IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS REMICK, et al., on behalf of themselves and all others similarly situated,	:	**No. 2:20-cv-01959-BMS**
Plaintiffs,	:	
v.	:	
CITY OF PHILADELPHIA; and BLANCHE CARNEY, in her official capacity as Commissioner of Prisons,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Civil Procedure 65(a), for a preliminary injunction, for the reasons stated in the accompanying Memorandum of Law.

Respectfully submitted,

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DATE: January 7, 2022

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs commenced this class action seeking relief from unconstitutional conditions of confinement that existed at that time and which, absent judicial intervention, will continue to exist in the Philadelphia Department of Prisons ("PDP"). Due in large part to severe understaffing in the PDP and, in particular, lack of sufficient correctional officer staffing and deployment, the prison population has been subjected to conditions that include extended lockdowns; lack of out-of-cell time; denial of timely and adequate medical and mental health care; lack of protection from physical assaults; excessive force by staff; denial of access to the courts, to legal counsel, and to timely legal mail; lack of due process in disciplinary proceedings; lack of access to necessary exercise; and other conditions that cause and exacerbate mental illness and mental distress and create grave risks of serious physical harm. While this Court's previous orders have prevented conditions in PDP from deteriorating even further, they are now moot or vacated and more comprehensive relief is necessary to address and prevent ongoing constitutional violations.

STATEMENT OF RELEVANT FACTS[1]

I. The Current Worsening Crisis at the PDP

Over the past several months, notwithstanding Orders from this Court which have been violated by Defendants, unconstitutional conditions of confinement at the PDP have seriously worsened and are at a critical crisis point. The primary cause of the deterioration in conditions is the huge lack of correctional staff, both in terms of actual employment and actual presence at the PDP. In June 2021, City Controller Rebecca Rhynhart warned that staffing levels at PDP were at "a tipping point."[2] Since then, the situation has become even more grave. Between April and August 2021, staffing levels dropped by 101 people, and as of mid-September 2021, the PDP was 479 people short of the 1,884 needed to fully staff the jails.[3] By January 2022, the staffing deficiencies had increased, and the City now has approximately 582 fewer staff members than its own deployment plan requires, a shortfall of 31%.[4] By comparison, Pennsylvania's Department of Prisons reports a 6.4% vacancy rate for officer positions.[5]

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[1] In this section we summarize the evidence that we will present at a hearing on this Motion, based on the allegations in the Second Amended Complaint.

[2] Samantha Melamed, *Philly controller says urgent action is needed to fix short-staffed, 'unsafe' jails*, The Philadelphia Inquirer (June 29, 2021), available at https://www.inquirer.com/news/philadelphia-controller-rebecca-rhynhart-jail-prison-conditions-20210629.html (last visited Jan. 6, 2022).

[3] Samantha Melamed, *Philly prison 'crisis' now includes a grand jury investigation and more court-ordered reforms*, The Philadelphia Inquirer (Sept. 20, 2021), available at https://www.inquirer.com/news/philadelphia-prisons-grand-jury-investigation-riot-disturbance-20210920.html (last visited Sept. 22, 2021); Maggie Kent, *Philadelphia's prison guard shortages lead to dangerous conditions for inmates, staff*, 6 ABC News (Sept. 17, 2021), available at https://6abc.com/prison-guard-shortage-philadelphia-system-inmates-safety/11027878/ (last visited Sept. 19, 2021).

[4] Samantha Melamed, *Panic attacks and 20-hour workdays: Why Philly correctional officers are quitting in droves*, The Philadelphia Inquirer (Jan. 4, 2022), available at https://www.inquirer.com/news/philadelphia-jail-staffing-crisis-prisons-cfcf-picc-20211230.html (last visited Jan. 4, 2022).

[5] *Id.*

Further exacerbating the staffing shortage is the high rate of absenteeism among PDP staff members. The average absentee rate among corrections officers is more than 25% per shift. On weekends, it is not uncommon for more than 40% of scheduled corrections officers to fail to report for their shifts and, on holiday weekends it is even worse. For example, on December 31, 2021 (New Year's Eve), ***only 10 out of 124 corrections officers scheduled to work at PDP's largest jail reported to work, an absentee rate of 92%***. As a result of these severe and persistent staffing shortages, incarcerated people regularly report that there are no officers present on their units for significant periods of time, or that there is only one officer for units with as many as 90 people. Remarkably, the population of incarcerated persons housed at PDP has actually ***increased*** 5% from March 2020 to October 2021 (the most recent monthly statistic available).[6] This lack of staff to manage a large prison population is the direct cause of the dire circumstances described below.

