Case No. 20-11622

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANTHONY SWAIN, *et al.*,

Plaintiffs-Appellees,

v.

DANIEL JUNIOR, Director of the Miami-Dade Corrections and Rehabilitation Department, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 1:20-cv-21457

BRIEF OF EIGHTH AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *Amici Curiae* Eighth Amendment Professors certify that the following persons and entities may have an interest in the outcome of this case:

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Dated: May 29, 2020

/s/ Andrew Kim
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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors who teach courses on federal and state constitutional and statutory law as it relates to prisons and jails. (Affiliations are listed only for purposes of identification.) Their academic work includes extensive study of the equitable powers of federal courts in tailoring relief for people experiencing unconstitutional conditions of confinement. *Amici* submit this brief because Defendants' arguments on appeal mark a significant departure from controlling caselaw and would undermine the basic principles governing application of the Eighth Amendment. If adopted by this Court, Defendants' construction of the subjective deliberate indifference standard will have sweeping implications in a broad range of Eighth Amendment cases where this Court and courts within this Circuit have accorded relief. *Amici* therefore have an interest in urging this Court not to decide this case on the question framed by Defendants—a question that is, for the reasons provided below, not critical to the resolution of this appeal. This brief draws on *amici*'s research and expertise in these areas to analyze this issue for the benefit of the Court.

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[1] No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

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STATEMENT OF ISSUES

1. Did the district court correctly determine that Plaintiffs had demonstrated a likelihood of showing that Defendants were deliberately indifferent by failing to take measures available them to achieve social distancing, which is a "critical step" in mitigating the unconstitutional conditions at Metro West?[2]

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[2] This Court has previously declined to resolve the question whether, under *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), liability for the unconstitutional treatment of pretrial detainees continues to require a showing of subjective deliberate indifference. *Dang ex rel. Dang v. Sheriff, Seminole Cty., Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) ("We cannot and need not reach this question."); *Johnson v. Bessemer, Ala.*, 741 F. App'x 694, 699 (11th Cir. 2018) (observing that *Dang* "refus[ed] to reach the issue of whether *Kingsley* requires a pretrial detainee to satisfy only the objective component in a deliberate indifference claim"). In a case like this, involving exposure-to-harm claims by pretrial detainees, the view of *amici* is that *Kingsley* requires an objective standard—that is, liability for intentional acts that create unreasonable conditions of confinement, without a showing of subjective deliberate indifference. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122-25 (9th Cir. 2018); *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1069-70 (9th Cir. 2016) (en banc); *Bruno v. City of Schenectady*, 727 F. App'x 717, 720 (2d Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 21 (2d Cir. 2017); *see also Colbruno v. Kessler*, 928 F.3d 1155, 1161 (10th Cir. 2019); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018), *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 424-25 (5th Cir. 2017) (Graves., J., specially concurring in part); *but see Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Alderson*, 848 F.3d at 420 (majority opinion). While *Kingsley* is an excessive force case, its analysis rested on *Bell v. Wolfish*, 441 U.S. 520 (1979), a conditions case. And its reasoning—that unreasonable results of intentional acts constitute punishment, which may not be inflicted upon pretrial detainees—applies equally to conditions and excessive force. Indeed, it would be bizarre if the liability standard for pretrial detention was lower for excessive force allegations than for unconstitutional conditions allegations. For all the reasons explained in *Whitley v. Albers*, 475 U.S. 312 (1986), one would expect the opposite to be true, if anything.

SUMMARY OF ARGUMENT

COVID-19 is an extraordinary contagion that has created an unprecedented risk to health and safety in our nation's jails and prisons. Because COVID-19 is a disease that thrives in crowded conditions, these facilities—especially *overcrowded* facilities like Metro West—have become fertile breeding grounds for the disease. And unlike ordinary citizens, there is little that incarcerated individuals can do to ameliorate the risk—they are required to be at close quarters with others at nearly all times.

