

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.:

HANNAH WEIKERT  
JENNIFER HERMANNNS  
TERRENCE LACEY  
SEAN NELSON  
JEAN-JOSEPH LE CHIFFRE  
GILBERT TRUJILLO,

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

BILL ELDER, Sheriff of El Paso County, Colorado, in his official capacity,

Defendant.

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**MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY  
INJUNCTION, AND EXPEDITED HEARING**

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Plaintiffs, by and through undersigned counsel and on behalf of the putative class, respectfully move for a temporary restraining order and preliminary injunction to ensure that they are adequately protected from contracting COVID-19 and adequately evaluated, treated, and monitored for COVID-19 if they become sick.<sup>1</sup> In support, Plaintiffs state:

**I. INTRODUCTION**

To the shock of a community well-accustomed to diligent mask-wearing to prevent the spread of COVID-19, weeks ago this November it emerged that the El Paso County Criminal

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<sup>1</sup> On Friday morning December 11, 2020, counsel for Plaintiffs gave notice of their intent to file this action to the counsel for Defendant in compliance with Fed.R.Civ.P. 65 and D.C.COLO.LCivR 65.1. In accordance with D.C.COLO.LCivR 7.1, counsel for Defendant indicated that Defendant opposes the relief sought herein.

Justice Center (“El Paso County Jail” or “Jail”) was not only failing to provide masks to all inmates or to require mask-wearing in the facility, the Jail had been *prohibiting* inmates from wearing masks in their housing wards.<sup>2</sup> (Ex. H, Adkins Decl. ¶ 5; Ex. O, Thomas Decl. ¶ 10; Ex. L, Williams Decl. ¶ 2; Ex. B, Weikert Decl. ¶ 5; Ex. P, Dobbins Decl. ¶ 3; Ex. I, Gantt Decl. ¶ 4.) By that time, the facility was in the midst of a skyrocketing outbreak in which over 1000 inmates and over 100 staff members had already become infected.<sup>3</sup>

Epitomizing the Jail’s failed response to the pandemic, Jail staff told people suffering that the jail’s plan was to let the virus “run its course.” (Ex. Q, Murry Decl. ¶ 6; Ex. D, Lacey Decl. ¶ 9.) This “let nature take its course” response to unsafe, potentially deadly jail conditions violates the inmates’ constitutional rights. *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (jails must protect inmates from “substantial risk of serious harm”). The Jail remains a facility in crisis, causing unspeakable and widespread suffering to Plaintiffs and the class, who face the ongoing threat of COVID-19 infection and inadequate monitoring and treatment when they become sick.

Contrary to guidelines established by the Centers for Disease Control and Prevention (CDC) and National Institutes of Health (NIH), the Jail fails to implement basic, necessary COVID-19 precautions pursuant to public health guidelines: failing to separate those positive or suspected positive for COVID-19 from those who are negative; failing to quarantine new intakes; failing to identify and protect the medically vulnerable; failing to ensure that all inmates and staff wear masks; and failing to adequately evaluate, monitor, and treat those suffering from

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<sup>2</sup> Olivia Prentzel et al, *El Paso County jail staff, inmates cite lack of masks in COVID-19 outbreak that became one of the largest in the state*, The Gazette (Nov. 14, 2020 updated Dec. 3, 2020), [https://gazette.com/premium/el-paso-county-jail-staff-inmates-cite-lack-of-masks-in-covid-19-outbreak-that/article\\_b1bec9be-25f9-11eb-9f87-8799f955bbc6.html](https://gazette.com/premium/el-paso-county-jail-staff-inmates-cite-lack-of-masks-in-covid-19-outbreak-that/article_b1bec9be-25f9-11eb-9f87-8799f955bbc6.html).

<sup>3</sup> Colorado Department of Public Health, *COVID OB Weekly Report 12 2 2020*://drive.google.com/file/d/1UQtI20evO-R1YNGqVgqZCSgM7Fgh\_TU\_/view (last accessed December 8, 2020).

COVID-19. These infirmities caused the out-of-control outbreak in the jail and continue to jeopardize Plaintiffs' health and lives.

The jail's failure to protect those in its custody is not only constitutionally infirm, it is inexcusable. Long before this outbreak, the CDC was publishing guidelines for COVID-19, including protocols specific to jails and prisons.<sup>4</sup> Over the spring and summer of 2020, courts across the nation recognized the need to protect inmates in jails, granting injunctive relief where jails and other facilities failed to adequately respond to COVID-19. *See, e.g., Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174, at \*15 (D. Colo. May 11, 2020) (granting in part preliminary injunction relating to an outbreak in the Weld County jail); *Criswell v. Boudreaux*, No. 120CV01048DADSAB, 2020 WL 5235675, at \*26 (E.D. Cal. Sept. 2, 2020) (granting preliminary injunction in part, including for failure to provide or require masks); *Banks v. Booth*, No. 20-cv-849-CKK, 2020 WL 3303006, at \*16 (D.D.C. June 18, 2020) (granting in part preliminary injunction including ordering compliance with certain CDC guidelines), *appeal docketed*, No. 20-5216 (D.C. Cir. July 22, 2020); *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 694 (C.D. Cal. May 26, 2020) ("mandating compliance with the CDC Guidelines in the Jail serves the public interest"). Defendant Elder was on notice that one of these injunctions was granted here in Colorado against the Sheriff of Weld County for failing to protect the inmates in his jail.<sup>5</sup>

Defendant Elder is well-aware of COVID-19's dangers and the necessary basic precautions to take in jail. Yet he has failed to act accordingly, leading to a massive COVID-19

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<sup>4</sup> CDC, *Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities*, (Oct. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>5</sup> *See* ACLU letter to all elected Sheriffs, "Re: Sheriffs' duty to protect high risk inmates from COVID-19," June 23, 2020, available at <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/2020-06-23-Sheriffs-ACLU.pdf> (last accessed Dec. 12, 2020).

outbreak in his Jail, and subjecting Plaintiffs and class members to an unjustifiable and substantial risk of serious harm to their health and to their lives. Injunctive relief is necessary to prevent immediate irreparable harm.

## **II. REQUEST FOR RELIEF**

Plaintiffs ask this Court to order Defendant Elder to implement a system-wide process to rectify the violation of Plaintiffs' constitutional rights and protect them from COVID-19, including:

- a. Inmates and staff must be required to wear masks at all times. To allow inmates to wear masks at all times, each inmate must be issued at least two cloth masks, such that when one mask is being washed daily, another mask can be worn. Alternatively, inmates may be issued disposable masks which are replaced at the frequency recommended by the mask manufacturer.
- b. COVID-19 positive and suspected COVID-19 positive inmates must be isolated from other inmates, with cohorting used sparingly for COVID-19 positive inmates, and no cohorting used for suspected COVID-19 positive inmates.
- c. Newly admitted inmates must be screened to determine if they are medically vulnerable, and all inmates arriving at the jail should be tested for COVID-19 upon arrival if possible.
- d. The jail should engage in regular prevalence testing to screen for COVID-19 outbreaks at the jail.
- e. Newly admitted inmates who do not test negative for COVID-19 upon arrival at the jail must be quarantined in a transition unit for at least 14 days prior to being moved to a general population unit in the jail.
- f. During the quarantine period for newly admitted inmates, the medically vulnerable newly admitted inmates must be placed in single cells to the maximum extent feasible to prevent exposure from other inmates of the transition unit.
- g. After leaving the transitional unit, medically vulnerable inmates should be housed and kept separate from other inmates to the maximum extent feasible, so that they do not come into contact with COVID-19 positive inmates.
- h. Routine cleaning practices for all hard-metal and other non-porous surfaces must be strictly followed, including for toilets, sinks, showers, tables, telephones, and other areas of the jail. Inmates must be afforded access to

cleaning supplies to wipe the surfaces down with cleaners or disinfecting wipes sufficient to eliminate the virus.

- i. Inmates must be afforded adequate supplies of soap for basic hygiene and hand-washing multiple times per day.
- j. Each COVID-19 positive inmate must be evaluated by medical personnel. Symptomatic inmates must have individual treatment plans consistent with medical best practices. Each COVID-positive inmate must be examined daily, with vital signs taken, to determine if their condition is worsening, and if changes are required for the inmate's treatment plan.
- k. Symptomatic inmates must be afforded treatment consistent with medical best practices, including access to pain relievers and other needed medication without undue delay.
- l. All inmates must be afforded ongoing access to clean drinking water from a fountain or other water faucet that does not require the inmate to drink from sinks used for handwashing. Likewise, inmates require access to both hot and cold water so that they can have proper nutrition by using hot water for food preparation such as for soup packets.
- m. All inmates must be provided accurate, up-to-date educational materials and information regarding controlling the spread of COVID-19.

