COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13116

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

v.

BARNSTABLE COUNTY SHERIFF'S OFFICE, BERKSHIRE COUNTY SHERIFF'S OFFICE, BRISTOL COUNTY SHERIFF'S OFFICE, DUKES COUNTY SHERIFF'S OFFICE, ESSEX COUNTY SHERIFF'S OFFICE, FRANKLIN COUNTY SHERIFF'S OFFICE, HAMPDEN COUNTY SHERIFF'S OFFICE, HAMPSHIRE COUNTY SHERIFF'S OFFICE, MIDDLESEX COUNTY SHERIFF'S OFFICE, NORFOLK COUNTY SHERIFF'S OFFICE, PLYMOUTH COUNTY SHERIFF'S OFFICE, SUFFOLK COUNTY SHERIFF'S OFFICE and WORCESTER COUNTY SHERIFF'S OFFICE,
APPELLEES.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Supreme Judicial Court Rule 1:21, the Massachusetts Association of Criminal Defense Lawyers (MACDL) represents that it a 501(c)(6) organization, and the Committee for Public Counsel Services (CPCS) represents that it is a statutorily created agency established by G.L. c. 211D. Neither MACDL nor CPCS issue any stock or have any parent corporation, and no publicly held corporation owns any stock in MACDL or CPCS.

INTRODUCTION

After more than a year, we now have a clearer understanding of both the breadth of devastation caused by COVID-19 and the ways we can mitigate the risk of further tragedy. Yet, to this day, the Houses of Correction (HOCs) have refused to take steps that, according to the Centers for Disease Control and Prevention (CDC) and the unrebutted expert evidence in this case, are essential to protect people in their facilities from COVID-19: regularly testing non-symptomatic incarcerated people and staff, and materially reducing their populations. Meanwhile, Bristol and Essex still do not provide meaningful and confidential modes of communication between incarcerated people and their lawyers during the pandemic. These actions violate constitutional guarantees concerning cruel and unusual punishment, due process, and the right to counsel.

The need for this Court's intervention is pressing. "[E]ven with the recent distribution of the vaccine, we cannot say for how long the virus might persist." *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 356 (2021). Community immunity, once thought to be the pandemic's endpoint, might never arrive. Instead, according to nearly 90% of the 119 immunologists, infectious-disease researchers, and virologists recently surveyed by the journal *Nature*, COVID-19 is likely to

continue circulating for years.[1] The dangers include not just hospitalization and death, but also long-term debilitating effects, currently estimated to impact one in ten people who contract the virus, that can stem from even mild cases. See R:143, ¶26.

The threat of COVID-19 will continue to be especially severe and prolonged for incarcerated people. As the CDC has recognized, such individuals "are at greater risk for some illnesses, such as COVID-19, because of close living arrangements." R:22, ¶7. Under these circumstances, "we have seen that the COVID-19 virus spreads rapidly, and that a few cases, or even no reported cases, on any given day or in any given place can quickly change to many cases." *Commonwealth v. Nash*, 486 Mass. 394, 408 (2020).

Precisely because incarcerated people are especially vulnerable to infectious diseases and entirely reliant on the government for their protection, the Eighth Amendment and art. 26 require jails "to take reasonable steps to protect [incarcerated people] from the spread of serious communicable diseases." Cf. *Foster v. Commissioner of Correction*, 484 Mass. 698, 719 (2020). Consequently, jails cannot be deliberately indifferent to the substantial risk of harm that such diseases pose to the people in their custody. See *id.* at 719-20. The constitutional

[1] Nicky Phillips, *The Coronavirus Is Here to Stay – Here's What That Means*, Nature (Feb. 16, 2021), https://www.nature.com/articles/d41586-021-00396-2.

"evaluation of the adequacy of health care revolves around the inquiry of whether the services are ' . . . at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.'" *Morales Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 208 (D.P.R. 1998) (quoting *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (alteration in original)). This Court can look to CDC guidelines and other expert testimony as "useful measures" to assist in this analysis. Cf. *Foster*, 484 Mass. at 722.

Here, the undisputed record demonstrates that, in two respects, the HOCs fall short of what science—and, therefore, the constitution—require.

First, the HOCs are deliberately indifferent to the need for more COVID-19 testing. The CDC has concluded that testing "people who are asymptomatic and do not have known, suspected, or reported exposure"—known as "screening testing"—is "essential to stop the spread of COVID-19." R:318, 320. It therefore advises facilities to (1) test an entire unit or facility after detecting a single COVID-19 infection; (2) test all staff every three to seven days; (3) test all incarcerated people at intake; and (4) conduct serial screening testing of incarcerated people and staff every three to seven days. R:318, 320, 325-27. Although CDC guidance is not mandatory, it represents "expert medical advice regarding measures needed to limit the spread of COVID-19." *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 691 (C.D. Cal. 2020). And unrebutted expert declarations in

this case confirm that any reasonable carceral response to COVID-19 must include screening testing of incarcerated people and staff. R:148, ¶51; R:197, ¶28.

But this is not happening. Nine HOCs fail to test at intake, and all HOCs refuse to conduct regular screening testing of staff or incarcerated people every three to seven days. R:23-24, ¶¶15-18, 23. During the entirety of the pandemic, Bristol and Suffolk have administered a *total* of just one and zero tests, respectively, to their staff, and Barnstable has tested just 24 incarcerated people. SJC-12926, Dkt. #162, (May 13, 2021) (hereinafter, 5/13/21 SM Report). Four HOCs have tested far fewer incarcerated people since April 2020 than the number they currently incarcerate, suggesting that they have not conducted even *one* complete round of testing. *Id.* Even if that practice had arguably been constitutional last spring, it is unjustifiable now.

Second, the HOCs have unconstitutionally failed to exercise their statutory authority to meaningfully decrease their incarcerated populations. This Court has held, and unrebutted expert declarations in this case confirm, that the number of incarcerated people should be reduced to mitigate the COVID-19 pandemic, see *Foster*, 484 Mass. at 701; R:202, ¶56. The HOCs have the statutory authority to decarcerate, but they have not meaningfully exercised it. The incarcerated populations in nine counties are now at least 80% of their populations at the start of reporting, and the overall pretrial population now *exceeds* the population on April

3, 2020. 5/13/21 SM Report.[2] Because decreasing the incarcerated population is the only way to increase the ability of the people that remain to physically distance, which is "a cornerstone of reducing COVID-19 transmission," R:152, ¶75, the HOCs' refusal to use their statutory authority is unconstitutional.

In addition to the violations described above, Bristol and Essex are unreasonably interfering with the constitutional right to counsel because the communication options they offer fail to provide timely, confidential, and meaningful access to counsel in the midst of the pandemic.

When the pandemic hit, the HOCs had to react quickly to an unforeseen danger. But whatever interim measures may have been appropriate in the spring of 2020, the HOCs' decision to continue unaltered along the same path now violates the constitution. Cf. *Foster*, 484 Mass. at 735, 740 (Gants, C.J., concurring).

ISSUES PRESENTED

I. Whether the Houses of Correction demonstrate deliberate indifference to the health and safety of the people in their custody, in violation of the Eighth Amendment and art. 26 rights of sentenced prisoners, by (a) failing to adequately

[2] Although the Special Master's Reports do not distinguish between pretrial and sentenced populations, the reports that the counties submit to the Special Master and the plaintiffs contain this information. To view or download the raw data from these reports, see ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prisons & Jails: Incarcerated Population Over Time*, https://data.aclum.org/sjc-12926-tracker (showing 3,905 pretrial detainees on May 12, 2021, versus 3,857 on April 6, 2020, which was the first day all counties reported).

test non-symptomatic incarcerated people and staff for COVID-19; and (b) failing to exercise their statutory authority to reduce their incarcerated populations through individual consideration of eligible incarcerated people.

II. Whether the practices described in Question I are also objectively unreasonable, and thus violate the due process rights of pretrial detainees.

