ELLEN F. ROSENBLUM
Attorney General
TRACY ICKES WHITE #904127
Senior Assistant Attorney General
ANDREW HALLMAN #083480
Assistant Attorney General
YUFENG LUO #184009
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 947-4700
Fax: (503) 947-4791
Email: Tracy.I.White@doj.state.or.us
Andrew.Hallman@doj.state.or.us
Yufeng.Luo@doj.state.or.us

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

PAUL MANEY; GARY CLIFT; GEORGE NULPH; THERON HALL; DAVID HART; MICAH RHODES; and SHERYL LYNN SUBLET, *individually, on behalf of a class of other similarly situated,*

Plaintiffs,

v.

KATE BROWN, COLETTE PETERS; HEIDI STEWARD; MIKE GOWER; MARK NOOTH; ROB PERSSON; and KEN JESKE,

Defendants.

Case No. 6:20-cv-00570-SB

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

TABLE OF AUTHORITIES

Cases

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Oregon Revised Statutes

United States Code

Rules and Regulations

Constitutional Provisions

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

I. Introduction.

The COVID-19 pandemic is an extraordinary time. So too are the extraordinary actions defendants are taking to protect the safety of Adults in Custody ("AICs") and the people of the State of Oregon. Plaintiffs' motion for preliminary injunctive relief, on the other hand, is unnecessary and unmerited. Plaintiffs' ultimate policy goal – mass release of AICs in state custody – should not be pursued in the federal courts. Their secondary goal—to require defendants to act appropriately in caring for AICs during the pandemic—is unwarranted. Defendants are already taking unparalleled measures to assure the safety and wellbeing of AICs, far beyond the legal requirement to avoid deliberate indifference.

The motion should be denied for several reasons:

First, the Court has no authority to order AICs to be released in response to this motion, which is what plaintiffs are seeking. Federal law has specific steps that must be followed before any prisoner release order can be issued. Since those steps have not yet occurred, this Court cannot issue such an order.

Second, plaintiffs have failed to set forth exactly what narrowly tailored relief they are requesting the Court to order. Plaintiffs' motion goes to great lengths to identify a known problem – COVID-19 within correctional facilities – but offers no specific solutions. Even their request for mass release is vague, with specifics left to an independent monitor (apparently appointed on a preliminary basis).

Third, only issues and relief relevant to the individually named plaintiffs may be considered. No class has been certified, and therefore no class exists. Consequently, plaintiffs cannot not obtain sweeping changes throughout the Oregon Department of Corrections ("ODOC").

Fourth, the standards for a preliminary injunction are exceptionally high for this type of lawsuit. Not only must plaintiffs meet the usual injunction standards, but they must satisfy the additional requirements of the Prison Litigation Reform Act ("PLRA"). They cannot do so.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Fifth, plaintiffs cannot show that defendants were deliberately indifferent to a substantial risk of serious harm to them. On the contrary, defendants have taken tremendous steps in their efforts to prevent and control the spread of COVID-19 within ODOC. As discussed below and in the supporting declarations, ODOC has upended its normal processes and is putting intense focus on the best ways to mitigate this situation. It is following the guidance for correctional institutions issued by the Centers for Disease Control and Prevention ("CDC"), as well as similar guidance issued by the Oregon Health Authority ("OHA"). Nothing about defendants' actions could reasonably be described as deliberately indifferent.

Sixth, plaintiffs cannot show a likelihood of irreparable harm. ODOC's efforts have greatly limited the spread of COVID-19. The nature of the COVID-19 pandemic is such that harm is certain to befall some AICs. But given ODOC's preventive measures, most AICs will not contract COVID-19. And, if they do, they will experience only mild or moderate symptoms. In fact, several of the plaintiffs live in institutions that have had zero cases of transmittal of the disease.

Seventh, the public interest and balance of equities favors ODOC's continuing its efforts to control the disease while maintaining a safe and secure prison system without judicial regulation.

For all these reasons, as more fully set forth below and in the accompanying documents, the motion for temporary restraining order ("TRO") and preliminary injunction should be denied.

II. Background.

A. Who are the parties?

As set forth in the complaint, the plaintiffs are seven AICs held at four different institutions within ODOC. Amended Complaint ("AC") ¶¶ 3-9. Three live at Oregon State Correctional Institution ("OSCI"), two live at Oregon State Penitentiary ("OSP"), one lives at Columbia River Correctional Institution ("CRCI"), and one lives at Coffee Creek Correctional

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Facility ("CCCF"). *Id.* While the complaint is captioned as a class-action, plaintiffs have not sought actual or provisional class certification.

All the plaintiffs allege that due to their age and/or medical conditions, they are at increased risk of COVID-19 infection and death. AC ¶¶ 3-9. One plaintiff has tested positive for COVID-19 during the pendency of this litigation. AC ¶ 111. For the purposes of this motion, defendants do not dispute these allegations.

Defendants are state officials who are sued in their official capacities. They are 1) Kate Brown, the Governor of Oregon; 2) Colette Peters, the Director of ODOC; 3) Heidi Steward, the Deputy Director of ODOC; 4) Mike Gower, the Assistant Director of Operations for ODOC; 5) Rob Persson, the Westside Institutions Administrator for ODOC; and 6) Ken Jeske, the Administrator for Oregon Corrections Enterprises (which provides work and training opportunities for AICs[1]). Complaint ¶¶ 10-16. Because these individuals manage some or all of ODOC's response to the COVID-19 crisis, many of the references below will refer simply to ODOC's response.