The District Court recognized that the risk of harm posed by the pandemic, exacerbated by the population density of Metro West, deprived individuals detained at Metro West of safe conditions of confinement. Recognizing that Metro West's officials had taken some steps to address the COVID-19 pandemic generally, the District Court nevertheless determined that it was more likely than not that those officials were deliberately indifferent, as there were important and obvious steps they did not take to ameliorate the harm posed by the COVID-19 virus at Metro

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If excessive force is judged using an objective standard, a similar approach to conditions cases follows. Under the correct, objective liability standard post-*Kingsley*, the deliberate indifference approach urged by Appellants and the arguments credited by the motions panel were entirely incorrect. But as we explain here, even under the subjective deliberate indifference standard (which would apply if all of the plaintiffs were post-conviction prisoners), the District Court's order should be affirmed.

West. R. 100, at 37. It instructed Defendants to take the steps necessary to allow the people in their custody to engage in social distancing and prescribed a number of measures to mitigate the risk of infection from COVID-19 at the facility. R. 100, at 49-52. The court did not, however, order anyone's release, or suggest that release was the only way to remedy the unconstitutional conditions at the jail.

Defendants hope to overturn the District Court's ruling by mischaracterizing the District Court's holding with respect to the subjective component of Plaintiffs' claim. They argue that jail officials could not have been deliberately indifferent because, they contend, they took what measures they had available to them. In their words, this made them "deliberately proactive," not deliberately indifferent, Appellants' Br. 14, and thus they should not be held responsible for failing to take measures beyond their authority and control. In making this latter argument, they contend that the District Court concluded "social distancing was not possible absent reductions in the jail population." *Id.* at 33. Because Defendants are unable to effect those reductions on their own, they reason their "inability to take a positive action" cannot amount to deliberate indifference. *Id.*

1. At the outset, Defendants' arguments mischaracterize the District Court's holding. The court determined that the absence of social distancing contributed to the unconstitutional conditions of confinement, and that Defendants' failure to ensure, or even allow, social distancing was evidence of their deliberate

indifference. While releasing part of Metro West's population would certainly help in stemming the spread of the COVID-19 virus, release was not the only means of mitigating the harmful conditions alleged by Plaintiffs. The District Court did not hold that Defendants were deliberately indifferent because they failed to release individuals from custody, but rather because they failed to take a number of steps well within their capacity and control regarding the proximity in which individuals at Metro West are confined.

2. Defendants' arguments are also on the wrong legal footing: even if they were correct that effective measures were outside of their authority (or budget), circuit precedent makes clear that this is no defense in a case for *prospective* relief. Otherwise, state and local governments could evade their constitutional obligation to provide minimally acceptable conditions of confinement by enacting laws that preclude their officials from taking essential remedial measures and then throwing up their proverbial hands.

3. The deliberate indifference standard proposed by Defendants would foreclose the ability of incarcerated individuals to obtain equitable relief from federal courts in the most dire of circumstances. In the uncommon case where releasing individuals from custody is truly the only means of ameliorating harmful conditions of confinement and curing a constitutional violation, such that a federal court finds it appropriate to enter a release order, prison officials will generally lack

the authority under state law to release individuals absent that order. In those circumstances, Defendants reason, prison officials cannot be deliberately indifferent because they are unable to take the "positive action" necessary to cure the unconstitutional harm. Therefore, they contend, there is no Eighth Amendment violation. Even with the statutory strictures placed upon a district court's power to accord equitable relief, such a blinkered view of the Eighth Amendment is unreasonable and unsupported by caselaw.

ARGUMENT

I. The focus of the deliberate indifference inquiry is on Defendants' decision not to take a number of available measures to mitigate the danger posed by COVID-19, not whether state law authorizes them to take one such measure.

"[A] prison official violates the Eighth Amendment" when those in his custody are "incarcerated under conditions posing a substantial risk of serious harm," and that official has a "sufficiently culpable state of mind," *i.e.*, he is deliberately indifferent about that harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted). "To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs so that knowledge can be inferred." *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993). When "knowledge of the infirm conditions" is combined with an official's "knowing[] or reckless[]" decision to "decline[] to take actions that would have improved the conditions," a prison official is deliberately indifferent. *Id.* at 1537; *accord Hale v.*

Tallapoosa Cty., 50 F.3d 1579, 1583 (11th Cir. 1995). The inquiry is ultimately whether prison officials "could have, but did not, take steps to minimize" the dangerous, unconstitutional conditions of confinement. *LaMarca*, 995 F.2d at 1537.