III. Whether Bristol and Essex violate the state and federal constitutional rights to counsel of the people in their custody by failing to provide meaningful attorney-client communications during the pandemic.

STATEMENT OF THE CASE

At the start of the pandemic, the Committee for Public Counsel Services and the Massachusetts Association for Criminal Defense Lawyers (collectively, plaintiffs) filed an emergency petition against the Chief Justice of the Trial Court seeking to mitigate the serious risk of COVID-19 by reducing the incarcerated population in the Commonwealth's jails and prisons.[3] The Single Justice then added respondents, and reserved and reported the case to the full court, which appointed a Special Master.[4]

On April 3, 2020, this Court held "that a reduction in the number of people who are held in custody is necessary"; announced a presumption of release for

[3] See SJ-2020-0115, Dkt. #2 (Mar. 24, 2020).
[4] See SJ-2020-0115, Dkt. #4 (Mar. 24, 2020); Dkt. #5 (Mar. 25, 2020); SJC-12926, Dkt. #2 (Mar. 25, 2020).

certain pretrial detainees; and ordered data reporting via a Special Master. *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 445, 447, 453 (2020) (hereinafter, *CPCS*). "The purpose of this critical monitoring . . . was to provide information and guideposts to the judiciary, as well as to the legislative and executive branches, during this unprecedented period, to allow informed decision-making to best protect incarcerated individuals and staff within various facilities." *Nash*, 486 Mass. at 408-09.

Beginning in mid-May 2020, plaintiffs and the Sheriffs' representatives participated in regular phone calls with the Special Master's team. The parties worked in good faith, and on December 18, 2020, plaintiffs filed an amended petition for relief on the three issues that required this Court's intervention where the parties could not reach an agreement.[5] This Court denied the filing without prejudice to refile in the Supreme Judicial Court for Suffolk County,[6] which the plaintiffs did the next day.[7]

The Single Justice appointed a Special Master to "determine which, if any, relevant facts have been agreed to by the parties," and to "make any and all findings of fact, and credibility determinations, beyond the facts agreed to by the parties, that he deems necessary and relevant to resolution of the questions of law

[5] See SJC-12926, Dkt. #134 (Dec. 18, 2020).
[6] See SJC-12926, Dkt. #137 (Dec. 23, 2020).
[7] See SJ-2020-0757, Dkt. #1-2 (Dec. 24, 2020).

raised by the plaintiffs in their complaint."[8] During the subsequent hearings, plaintiffs requested that the Special Master recommend or find facts where facts were supported by affidavit but were not agreed upon by the parties, including with respect to any expert opinion evidence that was unrebutted or any matters as to which there were genuine disputes, and offered to participate in evidentiary hearings to assist in these determinations. The Special Master indicated that he would not do so, and instead, that the affidavits and documents sent to the Single Justice would be considered part of the record to this proceeding and thus eligible to be cited as evidence in this matter.

The Special Master filed his findings of fact—which were limited to agreed-upon facts—and the record appendix with the Single Justice on May 10, 2021.[9] The Single Justice then reserved and reported the matter to the full court.[10]

STATEMENT OF FACTS

The months following this Court's *CPCS* decision have changed scientific understanding of the breadth of non-symptomatic SARS-CoV-2 transmission, the long-term impacts of COVID-19, and the dangers of the new variants. The CDC has updated its testing guidance for jails and prisons to reflect these realities, but the HOCs have not aligned their practices with that guidance. They still do not

[8] SJ-2020-0757, Dkt. #33 (March 3, 2021); R:12.
[9] See SJ-2020-0757, Dkt. #73-74 (May 10, 2021); R:16.
[10] See SJ-2020-0757, Dkt. #76 (May 10, 2021); R:17.

conduct the necessary screening testing of incarcerated people and staff, and they refuse to use their authority to meaningfully decrease their populations. In addition, while most HOCs have amended their practices to provide meaningful attorney-client communications during the pandemic, Bristol and Essex have not.

I. Advancements in the scientific understanding of COVID-19.

The scientific understanding of SARS-CoV-2 transmission and the risks of COVID-19 has advanced in at least two ways since the beginning of the pandemic.

First, research has clarified that "asymptomatic and presymptomatic infection are significant contributors" to COVID-19 transmission. R:367; see also R:144, ¶27; R:196, ¶25. The CDC estimates that 50% of COVID-19 transmission occurs before symptom onset. R:196, ¶25; R:313. When COVID-19 patients start showing symptoms, they may have already been infectious for up to two days. R:196, ¶26; see also R:144, ¶28. The CDC also estimates that 30% of COVID-19 cases are altogether "asymptomatic," but can still transmit the virus. R:196, ¶25; R:313. Taken together, this means that, in a congregate living environment, outbreaks will occur even if the facility immediately tests and isolates all symptomatic individuals. R:144-45, ¶30; R:196, ¶25.

Second, scientific advancements demonstrate the importance of reducing the incidence of even mild COVID-19 cases, because it is now understood that such cases can cause serious long-term symptoms, including fatigue, joint pain, chest

pain, shortness of breath, headache, and brain fog. R:141, ¶20. Although the complete contours of what is often called "long haul" COVID 19 are not yet clear, existing evidence suggests that more than one in ten COVID-19 patients will experience symptoms lasting over one month or receive a new neurological or psychiatric diagnosis within six months of their COVID-19 diagnosis. R:143, ¶26. As the CDC has acknowledged, "[l]ong COVID can happen to anyone who has had COVID-19, even if the illness was mild, or they had no symptoms."[11]

II. Variants of COVID-19.

Over time, the SARS-CoV-2 virus itself has become more dangerous. The CDC has identified five "variants of concern" for which "there is evidence of an increase in transmissibility, more severe disease (increased deaths), significant reduction in neutralization by antibodies generated during previous infection or vaccination, reduced effectiveness of treatments or vaccines, or diagnostic detection failures." R:140, ¶14; R:383. Massachusetts has reported cases of each of these variants.[12] In fact, as of April 24, over 50% of infections in Massachusetts were the B.1.1.7 variant, whose known attributes include an estimated "50%

[11] Centers for Disease Control and Prevention, *Post-COVID Conditions*, (updated April 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited May 19, 2021).
[12] CDC COVID Data Tracker, *Variant Proportions*, (updated May 18, 2021), https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last visited May 19, 2021).

increased transmission" and "potential increased severity based on hospitalizations and case fatality rates."[13] R:141, ¶15; R:384. As of that same date, over 10% of Massachusetts infections were the P.1 variant, whose known attributes include reduced neutralization by vaccination and previous SARS-CoV-2 infection.[14] "The introduction of variants in the incarcerated population is inevitable." R:194, ¶19. Because of their attributes, these variants may lead to increased transmission, morbidity, and mortality in Massachusetts prisons and jails. R:195, ¶21.

III. The CDC's updated guidance for testing in jails and prisons.

The CDC's most recent testing guidance for jails and prisons reflects these scientific advancements. Because the CDC does not impose COVID-19 mandates on state jails and prisons, the CDC's recommendations represent its strongest possible pronouncements. R:148, ¶50; R:201, ¶47.

Acknowledging that symptoms checks are not sufficient to prevent the transmission of SARS-CoV-2, the CDC states that testing non-symptomatic incarcerated people and staff without known or suspected exposure—known as screening testing—"is a key component of a layered approach to prevent SARS-CoV-2 transmission" in jails and prisons. R:322; R:325; see also R:148, ¶46;

[13] *Id.*
[14] *Id.*

R:198-99, ¶¶34, 36, 38. The CDC therefore recommends screening testing in at least four scenarios. R:199-200, ¶¶40-45.

First, if there is a single positive case, the CDC recommends testing all people within a single unit if there has been no movement by staff or incarcerated people between the unit with the infection and other units, and testing all people in the entire facility if any such movement has occurred. R:326; see also R:199, ¶41. The CDC explains that, in a carceral setting, one case "should be considered an outbreak." R:323; see also R:199, ¶41.

