 tests, and confirmed-positive results to the Petitioners and the Special Master, who was asked to file weekly reports with the Court. See *id.* at 435, 453. As this Court recently explained, "[t]he purpose of this critical monitoring . . . was to provide information and guideposts to the judiciary, as

well as to the legislative and executive branches, during this unprecedented period, to allow informed decision-making to best protect incarcerated individuals and staff within the various facilities[.]" *Commonwealth v. Nash*, SJC-12976, Slip Op. 24 (Dec. 14, 2020).

This Court has already modified its original order twice. On April 28, 2020, it ordered all correctional facilities to take additional steps to facilitate attorney access to client medical records. *CPCS*, 484 Mass. 1029, 1032-33 (2020). It simultaneously amended the daily reporting requirements to include identification of both individuals who are eligible to submit a petition to the parole board for early consideration and those who are incarcerated pending a final probation violation hearing or on a technical parole violation. See *id.* at 1033.

On June 23, 2020, this Court added several new reporting requirements—including a facility breakdown of the total number of tests and confirmed-positive results since the last report, the number of active COVID-19 cases, and the number of COVID-19 deaths—and switched the cadence from daily to weekly reporting. See SJC-12926, Dkt. #104 (June 23, 2020). The Court also ordered the parties to "continue to consult with the special master and, in particular, work to facilitate means to reduce the population of convicted and sentenced inmates." *Id.*

Since mid-May, Petitioners have participated in weekly phone calls with the Special Master's team and the Sheriffs' designated representatives. During these

calls, the Sheriffs' representatives have repeatedly stated that the HOCs are not conducting routine, comprehensive testing of non-symptomatic prisoners or staff. The Sheriffs' representatives claim that the HOCs instead test only those who are symptomatic or who are considered close contacts of infected individuals.[3] In October, following a COVID-19 outbreak at the Essex County House of Correction, Petitioners reiterated their view that the HOCs should be routinely and comprehensively testing non-symptomatic prisoners and staff. Petitioners also requested written testing policies and procedures from the HOCs. After the Sheriffs' designated representative informed the Special Master they would not provide these protocols, Petitioners sent public records requests to each HOC in the last week of October. As of this filing, four had not yet produced testing protocol documents.[4]

## II. Factual background.

The past nine months have dramatically changed our understanding regarding the breadth of non-symptomatic COVID-19 transmission, and have included significant spikes in COVID-19 transmission throughout the Commonwealth. At the same time, the record demonstrates the HOCs currently do not conduct routine,

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[3] Petitioners regard the Special Master discussions with the Respondents as court proceedings, and are prepared to submit a declaration as to their content.

[4] Barnstable has indicated that they are working on the request; Bristol has requested a $2,000 fee; and on December 17, Plymouth requested a $400 fee. In addition, Essex has produced documents responsive to a request regarding the number of attorneys who had entered the HOC since October 1, 2020, but has not yet produced any documents regarding their testing policies.

comprehensive testing of non-symptomatic prisoners and staff, and have not used their authority to meaningfully decrease their populations.

### A. Advancements in the scientific understanding of COVID-19.

The scientific understanding of COVID-19 transmission, impact, and treatment has advanced in at least three ways since April 2020.

*First*, new research has clarified the degree to which "asymptomatic and presymptomatic infection are significant contributors" to COVID-19 transmission.[5] We now know that infected individuals are likely at highest risk of spreading the illness *before* symptoms develop.[6] According to the CDC's best estimate, 50% of COVID-19 transmission occurs prior to the onset of symptoms.[7] The CDC also estimates that 40% of COVID-19 cases are "asymptomatic," *i.e.*, entirely without

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[5] See Centers for Disease Control and Prevention, *Guidance for Expanded Screening Testing to Reduce Silent Spread of SARS-CoV-2*, (hereinafter, CDC Silent Spread), https://www.cdc.gov/coronavirus/2019-ncov/php/open-america/expanded-screening-testing.html (last visited Dec. 18, 2020); see also Grad ¶ 18 ("[I]nfected individuals are infectious before they develop symptoms and even if they never develop recognizable symptoms.")

[6] 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/decarcerating-correctional-facilities-during-covid-19-advancing-health-equity-and.

[7] See Centers for Disease Control and Prevention, *Pandemic Planning Scenario,* https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html (last visited Dec. 18, 2020).

symptoms, and that these cases are 75% as likely as symptomatic cases to transmit the virus.[8] See also Grad ¶ 18; Jiménez ¶¶ 27-28.

*Second*, it is now understood that even mild COVID-19 cases can cause devastating long-term impacts, including impaired memory, limited concentration, and extreme fatigue.[9] As the CDC has acknowledged, "people who are not hospitalized and who have mild illness can experience persistent or late symptoms."[10] According to the co-director of a post-COVID clinic at Johns Hopkins, "more than half of our patients have at least a mild cognitive impairment" and they are "also seeing substantial mental health impairments."[11] Dr. Fauci describes these long-term COVID-19 symptoms as "quite real and quite extensive[.]"[12]

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[8] *Id.*

[9] See Rita Rubin, *As Their Numbers Grow, COVID-19 "Long Haulers" Stump Experts*, J. of Am. Med. Ass'n (Sept. 23, 2020), https://jamanetwork.com/journals/jama/fullarticle/2771111.

[10] Centers for Disease Control and Prevention, *Long Term Effects of COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html?ACSTrackingID=USCDC_425-DM42580&ACSTrackingLabel=Weekly%20Summary%3A%20COVID-19%20Healthcare%20Quality%20and%20Worker%20Safety%20Information%20%E2%80%93%20November%2016%2C%202020&deliveryName=USCDC_425-DM42580 (last visited Dec. 18, 2020).

[11] Pam Belluck, *Covid Survivors with Long-Term Symptoms Need Urgent Attention, Experts Say*, N.Y. Times (Dec. 5, 2020), https://www.nytimes.com/2020/12/04/health/covid-long-term-symptoms.html.

[12] *Id.*

*Third*, the Food and Drug Administration has now approved one COVID-19 vaccine, and seems poised to approve a second.[13] Governor Baker has announced that individuals living and working in congregate settings—including jails and prisons—will be the fourth group to receive the vaccination in phase one.[14] But the completion of this first phase is not anticipated 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."[15]

### B. Testing policies in communal living environments.

Consistent with the prevalence of asymptomatic and pre-symptomatic spread, studies demonstrate that symptoms-based screening does not prevent COVID-19 outbreaks in communal living environments. See Grad ¶ 20; Jiménez ¶ 29. Thus, "in congregate living environments like prisons and jails, any reasonable response to the COVID-19 pandemic includes routine, comprehensive testing of residents and staff without symptoms." Jiménez ¶ 30; see also Grad ¶ 22 ("[P]ublic health and

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[13] 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) (hereinafter Crimaldi, *Vaccine*), https://www.bostonglobe.com/2020/12/12/metro/inmates-correctional-workers-be-among-first-get-vaccine-mass-rollout-plan-is-hazy/.

[14] 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-initial-steps-for-covid-19-vaccine-distribution; Crimaldi, *Vaccine*.

[15] Crimaldi, *Vaccine*; see also Phase One Press Release.

infectious diseases researchers and officials recognize that, particularly in vulnerable communal living environments, the frequent testing of individuals without symptoms is necessary to contain the pandemic."). Daily, weekly, and even bi-weekly testing can have a significant impact. See Grad ¶¶ 23-26. But, "[t]o the extent that testing frequency decreases and results are delayed, testing will be less effective for controlling outbreaks because infected individuals cannot be identified and isolated" before "the virus can spread broadly." *Id.* ¶ 26; see also Jiménez ¶¶ 32, 35, 36.

For this reason, federal, state, and private communal-living facilities have adopted broad-based testing strategies. At the federal level, the CDC has emphasized the need for "expanded screening testing . . . to rapidly identify [COVID-19 positive] people without symptoms who are contributing to the silent spread of infection."[16] It has therefore instructed jurisdictions to prioritize asymptomatic testing of staff and individuals incarcerated in correctional facilities.[17] For those facilities within communities that are at moderate or high risk (based on either the cumulative number of new cases per 100,000 persons within the last seven days or the

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[16] CDC Silent Spread; see also Jiménez ¶¶ 34-35.

