

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Tre McPherson, et al.,
Plaintiffs-Petitioners,

v.

Ned Lamont, et al.,
Defendants-Respondents.

No. 20-cv-534
May 20, 2020

**Plaintiff-Petitioners' Reply in Further Support of
Their Motion for a Preliminary Injunction**

The proposed plaintiff classes in this action seek preliminary relief from the rampant COVID-19 infections plaguing their places of confinement in the defendants' prisons and jails. They seek an injunction providing them with the three elements comprising what medical science has identified as the only extant 'treatment' for this virus: prevention. Those three elements are sanitation (in the form of increased cleaning, laundry, and sanitization); medical care (in the form of universal testing, and medical treatment in non-punitive conditions); and the social distancing that the defendants have admitted is vital to warding off infection.

The defendants oppose preliminary relief [ECF No. 59], focusing on the possibility that changing the place of confinement for the medically vulnerable class members to accomplish the distancing that their prison buildings cannot will unleash a parade of woes. Their myopia translates poorly into reasons to ignore the rampant suffering in the defendants' facilities, and their opposition fails to counter the urgent necessity for the moderate measures of sanitation, medical care, and distancing.

A. COVID Infection Poses a Serious Risk of Harm to Human Health Sufficient to Establish Irreparable Harm

Rather than concede that the avoidance of COVID-19 infection has reordered human existence worldwide in recognition of its danger, Defendants Cook and Lamont contend in their opposition that their prisons are somehow different. In Connecticut prisons, they argue, COVID-19 is no cause for alarm because it has ‘only’ killed one percent of the prisoners in their custody infected with the pathogen, and hence, the plaintiff-petitioners “cannot show a substantial risk of serious harm in the form of death or serious illness.” Defs.’ Opp. at 17. This is grotesque and misguided.

First, incarcerated people need not die in order to have valid claims to protection against COVID-19. “[S]erious injury is unequivocally not a necessary element of an Eighth Amendment claim.” *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015). The question, instead, is whether the risk of a COVID infection is “one that today’s society chooses to tolerate.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Owing to society having largely shut down on account of COVID-19, the answer is obvious to all but the defendants here: whatever the frequency, the monumental impact of serious COVID-19 infections¹ means the disease is one that humanity has for the past three months placed an unparalleled premium on avoiding.

A historical comparison underscores the untenability of their position: the polio virus causes an asymptomatic infection in just under three-quarters of the humans to whom it spreads, mild flu-like symptoms in twenty-five percent, and paralysis in just one-half of one percent.² Nonetheless, humanity has universally recognized the pathogen as highly dangerous and

¹ Death is not the only thing the plaintiffs seek to avoid. COVID can cause long-lasting damage, including “permanent loss of respiratory capacity, . . . inflammation of the heart muscle . . .[,] permanent injury to the kidneys . . . and neurologic injury.” Declaration of Dr. Jonathan Golob [ECF No. 1-1] ¶ 9.

² U.S. Centers for Disease Prevention and Control, *What is Polio?*, <https://www.cdc.gov/polio/what-is-polio> (last visited May 18, 2020).

celebrated its widespread eradication. And any prison official or governor would be held unconstitutionally indifferent for arguing that they could fail to protect people in their custody from the polio virus because of its low overall incidence of paralysis.

Second, the defendants present no factual basis upon which the Court could conclude that COVID-19's dangers do not equally obtain to incarcerated people. The defendants have admitted "that COVID-19 is a respiratory disease affecting human beings." Defs.' Responses to Pl.'s First Requests to Admit # 1 (attached as Exhibit 1). And they admit "that a COVID-19 infection may result in serious illness or death." Defs.' Responses to Plaintiffs' First Requests to Admit # 3. Defendant Lamont has concluded that the disease "spreads easily from person to person," *e.g.*, Gov. Lamont Exec. Order No. 7 (Mar. 12, 2020), and the defendants both concede that "there is an increased risk of rapid spread of COVID-19 among persons living in congregate settings." Defs.' Responses to Plaintiffs' First Requests to Admit # 6. On the basis of such facts, Defendant Lamont has temporarily shut down most of Connecticut's economy and almost all of its government. Without the defendants providing any facts demonstrating that the risk to Connecticut's people in general does not pertain to its prisoners in specific, the Court should conclude that COVID-19's serious risk equally threatens the plaintiff-petitioners with irreparable harm.