Second, the CDC recommends testing all staff every three to seven days. R:325; see also R:148, ¶47; R:200, ¶42. The CDC reasons that "because staff move between the facility and the community daily, the risks of introducing infection into the facility from the community and/or bringing infection from the facility back into the community is ongoing." R:326.

Third, the CDC recommends testing all incarcerated people at intake; prior to transfer to another facility or reassignment in the same facility; prior to court and community visits; and prior to release. R:325-26; see also R:200, ¶43.

Fourth, the CDC recommends serial screening testing of incarcerated people every three to seven days, either by testing all or a random sample of at least 25% of the incarcerated population, or by targeting high-risk facilities or high-risk populations within a single facility. R:327; R:200, ¶44.

IV. Plaintiffs' unrebutted expert affidavits.

Plaintiffs submitted affidavits from Dr. Monik Jiménez and Ms. Tori Cowger, and Dr. Yonatan Grad and Ms. Emma Accorsi, demonstrating the necessity of both non-symptomatic testing and decarceration, which were not disputed by any of Dr. Alysse Wurcel's three affidavits.[15] The record therefore establishes, among other things, the following facts.

First, "routine testing of pre-symptomatic and asymptomatic individuals in jails and prisons is the medical standard of care," R:148, ¶51, and "any reasonable response to the COVID-19 pandemic" in jails and prisons "includes routine, comprehensive testing of residents and staff without symptoms," R:197, ¶28. Facilities that do not follow this standard of care "are not conducting the level of testing necessary to identify infected incarcerated people and staff" and, thus, "are not taking the necessary steps to protect the people who live and work in their facilities." R:198, ¶32. Such testing "is a fundamental and necessary predicate to preventing the spread of COVID-19 in a communal living facility" because "[t]he positive impact of quarantining, masking, distancing and hygiene is severely

[15] Plaintiffs initially filed their experts' affidavits with their opening and reply briefs before the Single Justice, and provided updated affidavits on April 19 and 23. The HOCs filed Dr. Wurcel's initial affidavit with their response brief before the Single Justice, and provided updated affidavits on April 23 and May 5.

limited if the facilities do not first identify infectious individuals throughout routine testing." R:149, ¶54.

Second, physical distancing, which is "a cornerstone of reducing COVID-19 transmission," is "exceptionally difficult within jails." R:152, ¶75. "Reducing the incarcerated population is the only way to increase the ability of the remaining individuals to physically distance from one another." R:202, ¶53; see also R:152, ¶75. As a result, "decarceration is a necessary component of any reasonable strategy to combat the spread of SARS-CoV-2" in jails and prisons. R:202, ¶56.

V. The HOCs have neither conducted adequate testing nor made adequate releases.

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

First, most HOCs—all but Essex, Hampden, Plymouth, and Franklin—still do not test incarcerated people at intake. R:23-24, ¶¶18-22. Only three—Essex, Hampden, and Plymouth—have ever tested staff without known or suspected exposure to COVID-19, and they only did so in specific, time-limited situations. R:23, ¶16. And no HOC has conducted serial screening testing of all or a random-sample of non-symptomatic, incarcerated people and staff. R:23, ¶15.

Second, the HOCs have refused to use their statutory authority to release any meaningful number of people to pretrial diversion or home confinement. See G. L. c. 127, §§ 20B, 49A. The vast majority of the HOCs have no operational home-

confinement or pretrial diversion programs, R:26, ¶38, 40, and those that do have failed to use them to achieve meaningful population reductions, R:28-29, ¶¶ 61-62, 64-66; R:427-28, ¶ 23. Cumulatively, the record demonstrates that the HOCs have used their own statutory authority to release just 142 incarcerated people from their custody since April 2020. R:28-29, ¶¶61-62, 64-66.

VI. Attorney/Client communications in Bristol and Essex.

A. In-person visiting options in Bristol and Essex.

Given the policies described above, many attorneys do not feel safe entering Bristol and Essex carceral facilities due to concerns related to the COVID-19 pandemic such as inadequate testing, low vaccination rates, and personal health concerns. R:63, ¶395; R:68, ¶444; R:73, ¶2; R:184, ¶54; R:244, ¶2; R:280, ¶2; R:288, ¶¶9-10. As a result, many attorneys go to these facilities less frequently or not at all. R:63, ¶395; R:68, ¶444; R:186, ¶3; R:267, ¶3.

Attorneys who do enter the facilities face additional obstacles in communicating with their clients. In the Bristol House of Correction, there are contact and non-contact options for in-person attorney visits. R:62, ¶381. The contact options are confidential, but the rooms are small, cramped, and appear to be unventilated. R:290, ¶24; R:306-07. The non-contact options are not confidential. R:302-05. They take place either in unenclosed booths in the visiting room, where an officer sits at a desk and speakers can be overheard by other

people, or in a room with no door and a correctional officer in the hallway within fifteen feet. R:62, ¶392; R:290, ¶¶25-26; R:302-05. One attorney, whose client had a pending case in Norfolk Superior Court, requested a court order to transfer his client from Bristol to Norfolk due in part to his inability to have meaningful communications with his client at the Bristol facility. R:63, ¶397; R:293, ¶13. The judge allowed the motion and ordered the transfer to Norfolk, which has videoconferencing capabilities. R:63, ¶398; R:293, ¶¶10, 15; R:294.

The phones used for non-contact visits at the Bristol Women's Detention Center are also in a common room where anyone can hear and the prisoners on the other side of the Plexiglas are not separated from one another. R:285, ¶19. The Ash Street Jail does not provide non-contact options, and the contact options are not confidential since they are held in a cell with no solid door. R:62, ¶393; R:290, ¶27; R:295-301.

In Essex, there are contact and non-contact visiting options. R:67, ¶440. For non-contact visits, there are multiple phones in a row, attorneys are separated from clients by Plexiglas, and they communicate via telephone. R:67, ¶441; R:68, ¶451. Attorneys are able to overhear conversations that other attorneys are having if their visits overlap. R:68, ¶451. Due to the Plexiglas barrier, attorneys cannot readily share paperwork with their clients, and must either hold it up to the Plexiglass or ask a correctional officer to bring it to the client. R:67, ¶441; R:69, ¶452.

B. Attorney-client communication—videoconferencing options.

In response to the pandemic, most counties in Massachusetts now offer confidential videoconferencing between incarcerated individuals and their attorneys that allows screen sharing and the inclusion of third parties, such as interpreters. R:87, ¶¶13-15; *Vazquez Diaz*, 487 Mass. at 338-40 (discussing Zoom capabilities). Of those counties that provide videoconferencing, most offer videoconferences over Zoom where defense counsel provides the link, and therefore bears the expense of the videocall. R:87, ¶13. Norfolk, Plymouth, and possibly Barnstable have installed JurisLink kiosks which allow attorneys to conduct secure videoconferences with clients. R:87, ¶15. JurisLink does not charge for the kiosks and does all the scheduling for its use. R:87, ¶16.

In contrast, Bristol does not permit attorney-client videoconferencing, R:62, ¶¶389-90, and Essex's videoconferences neither permit screen sharing nor contain a mechanism for third parties, such as interpreters, to join the video call. R:66-67, ¶¶432-33. The video calls in Essex are limited to either thirty or sixty minutes, but clients are frequently brought to the videoconferencing room after the timer has started, which cuts into the meeting time. R:69, ¶¶453-54. Moreover, Essex's Securus videoconferencing is plagued by technological issues. R:69, ¶458; R:81-82, ¶¶3(a)-(c); R:256-64, ¶¶20-42; R:426, ¶17(f). The video image on the screen is

small and cannot be enlarged such that documents and photographs held to the camera cannot be clearly seen. R:69, ¶¶455-56.