B. What are the claims?

Plaintiffs challenge defendants' response to the COIVD-19 pandemic within ODOC. Defendants will not be providing an extensive discussion of what COVID-19 is, what its symptoms are, how it is spread, and how society is responding to it. Except where discussed below or in accompanying documents, defendants do not challenge the general nature of the COVID-19 pandemic as set forth in plaintiffs' motion.

Plaintiffs bring two claims in their amended complaint. The first claim—and the only one at issue in this motion—is under 42 U.S.C. § 1983 for a violation of the Eighth Amendment. Specifically, plaintiffs allege that defendants are deliberately indifferent to the risk of harm presented by COVID-19. The second claim alleges violations of the Oregon Constitution. That

[1] The Complaint incorrectly refers to "Oregon Correctional Industries." It is actually "Oregon Corrections Enterprises." *See* Jeske Declaration for discussion.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Oregon Constitutional claim is not raised in the motion. In addition, plaintiffs have recently amended their complaint to seek damages as well as injunctive relief, but damages are not part of the relief sought in this motion. Accordingly, plaintiffs' motion seeks injunctive relief for alleged violations of plaintiffs' rights under the Eighth Amendment.

To prevail on this claim, plaintiffs must prove deliberate indifference. Plaintiffs allegations of deliberate indifference may be summarized as "ODOC isn't doing enough to stop spread of COVID-19 at ODOC and since it can't, it should release AICs." Defendants adamantly reject this claim. As will be shown below, ODOC is responding reasonably, responsibly, and thoroughly, consistent with the CDC and OHA guidelines, as well as its statutory duty to "exercise custody over those persons sentenced to a period of incarceration until such time as a lawful release authority authorizes their release[.]" Or. Rev. Stat. § 423.020(1)(c).

C. What do plaintiffs want the Court to do?

This is the question, of course, and plaintiffs' brief does little to answer it. Much of plaintiffs' motion focuses on seeking release of AICs, even though it is statutorily impossible for the Court to do this. As discussed further below, there are multiple preconditions for any prisoner release order, not least of which are 1) a prior, failed order, and 2) a three-judge panel. 18 U.S.C. § 3626(a)(3)(A), (B). Since none of these prerequisites have happened, it is inappropriate to discuss releasing AICs. Plaintiffs acknowledge this reality in passing and then indicate that the "animating principle of this motion" is to get the Court to tell defendants they are not following the Constitution. Pl's Mem., p. 52. This is not the purpose of a preliminary injunction.

Removing release of AICs from the motion leaves only a shell from which it is hard to deduce the proposed alternative relief. Plaintiffs do set forth some amorphous possibilities, including directing defendants to: 1) "take every action within their power to reduce the risk of COVID-19" from further spreading at ODOC; 2) "provide safe and non-punitive housing [sic] separation of prisoners in each ODOC facility based on their COVID-19 infection status; 3)

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

"create and enforce procedures to reduce the risk of COVID-19 transmission in ODOC facilities consistent with CDC and OHA guidance;" and 4) "immediately implement new procedures that will bring ODOC in compliance with expert guidance." Pl's Mot., p. 2. Plaintiffs also seek a monitor "to ensure such compliance." Pl's Mot., p. 2.

These are very vague requests, probably because they are secondary to plaintiffs' primary goal of release. This goal is revealed in their repeated assertions that, while defendants are taking some actions, their actions are insufficient and can never be sufficient given the current population within ODOC. Regardless, as discussed below, implementation of plaintiffs' vague requests is unnecessary and redundant because ODOC is already taking every reasonable step, including compliance with CDC and OHA guidelines, to prevent the spread of COVID-19 in its facilities.

D. What have defendants done in response to the COVID-19 pandemic?

Defendants are responding to the COVID-19 pandemic in a thoughtful and diligent way. The COVID-19 pandemic has impacted every aspect of corrections, which in turn has resulted in a seismic shift in how ODOC manages its AIC population.

ODOC has taken numerous, concrete steps to prevent and control the spread of COVID-19 within its facilities. The key components of ODOC's COVID-19 response are 1) education and tracking, 2) sanitation, hygiene, and personal protective equipment, 3) testing and medical care, 4) social distancing, 5) isolation and quarantine, and 6) screening protocols. These actions are set forth fully in the supporting declarations, particularly the declaration of ODOC Deputy Director Heidi Steward. Defendants incorporate that declaration, and all supporting declarations, into this response.

There are three important points to remember when answering the question of what defendants have done in response to COVID-19:

First, the playbook for ODOC's response has been the CDC and OHA guidance. ODOC has been, and is committed to, following that guidance.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Second, defendants do not claim, nor does the Constitution require, a perfect or mistake-free response to the COVID-19 pandemic. Deliberate indifference is vastly different from good-faith human imperfection. Plaintiffs have offered evidence from numerous AICs and one former ODOC staff member criticizing ODOC's response to the pandemic. Defendants have endeavored to respond to those allegations without minimizing the claims. Often times, the response is simply that ODOC fixed a prior mistake or found a solution to a problem.

Third, whatever imperfections may exist in ODOC's response, ODOC has, in fact, acted reasonably in managing the COVID-19 outbreaks within its facilities to date. There has not been a confirmed COVID-19 case in 10 of the fourteen institutions. *See* Dewsnup Decl. ¶ 39. Two of the four institutions with a confirmed case have not seen an increase in infections in recent weeks. *Id*. at ¶¶ 40-41. And although the current situation at OSP is presenting significant challenges, ODOC has been able to isolate and quarantine large portions of the AIC population to reduce the spread of COVID-19. *Id*.

E. What have defendants *not* done in response to the COVID-19 pandemic?

The only concrete, identifiable action that plaintiffs allege that defendants failed to take is the mass release of AICs to promote social distancing. This is the core of plaintiffs' claims, but it is not a fact in dispute.