[17] See *id.*; see also Centers for Disease Control and Prevention, *Testing in Correctional & Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html#asymptomatic-no-exposure (last visited Dec. 18, 2020); see also Jiménez ¶¶ 34-35.

percentage of viral tests that are positive during the last seven days), the CDC recommends weekly or twice-weekly, testing, respectively.[18]

In Massachusetts, the DOC conducted an initial round of universal testing of non-symptomatic prisoners in May and June, and continued with more targeted non-symptomatic testing for particular prisoners and facilities throughout the summer and fall. See *Foster*, 484 Mass. at 723; Department of Correction COVID Testing Protocols, attached as Exhibit D. A second round of universal testing at all DOC facilities that began mid-November also included mandatory staff testing.[19]

Meanwhile, in the analogous context of nursing homes, the Department of Public Health mandated universal baseline testing of all staff members and weekly testing of all of its staff. See Dep't of Public Health Dec. 7, 2020 Memo to Skilled Nursing Facilities, Rest Homes and Assisted Living Residences, attached as Exhibit S (hereinafter DPH Nursing Home Memo). All residents must be tested in the event of a positive result. *Id.* "Nursing facilities and rest homes are required to comply with the surveillance testing regimen, and may be subject to financial sanctions for

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[18] See CDC Silent Spread.

[19] See Press Release, DOC Implements Modified Operations at Facilities Statewide (Nov. 14, 2020), https://www.mass.gov/news/doc-implements-modified-operations-at-facilities-statewide; Deborah Becker, *New Coronavirus Testing for All State Prisoners and DOC Staff*, WBUR (Nov. 14, 2020), https://www.wbur.org/news/2020/11/14/mass-prisons-limit-visitors-for-2-weeks-as-it-conducts-more-coronavirus-tests.

non-compliance."[20] As of December 17, 407 out of 427 facilities were complying with this weekly mandate.[21]

Finally, more than 100 public and private colleges throughout New England have required universal non-symptomatic testing of students once or twice a week.[22] "[S]chools that have done frequent testing of asymptomatic students have kept their rates at well below 1% positivity," while those that test only "symptomatic [individuals] or only contacts of positives, have a rate at least tenfold higher."[23]

### C. The pandemic's deadliest phase.

This is the most dangerous moment of the pandemic. "From an epidemiological perspective, the COVID-19 risks are higher now than at any other

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[20] Massachusetts Dep't of Public Health, *Weekly COVID-19 Public Health Report* at 56 (Dec. 17, 2020) (hereinafter DPH Dec. 17 Weekly COVID Report), https://www.mass.gov/doc/weekly-covid-19-public-health-report-december-17-2020/download (last visited Dec. 18, 2020).

[21] *Id.* at 56-73. For other residential congregate care programs, EOHHS has mandated universal baseline testing of all staff members and a staff surveillance program that tests all staff every two to four weeks, where a positive test result triggers testing of all residents and staff who share physical space. See Massachusetts Executive Office of Health and Human Services, *Residential and Congregate Care Programs: 2019 Novel Coronavirus (COVID-19) Surveillance Testing Guidance* (Dec. 17, 2020), https://www.mass.gov/doc/eohhs-congregate-care-surveillance-testing-guidance (last visited Dec. 18, 2020).

[22] See Carey Goldberg, *Initial Results from a Massive Experiment: Over 3 Million Coronavirus Tests as New England Colleges,* WBUR (Nov. 25, 2020), https://www.wbur.org/commonhealth/2020/11/25/on-campus-testing-colleges-broad; see also Grad ¶ 32.

[23] See Carey Goldberg, *Initial Results from a Massive Experiment: Over 3 Million Coronavirus Tests as New England Colleges,* WBUR (Nov. 25, 2020), https://www.wbur.org/commonhealth/2020/11/25/on-campus-testing-colleges-broad.

point, including the first surge in the spring." Jiménez ¶ 5; see also Grad ¶¶ 13-16, 53. When this case was filed, Massachusetts had reported 777 COVID-19 cases in total. See SJ-2020-0115, Dkt. #2 at 5 (Mar. 24, 2020). It now regularly reports thousands of new cases *each day*.[24] Governor Baker has acknowledged that there is now "community transmission across the Commonwealth," and, in a troubling sign of what is to come, field hospitals are re-opening.[25]

As the cases increase, so do the tragedies. Hospitalizations and deaths in Massachusetts rose 100% in the three weeks between the end of November and the start of December.[26] Total COVID-19 deaths in Massachusetts have topped 11,000 and are trending upward.[27] After months of no reported COVID-19 deaths among Massachusetts prisoners, two individuals died of COVID-19 in late November less

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[24] See, e.g., Massachusetts Dep't of Public Health, *COVID-19 Dashboard of Public Health Indicators* (Dec. 17, 2020) (reporting 4,985 newly reported confirmed cases on Dec. 17) (hereinafter DPH Dec. 17 Daily Dashboard), https://www.mass.gov/doc/covid-19-dashboard-december-17-2020/download (last visited Dec. 18, 2020); see also Jiménez ¶¶ 5-7.
[25] Jeremy C. Fox and Travis Andersen, *Baker Says Record-Setting Number Of COVID-19 Cases In State Shows Widespread Community Transmission*, Boston Globe (Dec. 3, 2020), https://www.bostonglobe.com/2020/12/03/metro/baker-says-high-number-covid-19-cases-state-shows-widespread-community-transmission/. see also Grad ¶ 16.
[26] See Shirley Leung, Tim Logan, and John Hilliard, *Public Health Expert and Some Boston-area Mayors Urge More Action on COVID-19*, Boston Globe (Dec. 6, 2020), https://www.bostonglobe.com/2020/12/06/business/with-no-new-covid-19-restrictions-state-top-health-expert-some-boston-area-mayors-urge-more-action/; see also https://twitter.com/ashishkjha/status/1335433924202418176 .
[27] See DPH Dec. 17 Daily Dashboard.

than a day after they were released from DOC custody,[28] one COVID-19 positive prisoner died in DOC custody on December 4, and two more died in DOC custody within the past week.[29] The head of the CDC has warned that the months ahead could be "the most difficult in the public health history of this nation."[30]

### D. The HOCs have neither conducted adequate testing nor undertaken adequate releases.

The record demonstrates two key ways in which the HOCs have not adequately responded to these significant changes.

First, although a few HOCs are testing more than the rest, none have conducted routine, comprehensive asymptomatic testing of incarcerated individuals or staff. As of December 17, according to CDC's guidance indicators, nine Massachusetts counties were in the high infection tier, for which weekly or twice-weekly screening is recommended, while the remaining five were in the moderate

[28] See Deborah Becker, *2 Mass. Prisoners Hospitalized with COVID-19 a Day After Being Granted Medical Parole*, WBUR (Dec. 4, 2020), https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths.

[29] See SJC-12926, Dkt. #132 at App'x 62 (Dec. 17, 2020).

[30] Amanda Kaufman, *Winter Could be "Most Difficult Time in the Public Health History" of the U.S., C.D.C. Director Says*, Boston Globe (Dec. 2, 2020), https://www.bostonglobe.com/2020/12/02/nation/winter-could-be-most-difficult-time-public-health-history-us-cdc-director-says/; see also Grad ¶ 53; Jiménez ¶ 45.

infection tier, for which weekly screening testing is recommended.[31] Not one HOC has hit this benchmark.

Testing in seven counties—Barnstable, Berkshire, Bristol, Middlesex,[32] Norfolk, Suffolk and Worcester—has been especially sparse. At these HOCs, the total number of tests since April 5 is less than their mean population, meaning they likely have not tested every prisoner *even once* in the span of nearly nine months.[33] Barnstable has not tested any incarcerated individuals since October 14,[34] while Bristol, Worcester, and Norfolk have tested just 67, 39, and 4 since September 3.[35]

While other facilities have conducted more tests of non-symptomatic

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[31] See CDC Silent Spread; see also DPH Dec. 17 Weekly COVID Report at 25 (Dec. 17, 2020), https://www.mass.gov/doc/weekly-covid-19-public-health-report-december-17-2020/download (last visited Dec. 18, 2020) (Barnstable, Berkshire, Franklin, Hampshire, and Norfolk, had average daily incidents rates of between 27.9 and 47.3, thus falling into the CDC's definition of moderate infection tier; Bristol, Dukes & Nantucket, Essex, Hampden, Middlesex, Plymouth, Suffolk, and Worcester Counties had average daily incidents rates of 54.3 to 101.5, thus falling into the CDC's definition of high infection tier.); see also DPH Nursing Home Memo.