C. Telephone and tablet calls.

Telephone calls are an insufficient substitute for in-person or even video meetings. R:64, ¶413. First and foremost, they are not confidential. In both Bristol and Essex facilities, telephone calls take place in common areas. R:62, ¶386; R:65, ¶418. Attorneys can hear people in the background, can hear their clients talking to other people, and can hear other people talking to their clients. R:64, ¶¶404-06; R:68, ¶¶446-48. Due to the lack of confidentiality, attorneys have had to resort to asking only yes or no questions because their clients have not felt comfortable talking to them about their cases over the phone. R:64, ¶407; R:68, ¶449. While people incarcerated in Essex have access to tablets, and can make audio-only calls from their cells, this does not solve the confidentiality problem because nearly all prisoners are in double-bunk cells or dormitory-style housing. R:67, ¶¶434-37. Moreover, when clients call from their tablets, it is difficult to hear, the connection is poor, and the calls are sometimes disconnected. R:68, ¶445.

Additionally, it is always more difficult, and often impossible, to review discovery, such as audio or video evidence, with clients over the phone. R:64, ¶¶409-10. For some clients, this means that they have no opportunity to review the evidence against them because, due to the nature of their charges, it is unsafe for

them to have their discovery while incarcerated. R:63, ¶403; R:68, ¶450. Moreover, over the telephone, attorneys lack the ability to read body language and observe non-verbal cues that reveal misunderstanding or confusion. R:64, ¶411. It is also difficult for attorneys to build rapport and a trusting relationship with clients who have never seen them. R:64, ¶412.

D. Impact on expert evaluations in Bristol.

Finally, some experts are also unwilling to enter Bristol facilities to meet with incarcerated clients. R:63, ¶399. Because there is no videoconferencing option, clients must be transported to the courthouse for expert evaluations and this contributes to case delays. R:63, ¶¶400, 402. Once at the courthouse, some clients meet with experts over Zoom, but because they cannot have a laptop with them in the cell, the attorney must sit outside the cell and point the laptop at them. R:63, ¶401. In one case, the glass between the attorney and the client was so thick that the expert and the client could not hear each other and the laptop had to be placed on the floor outside a steel mesh barrier. *Id*. The 67-year-old client had to sit on the cement floor and was initially unable to get up off the floor; when he attempted to stand up, he fell down. R:274, ¶11.

SUMMARY OF ARGUMENT

I. To comply with the Eighth Amendment and art. 26, the HOCs cannot be deliberately indifferent to a substantial risk of harm to incarcerated people.

Pgs 32-34. COVID-19—a deadly, highly-contagious disease that poses an especial danger to people in congregate living facilities—unquestionably constitutes a substantial risk. Pgs 34-35. The HOCs have been deliberately indifferent to that risk in two respects.

First, the HOCs' refusal to conduct regular screening testing of staff and incarcerated people constitutes deliberate indifference because both CDC guidance and the unrebutted expert declarations in this case demonstrate that screening testing is essential to stop the spread of the virus in jails and prisons. By failing to conduct such tests, the HOCs have unconstitutionally blinded themselves to the true number of infected people in their facilities, and thus what measures must be taken to protect them. Pgs 36-41.

Second, the HOCs' refusal to use their release authorities constitutes deliberate indifference because depopulation is the only way to enable the remaining incarcerated people to achieve adequate physical distancing. Despite their statutory authority to reduce their populations through individual grants of home confinement and pretrial diversion, most HOCs have refused even to create such programs, and the rest have refused to use them to meaningfully reduce their populations. The HOCs without home-confinement and pretrial diversion programs show deliberate indifference by choosing not to create such programs, and all of the HOCs show deliberate indifference by refusing to use their statutory powers to

meaningfully reduce their incarcerated populations through individual consideration of eligible people. Pgs 41-45.

II. Under *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), pretrial detainees bringing Fourteenth Amendment claims for the denial of medical care need not show deliberate indifference, as in the Eighth Amendment context, but only that the denial is objectively unreasonable. Because the HOCs' refusal to implement a reasonable testing protocol and to use their statutory authority to meaningfully reduce their populations demonstrates deliberate indifference, the HOCs violate the due process rights of pretrial individuals under any applicable standard. But even if this Court were to hold that plaintiffs have not proven deliberate indifference, the HOCs' failures are objectively unreasonable, and therefore violate the due process rights of pretrial detainees. Pgs 45-47.

III. Under the Massachusetts Declaration of Rights and the United States Constitution, the HOCs are required to facilitate meaningful access to attorneys. Bristol and Essex have failed to do so within the context of the pandemic. While in-person contact visits remain necessary, they are no longer sufficient, as some attorneys cannot visit in person due to reasonable fears surrounding the lack of testing, lack of vaccinations among staff, and personal health issues. The telephone calls provided by Bristol and Essex are an insufficient substitute, both because they are not confidential, and because even if they were, the telephone does not allow

an attorney to sufficiently review discovery with, read the body language of, or build a relationship with their client. To satisfy the right to counsel during the pandemic, jails must provide meaningful video communications that includes screen sharing capabilities and allows third parties, such as experts or translators, to participate. Bristol and Essex's refusal to do so violates the state and federal constitutions. Pgs 47-55.

ARGUMENT

More than a year of data reporting and the undisputed record reveal three constitutional violations requiring this Court's intervention.

I. The HOCs' inadequate COVID-19 testing and decarceration practices unconstitutionally punish sentenced people in violation of the Eighth Amendment and art. 26.

A. The HOCs are constitutionally bound to take reasonable steps to protect sentenced people from a known, substantial risk.

When the state "so restrains an individual's liberty that it renders him unable to care for himself," it must "provide for his basic human needs." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 200 (1989). The Eighth Amendment's ban on "cruel and unusual punishments," and art. 26's ban on "cruel or unusual punishments," therefore require prisons to provide "adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of" prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations omitted). These measures include protecting sentenced people "from the

spread of serious, communicable diseases, including where the complaining inmate does not show symptoms of the disease, or where the possible infection might not affect all of those exposed." *Foster*, 484 Mass. at 701 (internal quotation marks omitted).

To demonstrate that potential exposure to a disease amounts to unconstitutional punishment, sentenced people must establish, first, a "substantial risk of serious harm," *Farmer*, 511 U.S. at 834, and, second, that officials acted with a "sufficiently culpable state of mind," *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Sentenced people must show that officials demonstrated subjective deliberate indifference to their health or safety to establish a culpable state of mind. *Farmer*, 511 U.S. at 829. Jails and prisons are deliberately indifferent when they "fail[] to take reasonable measures to abate" a known, substantial risk of harm. *Id*. at 847.[16]

Although "[p]ublished standards of medical care or adopted guidelines" "do not establish absolute standards for measuring the constitutionality of official action," they "are useful measures for determining whether contemporary

[16] See also *Zingg v. Groblewski*, 907 F.3d 630, 635 (1st Cir. 2018) (deliberate indifference due to "fail[ure] to take the steps that would have easily prevented" a known harm); *Ahearn v. Vose*, 64 Mass. App. Ct. 403, 417 (2005) (correctional staff violate the Eighth Amendment when they "fail[] to take 'easily available measures' to reduce the known risk to the plaintiffs' health") (quoting *Clancy v. McCabe*, 441 Mass. 311, 318 (2004)).

standards of decency have been met." *Foster,* 484 Mass. 394 (internal citations omitted). Because "[a]n institution that is aware of the CDC Guidelines and able to implement them but fails to do so demonstrates that it is unwilling to do what it can to abate the risk of the spread of infection," such non-compliance provides strong evidence of deliberate evidence. *Ahlman*, 445 F. Supp. 3d at 691.