Lastly, the defendants' phrasing of their duty as nothing more than a comparison between the foregone chance of infection on the outside and in prison fails to advance their position. The constitutional floor exists to prevent the unreasonable risk of harm, *e.g.*, *Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003), and not to permit prison officials to shrug and conclude that the risk is diminished because either some people have it worse, or the threatened harm is difficult to avert.

B. Defendants fail to provide any arguments regarding Plaintiffs’ conditions of confinement claims and misrepresent Plaintiffs’ claims of inadequate medical treatment.

Defendants’ Opposition focuses solely on Eighth and Fourteenth Amendment claims based on delayed medical care, disregarding case law supporting Plaintiffs’ claims against unconstitutional conditions of confinement stemming from *Helling*, which Defendants fail to cite entirely. 509 U.S. at 31. *See also Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (finding that “a [pretrial] detainee’s rights are ‘at least as great as the Eighth Amendment protections available to a convicted prisoner.’” (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983))).

The plaintiffs’ claims are rare birds as conditions ones go, inasmuch as they identify severe conditions shortcomings that lead to rapid spread of a disease, and the remedies for which are prescribed by medical science. The best medical evidence shows that the most effective treatment for COVID-19 is to interrupt it in the first instance through proper sanitation, distancing, and medical care such as universal viral testing. *See Wilson v. Williams*, No. 20-cv-794, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22, 2020) (acknowledging that COVID-19 conditions claims “evade[] easy classification”). However, no matter how one characterizes the conditions deficiencies demonstrated by the plaintiffs, they do not comprise a contest of medical delays. The defendants’ concentration on medical delay case law is no surprise, given that the weight of authority lies against them as to conditions leading to communicable pathogens. The Second Circuit has repeatedly noted that “correctional officials have an affirmed obligation to protect inmates from infectious disease.” *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). Similarly, the Supreme Court has ruled that inmates were entitled to relief under the Eighth Amendment when they proved “threats to personal safety from . . . the mingling of inmates with serious contagious diseases with other inmates.” *Helling*, 509 U.S. at 34. The Supreme Court found that

the threat of “infectious maladies” was unconstitutional “even though the possible infection might not affect all those exposed.” *Id.* at 33.

Further, courts around the country have repeatedly ruled that the threat of COVID-19 in prisons has resulted in unconstitutional conditions that present an unreasonable risk to inmates’ health. *See Ruderman v. Kolitwenzew*, No. 20-cv-2082, 2020 WL 2449758, at *13 (C.D. Ill. May 12, 2020); *Frazier v. Kelley*, No. 20-cv-00434, 2020 WL 2110896, at *6 (E.D. Ark. May 4, 2020) (“it cannot be disputed that COVID-19 poses an objectively serious health risk . . . given the nature of the disease and the congregate living environment of the [correctional] facilities.”); *Awshana v. Adducci*, No. 20-10699, 2020 WL 1808906, at *7 (E.D. Mich. Apr. 9, 2020) (“Objectively, the health risks posed by COVID-19 are abundantly clear.”). None of those courts’ conclusions is surprising, because unsanitary conditions (such as exposing inmates to a deadly disease), have been “long recognized” as cruel and unusual punishment. *Walker v. Schult*, 717 F.3d 119, 127 (2d Cir. 2013). *See also Wright v. McMann*, 387 F.2d 519, 522, 526 (2d Cir. 1967) (reaching that conclusion where a prisoner was in a cell that “fetid and reeking from the stench of the bodily wastes of previous occupants”).

Worse, Defendants have failed to take necessary measures to abate this risk. They misrepresent Plaintiffs’ injury as a mere preference for other measures to be taken. But Defendants’ actions have not resulted in constitutional conditions. Last week, this Court ruled that failure to seriously consider and facilitate transfer of medically vulnerable prisoners constituted deliberate indifference under the Eighth Amendment. *Martinez-Brooks v. Easter*, No. 20-cv-00569, 2020 WL 2405350, at *20–22 (D. Conn. May 12, 2020). Defendants are not immune from deliberate indifference simply because they have taken some measures to stop the spread of the COVID-19 virus. Courts around the country have ruled that insufficient mitigation measures result

in deliberate indifference.³ Therefore, Defendants have been deliberately indifferent to the unconstitutional conditions of confinement that unconstitutionally, cruelly, and unusually punish both post-adjudication and pretrial class members at risk under the Eighth and Fourteenth Amendments.

C. Defendants are unconstitutionally punishing pretrial class members because they do not have a “legitimate governmental purpose” for the conditions at DOC facilities.

