No. 20-11622

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANTHONY SWAIN, ALEN BLANCO, BAYARDO CRUZ, RONNIEL FLORES, WINFRED HILL, DEONDRE WILLIS, PETER BERNAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

DANIEL JUNIOR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MIAMI-DADE CORRECTIONS AND REHABILITATION DEPARTMENT, AND MIAMI-DADE COUNTY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida,
No. 1:20-cv-21457 (Williams, J.)

APPELLEES' BRIEF

ALEC KARAKATSANIS
CIVIL RIGHTS CORPS
1601 Connecticut Avenue N.W.
Suite 800
Washington, D.C. 20009
(202) 681-2409
alec@civilrightscorps.org

DANIEL S. VOLCHOK
EMMA SIMSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
emma.simson@wilmerhale.com

EMILY BARNET
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
emily.barnet@wilmerhale.com

May 28, 2020

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STAEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-1, Appellees Anthony Swain, Alen Blanco, Bayardo Cruz, Ronniel Flores, Winfred Hill, Deondre Willis, and Peter Bernal certify that the appellants' certificate of interested persons is complete.

/s/ Emma Simson
EMMA SIMSON

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for June 9, 2020.

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INTRODUCTION

Plaintiffs, pre-trial detainees at the Metro West Detention Center in Miami, filed this Fourteenth Amendment case because defendants were not taking basic measures to protect plaintiffs from COVID-19, a serious, potentially fatal, disease. Plaintiffs submitted extensive evidence illustrating that conditions at Metro West are ripe for rapid transmission of COVID-19. This evidence further showed that defendants had not taken reasonable, available steps to ensure basic hygiene and sanitation or to implement "social distancing," both of which are essential to reduce the spread of COVID-19. And the evidence showed that the severe risk that COVID-19 poses could be sufficiently mitigated only by reducing the jail population to allow for medically required social distancing, a step prevented by state law—state law defendant Daniel Junior is responsible for enforcing. Given the undeniable urgency of the situation (the same urgency that prompted governors nationwide to issue orders requiring social distancing), plaintiffs moved for preliminary relief.

After reviewing dozens of declarations and exhibits from the parties, as well as a jail-inspection report from two independent infectious-disease experts, the district court concluded that, even setting aside many factual disputes about conditions at the jail, plaintiffs will likely succeed with their claims that (1) defendants' failure to implement available social-distancing measures and (2)

defendants' ongoing confinement of plaintiffs in conditions that do not permit essential distancing each reflects deliberate indifference to the substantial risk of harm that COVID-19 poses to plaintiffs, and therefore violates the Fourteenth Amendment. The court further concluded that plaintiffs will suffer irreparable harm absent preliminary relief, an unsurprising conclusion given the disease's seriousness. Finally, the court determined that the remaining preliminary-injunction factors also favor plaintiffs; among other things, it noted that an injunction advances the public interest because an outbreak at Metro West threatens the broader Miami-Dade community.

The court thus issued a preliminary injunction aimed at protecting plaintiffs' health and safety pending further adjudication of their claims. Consistent with guidance from the Centers for Disease Control and Prevention (and other health experts), the injunction requires defendants to "enforce adequate … social distancing"—i.e., "spacing of six feet or more"—to "the maximum extent possible considering Metro West['s] … current population" and to submit a proposal on additional social-distancing safeguards. R.100 at 49-50, 52. It also requires defendants to implement other basic measures that the CDC recommends for jails, R.100 at 49-51, which the record indicates defendants were not providing prior to this suit. *Id.* at 12-19.

Defendants' challenges to the injunction rest largely on an inaccurate portrayal of the relevant caselaw, the record, and the district court's decision. To take just one example, defendants pervasively assert that the district court based its deliberate-indifference finding solely on the fact that COVID-19 infections are skyrocketing inside the jail. That is false. The court based its conclusion on the following key findings: (1) COVID-19 poses a serious risk to detainees' health and safety; (2) there is virtually universal consensus that social distancing is key to mitigating the spread of COVID-19; (3) defendants have failed to implement and enforce social-distancing measures that are feasible even with the jail's current population; and (4) Junior continues to confine a jail population that is simply too large to allow for necessary distancing and, therefore, to prevent intolerable infection and suffering. R.100 at 37-38. The court noted the skyrocketing rate of infections at the jail—up 994% in the eight days prior to the injunction hearing, *id.* at 34—merely in response to defendants' contentions that the steps they claim to have taken adequately mitigate spread of the virus. *Id.* at 37. Defendants' inaccurate presentation speaks volumes about the strength of their challenges.

And indeed, those challenges are weak. Defendants do not dispute that COVID-19 poses a serious risk of harm to those who contract it. Nor do they deny that they have known—for months—that COVID-19 poses a serious threat of harm to Metro West's detainees. They also do not dispute (and internal memoranda

make clear) that they know social distancing is crucial to stemming the spread of COVID-19. Finally, defendants do not dispute that medically required distancing is currently impossible at Metro West given the number of detainees confined in cramped units. Defendants insist, however, that they cannot be found deliberately indifferent because they have taken steps *other* than enforcing feasible social distancing. But this Court's precedent makes clear that where a deliberate-indifference claim is based on a defendant's failure to take a crucial step, it is no answer that any number of other, less efficacious steps are being taken. Complete inaction in response to a known threat of severe harm, in other words, is not required to establish deliberate indifference. The question is simply whether the failure to take an indisputably critical measure constitutes knowing or reckless disregard. For all defendants' bluster, they ignore this dispositive legal point.

As the district court concluded, plaintiffs will likely establish the requisite disregard here. Again, it is undisputed—and the court found—that defendants have failed to take steps to enforce a feasible level of distancing among detainees and staff. And the consequence of that failure is underscored by the rapid transmission of COVID-19 at Metro West: In just three weeks, the number of infected detainees jumped from 0 to 163, R.100 at 4.

Defendants also assert that the district court erred by not addressing their arguments that plaintiffs failed to (1) comply with administrative-exhaustion

requirements and (2) establish municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). But the court deemed defendants' exhaustion argument waived at this stage, because defendants improperly attempted to raise it by incorporating a separate brief by reference. And the court's refusal to address *Monell* at this stage is immaterial: Junior is plainly a final decisionmaker for the management of the county's jail. And *Monell* is irrelevant to plaintiffs' claim that Junior can be enjoined, under *Ex parte Young*, 209 U.S. 123 (1908), from continuing to enforce state law that blocks the population-reduction efforts necessary to prevent the intolerable threat that COVID-19 poses to detainees.

In short, there is no sound basis to conclude that the district court abused its discretion in crafting an injunction that temporarily mandates minimal but critical safeguards to protect Metro West's detainees from the worst pandemic in a century while the court gives fuller consideration to plaintiffs' claims.

A final opening point: Defendants unsurprisingly cite at every opportunity a motions panel's divided decision granting their request for a stay pending appeal. *See Swain v. Junior*, 2020 WL 2161317 (11th Cir. May 5, 2020). But they never acknowledge that that ruling is not binding on this panel; indeed, this panel is free to alter or vacate that ruling in whole or in part. *See* 11th Cir. R. 27-1(g); *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1253 (11th Cir. 2004); *Jones*

v. United States, 224 F.3d 1251, 1256 (11th Cir. 2000). And it should. As elaborated below, the motions panel's decision—quite possibly due to the extremely rushed proceedings (briefing was completed in less than 48 hours and without oral argument)—rested largely on defendants' inaccurate depiction of the record and decision below. Once the record, decision, and caselaw are properly understood, it is clear the motions panel's decision should not be followed.

ISSUE PRESENTED

Did the district court abuse its discretion in issuing the preliminary injunction?

STATEMENT

A. The COVID-19 Pandemic

COVID-19 is a novel, "highly infectious and easily communicable disease." R.80-21 ¶13. It is thought to spread "from person to person primarily through respiratory droplets," although it can "survive[] on inanimate surfaces for up to three days," further facilitating its spread. *Id.* ¶13; R.80-22 ¶12. COVID-19 is serious and sometimes lethal. Approximately 20% of patients experience "serious … to critical illness," R.80-22 ¶15, which may result in "permanent" and "widespread" damage to major organs. R.80-14 ¶7. And an estimated 1-3% of those infected will die. R.80-22 ¶15. People over 50 and those with certain

underlying health conditions are at even greater risk. *Id.*; R.80-14 ¶3. Among the highest risk populations, the case-fatality rate is as high as 15%. *Id.* ¶4.

There currently is no vaccine or known cure for COVID-19. R.80-14 ¶8. The only known effective way to avoid serious illness and death is to avoid contracting the disease. R.80-16 ¶3. To that end, for months the CDC, in addition to recommending hygienic measures like regular handwashing, has urged "social distancing," meaning "[a]void[ing] close contact" with others. CDC, *How to Protect Yourself & Others*, https://bit.ly/3dacAah (visited May 28, 2020). The CDC has specifically advised staying at least six feet from others, *id.*, but experts have noted that this recommendation may "underestimate the distance, timescale, and persistence over which [COVID-19] … travel[s]," R.80-22 ¶13, and that especially in "enclosed spaces" like correctional facilities, "six feet may not … be enough" because of poor ventilation, R.80-33 ¶5.