Defendants argue that the district court erred by faulting them for failing to take what they describe as an "impossible" step. The district court determined that social distancing was necessary to address the harm posed by COVID-19. According to Defendants, the only way to permit social distancing is to reduce the population of people incarcerated at Metro West. *See* Appellants' Br. 33. Defendants go on to argue that the only way to do this is to release people from custody, a measure they claim they cannot take. *Id.* The motions panel of this Court also focused on this characterization of the District Court's opinion in granting a stay of the District Court's preliminary injunction order. Stay Order 10. Defendants contend that the fact that they have taken *some* positive action, and the impossibility of other meaningful positive action, means they cannot be found to be deliberately indifferent. Appellants' Br. 33.

1. Every aspect of that argument is wrong. The District Court never concluded that "Plaintiffs met their burden simply because social distancing could not be achieved 'absent additional reduction in Metro West's population or some other measure to achieve social distancing.'" *Id.* at 31-32. Rather, the District Court determined that the impact of COVID-19 was worsened by the absence of social

distancing, and Defendants failed to take adequate measures to mitigate the increased risk posed by Metro West's population density—including measures to reduce that density. In other words, the absence of social distancing is part of the unconstitutional conditions of confinement, and the presence of it is part of the cure for the harm. R. 100, at 35 ("[T]he lack of social distancing . . . and the issues attendant to effectively implementing CDC standards present an *immediate, ongoing risk of harm* to Plaintiffs . . . ." (emphasis added)).

2. Defendants wrongly suggest that, because they have done *some* things to tackle the COVID-19 crisis, they have not been deliberately indifferent. Appellants' Br. 26 ("MDCR officials have not been indifferent, let alone deliberately so. . . . MDCR implemented and updated numerous policies targeted at preventing the introduction and spread of COVID-19 within Metro West."). Prison officials can be deliberately indifferent even if they take some action to mitigate harm. In *LaMarca*, for example, when a former prison superintendent faced allegations that he was deliberately indifferent to incidents of sexual assaults of incarcerated individuals, he pointed to his efforts to "improve[] [the] physical plant, modernize[] the prison's infirmary, decrease[] staff overtime, increase[] the number of confinement cells, and . . . [improve the] document[ing of] incidents at [the prison] (an effort necessary to proper management and safety)." *LaMarca*, 995 F.2d at 1537 n.22. This Court concluded that the superintendent could have nevertheless

"recklessly disregarded the *necessary* means to protect inmate safety." *Id.* at 1538. Similarly, when the sheriff in *Hale* was accused of being deliberately indifferent to violence exacerbated by overcrowding, the sheriff responded that he was making efforts to build "a new jail which, he contends, was the only way to reduce the risk of violence." 50 F.3d at 1584. This Court explained that "such efforts would not necessarily absolve him or [his employing] County of liability." *Id.* The Court noted that a jury could have found that, "despite any efforts he made toward construction of the new jail, [the sheriff] was deliberately indifferent by disregarding 'alternative means' or interim measures for reducing the risk of violence." *Id.*

That is precisely the inquiry that the District Court conducted here. The court considered "whether 'the conditions and procedures at Metro West to address COVID-19 show a deliberate indifference.'" R. 100, at 36. The court determined that "the measures Defendants have adopted" were not enough to mitigate the harm caused by the absence of "meaningful social distancing." *Id.* at 37. It recited the conditions of which Defendants were aware, but failed to address in any meaningful way: the increased risk posed by close contacts at jail bunks, the telephones, the restroom, the showers, the infirmary, and in outdoor space. *Id.* at 38. Defendants' measures did not even include measures available to reduce the situational risk posed by close contact in these densely populated settings, never mind the "critical step" of density reduction as necessary to allow incarcerated individuals to maintain social

distancing at all times. *See id.* at 37. Defendants had other measures available to prevent close contact and limit viral transmission, and failed to take those measures; this is what made them deliberately indifferent.