II. Lack of Out-of-Cell Time

Incarcerated people throughout PDP are denied adequate out-of-cell time to protect both their physical and mental health and to provide access to essential and constitutionally-mandated services. This lack of consistent out-of-cell time means that incarcerated people are frequently unable to take showers or to place phone calls to family and legal counsel. This extreme isolation has caused and exacerbated mental illness and mental distress for class members, and in particular, for persons with psychiatric disabilities. Individuals detained in these conditions also suffer

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[6] *See* MacArthur Safety and Justice Challenge, *Philadelphia Jail Population Report* (March 2020), p. 9, https://www.phila.gov/media/20200506144620/Full-Public-Jail-Report-March-2020.pdf (last visited Jan. 7, 2022) (noting the average daily population of PDP in March 2020 was 4,454); MacArthur Safety and Justice Challenge, *Philadelphia Jail Population Report* (October 2021), p. 7, https://www.phila.gov/media/20211126121153/Full-Public-Prison-Report-October-2021.pdf (last visited Jan. 7, 2022) (noting the average daily population of PDP in October 2021 was 4,694).

physical harm due to lack of exercise for prolonged periods of time, and the harmful effects are exacerbated for those with chronic medical conditions that require exercise.

Throughout the course of the pandemic, incarcerated people have reported not being allowed out of their cells for days at a time. The most recent data provided by the City demonstrates that from December 25, 2021 to January 2, 2022 at Philadelphia Industrial Correctional Center ("PICC"), only one unit received three hours of out-of-cell time in a day. Some persons housed on two other units received two hours on one day. Otherwise, everyone at PICC received one hour or less time out of their cells per day for the entire week. The same was true for several units at Riverside Correctional Facility ("RCF") during the three-day period from December 31, 2021 to January 2, 2022. Many people at PICC went without any out-of-cell time for multiple days in a row. Further, on every day in December 2021, there were at least some incarcerated persons who received less than 30 minutes of out-of-cell time, including some who received none at all.

Even where reports from the City indicate more substantial out-of-cell time, incarcerated persons report that correctional officers or incarcerated workers inflate these numbers. There are reports from incarcerated persons of threats of punishment if they refuse to sign a sheet representing more time out of their cells than they actually received. A recent *Philadelphia Inquirer* article quotes a former correctional officer describing this practice.[7]

III. Medical Care

Incarcerated persons are also denied timely access to necessary medical care and medications. Medications are not dispensed according to the medically-prescribed schedules, appointments with outside medical providers are regularly cancelled or rescheduled for months later, and chronic conditions go unmanaged. One individual who required an outside follow-up

[7] Melamed, *Panic Attacks, supra* n.4.

appointment after an injury at the jail was not taken for weeks, resulting in the partial loss of his eyesight. Many incarcerated people have reported that medical staff have not provided them with required doses of essential medications. Some people with severe health conditions describe extreme mismanagement of their care. One individual who entered PDP custody with serious gunshot wounds developed bed sores and infections due to poor wound care and monitoring. Incarcerated people describe submitting several sick calls slips for the same issue, and never receiving a response. Moreover, lack of staffing and resources at PDP continue to have harmful implications following a person's release from custody, as those issues have seriously disrupted the program that provides essential medications and critical medical care to released persons.

Individuals suffering from medical emergencies in their cells are not provided necessary medical care and treatment and have been forced to wait for prolonged periods for assistance from medical staff, exacerbating their condition and putting them at risk of illness, injury, and death. Emergency call buttons in the cells either do not function properly or are ignored by staff. Incarcerated people have described experiencing chest pain, seizures, diabetic shock, and panic attacks in their cells, with their urgent calls for medical attention going ignored. One individual's medical records specifically cite the staff shortage as the reason for the failure of PDP to adequately address medical emergencies. Incarcerated people with disabilities have described an inability to access accommodations, such as PDP failing to provide wheelchair-accessible toilets and showers.