Given the contagiousness and seriousness of COVID-19, countries around the world have taken unprecedented steps to require social distancing, including mandating home detention and ordering the closure of businesses, schools, recreational facilities, and other places where people congregate. R.1 ¶28.

B. COVID-19 In Correctional Facilities

"Congregate settings" such as jails are particularly conducive to the spread of COVID-19. R.80-21 ¶16. In such environments, people may "share dining

halls, bathrooms, showers, and other common areas," making "the opportunities for transmission … far greater than normal." *Id.* Jails, moreover, often house individuals with higher rates of underlying conditions that exacerbate the risk of adverse outcomes or death if they contract COVID-19. R.80-31 ¶15; R.1-06 at 2.

On March 23, the CDC issued guidance to correctional facilities on reducing transmission. R.1-06. The CDC Guidance advised facilities to, among other things, ensure free and adequate access to hygiene supplies and ramp up disinfecting practices. *Id.* at 7-10. The CDC further emphasized that "social distancing" "is a cornerstone of reducing transmission," *id.* at 4, and it called on facilities to "[i]mplement social distancing strategies to increase the physical space between incarcerated/detained persons," and put at least "six feet between all individuals, regardless of the presence of symptoms." *Id.* at 11.

C. Conditions At Metro West Prior To This Suit

According to numerous declarations submitted by detainees at Metro West, conditions at the jail prior to this action were at extreme risk for rapid transmission of COVID-19, and defendants had not implemented even basic measures to reduce its spread. The detainees described Metro West as a "petri dish for disease," R.80-23 ¶13, with people "packed into" "filthy" communal living spaces, *id.* ¶3; R.80-25 ¶8, often housing more than sixty people in cramped bunks. R.80-26 ¶7. Detainees noted that the jail setup makes it "impossible" to "stay away from

people," R.80-26 ¶7—indeed, sleeping quarters are so close that detainees can "reach across and touch" adjacent bunks. R.80-25 ¶8.

Detainees also described defendants' widespread failure to maintain basic standards of hygiene and cleanliness in Metro West's housing units. They lacked access to liquid soap, paper towels, and toilet paper. R.81-01 at 41 ¶29; R.81-01 at 46 ¶19 (reporting going "without toilet paper for about six days"). The jail's "trustees"—detainees tasked with cleaning common areas and bathrooms—did not clean many high-touch surfaces like chairs and phones, R.81-01 at 54-55 ¶11, and detainees had no way to disinfect their bunks, belongings, or shared high-touch surfaces and items, *see id.*; R.81-01 at 46-47 ¶21; R.81-01 at 15 ¶5. Trustees also were provided ineffective, and "watered down," chemicals to sanitize surfaces. R.80-27 ¶7; R.80-23 ¶15.

Finally, detainees reported pervasive medical neglect. As the COVID-19 crisis escalated, the jail repeatedly failed to promptly evaluate, treat, or quarantine people exhibiting symptoms. Specifically, declarants described people remaining in crowded dormitories despite "coughing, having fevers, [or being] otherwise ill," R.80-23 ¶¶4-6; R.80-25 ¶7; R.80-26 ¶4, and detainees returning from medical housing "coughing, hacking, and dirty," R.80-23 ¶13. Detainees also waited days in the general population after submitting requests for medical attention, despite exhibiting COVID-19 symptoms. R.80-25 ¶5; R.80-26 ¶6. As one example, it

took almost a week for jail staff to transfer a detainee with a 103° fever from his crowded unit to a hospital. R.80-23 ¶5. Detainees, especially those considered high-risk because of age or underlying health conditions, were "terrified" and feared that they would "end up dead." R.80-24 at ¶2.

D. This Lawsuit

1. Complaint and TRO proceedings

On April 5, seven pretrial detainees filed this putative class action against Miami-Dade County and Junior, the director of the Miami-Dade Corrections and Rehabilitation Department. The named plaintiffs—who all have health conditions that put them at high-risk of serious illness or death if they contract COVID-19, R.1 at ¶¶9-15—allege that, in violation of the Fourteenth Amendment, defendants' response to the COVID-19 pandemic reflects deliberate indifference to the substantial risk that the infection poses to their health and safety. Plaintiffs seek injunctive relief requiring defendants to take reasonable steps to mitigate the spread of COVID-19, including implementing social-distancing safeguards feasible with the jail's current population level, and reducing Metro West's population to a level that allows for adequate distancing. They further seek habeas relief for a subclass of medically vulnerable detainees who are at an especially high risk of harm from COVID-19. (The district court denied preliminary relief on the habeas claim, R.100 at 44-49, and it is not at issue here.)

Together with their complaint, plaintiffs filed a motion for a temporary restraining order and preliminary injunction, and submitted the declarations described above. Based on this preliminary evidence, the district court entered a 14-day TRO. R.25. The TRO required defendants to implement practices generally consistent with CDC guidance, including "provid[ing] adequate spacing of six feet or more" between detainees "to the maximum extent possible considering Metro West['s] … current population level." *Id.* ¶4. The court subsequently extended its TRO for an additional six days. R.52.

2. Preliminary-injunction proceedings

Three weeks after this case was filed, the district court held a two-day preliminary-injunction hearing. Defendants submitted declarations from jail officials describing updated measures at the facility. These declarations acknowledged that defendants had been aware for almost two months of the "inherent danger" that COVID-19 poses to Metro West's detainees and staff. R.65-01 ¶49. The declarations stated that defendants began modifying facility policies around that time, *id.* ¶52, and that they continued to undertake additional measures after this suit was filed—for instance, "staggering" the configuration of bunk beds, instructing detainees to sleep head-to-toe, R.65-06 ¶14, and implementing "slightly staggered" mealtimes, R.65-02, ¶¶25-26. Defendants'

evidence consisted almost entirely of descriptions of general policies, *e.g.*, R.65-01; R.65-02.

Plaintiffs submitted, in addition to the seven declarations filed at the outset of the suit, twenty supplemental declarations, recounting conditions at the jail. While the supplemental declarations described some changes since the lawsuit's filing (and the TRO's issuance), they disputed defendants' portrayal of conditions at the jail. And they emphasized the continued impossibility of maintaining social distance inside.

In particular, detainees continued to be forced into "close contact at all times." R.81-01 at 5 ¶¶25; *see id.* at 34 ¶5; R.81-03 ¶23. Even with newly staggered bunks and "head-to-toe" sleeping arrangements, beds remained "about two feet" apart, R.81-01 at 34 ¶¶6-7; *id.* at 27 ¶7, and detainees could still "touch the person sleeping next to [them]," R.81-03 ¶24. Detainees were "clustered together" when lining up to receive meals or medication, R.81-01 at 56 ¶31, and "literally on top of other people," while eating, *id.* at 41 ¶23; R.81-04 ¶14. With "60 guys sharing one bathroom," R. 81-01 at 40 ¶20, people also found it "impossible to practice social distancing" in bathrooms, R.81-05 ¶16; R.81-01 at 12 ¶10, especially during "peak periods," because toilets are "just a foot apart," have "no doors," and are separated by a "short" partition, R.81-01 at 40 ¶¶19-20.

Sinks are "barely separated" and the lack of separation between showers causes water to "splash[] from side to side across" them. R.81-01 at 4-5 ¶¶21-22.

Detainees were additionally forced to "st[and] shoulder-to-shoulder" three times daily for headcount, R.81-01 at 4 ¶18, and while using jail phones that are "just a foot apart," R.81-01 at 27 ¶11, 5 ¶27; R.81-04 ¶16. They also had to line up "right in each other's faces" to enter and leave the outdoor yard for mandatory recreation, R.81-01 at 56 ¶32, 74 ¶9.

Areas around the elevators are "packed with prisoners from different cells, often handcuffed to [nearby] bench[es] for hours." R.81-01 at 61 ¶9. Guards take detainees "to medical in groups of 8 or 10 people," and in the clinic, people "sit[]… shoulder-to-shoulder" while awaiting treatment. *Id.* at 56 ¶33. Because there is "no kind of social distancing" at the medical clinic, R.81-04 ¶23, some detainees reported that they "stopped going" for necessary treatment, R.81-01 at 20 ¶13, as they are "too afraid of being exposed to" COVID-19 by "people from outside [their] cell," *id.* at 73-74 ¶6.

Detainees additionally reported "mass confusion" among jail staff about how distancing should be accomplished, R.81-01 at 41 ¶26, meaning such measures are frequently not implemented or enforced, including in common areas, *e.g.*, *id.* at 5 ¶28; *id.* at 12 ¶8, in the medical clinic, *id.* at 73-74 ¶6, and while sleeping, R.81-04 ¶12. And even where detainees exhibited COVID-19 symptoms, jail staff failed to

ensure adequate distancing. For example, while en route to receive medical treatment, detainees were "smushed together in [a] van" without masks. R.81-03 ¶¶9-10. Some later tested positive for COVID-19. *Id.* ¶18. There were also multiple accounts of detainees being brought to new cells, or remaining in the general population, while awaiting COVID-19 test results, sharing the same communal facilities, without jail officials warning their healthy cellmates about potential exposure risk. R.81-05 ¶¶39-46; R.81-01 at 65-66 ¶¶5-6.