3. Even assuming that the District Court held that reducing the population *density*—as distinct from the population *level*—was the *only* way of accomplishing the social distancing necessary to reduce harm to those incarcerated at Metro West, Defendants are wrong in suggesting that such reduction is impossible, or that release from custody is the only way of effecting it. *See* Appellants' Br. 33. There are several options at Defendants' disposal. They can, for example, move part of the population of Metro West to other county facilities. Or they can create "reduced custody housing area[s]" to reduce the number of individuals in the general population—the "chief correctional officer," Appellant Daniel Junior, is expressly empowered by state law to make that determination. *See* Fla. Stat. § 951.23(7). For those newly accused of misdemeanor offenses (who would add to Metro West's population), the County's booking officers can issue notices to appear, in lieu of placing them at Metro West for misdemeanor offenses. Fla. R. Crim. Proc. 3.125(c). And given the ongoing state of emergency in the State of Florida, the County can exercise the emergency plenary powers accorded to it as a political subdivision under Florida law to reduce the density at Metro West, either by expanding capacity (reallocating or constructing other facilities to be used for temporary housing) or by

other measures. Fla. Stat. § 252.46. These are steps that officials "could have, but did not, take [] to minimize" the risk posed by the spread of COVID-19 amidst the dense population at Metro West, making them deliberately indifferent to that risk. *See LaMarca*, 995 F.2d at 1537.

II. Whether a prison official's ability to take the steps necessary to address harmful conditions is limited by the legal or fiscal constraints of state law is not relevant to the deliberate indifference inquiry, at least in a case for *prospective* relief.

Like most health and safety measures, taking meaningful steps to reduce population density at Metro West will doubtless require coordination with other government officials and the expenditure of resources. But circuit precedent makes clear that Defendants can be deliberately indifferent even if they have not presently obtained that cooperation and those resources.

This Court has held time and again that "Defendants clearly may not escape liability solely because of the legislature's failure to appropriate requested funds." *Williams v. Bennett*, 689 F.2d 1370, 1387-88 (11th Cir. 1982). That is true even if the legislature's austerity is part of the reason the harmful conditions exist. *See Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) ("We are aware that systemic deficiencies in medical care may be related to a lack of funds allocated to prisons by the statute legislature. Such a lack, however, will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment.").

Defendants assert they are not responsible for taking any actions beyond which they have already taken; they purport that any remaining measures are beyond their ability to command. In support of this, they cite *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976), which held that when "errors take place outside of [a prison official's] realm of responsibility, he cannot be found liable because he has acted reasonably and in good faith." *Id.* at 1215.

But the reliance on *Bryan* is misplaced for two reasons. First, *Bryan* does not stand for the proposition that the absence of express authority to fix a harmful condition means a prison official is absolved of deliberate indifference liability. When *Bryan* speaks of "errors" outside of a prison official's "realm of responsibility," it refers to actual mistakes made by someone else, not the absence of authority. In *Bryan*, a plaintiff sued the county sheriff, alleging that the sheriff had wrongfully detained him even after the district attorney had dropped the charges against the plaintiff. 530 F.2d at 1212. The plaintiff had been detained because of the district attorney's clerical error: the plaintiff's grand jury report had the correct name and indictment number, but listed the wrong warrant number. *Id.* As a result, when the charges were dropped and the plaintiff was to be released, the sheriff's records incorrectly indicated that the plaintiff should remain detained on an active warrant, so the sheriff did not release the plaintiff. *Id.* The court held that the sheriff could not be held responsible; unlike a violation arising from the sheriff's own

negligent recordkeeping, the events that led to the plaintiff's continued detention were the result of someone else's mistake, and outside of the sheriff's "realm of responsibility." *Id.* at 1215.

Second, and perhaps more importantly, courts do not find relevant constraints on an official's ability to act where, as here, a plaintiff is seeking injunctive relief to mitigate further harm from the official's deliberate indifference.[3] In *Bryan*, the plaintiff sought damages, so the Fifth Circuit looked to what was within the sheriff's control. *See id.* at 1211. By contrast, when the relief sought is prospective, binding precedent dictates that what a prison official is *authorized* to do is beside the point, as the court can exercise its equitable powers to fashion a remedy that ensures those being detained receive "adequate protection." *LaMarca*, 995 F.2d at 1543.