To be clear: Defendants acknowledge that, collectively, their fourteen facilities do not allow for over 14,000 AICs to maintain the ideal six feet of social distancing at all times. And defendants acknowledge that they have not conducted a mass release of AICs that would allow for that ideal social distancing. But maintaining six feet of social distancing is not required by the CDC guidelines, much less the Constitution. As shown in the declarations and in the discussion below, the many actions defendants are taking to address the pandemic compel a conclusion that they are not deliberately indifferent.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

III. Initial considerations.

A. This Court lacks statutory authority to order the release of AICs.

Conspicuously absent from plaintiffs' 61-page motion is any evaluation of the PLRA's restrictions on prisoner release orders. Yet at this stage of the proceedings, the PLRA categorically bars the relief plaintiffs seek, which is an order "requir[ing] Defendants to reduce prisoner populations to levels at each facility that would enable Plaintiffs the protection of being able to socially distance themselves to prevent their infection with COVID-19 and reduce transmission to others." Pl's Mot., p. 2.

"Under the PLRA, only a three-judge court may enter an order limiting a prison population." *Brown v. Plata*, 563 U.S. 493, 512 (2011) (citing § 3626(a)(3)(B)) "Before a three-judge court may be convened, a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders." *Id.* (citing § 3626(a)(3)(A)). "The party requesting a three-judge court must then submit 'materials sufficient to demonstrate that [these requirements] have been met.'" *Id.* (citing § 3626(a)(3)(C)). "If the district court concludes that the materials are, in fact, sufficient, a three-judge court may be convened." *Id.* "The three-judge court must then find by clear and convincing evidence that 'crowding is the primary cause of the violation of a Federal right' and that 'no other relief will remedy the violation of the Federal right.'" *Id.* (citing 18 U.S.C. § 3626(a)(3)(E)).

These provisions of the PLRA bar plaintiffs from seeking a reduction in population to achieve social distancing at this juncture.[2] The most that plaintiffs could seek in this proceeding

[2] *See e.g., Alvarez v. Larose*, ___ F.Supp.3d ___, 2020 WL 2315807, at *4 (S.D. Cal. May 9, 2020) (could not grant the plaintiffs' request for a TRO requiring the release of medically vulnerable pretrial and post-conviction detainees because the request constituted a "prisoner release order" under PLRA and thus could not be entered by the court); *Money v. Pritzker*, ___ F.Supp.3d ___, 2020 WL 1820660, at *12 (N.D. Ill. Apr. 10, 2020) (the plaintiffs' request for a "process through which subclass members eligible for medical furlough will be identified and evaluated . . . and transferred accordingly" would constitute a "prisoner release order" within the meaning of Section 3626(a)(3) and (g)(4), and consequently require a three-judge court order).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

is a narrowly drawn permanent injunction that, if it fails to remedy the violation, would be grounds for *requesting* a three judge panel to consider whether a prisoner release order is the only way to remedy the violation of the federal right. And, if such a prisoner release order was granted, then defendants would be able to seek direc*t* review to the United States Supreme Court. *See* 28 U.S.C. § 1253. Plaintiffs offer no legal rationale as to why they are entitled to seek a prisoner release order at this stage, particularly on a preliminary basis.

Suffice it to say that plaintiffs' request for a prisoner release order is inappropriate and should not be considered in this motion for preliminary injunctive relief.[3]

B. This is a motion for a preliminary injunction, not for a TRO.

Plaintiffs request both a temporary restraining order and a preliminary injunction, seemingly using the words interchangeably. They are not the same. A TRO is a short-term restraint, usually until such expedited time as a preliminary injunction hearing can be held. *See* Fed. R. Civ. P. 65(b)(2) (TRO expires after 14 days except with good cause). TROs can also be issued without notice to the opposing party. Fed. R. Civ. P. 65(b)(1). In this case, all parties are on notice and a hearing has been scheduled. This proceeding is properly referred to as a preliminary injunction hearing.

Regardless, the legal standards for obtaining a TRO or preliminary injunction are the same. *See Doe #1 v. Trump*, 414 F. Supp. 3d 1307, 1311 (D. Or. 2019). For convenience, therefore, this brief will discuss this motion as one for a preliminary injunction, though it does not affect the result either way.

[3] Additionally, as set forth in the Steward's Declaration, ODOC has no authority to release AICs. *See* Steward Decl. ¶¶ 83-91. Under the PLRA, the Court cannot order a state agency to act beyond its authority unless "(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(B). Thus, plaintiffs' requested relief effectively seeks to compel the Governor of Oregon to exercise her executive clemency power to facilitate mass release of AICs.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

C. The focus must be on *here* and *now*.

The question before the Court is whether and how to require defendants to respond differently to the COVID-19 pandemic at ODOC. The focus is thus on prospective action. Consequently, the focus of this proceeding needs to be on the here and now, on the situation in Oregon, at ODOC, as of the date of the hearing.

This point needs saying only because plaintiffs' brief, and especially the declarations in support of it, focuses extensively on data and anecdotes from other states and at ODOC weeks or even months ago. It is common knowledge that the COVID-19 picture changes from week to week, day to day, and hour to hour. The conditions and defendants' response in March might have little in common with the situation today. Likewise, the state of affairs in New York City or elsewhere in the nation is not determinative for Oregon. While this information may shed some background on the total picture, the Court's mandate is to determine what, if anything, needs to be done now in Oregon. *See Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (inmate seeking injunction based on deliberate indifference standard [discussed below] must establish that defendants will have deliberate indifference to an "objectively intolerable risk of harm" throughout the litigation and "into the future");[4] *Helling v. McKinney*, 509 U.S. 25, 36-37 (1993) ("[t]he subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct[.]").