Plaintiffs also submitted declarations from four medical experts, attesting to the imminent danger facing those confined at Metro West, even as conditions were described by defendants. R.80-35 ¶¶17-18; R.80-34 ¶10-14. The experts made clear that "ensuring all detainees in Metro West … can socially distance … is the only way to prevent further, essentially uncontrolled, spread" of COVID-19. R.80-35 ¶19; R.80-34 ¶13. They all agreed that other measures "do not eliminate the need for social distancing," R.80-34 ¶13, given the "crowding, dormitory-style sleeping, poor ventilation, [and] proportion of vulnerable people detained." R.80-35 ¶11. The experts further concluded that an "urgent reduction in population in this facility is necessary" to adequately "protect[] against spread" of COVID-19. *Id.* ¶32; R. 80-33 ¶8.

Finally, the district court received a report from two independent infectious-disease experts (one recommended by each side) whom the court commissioned to

inspect Metro West. Critically, over plaintiffs' objections, R.133 at 7:11-8:19, defendants were directed to show the inspectors only a portion of the jail's housing units and were given advance notice about which areas would be inspected, R.52 at ¶4. Afterwards, plaintiffs submitted declarations attesting that defendants hastily made changes in the designated areas, "really put[ting] on a show" for the inspectors, R.81-04 ¶34. For instance, detainees reported that defendants painted over mold, provided new masks and higher-quality soap, respaced furniture, and moved detainees out of the units slated for inspection. *Id.* ¶¶34-37; R.81-01 at 60 ¶2, *id.* at 75 ¶¶17-19.

Yet even with the advance warning and "show," the experts found cause for concern. In particular, although the experts concluded that jail staff were "doing their best," and that the inspected units "appeared clean," they found that Metro West's "high census …, in addition to the dormitory style housing units, makes it impossible to follow CDC guidance for social distancing." R.70-01 at 1-2. The experts noted that "almost all of the units inspected (except medical housing) were too overcrowded to allow for adequate social distancing." *Id.* at 1. And while the experts noted "staggered" bunks and changes to the setup of communal eating and recreational areas, they observed that "distancing is not able to be maintained." *Id.* at 1. The experts further noted "congregation around tables and … televisions, that violated social distancing guidelines." *Id.* The experts accordingly concluded that

Metro West required an "urgent decrease in the population density of the housing units" to "allow for adequate social distancing" and adequately mitigate transmission of COVID-19. *Id.* at 2.

3. Preliminary injunction

Based on the foregoing, the district court issued a preliminary injunction, ruling that plaintiffs clearly established the four requisite elements for relief. As to likelihood of success on plaintiffs' Fourteenth Amendment claim, the court determined that, even "setting aside the numerous factual disputes as to the consistency and efficacy" of the measures defendants have implemented, plaintiffs will likely prove that defendants were deliberately indifferent to the serious risk of harm plaintiffs face. R.100 at 37. Specifically, the court found several important facts: (1) COVID-19 poses an immediate, objectively serious risk of harm to Metro West's detainees, *id.* at 5, 35, 38; (2) measures other than social distancing are insufficient to stop the spread of COVID-19, *id.* at 34; (3) defendants have not tried to achieve the level of distancing feasible with the current jail population, *id.* at 11-12, 37-38; and (4) the jail continues to detain too many people to allow for medically required distancing, *id.* at 6-8, 37-38.

On the remaining preliminary-injunction factors, the district court found that absent injunctive relief, "COVID-19 will continue to spread throughout Metro West," causing plaintiffs irreparable injury. R.100 at 41-42. It also determined

that this "threatened injury … outweighs the damage to Defendants caused by an injunction requiring Defendants to comply with the CDC Guidance," finding that defendants had "not offered any evidence as to why the administrative burden resulting from compliance … outweighs the threat of serious illness or death of inmates that will result from the spread of [COVID-19] throughout Metro West." *Id.* at 43. Finally, the court found that an injunction will advance the public interest because "measures to reduce the spread of [COVID-19] in Metro West … reduc[e] the chance of community spread in Miami-Dade County." *Id.*

The preliminary injunction largely extended the TRO's provisions for 45 days. The only new requirements were for defendants to provide the court with "weekly reports containing the current population" of Metro West and to submit "a proposal outlining steps Defendants will undertake to ensure additional social distancing safeguards." *Id.* at 52.[1]

[1] After the district court's preliminary injunction, plaintiffs learned that at least one detainee, Charles Hobbs, died after manifesting COVID-19 symptoms. *See* Notice at 4, No. 20-11622 (11th Cir. May 4, 2020). According to declarations submitted by witnesses, Hobbs received little medical attention for days despite "visible trouble breathing," coughing, and a high fever. R.109-01 ¶¶5-8. Jail staff had abandoned their stations inside the unit housing sick detainees. R. 109-02 ¶7. When a nearby detainee sought help for Mr. Hobbs, a corporal in the hallway responded "not my problem" and walked away. *Id.* ¶10. Detainees began "pounding on the door, trying to get a guard's attention" when Mr. Hobbs became unresponsive. After considerable delay, jail staff removed Mr. Hobbs, *id.* ¶¶13-14, and eventually informed his cellmates of his death. R.109-01 ¶14.

Defendants appealed and sought an emergency stay of the injunction, which a divided motions panel granted. *See Swain*, *supra*.

E. Standard Of Review

This Court formally reviews a district court's grant of a preliminary injunction for "abuse of discretion," including reviewing legal conclusions de novo and factual findings for clear error. *Jones v. Governor of Florida*, 950 F.3d 795, 806 (11th Cir. 2020) (per curiam). In practice, however, review of preliminary injunctions is "extremely narrow," because of "the expedited nature of preliminary injunction proceedings, in which judgments about the viability of a plaintiff's claims and the balancing of equities and the public interest are the district court's to make." *Id.* (quotation marks, citations, and alterations omitted).

SUMMARY OF ARGUMENT

The district court properly granted a preliminary injunction to protect the lives of Metro West detainees while it further adjudicates plaintiffs' claims. Both the court's conclusion that plaintiffs satisfied each of the preliminary-injunction factors, and the scope of the injunction it issued, were amply justified by the record, and not remotely an abuse of discretion.

A. The court correctly concluded that plaintiffs will likely prove that, in violation of the Fourteenth Amendment, defendants were deliberately indifferent to a serious and known risk of harm. Based on the extensive evidence before it, the

court found that COVID-19 poses a substantial risk of serious, objectively intolerable harm to Metro West's detainees, that defendants know of that risk, and that they have recklessly disregarded it. On the last point, the court found that defendants know social distancing is essential to reducing transmission of COVID-19, and that this knowledge engendered two independent bases for finding deliberate indifference: (1) defendants have not enforced critical social-distancing measures that are feasible even with the jail's current population, and (2) Junior continues to enforce state law requiring the detention of those at Metro West, despite awareness that the current population level makes social distancing needed to mitigate transmission of the disease impossible.

Defendants do not challenge much of this analysis, arguing only that they have adequately responded to COVID-19. In that regard, defendants raise three principal arguments: *First*, they insist that they have undertaken a number of *other* measures to address COVID-19's threat and that such efforts preclude a deliberate-indifference finding. *Second*, they assert that the district court found them deliberately indifferently based solely on their failure to prevent the introduction and spread of COVID-19 at the jail. *Third*, they argue that they cannot be found deliberately indifferent for failing to reduce the jail population because they lack the power under state law to release individuals subject to a state-court detention order.

Each argument is wrong. As to the first, this Court has held that a "decision to take … less efficacious" measures can constitute deliberate indifference. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). Here, defendants have failed to implement and enforce the one measure—social distancing—that medical experts agree is essential to reduce transmission of COVID-19. That failure is significant. As the district court found, "other measures—absent social distancing—are not alone sufficient" to abate the intolerable risk of harm. R.100 at 34. Defendants' egregious failure, in short, is not salvaged by the fact that they have taken other, far less effective steps.

Defendants' second argument rests on an inaccurate portrayal of the decision below. While the court rightly cited the skyrocketing number of COVID-19 cases at the jail in response to defendants' claim that the other efforts they have undertaken are sufficient to control the outbreak, its deliberate-difference finding rested on their failure to enforce necessary distancing within the jail. There is no conceivable error with the court's factual findings regarding social distancing; defendants ignore those findings and make no real attempt to show that they are clear error.

As for the third argument, defendants cite no authority for the proposition that a prison official's absence of state-law authority to take an action precludes a finding that the official has acted with deliberate indifference to a known risk of

harm. Clearly, if a prison official were told that a gas line were about to explode at the jail, and she had the physical means to release detainees but declined to do so because of state-law constraints, she could be found to have knowingly or recklessly disregarded an intolerable risk of harm. While it may be appropriate to allow the official to assert lack of authority as a defense in a *damages* suit against her in her *personal* capacity, no one could seriously doubt that a federal court would be empowered to enjoin the official to alleviate the intolerable risk. Moreover, under *Ex parte Young*, plaintiffs have properly sued Junior, in his official capacity as enforcer of state-court detention orders (i.e., as an agent of the state), to enjoin the continuing constitutional violation. The evidence establishes that continued confinement of Metro West's detainees in conditions giving rise to an objectively intolerable risk reflects deliberate indifference to that risk.