IV. Failure to Protect from Violence

Plaintiffs have been subjected to an increased danger of violence and death. The risk of violence is exacerbated by the lockdown conditions, which lead to disputes and fights over phones during the limited time when people are out of their cells, and by the staff shortage, which leads to housing units being left unattended by corrections officers for hours at a time. The risk of

violence and resulting serious injury or death is further exacerbated by the fact that emergency call buttons in cells either do not function properly or are ignored. Even when staff are present during fights, incarcerated people report that they fail to intervene in certain instances or wait until a fight has resolved before providing assistance.

Locking mechanisms on many cell doors are easily disabled, thereby allowing some incarcerated individuals to leave their cells and become involved in altercations. While the City has reported a program to permanently repair the locks, in some housing units PDP has installed bolt locks on the cell doors which can only be unlocked manually, one by one, thereby exposing Plaintiffs to an unreasonable risk of serious injury or death should a fire or other emergency occur.

There have been at least 18 deaths in the PDP this year.[8] The Bureau of Justice Statistics reports in 2019, the most recent year for which data is available, the national mortality rate for local jails was 167 per 100,000.[9] The mortality rate for PDP facilities in the same period was 215.19 per 100,000. The mortality rate for PDP facilities for 2021 is nearly 400 per 100,000, more than double the national rate for 2019, and almost double the PDP mortality rate for 2019. Between August 2020 and April 2021, five or six incarcerated individuals in the PDP were killed.[10] These numbers represent a homicide rate that is significantly higher than the national average in jails.

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[8] Samantha Melamed, *4 Philly prisoners died in two weeks, capping a tumultuous and deadly year*, The Philadelphia Inquirer (December 27, 2021), *available at* https://www.inquirer.com/news/philadelphia-jail-deaths-lawsuit-prison-conditions-20211227.html (last visited Jan. 3, 2021).

[9] Bureau of Justice Statistics, *Mortality in Local Jails, 2000-2019*, Statistical Tables, (December 2021), available at https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf?utm_content=juststats&utm_medium=email&utm_source=govdelivery (last visited January 3, 2022).

[10] Samantha Melamed, *Another assault at Philly jail leaves a man on life support and staff and prisoners warning of a crisis*, The Philadelphia Inquirer (Apr. 23, 2021), *available at* https://www.inquirer.com/news/philadelphia-jail-murder-christopher-hinkle-armani-faison-20210423.html (last visited Sept. 13, 2021).

According to data from the Bureau of Justice Statistics, the local jail homicide mortality rate for 2019, the most recently available year, is 3 deaths per 100,000.[11] The homicide rate at PDP facilities is approximately 114.90 or 137.89 per 100,000 for the period between August 2020 and April 2021, roughly forty times the national average. In 2021, there were at least three homicides at PDP.[12]

Specific incidents of violence have been captured by security cameras and reported in the news. On September 30, 2021, an incarcerated person was attacked by three people and repeatedly stabbed. No correctional officer appears in the video, and afterwards, incarcerated people cleaned up blood left on the ground.[13] Another video from August 2021 shows an individual being stabbed without any officer intervention. Other incarcerated people broke up the fight themselves.[14]

V. Excessive Force

There has been an increase in the use of unreasonable force by correctional officers against incarcerated individuals, including the frequent use of pepper spray to enforce PDP's lockdown practices. PDP correctional officers routinely use pepper spray and other force in response to verbal provocations or minor rule violations, rather than to protect themselves or others from physical harm. Individuals merely in the vicinity of conflicts with officers or other persons are subjected to pepper spray without warning. Defendants have failed to adequately train or supervise officers in the proper use of pepper spray, causing incarcerated people to be sprayed in sensitive areas or sprayed with prolonged sprays instead of short bursts.