B. COVID-19 presents a substantial risk of serious harm to incarcerated people.

"There is, and can be, no meaningful dispute that COVID-19 presents a substantial risk of serious harm" to incarcerated people. *Baez v. Moniz*, 460 F. Supp. 3d 78, 89 (D. Mass. 2020).[17] As is understood all too well at this point, COVID-19 is a dangerous and sometimes deadly disease that can damage the lungs, heart, and brain. R:21, ¶1; R:139, ¶7. Incarcerated people are more likely to both contract COVID-19 and to become seriously ill or die from it. R:22, ¶7; R:190, ¶7. As of April 21, 2021, at least 2,443 incarcerated people had died due to COVID-19—914 more people than those executed under the death penalty between 1976 and 2020[18]—and "recent . . . data from state prisons across the United States and the federal Bureau of Prisons demonstrated that the age and sex adjusted mortality rate from COVID-19 among incarcerated people was nearly

[17] See also *Savino v. Souza*, 459 F. Supp. 3d 317, 328 (D. Mass. 2020).
[18] Tom Meagher and Gabriel Dance, *The Next to Die: Watching Death Row*, The Marshall Project, https://www.themarshallproject.org/next-to-die.

three times higher [] than the general population." R:192, ¶¶13, 16. As this Court has repeatedly recognized, "there can be no real dispute that the increased risk of contracting COVID-19 in prisons, where physical distancing may be infeasible to maintain, has been recognized by the [Centers for Disease Control] and by courts across the country." *Nash*, 486 Mass. at 408 n.18 (quoting *Foster*, 484 Mass. at 718) (alteration in original).

The HOCs' provision of vaccines to incarcerated people and staff does not change this conclusion. Just this month, this Court reiterated that the Commonwealth had a "significant" interest in protecting the public from the "highly contagious" COVID-19, whose transmissibility is increased in "confined, enclosed environments," and held that the government generally had a compelling interest to hold zoom rather than in-person hearings. *Vazquez Diaz*, 487 Mass. at 354. *Vazquez Diaz*'s conclusion regarding the continued danger of COVID-19 transmission in a room with a handful of people for a few hours is all the more applicable to the dangers faced by the hundreds of people living together full-time in the HOCs, where turnover is frequent, and where the HOCs do not even know what proportion of incarcerated people and staff members have been vaccinated. R:31, ¶¶88-89, 92-93.[19]

[19] Although the HOCs could collect the weekly number of currently incarcerated people who have been vaccinated, they do not. R:31, ¶¶90-91. Instead, they report the cumulative number of vaccines administered both to people who remain in

C. The HOCs' failure to conduct regular screening testing of incarcerated people and staff constitutes deliberate indifference.

Jails and prisons' constitutional obligation to protect people in their custody by testing broadly for infectious diseases pre-dates the current pandemic. See, e.g., *Lareau v. Manson,* 651 F.2d 96, 109 (2d Cir. 1981) (holding "the failure to adequately screen newly arrived inmates for communicable diseases" constitutes deliberate indifference). For example, many courts have held that the failure to test incarcerated people for tuberculosis constitutes deliberate indifference. See, e.g., *Hernandez v. Cty. of Monterey,* 110 F. Supp. 3d 929, 942-45, 959 (N.D. Cal. 2015); *Morales Feliciano v. Calderon Serra*, 13 F. Supp. 2d 151, 208 (D.P.R. 1998).

The highly contagious SARS-CoV-2 virus places similar constitutional demands on jails and prisons. In determining that people incarcerated in the Department of Correction were unlikely to succeed on their Eighth Amendment claim at the start of the pandemic, the Court relied in part on what it called the DOC's "widespread testing of nonsymptomatic inmates." *Foster*, 484 Mass. at

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custody and to people who have been released, making it impossible to calculate the proportion of presently incarcerated people who have been vaccinated. R:31, ¶¶89, 92-93.

723.[20] The logic of that determination is that the *absence* of widespread testing can constitute deliberate indifference. Thus, in *Savino v. Souza*, 459 F. Supp. 3d 317, 331 (D. Mass. 2020) Judge Young concluded that "[k]eeping individuals confined closely together in the presence of a potentially lethal virus, while neither knowing who is carrying it nor taking effective measures to find out, likely displays deliberate indifference to a substantial risk of serious harm."[21]

Here, the HOCs have acted with deliberate indifference by failing to adequately test non-symptomatic incarcerated people and staff for COVID-19, a measure they know the CDC has deemed "essential to stop the spread of COVID-19." R:318.

The Massachusetts Department of Public Health (DPH) has explicitly referred the HOCs to the CDC's March 17, 2021 guidance for testing in jails and

[20] Chief Justice Gants's concurrence cautioned, however, that Eighth Amendment claims might succeed if additional measures were not taken by the fall of 2020. See *Foster*, 484 Mass. at 735, 740 (Gants, C.J., concurring).

[21] See also *Pimental-Estrada v. Barr*, 464 F. Supp. 3d 1225, 1229, 1233 (W.D. Wash. 2020) (facility's actions were not objectively reasonable because, "[w]ithout widespread testing, Respondents cannot identify 'confirmed cases' – the lynchpin that causes them to take further preventative procedures"); *Zepeda Rivas v. Jennings*, No. 20-CV-02731, 2020 WL 7066346, *1-2 (N.D. Cal. Dec. 3, 2020) (finding deliberate indifference in part because of facility's "conscious avoidance of widespread testing" of both detainees and staff); *N.C. State Conference of the NAACP v. Cooper*, North Carolina Superior Court Division – Wake County, No. 20-CV-500110, slip op. at 3, Preliminary Injunction Order (June 16, 2020) (holding plaintiffs likely to establish deliberate indifference in part because "[Defendants] have failed to provide the sufficient COVID-19 testing").

prisons, and "has not issued general recommendations on expanded screening testing to [the] HOCs beyond the information in [that] guidance." R:395; see also R:390-93. The CDC guidelines, in turn, provide "strong guidance for comprehensive and frequent testing of incarcerated people and staff, including non-symptomatic people with no known or suspected exposure to infected individuals." R:198, ¶33. Specifically, the CDC advises jails and prisons to conduct several types of screening testing, including: (1) testing an entire unit or facility after detecting a single COVID-19 infection; (2) testing all staff every three to seven days; (3) testing all incarcerated people at intake; and (4) serial screening testing additional incarcerated people and staff every three to seven days. R:325, 327.

The strong recommendation of the CDC's medical experts provides an important indicator of "the appropriate response to the risk presented by COVID-19" for constitutional purposes. *Ahlman,* 445 F. Supp. 3d at 690-91. That regular screening testing is constitutionally required is buttressed by (1) this Court's recognition that testing—followed by contract tracing and quarantining—are "the sine qua non of any effort to control the COVID-19 pandemic," *Foster*, 484 Mass. at 722-23; (2) the undisputed declarations of plaintiffs' affiants, which show that screening testing is the medical standard of care because it is necessary to protect people who live and work in the HOCs, R:148, ¶51; R:197, ¶28; and (3) the

numerous facilities that have already implemented the regular testing of staff[22] and/or of incarcerated people at intake.[23]

None of this is rebutted by the HOCs. Their affiant, Dr. Wurcel, does not dispute that the medical standard of care is to conduct routine testing of non-symptomatic staff and incarcerated people both at intake and during their detention. Far from rebutting plaintiffs' affiants, Dr. Wurcel attests that she has "reviewed the scientific studies and literature cited by Plaintiffs' experts" and has "not discounted these scientific findings." R:537, ¶9. In fact, she agrees that the "CDC is the leading authority for COVID19 prevention and mitigation—including testing— in correctional facilities." R:537, ¶9.