### **III. FACTUAL BACKGROUND**

#### **A. Evolving Knowledge of the Coronavirus and the Corresponding Response**

In early 2020, the COVID-19 virus arrived in the United States and created a nationwide health crisis. Fear about the virus exploded as hospital rooms began filling with infected patients. Schools and workplaces closed, concerts and sporting events were cancelled, and some areas implemented stay-at-home orders. Scientists knew little about how COVID-19 was transmitted. There was an early emphasis on surface transmission while conflicting messages were issued to the public about mask wearing and other preventative measures.

Through the spring and summer of 2020, scientists learned more about SARS-CoV-2 (the virus that causes COVID-19). Studies revealed the primary risk of transmission was airborne.<sup>6</sup> The prevalence of asymptomatic carriers and transmission through these carriers became well-known.<sup>7</sup> Importantly for this case, the scientific community coalesced around the importance of mask wearing for preventing spread of the virus.<sup>8</sup>

As a society, we largely adjusted our practices in response to the emerging knowledge about the COVID-19 virus. We limited social contact and focused on being outdoors where airborne transmission was more limited. Sanitizing products appeared at the entrance to public spaces. Facial coverings became the norm. In fact, on July 17, 2020 Colorado implemented a state-wide mask mandate requiring facial coverings in all indoor public spaces. Where facial coverings were impractical, strict capacity limitations were imposed to prevent close contact between unmasked people. By that time, multiple published studies showed the importance of mask wearing for preventing the spread of COVID-19.<sup>9</sup>

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<sup>6</sup> See, e.g., Zhang, Renyi, “Identifying airborne transmission as the dominant route for the spread of COVID-19,” *Proceedings of the National Academy of Sciences* (first published June 11, 2020), available at <https://www.pnas.org/content/117/26/14857> (last accessed Dec. 12, 2020).

<sup>7</sup> See, e.g., Zhao, Hongjun, “COVID-19: asymptomatic carrier transmission is an underestimated problem,” *Cambridge University Press Public Health Emergency Collection* (published online June 11, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7322154/> (last accessed Dec. 12, 2020).

<sup>8</sup> “CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public,” *National Public Radio* (April 3, 2020), available at <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public> (last accessed Dec. 12, 2020).

<sup>9</sup> See, e.g., “Visualizing Speech-Generated Oral Fluid Droplets with Laser Light Scattering,” *New England Journal of Medicine* (April 15, 2020), available at: <https://www.nejm.org/doi/full/10.1056/NEJMc2007800> (last accessed Dec. 12, 2020); Nancy Leung, *et al.*, “Respiratory virus shedding in exhaled breath and efficacy of face masks,” *Nature Medicine* (April 3, 2020), available at: <https://www.nature.com/articles/s41591-020-0843-2#Sec3> (last accessed Dec. 12, 2020); Wei Lyu and George Wehby, “Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US,”

**B. Incarcerated individuals are particularly vulnerable to infection from COVID-19.**

The overwhelming consensus of public health authorities and experts is that inmates have a particular vulnerability to COVID-19.<sup>10</sup> (Ex. A, *Expert Report of Carlos Franco-Paredes, M.D., M.P.H.*, ¶¶ 26-33.) Congregate settings such as jails and prisons allow for rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets through coughing and sneezing. When people must share dining halls, bathrooms, showers, and other common areas, the opportunities for transmission are greater. Infectious diseases, particularly airborne diseases such as COVID-19, are more likely to spread rapidly between individuals in correctional facilities. (*Id.*) According to data released by the Bureau of Prisons, the infection rate inside jails and prisons is nearly five times higher than the infection rate in the general public in the United States.<sup>11</sup>

COVID-19 Rate of Infection for Various Populations

Location	Cases	Population	Infections/ 1,000 People	Infection Rate as Percent of Population
BOP Imprisoned Population	15,237 <sup>2</sup>	140,733 <sup>3</sup>	108.27	10.8269%
United States	7,504,116	330,412,610 <sup>4</sup>	22.71	2.2711%
China	90,678 <sup>5</sup>	1,394,015,977 <sup>6</sup>	0.07	0.0065%
Italy	330,263 <sup>7</sup>	62,402,659 <sup>8</sup>	5.29	0.5292%

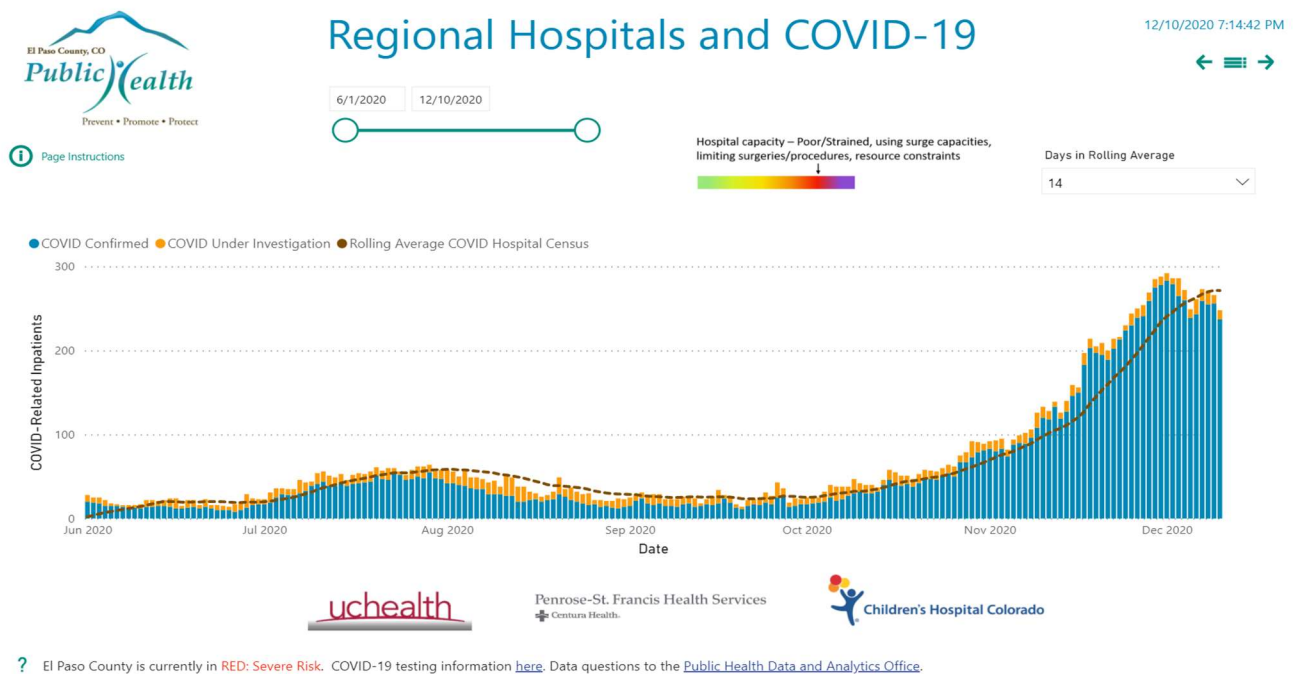
	BOP has an infection rate X times higher
Compared to the United States	4.77
Compared to China	1664.44
Compared to Italy	20.46

Health Affairs (June 16, 2020), available at <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00818> (last accessed Dec. 12, 2020).

<sup>10</sup> See, e.g., Laura Hawks, M.D. *et al.*, “COVID-19 in Prisons and Jails in the United States,” *JAMA Intern Med.* (April 28, 2020), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271> (last accessed Dec. 12, 2020).

<sup>11</sup> BOP-Reported Positive Tests for COVID-19 Nationwide, Federal Defenders of NY (<https://federaldefendersny.org/>) (last visited Dec. 10, 2020).