[32] According to the produced public records, Middlesex has conducted sporadic asymptomatic testing of select groups of incarcerated individuals in the past.

[33] See SJC-12926, Dkt. #132 at App'x 4-6; App'x 7-9; App'x 10-15; App'x 43-45; App'x 46-48; App'x 52-57; App'x 58-60 (Dec. 17, 2020). In addition to these seven counties, Hampshire—which reports testing of prisoners and detainees upon intake—has tested a total of 157 incarcerated individuals since April 4, during which time it always had a population above 106. See SJC-12926, Dkt. #132 App'x at 40-42 (Dec. 17, 2020).

[34] See SJC-12926, Dkt. #132 App'x at 5-6 (Dec. 17, 2020).

[35] See SJC-12926, Dkt. #132 at App'x 10-15; App'x 46-48; App'x 52-57; App'x 58-60 (Dec. 17, 2020).

prisoners, they fall far short of the necessary routine, comprehensive testing. Franklin has tested a total of 643 incarcerated individuals throughout the pandemic;[36] Hampden has tested a total of 3,308 incarcerated, and in response to the public records requests, reported two facility-wide tests in the spring and late fall, as well as plans for another round.[37] In addition, Essex[38] and Plymouth[39] conducted a round of facility-wide testing after outbreaks erupted at each facility this fall.[40] This testing puts these four HOCs ahead of some others, but leaves them still short of the weekly or biweekly testing of non-symptomatic individuals that is the minimum required to

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[36] See SJC-12926, Dkt. #132 App'x at 30 (Dec. 17, 2020).

[37] See SJC-12926, Dkt. #132 App'x at 33 (Dec. 17, 2020). Both Franklin and Hampden reported that they test all prisoners and detainees at intake.

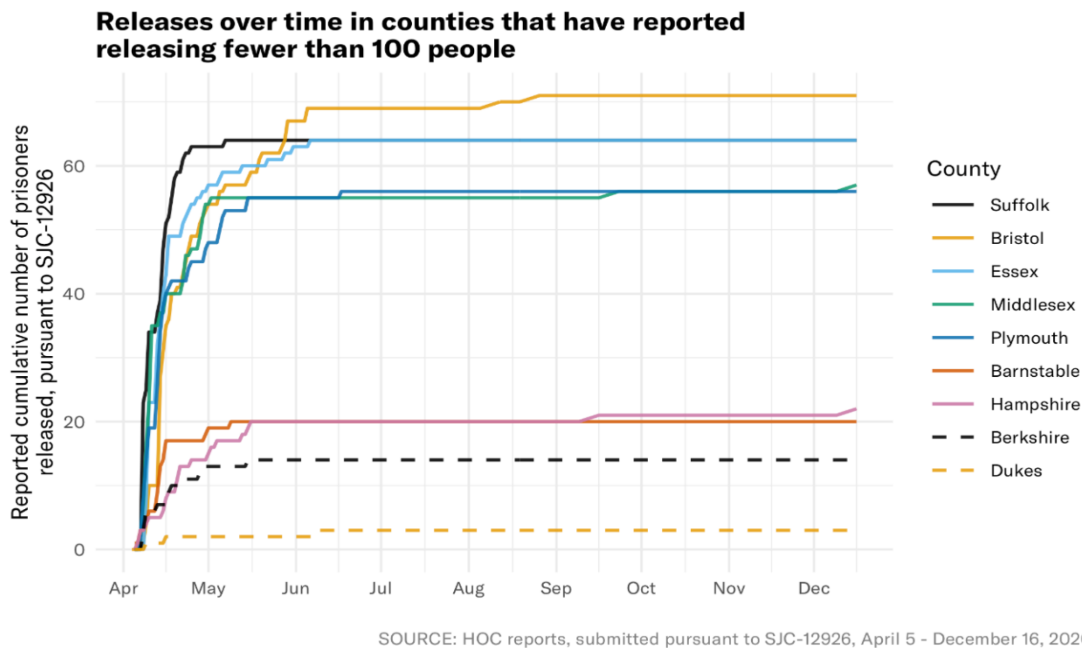
[38] Deborah Becker, *Middleton Jail in Essex County Closes to Visitors Amid Outbreak,* WBUR (Oct. 4, 2020), https://www.wbur.org/news/2020/10/04/covid-outbreak-essex-jail. See SJC-12926, Dkt. #132 App'x at 20-21 (Dec. 17, 2020). Through September 30, Essex had tested just 196 prisoners; by October 7, it had tested 1,270; since that time, Essex has tested an additional 708 prisoners.

[39] Joe Difazio, *Plymouth County Jail sees COVID-19 Spike; More than 40 Inmates, Two Dozen Correctional Officers Test Positive*, The Patriot Ledger (Dec. 10, 2020), https://www.patriotledger.com/story/news/2020/12/09/more-than-40-inmates-test-postive-covid-19-plymouth-county-jail/6506628002/. See SJC-12926, Dkt. #132 at App'x 51 (Dec. 17, 2020). Through December 2, Plymouth had tested just 224 incarcerated individuals; by December 9, it had tested 936. Plymouth has tested an additional 64 prisoners since that time.

[40] Petitioners only learned about this through a federal filing, as Plymouth has not yet produced records in response to Petitioners' public records request, responding on December 17 with $400 fee request. See *Nizeyimama v. Moniz,* No. 20-cv-10685-ADB, Dkt. #289 at 2 (D. Mass. Dec. 1, 2020).

effectively mitigate COVID-19 transmission in communal living spaces.[41] This is particularly notable because, under the CDC's guidelines, Hampden, Essex, and Plymouth all currently fall within the higher infection tier which for which weekly or twice-weekly testing is recommended. See *supra* n.57.

Second, after an initial population drop in the wake of the Court's April 3 decision, most HOCs are now reporting almost no releases pursuant to this Court's order. Since the beginning of May, Barnstable, Suffolk, Berkshire and Dukes have each reported releasing one individual pursuant to this Court's order.[42] Similarly,




[41] For example, between November 19 and December 16, Hampden tested 1,131 prisoners with a mean population of 783. SJC-12926, Dkt. #132 at App'x 33 (Dec. 17, 2020). By way of comparison, bi-weekly testing would have resulted in 1,556 tests, while weekly testing would have resulted in 3,132 tests.

[42] See SJC-12926, Dkt. #132 App'x at 4-6; App'x at 7-9; App'x at 16-18; App'x at 52-54 (Dec. 17, 2020).

since the beginning of June, Plymouth and Essex have each reported releasing one individual pursuant to this Court's order; Hampshire and Middlesex have each reported releasing two individuals, and Bristol has reported releasing three.[43]

While Hampden, Norfolk, Franklin, and Worcester have each reported releasing more individuals since June 1—279, 453, 511, and 729, respectively, as of December 16[44]—they have each continued to incarcerate dozens of individuals who are eligible for transfer to home confinement. As of November 5, 2020, Norfolk and Worcester had placed *none* of their combined 64 estimated eligible individuals on home confinement, while Hampden and Franklin had each placed just three out of an estimated 36 and 21 eligible individuals, respectively. See Affidavit of Daniel Jaffe Ex. 1, attached as Exhibit C (hereinafter Jaffe).

Collectively, the HOCs' failure to exercise their authority to depopulate their facilities has contributed to a reversal of the decreases that occurred early in the pandemic. From April 7 to June 21 the HOC population decreased from 7,173 to

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[43] See SJC-12926, Dkt. #132 App'x at 10-12; App'x 19-21; App'x at 40-42; App'x 43-45; App'x 49-51 (Dec. 17, 2020).

[44] See SJC-12926, Dkt. #132 App'x 28-30; App'x at 31-33; App'x 46-48; App'x 58-60 (Dec. 17, 2020). Given the disparity across counties, during the December 10 and 17 Special Master's call, Petitioners asked the Sheriffs' designee to describe the categories of individuals that each county is including in their release data. Petitioners' understanding is that the Sheriffs' designee is looking into the matter and will respond once they have the information.