Lastly, Defendants contend that their legitimate governmental purpose for unconstitutionally punishing pretrial class members is public safety. However, this analysis is misplaced. First, as Defendants note, there must be a non-punitive governmental purpose rationally connected to a given condition, and the condition must be proportional to that purpose, not an excessive means for accomplishing the purpose.” *Bell v. Wolfish*, 441 U.S. 520, 538–59 (1979). The government’s claim that pretrial Plaintiffs should not be released because of public safety concerns has been deemed excessive under the particular circumstances and threat from COVID-19 virus in many other courts.⁴ Second, Defendants fail to provide a legitimate

³ See *Valentine v. Collier*, No. 20-cv-1115, 2020 WL 1916883, at *10 (S.D. Tex. Apr. 20, 2020) (finding that “the risk of COVID-19 is obvious” and the Defendant facilities were deliberately indifferent because the facilities were not complying with their implemented policies (e.g., placing inmates on lockdown, taking temperatures twice per day, and providing inmates with new cloth masks daily and additional soap at no cost)); *Swain v. Junior*, No. 20-cv-21457, 2020 WL 2078580, at *16 (S.D. Fla Apr. 29, 2020) (finding defendants’ preventative measures demonstrated deliberate indifference due to the “exponential rate of infection since the case commenced.”); see also *Wilson*, 2020 WL 1940882, at *8 (finding respondents acted with deliberate indifference because they lacked sufficient equipment to test inmates properly and failed to separate its inmates at least six feet apart).

⁴ See *Rodriguez Alcantara v. Archambeault*, No. 20-cv-0756, 2020 WL 2315777, at *8–9 (S.D. Cal. May 1, 2020) (noting that the governmental purpose of preventing danger to community could be achieved by less severe alternatives during a COVID-19 outbreak); *Ruderman v. Kolitwenzew*, No. 20-cv-2082, 2020 WL 2449758 (C.D. Ill. May 12, 2020) (finding that the government’s legitimate interest is greatly diminished absent a showing that “he is a danger to the community or a flight risk” and considering the totality of the circumstances, particularly because Petitioner is a medically-vulnerable detainee, “Petitioner’s detention appears excessive in relation to the Government’s legitimate nonpunitive purpose.”); *Favi v. Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566 (C.D. Ill. May 4, 2020); *Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020) (finding that the government’s legitimate interest in detaining petitioners was deeply weakened in light of the COVID-19 pandemic and medical

government interest justifying their refusal to provide sanitation and proper medical care necessary to mitigate the chances of harm from the pathogen. And their silence on the subject is unsurprising, as there appears to be no legitimate government interest justifying the denial of mitigation measures that the classes seek here against a dangerous disease. Lacking a showing that their failures as to the pretrial plaintiffs is in service of any justifiable interest, the defendant-respondents may not avoid preliminary relief being entered against them.

D. Conclusion

For the reasons set out in the plaintiff-petitioners' motion for a preliminary injunction, the Court should accord them immediate relief in the form of sanitation, proper medical care, and distancing to avert even wider COVID infections than have already occurred.

Dated: May 20, 2020

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vulnerabilities of the petitioners); *Santiago P. v. Decker*, No. 20-5067, 2020 WL 2487648, at *7 (D.N.J. May 14, 2020) (government's legitimate objective in "preventing Petitioner from absconding, enforcing immigration laws, and protecting the public" was excessive given other alternatives available to the government to achieve those objectives in light of COVID-19).

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EXHIBIT 1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|-----------------------|---|-----------------------------|
| TRE MCPHERSON, et al, | : | CIVIL NO. 3:20-CV-534 (JBA) |
| <i>Plaintiffs,</i> | : | |
| | : | |
| v. | : | |
| | : | |
| NED LAMONT, et al, | : | MAY 14, 2020 |
| <i>Defendants,</i> | : | |

RESPONDENTS’ RESPONSES TO PLAINTIFFS’ FIRST REQUESTS FOR ADMISSION

Respondents hereby respond to Plaintiffs’ First Requests for Admissions dated May 12, 2020 (the “Requests for Admission”). Defendants object to these Requests for Admission as being well beyond the ten that were agreed to before Magistrate Judge Garfinkel on May 11, 2020.

Subject to and without waiving the foregoing objections, the Defendants hereby respond as follows:

1. Admit that COVID-19 is a respiratory disease affecting human beings.

Response: Admit that SARS-CoV-2 is a virus that causes COVID-19, which is the disease one develops as a result of SARS-CoV-2 (and hereinafter collectively referred to as “COVID-19”). COVID-19 is a disease affecting human beings, including their respiratory system.