D. Plaintiffs do not have class certification and have no standing to seek sweeping remedies.

Although plaintiffs have filed this action on behalf of a putative class, they have not sought class certification under Fed. R. Civ. P. 23(c). Nor have they sought provisional class certification in furtherance of their motion for preliminary injunction. *See, e.g., Saravia for A.H.*

[4] Conversely, "even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation." *Farmer v. Brennan*, 511 U.S. 825, 846 n.9 (1994).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

v. Sessions, 905 F.3d 1137, 1141 (9th Cir. 2018) (plaintiff moved for provisional class certification and preliminary injunction).[5]

Therefore, plaintiffs' motion applies to only the individual named plaintiffs. As such, whether and to what extent a preliminary injunction should issue must be evaluated relative to only those individuals. Among other concerns, not all of ODOC's facilities even have a named plaintiff housed in them. *See* Complaint ¶¶ 3-9, 11 (plaintiffs reside in OSCI, OSP, CRCI, and CCCF, which are four of ODOC's fourteen facilities). And of the four facilities that do have plaintiffs, only OSP has had any COVID-19 positive cases originate there. Dewsnup Decl. ¶ 39. Additionally, only three plaintiffs have even submitted a declaration.[6] The named plaintiffs thus do not have standing to request an injunction that is applicable to all ODOC's institutions.

In order to establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1547 (2016) "'[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ U.S. __, 137 S. Ct. 1645, 1650 (2017) (citations omitted). If there are multiple plaintiffs, at least one "must have standing to seek each form of relief requested in the complaint." *Id.*

---

[5] Provisional class certification is not a formality or technicality that can be overlooked. Rather, it requires evidence on and an analysis of the class certification requirements in Fed. R. Civ. P. 23. *See, e.g., Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036 (9th Cir. 2012), *cert. denied*, 569 U.S. 975 (2013) (upholding district court's ruling granting plaintiff's motion for provisional certification of class and preliminary injunction). Plaintiffs inclusion of "class action allegations" in their complaint is not sufficient. *See Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014), *rehearing en banc denied*, 784 F.3d 571 (9th Cir. 2015) ("In evaluating whether a party has met the requirements of Rule 23, . . . Rule 23 does not set forth a mere pleading standard.") (internal quotations omitted). Had plaintiffs moved for provisional class certification, defendants would have had an opportunity raise objections to class certification generally and the proposed class. *See Rodriguez Alcantara v. Archambeault*, ____ F. Supp. 3d ___, 2020 WL 2315777, at *6 (S.D. Cal. May 1, 2020) (addressing provisional class certification for civil immigration detainees at risk for COVID-19; modifying proposed class). Plaintiffs did not move for provisional class certification, however, and class allegations are not before this Court.

[6] These are plaintiffs Hall, Hart, and Rhodes.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Admittedly, at the preliminary stage, "plaintiffs 'may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their [preliminary-injunction] motion to meet their burden.'" *City and State of San Francisco v. United States Citizenship and Immigration Services,* 944 F.3d 773, 787 (9th Cir. 2019) (citation omitted, bracketed material in original). Even so, absent class certification, plaintiffs must rely on their individual standing for any relief sought. This excludes the sweeping changes they seek for all AICs throughout ODOC.

E. Unauthenticated hearsay evidence should be given reduced weight.

Much of plaintiffs' argument relies on unauthenticated hearsay statements, including many, many citations to news articles. *See* "Other Authorities" section of Pl's Mem., pp. ii-viii. It is true that the Court may rely on otherwise inadmissible evidence in a preliminary injunction proceeding. *See Coffman v. Queen of Valley Medical Center,* 895 F.3d 717, 729 (9th Cir. 2018). However, issues regarding authentication and hearsay can and should be used here to discount the weight to be given such articles. *See Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Services, Inc.*, 80 F. Supp. 3d 1058, 1073 (C.D. Cal. 2015).

Here, to the extent plaintiffs' normally inadmissible evidence raises anything other than common knowledge or background information, it should be seriously scrutinized.

IV. Summary of anticipated evidence.

Given the nature of the COVID-19 pandemic, the only guarantee is that the evidence presented by both parties will be out-of-date the moment it is submitted. Moreover, the combined evidence from the parties, which addresses almost every aspect of ODOC's COVID-19 pandemic response, does not lend itself to summation. Regardless, defendants offer the following roadmap of the evidence in this case to date:

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

A. Plaintiffs' evidence.

The bulk of plaintiffs' brief summarizes the COVID-19 pandemic, the risk of harm it presents, and its impact on correctional facilities throughout the nation. Most of this background information is either not in dispute or irrelevant to the specific issues within ODOC.

Plaintiffs have submitted the declarations of two experts, Jeffrey Schwartz (a security expert) and Dr. Marc Stern (a physician) who make numerous recommendations regarding the management of operations and health care at correctional institutions. But neither expert has apparently reviewed, nor do they comment on, the actual implementation of ODOC's COVID-19 response. Put differently, both experts state what ODOC should be doing without considering what ODOC is actually doing. Apart from the mass release of AICs, plaintiffs' experts fail to identify any concrete, available remedies for what they perceive to be an inadequate response on the part of ODOC.

Plaintiffs have also submitted the declaration of a former corrections officer at OSP, Jeffrey Parnell. While Mr. Parnell is highly critical of OSP's response to the COVID-19 crisis, he does note many positive actions that ODOC has taken.