5,565, but as of December 16 it was back up to 6,277.[45] Four counties—Barnstable, Bristol, Franklin, and Hampden—are at 92% or higher of their incarceration levels at the start of reporting.[46] The increase is especially pronounced with respect to pretrial detainees, who were incarcerated in greater numbers on December 7 than on the date of this Court's initial decision.[47]

## Bases for Relief

In filing this case, Petitioners requested, and continue to request, that this Court exercise its superintendence authority. Petitioners did not initially bring constitutional claims, but do so now.

### I. The HOCs are violating art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the U.S. Constitution because they are not taking basic measures to protect sentenced prisoners from COVID-19.

The HOCs' failure to conduct comprehensive and routine testing of non-symptomatic prisoners and staff, as well as their failure to meaningfully exercise their

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[45] Compare SJC-12926, Dkt. #70 App'x 1 (Apr. 13, 2020), with SJC-12926, Dkt. #132 App'x 1-3 (Dec. 17, 2020).

[46] Compare SJC-12926, Dkt. #70 App'x 2; App'x 4; App'x 7; App'x 8 (Apr. 13, 2020) with SJC-12926, Dkt. #132 App'x 4-6; App'x 10-12; App'x 28-30; App'x 31-33; App'x 52-54 (Dec. 17, 2020).

[47] Compare Massachusetts Dep't of Correction, *Weekly Count Sheet: December 7, 2020* at 7 (listing total county jail population as 4,306) (Dec. 7, 2020), https://www.mass.gov/doc/weekly-inmate-count-1272020-0/download, with Massachusetts Dep't of Correction, *Weekly Count Sheet: April 6, 2020* at 7 (listing total county jail population as 4,193) (Apr. 6, 2020), https://www.mass.gov/doc/weekly-inmate-count-462020/download.

depopulation authority, amounts to deliberate indifference that violates the constitutional rights of sentenced prisoners.

### A. Carceral facilities are constitutionally required to take reasonable steps to protect sentenced prisoners from a known, substantial risk.

When the state "so restrains an individual's liberty that it renders him unable to care for himself," it assumes the obligation "to provide for his basic human needs." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). The Eighth Amendment's ban on "cruel and unusual punishments," and art. 26's ban on "cruel or unusual punishments," therefore require prison officials to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations omitted). These measures include protecting prisoners "from the spread of serious, communicable diseases, including where the complaining inmate does not show symptoms of the disease, or where 'the possible infection might not affect all of those exposed.'" *Foster*, 484 Mass. at 701 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)).

To succeed on a claim that the threat of exposure to a disease amounts to cruel and unusual punishment, convicted prisoners must satisfy two elements.[48] See

[48] This Court has not yet decided whether art. 26 provides greater protection for prisoner health and safety than does the Eighth Amendment. See *Foster*, 484 Mass.

*Foster*, 484 Mass. at 701. First, they must establish that, objectively, the conditions pose a "substantial risk of serious harm." See *Farmer*, 511 U.S. at 834. Second, they must show that officials acted with a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The requisite state of mind is subjective deliberate indifference to prisoner health or safety. See *Farmer*, 511 U.S. at 829.

Jails and prisons are deliberately indifferent when they "fail[] to take reasonable measures to abate" a known, substantial risk of harm. *Id.* at 847.[49] This 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*, -- S. Ct. --, 2020 WL 6704453, *4 (Nov. 16, 2020) (Sotomayor, J., dissenting) (emphasis added) (internal citations omitted). Because the Constitution prohibits not just a complete absence of treatment, but also inadequate treatment, a jail cannot insulate itself 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).[50] Instead, the failure to

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at 716; *Torres v. Comm'r of Correction*, 427 Mass. 611, 615-16 (2011). Petitioners allege violations of both provisions.

[49] 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 Amendment when they "fail[] to take 'easily available measures' to reduce the known risk to the plaintiffs' health") (quoting *Clancey v. McCabe*, 441 Mass. 311, 318 (2004) ).

[50] See also *Savino v. Souza*, 459 F. Supp. 3d 317, 329 (D. Mass. 2020) (holding detainees were likely to establish deliberate indifference notwithstanding steps the jail

undertake a "fundamental prerequisite" whose absence will render other steps "insufficient" and "ineffectual" to protect prisoners constitutes deliberate indifference. *In re Von Staich*, 270 Cal. Rptr. 3d 128, 149-50 (Cal. App. 2020).

**B. The HOCs' knowing failure to take reasonable steps to mitigate the serious risks of COVID-19 constitutes deliberate indifference.**

Because COVID-19 presents a known, substantial risk of serious harm, see *Foster*, 484 Mass. at 718, the constitutional inquiry hinges on whether the HOCs have been deliberately indifferent to this risk by knowingly failing to take reasonable steps to mitigate it. They have. The HOCs have failed (1) to undertake routine, comprehensive testing of prisoners and staff, and (2) to depopulate through removals due to disease, transfers to home confinement, and pretrial diversion.

**1. The HOCs' failure to conduct routine, comprehensive testing demonstrates deliberate indifference.**

The HOCs have acted with deliberate indifference by failing to adequately test non-symptomatic prisoners and staff for COVID-19. This Court recently emphasized, "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," especially in congregate settings like jails and prisons. *Nash*,

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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).

SJC-12976, Slip Op. at 23. This Court has also recognized that testing, contact tracing, and quarantining—*all* of which depend on finding contagious individuals—are "the sine qua non of any effort to control the COVID-19 pandemic." *Foster*, 484 Mass. at 722-23. Indeed, in determining that DOC prisoners were unlikely to succeed on their Eighth Amendment claim at the start of the pandemic, the Court relied in part on what it called "widespread DOC testing efforts." *Id.* at 724.[51] The logic of that determination, as other courts have held, is that the *absence* of widespread testing can constitute deliberate indifference. See, e.g., *Savino v. Souza*, 459 F. Supp. 3d 317, 331 (D. Mass. 2020) (finding facility was deliberately indifferent in part because of its sparse testing system).[52]

This makes sense. Failing to test non-symptomatic individuals *necessarily* blinds government officials to people for whom contact tracing and quarantining—the other pillars of prevention—must be conducted. "[R]outine testing of pre-symptomatic and asymptomatic individuals in jails and prisons is the medical

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[51] The concurrence cautioned, however, that Eighth Amendment claims against the DOC could very well succeed if additional measures were not taken by this past fall. *Foster,* 484 Mass. at 735, 740 (Gants, C.J., concurring).

[52] See also *Pimental-Estrada v. Barr*, 464 F. Supp. 3d 1225, 1232-33 (W.D. Wash. 2020) (holding facility's actions were not objectively reasonable because "[w]ithout widespread testing, Respondents cannot identify 'confirmed cases' – the lynchpin that causes them to take further preventative procedures"); *Zipeda Rivas v. Jennings,* 20-cv-02731, Dkt. # 867, Slip Op. 4, 9 (N.D. Cal. December 3, 2020) (holding facility deliberately indifferent in part because of its "conscious avoidance of widespread testing" of both detainees and staff).

standard of care to protect the public health of prisoners, staff, and the surrounding community." Grad ¶ 31; see also Jiménez ¶ 30. That is because "[i]f these infections are not identified due to lack of testing, the facility cannot take effective action to protect the rest of its incarcerated population from exposure and infection." See Grad ¶¶ 34, 36; see also Jiménez ¶ 33 ("[I]n prisons and jails, the efficacy of isolation and contact tracing depend upon the routine testing of staff and residents who are not yet experiencing symptoms."); *Savino,* 459 F. Supp. 3d at 331. Simply put, quarantines can't work if you don't know who to quarantine. Instead, routine and comprehensive testing of residents and staff is the "fundamental and necessary predicate to preventing the spread of COVID-19 in a communal living facility." Grad ¶ 40; see also *Zipeda Rivas v. Jennings*, 20-cv-02731, Dkt. # 867, Slip Op. 25 (N.D. Cal. December 3, 2020) (ordering weekly testing of all detainees and staff who had not tested positive for COVID-19 within 90 days). This requires at the very least weekly or bi-weekly testing of non-symptomatic prisoners and staff. Jiménez ¶ 36.[53]

Yet not one of the HOCs is doing this. Instead, most of the HOCs test only people with symptoms and those identified as close contacts of infected individuals. Even the handful of HOCs that have conducted more non-symptomatic testing "are not conducting the level of testing necessary to identify infected prisoners and staff," and are therefore "not taking the necessary steps to protect the people who live and

[53] See also CDC Silent Spread.

work in their facilities." Jiménez ¶ 36; see also Grad ¶39. By declining to meaningfully look for COVID-19, the HOCs disable themselves from preventing and containing outbreaks among their staff and incarcerated populations, and thus violate their constitutional obligations. Cf. *Von Staich*, 270 Cal. Rptr. at 150. As Judge Sorokin explained, DOC learned about the importance of widespread testing "the hard way," and the HOCs "would be wise to benefit from DOC's experience." *Baez v. Moniz*, 460 F. Supp. 3d 78, 91 n.13 (D. Mass 2020).