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[11] Bureau of Justice Statistics, *Mortality in Local Jails, supra* n.9.
[12] Melamed, *4 Philly prisoners died in two weeks*, *supra* n.8.
[13] Samantha Melamed, *Stabbings at Philly jail went unnoticed amid staff shortages, video shows*, The Philadelphia Inquirer (Nov. 4, 2021), *available at* https://www.inquirer.com/news/philadelphia-jails-staffing-shortage-assault-20211104.html (last visited Jan. 6, 2022).
[14] *Id.*

When pepper spray is used, Plaintiffs have been denied needed timely medical care to ameliorate its effects. Pepper spray and other force are frequently used without any regard for the victims' physical or psychiatric disabilities, which place them at greater risk of injury or death from such force. PDP staff used pepper spray on incarcerated people 554 times in 2020, a 9% increase compared to the previous year, despite a 6% decrease in the average monthly population. In 2020, pepper spray was used more at PICC than in all but two of the county jails in Pennsylvania on a per capita basis.[15]

Incarcerated people describe assaults by correctional officers over minor provocations, and, on some occasions, these assaults occur when the incarcerated person is in handcuffs and/or leg shackles.

VI. Access to Counsel and the Courts

Due to lack of staffing and Defendants' unnecessary and unreasonable quarantine procedures and practices, numerous individuals have not been transported to remote (via video) and in-person court proceedings, causing significant and, at times, months-long delays in the resolution of their criminal charges—and needlessly prolonging their incarceration. Defendants' policies and practices that prevent class members from attending their court proceedings include keeping vaccinated individuals on quarantine units, contrary to guidance from the Centers for Disease Control ("CDC");[16] erroneously housing people on quarantine units who have already

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[15] Pennsylvania Department of Corrections (2020). *2020 County Prisons Extraordinary Occurrences Report (EOR) Data*, 2020, *available at* https://www.cor.pa.gov/Facilities/CountyPrisons/Pages/Inspection-Schedule,-Statistics-And-General-Info.aspx.; Pennsylvania Department of Corrections (2019). *2019 County Prisons Extraordinary Occurrences Report (EOR) Data*, 2019, *available at* https://www.cor.pa.gov/Facilities/CountyPrisons/Pages/Inspection-Schedule,-Statistics-And-General-Info.aspx.

[16] Centers for Disease Control and Prevention, *Recommendations for Quarantine Duration in Correctional and Detention Facilities* (updated June 9, 2021), *available at*

completed a quarantine period; moving unvaccinated people onto vaccinated units; moving individuals to units already on quarantine status in violation of CDC guidelines, which risks restarting the quarantine period; and failing to adhere to their own serial testing protocols for quarantine units, leading housing units to remain on quarantine longer than is necessary. Some units have remained on quarantine for months at a time as the result of this failure to implement adequate quarantine policies.

As a result of the failure to follow adequate quarantine procedures, hundreds of individuals per week have missed court hearings. For the week of December 13, 2021, nearly 300 individuals could not attend court because they were housed on units in quarantine status. Of those who were not allowed to attend court, 108 individuals were fully vaccinated at the time and therefore should not have been in quarantine. The number of people on quarantine units continues to increase, and a significant number of them are there unnecessarily, as explained above. The average length of jail stay in PDP, as of May 2021, was 271 days, compared with 189 days in March 2020, before the COVID-19 pandemic began, a 43% increase.[17]

Visits with attorneys, both in-person and remote, are often cancelled or delayed due to lack of staff and/or COVID-19 quarantine restrictions. Criminal defense attorneys have described finding the visiting entrances to the jail locked and been told they are unable to visit clients due to quarantines or lack of staffing. The same is true for remote visits via Zoom or PDP's Global Tel Link remote visitation system, which are often cancelled without explanation or significantly delayed.

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https://www.cdc.gov/coronavirus/2019-ncov/community/quarantine-duration-correctional-facilities.html (last visited Jan. 6, 2022) ("Incarcerated/detained persons who are fully vaccinated … and do not have symptoms consistent with COVID-19 do not need to quarantine at intake, after transfer, or following exposure to suspected or confirmed COVID-19.").

[17] Melamed, *Philly controller, supra* n.2.

Incarcerated people are also left unable to advocate for themselves, provide critical information for investigative purposes in their criminal cases, and participate in their defense overall due to long delays in the sending and delivery of legal mail. Delays often extend more than a week and at times several weeks or even months. On some occasions, legal mail has not been delivered at all. Incarcerated people have also been denied regular access to the law library, as well as access to commissary, which means they often have no access to paper, writing implements, or postage, items needed to write legal letters and/or filings, also putting *pro se* litigants at a unique disadvantage.