Jails also lack adequate medical care infrastructure to address the spread of infectious disease, like COVID-19, and to treat high-risk people in custody. Health units are not equipped with sufficient emergency medical equipment, such as oxygen tanks, nasal cannulae, and oxygen face masks, to respond to an outbreak of patients with respiratory distress. For these reasons, among others, experts have warned that “widespread community transmission of COVID-19 within a correctional institution is likely to result in a disproportionately high COVID-19 mortality rate.”<sup>12</sup> Jails rely on outside community hospitals to provide more advanced and intensive medical care and, in El Paso County, these outside facilities are nearing capacity themselves.<sup>13</sup>



<sup>12</sup> “COVID-19 in Correctional Settings: Unique Challenges and Proposed Responses” (March 23, 2020), available at: <https://amend.us/wp-content/uploads/2020/03/COVID-in-Corrections-Challenges-and-Solutions1.pdf>; *see also* “Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions,” Health Affairs Blog, March 26, 2020, available at <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/>.

<sup>13</sup> El Paso County Public Health, Public Health Data and Analytics (available at <https://www.elpasocountyhealth.org/covid19data-dashboard>) (last visited Dec. 10, 2020).



### **C. CDC and Public Health Protocols for COVID-19 Prevention, Monitoring, and Treatment in a Carceral Setting**

Operators of carceral facilities are not left stranded in their quest to manage COVID-19 inside jails and prisons. Near the beginning of the pandemic, the CDC issued guidance specifically tailored to preventing the spread of COVID-19 inside jails and detention centers and managing an outbreak.<sup>14</sup> This guidance is updated routinely as new studies are published and scientific knowledge improves. For crowded residential facilities like the El Paso County Jail, which currently houses approximately 1200 people, the CDC recognizes that strict procedures must be implemented to prevent spread and ensure adequate monitoring and treatment. In this setting, among other things, the CDC protocols call for:

- Universal mask-wearing, whether the wearer is positive or negative for the virus, including the provision of at least two washable masks. (Mask-wearing both stops spread of COVID-19 combined with other precautions, and further protects the wearer, reducing transmission and reducing the chances of symptomatic infection.).
- Medical isolation of all inmates positive for COVID-19 from other inmates pursuant to cohorting protocols;
- Medical isolation of all inmates symptomatic or suspected positive for COVID-19;
- A 14-day quarantine for all new intakes into a facility;
- Immediate testing for anyone potentially exposed to COVID-19, followed by an appropriate quarantine;

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<sup>14</sup> See generally *Guidance for Correctional & Detention Facilities*, Center for Disease Control and Prevention (available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>) (last accessed December 10, 2020).

- Identification and protection of persons medically vulnerable to serious illness or death from COVID-19 pursuant to CDC guidelines;
- Immediate evaluations of persons symptomatic for COVID-19, including an assessment for medical vulnerabilities, individualized treatment according to treatment guidelines, and daily monitoring of symptoms;
- Minimizing movement of inmates inside the facility and minimizing interactions between inmates living in different housing units.

CDC's guidance encourages jails to provide special accommodations for persons at increased risk for severe complications from COVID-19, including older inmates and inmates with certain medical conditions. (Ex. A, Franco-Paredes Decl. ¶ 34.) The reasons for this special care are well known. Studies show older people are more likely to develop severe COVID-19 illness resulting in hospitalization or death.<sup>15</sup> Persons age 50-64 are 4 times more likely to be hospitalized, and 30 times more likely to die from COVID-19, compared to a younger control group; persons age 65-74 are 5 times more likely to be hospitalized, and 90 times more likely to die, compared to that same control group; and so on.

People of any age who have one of the following conditions are also at high risk of serious complications: cancer; chronic kidney disease; chronic obstructive pulmonary disease (COPD); heart conditions; immunocompromised state from solid organ transplant; obesity (BMI of 30 or higher); severe obesity (BMI of 40 or higher); pregnancy; sickle cell disease; smoking; type 2 diabetes mellitus.<sup>16</sup> (Ex. A, Franco-Paredes Decl. ¶ 12.) The CDC also recognizes that not

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<sup>15</sup> CDC, *Older Adults*, available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last accessed Dec. 10, 2020).

<sup>16</sup> CDC, *People with Certain Medical Conditions*, available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medicalconditions.html?>

enough is known about how many pre-existing conditions may increase the risk of severe complications from COVID-19. As such the CDC recommends that special care be given to individuals of any age with the following conditions: asthma (moderate to severe); cerebrovascular disease; cystic fibrosis; hypertension or high blood pressure; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medications; neurologic conditions such as dementia; liver disease; overweight (BMI of 25 or greater); pulmonary fibrosis; thalassemia; type 1 diabetes mellitus. (Ex. A, Franco-Paredes Decl. ¶ 13.)

Due to the range of vulnerabilities to this deadly virus, individual assessments for medical vulnerabilities are imperative to ascertain whether a particular medical condition or combination of conditions in a given individual creates heightened risk of mortality and serious illness to COVID-19. In such cases, even if the condition or combination of conditions are not on the CDC list, the individual may be considered medically vulnerable and require the same heightened protections.<sup>17</sup>

#### **D. Defendant Elder Refuses to Implement Policies that Comply With Basic COVID-19 Protocols**

The laissez-faire attitude, to just let COVID-19 “run its course,” flies in the face of science and shows Defendant Elder has abdicated his constitutional duty to the inmates in his care. Defendant Elder’s policies have not only failed to slow the spread of COVID-19 in his facility, they have actively promoted infection of the inmates, with catastrophic results.

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CDC\_AA\_refVal= <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last accessed Dec. 10, 2020).

<sup>17</sup> CDC, *People with Certain Medical Conditions*, available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medicalconditions.html>? CDC\_AA\_refVal= <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last accessed Dec. 10, 2020).

The most blatant example of Defendant Elder's disregard for the safety of inmates in his care was exposed in November 2020, in the midst of an outbreak that has already led to over 1000 inmates and staff members testing positive for COVID-19. Observers were shocked when it was revealed that, not only was the jail refusing to provide masks to inmates, Jail staffers actually prohibited inmates from wearing masks while inside their housing wards and would not allow inmates to wear makeshift masks they made out of sheets and underwear to try to protect themselves.<sup>18</sup> (Ex. H, Adkins Decl. ¶ 5; Ex. O, Thomas Decl. ¶ 10; Ex. L, Williams Decl. ¶ 2; Ex. B, Weikert Decl. ¶ 5; Ex. P, Dobbins Decl. ¶ 3; Ex. I, Gantt Decl. ¶ 4.) Most housing wards hold 70-80 people and the Jail's policies make social distancing impossible. (Ex. P, Dobbins Decl. ¶ 10; Ex. J, Kershaw Decl. ¶ 2; Ex. E, Nelson Decl. ¶ 9; Ex. D, Lacey Decl. ¶ 12.) This prohibition on mask wearing in a close contact setting is directly contrary to CDC guidance and runs afoul of commonsense.

Indeed, even after it has become clear that his Jail is in the midst of a massive outbreak of COVID-19, Defendant Elder has refused to implement even the most basic of the CDC's recommended COVID-19 protocols. The Jail's ongoing failures, documented by current inmates as of the time of this filing, include:

- Failure to provide sufficient masks and enforce mask wearing. Until recently, inmates were provided with masks only when they were travelling to or from court or when moving in the hallways outside their wards. (Ex. O, Thomas Decl. ¶ 10; Ex. C, Hermanns Decl. ¶ 5; Ex. H, Adkins Decl. ¶ 5.) Inmates report that, after the National Guard was

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<sup>18</sup> Olivia Prentzel et al, *El Paso County jail staff, inmates cite lack of masks in COVID-19 outbreak that became one of the largest in the state*, The Gazette (Nov. 14, 2020 updated Dec. 3, 2020), available at: [https://gazette.com/premium/el-paso-county-jail-staff-inmates-cite-lack-of-masks-in-covid-19-outbreak-that/article\\_b1bec9be-25f9-11eb-9f87-8799f955bbc6.html](https://gazette.com/premium/el-paso-county-jail-staff-inmates-cite-lack-of-masks-in-covid-19-outbreak-that/article_b1bec9be-25f9-11eb-9f87-8799f955bbc6.html) (last accessed Dec. 9, 2020).

brought in, they recently each received one mask that they can keep with them in their wards. (Ex. F, Le Chiffre Decl. ¶ 18; Ex. L, Williams Decl. ¶ 12; Ex. Q, Murray Decl. ¶ 8.) However, they cannot get a second mask if their masks break and they cannot keep the blue hospital masks that they get when being transported around the facility. (Ex. G, Trujillo Decl. ¶ 14). Masks are not washed regularly by the staff and, when the inmates take it upon themselves to wash their single mask in the sink, they inmates have no protection. (Ex. L, Williams Decl. ¶ 12; Ex. F, Le Chiffre Decl. ¶ 18; Ex. I, Gantt Decl. ¶ 16; Ex. E, Nelson Decl. ¶ 7.) Moreover, the Jail still does not enforce mask wearing and reports show that many inmates and staff are frequently seen without masks or wearing masks improperly (e.g., without covering their nose) throughout the facility. (Ex. M, Dimas Decl. ¶ 4; Ex. O, Thomas Decl. ¶ 11; Ex. I, Gantt Decl. ¶ 16; Ex. F, Le Chiffre Decl. ¶ 18.)