Not surprisingly, then, the HOCs have been unable to manage what they have chosen not to measure. Between June 1 and September 23, Essex tested just 57 prisoners during a period when its population was always above 900.[54] Within three weeks, the number of confirmed positive prisoners ballooned by 158 individuals.[55] During an October 14 phone call with the Special Master's team and the Sheriffs' representative, Petitioners expressed concern that Essex was a harbinger of what was to come at other HOCs with low testing rates. Shortly thereafter, Plymouth saw 66 infections among staff members and 51 infections among incarcerated individuals between November 5 and December 16.[56] This followed three months where Plymouth had tested just two staff members and 23 incarcerated individuals.[57]

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[54] See SJC-12926, Dkt. #132 App'x 19-20 (Dec. 17, 2020).
[55] See *id.*
[56] See SJC-12926, Dkt. #132 App'x 49-51 (Dec. 17, 2020).
[57] See *id.*

Against this backdrop, the HOCs' refusal to conduct routine, comprehensive testing of prisoners and staff is deliberate indifference. See *Farmer*, 511 U.S. at 824, 842.

### 2. The HOCs' refusal to depopulate also demonstrates deliberate indifference.

The HOCs have also acted unconstitutionally with deliberate indifference by failing to use their authority to reduce their incarcerated populations.

Petitioners and this Court have called for a reduction in the population of incarcerated individuals as a means of protecting incarcerated individuals, correction staff, and surrounding communities. *CPCS*, 484 Mass. at 445; *Foster*, 484 Mass. at 701; SJC-12926, Dkt. #5 at 1 (Mar. 26, 2020); Dkt. #40 at 8 (Mar. 30, 2020); Dkt. #71 at 6 (Apr. 17, 2020). And for good reason. Because "physical distancing is paramount to combating COVID-19 transmission," and "[r]educing the incarcerated population is the only way to increase the ability of the remaining individuals to physically distance," "decarceration is a necessary component of any reasonable strategy to combat the spread of COVID-19 in Massachusetts prisons and jails." Jiménez ¶¶ 37, 41; see also Grad ¶ 45, 47-50; Jiménez ¶¶ 38-40. Without such distance, and even assuming other mitigation strategies are deployed, confinement in the HOCs will continue to pose a grave risk to prisoners. See Grad ¶ 50; Jiménez ¶ 41. Therefore, as a recent National Academies of Science, Engineering and

Medicine report concluded, decarceration is a "necessary mitigation strategy."[58] See also Grad ¶ 50; Jiménez ¶ 41.

To achieve this mitigation, some corrections systems have increased their use of programs such as home confinement, which allow people to serve the remainder of their sentences from their homes. For example, the Federal Bureau of Prisons has placed 19,021 prisoners in home confinement since March.[59]

Where officials have refused to depopulate to mitigate the threat of COVID-19, several courts have held that this failure violates the Eighth Amendment. In *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411 (D. Conn. 2020), a class of federal prisoners claimed that the warden's failure to transfer medically vulnerable prisoners to home confinement "in any meaningful numbers" constituted deliberate indifference to prisoners' serious medical needs. *Id.* at 441. The Court noted that transfer to home confinement or compassionate release was "the only viable measure by which the safety of highly vulnerable inmates can be reasonably assured." *Id.* at 443. It therefore held that the facility's failure to transfer more than 21 out of 1,000 prisoners to home confinement established a likelihood of success

[58] NASEM Report S-2.

[59] See Federal Bureau of Prisons, *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, https://www.bop.gov/coronavirus/faq.jsp (last visited December 18, 2020).

on the claim that the inadequate implementation of home confinement authority constituted deliberate indifference. See *id.* at 441-43.[60]

Like the BOP, the HOCs can use home confinement to safely reduce their populations. Specifically, G. L. c. 127, § 49 empowers the HOCs to establish education, training, and employment programs, including programs that may be completed outside of a correctional facility, for prisoners who are within eighteen months of parole eligibility and have not been convicted of certain enumerated offenses. This provision authorizes the HOCs to transfer prisoners to home-confinement programs. See *Foster*, 484 Mass. at 733; *cf. Commonwealth v. Donohue*, 452 Mass. 256, 266 (2008) (finding that "the statutory scheme suggests a legislative intent to allow this kind of [GPS-monitored home confinement] arrangement"). Indeed, "General Laws c. 127 § 49A, *requires* the commissioner to establish in each correctional facility a committee to evaluate the behavior and

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[60] See also *United States v. Young*, 460 F. Supp. 3d 71, 73 (D. Mass. 2020) (granting a motion for compassionate release); *In re Von Staich,* 270 Cal. Rptr.3d at 153 (finding deliberate indifference and ordering 50% population reduction, despite the facility's use of some mitigation measures, where the facility had "dismissed the fundamental prerequisite" of population reduction); *Campbell v. Barnes*, Case No. 30-2020-1141117, Order On Writ of Habeas Corpus and Writ of Mandate*,* Slip Op. 16-17 (Orange Cty. Sup. Ct., Dec. 11, 2020) (finding deliberate indifference and ordering a 50% population reduction where "the measures taken lack the very cornerstone of a successful abatement plan, namely, a sufficient reduction in jail population to enable proper social distancing");*Torres v. Milusnic*, No. CV-20-4450-CBM-PVC, 2020 WL 4197285, at 16 (C.D. Cal. July 14, 2020) (holding that prison officials were likely deliberately indifferent when they failed to make prompt and meaningful use of home confinement).

conduct of inmates within the prison and recommend whether an inmate 'shall be permitted to participate in any program outside a correctional facility, exclusive of parole.'" *Foster,* 484 Mass. at 737 (Gants, C.J., concurring).

The HOCs have other depopulation tools at their disposal. Where a "disease breaks out in a jail or other county prison" that "may endanger the lives or health of the prisoners to such a degree as to render their removal necessary," a Sheriff may remove incarcerated individuals to another designated location "until they can safely be returned" to the HOC. G. L. c. 126, § 26. And for pretrial detainees, the HOCs can release individuals to pretrial diversion programs. See G. L. c. 127, § 20B.

Nevertheless, the exercise of the HOCs' depopulation authorities has apparently been limited. Three HOCs—Bristol, Plymouth, and Suffolk—do not even have home-confinement programs. See Jaffe Ex. 1. And the nine HOCs that have home-confinement programs have failed to use them to achieve meaningful population reductions, despite their statutory obligation to consider all eligible prisoners. See G.L. c. 127, § 49A. Indeed, five of the HOCs with home-confinement programs had zero people on home confinement as of November 5, and three others had three or fewer people on home confinement on that same date. See Jaffe Ex. 1.[61] Overall, just 16 people were on home confinement as of

[61] Dukes County Sherriff's Office did not respond to a public records request seeking information about its use of home confinement.

November 5, even though an estimated total of 427 individuals were eligible for such release as of December 11. See *id.* To the best of Petitioners' knowledge, none of the Sheriffs have exercised their authority to move prisoners to a new location under G. L. c. 126, § 26. And the HOCs have similarly failed to use all available tools to decrease their pretrial populations, with seven counties housing more pretrial detainees on December 7 than on the date of this Court's initial decision.[62] Under the circumstances of the present crisis, the HOCs' failure to take these known, reasonable measures to protect the people in their custody is deliberate indifference prohibited by the Eighth Amendment and art. 26.

## II. The HOCs are violating the due process rights of pretrial detainees guaranteed to them by art. 1, 10, and 12 of the Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution.