VII. Disciplinary and Administrative Segregation

Plaintiffs have been subjected to discipline, including being held in punitive or administrative segregation housing (i.e., solitary confinement), without disciplinary hearings or proceedings, sometimes for several months. For over a year and a half, there was no hearing process in place. A hearing officer would review an incident report with no input, statement, or evidence presented by the incarcerated person. Some individuals received orders of restitution in addition to lengthy sentences in punitive segregation. Even after serving their punitive segregation sentence, many individuals were moved to administrative segregation for lengthy periods of time before being returned to the general population. After incidents at PICC in August and October 2021, the majority of people housed on the disrupted units were sent to disciplinary segregation and received the same punishment regardless of their involvement. While Defendants state that disciplinary hearings resumed as of October 2021, there are still individuals in disciplinary segregation who never received a hearing.

ARGUMENT

To obtain mandatory preliminary injunctive relief, plaintiffs must show (1) a substantial likelihood of success on the merits of their claims and (2) that they are likely to suffer irreparable injury if relief is not granted. *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 320 (3d Cir. 2020); *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013). The district court should then consider (3) the possibility of harm to the opposing party from the grant of the injunction and (4) the public interest. *Id.* The first two factors are "the most critical." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2008)). When they are established, the court should then consider all four factors together and determine whether they "balance in favor of granting the requested relief." *Id.*

Under the Prison Litigation Reform Act, preliminary injunctive relief is permitted to address unconstitutional or otherwise unlawful prison conditions so long as it is "narrowly drawn, extend[s] no further than necessary to correct the harm … and [is] the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). 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) (cleaned up).

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCEEDING ON THE MERITS OF THEIR CLAIMS.

A. Defendants are subjecting Plaintiffs to inhumane, dangerous conditions that violate their rights under the Fourteenth Amendment.

The conditions for people held in PDP are so inhumane and detrimental to physical and mental health that they violate Plaintiffs' substantive due process right, as predominantly pretrial detainees, to safe and humane conditions of confinement. The Constitution requires the provision of basic human needs to incarcerated people. *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*,

489 U.S. 189, 199–200 (1989). These basic needs include, among others, medical care and "reasonable safety." *Id.* at 200. Failure to provide for these basic needs "transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Id.*

While the Eighth Amendment protects prisoners serving criminal sentences from "cruel and unusual" punishment, the Fourteenth Amendment protects pretrial detainees from being punished at all. *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Hubbard v. Taylor*, 399 F.3d 150, 167 n.23 (3d Cir. 2005). Pretrial detainees are thus "entitled to greater constitutional protection than that provided by the Eighth Amendment." *Id.*; *see also Davis v. City of Phila.*, 284 F. Supp. 3d 744, 752 (E.D. Pa. 2018) (explaining that "the law in this circuit is well-settled" that the controlling standards under the Eighth and Fourteenth Amendments are distinct and that pretrial detainees are entitled to greater constitutional protections than convicted prisoners). The Eighth Amendment standard is, however, relevant to pretrial detainees' claims "because it establishe[s] a floor." *Hubbard*, 399 F.3d at 165–66.

Under the Fourteenth Amendment standard, conditions of confinement to which a pretrial detainee is subjected are unconstitutional when they "amount[] to punishment prior to an adjudication of guilt." *Montgomery v. Ray*, 145 F. App'x 738, 740 (3d Cir. 2005) (citing *Hubbard*, 399 F.3d at 158). To determine when conditions of confinement amount to punishment, "courts in the Third Circuit … [f]irst must ask whether the complained of conditions serve 'any legitimate purpose' [and] [i]f so, whether the conditions are 'rationally related' to that purpose." *Davis*, 284 F. Supp. at 752 (quoting *Hubbard*, 399 F.3d at 159). If the conditions are not rationally related to any legitimate purpose, the plaintiffs prevail. *See Stevenson v. Carroll*, 495 F.3d 62 at 67–68 (3d Cir. 2007) (citing *Bell*, 441 U.S. at 539). If they are, courts must then determine "whether the conditions cause the detainee to endure such 'genuine hardship' that the conditions are 'excessive

in relation to the purposes assigned to them.'" *Davis*, 284 F. Supp. at 752 (quoting *Hubbard*, 399 F.3d at 159–60); *see also Camps v. Giorla,* 843 F. App'x 450, 453 (3d Cir. 2021) (analyzing pretrial detainee's conditions of confinement claim under the *Bell*/*Hubbard* punishment standard).[18]