[22] See, e.g., *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, 2020 WL 7066346, *11 (N.D. Cal. Dec. 3, 2020) (ordering detention center to test all staff members on a weekly basis); *N.C. State Conf. of the NAACP v. Cooper*, No. 20-CVS-500110, Joint Mtn. for Stay (Wake Cnty. Super. Ct Feb. 25, 2021) (agreeing to biweekly testing of all non-vaccinated North Carolina prison staff who come into proximity with incarcerated people), https://www.acluofnorthcarolina.org/sites/default/files/field_documents/2021.02.25_20cvs500110_joint_motion_for_stay_w_att.pdf; *Duval v. Hogan*, No. 1:94-cv-02541, Dkt. 684 (July 21, 2021) (ordering Baltimore Central Booking and Intake Center to provide weekly COVID testing of staff in close contact with detainees).

[23] See, e.g., *Evdokimow v. Doll*, No. 4:21-CV-00261, 2021 WL 767554, at *2 (M.D. Pa. Feb. 26, 2021) (noting York County Prison is testing all new detainees who do not test positive for COVID-19 antibodies); *United States v. Gulley*, No. CR 3:18-9, 2021 WL 663710, at *9 (W.D. Pa. Feb 19, 2021) (noting Cambria County Prison is testing all new intakes multiple times); *Zepeda Rivas*, 2020 WL 7066346, at *11 (ordering detention center to test all intakes).

For their part, the HOCs nowhere state that they lack the capacity to conduct regular screening testing. Yet the record is clear that they are not doing so. Only three HOCs have ever tested non-symptomatic staff without known or suspected exposure to COVID-19; nine HOCs do not test incarcerated people at intake; and none of the HOCs conduct serial screening testing of all or a random sample of non-symptomatic incarcerated people and staff. R:23, ¶¶15-16; R:23-24, ¶¶18-22. Reflecting this practice, more than half of the HOCs have administered fewer than 200 total tests to correctional officers or staff members over the course of thirteen months of reporting. 5/13/21 SM Report. From October 1, 2020, through January 27, 2021, eight HOCs represented 57% of the incarcerated population and yet accounted for just 13.4% of all COVID-19 tests of incarcerated people at HOCs. R:25, ¶33. As of the most recent Special Master's report, four HOCs had each administered fewer COVID-19 tests to incarcerated people throughout the entire pandemic than their current populations. 5/13/21 SM Report.

By declining to follow what the CDC, the plaintiffs' unrebutted expert-testimony, and this Court have all recognized is necessary to detect COVID-19, despite having the apparent capacity to do so, the HOCs disable themselves from preventing and containing outbreaks among their staff and incarcerated populations. This "known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of

serious harm." *Hernandez,* 110 F. Supp. 3d at 943. Because the HOCs have "completely failed to address" how "testing [is] not reasonable and available here," and "especially in light of the CDC Guidelines recommending that testing . . . measures be taken in correctional facilities to abate the risks of COVID-19," they are deliberately indifferent to the substantial risk of serious harm posed by COVID-19. *Criswell v. Boudreaux*, No. 120-cv-01048, 2020 WL 5235675, at *18 (E.D. Cal. Sept. 2, 2020).

D. The HOCs' refusal to exercise their statutory decarceration authority also constitutes deliberate indifference.

This Court has called for decarceration as a means of protecting the people who live and work in carceral facilities and the surrounding communities. *CPCS*, 484 Mass. at 445; *Foster*, 484 Mass. at 701. And for good reason. Because "physical distancing is paramount to combating SARS-CoV-2 transmission," and "[r]educing the incarcerated population is the only way to increase the ability of the remaining individuals to physically distance," "decarceration is a necessary component of any effective strategy to protect people who live and work in carceral settings from COVID-19." R:202, ¶53; see also R:152-53, ¶¶73-78; R:202, ¶¶53-56. But the HOCs have not heeded this call. Instead, despite their statutory authority to reduce their populations through individual grants of home confinement and pretrial diversion, most HOCs have refused even to create such programs, and the rest have refused to use them to meaningfully reduce their

populations. These refusals constitute deliberate indifference to the serious risk of COVID-19.

Several courts have held that prison systems' refusal to use their release powers to mitigate the threat of COVID-19 violates the Eighth Amendment. In *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411 (D. Conn. 2020), a class of federal prisoners claimed that the warden's failure to transfer medically vulnerable prisoners to home confinement "in any meaningful numbers" constituted deliberate indifference. *Id.* at 441. The court agreed, holding that the facility's failure to transfer more than 21 out of 1,000 prisoners to home confinement established a likelihood of success on the Eighth Amendment claim. See *id.* at 441-43.[24] Perhaps

[24] See also *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 744–45 (C.D. Cal. 2020) (finding likelihood of deliberate indifference in part because of "the failure to take measures within ICE's power to increase the distance between detainees and prevent the spread of infectious disease, for example by promptly releasing individuals from detention to achieve greater spacing between medically vulnerable individuals and the general population"); *Campbell v. Barnes*, No. 30-2020-1141117, Order On Writ of Habeas Corpus and Writ of Mandate, slip op. at 16-17 (Orange Cnty. Super. Ct., Dec. 11, 2020) (finding deliberate indifference and ordering a 50% population reduction where "the measures taken lack the very cornerstone of a successful abatement plan, namely, a sufficient reduction in [j]ail population to enable proper social distancing"), https://www.aclu.org/legal-document/order-ahlman-v-barnes; *Torres v. Milusnic*, 472 F. Supp. 3d 713, 740 (C.D. Cal. 2020) (holding that prison officials were likely deliberately indifferent by failing to make prompt and meaningful use of home confinement).

partly because of this constitutional command, the Federal Bureau of Prisons has transferred 25,607 people to home confinement since March 2020.[25]

Like the Bureau of Prisons, the HOCs have statutory tools to safely reduce their populations. Under G. L. c. 127, § 20B, the HOCs can release individuals to pretrial diversion programs. And G. L. c. 127, § 49 empowers the HOCs to establish education, training, and employment programs, including programs that may be completed outside of a correctional facility, for people who are within eighteen months of parole eligibility and have not been convicted of certain enumerated offenses. This provision authorizes the HOCs to allow people to serve the remainder of their sentences in home confinement. See *Foster*, 484 Mass. at 733. Indeed, "General Laws c. 127, § 49A, *requires* the commissioner to establish in each correctional facility a committee to evaluate the behavior and conduct of inmates within the prison and recommend whether an inmate 'shall be permitted to participate in any program outside a correctional facility, exclusive of parole.'" *Id.* at 737 (Gants, C.J., concurring) (quoting G.L. c. 127, § 49A).

Yet the HOCs' use of these authorities has been meager. Six HOCs have no home-confinement programs whatsoever, and two have suspended theirs during the pandemic. R:26, ¶38; R:427, ¶23. Five HOCs claim to have operational

[25] See Federal Bureau of Prisons, *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, https://www.bop.gov/coronavirus/faq.jsp (last visited May 19, 2021).

programs, but have failed to use them to achieve meaningful population reductions. As of April 2021, at least four of those five HOCs each had seven or fewer people on home confinement.[26] Meanwhile, at least eight counties do not have pretrial diversion programs pursuant to G. L. c. 127, § 20B, and another three have released nobody under these programs since at least April 2020. R:26, ¶40; R:427-28, ¶23. Cumulatively, it appears that the HOCs have used their own statutory authority to release just 142 incarcerated people since April 2020. R:28, ¶¶61-62, 64-66. It is therefore likely that, of the 3,968 people who are listed in the Special Master's report as "released per the SJC order," most, if not all, were released due to a decision by a trial court or district attorney's office. Cf. *CPCS*, 484 Mass. at 453 (ordering the trial courts to conduct bail reconsideration hearings and to apply a presumption of release for certain pretrial detainees).