2. Admit that COVID-19 spreads easily from person to person.

Objection: The Defendants object to this Request for Admission because the term “easily” is inadequately defined.

3. Admit that a COVID-19 infection may result in serious illness or death.

Response: Admit.

4. Admit that on March 23, 2020, the Center [*sic*] for Disease Control (“CDC”) issued its “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities” (the “Guidelines”).

Response: Admit.

5. Admit that the twenty-six page document appended to these Requests is a complete and accurate copy of the Guidelines.

Response: Admit.

6. Admit that there is an increased risk of rapid spread of COVID-19 among persons living in congregate settings.

Response: Admit.

7. Admit that it is possible to transmit COVID-19 without a person showing symptoms.

Response: Admit.

8. Admit that it is possible to spread COVID-19 through aerosol transmission.

Response: Admit.

9. Admit that it is possible to spread COVID-19 through contact with contaminated surfaces or objects.

Response: Admit.

10. Admit that the risk of severe illness and death from COVID-19 is higher for people who are 60 years or older.

Response: Cannot admit or deny. The CDC states that those at high risk for severe illness from COVID-19 include people 65 years and older. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

11. Admit that there is no known vaccine for COVID-19.

Response: Admit.

12. Admit that there is no medication to prevent or cure COVID-19 infection.

Response: Admit that there is no known medication that can prevent a COVID-19 infection. **Cannot admit or deny** the remainder of the sentence because ongoing clinical studies have shown some promise in the treatment of COVID-19.

13. Admit that the CDC considers people with chronic lung disease or moderate to severe asthma at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

14. Admit that the CDC considers people with serious heart conditions at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

15. Admit that CDC considers people with compromised immune systems at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

16. Admit that the CDC considers people with severe obesity (body mass index of 40 or higher) at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

17. Admit that the CDC considers people with diabetes at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

18. Admit that the CDC considers people with chronic kidney disease at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

19. Admit that the CDC considers people with liver disease at higher risk for severe illness or death from COVID-19, regardless of age.

Response: Admit in part. The CDC states that these conditions place individuals at a higher risk, regardless of age “particularly if not well controlled.”
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

20. Admit that frequent handwashing for at least 20 seconds or use of alcohol-based sanitizer greatly reduces the risk of COVID-19 transmission.

Objection: The respondents object to the terms “greatly” and “frequent” as they are inadequately defined, but admit that this is recommended to reduce the risk of COVID-19 transmission.

21. Admit that avoiding touching the face with unwashed hands greatly reduces the risk of COVID-19 transmission.

Objection: The respondents object to the term “greatly” as it is inadequately defined, but admit that this is recommended to reduce the risk of COVID-19 transmission.

22. Admit that routine cleaning of public spaces greatly reduces the risk of COVID-19 transmission.

Objection: The respondents object to the terms “greatly” and “routine” as they are inadequately defined, but admit that this is recommended to reduce the risk of COVID-19 transmission.

23. Admit that routine cleaning of frequently handled items greatly reduces the risk of COVID-19 transmission.

Objection: The respondents object to the terms “greatly”, “frequently” and “routine” as they are inadequately defined, but admit that this is recommended to reduce the risk of COVID-19 transmission.

24. Admit that plaintiff Pattikate Williams-Void has hypertension.

Response: Admit.

25. Admit that plaintiff Pattikate Williams-Void is pre-diabetic.

Response: Deny. The Department of Correction classifies Ms. Williams Void as having adult onset diabetes that is well controlled.

26. Admit that plaintiff John Doe is above the age of 70.

Response: Admit.

27. Admit that plaintiff John Doe has HIV.

Response: Admit.

28. Admit that plaintiff John Doe has Hepatitis C.

Response: Deny. The Department of Correction classifies John Doe as having been treated and cured of HCV infection.

29. Admit that plaintiff John Doe requires regular dialysis for kidney disease.

Response: Admit.

30. Admit that plaintiff John Roe is above the age of 50.

Response: Deny.

31. Admit that plaintiff John Roe has HIV.

Response: Admit.

RESPONDENTS:
NED LAMONT AND
ROLLIN COOK

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent by email to petitioners' counsel on this 14th day of May 2020.

____Terrence M. O'Neill____

Terrence M. O'Neill
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