Defendants further argue that the district court erroneously declined to address their exhaustion defense. But the court deemed that defense waived for purposes of the preliminary-injunction motion, because defendants' opposition to that motion improperly attempted to incorporate arguments from another filing by reference. That routine procedural ruling was assuredly not an abuse of the court's discretion to manage proceedings before it.

Finally, defendants argue that the district court erroneously declined to address whether plaintiffs will likely establish municipal liability under *Monell*.

Monell, however, is irrelevant to plaintiffs' claim against Junior for his role in enforcing state law that requires detaining too many people to abate the serious risk of infection at Metro West. And with respect to defendants' failure to implement and enforce additional social-distancing measures, Junior clearly is a final decisionmaker whose actions are attributable to the county.

B. The district court did not abuse its discretion in concluding that the remaining preliminary-injunction factors favor plaintiffs. Plaintiffs demonstrated that absent relief, they will likely suffer irreparable injury—including potentially irreversible health consequences or even death—whereas defendants offered zero evidence that the injunction would cause them any harm, despite having been subject for weeks to a TRO containing most of the same provisions. Plaintiffs also established that injunctive relief is in the public interest, in part because an unmitigated outbreak at Metro West threatens the health of the wider community.

C. The district court fashioned an appropriate, narrowly drawn injunction, requiring measures that were all designed to address the threat that COVID-19 poses to plaintiffs. Numerous other federal courts have issued like injunctions in recent days. Defendants attempt to scare the Court by asserting that the injunction is the first step towards a release order. Of course, if the Constitution requires such an order, defendants can have no legitimate objection. But in any event, release is not at issue here. Indeed, the district court is powerless

to enter a release order—only a three-judge court, convened after several additional requirements are satisfied, can issue such relief.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

A district court may grant preliminary relief where plaintiffs establish that they are "likely to succeed on the merits" and "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The district court did not abuse its discretion in deeming these elements satisfied, or in crafting its injunction.

A. The District Court Correctly Held That Plaintiffs Will Likely Prevail On Their Claims

The Supreme Court has explained that "[t]he Constitution does not mandate comfortable prisons …, but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation marks omitted). When the government "strip[s] [prisoners] of virtually every means of self-protection and foreclose[s] their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* at 833. The Fourteenth Amendment, like the Eighth Amendment, requires the government to provide those in its

custody "adequate food, clothing, shelter, and medical care," and to "take reasonable measures to guarantee the[ir] safety." *Id.* at 832.

To establish a violation of this constitutional mandate, plaintiffs must prove that (1) they face an objectively serious risk of harm and (2) defendants have exhibited "deliberate indifference" to that risk. *Lane v. Philbin*, 835 F.3d 1302, 1307-1308 (11th Cir. 2016). The second element requires showing that defendants are subjectively aware of the risk and disregard it by conduct more culpable than "'mere negligence.'" *Id.* at 1308. As to the requisite disregard, this Court has said that, "[o]bjectively, the official must have responded to a known risk in an unreasonable manner, in that he knew of ways to reduce the harm'[,] but knowingly or recklessly declined to act." *Marbury v. Warden*, 936 F.3d 1227, 1233 (11th Cir. 2019) (per curiam).[2]

The district court concluded that plaintiffs will likely satisfy each element. Defendants do not dispute that COVID-19 poses an objectively serious risk of harm or that they are aware of the risk. They challenge only the district court's

[2] Whether presumptively innocent pretrial detainees must show subjective deliberate indifference is the subject of a circuit split. It appears this Court has concluded that they must. *See Dang ex rel. Dang v. Sheriff, Seminole County*, 871 F.3d 1272, 1279 n.2, 1279-1281 (11th Cir. 2017); *Taylor v. Hughes*, 920 F.3d 729, 733 (11th Cir. 2019). Although plaintiffs maintain that detainees need not show subjective indifference, that issue is immaterial here, because defendants are subjectively aware of the risk COVID-19 poses. *Infra* p.25.

finding that they have failed to adequately respond. But that finding is unassailable.

1. COVID-19 poses an objectively serious risk of harm

The district court held that plaintiffs will likely prove that they face an objectively serious risk of harm, noting that the gravity of the threat COVID-19 poses is "beyond peradventure." R.100 at 5. That conclusion, uncontested here, is correct. As discussed, *supra* pp.6-7, COVID-19 is a highly contagious disease that causes serious illness in 20% of people who contract it and has an overall estimated mortality rate of 1-3%, with higher rates for people who—like plaintiffs—have serious underlying health conditions. There is also no dispute that COVID-19 poses an imminent and substantial risk of harm to Metro West's detainees; indeed, the disease has been spreading rapidly within the jail for weeks, already appearing to claim at least one life, *supra* p.4, 17 n.1.

2. Defendants are aware of the risk that COVID-19 poses

The district court found that defendants are subjectively aware of the risk COVID-19 poses to Metro West's detainees. R.100 at 38-39. Again, defendants rightly offer no challenge; indeed, they have acknowledged the "inherent danger" that COVID-19 poses to those in their custody. *Supra* p.11.

3. Defendants have recklessly disregarded the risk

The district court also found that defendants recklessly disregarded the risk COVID-19 poses to Metro West's detainees by failing to ensure adequate social distancing within the jail. R.100 at 34, 38-39. The court observed the near-universal consensus among experts that "social distancing is a critical step in preventing or flattening the rate of contagion," *id.* at 37, and found that other measures will not suffice to reduce the spread of COVID-19 if distancing is not also achieved, *id.* at 34. The court found reckless disregard in two ways (1) defendants' failure to implement distancing measures feasible with the jail's current population, *id.* at 37-38, and (2) Junior's enforcement of pretrial detention orders when the jail population size precludes adequate distancing, R.100 at 37-38. These findings are reviewed for clear error. *Thomas v. Bryant*, 614 F.3d 1288, 1312-1313 (11th Cir. 2010). Defendants show no such error here.

a. Failure to implement additional social-distancing measures feasible with the current jail population

Consistent with a near-universal consensus, R.100 at 6-7, the district court found that social distancing is essential to reducing the spread of COVID-19 at Metro West, *id.* at 34. As the expert opinions it relied on explained, distancing is "crucial," R.80-33 ¶5. Indeed, distancing is "the essential, irreplaceable element of any plan to reduce the transmission of COVID-19." R.80-34 ¶15. The CDC guidance for correctional facilities is in accord, stating that distancing "is a

cornerstone of reducing transmission." R.1-06 at 4. And while that guidance recognizes that "distancing is challenging … in correctional and detention environments," it advises jails to implement measures such as "[s]tagger[ing] meals" and "[e]nforc[ing] increased space between individuals in holding cells, as well as in lines and waiting areas such as intake." *Id.* at 4, 11. The CDC does not "require all facilities to adopt one specific strategy over another," Defs.' Br. 34, but it does clearly prescribe distancing to the maximum extent feasible, R.1-06 at 11. In light of this, the district court rightly gave no weight to defendants' expert, R.100 at 7 n.6, who opined that "widespread use of masks ameliorates to a substantial extent the need to maintain strict social distancing," R.65-10 ¶18.

Plaintiffs' undisputed evidence further supports the district court's deliberate-indifference finding, by showing that defendants *know* social distancing is critical. The CDC issued the guidance just cited over a month before the preliminary injunction issued and defendants say they "immediately reviewed" that guidance. Defs.' Br. 7. In that same timeframe, Junior told Metro West staff in an internal memorandum that it was "[n]ow, more than ever … important that everyone practice strict social distancing even while wearing [a] protective mask." R.65-25 at 15; *see* R.65-25.

Despite this, defendants neither adopted nor implemented feasible social-distancing measures in connection with key aspects of Metro West's operations.

R.100 at 12-15, 37-38. For instance, the court credited detainee declarations noting, among other things, that detainees are forced to stand shoulder-to-shoulder three times a day for headcount and forced into close proximity when using the phones and bathrooms, R.100 at 12-14, 37-38; *see, e.g.*, R.81-01 at 4-5 ¶¶18,27; R.81-04 ¶¶13, 16, that detainees are still "literally on top of other people" when they eat, R.100 at 15, 38; *see, e.g.*, R.81-01 at 41 ¶23, and that detainees are transported to, and forced into close proximity when at, the medical clinic, R.100 at 14-15, 38. The court's findings are also supported by the inspection report, which noted "congregation around tables, and around televisions, that violated social distancing guidelines." R. 70-1 at 1. In sum, there is a "lack of social distancing" at Metro West. R.100 at 35.

Defendants offered *no explanation* for failing to enforce feasible social distancing. Given the importance of distancing, this unexplained inaction is "grossly inadequate," *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999), and therefore constitutes deliberate indifference—as courts have recently found in similar circumstances, *see, e.g.*, Mem. Op. 14 (ECF No. 51), *Banks v. Booth*, No. 20-00849 (D.D.C. Apr. 20, 2020) (finding deliberate indifference because "social distancing" was "slow to be instituted and ha[d] not been fully operationalized").