Finally, plaintiffs have submitted the declarations of 45 AICs from all but one of ODOC's institutions, along with survey responses and statements from other AICs. These AICs identify many alleged shortcomings in ODOC's response, such as shortages of hygiene and cleaning supplies, inadequate social distancing, testing issues (both the reluctance to be tested and the apparent lack of tests), and problems with isolation and quarantine. But these declarations also describe many of the steps that ODOC has taken to respond to COVID-19.

B. Defendants' evidence.

Defendants' response is supported by the declarations of Heidi Steward, Dr. Daniel Dewsnup, Garry Russell, Joe Bugher, Ken Jeske, Brandon Kelly, and Jacob Humphreys:

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Heidi Steward, ODOC's Deputy Director: Ms. Steward provides a comprehensive overview of ODOC's response to the COVID-19 pandemic. This includes a timeline of ODOC's response, as well as a description of ODOC's actions with respect to 1) education and tracking, 2) sanitation, hygiene, and personal protective equipment, 3) testing and medical care, 4) social distancing, 5) isolation and quarantine, and 6) screening protocols. Ms. Steward also discusses ODOC's infection prevention readiness reviews and ODOC's lack of statutory authority to release AICs.

Dr. Daniel Dewsnup, ODOC's infectious disease specialist: Dr. Dewsnup provides additional details regarding the medical basis for ODOC's response, particularly with respect to testing, medical care, isolation, and quarantine. Additionally, he responds to the declaration of Dr. Stern, plaintiffs' medical expert.

Garry Russell, ODOC's Chief of Security: Mr. Russell one of the two leaders of ODOC's Agency Operations Center ("AOC"), which manages ODOC's response to the pandemic. He sets forth AOC's role in responding to the pandemic. He also responds to the specific allegations from the AICs at the different institutions and from Jeffrey Schwartz, plaintiffs' security expert.

Joe Bugher, ODOC's Health Services Administrator: Mr. Bugher is the other leader of AOC. He provides updated information regarding ODOC's COVID-19 response, including the number of current infections and tests.

Ken Jeske, OCE Administrator: Mr. Jeske discusses OCE's response to the pandemic and responds to the specific allegations concerning prison industries and COVID-19.

Brandon Kelly, OSP Superintendent: Mr. Kelly discusses OSP's response to the pandemic and addresses the allegations made by Mr. Parnell (the former corrections officer) and the AICs at OSP.

Jacob Humphreys, ODOC's Statewide Grievance Coordinator: Mr. Humphreys discusses the remedies available for the plaintiffs to exhaust their claims regarding their

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

individual care and treatment. He also discusses how ODOC has applied its grievance rules to generalized complaints about COVID-19.

Together, this evidence establishes that defendants have responded diligently to COVID-19 and have been nowhere near deliberately indifferent.

V. Standards for preliminary injunction.

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) It is "never awarded as of right." *Id.* at 24.

The plaintiffs must be able to show four factors:

1. Likelihood of success on the merits.
2. Likelihood of irreparable harm in the absence of preliminary relief.
3. The balance of equities tips in their favor.
4. An injunction is in the public interest.

Winter, 555 U.S. at 20.

The Ninth Circuit evaluates these factors on a "sliding scale" such that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135 (quotations in original).

Significantly, "[l]ikelihood of success on the merits 'is the most important' *Winter* factor; if a movant fails to meet this 'threshold inquiry,' the court need not consider the other factors, * * * in the absence of 'serious questions going to the merits[.]'" *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal and external citations omitted).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

In addition to this significant challenge to obtaining a preliminary injunction, plaintiffs in this case face two other obstacles: First, they are seeking a mandatory injunction, requiring defendants to take affirmative steps. Mandatory injunctions are not designed to maintain the status quo and are highly disfavored. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). "In general, mandatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Id.* (citations omitted).

This is especially so when dealing with the prison system lest the court find itself attempting to manage a complex system that is better handled by state experts. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (addressing mail and marriage regulations). "[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (addressing disciplinary process).

Second, this case is subject to the additional PLRA standards for injunctions. The PLRA imposes at least four specific requirements on prospective injunctions regarding prison conditions.

1. **Narrow tailoring:** A preliminary injunction must be "narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2).

2. **Substantial weight to public safety and operation of criminal justice system:** "The court shall give substantial weight to any adverse impact on public safety or the

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

operation of a criminal justice system caused by the preliminary relief[.]" 18 U.S.C. § 3626(a)(2).

3. **Limits on ordering state government officials to exceed their authority:** The Court "shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief." 18 U.S.C. § 3626(a)(2). The referenced paragraph provides: "The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless—(i) Federal law requires such relief to be ordered in violation of State or local law; (ii) the relief is necessary to correct the violation of a Federal right; and (iii) no other relief will correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(B).

4. **Automatic expiration after 90 days:** The PLRA further provides that any "[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes [specific findings] and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2).

These cumulative standards—for general preliminary injunctions, mandatory injunctions, and PLRA injunctions—impose on plaintiffs an extraordinarily heavy burden of proof. As discussed below, they are not able to carry that burden and the motion should be denied.

VI. No likelihood of success on the merits.

A. Plaintiffs will not be entitled to *any* relief under the Eighth Amendment.

The only claim at issue is the claim under 42 U.S.C § 1983[7] alleging a violation of the Eighth Amendment[8] to the United States Constitution.[9] There is no dispute that the Eighth

[7] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Amendment requires the state to provide for AICs' basic human needs, including medical care and reasonable safety. *See Helling*, 509 U.S. at 32. "The Constitution 'does not mandate comfortable prisons,' * * * but neither does it permit inhumane ones[.]" *Farmer*, 511 U.S. at 832 (internal and external citations omitted).