- Failure to separate inmates with positive test results. Inmates with obvious COVID-19 symptoms and positive test results remain in their housing wards with non-infected inmates. (Ex. L, Williams Dec. ¶ 5; Ex. M, Dimas Decl. ¶ 13; Ex. K, Aleksa Decl. ¶ 5; Ex. B, Weikert Decl. ¶ 6.) Gilbert Trujillo, who has not yet contracted COVID-19, was moved into a two-man cell with an inmate who was positive for COVID-19 and symptomatic. He was so scared to live this close to his COVID-positive cellmate that Trujillo laid in bed covering his face with his bed sheet and then claimed to be suicidal so he would be moved to a different cell. (Ex. G, Trujillo Decl. ¶¶ 6-7.) Even as the recent COVID-19 outbreak grew, the Jail refused (and continues to refuse) to meaningfully segregate COVID-19 positive inmates from others. (Ex. F, Le Chiffre Decl. ¶ 20; Ex. I, Gantt Decl. ¶ 20; Ex. E, Nelson Decl. ¶ 12; Ex. D, Lacey Decl. ¶ 9; Ex. G, Trujillo Decl.

¶ 16.) Jail staffers are covering up this shortcoming, falsely telling family members that COVID-positive inmates are housed separately from those yet to be infected. (Ex. N, Fain Decl. ¶ 5.)

- Failure to quarantine new intakes into the facility. As new inmates are admitted to the Jail, some are given a rapid test and, within days, are placed into a general population housing pod. (Ex. G, Trujillo Decl. ¶ 3.) The Jail knows these rapid tests miss about 40% of COVID infections, but it does not observe the standard 14-day quarantine period, a failure that endangers both the newly admitted inmates and the longer term residents. (Ex. R, October 27, 2020 Email from UCHealth; Ex. J, Kershaw Decl. ¶ 2; Ex. H, Adkins Decl. ¶ 19; Ex. M, Dimas Decl. ¶ 14; Ex. K, Aleksa Decl. ¶ 9; Ex. Q, Murray Decl. ¶ 10; Ex. I, Gantt Decl. ¶ 10; Ex. G, Trujillo Decl. ¶ 4.) Austin Williams, a 62-year-old with type 2 diabetes and high blood pressure, reports having a new cellmate every day for the first month he was at the Jail; each of his cellmates had come in straight from the streets and none was tested for COVID-19. (Ex. L, Williams Decl. ¶¶ 1, 3.) One Plaintiff reports having nine different cellmates since he was detained at the end of August 2020; some of whom had been arrested and booked into the Jail within days of being placed in his cell. (Ex. F, Le Chiffre Decl. ¶ 13.)
- Failure to identify and protect older inmates and those who are otherwise medically vulnerable. The Jail makes little to no effort to identify individuals at higher risk for severe complications from COVID-19. (Ex. L, Williams Decl. ¶ 1; Ex. F, Le Chiffre Decl. ¶ 22.) For example, Jean-Joseph Le Chiffre has type 2 diabetes and high blood pressure—conditions that make him at high risk for serious complications—but has been housed with others positive for COVID-19. (Ex. F, Le Chiffre Decl. ¶¶ 17-22.) No inmate

reports a screening process upon intake or at any other point that would allow the Jail to segregate all persons who are at higher risk for complications from the virus. Absent knowledge of which inmates are at higher risk, the Jail cannot possibly make appropriate accommodations to ensure those inmates are protected from infection. (*See* Ex. A, Expert Decl. of Dr. Carlos Franco-Paredes ¶ 44(g).)

- Failure to allow adequate social distancing. The Jail is densely populated. After a brief decline early in the pandemic, the Jail’s population has been consistently rising, with a current daily population hovering above 1200.<sup>19</sup> Many inmates live in housing wards of approximately 70-80 people and sleep only a few feet away from others in open bays of 8-10 inmates. (Ex. B, Weikert Decl. ¶ 4; Ex. M, Dimas Decl. ¶ 2; Ex. I, Gantt Decl. ¶ 2; Ex. C, Hermanns Decl. ¶ 4; Ex. G, Trujillo Decl. ¶ 4.) In the day room, tables are a couple feet apart and people sit shoulder to shoulder to eat. (Ex. J, Kershaw Decl. ¶ 3.) Jail staff continues to regularly conduct “shake downs” during which they force all 80 inmates in the ward (many maskless) to congregate in a room that is less than 15 feet by 12 feet. (Ex. E, Nelson Decl. ¶ 9.) Jail staff does not encourage social distancing but, even if they did, social distancing is impossible under these conditions, making it even more important to enforce mask wearing. (Ex. F, Le Chiffre Decl. ¶ 18; Ex. O, Thomas Decl. ¶ 12; Ex. L, Williams Decl. ¶ 13.)
- Failure to consistently or adequately evaluate, monitor, and treat those experiencing COVID-19 symptoms. Inmates experiencing symptoms commonly associated with COVID-19 are frequently not evaluated and are left unmonitored by the Jail staff.

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<sup>19</sup> The ACLU has been receiving weekly updates on the population at El Paso County Jail. The latest update reported that the El Paso County Criminal Justice Center was housing 1227 persons on December 10, 2020.

Medical checks are rare, even when an inmate is symptomatic, and treatment is basically non-existent. (Ex. P, Dobbins Decl. ¶ 5; Ex. L, Williams Decl. ¶ 7; Ex. C, Hermanns Decl. ¶¶ 8-9; Ex. I, Gantt Decl. ¶ 9.) COVID-positive inmates have to affirmatively seek out medical attention and, even then, sometimes do not receive a response or any attention for weeks. (Ex. L, Williams Decl. ¶¶ 6-7; Ex. H, Adkins Decl. ¶ 13; Ex. D, Lacey Decl. ¶¶ 5-12.) In fact, one inmate who, prior to the recent outbreak, was having his vitals monitored daily, stopped receiving his daily monitoring *after* he tested positive for COVID-19. (Ex. H, Adkins Decl. ¶ 15.) Deannie Aleksa tested positive for COVID-19 in early November and has been experiencing symptoms since then. After multiple requests for medication and monitoring, she was finally given Tylenol. No one actively monitored her health, asked about her symptoms or took her oxygen level until December 8, 2020, approximately six weeks after she first began experiencing symptoms. (Ex. K, Aleksa Decl. ¶¶ 3-7.)

- Failure to inform and educate inmates on COVID exposure and risks. Inmates at the Jail report getting a COVID-19 test and never receiving their results. (Ex. O, Thomas Decl. ¶ 8; Ex. F, Le Chiffre Decl. ¶ 16; Ex. H, Adkins Decl. ¶ 12; Ex. E, Nelson Decl. ¶¶ 4, 12; Ex. D, Lacey Decl. ¶ 7; Ex. G, Trujillo Decl. ¶ 16.) Inmates left in the dark as to their status are unable to self-quarantine or take steps to protect those around them. Moreover, the Jail fails to provide basic educational materials about how the virus is spread and the importance of mask wearing. (Ex. O, Thomas Decl. ¶ 14; Ex. F, Le Chiffre Decl. ¶ 12.)
- Failure to provide adequate food and water. Since late October, the Jail has served the inmates only three meals of cold food each day. (Ex. B, Weikert Decl. ¶ 12; Ex. I, Gantt Decl. ¶ 18; Ex. E, Nelson Decl. ¶ 11.) Hannah Weikert, who is pregnant, was getting



extra food prior to the recent COVID outbreak, but is now being denied access to the food necessary to keep herself and her baby healthy. (Ex. B, Weikert Decl. ¶ 12.) The Jail is also denying inmates regular access to clean drinking water, despite medical staff encouraging COVID-positive inmates to drink 8-10 glasses of water a day. Jail staff regularly turns off fountains in the bays as “punishment.” (Ex. D, Lacey Decl. ¶¶ 4, 12; Ex. E, Nelson Decl. ¶ 11; Ex. M, Dimas Decl. ¶ 12.)