The HOCs' failure to use their statutory authority is dangerous. As of May 12, 2021, the combined population of the HOCs was 85% of their combined population on April 12, 2020, and nine counties had populations that were at least 80% of their populations in April 2020. SM Report 5/13/21. Six counties had higher populations in April 2021 than in July 2020, SM Report 5/13/21, and the

[26] Hampden had zero people on home confinement, Franklin had just one, and Middlesex and Hampshire had seven. R:28, ¶¶61-64. Essex reports that it has released a total of 40 people on electronic monitoring over the course of the pandemic, but does not report how many people are presently serving their sentences in the community. R:428, ¶24.

total number of pretrial detainees was higher on May 12, 2021 than on April 6, 2020.[27] Under the circumstances of the present crisis, the HOCs without home-confinement and pretrial diversion programs show deliberate indifference by choosing not to create such programs, and all of the HOCs show deliberate indifference by refusing to use their statutory powers to meaningfully reduce their incarcerated populations through individual consideration of eligible people.

II. The HOCs' inadequate COVID-19 testing and decarceration practices also violate the due process rights of pretrial detainees.

Unlike sentenced people, pretrial detainees cannot be punished at all. *Ingraham v. Wright*, 430 U.S. 651, 671–72, n.40 (1977). Because the HOCs' refusal to implement a reasonable testing protocol and to use their statutory authority to meaningfully reduce their populations demonstrates deliberate indifference, see *supra*, this Court could simply hold that the HOCs violate the due process rights of pretrial individuals under any applicable standard. But even if this Court were to hold that deliberate indifference is absent here, it still could and should hold that the due process rights of pretrial detainees have been violated.

The Supreme Court has held that pretrial detainees alleging Fourteenth Amendment violations for excessive force need not prove that the officers were

[27] See ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prisons & Jails: Incarcerated Population Over Time*, https://data.aclum.org/sjc-12926-tracker (showing 3,905 pretrial detainees on May 12, 2021, versus 3,857 on April 6, 2020, which was the first day all counties reported).

subjectively aware that the force was excessive, as they must do in the Eighth Amendment context, but merely that the force was objectively unreasonable. *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). Following *Kingsley*, federal circuit courts are split on the related question of whether pretrial detainees bringing Fourteenth Amendment conditions-of-confinement claims need only show objective unreasonableness, rather than that prison officials were subjectively aware of the risk. See *Gomes v. U.S. Dep't of Homeland Sec., Acting Sec'y*, 460 F. Supp. 3d 132, 147–48 & n.32 (D.N.H. 2020) (collecting cases).

This Court should join the Second, Seventh, and Ninth Circuits in concluding that, under the logic of *Kingsley*, proving objectively unreasonable conditions of confinement is sufficient to establish a due process violation.[28] The First Circuit has not yet answered this question, noting instead that the boundaries

[28] See *Darnell v. Pineiro*, 849 F.3d 17, 35, 36 (2d Cir. 2017) (observing "*Kingsley's* broad reasoning extends beyond the excessive force context in which it arose," and holding that "[t]he same objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment"); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (holding that *Kingsley* applies to all Fourteenth Amendment claims brought by pretrial detainees against individual defendants based on its conclusion that "[t]he Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally" (quoting *Kingsley*, 576 U.S. at 398)); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (applying objective standard to pretrial detainee's claim for denial of medical care); cf. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (explaining that *Kingsley* "calls into serious doubt whether" pretrial detainees need to prove a subjective component in conditions claims).

of the duty to provide medical care to pretrial detainees "have not been plotted exactly." *Miranda-Rivera v. Toledo-Dávila*, 813 F.3d 64, 74 (1st Cir. 2016) (citation omitted)); *Gomes*, 460 F. Supp. 3d at 147 (noting "the First Circuit's approach to the deliberate indifference claims in [post-*Kingsley*] cases does not appear to foreclose a ruling that *Kingsley* has changed the standard"). Based on the reasoning above, this Court can leave the question of due process standards for another day. But if this Court decides that the HOCs have not been deliberately indifferent, it should hold that their actions still violate the due process rights of pretrial detainees because they are objectively unreasonable.

III. By failing to facilitate meaningful attorney-client communication, Bristol and Essex are violating incarcerated people's constitutionally protected right to counsel.

Both the Massachusetts Declaration of Rights and the United States Constitution require prisons and jails to facilitate meaningful access to attorneys. See U.S. Const. amends. VI, XIV; Mass. Declaration of Rights, arts. 1, 10, 12. Confidential in-person contact visits are a constitutionally required component of that meaningful access. See *Benjamin v. Fraser,* 264 F.3d 175, 180-81 (2d Cir. 2001) (upholding district court's order requiring jail to provide private visits). Due to the pandemic, in-person contact visits remain *necessary*, but they are no longer *sufficient* to protect the rights of incarcerated people. In these extraordinary times, in-person visits must be supplemented with timely, confidential video

communications that allow attorneys to have timely, meaningful discussions with their clients. Yet Bristol has absolutely no videoconferencing capabilities for attorney-client communications, and Essex's videoconferencing, which lacks the ability to share documents or include third parties such as interpreters, is woefully insufficient. In light of the pandemic, these failures violate the right to counsel under the state and federal constitutions.

A. Incarcerated people are constitutionally entitled to meaningful attorney access.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Among other rights, prisons and jails must provide people in their custody with "sufficient access to attorneys." *Cacicio v. Sec'y of Pub. Safety*, 422 Mass. 764, 773 (1996). Sufficient access requires in-person, contact visits with counsel. See *Hoffer v. Comm'r of Corr.*, 397 Mass. 152, 155 (1986).[29] These visits must be private and confidential. See *id*.[30] Under this rule, courts have invalidated practices that

[29] See also *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (right of access to courts includes contact visitation with counsel); *Adams v. Carlson*, 488 F.2d 619, 632 (7th Cir. 1973) ("Where an attorney visiting an incarcerated client offers to waive his right to resist a search by prison guards, a penal institution errs at the expense of the inmate's right of full access to the courts when it . . . requires a conference by phone across glass.").

[30] See also *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972) ("[T]he prisoner has a right to have the confidence between himself and his counsel totally respected."); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) ("[C]ontact with an attorney and the opportunity to communicate privately is a vital ingredient to

required incarcerated people to yell to be heard by their attorneys, see *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990), and have required prisons to provide sufficiently private areas for meaningful attorney-client interviews, see *Dreher v. Sielaff*, 636 F.2d 1141, 1145 (7th Cir. 1980).

When extreme circumstances interfere with in-person visits, a prison or jail must provide supplemental modes of confidential attorney-client communications. These supplements, while not replacing the need for in-person visits, must *at least* satisfy the other constitutional requirements for meaningful attorney-client access. Accordingly, given that some attorneys are justifiably unwilling to visit in person, prisons and jails must either supplement in-person visitation with confidential videoconferencing or else demonstrate a sufficient justification for failing to do so. Cf. *S. Poverty L. Ctr. v. United States Dep't of Homeland Sec.*, No. 18-760, 2020 WL 3265533, at *1-2, 28-31 (D.D.C. June 17, 2020), (hereinafter *SPLC*) (finding likelihood of success on access-to-counsel claim based on inadequate opportunities for remote legal visitation during the pandemic).

Here, under any arguably applicable constitutional standard,[31] there is no legitimate reason for Bristol and Essex's failure to supplement in-person visits with

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the effective assistance of counsel and access to the courts."). Cf. *In re a John Doe Grand Jury Investigation*, 408 Mass. 480, 481–82 (1990) (administration of justice requires confidential attorney-client communications).

[31] The Supreme Court has said that burdens on the right to counsel "must be weighed against the legitimate interests of penal administration and the proper

confidential videoconferences that permit screen sharing and third parties, as the vast majority of counties have done. R:70, ¶¶467-68. See *Procunier v. Martinez*, 416 U.S. 396, 420 (1974), overruled in part on other grounds by, *Thornburgh v. Abbott,* 490 U.S. 401 (1989) (limitations on attorney access balanced against "legitimate interests of penal administration"); *Turner*, 482 U.S. at 89 (holding that a prison regulation that impinges on incarcerated people's constitutional rights must be "reasonably related to legitimate penological interests").