Here, plaintiffs are attempting to argue that the exceptional efforts put forth by ODOC to protect AICs during the world-shaking COVID-19 pandemic constitute "cruel and unusual punishment." In order to prevail on this extraordinary claim, or to establish a likelihood of success on it, plaintiff will have to meet the high standards established by the Supreme Court for proving an Eighth Amendment violation in a prison setting.

There are two elements to an Eighth Amendment claim. Only one is currently at issue.[10] Plaintiffs must show that the accused officials had "'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834. The standard "follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* (citation omitted).

B. No deliberate indifference.

Plaintiffs have no likelihood of showing deliberate indifference. The aggressive and ongoing measures by ODOC officials to prevent the spread of COVID-19 is the very opposite of indifference—deliberate or otherwise.

Deliberate indifference requires that the accused defendant "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the

---

[8] The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[9] Although the Complaint also raises claims under the Oregon Constitution, those are not addressed in the motion for preliminary injunction. Therefore, they are not at issue here.

[10] The second element is that the alleged deprivation is objectively serious. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The person must be "incarcerated under conditions posing a substantial risk of serious harm." *Id.* For the purposes of this motion, defendants are not challenging this factor.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. An "official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

Furthermore, prison officials who are aware of a substantial risk to health or safety "may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 842. This standard "incorporates due regard for prison officials' 'unenviable task of keeping dangerous [people] in safe custody under humane conditions[.]'" *Id.* at 845 (citation omitted). "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.*

Contrary to plaintiffs' suggestion, the deliberate indifference standard in this case should not be given lesser stringency as in cases involving medical treatment. *See* Pls' Mem., p. 42. While this case deals with a medical issue—COVID-19—it does not primarily deal with how the condition itself is treated. Plaintiffs' focus is not on medical care for the illness, but on its prevention. Given the nature of the virus, this very much competes with other administrative concerns in a way that pure medical care does not. *Cf. Hudson v. McMillian*, 503 US. 1, 5-6 (1992) (deliberate indifference was appropriate standard because "State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns."). The reasonableness of defendants' response thus must be assessed in conjunction with their duty to manage the corrections system.

In a similar case, a U.S. District Court in West Virginia found plaintiff inmates unlikely to succeed on the merits of their claim regarding COVID-19. *Baxley v. Jividen*, 2020 WL 1802935 at * 6 (S.D.W. Va. April 8, 2020). This was due primarily to the fact that the corrections officials had, in fact, acted diligently to try to mitigate the effects of the disease. "The existence and ongoing implementation of Defendants' COVID-19 response plan makes it

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

impossible to conclude that Defendants 'actually knew of and disregarded a substantial risk of serious injury to the detainee' * * *. In fact, the opposite seems to be the case: Defendants have demonstrated actual knowledge of the risk of COVID-19, and regard it with the seriousness it deserves." *Id.*

Again, lack of deliberate indifference does not require anything more than reasonable efforts. As the court in *Baxley* stated when applying the balancing of equities element, "And mitigation is all that can be demanded in this case, as no technology yet exists that can cure or entirely prevent COVID-19. The best scientists in the world have been unable to eliminate the risk of the disease, and the Court can expect no more of Defendants." *Baxley*, 2020 WL 1802935 at *7.

Moreover, plaintiffs cannot show deliberate indifference by arguing that ODOC should follow different steps or act more quickly. "Given the constantly shifting parameters and guidance regarding how to combat a previously little known virus, it is worth pointing out that 'the mere failure * * * to choose the best course of action does not amount to a constitutional violation.'" *Money v. Pritzker*, __ F.Supp.3d __, 2020 WL 1820660 at * 18 (N.D. Ill. April 10, 2020) (citation omitted). The fact that defendants are "trying, very hard, to protect inmates against the virus and to treat those who have contracted it" belies the conclusion that they had "'total unconcern'" for AICs. *Id.* (citation omitted).

Additionally, the fact that ODOC cannot achieve the ideal six feet of social distancing does not establish deliberate indifference. In another recent COVID-19 case, the Eleventh Circuit stayed a preliminary injunction, concluding that "inability to take a positive action likely does not constitute 'a state of mind more blameworthy than negligence.'" *Swain v. Junior*, __ F.3d. __, 2020 WL 2161317 at *4 (11th Cir. May 5, 2020) (discussing jail's inability to maintain social distancing). The Court added, "While perhaps impossible for the defendants to implement social distancing measures effectively in all situations at Metro West's current population level, the district court cited no evidence to establish that the defendants subjectively believed the

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

measures they were taking were inadequate." *Id.* Even lapses in the policies were not proof of deliberate indifference absent proof that the jail was ignoring or approving them. *Id.* at *5. "Accepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants' actions likely do not amount to deliberate indifference." *Id.*[11]

Finally, there is no basis for plaintiffs' implication that following CDC and OHA guidelines for correctional facilities is not enough to avoid a finding of deliberate indifference. The Eighth Amendment analysis is based on avoiding a violation of "contemporary standards of decency." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), *pet. for rehearing denied*, 429 U.S. 1066 (1977). Official guidance issued by the federal and state government agencies directly charged with overseeing public health necessarily reflects contemporary standards of decency. There is no basis for concluding otherwise.

These authorities demonstrate that the existence and implementation of ODOC's substantial plan to deal with COVID-19 precludes any conclusion that defendants were indifferent to the disease.

C. Plaintiffs are not entitled to the relief they seek.

Even if plaintiffs could demonstrate a likelihood of success of demonstrating an Eighth Amendment violation, they cannot demonstrate a likelihood that they are entitled to the relief they seek, particularly on a preliminary basis.