Defendants assert, however (Br. 2), that the district court "credit[ed] the overwhelming evidence that [they] have taken … substantial steps to respond to

the COVID-19 pandemic." And they insist (Br. 26-29) that they cannot therefore be found deliberately indifferent. In other words, defendants posit that they cannot be deemed deliberately indifferent for failing to implement feasible social-distancing measures because they have taken *other* steps to address COVID-19. The motions panel accepted that argument. *Swain*, *supra*, at *4. But it is wrong.

As a threshold matter, it is patently untrue that the district court "credited" defendants' evidence or made "findings that defendants, on their own, … enacted sweeping measures to protect inmates from the COVID-19 pandemic." Defs.' Br. 3. The court expressly reserved judgment about most of the factual disputes regarding defendants' consistency in implementing the measures they announced, R.100 at 37, while explicitly questioning whether defendants, absent this lawsuit, would have undertaken a number of the changes they note, R.100 at 31-32.

That aside, defendants' argument misunderstands the deliberate-indifference inquiry. As explained, *supra* p.26-27, it is near-universally agreed that social distancing is essential to mitigating the threat of COVID-19. And this Court's precedent rejects defendants' argument that it cannot constitute reckless disregard of a known risk to fail to take *the single most important step to reduce that risk*, so long as some other, far less effective, steps are taken instead. Specifically, the Court has held that a "decision to take … less efficacious" measures can constitute deliberate indifference. *McElligott*, 182 F.3d at 1255. That precedent is not only

binding but also sound: Defendants' argument would mean they could, for example, withhold a low-cost COVID-19 vaccine as long as they were taking some measures to address the disease—even if they knew that those measures were far less effective and would allow greater sickness and death. The law does not condone such an inhumane result.

Defendants also argue repeatedly (*e.g.*, Br. 1, 2, 17, 33) that the district court collapsed the "subjective and objective components of the deliberate indifference inquiry," by finding them deliberately indifferent for failing to "prevent the introduction and spread of a viral infection into Metro West," Defs.' Br. 31. The motions panel agreed, writing: "The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk." *Swain*, *supra*, at *4.

That conclusion rests on a misreading of the district court's opinion and on defendants' misrepresentations to the motions panel about the record. The district court noted the skyrocketing infections only in response to defendants' assertions that their actions were adequate to mitigate the spread of infection even absent implementing and achieving meaningful distancing, and specifically to underscore that the data bear out the experts' consensus: In a congregate environment like the jail, distancing is essential. R.100 at 37. As explained, the court's deliberate-indifference finding rested on more than the evidence of actual harm; it rested on

three key factual findings: (1) COVID-19 poses a serious risk to health, (2) social distancing is essential to reasonably mitigate that risk, and (3) defendants failed to take feasible steps (principally implementing and enforcing additional distancing in specific areas) to avoid the known risk.

The motions panel also accepted defendants' assertion (Br. 21-22) that the district court's deliberate-indifference finding relied only on "lapses in enforcement of social-distancing policies." *Swain*, *supra*, at *5. That, too, is wrong. As discussed, *supra* p.27-28, the district court pointed to, and the evidence shows, failures to adopt social-distancing policies relating to key, pervasive aspects of jail life, such as thrice-daily headcounts, telephone usage, dayroom congregating, the medical clinic, prisoner transport, and recreation. R.100 at 12-19, 37-39.

Finally, defendants cite (Br. 30-31) cases that they say "recognize[d] that in these times jailors have neither an obligation nor the ability to reduce the risk of COVID-19 to zero." That is obviously a strawman, as the district court here did not hold defendants to any such standard. In any event, this case is unlike several that defendants cite. For instance, in *Plata v. Newsom*, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020), the plaintiffs agreed at oral argument that the plan put forward by California and a receiver *would* allow for social distancing sufficient to cure the constitutional violation. *Id.* at *7, *11. The *Plata* court nonetheless noted that it

would continue to oversee the defendants' response to COVID-19, and that if the defendants failed to follow through on some efforts, such as ensuring adequate distancing, it might later find deliberate indifference. *Id.* at *9.

As for *Sacal-Micha v. Longoria*, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020), the court there rejected an individual detainee's habeas petition on the grounds that (1) the detainee relied only on "general information" about COVID-19 rather than information specific to his facility, (2) the evidence reflected that ICE had "provided constant medical attention to" the detainee, and (3) the facility had no COVID-19 cases. *Id.* at *2, *5. None of that is true here. And in *Albino-Martinez v. Adducci*, 2020 WL 1872362 (E.D. Mich. Apr. 14, 2020), the court found that plaintiffs had not satisfied the objective component of a deliberate-indifference claim, *id.* at *4; here, that element is not disputed.

Finally, *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020), which defendants cite several times in their brief, was a stay decision that, like the stay decision here, was issued under rushed proceedings. And the merits panel for that appeal has recently issued an order stating: "Because of the alarming speed the COVID-19 virus is spreading in Wallace Pack Unit, the Court expedites further the oral argument of this appeal" from June 4 to May 28. Order, *Valentine v. Collier*, No. 20-20207 (5th Cir. May 22, 2020). Earlier this week, the panel also directed the defendants to "be prepared … to give the court up-to-date figures on … [the]

numbers of infections, hospitalizations, and deaths," and "up-to-date information on all measures being undertaken at the Wallace Pack Unit to protect inmates and staff from COVID-19 and to treat inmates who test positive for COVID-19." Letter to Counsel (May 25, 2020). (All this underscores the reasons to hesitate before following a hastily issued motions-panel decision—reasons that are of course embodied in this Court's rule providing that a motions-panel decision does not bind the merits panel and can be vacated in whole or in part by that panel, 11th Cir. R. 27-1(g), *supra* p.5-6.)

In any event, numerous other courts have found that plaintiffs would likely prevail in establishing that detention officials have exhibited deliberate indifference in similar circumstances, including as a result of the officials' failure to take sufficient steps to implement social distancing where possible. *See, e.g.*, *Cameron v. Bouchard*, 2020 WL 2569868, at *21-25 (E.D. Mich. May 21, 2020), *motion to stay denied*, No. 20-1469 (6th Cir. May 26, 2020); *Wilson v. Williams*, 2020 WL 1940882, at *8 (N.D. Ohio Apr. 22, 2020), *application for stay denied*, No. 19A1041 (U.S. May 26, 2020); *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *22 (D. Conn. May 12, 2020); *Carranza v. Reams*, 2020 WL 2320174, at *10 (D. Colo. May 11, 2020); *Savino v. Souza*, 2020 WL 2404923, at *8-10 (D. Mass. May 12, 2020); *Malam v. Adducci*, 2020 WL 1672662, at *12 (E.D. Mich. April 5, 2020); Order 13-18, *Ahlman v. Barnes*, No. 20-cv-00835 (C.D. Cal. May 26,

2020). The decision below emphasizing the essential role of social distancing is thus far from an outlier and certainly involved no clear error.

b. Ongoing confinement at current population level despite awareness of the impossibility of adequate social distancing at that level

The district court separately found that plaintiffs will likely establish that Junior has exhibited deliberate indifference by enforcing plaintiffs' ongoing confinement when the jail's population precludes adequate distancing. R.100 at 37-38. Again, that finding is well supported. As the evidence showed, unmitigated spread of COVID-19 poses an intolerable risk of serious harm, and Junior is aware of that risk. *Supra* p.25. He is also aware that social distancing is critical. *Supra* p.27. Finally, he knows that distancing necessary to mitigate the risk to a tolerable level can be achieved only through reducing Metro West's population. *See* R.70-2 at 1; R.65-01 at ¶64. Despite this subjective awareness, Junior (the enforcement agent for the state) continues to enforce state law, keeping people in conditions that pose an intolerable risk of serious illness and death.

Defendants argue (Br. 32), and the motions panel seemed to agree without explanation (*Swain*, *supra*, at *4), that Junior cannot be held responsible for the known risk because he lacks the authority to release individuals detained at Metro West without a court order. On this view, Junior can only be found deliberately indifferent for failing to take actions within his state-law authority. Defs.' Br. 32.

Defendants, however, cite no authority that supports that proposition. They cite (Br. 32) only *Bryan v. Jones*, 530 F.2d 1210, 1215 (5th Cir. 1976) (en banc), but *Bryan* addressed whether a jailor, in a damages case, can establish an immunity defense to a Fourth Amendment false-imprisonment claim when he acts reasonably and in good faith. *Id.* at 1213-1215. That case has no bearing on whether a federal court can enjoin Junior, both because this is neither a damages case nor a Fourth Amendment case. Rather, it is an injunctive-relief case based on Junior's failure to release people within his custody who are exposed to a known and objectively intolerable risk of harm, which plaintiffs claim (and the court found) exhibits deliberate indifference in violation of the Fourteenth Amendment.