- Failure to provide sanitary living conditions or allow proper hygiene. Common use areas and items such as telephones and drinking fountains are not cleaned or sanitized regularly. (Ex. G, Trujillo Decl. ¶ 8; Ex. L, Williams Decl. ¶ 10; Ex. B, Weikert Decl. ¶¶ 4, 9; Ex. I, Gantt Decl. ¶ 2; Ex. E, Nelson Decl. ¶ 6.) Deputies deny inmates access to the cleaning products used to sanitize common areas. (Ex. H, Adkins Decl. ¶ 6; Ex. G, Trujillo Decl. ¶ 8.) Toilets routinely back up or overflow; one bay that houses 80 men only has two working toilets. (Ex. Q, Murray Decl. ¶ 9; Ex. D, Lacey Decl. ¶ 4; Ex. F, Le Chiffre Decl. ¶ 14.) Soap is unavailable for days at a time. (Ex. M, Dimas Decl. ¶ 11; Ex. B, Weikert Decl. ¶ 9; Ex. E, Nelson Decl. ¶ 6.)

On these facts, Plaintiffs petition the Court for issuance of an injunction requiring Defendant Elder to meet his constitutional obligation to protect inmates in his Jail from serious risk of harm.

#### **IV. DEFENDANT’S DELIBERATE INDIFFERENCE TO THE SERIOUS HARM CAUSED BY COVID-19 WARRANTS AN IMMEDIATE INJUNCTION**

Plaintiffs are pretrial detainees and post-conviction inmates in the custody of the El Paso County Jail whose health and lives are in jeopardy due to the jail’s failure to protect them from COVID-19, and failure to adequately evaluate, treat, and monitor them when they become infected. Without urgent action, countless inmates will continue to become infected. Some may

die in the coming weeks, and all will suffer. Plaintiffs ask the Court to grant injunctive relief that will protect them from unreasonable exposure to COVID-19, and that will ensure they are adequately evaluated and treated for COVID-19 if they become infected, consistent with established CDC and NIH guidelines.

Courts are empowered to grant temporary restraining orders and preliminary injunctions in class actions regardless of whether the class has yet been certified. *See Carranza*, 2020 WL 2320174, at \*6 n.6.; *Simer v. Rios*, 661 F.2d 655, 658 (7th Cir. 1981) (granting temporary restraining order within days of action’s filing). A plaintiff seeking interim injunctive relief “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016). “[W]here the moving party has established that the three ‘harm’ factors tip decidedly in its favor, the ‘probability of success’ requirement is relaxed[.]” *Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d 639, 652-53 (10th Cir. 2004).

Once a plaintiff demonstrates entitlement to interim relief, courts have broad power to fashion equitable remedies to address constitutional violations in jails and prisons. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). Although courts must “be sensitive to the State’s interest[s]” in imprisonment, courts “must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners [and] . . . may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.” *Brown v. Plata*, 563 U.S. 493, 511 (2011); *Plata v. Brown*, 2013 WL 3200587, \*8 (N.D. Cal., June 24, 2013) (directing removal of prisoners at risk of contracting Valley Fever

from prisons where the risk of contracting it was high). As noted by Chief Judge Brimmer when granting an injunction against the Sheriff of Weld County in *Carranza*, “[a]lthough the Court acknowledges defendant’s interest in retaining discretion to administer the Jail, ‘[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.’” 2020 WL 2320174, at \*11 (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011)).

Injunctive relief is necessary because the danger here—infection by a contagious disease, ensuing harm, suffering, long-term injury, and potential death—is the quintessential irreparable harm. *Edmisten v. Werholtz*, 287 F. App’x 728, 732-35 (10th Cir. 2008) (holding that evidence that health will “deteriorate irreparably” absent relief is sufficient to support issuance of injunctive relief); *see also Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wisc. 2001) (“[P]ain, suffering and the risk of death constitute ‘irreparable harm’ sufficient to support a preliminary injunction in prison cases.”). There is also an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections among inmates, jail staff, and the broader community, and to reduce strain on overwhelmed health systems. And, in light of the global COVID-19 pandemic, the balance of equities and public interest weigh heavily in favor of protecting these vulnerable inmates.

**A. Plaintiffs Are Likely To Succeed on the Merits.**

Plaintiffs are likely to establish that their conditions of confinement place them at substantial risk of harm from COVID-19, in violation of their Eighth and Fourteenth Amendment rights and parallel rights under the Colorado Constitution.<sup>20</sup> Cases in Colorado and nationwide

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<sup>20</sup> Art. II, Section 20 prohibits the infliction of “cruel and unusual punishments.” Colo. Const. art. II, § 20; Art. II, Section 25 guarantees due process of law.

support granting relief where a facility fails to comply with CDC guidelines or other generally accepted practices for reducing the spread of the virus. *See, e.g., Carranza*, 2020 WL 2320174, at \*14; *Criswell v. Boudreaux*, No. 20CV1048-DAD-SAB, 2020 WL 5235675, at \*26 (E.D. Cal. Sept. 2, 2020) (ordering jail to adopt a mask policy “including the provision of masks to inmates and requirements for the wearing of masks.”); *Hernandez Roman v. Wolf*, 829 F. App’x 165, 172 (9th Cir. 2020) (affirming in part injunction where facility was aware of risks, including failure to provide adequate masks, but “had not remedied the conditions.”); *Castillo v. Barr*, 2020 WL 1502864, at \*1 (C.D. Cal. Mar. 27, 2020) (granting TRO and finding that the immigration detainee petitioners were likely to suffer irreparable harm from COVID-19 when they were not kept six feet apart from other detainees); *Banks v. Booth*, No. CV 20-849 (CKK), 2020 WL 3303006, at \*9 (D.D.C. June 18, 2020), *appeal docketed*, No. 20-5216 (D.D.C. July 22, 2020); *Kaur v. U.S. Dep’t of Homeland Sec.*, No. 2:20-cv-03172, 2020 WL 1939386, at \*3 (C.D. Cal. April 22, 2020); *Doe v. Barr*, No. 20-cv-02141, 2020 WL 1820667, at \*1, 9 (N.D. Cal. Apr. 12, 2020); *Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850, at \*1–2 (N.D. Cal. Apr. 9, 2020); *Thakker v. Doll*, No. 20-cv-0480, 2020 WL 1671563, at \*9 (M.D. Pa. Mar. 31, 2020); *Basank v. Decker*, 449 F. Supp. 3d 205, 213 (S.D.N.Y. 2020) (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.”).

**i. Monell Liability is Proper Against the Sheriff in his Official Capacity.**

Defendant Elder, as the final decisionmaker regarding the operation of the jail, may be sued in his official capacity. A county may be liable under § 1983 where “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” *Monell v. Dep’t of Soc.*

*Servs.*, 436 U.S. 658, 690 (1978). The three elements of a *Monell* claim are “(1) official policy or custom, (2) causation, and (3) state of mind.” *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013).

Here, each element is clearly met. **First**, as elected Sheriff, Defendant Elder sets policy for the jail such that his actions may be attributable to the County. *See, e.g., Carranza*, 2020 WL 2320174, at \*6 (ruling Sheriff has “final policymaking authority with respect to the Jail”).

**Second**, the jail’s policies with respect to COVID-19 prevention and treatment are “closely related” to the exposure to and infection from COVID-19, the harm claimed by Plaintiffs in violation of their constitutional rights, so causation is also clear. *Id.* at \*7 (quoting *Schneider*, 717 F.3d at 770).

**Third**, the requisite state of mind for Defendant Elder is established under either an objective or subjective standard. For a municipal liability claim of “deliberate indifference,” the Court applies “an objective standard which is satisfied if the risk is so obvious that the official should have known of it.” *Barney v. Pulsipher*, 143 F.3d 1299, 1307 n.5 (10th Cir. 1998) (“Deliberate indifference ... is defined differently for Eighth Amendment and municipal liability purposes.”); *see also Carranza*, 2020 WL 2320174, at \*7. Here, any reasonable Sheriff would know—and Defendant Elder has known and does know—that failure to protect Plaintiffs from COVID-19 can result in infection, suffering, and death, as further discussed below.