This Court has applied this rule for decades: the Court reasoned in *Williams*, even before *LaMarca*, that a prison official's authority and ability to provide relief

[3] Some courts have held that whether a prison official has the authority and ability to effect change plays a role when the claim is one for damages—because such a claim typically seeks to hold the prison official individually liable, this Court has reasoned that the choices the official could have made (along with the constraints placed on those choices) become relevant. *See Williams*, 689 F.2d at 1388. Because "damages" are "entirely retrospective," as they "provide redress for something officials could have done but did not," the courts that adopt this rule conclude that the "spectrum of choices that officials had at their disposal" factors into the deliberate-indifference analysis. *Peralta*, 744 F.3d at 1083. *Amici* express no opinion as to whether this is the proper approach in a case in which a plaintiff seeks damages, but the Court need not reach that question given that Plaintiffs here seek only injunctive relief.

that addresses harmful, unconstitutional conditions is not relevant in a claim for prospective relief against a prison official in his official capacity. 689 F.2d at 1388; *Moore v. Morgan*, 922 F.2d 1553, 1557 & n.4 (11th Cir. 1991) (refusing to excuse a prison official's failure to address harmful conditions on the basis of lack of funds); *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." (citation omitted)); *see also Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc) ("Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations.").

This Court has also recognized that defendants cannot avoid liability by showing that addressing harmful conditions would require prison officials to violate state law. *E.g.*, *Smith v. Sullivan*, 611 F.2d 1039, 1043 (5th Cir. 1980) (holding that there was "no merit" to defendants' argument that "compliance with the order's limitation on inmate population would require the sheriff to violate his statutory duty to accept prisoners"); *Costello v. Wainwright*, 525 F.2d 1239, 1243 (5th Cir. 1976).[4]

In the Prison Litigation Reform Act (PLRA), Congress, too, recognized that

[4] The panel decision in *Costello* had been vacated by the en banc court at one point, 539 F.2d 547 (5th Cir. 1976) (en banc), but the original decision was restored after a reversal by the Supreme Court. 430 U.S. 325 (1977); 553 F.2d 506 (5th Cir. 1977) (en banc).

federal courts would sometimes need to order—and authorized them to order—a state or local official to "exceed his or her authority under State or local law" or mandate a remedy that "otherwise violates State or local law." 18 U.S.C. § 3626(a)(1)(B). It recognized that sometimes "Federal law [will] require[] such relief to be ordered in violation of State or local law," that such relief will be "necessary to correct the violation of the Federal right," and that "no other relief will correct the violation of the Federal right."[5] *Id*.[6]

A contrary rule would allow states, local governments, and correctional departments to circumvent the Eighth Amendment altogether by passing laws, regulations, and policies stripping officials of authority to ensure safe, constitutional prison conditions. A legislature that chose to appropriate no money toward correctional health care or chose to forbid sheriffs from providing those in custody with soap would enjoy legislative immunity, and individuals who sued their jailers would be foreclosed from both establishing an Eighth Amendment violation and

[5] To be clear, the District Court in this case need not have made findings under 18 U.S.C. § 3626(a)(1)(B), because, as discussed *supra*, it did *not* order Defendants to exceed their authority under State or local law.

[6] *Castillo v. Cameron Cty., Tex.,* 238 F.3d 339, 355-56 (5th Cir. 2001) (considering an order "permitting the Cameron County sheriff to decline to accept 'blue warrant' parole violators into the jail" in order to reduce the population of the jail, which the parties did not dispute "constitutes . . . a violation of state law," and concluding that such an order entered following enactment of the PLRA would be permissible if it complied with 18 U.S.C. § 3626(a)(1)(B)).

obtaining any recourse from the courts.

III. Release could be an appropriate remedy for correcting the constitutional violation resulting from Defendants' deliberate indifference, even if they lack the authority to release absent a federal court order.

Defendants are advocating for an impossible standard: they argue that the release of people from custody is the only way to mitigate the harm alleged by Plaintiffs, but because that relief can only be effectively provided by a federal court and not by prison officials who lack the power to release under state law, Plaintiffs cannot prove a deliberate indifference claim. Appellants' Br. 32.

At the outset, Defendants' underlying premises are wrong. For example, there are other measures short of releasing individuals from custody that can address the harms associated with conditions of confinement at Metro West during the COVID-19 pandemic, including some measures that would reduce population density. *See supra* Part I. There are, in fact, *release*-related alternatives that Defendants can employ: as one example, the County's Board of Commissioners, on the recommendation of Appellant Junior, might effectively speed up the release of individuals who are serving their sentences at Metro West by authorizing additional gain-time for good conduct. *See* Fla. Stat. § 951.21(3).