Whereas convicted prisoners cannot be subjected to cruel and unusual punishment, pretrial detainees cannot be punished at all. See *Ingraham v. Wright*, 430 U.S. 651, 671–72, n.40 (1977). Accordingly, as compared to convicted

[62] Compare Massachusetts Dep't of Correction, *Weekly Count Sheet: December 7, 2020* at 7 (listing total county jail population as 4,306) (Dec. 7, 2020), https://www.mass.gov/doc/weekly-inmate-count-1272020-0/download,with Massachusetts Dep't of Correction, *Weekly Count Sheet: April 6, 2020* at 7 (listing total county jail population as 4,193) (Apr. 6, 2020), https://www.mass.gov/doc/weekly-inmate-count-462020/download.(showing that Barnstable, Essex, Franklin, Hampden, Hampshire, Norfolk, and Suffolk counties held more pretrial detainees on December 7 than on April 6).

prisoners, pretrial detainees face a lower hurdle in demonstrating that the HOCs have violated their constitutional rights.

Guided by this principle, the Supreme Court has held that pretrial detainees alleging Fourteenth Amendment violations for excessive force need not prove that the officers were subjectively aware that the force used was excessive, as in the Eighth Amendment context, but merely that the force was objectively unreasonable. See *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). The federal appellate courts are split over the related question of whether, under *Kingsley*, pretrial detainees bringing Fourteenth Amendment conditions-of-confinement claims need only show that the officials' actions were objectively unreasonable, rather than that prison officials were subjectively aware of the risk, as in the Eighth Amendment context. See *Gomes v. US Dep't of Homeland Sec., Acting Sec'y*, 460 F. Supp. 3d 132, 147–148 & n.32 (D.N.H. 2020) (collecting cases).

This Court should join the Second, Seventh, and Ninth Circuits and recognize that the logic of *Kingsley* applies with equal force to Fourteenth Amendment and state due process claims. See *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc); see also *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (explaining that *Kingsley* "calls into serious doubt whether" pretrial detainees need to prove a subjective

component in conditions claims). And it should further hold that, for all of the reasons discussed above, the HOCs' refusal to provide routine, comprehensive testing or to use their statutory authority to decrease their incarcerated population is objectively unreasonable in light of the threat COVID-19 poses to health and safety of the people in their custody.[63]

## III. By failing to facilitate meaningful attorney-client communication, five HOCs are violating detainees' rights to counsel.

The Sixth Amendment and art. 12 require prisons and jails to facilitate meaningful access to attorneys. In-person contact visits that are both timely and confidential are a constitutionally required component of that meaningful access. See *Benjamin v. Fraser,* 264 F.3d 175, 180-81 (2d Cir. 2001) (upholding lower court's order requiring jail to provide timely, private visits). But due to the limitations of such visits during the pandemic, while in-person contact visits remain *necessary*, they are no longer *sufficient* to protect these rights.

In these extraordinary times, the right to counsel requires timely and confidential telephone and video communications as a supplement to in-person visits. Unfortunately, Bristol, Essex, Hampden, Plymouth, and Worcester (collectively, "the Five HOCs") do not currently facilitate sufficient confidential

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[63] Even if this Court applies the deliberate indifference standard to pretrial detainees, the HOCs have violated the due process rights of pretrial detainees for the same reason they have violated the Eighth Amendment and art. 26 rights of sentenced prisoners. See *supra.*

phone and video conferences between attorneys and clients.[64] In light of the pandemic, that failure violates the right to counsel under the state and federal constitutions. See U.S. Const. VI, XVI; Mass. Declaration of Rights, art. 1, 10, 12.

### A. Incarcerated individuals are constitutionally entitled to meaningful access to their attorneys.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Among the rights that prisons may not extinguish is the right to the effective assistance of counsel. See *Cacicio v. Sec'y of Pub. Safety*, 422 Mass. 764, 773 (1996). Thus, prisons and jails must provide the people in their custody with "sufficient access to attorneys." *Id.* at 773.

Sufficient access requires in-person, contact visitation with counsel. See *Hoffer v. Comm'r of Correction*, 397 Mass. 152, 155 (1986) (prisoners entitled to meet with counsel).[65] To be constitutionally meaningful, these visits must be private

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[64] On a December 17 phone call with Petitioners and the Special Master, Sheriff Cocchi of Hampden County stated that he would be able to provide confidential video conferencing. Petitioners remain open to continue working with Sheriff Cocchi to ensure all prisoners have meaningful access to counsel.

[65] See also *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (right of access to courts includes contact visitation with counsel); *Adams v. Carlson*, 488 F.2d 619, 632 (7th Cir. 1973) ("[w]here an attorney visiting an incarcerated client offers to waive his right to resist a search by prison guards, a penal institution errs at the expense of the inmate's right of full access to the courts when it . . . requires a conference by phone across glass"); *Federal Defenders of New York, Inc. on behalf of Metropolitan Detention Center – Brooklyn v. Federal Bureau of Prisons*, 416 F. Supp. 3d 249,

and confidential. See, e.g., *id.*; *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972) (acknowledging that "the prisoner has a right to have the confidence between himself and his counsel totally respected").[66] Under this rule, courts have invalidated practices that required incarcerated people to yell to be heard by their attorneys, see *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990), and have required prisons to provide sufficiently private areas for meaningful attorney-client interviews*,* see *Dreher v. Sielaff*, 636 F.2d 1141, 1145 (7th Cir. 1980).

Additionally, access to attorneys must be timely. Courts have found violations of the Sixth Amendment where prisons and jails have imposed unreasonable delays in facilitating attorney-client meetings. In *Benjamin v. Fraser,* 264 F.3d 175 (2d Cir. 2001), for example, defense attorneys "routinely face[d] unpredictable, substantial delays in meeting with clients detained at Department facilities." *Id.* at 179. The Second Circuit noted that the delays "impaired [attorneys'] ability to establish rapport and trust with clients, to collect information from clients, to counsel clients

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251 (E.D.N.Y. 2019) (finding that "there is no question that an inmate's right to attorney visits is protected by the Sixth Amendment to our Constitution").

[66] See also *Bach v. People of State of Ill.*, 504 F.2d 1100, 1102 (7th Cir. 1974) ("We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts"). Cf. *Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 481–482 (1990) (administration of justice requires confidential attorney-client communications); *Commonwealth v. Downey*, 65 Mass. App. Ct. 547, 555–56 (2006) ("confidential communication lies at the heart of confidential and strategic decisions between the accused client and defense counsel—which is precisely why the law for centuries has protected privileged attorney-client communication").

in a crisis, and to assist clients in considering plea agreements," and upheld an injunction requiring jails to facilitate attorney visits promptly. *Id.* at 180. See also *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978), *rev'd on other grounds*, 441 U.S. 520 (1979) (affirming a remedial order where "attorney visits were made in the general visiting rooms during visiting hours thereby entailing long delays, limiting the attorney's time with his client, and totally vitiating confidentiality"). Cf. *Carrasquillo v. Hampden County Dist. Courts*, 484 Mass. 367, 380 (2020) (assistance of counsel so fundamental to protection of defendant's rights that appointment and appearance of counsel must take place as promptly as possible).

When extreme circumstances limit attorneys' ability to visit their clients, a prison or jail must provide supplemental means of timely and confidential attorney-client communications. These alternatives cannot and never will *replace* the need for in-person visits. However, they must *at least* satisfy the other constitutional requirements for meaningful attorney-client access—that is, they must be timely and confidential—to help supplement the more circumscribed in-person visits while the emergency remains in place. For this reason, courts have recognized that the limitations the pandemic imposes on in-person visitation require prisons and jails to supplement in-person visitation with confidential and timely videoconferencing. See *S. Poverty Law Ctr. v. United States Dep't of Homeland Sec.*, No. 18-760, 2020 WL

3265533, at 2 (D.D.C. June 17, 2020) (hereinafter *SPLC*); *Banks v. Booth*, 459 F. Supp. 3d 143, 163 (D.D.C. 2020).

If a facility does not provide adequate access to timely and confidential attorney-client communications, this failure violates the Sixth Amendment and art. 12 unless it is sufficiently justified. Here, there can be no legitimate reason for the failure of the Five HOCs to supplement the limited in-person visits with meaningful access to timely and confidential phone calls and videoconferencing. Thus, under any articulation of the standard to assess whether restrictions on an incarcerated individual's access to counsel are constitutionally permissible,[67] the Five HOCs fall short. See *Procunier v. Martinez*, 416 U.S. 396, 420 (1974), overruled in part on other grounds, *Thornburgh v. Abbott,* 490 U.S. 401 (1994) (limitations on attorney access balanced against "legitimate interests of penal administration"); *Turner*, 482 U.S. at 89 (holding that a prison regulation that impinges on prisoners' constitutional rights must be "reasonably related to legitimate penological interests").