In this context, failing to take an action one knows to be necessary to prevent serious harm—even if outside one's legal authority—can establish the requisite intent for deliberate indifference. A few examples illustrate the certainty of that basic principle. Suppose a jailer learned a levee was about to break and flood a jail, killing everyone detained inside. If the jailer nonetheless leaves the detainees locked inside, she would be acting with deliberate indifference even if state law prohibits her from freeing the detainees. Such a jailer is aware of a serious (potentially lethal) risk of harm and has disregarded obvious actions (i.e., release) to abate the risk. And a federal court could enjoin her to save prisoners from drowning. To take another example, suppose a state law provided that a jailer can

obtain food and water for a jail only from an approved vendor, and that a supply-chain disruption prevented approved vendors from providing food and water to the jail. If the jailer threw up her hands and failed to provide detainees with food or water, she could be found deliberately indifferent—that is, to have knowingly or recklessly disregarded a known risk of serious harm—notwithstanding the existence of the state law. Again, a federal court could enjoin the jailer to provide food and water.

To be sure, in a case that seeks to hold a jailer personally liable for *damages*, it may well be appropriate or necessary to consider whether the jailer lacked state-law authority to take the relevant action. But this case seeks prospective relief only. As binding precedent shows, that distinction is an important one. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 403-404 (5th Cir. 1980) (granting prospective declaratory relief but denying damages award against individual officials who relied on unconstitutional statutory scheme, because an official who acts "in the good faith performance of his official duties, … enjoys immunity from personal liability for damages.").

Plaintiffs are not aware of any case in American history holding that a federal court lacks equitable power to remedy an objectively intolerable risk of illness and death solely because the state agent in charge of the welfare of detainees lacks state-law authority to take actions necessary to save lives. Indeed,

the only Supreme Court case ordering prisoner release as a remedy for conditions-of-confinement violations ordered relief against the state official enforcing detention, for violations outside that official's state-law authority to remedy. *See Brown v. Plata*, 563 U.S. 493, 526-529 (2011) (granting relief against the California governor, among others, to require prisoner release to alleviate systemic conditions-of-confinement violations that stemmed from overcrowding, budget shortfalls, lack of legislative will, and inadequate infrastructure).

Even if a jailer's scope of authority were relevant to determining whether the *jailer* has exhibited deliberate indifference in some personal sense, the district court's finding would still be sound. The evidence showed that Junior's state-law obligation to enforce state-court detention orders has created crowded conditions during a viral pandemic that pose an extraordinary threat to the health and lives of the individuals housed at Metro West. R.100 at 6-8, 37-38, 48. But, of course, plaintiffs cannot sue the state for directing Junior to place them at intolerable risk. *See* U.S. Const. amend. XI. They have therefore sued Junior, in his official capacity as enforcer of state-court detention orders, under the well-established doctrine of *Ex parte Young*. That doctrine permits suits against state officers to enjoin ongoing violations of federal law. *See Florida Association of Rehabilitation Facilities, Inc. v. Florida Department of Health & Rehabilitation Services*, 225 F.3d 1208, 1219 (11th Cir. 2000). As this Court has held, a proper state defendant

includes any person who, "by virtue of his [or her] office, ha[s] some connection with the … conduct complained of." *Luckey v. Harris*, 860 F.2d 1012, 1015-1016 (11th Cir. 1988) (quotation marks omitted).

Junior has more than "some connection" to the continued confinement of plaintiffs in objectively intolerable conditions; on behalf of the state, he holds the keys to the jail. It is only in this capacity that the necessary relief could be ordered against Junior. (As discussed *infra* p.56, because of the Prison Litigation Reform Act, even though plaintiffs clearly showed the subjective awareness necessary for deliberate indifference on their underlying claims, the district court could not order the population reduced to remedy this violation; plaintiffs face additional steep hurdles in achieving a release order as a *remedy* for the constitutional violation.)

Other courts have held in analogous contexts that *Ex parte Young* permits injunctive-relief suits against county sheriffs, in their official capacities, for their role in enforcing state-court orders that cause federal constitutional violations. For example, in *McNeil v. Community Probation Services, LLC*, 945 F.3d 991 (6th Cir. 2019), the court upheld a preliminary injunction prohibiting a jailer from enforcing unconstitutional state-court bail orders after noting that "there are plenty of cases allowing injunction actions like this one" under *Ex parte Young*, where the county sheriff merely acts as an agent to enforce unconstitutional state directives, *id.* at 995-996. Similarly, in *Moore v. Urquhart*, 899 F.3d 1094 (9th Cir. 2018)

(subsequent history omitted), the court held it was "unnecessary" to decide whether a county sheriff acted on behalf of the county or the state in executing allegedly unconstitutional writs of restitution pursuant to state law, because "[a]ctions under *Ex parte Young* can be brought against both state and county officials" and "[t]he only issue" was whether the sheriff had "at least 'some connection' to enforcement of the allegedly unconstitutional eviction procedure," *id.* at 1103. Given his role in executing the writs, he did. *Id.* This case is no different: Junior is the direct enforcer of state-court orders that mandate detention at levels that Junior knows expose plaintiffs to an objectively intolerable risk of infectious disease and death, and he therefore is the proper defendant for claims seeking an injunction under *Ex parte Young*.

Finally, it is important to emphasize that if defendants were right that a suit against Junior is not proper because he lacks the state-law authority to release people, then individuals in plaintiffs' position would be denied *any* judicial redress for an objectively serious risk of harm that their custodians are fully aware of. It cannot be that the government can subject individuals to known conditions that society deems intolerable and inhumane without any recourse solely because state law does not permit the jailer to take the only action that overwhelming evidence establishes is sufficient to mitigate the harm.

4. To the extent plaintiffs need to satisfy *Monell*, they will likely do so

Defendants next assert (Br. 35-39) that the district court erred by declining to address (R.100 at 33) whether plaintiffs will likely establish municipal liability. Under *Monell*, a municipality cannot be held liable under §1983 merely for employing a tortfeasor; a plaintiff must establish that a municipal policy or custom was a moving force behind the constitutional injury. 436 U.S. at 690-694. The district court here did not err in refraining from addressing the county's *Monell* liability.

First, *Monell* is irrelevant to plaintiffs' challenge to Junior's continuing to detain too many people to allow essential social distancing. As discussed, *supra* p.34-39, in continuing to detain the individuals housed at Metro West, Junior acts on behalf of the state, because state law requires him to enforce pretrial bail and detention orders, Defs.' Br. 32. That claim is in effect a claim against the state, *supra* p.37-38—and therefore not "redundant" of the claim against the county, Defs.' Br. 36. And because *Monell* has no relevance to the district court's deliberate-indifference finding predicated on Metro West's overcrowding, the court was amply justified in not addressing *Monell* liability. *See McNeil*, 945 F.3d at 997 (in suit relating to county sheriff's enforcement of state-court detention

orders, it was unnecessary to resolve *Monell* liability at preliminary-injunction stage).[3]

Second, even if the district court were required to address whether plaintiffs will likely establish *Monell* liability in connection with their claim that defendants have recklessly failed to implement feasible social-distancing measures, the answer is clearly yes. Plaintiffs can establish liability by citing decisions made by a "final policymaker"—that is, someone who "speak[s] with final policymaking authority for the local government[] … concerning the action alleged to have caused the particular … violation at issue." *Carter v. City of Melbourne*, 731 F.3d 1161, 1166-1167 (11th Cir. 2013) (per curiam) (quotation marks omitted). And the evidence shows (as explained below, R.85 at 40), that Junior speaks with final policymaking authority for the county when it comes to jail policies. Miami-Dade County has delegated to him "[a]ll duties and functions which pertain to the … incarceration, … custody and release of prisoners [in the] County jail[s]." *Delegation of Powers to the Department of Corrections and Rehabilitation*,

[3] Defendants cite no authority supporting their contention that the court erred by not addressing address *Monell* liability. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), stands for the uncontroversial proposition that burdens of proof at the preliminary-injunction stage track those at trial. And *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994), vacated a preliminary injunction because the district court erroneously held that the plaintiffs would likely establish municipal liability, not because the court declined to address the question.

Administrative Order No. 9-22 (July 23, 2002), https://bit.ly/3guH88I. Junior also exercises that authority: He issued the directives and policies that defendants repeatedly cite as evidence of their formal response to COVID-19. *E.g.*, R.65-14; R.65-18.

Plaintiffs have also established that Junior's official conduct is the cause of their constitutional injury. Specifically, his failure to implement critical social-distancing safeguards exhibits deliberate indifference to a known risk of harm. *Supra* p.26-28; *see City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

Defendants suggest (Br. 37) that the district court found them deliberately indifferent based on "anecdotal evidence of lapses in enforcement of protective measures," and that they cannot be held liable for such lapses unless there is a pervasive custom or practice of which they are aware. As discussed, however, *supra* p.26-28, 31, it is simply not true that the court's finding rested on isolated failures to enforce distancing.

Defendants next suggest (Br. 38 n.19) that Junior is not a "final policymaker" because he can be fired by the county's mayor "with or without cause." But an individual is considered a "final policymaker" unless her decisions are subject to meaningful review by her superiors. *Carter*, 731 F.3d at 1167. The fact of at-will employment does not reflect meaningful review. Nor have defendants pointed to evidence that Junior's conduct related to the county's jails is

otherwise subject to meaningful review. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004) ("If a higher official has the power to overrule a decision but as a practical matter never does so, the decision maker may represent the effective final authority on the question.") (quotation marks omitted); *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168 (5th Cir. 2010) ("An official may be termed a 'policymaker' even if the municipality retains 'the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official.'").