[11] *See also Money v. Pritzker*, __ F.Supp.3d __, 2020 WL 1820660 at * 18 (N.D. Ill. April 10, 2020) (prison's lengthy list of actions to protect inmates from COVID-19, which was expanded and modified on an almost daily basis, indicated plaintiffs had almost no chance of showing deliberate indifference).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

Taking release of AICs off the table – as this Court must[12] – the Court is left with plaintiffs' expansive requests for unspecified actions that are anything but narrowly drawn. To satisfy this standard, "What is important, and what the PLRA requires, is a finding that the set of reforms being ordered—the 'relief'—corrects the violations of prisoners' rights with the minimal impact possible on defendants' discretion over their policies and procedures." *Edmo v. Corizon, Inc*., 935 F.3d 757, 783 (9th Cir. 2019), *rehearing en banc denied*, 949 F.3d 489 (9th Cir. 2020), *pet. for cert. filed* (May 6, 2020), *stay denied*, S. Ct. , 2020 WL 2569747 (May 21, 2020). Yet the "relief" posed by plaintiffs in this case is untethered to any specific, alleged violation of their rights. Plaintiffs proposed relief would require defendants to "take every action within their power to reduce the risk of COVID-19," "provide safe and non-punitive housing separation" of AICs, "create and enforce procedures to reduce the risk of COVID-19 transmission," and "immediately implement new procedures that will bring ODOC in compliance with expert guidance." Pl's Mot., p. 2. Not only is this relief *not* narrowly drawn, it is amorphous and unenforceable.

Perhaps plaintiffs' solution to the lack of narrowly drawn relief is the appointment of an independent monitor "to ensure such compliance." Pl's Mot., p. 2. But appointment of an independent monitor is unnecessary and premature at this juncture. There have not been any orders entered in this case, much less problems with compliance or disputes that would warrant appointment of an independent monitor or special master. *See Hook v. State of Ariz*., 120 F.3d 921, 925–26 (9th Cir. 1997) (affirming a district court's order appointing a special master to monitor compliance with a consent decree); *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 774–75 (9th Cir. 1990) (special masters may be appointed to aid a district court in enforcing its decree because of complexity and problems with compliance). Plaintiffs present no argument

[12] As discussed above, plaintiffs' primary relief sought is a prisoner release order that is unavailable to them under the PLRA. *See Brown v. Plata*, 563 U.S. 493, 512 (2011) (citing § 3626(a)(3)(B)).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

as to why the appointment of an independent monitor or special master is appropriate here, and defendants can find none.

This means that plaintiffs have failed to plead or seek any cognizable relief even if they could demonstrate an Eighth Amendment violation.

D. PLRA exhaustion requirement blocks *individualized* concerns.

As plaintiffs concede, the PLRA imposes an exhaustion requirement. 42 U.S.C. § 1997e(a); *see also Woodford v. Ngo,* 548 U.S. 81 (2006) (analyzing PLRA exhaustion requirement).[13] If, after considering the requirements of narrowly drawn relief under the PLRA and standing, there were any relief available to plaintiffs, it would be with respect to their individualized circumstances. Yet plaintiffs have failed to exhaust any such individualized claims.

The PLRA requires that prisoners exhaust "such administrative remedies as are available" before bringing an action challenging prison conditions. *See Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1856 (2016). The PLRA's exhaustion requirement applies to plaintiffs who were prisoners at the time their operative complaint was filed. *Jackson v. Fong*, 870 F.3d 928, 935 (9th Cir. 2017). The PLRA's "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes[.]" *Porter v. Nussle*, 534 U.S. 516, 532 (2002). There is no exception to the requirement that inmates exhaust all available remedies prior to filing suit. *See Ross*, 136 S. Ct. at 1856.

The parties agree that any available administrative remedy for plaintiffs' claims would be through ODOC's grievance process. Defendants acknowledge that ODOC is currently not accepting grievances arising from general prison conditions as related to COVID-19 pandemic,

[13] Plaintiffs offer no legal support for the argument that the PLRA exhaustion requirement is illegal. *See* Pls' Mem., pp. 56-58. On the contrary, plaintiffs note numerous cases that have applied the requirement. Defendants assume this court will "consider itself bound by law assuming and adjudicating the availability of this defense as provided by the PLRA." Pls. Mem., p. 58.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

such as those requesting greater social distancing, because those grievances fall outside the scope of ODOC's grievance process. *See* Humphreys Decl. ¶¶ 12-13.

But this concession does not end the exhaustion inquiry. ODOC's grievance rules still allow for plaintiffs to bring grievances pertaining to their individualized circumstances. Humphreys Decl. at ¶ 8. The brief and declarations raise many issues that might be grievable, if related to the individual AIC: units running out of cleaning supplies or paper towels; unclean tablets, phones, and cafeteria tables; lack of access to a personal inhaler; a broken toilet; and alleged mockery by correction officers. Pl's Mem., pp. 21-22, 27, 32. Here, only one plaintiff – Gary Clift – filed any grievances, and those grievances did not address individualized, discrete concerns; consequently, they were not accepted by ODOC. *See* Humphreys Decl. ⁋⁋17-18.

Plaintiffs' cited timeline for processing grievances, *see* Pl's Mem., p. 55, does not excuse plaintiffs from at least attempting to exhaust administrative remedies. Without giving ODOC a chance to respond to the concerns in a reasonable time, plaintiffs cannot legitimately claim a potential remedy is unavailable. Therefore, the claims based on the individual, discrete concerns are barred by the exhaustion requirement of the PLRA. As such, plaintiffs cannot show a likelihood of success on the merits of any such claims.