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[67] Assessing limitations on the right to access counsel, the Supreme Court instructed that "[t]he extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials." *Procunier*, 416 U.S. at 420. In *Cacicio*, this Court suggested that the familiar *Turner v. Safley* test applies to constitutional challenges to limitations on attorney access. See *Cacicio,* 422 Mass. at 770 (1996) (citing *Turner v. Safley*, 482 U.S. 78, 89-91 (1987)); but see *Benjamin*, 264 F.3d at 187 & n.10 (holding that the *Procunier* standard, rather than the *Turner* standard, applies to Sixth Amendment claims for the abridgement of attorney access).

### B. Under the unique circumstances of the pandemic, the Five HOCs that do not facilitate confidential and timely attorney-client telephone and video calls are unreasonably interfering with the right to counsel.

While the barriers vary across the Five HOCs, the aggregate available communication options do not provide meaningful access to counsel under the extraordinary circumstances of the pandemic.

#### 1. In-person attorney visits to the HOCs are not a sufficient option for attorney-client meetings during the pandemic.

In-person visitation is a necessary component of meaningful access to counsel and, under normal circumstances, combined with confidential mailings and telephone calls, provides "sufficient access to attorneys." *Cacicio*, 422 Mass. at 773. During the pandemic, however, that is not the case. See *SPLC*, 2020 WL 3265533, at 2 ("[d]ue to the emergence and spread of COVID-19, in-person legal visitation is no longer viable as a primary vehicle of communication between legal representatives and detained individuals . . .").

To begin, many attorneys presently cannot visit jails because they justifiably do not feel safe doing so. See Affidavit of Jacqueline Dutton ¶ 19, attached as Exhibit E (hereinafter Dutton); Affidavit of Tommy Fears ¶¶ 6, 8, attached as Exhibit F (hereinafter Fears); Affidavit of Tracy Magdalene ¶ 11, attached as Exhibit G (hereinafter Magdalene); Affidavit of James J. Vita, III ¶ 10, 15, attached as Exhibit H (hereinafter Vita); Affidavit of Rebecca Whitehill ¶ 4, attached as Exhibit I (hereinafter Whitehill). As discussed above, the rate of transmission in

Massachusetts prisons and jails is several times higher than the community rate of transmission. The HOCs' failure to conduct routine testing of incarcerated people and staff increases attorneys' concerns that in-person visits could expose them to an undetected outbreak. See Dutton ¶ 28; Fears ¶¶ 6-8; Vita ¶¶ 9-10. As a result, many attorneys go to the HOCs less frequently, for shorter periods of time, or not at all. See Fears ¶ 8; Magdalene ¶ 11; Affidavit of Thomas Mello ¶ 5, attached as Exhibit J (hereinafter Mello); Whitehill ¶ 4.[68] Even non-contact attorney visits—which some facilities have offered as an alternative in the midst of the pandemic—do not change the calculus, as they still pose a hazard if correctional officers test positive for COVID-19. See Affidavit of John Nolen ¶¶ 21-24, attached as Exhibit K (hereinafter Nolen).[69]

For attorneys who are able to enter the facilities, the resulting visits still do not meet the constitutional standards in many instances. In Bristol, Essex, Hampden, and Worcester, the non-contact visits are not confidential (or confidentiality cannot be guaranteed), which negates the utility of visiting clients. See Affidavit of Carlos

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[68] Experts are reluctant to go to the jails as well. Vita ¶ 22.

[69] Hampden County currently provides attorneys with full personal protective equipment and allows them to meet with quarantined clients in their housing units. Magdalene ¶ 29. By forcing attorneys to choose between the risk of infection and forgoing confidential client communication, such a policy could place attorneys' interests in conflict with those of their clients, in violation of the right to counsel. Cf. *Commonwealth v. Fernandes*, 485 Mass. 172, 195 (2020) (conflict of interest exists where attorney's interests impair professional judgment).

Brito ¶ 6, attached as Exhibit L (hereinafter Brito); Affidavit of Kevin Chapman ¶ 7, attached as Exhibit M (hereinafter Chapman); Dutton ¶ 18; Magdalene ¶ 11. And of the facilities with confidential, in-person visitation, not all offer such visitation for all detainees. In Worcester, for example, when detainees are placed in quarantine due to possible COVID-19 exposure, they cannot have even non-contact attorney visits. Dutton ¶ 26.[70]

This combination of justifiable safety fears, lack of confidentiality, and limited access render in-person attorney visits insufficient on their own to provide meaningful access to counsel in the midst of the pandemic.

### 2. The Five HOCs do not offer the type of virtual communications options necessary to provide meaningful access to counsel in light of the limitations of in-person visits during the pandemic.

As discussed above, when extreme circumstances limit attorneys' ability to visit their clients, a prison or jail must provide supplemental means of timely and confidential attorney-client communications. During the pandemic, therefore, the Sixth Amendment and art. 12 require the Five HOCs to provide sufficient virtual communications options to supplement the currently limited in-person visitations. As described below, they have not done so.

[70] Due to conflicting information provided by the facility, it is unclear whether prisoners in Essex can have non-contact visits while in a quarantine unit. Chapman ¶ 7. However, it seems unlikely that the jail would bring a quarantined prisoner to a non-contact visit when it will not allow quarantined prisoners to leave their housing units to attend video court hearings. Chapman ¶ 6. See also Morris ¶ 38.

### a. Telephone.

Although the Five HOCs all provide the opportunity for some telephone communications with attorneys, they do not all do so in a way that provides meaningful access.

*First*, the Five HOCs do not always assure confidential legal telephone communications. Clients can sometimes call their attorneys from the general-use telephones on their units. But in Bristol, Essex, Hampden, and Worcester, the general-use telephones are on the tier, which means that such calls must occur during their recreation time and in a common space occupied by other prisoners. See Chapman ¶ 3; Dutton ¶ 5; Magdalene ¶ 20; Mello ¶ 6(e). In addition, although each HOC has a procedure whereby an attorney can ask the facility to relay a message for their client to call them, the resulting call is not always confidential in Bristol, Essex, Hampden, or Worcester. See Chapman ¶ 7; Dutton ¶ 6; Magdalene ¶ 12; Mello ¶ 6(a); Affidavit of Nicholas J. Morris ¶ 17, attached as Exhibit N (hereinafter Morris). Instead, such calls are often made from the tier phones—subject to the exposure described above— or from a staff member's office or their prison cell. See Chapman ¶ 7; Brito ¶ 8; Dutton ¶ 6; Magdalene ¶ 13; Affidavit of Timothy Noonan ¶ 6, attached as Exhibit O (hereinafter Noonan); Vita ¶ 17. Calls from staff members' offices are sometimes on recorded lines, and the HOC employee may still be in the office or nearby, see Dutton ¶ 6; Affidavit of Jake Hasson ¶¶ 10, 13,

attached as Exhibit P (hereinafter Hasson); Magdalene ¶ 13, while the calls from cells can also be overheard by staff or other incarcerated people. See Affidavit of Joel Arce ¶ 11, attached as Exhibit Q (hereinafter Arce); Affidavit of Anthony Hill ¶ 13, attached as Exhibit R (hereinafter Hill); Morris ¶ 17; Noonan ¶ 6.

*Second,* timely access to the phone calls of sufficient length is not always assured. In Bristol County, attorneys can only request a phone call between 10:00 a.m. and 2:00 p.m., and all scheduled calls must occur between 10:00 a.m. and 2:00 p.m. and no sooner than the following day. See Mello ¶ 6(a). In Hampden, an incarcerated individual's request to make an attorney phone call may be denied or not honored for many days. See Arce ¶ 8; Nolen ¶ 4(d).

The problem of lack of access to timely calls is especially acute for individuals in medical quarantine units who may be in even greater need of prompt access to their counsel. See Hasson ¶¶ 5-6; Noonan ¶¶ 6-7. Quarantined individuals in Hampden and Worcester may have an hour or less on the tier to call their attorneys—as well as satisfy any other pressing needs including showering and calling loved ones—and that hour may fall outside of business hours. See Arce ¶¶ 6-7; Dutton ¶ 4; Hill ¶¶ 10-11. Further, in some HOCs, including Bristol and Hampden, the calls are sometimes cut short. See Magdalene ¶ 20; Mello ¶ 6(d) (noting the length of phone calls in Bristol is restricted to 30 minutes, but calls are often ended at 15 to 20 minutes without warning).