5. Defendants' exhaustion argument fails

The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions … until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a). Failure to exhaust is an affirmative defense, meaning plaintiffs need not "specially plead or demonstrate exhaustion in their complaints" and defendants bear the burden of proof. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

In issuing its injunction, the district court declined to address exhaustion, ruling that defendants had waived exhaustion by failing to properly raise it in their opposition to plaintiffs' preliminary-injunction motion. R.100 at 28 n.14. That opposition "incorporated by reference" the exhaustion arguments that defendants asserted they had "fulsomely detail[ed]" in their separate motion to dismiss. R.67

at 12. The court deemed this incorporation by reference into an already overlength brief improper, and thus concluded that exhaustion was not properly raised for purposes of the preliminary-injunction motion. R.100 at 28 n.14.

That waiver ruling was well within the court's discretion. District courts routinely hold that it is not "proper" for a party "to attempt to incorporate earlier arguments by reference." *Connectus LLC v. Ampush Media, Inc.*, 2017 WL 2620541, at *5 (M.D. Fla. June 16, 2017); *accord, e.g.*, *Lane v. United States*, 338 F. Supp. 3d 1324, 1341 n.12 (S.D. Ga. 2018). So do appellate courts, including this one, *see Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004). Appellate courts have held that a district court does not abuse its discretion by refusing to consider, at the preliminary-injunction stage, an argument "not properly raised" in preliminary-injunction papers. *Wells Fargo & Company v. ABD Insurance & Financial Services, Inc.*, 758 F.3d 1069, 1073 (9th Cir. 2014); *see also Michigan Catholic Conference & Catholic Family Services v. Burwell*, 755 F.3d 372, 396 n.14 (6th Cir. 2014), *vacated on other grounds*, 575 U.S. 981 (2015). Those holdings are unsurprising: There is nothing special about preliminary-injunction proceedings that precludes the application of ordinary case-management rules.

Strikingly, defendants' opening brief does not even mention the district court's waiver holding, let alone expressly challenge it. The same is true of the

motions panel's decision. That failure by defendants waives any such challenge for this appeal, *see, e.g.*, *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015), and this Court need go no further to reject defendants' exhaustion argument.

Defendants *do* say (Br. 39) that PLRA exhaustion "is an affirmative defense that this Court expressly directs defendants to raise in a motion to dismiss." That is meritless. To begin with, the cases defendants cite do not "expressly direct[] defendants to raise [exhaustion] in a motion to dismiss." *Id.* To the contrary, the first case says that "[i]n response to a prisoner suit, defendants *may* bring a motion to dismiss" and raise exhaustion. *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1209 (11th Cir. 2015) (emphasis added). And the second case likewise contemplates that defendants may raise exhaustion at varying stages of litigation. *See Bryant v. Rich*, 530 F.3d 1368, 1374-13745 (11th Cir. 2008). In any event, none of the cases defendants cite addresses the key issue here: whether raising an exhaustion defense in a motion to dismiss relieves a defendant of the normal obligation to include, in an opposition to any other motion, all of the arguments bearing on that motion. There is no reason that it should, *see Jones*, 549 U.S. at 214 ("the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA").

Defendants also cite (Br. 40) this Court's precedent for the proposition that courts must address exhaustion before ruling on the merits at summary judgment or at trial. But that is obviously true only when exhaustion is properly raised; no case defendants cite holds that courts must address exhaustion, even if waived. To the contrary, in a case defendants cite (Br. 39-40), this Court recognized that PLRA "exhaustion … is not a jurisdictional prerequisite," *Bryant*, 530 F.3d at 1374 n.10. This Court has also recognized that district courts ordinarily should not raise PLRA exhaustion on their own. *Abram v. Leu*, 759 F. App'x 856, 860 (11th Cir. 2019) (per curiam) (subsequent history omitted).[4]

B. The Remaining Preliminary-Injunction Factors Favor Affirmance

As this Court recently reaffirmed, "[s]ince the preliminary injunction factors other than the likelihood of success on the merits turn on equitable considerations and factual findings, [this Court] owe[s] *substantial deference* to the district court's conclusions." *Jones*, 950 F.3d at 828 (emphasis added). Applying that deference leaves no doubt that the district court's determination that the other preliminary-injunction factors favor plaintiffs should be upheld.

[4] If this Court somehow found an abuse of discretion in the district court's waiver holding, it should remand for that court to address exhaustion in the first instance.

1. Irreparable injury

To establish entitlement to preliminary relief, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. The district court found this requirement "clearly" satisfied "because, absent injunctive relief, COVID-19 will continue to spread throughout Metro West and infect additional detainees and staff, which could lead to serious medical complications, including death, for those who are exposed to" COVID-19. R.100 at 41. That finding was fully supported by plaintiffs' evidence that, absent the types of measures the district court ordered, COVID-19 will spread more rapidly through the jail and cause greater—and irreparable—harm. R.80-21 ¶14; *supra* p.7. That easily suffices. *See, e.g.*, *Basank v. Decker*, 2020 WL 1481503 *2-4 (S.D.N.Y. Mar. 26, 2020) (irreparable-injury requirement met where petitioners faced serious health risks from COVID-19).

Defendants do not deny that being put at greater risk of contracting COVID-19 constitutes irreparable harm. They argue only (Br. 41-42) that the district court abused its discretion because they are already taking the steps the injunction mandates and there is "no evidence that [they] would discontinue the protective measures" absent the injunction. In support of this argument, they suggest (Br. 42) that the court was required to accept assurances from "three high-ranking County

officials" that defendants are in full compliance with the TRO and would not cease the protective measures. This argument fails.

A district court is not required to credit government officials' assertions regarding their conduct—and the court did not do so here. It observed that whether defendants are "in full compliance" with the TRO (which the preliminary injunction largely tracks) is "highly disputed," R.100 at 31, not least because "many of [plaintiffs'] declarations suggest that some of the measures … ordered by the TRO are not being implemented in a way that furthers the stated goal of reducing the spread of COVID-19," *id.* at 17. And—critically—the court found (in rejecting defendants' mootness argument) that there was insufficient reason to conclude that defendants would continue to implement the relevant measures absent an injunction. *Id.* at 31. Specifically, the court found that: (1) the measures defendants say they are now implementing "appear to have been initiated, to some degree, by this litigation"; (2) defendants have not incorporated the measures into any formal policy; and (3) "the pace at which this case and the conditions at Metro West have evolved ha[s] not provided an opportunity for Defendants to demonstrate whether they are committed to maintaining these new, informal policies and procedures." R.100 at 31.

Defendants say *nothing* about any of this, again closing their eyes to the record and the decision below, and evidently hoping this Court will too. The

motions panel, relying on defendants' representations in their emergency briefing, evidently also overlooked these findings. *Swain*, *supra*, at *5. Those findings, however, fully refute defendants' lone irreparable-harm argument—again, particularly given the "substantial deference" owed to the district court's evaluation of irreparable harm, *Jones*, 950 F.3d at 828.

2. Balance of harms and public interest

As the Supreme Court has explained (in discussing the analogous test governing stays), "[t]he first two factors" of the preliminary-injunction standard "are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *but see* Defs.' Br. 45 (citing contrary dicta in a 47-year-old circuit-court decision). For the reasons given, those "most critical" factors support affirmance. In any event, the remaining two factors do as well.

a. On balance of harms, the district court found that "[t]he threat of a continuing outbreak of COVID-19 … at Metro West outweighs the damage to Defendants caused by an injunction requiring Defendants to comply with CDC Guidance." R.100 at 42. Indeed, it found, defendants had "not offered any evidence as to why the administrative burden resulting from compliance with an injunctive order outweighs the threat of serious illness or death … that will result from the spread of [COVID-19] throughout Metro West." *Id.* at 43.

Defendants argue (Br. 44-45) that the risk of serious illness—and even death—that plaintiffs (and defendants' employees) face is outweighed by the administrative burdens the injunction imposes on them. Specifically, defendants reprise the motions panel's claim that the injunction takes away their "'discretion … to allocate scarce resources among different county operations,'" and thereby "'hamstrings'" their ability to respond to COVID-19. Defs.' Br. 44 (quoting *Swain*, *supra*, at *5). But defendants' brief (like their briefing below and the motions panel's decision) fails to identify *any* specific harm, *e.g.*, any example of them being unable to provide "scarce resources" somewhere else because of the injunction. This failure is particularly glaring given that defendants were subject to essentially the same provisions for nearly a month before the preliminary injunction was stayed. Defendants are therefore simply speculating without citation to any evidence (as was, with respect, the motions panel). Having failed to cite any record evidence regarding potential harms—no declaration, nothing—defendants cannot establish clear error or an abuse of discretion in the district court's assessment. And if a real problem of scarce resources were to arise, the district court could modify the injunction upon request; the equitable nature of injunctions is perfectly capable of meeting any real need if one arises.