B. Bristol and Essex's failure to facilitate meaningful, confidential attorney-client videoconferencing, compounded by the lack of confidential telephone calls, is unreasonably interfering with the right to counsel.

This Court has already found that "court[s] must make available to an indigent defendant counsel with whom reasonable communication is possible[.]" *Commonwealth v. Lee*, 394 Mass. 209, 216 (1985) (assessing effective assistance of counsel and voluntary waiver of the right to counsel). Here, Bristol and Essex's unwarranted refusal to provide accommodations for such reasonable

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regard that judges should give to the expertise and discretionary authority of correctional officials." *Procunier v. Martinez*, 416 U.S. 396, 420 (1974). The Supreme Judicial Court has suggested that the familiar *Turner v. Safley* test applies to limitations on attorney access. See *Cacicio,* 422 Mass. at 770 (citing *Turner*, 482 U.S. at 89-91); but see *Benjamin*, 264 F.3d at 187 & n.10 (holding that the *Procunier* standard, rather than the *Turner* standard, applies to Sixth Amendment claims for the abridgement of attorney access).

communications, which at least nine other HOCs are already providing, is interfering with the right to counsel.

1. In-person attorney visits to the HOCs are inadequate during the pandemic.

Due to COVID-19, "in-person legal visitation is no longer viable as a primary vehicle of [attorney-client] communication," *SPLC*, 2020 WL 3265533, at *2, including in Massachusetts. Many attorneys presently cannot visit jails because they justifiably do not feel safe doing so, particularly given the HOCs' failure to conduct regular screening testing of incarcerated people and staff, low vaccination rates, as well as attorneys' personal health issues. R:63, ¶395; R:68, ¶444; R:73, ¶2; R:184, ¶4; R:244, ¶2; R:280, ¶2; R:288, ¶¶9-10. As a result, many attorneys go to these facilities less frequently or not at all. R:63, ¶395; R:68, ¶444; R:186, ¶3; R:267, ¶3.

The option of non-contact attorney visits does not solve the problem. The non-contact visits in Bristol and Essex are not always confidential, and attorneys cannot review documents with their clients through Plexiglass. R:69, ¶452. By forcing attorneys to choose between the risk of infection and forgoing confidential client communication, such a policy could place attorneys' interests in conflict with those of their clients, in violation of the right to counsel. R:289, ¶19. Cf. *Commonwealth v. Fernandes*, 485 Mass. 172, 195 (2020) (conflict of interest exists where attorney's interests impair professional judgment).

This combination of safety fears, lack of confidentiality, and additional obstacles render in-person attorney visits insufficient to provide meaningful access to counsel during the pandemic.

2. Bristol and Essex do not offer the virtual communications necessary to provide meaningful access to counsel during the pandemic.

Neither Bristol nor Essex offers the supplemental options necessary to assure confidential attorney-client communications in light of the pandemic. First and most important, they are not providing adequate access to videoconferencing—the mode of communication that, while not a substitute for in-person visits, is the best approximation thereof. Second, they are not even providing adequate access to confidential attorney-client phone calls.

In Bristol, the lack of attorney-client videoconferencing has demonstrably negatively impacted incarcerated defendants. In addition to not being able to develop trust and a rapport, review discovery together, and assess client understanding through non-verbal cues, the lack of videoconferencing is delaying cases where a forensic evaluation is required. R:63, ¶402; R:64, ¶¶409-12. Moreover, because some expert witnesses are unwilling to go to the jail, clients held in Bristol often have to be brought to the courthouse for forensic evaluations, where they sometimes occur under terrible conditions. R:63, ¶¶399-401; R:274, ¶¶6-12. Indeed, the attorney-client communication options are so insufficient that

one judge allowed a motion to move a client out of Bristol and into Norfolk, which has videoconferencing capabilities. R:63, ¶¶397-398; R:294.

While Essex does provide attorney-client videoconferencing, it is woefully inadequate. Meetings are often cut short, outright cancelled, or of poor quality; the video image on the screen is small; and because it neither allows third parties nor permits screen sharing, it is barely better than a phone call.

Even if phone calls were sufficient, which they are not, neither Bristol nor Essex assure confidential legal telephone communications. Clients can call their attorneys from general-use telephones in common areas in the presence of other incarcerated people and correctional officers. In Essex, the calls from the tablets are not confidential, often of poor quality, and are frequently disconnected

3. The significant impact on incarcerated individuals' ability to meaningfully access counsel is not justified.

Inadequate access to counsel at the Bristol and Essex carceral facilities harms numerous incarcerated people. As the Court has recognized, "[t]here are myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel." *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 235 (2004). See also *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (acknowledging that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself"). Depriving

clients of meaningful supplements to in-person visits during the pandemic hamstrings these efforts, particularly for incarcerated people with upcoming court dates, such as G. L. c. 276, § 58A hearings on pretrial detention.

Bristol and Essex have not justified this heavy burden on the right to counsel with legitimate administrative interests. As discussed above, many counties provide attorney-client videoconferencing via Zoom or JurisLink, including Hampden County, which had to overcome significant technological obstacles in order to be able to provide videoconferencing. R:70, ¶467-68; R:77-78. Significantly, both Bristol and Essex currently facilitate some individuals' court appearances. R:67, ¶439; R:290-91, ¶¶29-32.

Courts have recognized that the pandemic does not justify the denial of meaningful access to counsel. In *Banks v Booth*, 459 F. Supp. 3d 143, 158 (D.D.C. 2020), a class of pretrial detainees challenged measures that deprived them of access to telephones and confidential communication with their attorneys while in medical isolation. The court held that it could "not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration," and directed the facility to provide "access to confidential, unmonitored legal calls of a duration sufficient to discuss legal matters." *Id*. at 160, 163 (internal quotations omitted); see also *United States v. Davis*, 449 F. Supp. 3d 532, 541 (D. Md. 2020) (denying government's motion for pretrial detention in

part because of the burden it would place on the right to counsel); *SPLC*, 2020 WL 3265533, at *2 (finding likelihood of success on access-to-counsel claim based on facility's inadequate "response to [the pandemic] with respect to increasing the capacity and possibilities for remote legal visitation").

This Court has already recognized that the administration of justice during this pandemic rests on defense attorneys' ability to "promptly [] convene video or teleconferences with their clients," and requires the Sheriffs "to work with the defense bar to facilitate such communications." *CPCS*, 484 Mass. at 448–49. This Court should do so again now. The lack of confidential legal videoconferences does not serve any interest in penal administration and violates the right to counsel of people in the custody of Bristol and Essex.

CONCLUSION

For the foregoing reasons, plaintiffs ask this Court to:

(1) Declare that the HOCs' failure to conduct screening testing and to use their statutory authority to meaningfully decrease their populations violates the state and federal constitutional rights of all individuals in their custody;

(2) Declare that Bristol's and Essex's failure to provide meaningful attorney-client communications within the context of the

pandemic violates the state and federal constitutional rights of all individuals in their custody;

(3) Order the HOCs to conduct regular screening testing of incarcerated people and staff and to use their statutory authority to meaningfully decrease their populations through individual consideration of all eligible people; and

(4) Order Bristol and Essex to provide meaningful access to timely, confidential videoconferences and phone calls.

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Respectfully,

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May 19, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a) (13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P 18 (appendix to the briefs); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). The brief was typed in Times New Roman 14 point font using Microsoft Word 2016, and includes 10,694 non-excluded words.

Dated: May 19, 2021

/s/ Benjamin Keehn
Benjamin Keehn

CERTIFICATE OF SERVICE

I certify that on May 19, 2021, I caused a true copy of the Brief and Record Appendix to be served by electronic filing through the CM/ECF system and also served the Brief and Record Appendix via email on Carrie Hill at carrie.hill@massmail.state.ma.us and Dan V. Bair, II at dbair@danbairlaw.com.

Dated: May 19, 2021

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