**ii. Defendant Violated Plaintiffs’ Eighth and Fourteenth Amendment Rights**

Plaintiffs are likely to establish that their conditions of confinement in the jail place them at substantial risk of infection with COVID-19, prolonged suffering, and possible death, in violation of their respective state and federal constitutional rights. The Supreme Court has long held that when state officials “strip [inmates] of virtually every means of self-protection and

foreclose[] their access to outside aid, [they] are not free to let the state of nature take its course.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). “The [Eighth] Amendment ... requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’”<sup>21</sup> *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

An Eighth Amendment violation is shown where (1) objectively, the harm plaintiffs complain of is sufficiently “serious” to merit constitutional protection, and (2) defendant acted with deliberate indifference to a substantial risk to plaintiffs’ health or safety. *Farmer*, 511 U.S. at 834. Plaintiffs easily meet both prongs. Defendant’s practices clearly show deliberate indifference to a substantial risk of serious harm.

### **1. Harm from COVID-19 Is Sufficiently Serious**

Courts across the nation have recognized that COVID-19 is sufficiently “serious” to merit constitutional protection under the Eighth and Fourteenth Amendments. *See, e.g., Carranza*, 2020 WL 2320174, at \*7; *Torres v. Milusnic*, No. 20-cv-4450-CBM-PVC(x), 2020 WL 4197285, at \*9 (C.D. Cal. July 14, 2020) (“Petitioners show they are at substantial risk of exposure to COVID-19, which is inconsistent with contemporary standards of human decency.”); *Cameron v. Bouchard*, No. 20-10949, 2020 WL 1929876, at \*2 (E.D. Mich. Apr. 17, 2020), *as modified on reconsideration*, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020) (“It cannot be disputed that COVID-19 poses a serious health risk to Plaintiffs and the putative class [consisting of current and future jail detainees].”).

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<sup>21</sup> Although the Fourteenth Amendment applies to pretrial detainees and the Eighth Amendment applies to those post-conviction, the Tenth Circuit applies an “identical” analysis in either scenario, so Plaintiffs do the same here. *Carranza*, 2020 WL 2320174, at \*7 n. 9 (quoting *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999)).

This rationale is well supported. Courts have long recognized that infectious diseases with less severe health risks are considered “serious harm” for Eighth Amendment purposes. In *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court recognized that “deliberate indifference to the exposure of inmates to a serious, communicable disease” would violate the Eighth Amendment, even if a prisoner currently shows no serious symptoms. *Id.* at 33. The Tenth Circuit similarly recognized that the risk of exposure to a life-threatening communicable disease implicates the Eighth Amendment. *Loftin v. Dalessandri*, 3 F. App’x 658, 663 (10th Cir. 2001) (risk of exposure to tuberculosis satisfied “serious harm” standard).

COVID-19 is “an extremely infectious and potentially deadly virus,” that has killed nearly 300,000 people in the United States alone. (Ex. A, Franco-Paredes Decl. ¶ 8.) Plaintiffs are likely to prevail on their claim that Defendant Elder is exposing them to a sufficiently substantial risk of serious harm to implicate the Eighth Amendment.

## **2. Defendant Elder Knew of the Serious Risk Posed by COVID-19**

Having established the potential harm is sufficiently serious, Plaintiffs are likely to succeed in showing that Sheriff Elder is and has been deliberately indifferent to that harm.

The record shows Elder was well aware of the risks associated with COVID-19 and the effectiveness of some preventions, such as mask wearing. Defendant Elder made numerous public statements about the importance of mask-wearing and other precautions, including stating “wearing a mask will slow the spread of COVID-19 and save lives.” *See, e.g.*, July 16, 2020 post of the El Paso County Sheriff’s Office Facebook page. Elder further claimed in a public video to constituents the next day: “We follow this [mask] order inside the Sheriff’s Office, we have for several months at this point,” as he held up his own mask and indicated the importance of

wearing it, demonstrating he knew the importance of mask-wearing to prevent infection. *Id.*, video available at <https://perma.cc/GQ9K-9HZZ> (last accessed Dec. 10, 2020).

Defendant Elder also knew the virus had made its way into his Jail, and with deadly results. A 41-year-old deputy serving under Defendant Elder died of COVID-19 in April 2020. This deputy worked in the intake area of the jail and interacted with countless others, including inmates. In the wake of his death, multiple other staff members tested positive.<sup>22</sup> He also knew that protective equipment should be used in the Jail to manage COVID-19. On November 3, 2020, early in the current outbreak, Elder was informed that all staff should have “full PPE” – defined as “eye covering, KN95 mask and rubber gloves” – if they were around COVID-positive inmates; Defendant Elder responded that this was “good information.” (Ex. S.)

Additionally, Governor Polis issued Executive Orders that put Defendant on subjective notice of the risk posed from COVID-19 and the importance of mask-wearing and other precautions to stop the spread and protect people. “The potential spread of COVID-19 in facilities and prisons poses a significant threat to prisoners and staff who work in facilities and prisons[.]”<sup>23</sup> Defendant surely was aware of this order from the Governor. Defendant was also aware of Governor Polis’ statewide mask order on July 16, 2020, as he posted about it on Facebook on July 16 and 17, 2020, as discussed above.

Sheriff Elder was specifically informed about the risks of COVID-19 in jails, and the importance of following CDC protocols, by letters sent to him from the ACLU on March 26,

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<sup>22</sup> *El Paso Co. Deputy Jeff Hopkins passing determined to be in the line of duty*, KOAA (Apr. 14, 2020), available at: <https://www.koaa.com/news/covering-colorado/el-paso-co-deputy-jeff-hopkins-passing-determined-to-be-line-of-duty-death>.

<sup>23</sup> State of Colorado, Executive Order D 2020 016, March 25, 2020, at pg. 1, available at <https://drive.google.com/file/d/18o0yWHzZleHJ87hmgLuBmXwpM8R74Q5x/view>.



2020,<sup>24</sup> and June 23, 2020.<sup>25</sup> He was even provided Chief Judge Brimmer’s preliminary injunction order from *Carranza v. Reams* on June 23, further instructing him of the importance of complying with CDC guidelines.

No reasonable person in Defendant Elder’s position could deny knowledge of the risks associated with COVID-19. The evidence is undeniable that, prior to the Jail’s outbreak that started in October 2020 (and is still ongoing), there were “longstanding, pervasive, well-documented” risks from failing to address COVID-19. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). As one court noted, “the seriousness of the threat posed by COVID-19—and the particular vulnerability of elderly individuals as well as those with certain preexisting medical conditions—are so well known that it would be implausible to suggest that prison officials are unaware of this risk.” *Martinez-Brooks v. Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at \*21 (D. Conn. May 12, 2020).

Given all of the above, Plaintiffs can easily show Defendant Elder has actual and constructive knowledge of the serious risk COVID-19 poses to inmate health and safety.

### **3. Defendant Failed to Take Steps to Protect Inmates from the Serious Risks Associated with COVID-19**

Plaintiffs are likely to succeed in showing that, despite knowing the serious of exposure to COVID-19, Defendant Elder failed to take constitutionally adequate measure to protect inmate health and safety. Conditions inside the Jail show Defendant was and is deliberately indifferent to this risk.

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<sup>24</sup> Letter To Colorado Sheriffs Regarding COVID-19, ACLU OF COLORADO (March 26, 2020), available at: <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/COVID-19-Sheriff-Letter-3-26-2020.pdf>.

<sup>25</sup> Letter To Colorado Sheriffs Regarding COVID-19, ACLU OF COLORADO (June 23, 2020), available at <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/2020-06-23-Sheriffs-ACLU.pdf>.

**First**, in the contagious disease setting, exposing non-infected incarcerated people to contagious individuals constitutes deliberate indifference. *See, e.g., Duvall v. Dallas Cnty., Tex.*, 631 F.3d 203, 208 (5th Cir. 2011) (upholding a finding of unconstitutional conditions of confinement where officials continued to house inmates in a facility despite the existence of an extensive MRSA outbreak); *Laureau v. Manson*, 651 F.2d 96, 98–99 (2d Cir. 1981) (upholding finding of unconstitutional conditions of confinement where healthy prisoners were housed with physically ill cellmates).