*Third*, the inherent limitations of the medium render telephone communication inadequate on its own to provide meaningful access to counsel. See Fear ¶ 9; Mello ¶ 7(a)-(c). Over the phone, the ability to review discovery with clients is limited or nonexistent, see Mello ¶ 7(b); Vita ¶ 23; clients cannot watch videos, see Vita ¶ 20; and attorneys cannot watch their clients for non-verbal cues that would indicate misunderstanding or confusion, see Mello ¶ 7(c); Vita ¶ 21. These limitations hinder the effective representation of counsel. See Fears ¶ 9; Mello ¶ 7; Morris ¶ 23.

**b. Videoconferencing.**

Videoconferencing is not a substitute for in-person visits. Given the deficiencies described above, however, videoconferencing is the virtual communication device that best approximates the benefits of in-person meetings when such visits are limited due to the pandemic. Yet despite their constitutional obligation to continue to provide meaningful attorney access, the Five HOCs are not currently providing adequate access to videoconferencing.

At this time, there are no opportunities for attorney-client videoconferencing at Bristol HOC. See Mello ¶ 8. In Hampden County, video conferences are only permitted in very limited circumstances, such as when a client is hearing-impaired. See Magdalene ¶ 9. In Worcester, attorney-client videoconferences are limited to just three days a week, the calls are not always confidential, and video calls are not

facilitated for people in quarantine. See Dutton ¶¶ 10, 12, 14. In Plymouth, videoconferences are of limited duration.[71]

The videoconferencing at Essex is often cancelled, see Morris ¶¶ 24-25; Whitehill ¶ 16; or of poor quality, Morris ¶¶ 28, 30. Moreover, it neither allows interpreters to attend nor permits screen sharing, making it barely better than a phone call when an interpreter or a discovery issue is involved. See Morris ¶ 26; Whitehill ¶¶ 12-13.

### 3. The significant impact on incarcerated individuals' ability to meaningfully access counsel at the Five HOCs is not justified.

The lack of meaningful access to counsel at the Five HOCs is most acutely felt by those defendants with upcoming court dates such as § 58A hearings to determine whether a defendant will be held pretrial. See, e.g., *J.B. v. Onondaga Cty.*, 401 F. Supp. 3d 320, 344 (N.D.N.Y. 2019) (without candid pre-hearing consultation with counsel individuals could be detained for months when more information could have secured release). For all the reasons described above, many attorneys are not able to have confidential, in-person meetings at the Five HOCs. And due to non-existent or insufficient capacity and rules surrounding the movement of quarantined individuals, it is often impossible to schedule a video call prior to the short turnaround time for a § 58A hearing. See Dutton ¶ 11; Fears ¶ 10; Whitehill ¶ 9.

[71] Plymouth limits video calls to 50 minutes. See Fears ¶ 10.

Of course, it is not just those defendants with immediate court dates who require meaningful access to their attorneys. As this Court has recognized, "[t]here are myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel." *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 235 (2004); see also *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (acknowledging that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself").

Critically, the Five HOCs have not justified this heavy burden with legitimate administrative interests. In recent months, numerous courts have recognized that the challenges posed by the COVID-19 pandemic do not justify jails' failures to devise meaningful access to counsel. In *Banks v. Booth*, a class of pretrial detainees challenged, among other things, measures that deprived them of access to telephones and confidential communication with their attorneys while in medical isolation. 459 F. Supp. 3d at 158. The court held that it could "not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration," and granted a restraining order that directed the facility to provide "access to confidential, unmonitored legal calls of a duration sufficient to discuss legal matters." *Id.* at 160, 163 (internal quotations omitted). See also *United States v. Davis*, 449 F. Supp. 3d 532, 541 (D. Md. 2020)

(denying government's motion for pretrial detention in part because of the burden it would place on the right to counsel); *SPLC*, 2020 WL 3265533, at 2 (finding likelihood of success on access-to-counsel claim where a facility's "response to [the pandemic] with respect to increasing the capacity and possibilities for remote legal visitation and communication have been inadequate and insufficient").

This Court has already recognized that the relief it ordered regarding motions to reconsider in this case rested on defense attorneys' ability to "promptly [] convene video or teleconferences with their clients," and required the sheriffs' offices "to work with the defense bar to facilitate such communications." *CPCS*, 484 Mass. at 448–49. It should do so again now. The lack of timely, confidential legal telephone calls and videoconferences does not serve any interest in penal administration. Demonstrating this point, the Five HOCs themselves currently facilitate some individuals' court appearances by videoconference. Because there is no reason not to provide the necessary opportunities for timely, confidential attorney-client meetings, the failure to do so violates HOC prisoners' right to counsel.

## REQUESTED RELIEF

Petitioners respectfully request further relief in this case, both as an exercise of this Court's superintendence authority and as a remedy for the constitutional violations identified in this amended petition. As always, Petitioners remain prepared to work with the Respondents, the Special Master, and the Court on the

form the remedy could take. To clarify the issues, Petitioners request the following proposed remedies.

**As a supplement to the existing remedy pursuant to G. L. c. 211, § 3, Petitioners ask this Court to:**

1) Order the HOCs to:
    a. Alert the parties and the Special Master to outbreaks by automatically reporting when five or more prisoners, detainees, and/or staff members at a facility test positive for COVID-19 in one day; and
    b. Regularly report the bases of detention for individuals who are being held pretrial and their date of entry.

2) Modify the presumption of release for pretrial HOC detainees by:
    a. Narrowing the scope of excludable offenses in Appendix A; and
    b. Specifying that the Commonwealth can overcome the presumption only with proof by clear and convincing evidence.

3) Modify this Court's current order regarding attorney-client communications with respect to the Bristol, Essex, Hampden, Plymouth, and Worcester HOCs, by:
    a. Requiring meaningful access to timely, confidential phone calls between counsel and their clients during business hours; and
    b. Requiring timely access to confidential videoconferences upon counsel's request.

**As a remedy for the constitutional violations identified here, Petitioners ask this Court to:**

1) Declare that the HOCs' failure to conduct routine, comprehensive testing of all incarcerated individuals and staff violates the state and federal constitutions;

2) Declare that the HOCs' failure to consider home confinement for all eligible prisoners and to exercise their additional statutory authority to decrease their populations violates the state and federal constitutional rights of all individuals in their custody.

3) Declare that the HOCs must conduct routine, comprehensive testing of incarcerated individuals and staff, and consider home confinement for all eligible prisoners, and decrease their incarcerated populations, to comport with their state and federal constitutional obligations to all individuals in their custody.

4) Set a status conference to review the HOCs' progress toward conducting routine, comprehensive testing of incarcerated individuals and staff, considering home confinement for all eligible prisoners, and decreasing their incarcerated populations. If the Court determines that any HOC has not met its constitutional obligations at that point, Petitioners request that the Court authorize the Trial Court to revise and revoke the sentences of certain individuals serving a sentence at that HOC.

5) Grant Petitioners such other and further relief as the Court considers just and proper.

[signatures on the following page]

Respectfully submitted,

*/s/ Rebecca A. Jacobstein*

Rebecca Jacobstein, BBO 651048
Benjamin H. Keehn, BBO 542006
Committee for Public Counsel Services
100 Cambridge Street, 14th Floor
Boston, MA 02114
(617) 910-5726
rjacobstein@publiccounsel.net

*Counsel for the Committee for Public Counsel Services*

*/s/ Matthew R. Segal*

Matthew R. Segal, BBO 654489
Jessie J. Rossman, BBO 670685
Laura K. McCready, BBO 703692
ACLU Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org*

Chauncey B. Wood, BBO 600354
Massachusetts Association of Criminal Defense Lawyers
50 Congress Street, Suite 600
Boston, MA 02109
(617) 248-1806
cwood@woodnathanson.com

Victoria Kelleher, BBO 637908
Massachusetts Association of Criminal Defense Lawyers
One Marina Park Drive, Ste. 1410
Boston, MA 02210
(978) 744-4126
victoriouscause@gmail.com

*Counsel for Massachusetts Association of Criminal Defense Lawyers*

Dated: December 18, 2020

* Petitioners also acknowledge the important contributions to this filing by Legal Fellow Rebecca G. Krumholz, who is pending admission to the Massachusetts Bar.