VII. No likelihood of irreparable harm.

A. Plaintiff Hart.

One plaintiff, Mr. Hart, has contracted COVID-19 since the filing of plaintiffs' motion. His care is being managed at the institution, and there is no indication that his current condition will be "irreparable. Out of respect for Mr. Hart's condition, defendants do not contest the irreparable harm factor with respect to Mr. Hart. However, it is unclear how the injunctive relief currently sought by plaintiffs would apply to Mr. Hart individually, since he is now in a different proposed class of plaintiffs. *See* AC ¶ 41. Regardless, defendants do not include plaintiff Hart in this section.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

B. The remaining plaintiffs.

The remaining plaintiffs have not provided evidence that each of them, individually, has a probability of being irreparably harmed due to anything defendants are or are not doing. Proof on this factor goes well beyond the substantial risk of serious harm element of an Eighth Amendment claim, which defendants do not contest. First, the proof must be of a *likelihood* of harm, not just a substantial risk.[14] Second, the proof must be of a likelihood of *irreparable* harm.

Although COVID-19 poses substantial risks of harm as a general matter, the remaining plaintiffs have failed to establish a likelihood of irreparable harm individually.[15] Of the remaining plaintiffs, only plaintiff Hall is housed at an institution (OSP) where there have been confirmed cases of COVID-19 originating at the institution. *See* Dewsnup Decl. ¶ 39. Moreover, there is no evidence that the remaining plaintiffs are not only likely to contract COVID-19, but also are likely to suffer such severe complications that the harm is irreparable. As plaintiff admits, many people who catch the virus are asymptomatic. Pl's Mem., p. 6. Most others experience mild symptoms such as a fever or cough that is temporary, not irreparable. *See* Dewsnup Decl. ¶¶ 7-8.[16] Even if plaintiffs' underlying health considerations are considered, they cannot demonstrate a *likelihood* of irreparable harm on an *individualized* basis.

Absent such proof, plaintiffs cannot carry this element of their motion for preliminary injunction.

---

[14] The Supreme Court expressly overruled the idea that a "possibility" of irreparable harm was sufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Thus, plaintiffs' reference to this standard on page 4 of its brief is incorrect.

[15] Again, because plaintiffs have failed to move for preliminary class certification, they must each demonstrate the risk of harm to themselves individually.

[16] *See also* OHA, Public Health Division, "Novel Coronavirus Fact Sheet," https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2356.pdf (last accessed May 17, 2020) ("Most people with mild coronavirus illness will recover on their own by drinking plenty of fluids, resting, and taking pain and fever medications."). *See also* OHA, COVID-19 Updates, "Covid-19 Weekly Report," May 12, 2020, https://www.oregon.gov/oha/PH/DISEASESCONDITIONS/DISEASESAZ/Emerging%20Respitory%20Infections/COVID-19-Weekly-Report-2020-05-12-FINAL.pdf (setting forth rates of symptoms and severity of cases in Oregon)

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

VIII. Balance of equities/public interest.

The final two factors, the balance of equities and the public interest, merge in this case. "Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Padilla v. Immigration and Customs Enforcement*, 953 F.3d 1134, 1141 (9th Cir. 2020).

The balance places the risks of COVID-19 on one side of the scale, and the further disruption of the carefully managed ODOC system on the other side. In this regard, the PLRA mandates, "The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief[.]" 18 U.S.C. § 3626(a)(2).

Plaintiffs offer no real analysis of this balance except in regard to releasing AICs. As discussed above, that cannot happen at this juncture.

The West Virginia District Court in *Baxley* offers a good analysis. The Court noted the dangers of COVID-19, along with the reality that no one in the world has managed to completely control the disease. *Baxley*, 2020 WL 1802935 at *7. Additionally, the Court considered the public interest in limiting the spread of the virus and preventing sick prisoners from overwhelming local hospitals. *Id.* at *8. On the other hand, the Court recognized the prison's "obvious interest in ensuring that incarcerated individuals actually complete their terms of incarceration." *Id.* Additionally, the fast-moving nature of the virus required efficient and rapid responses by prison, which would be inhibited by Court intervention. *Id.* "It is likely that any injunction would leave Defendants unsure of precisely what actions they could take without notifying Plaintiffs and the Court, thereby slowing any response and making disease prevention more difficult." *Id.*

Similarly, in the Eleventh Circuit case, the Court noted that an injunction would make the court into a "super-warden," controlling the government defendants' resources and

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791

administrative decisions. *Swain*, __ F.3d at ___, 2020 WL 2161317 at * 5. This would irreparably harm the government defendants. *Id.*

Given that ODOC is already taking extreme measures to control the virus, any additional orders from the Court would be both unnecessary and disruptive. The balance weighs against any injunction.

IX. Conclusion

The COVID-19 pandemic is an extraordinary and serious event. And defendants are treating it as such. ODOC has taken enormous measures to adjust nearly every aspect of its institutions in order to mitigate the dangers. It cannot prevent the spread of the disease entirely, just as no state in the country has. It cannot spare every AIC from contracting the disease; the virus spreads to those who are incarcerated and those who are not. Still, defendants' extreme measures are more than sufficient to avoid a preliminary injunction. Plaintiff have not produced evidence showing they are 1) likely to succeed on the merits, 2) likely to suffer irreparable harm, or 3) that the balance of equities and public interest weigh in their favor. The motion for preliminary injunction should be denied.

DATED May 22, 2020.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

s/ Tracy Ickes White

TRACY ICKES WHITE #904127
Senior Assistant Attorney General
Trial Attorney
ANDREW HALLMAN #083480
Assistant Attorney General
YUFENG LUO #184009
Assistant Attorney General
Tel (503) 947-4700
Tracy.I.White@doj.state.or.us
Andrew.Hallman@doj.state.or.us
Yufeng.Luo@doj.state.or.us
Of Attorneys for Defendants

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4791