Defendants also carp that the district court established itself as a "super-warden to second-guess the decisions of the real wardens." Defs.' Br. 45

(quotation marks omitted). But whatever appeal that rhetorical flourish may have, prison officials are permitted to exercise discretion only "within the bounds of constitutional requirements," *Prison Legal News v. Secretary, Florida Department of Corrections*, 890 F.3d 954, 965 (11th Cir. 2018) (quotation marks omitted). And when a court finds likely constitutional violations and irreparable harm, it is empowered (if not obligated) to issue an injunction. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). Moreover, defendants' "super warden" complaint rings hollow, as every injunction must "state its terms specifically," Fed. R. Civ. P. 65(d)(1)(B), to "prevent uncertainty and confusion," *Garrido v. Dudek*, 731 F.3d 1152, 1159 (11th Cir. 2013). Had the court issued a less detailed injunction, defendants would no doubt complained to this Court that the injunction violates Rule 65—as, indeed, their opening brief (at 47) does.[5]

b. The district court also found the public-interest factor satisfied, explaining that efforts to minimize the spread of COVID-19 at Metro West "advance[] the public interest by reducing the chance of community spread in Miami-Dade County[.]" R.100 at 43. The evidence supported that conclusion. As a medical expert with extensive experience overseeing medical care in large

[5] Defendants also reprise (Br. 43) their claim that "the district court conflated the risk of COVID-19 in general with irreparable harm to Plaintiffs." As discussed, the court did no such thing. *Supra* p.30-31.

metropolitan jails explained, an outbreak at a jail like Metro West "poses a grave threat to the health and safety of Floridians" because "[j]ails and prisons do not exist in isolation," and an outbreak at the jail may "limit the ability of health professionals to contain, mitigate, and treat the spread of COVID-19[.]" R.80-21 ¶¶11-12. Defendants have nothing to say about this—nor did the motions panel. Defendants (citing the motions panel) simply say (Br. 45) that "the public interest merges with the balance of harms analysis." That general principle is not a license to disregard concrete findings of the district court that are specific to the public-interest factor. R.100 at 49.

C. The District Court Properly Exercised Its Discretion In Fashioning Temporary Relief

For claims relating to prison conditions, the PLRA requires courts to ensure that preliminary injunctions are "narrowly drawn," "extend[] no further than necessary to correct the harm," and are "the least intrusive means necessary to correct th[e] harm." 18 U.S.C. §3626(a)(1)(A). The injunction here is consistent with these mandates. The district court found that plaintiffs will likely prove that defendants have not adequately responded to the objectively intolerable risk that COVID-19 presents. R.100 at 37-41. And it concluded that a reduction in Metro West's population is needed to adequately mitigate intolerable risk. *Id.* at 48. But the PLRA bars the court from providing relief that would most directly alleviate the harm plaintiffs face: a reduction in Metro West's population. *Infra* p.56. The

court thus required defendants to comply with CDC recommendations that can at least partially slow transmission of the disease—for instance, recommendations on providing access to basic hygiene and disinfecting products and on maximizing social distancing. R.100 at 49-52. Such an injunction was well within the district court's remedial powers, given the evidence that such measures can at least aid in mitigating the risk plaintiffs face, and given the court's justified skepticism that defendants would adhere to such recommendations absent an injunction, R.100 at 31-32.

Numerous courts have issued similar injunctions in recent days. *See, e.g.*, *Mays v. Dart*, 2020 WL 1987007, at *36-37 (N.D. Ill. Apr. 27, 2020) (injunction requiring sheriff to "enforce social distancing," provide adequate hygienic and sanitation supplies and masks, and facilitate additional testing); Order 5, *Cameron v. Bouchard*, No. 20-10949 (E.D. Mich. May 21, 2020) (injunction requiring jail to "provide adequate spacing of six feet or more" between inmates to "accomplish[]" social distancing, in addition to other precautionary measures); *see also supra* p.33.

Defendants' objections to the injunction lack merit.

First, defendants argue (Br. 47) that many of the district court's provisions are improper because they relate to matters other than social distancing, on which the district court's deliberate-indifference finding focused. To begin with, that objection has no bearing on the injunction's mandate to implement distancing to

the extent feasible, or its provision requiring defendants to submit a proposal regarding additional distancing measures. R.100 at 49-50, 52. In any event, as noted, all of the measures in the injunction reasonably relate to preventing the intolerable risk of harm the court identified, *supra* p.7, and flow from the court's separate conclusion that defendants had not met their mootness burden to demonstrate that they would continue to undertake those additional measures absent a court order, R.100 at 31.

Second, defendants suggest (Br. 47), and the motions panel seemed to agree (*Swain*, *supra*, at *5), that the district court imposed an "impossible task" by requiring defendants to propose and undertake additional "social distancing safeguards" despite finding that fully adequate distancing is impossible with Metro West's current population. That argument rests on the flawed premise that distancing is an all-or-nothing proposition. In reality, distancing is a continuum rather than binary, with more distancing is better than less. So while the court found that medically required distancing is impossible given the jail's current population, it also expressly found that defendants *could*—and were not—implementing and enforcing a *greater* level of distancing. R 100 at 37-38. Defendants' argument also ignores the injunction's language, which mandates "six feet or more" of "social distancing only "[t]o the *maximum extent possible*

considering Metro West['s] … current population level." R.100 at 49 (emphasis added). That, by definition, is not "impossible." Defs.' Br. 47.

Third, defendants assert (Br. 47-48) that the injunction lacks "specificity" about the areas in which social distancing is wanting or could be improved, and that a "narrowly drawn order would have specified th[e] steps" defendants should take, rather than directing them to submit a proposal. But the court specified several areas of concern, including distancing during mealtimes, daily headcounts, detainees' telephone usage, and medical visits. R.100 at 12-16, 37-38, 52. Defendants cannot succeed in showing any abuse of discretion in the district court's desire to have defendants themselves propose a plan to remedy the areas of concern that it specifically identified.

Indeed, this argument underscores the internal contradictions in defendants' arguments. They deride the district court for supposedly assuming the role of a "super-warden," Defs.' Br. 23, 24, but then turn around and fault the court for not having been *more* intrusive with its injunction. That is untenable. The court—while properly issuing an injunction to prevent the irreparable harm caused by a likely constitutional violation—correctly sought to minimize the disruption and intrusiveness, including by allowing defendants to propose measures to improve distancing. And this Court's precedent makes clear that "[b]y leaving to [defendants] substantial discretion in how to comply with the preliminary

injunction, the district court's order respects the[ir] … sovereignty." *Jones*, 950 F.3d at 830. Certainly defendants cite no authority even suggesting that a district court abuses its discretion by providing defendants a role in determining how to remedy a violation.

Lastly, defendants seek to frighten this Court into vacating the injunction by insisting (Br. 48) that it "pav[es] the way" for an order releasing some of the jail's (presumptively innocent) detainees. Of course, defendants can have no valid objection if the Constitution requires release of some people during an unprecedented pandemic to protect detainee and public health from a unique and intolerable risk. That aside, release is simply not at issue here. The district court denied plaintiffs' request for immediate habeas relief, R.100 at 52, and it is not even empowered to order release. Under the PLRA, only a three-judge tribunal, appointed by Chief Judge Carnes, 28 U.S.C. §2284, could do that, and even that court could do so only if it makes a number of specific findings, including that prior relief has failed to cure the violations and that "clear and convincing evidence" establishes that "no other relief will remedy the violation," 18 U.S.C. §3626(a)(3). A three-judge tribunal would also first need to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system." *Id.* at (a)(1)(A).

In short, defendants' reliance on the specter of release is misplaced. The only issue before this Court is whether the district court acted within its remedial discretion to extend the CDC-recommended measures contained in its TRO and to require defendants to provide a prompt proposal for improved distancing to slow the spread of COVID-19. This restrained approach was designed to prevent irreparable harm (including, potentially, death) to plaintiffs. For all the reasons given above, the district court justifiably exercised its equity powers here.

CONCLUSION

The district court's preliminary injunction should be affirmed.[6]

[6] Defendants twice urge this Court (Br. 3, 48) to direct denial of plaintiffs' preliminary-injunction motion "with prejudice." If that means ordering the district court to deny the motion and bar plaintiffs from ever renewing it, the request—for which defendants offer no authority or logic—should be rejected out of hand.

Respectfully submitted,

/s/ Emma Simson

DANIEL S. VOLCHOK
EMMA SIMSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000
emma.simson@wilmerhale.com

EMILY BARNET
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
emily.barnet@wilmerhale.com

ALEC KARAKATSANIS
CIVIL RIGHTS CORPS
1601 Connecticut Avenue N.W.
Suite 800
Washington, D.C. 20009
(202) 681-2409
alec@civilrightscorps.org

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g), I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief (*see* FRAP 32(f)), the brief contains 12,991 words.

2. As permitted by FRAP 32(g)(1), I have relied upon the word-count feature of this word-processing system in preparing this certificate.

/s/ Emma Simson
EMMA SIMSON

CERTIFICATE OF SERVICE

On this 28th day of May, I filed the foregoing with the Court using the appellate CM/ECF system, which will serve counsel for all parties to this appeal.

/s/ Emma Simson
EMMA SIMSON