But even assuming that the District Court eventually concludes that the release is the only way to cure a constitutional violation in this case, there is nothing that prevents the District Court from providing such relief here. Despite Defendants'

assertions to the contrary, the law is clear that whether correctional officials have the power to engage in "prison depopulation . . . without a state criminal court order," Appellants' Br. 32, has no bearing on whether Plaintiffs have adequately established a constitutional claim for prospective relief. *See supra* Part II.

And there is no question that the District Court has the *power* to order such relief even in the absence of an authorizing state law. "Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538 (2011) (citation and internal quotation marks omitted). When faced with cruel and unusual conditions of confinement, it is possible that, in the "equitable, remedial judgment[]" of the District Court, release becomes the only "efficacious remedy." *Id.* at 541. Under such circumstances, there is no doubt that the District Court's order is all that is needed to effect a remedy for the constitutional violation; whether state law authorizes such action is irrelevant. *See Smith*, 611 F.2d at 1044 ("[T]he federal courts have the power, and the duty, to make their intervention effective.").

Of course, there are statutory constraints on a district court's ability to order release from detention as an equitable remedy—namely, the PLRA. 18 U.S.C. § 3626. But even that statutory vise recognizes that a lack of authority to release detained individuals is not part of the Eighth Amendment analysis. The PLRA allows a district court to provide the remedy of release when the circumstances

compel it, which would make no sense if a lack of authority meant there was no Eighth Amendment violation to remedy. *Plata*, 563 U.S. at 511.[7]

Defendants seek to impose a standard that will strip incarcerated individuals of even that avenue of "last resort," *id.* at 514—to seek the remedy of release when "no other relief will remedy" a constitutional violation, 18 U.S.C. § 3626(a)(3)(E)(ii). *See Plata*, 563 U.S. at 526, 527-29. Prison officials are generally *not* empowered by state law to release those in their custody at their discretion. So if release is truly the only means of correcting unconstitutional conditions of confinement, the ability to provide it is beyond the means of a prison official, and the prison official's inability to provide it clears him of deliberate indifference and absolves him of the constitutional violation, *see* Appellants' Br. 32, then an incarcerated individual will *never* be able to bring a claim for the relief of release, no matter how serious the constitutional violation or the underlying conditions that give rise to it.

That cannot be right. As the Supreme Court explained in *Plata*, "Congress limited the availability of limits on prison populations, but it did not forbid these

[7] Even in cases like this one, it may well be that a federal court can order release without being bound by the strictures of the PLRA's prisoner-release provision. *E.g.*, *Cameron v. Bouchard*, --- F. Supp. 3d ----, 2020 WL 2569868, at *28 (E.D. Mich. May 21, 2020) (decision "to release particular inmates in response to COVID-19 under § 1983 would not be a prison release order to which the requirement of § 3626 apply").

measures altogether." 563 U.S. at 526. "Courts should presume that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Congress did not leave prisoners without a remedy for violations of their constitutional rights." *Id.* Defendants' understanding of deliberate indifference would, in these circumstances, "render population limits unavailable in practice," which, in turn, "would raise serious constitutional concerns." *See id.*

Here, the District Court has not yet considered release as a remedy, but it has already taken one of the preliminary steps necessary to order release under the PLRA's prisoner-release provision: it has issued a preliminary injunction in an attempt to remedy the constitutional violation with "less intrusive relief." *Id.* at 512. That injunction should be affirmed. If this Court were to vacate the injunction on the grounds offered by Defendants here, it would effectively foreclose any opportunity to seek judicial review of prison conditions when the only remedy for such conditions is limiting the population. The Supreme Court has made clear that the ability to call upon the equitable power of the federal courts to fix constitutional violations cannot be foreclosed completely in such a manner, and this Court should reject Defendants' attempt to do so.

CONCLUSION

The District Court's grant of a preliminary injunction should be affirmed.

Respectfully submitted,

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,220 words, excluding the parts of the brief that are exempt under Federal Rule of Appellate Procedure 32(f).

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Date: May 29, 2020

/s/ Andrew Kim
Andrew Kim

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I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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