COVID-19 is rampant throughout the Jail but, instead of implementing policies designed to manage the outbreak and protect inmates, Defendant has decided to just let the outbreak “run its course.” (Ex. Q, Murray Decl. ¶ 6; Ex. D, Lacey Decl. ¶ 9.) The Jail is doing nothing to protect COVID-negative inmates; inmates with obvious COVID-19 symptoms and positive test results remain in the same housing wards with non-infected persons. (Ex. F, Le Chiffre Decl. ¶ 20; Ex. I, Gantt Decl. ¶ 20; Ex. E, Nelson Decl. ¶ 12; Ex. D, Lacey Decl. ¶ 9; Ex. G, Trujillo Decl. ¶ 16.) As new arrests occur, the Jail is not following any meaningful quarantine protocol; rather, new admittees are moving into the bays (likely with both COVID-negative and COVID-positive inmates) within days of their arrival. (Ex. J, Kershaw Decl. ¶ 2; Ex. H, Adkins Decl. ¶ 19; Ex. M, Dimas Decl. ¶ 14; Ex. K, Aleksa Decl. ¶ 9; Ex. Q, Murray Decl. ¶ 10; Ex. I, Gantt Decl. ¶ 10; Ex. G, Trujillo Decl. ¶ 4.) Even when new admittees show obvious signs of being COVID-positive, they are placed in the normal bays. (Ex. Q, Murray Decl. ¶ 10.) Jail staff exhibiting symptoms are still showing up for work, coughing and sneezing on inmates without a mask. (Ex. Q, Murray Decl. ¶ 4.) This failure to protect non-infected persons alone constitutes deliberate indifference.

**Second**, a systemic failure in inmate processes and procedures can serve as a basis for Eighth Amendment liability for deliberate indifference. *Quintana v. Santa Fe Cty. Bd. of Commissioners*, 973 F.3d 1022, 1033–34 (10th Cir. 2020) (“deficient medical intake protocol” may lead to municipal liability); *Feliciano v. Gonzales*, 13 F. Supp. 2d 151, 208-09 (D.P.R. 1998) (defendant’s “inability . . . to properly isolate cases of active tuberculosis,” the “insufficient medical dormitory beds,” the failure to “fully screen incoming inmates,” and the failure to “provide for a sick call system that ensures access to care and that is capable of effectively handling emergencies” constituted deliberate indifference).

From March of 2020 through the summer and into the fall, it was well-known and documented that policies requiring mask-wearing, allowing for isolation and quarantine protocols, and maintaining high levels of hygiene are necessary to prevent the spread of COVID-19 in jails. (Ex. A, Dr. Franco-Paredes Decl. ¶ 40.) Yet Defendant not only refused to provide masks to inmates until recently, his staff took masks away and disciplined inmates who tried to protect themselves with facial coverings. (Ex. L, Williams Decl. ¶ 2; Ex. O, Thomas Decl. ¶ 10; Ex. M, Dimas Decl. ¶ 3; Ex. F, La Chiffre Decl. ¶ 11.) As discussed above, inmates exhibiting symptoms are not segregated from healthy inmates and new admittees are introduced into the general population. These are systemic failures that show deliberate indifference.

Because Defendant Elder had “actual and constructive notice” of the risks of failing to act diligently, his failure to implement policies and procedures to prevent the spread of COVID-19 is deliberate indifference. *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998); *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372, 381 (7th Cir. 2017) (municipal liability regarding the “institution itself”; jury could find entity had “actual knowledge that, without protocols for

coordinated, comprehensive treatment, the constitutional rights of chronically ill inmates would sometimes be violated” (cite omitted)).

**Third**, Defendant Elder made deliberate decisions that are putting inmates in his Jail at risk. As late as October and even into November, inmates were denied access to masks and forbidden from wearing makeshift masks in their housing units. Sheriff Elder was simultaneously advocating the use of masks to prevent COVID-19 transmission to the public and refusing to allow inmates to protect themselves by wearing masks. And this situation could have been easily remedied. Sheriff Elder was granted \$13.6 million dollars in federal funds under the CARES act for the specific purpose of COVID-19 protection. (Ex. T, Press Release Issued by Defendant Elder on June 16, 2020.) But rather than spend approximately .05% of these funds on purchasing 10,000 reusable masks (more than two for every inmate and Jail staff member), Defendant Elder chose to spend his CARES act money on projects such as renovating the staff locker room and remodeling a training facility.

Defendant Elder’s callous attitude towards the safety of inmates under his care when he knows of the serious risk from COVID-19 is the very definition of deliberate indifference. Plaintiffs are therefore likely to succeed on the merits of their claim that Defendant Elder violated the Eighth and Fourteenth Amendments of the United State Constitution. For the same reasons, and because “the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution,” *People v. Young*, 814 P.2d 834, 842 (Colo. 1991), Plaintiffs also are likely to succeed on Counts III and IV of the Complaint, which allege that Defendant Elder has violated and is violating their more expansive rights under the Colorado Constitution.

**B. Plaintiffs are likely to suffer irreparable harm absent injunctive relief.**

“[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *DTC Energy Group, Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir. 2018); *Carranza*, 2020 WL 2320174, at \*10 (risk of irreparable harm shown where plaintiffs are “not only confined in close quarters, but some inmates in the Jail have already contracted COVID-19.”). “It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary,” *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (holding that “[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm” while affirming grant of preliminary injunction in prison conditions case).

The Tenth Circuit has held that a harm that cannot be remedied monetarily after a final judgment is sufficient to establish a likelihood of irreparable harm in support of injunctive relief. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (holding that there is a showing of irreparable harm when the “harm cannot be compensated after the fact by monetary damages”); *see also Padilla v. U.S. Immigration & Customs Enforcement*, 387 F. Supp. 3d 1219, 1231 (W.D. Wash. 2019) (recognizing that “substandard physical conditions, [and] low standards of medical care” in immigration detention constitute irreparable harm justifying injunctive relief); *Indep. Living Cent. of S. California, Inc. v. Shewry*, 543 F.3d 1047, 1050 (9th

Cir. 2008) (recognizing that Medi-Cal beneficiaries would suffer irreparable harm where new policy would limit beneficiaries' access to "much-needed pharmaceuticals").

Given the grave danger posed by COVID-19, courts across the country have concluded that correctional facilities' failure to ameliorate the risks of COVID-19 constitutes irreparable harm. *See, e.g., Criswell*, 2020 WL 5235675, at \*26; *Castillo*, 2020 WL 1502864, at \*1 (granting TRO and finding that the immigration detainee petitioners were likely to suffer irreparable harm from COVID-19 when they were not kept six feet apart from other detainees); *Banks*, No. 20-cv-849-CKK, 2020 WL 3303006, at \*16 ("The Court concludes that Plaintiffs' risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm.").

El Paso County's ongoing failure to provide conditions ensuring CDC-compliant precautions for COVID-19 not only risks irreparable harm to Plaintiffs, but nearly guarantees it. *Jones 'El*, 164 F. Supp. 2d at 1123 ("[P]ain, suffering and the risk of death constitute irreparable harm sufficient to support a preliminary injunction in prison cases." (internal quotation marks omitted)). Even for those who survive infection, there may be a prolonged suffering and injury, including the need for extensive rehabilitation, neurological damage, and the loss of respiratory capacity. *Cole v. Collier*, No. 4:14-CV-1698, 2017 U.S. Dist. LEXIS 112095, at \*141-42 (S.D. Tex. July 19, 2017) (holding plaintiffs had demonstrated irreparable injury where there was evidence that "[t]hose who experience heat stroke [from a lack of air conditioning in their prison cell] but do not die are at risk of being permanently disabled").

**C. The balance of equities favors immediately stopping the spread of COVID-19 in the jail and adequately treating those who are sick.**

The balance of equities weighs in favor of ordering COVID-19 precautions consistent with CDC guidance. *See, e.g., Carranza*, 2020 WL 2320174, at \*11 ("the balance of equities

weighs in plaintiffs' favor"). In evaluating this factor, the Court must "balance the competing claims of injury, which involves considering the effect on each party of the granting or withholding of the requested relief." *Shvartser v. Lekser*, 308 F. Supp. 3d 260, 267 (D.D.C. 2018). Here, the equities in favor of protecting Plaintiffs from COVID-19 and its ensuing harm carry extraordinary heft in comparison with the minimal cost and burden imposed on the jail. *Carranza*, 2020 WL 2320174, at \*11. Moreover, "[t]he balance of equities and public interest tilt heavily Plaintiffs' favor when contemplating compliance with the CDC Guidelines" regarding COVID-19. *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 693 (C.D. Cal. 2020).

As the Central District of California explained in granting a TRO in a similar case:

The balance of the equities tip sharply in favor of the Petitioners. The Petitioners face[] irreparable harm to their constitutional rights and health. Indeed, there is no harm to the Government when a court prevents the Government from engaging in unlawful practices.

*Castillo*, 2020 WL 1502864, at \*1. Here too, other than the relatively minimal administrative burden, there is no identifiable "harm" to Defendant. This burden is far outweighed by what is at stake to Plaintiffs and the public if no TRO is issued.

Even from the Sheriff's perspective, the equities weigh in favor of granting relief. A temporary restraining order and preliminary injunction will not "substantially injure other interested parties." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. Granting the motion will bring order to the jail's operation: "compliance with CDC guidelines promotes the orderly administration of jails." *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 693 (C.D. Cal. 2020). Any costs incurred through compliance are not only justified, they cannot reasonably be complained about by Defendant Elder given that his office was granted \$13.6 million in federal funding under the CARES Act to address COVID-19.

The relief sought will help protect Defendant Elder’s staff, their families, and the community at large by reducing COVID-19 infection in the facility. Not only have approximately 1000 inmates become infected, over 100 staff have as well, and one deputy died early in the pandemic. While the inmates are confined to the Jail, the staff comes and goes on a daily basis. Lowering COVID-19 infection rates inside the Jail reduces transmission from inmate to staff, thereby benefitting the staff members and everyone with whom those staff members come into contact. Clearly, preventing infection by implementing compliance with CDC guidelines is to the benefit of all.

**D. The public has a strong interest in stopping the spread of COVID-19, both within the El Paso County Jail and the community.**

“It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Awad*, 670 F.3d at 1131; *Carranza*, 2020 WL 2320174, at \*11. Because Plaintiffs can demonstrate that their constitutional rights have been violated, granting injunctive relief is in the public interest. That interest alone is sufficient to weigh in favor of injunctive relief.

Here, however, the public has an additional independent and overwhelming interest in preliminary relief that would require Defendant to take action to minimize the spread of COVID-19. Reducing spread of COVID-19 in the jail will reduce spread into the community and the families of staff, as well as freeing up public health resources and hospital beds. As Chief Judge Brimmer concluded in *Carranza*, “minimizing the exposure of inmates with pre-existing vulnerabilities furthers public health, which is a matter of public interest.” *Carranza*, 2020 WL 2320174, at \*11 (citing *Castillo*, 2020 WL 1502864, at \*6 (noting that “[t]he public has a critical interest in preventing the further spread of the coronavirus”) and *Banks*, 2020 WL 1914896, at \*12 (“No man’s health is an island”)); *Criswell*, 2020 WL 5235675, at \*24 (“preventing a



COVID-19 outbreak in the Jails benefits the public by preventing further spread of the virus in the community and burden on local healthcare facilities.”).

#### **E. Defendant Should be Ordered to Comply with CDC and NIH Guidance**

The above discussions shows Plaintiffs are entitled to preliminary injunctive relief to immediate stop the harm caused by Defendant Elder’s deliberate indifference to the serious risk of COVID-19 infection in the jail. The principal relief requested by Plaintiffs is simple—Plaintiffs seek only to have Defendant Elder comply with the CDC guidance on managing the COVID-19 pandemic in a carceral setting.

Even before the COVID-19 pandemic, courts were relying on published public health protocols to evaluate whether jails were respecting inmate constitutional rights. Published public health protocols do not create constitutional rights, but courts rely on them to inform whether a health risk was well known and how a facility should reasonably respond to a known risk. *See Mata v. Saiz*, 427 F.3d 745, 757-59 (10th Cir. 2005) (held that “[w]hile published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care [worker] knew of a substantial risk of serious harm.”); *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991) (“contemporary standards and opinions of the medical profession also are highly relevant in determining what constitutes deliberate indifference to medical care.”); *Ferguson v. Bd. of Cty. Commissioners*, No. CV 11-1001 WPL/CG, 2013 U.S. Dist. LEXIS 202824, at \*54 (D.N.M. Apr. 2, 2013) (relying on CDC guidance that MRSA was a serious risk in a carceral setting).

In *Hernandez v. Cty. of Monterey*, the court relied on CDC guidelines (and defendant’s failure to follow that guidance) in granting a preliminary injunction based on a jail’s failure to adequately stop the spread of tuberculosis in its facility. 110 F. Supp. 3d 929, 943 (N.D. Cal.

2015). The court stated that “known noncompliance with generally accepted guidelines for inmate health” such as the CDC guidelines related to tuberculosis, “strongly indicates deliberate indifference to a substantial risk of serious harm” and, therefore, “[a]t least since the CDC released its guidelines.... Defendants’ policies and practices fell below the constitutional standard of care [because] Defendants have known about the risks of harm but have not changed their practices.” *Id.*

The novelty of the current pandemic makes it even more imperative to look to published public health protocols like the CDC guidance. Local officials running jails and prisons across the country cannot reasonably be expected to stay abreast of all of the scientific studies regarding COVID-19 prevention and treatment. Nor can they be expected to understand how to best translate that highly-technical scientific knowledge into best practices for a carceral setting. That’s what the CDC is for, and why the CDC publishes updated guidance to jails. Its experts are devoted to applying the developing science to different situations—including jails and prisons—and adjusting its recommended protocols.

Courts across the country have recognized the importance of the CDC guidelines in the current pandemic. *See, e.g., Ahlman v. Barnes*, 445 F. Supp. 3d 671, 694 (C.D. Cal. May 26, 2020) (“mandating compliance with the CDC Guidelines in the Jail serves the public interest”) One court—seemingly astounded at the facility’s failure to follow basic CDC protocols—put the burden on defendant to explain why they were not complying with CDC COVID-19 guidelines given “the extraordinary threat to life and safety posed by rapid spread of the virus.” *Costa v. Bazron*, 464 F. Supp. 3d 132, 142 (D.D.C. 2020) (“a failure to comply with CDC guidance requires some explanation grounded in professional judgment.”)

The CDC guidelines are well recognized as the authoritative protocols in how COVID-19 should be managed in a jail setting and, where those standards are being ignored, courts are ordering injunctive relief. *See Carranza*, 2020 WL 2320174, at \*12 (“the Court will order defendant to identify those individuals who are, according to the CDC guidelines, at a high risk of serious illness or death from COVID-19”); *Fraihat v. U.S. Immigration & Customs Enforcement*, 445 F. Supp. 3d 709, 744 (C.D. Cal. 2020), order clarified, No. EDCV191546JGBSHKX, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (analyzing whether conditions in the detention center allowed compliance with “mandated” CDC recommendations); *Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 5646138, at \*2 (S.D. Tex. Sept. 21, 2020) (ordering interim relief where detention facility was not following CDC guidance on cohorting).

The relief requested by Plaintiffs here does not break new ground. Plaintiffs simply ask the Court to order Defendant Elder to comply with published guidance from the CDC and the NIH, well established protocols for preventing the spread of COVID-19 and for treating the illness, and to comply with related well-established basic public health measures. The El Paso County Criminal Justice Center should not be permitted to continue endangering inmate health and safety by failing to take even these basic measures.

V. **THE COURT SHOULD NOT REQUIRE A BOND FOR INDIGENT PLAINTIFFS AND THIS MATTER OF PUBLIC INTEREST**

Under Rule 65(c) of the Federal Rules of Civil Procedure, district courts have discretion to determine the amount of the bond accompanying a preliminary injunction, and this includes the authority to set a nominal bond. In this case, the Court should waive bond because Plaintiffs are indigent, the requested interim relief is in the public interest, and the injunction is necessary to vindicate constitutional rights. *See Carranza*, 2020 WL 2320174, at \*14 (declining to require a bond where plaintiffs were indigent and compliance with the order would not cause significant

damages to defendant). Indigent plaintiffs “ordinarily should not be required to post a bond under Rule 65(c).” *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971); *see also* 11A *Fed. Prac. & Proc.* § 2954 (noting that *Bass* “seems correct and has been followed by other courts”); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) (“minimal bond amount should be considered” in public interest case); *Pocklington v. O’Leary*, 1986 WL 5748, at \*2 (N.D. Ill. May 6, 1986) (“[B]ecause of [a prisoner’s] indigent status, no bond under Rule 65(c) is required.”); *Complete Angler, L.L.C. v. City of Clearwater*, 607 F.Supp.2d 1326, 1335 (M.D. Fla. 2009) (“Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.”).

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for emergency interim relief should be granted in its entirety.

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Respectfully submitted,

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