Conditions of confinement violate the Constitution when they result "in the denial of the minimal civilized measure of life's necessities" or "pos[e] a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations omitted). The overall conditions and their effects on the plaintiffs are central to the constitutional inquiry. *See Young v. Quinlan*, 960 F.2d 351, 364 (3d Cir. 1992) ("The touchstone [of the constitutional analysis] is the health of the inmate."). Conditions "can have a mutually reinforcing effect," so "some conditions of confinement may establish [a constitutional] violation in combination when each would not do so alone." *Mammana v. Fed. Bureau of Prisons*, 934 F.3d 368, 373–74 (3d Cir. 2019) (citing *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). The "inquiry into whether given conditions constitute 'punishment' [in violation of the Fourteenth Amendment] must therefore consider ***the totality of circumstances within an institution***." *Hubbard*, 399 F.3d at 160 (emphasis added); *see also id.*

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[18] The Eighth Amendment standard, on the other hand, requires a showing of deliberate indifference to incarcerated individuals' health or safety and includes an objective component as well as a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). First, "the deprivation alleged must be, objectively, sufficiently serious." *Id.* (cleaned up). Second, the defendant "must have a sufficiently culpable state of mind." *Id.* (cleaned up). This state of mind—deliberate indifference—is tantamount to "a conscious disregard of a serious risk" and exists when the defendant "'acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (quoting *Farmer*, 511 U.S. at 842). A plaintiff can rely on circumstantial evidence to establish deliberate indifference, and "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842; *see also Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 445 (3d Cir. 2020) (cleaned up) ("The inmate may demonstrate deliberate indifference by showing that the risk of harm was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past such that defendants must have known about the risk.").

("[W]e do not assay separately each of the institutional practices, but look to the totality of the conditions.") (quoting *Jones v. Diamond*, 636 F.2d 1364, 1368 (5th Cir. 1981)). Similarly, conditions that might pass constitutional muster when imposed for a short period of time may be unconstitutional when imposed for extended periods of time. *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978); *Young v. Quinlan*, 960 F.2d 351, 364 (3d Cir. 1992); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 679 (M.D. La. 2007).

Here, whether considered alone or in combination, the conditions in PDP facilities—including lack of out-of-cell time, delays in providing needed medical care, frequent incidents of violence among incarcerated people, excessive and unreasonable force by corrections officers, and lack of timely responses to emergencies—are currently causing Plaintiffs to suffer physical and psychological harm and exposing them to a substantial risk of serious harm in the future. That some members of the Plaintiff class have been enduring these conditions for nearly two years, since March 2020, only makes matters worse.

1. Out-of-cell Time

Large numbers of the Plaintiff class are currently being deprived of adequate out-of-cell time, in violation of their constitutional rights. It is widely acknowledged, and beyond reasonable dispute, that extended in-cell confinement, without meaningful opportunities for social interaction and exercise, poses grave dangers to the physical and psychological well-being of incarcerated people. *See, e.g.*, *Shorter v. Baca*, 895 F.3d 1176, 1185 (9th Cir. 2018) ("[T]here is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being [*sic*] of the inmates.") (citation omitted); *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) (noting the "growing consensus … that [solitary confinement] conditions … can cause severe and traumatic psychological damage," as

well as physical harm, including suicide and self-mutilation); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) ("[T]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects.") (citation omitted).

Physical exercise and social interaction are basic human needs protected by the Constitution. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Thomas v. Ponder*, 611 F.3d 1144, 1151–52 (9th Cir. 2010); *Wilkerson*, 639 F. Supp. 2d at 678. The Constitution thus "requires jail officials to provide outdoor recreation opportunities, or otherwise meaningful recreation, to prison inmates." *Shorter*, 895 F.3d at 1185; *see also Henrickson v. Nevada*, No. 20-1014, 2021 U.S. Dist. LEXIS 54485, at *3–4 (D. Nev. Mar. 23, 2021) (granting preliminary injunction ordering outdoor recreation).

Much of the PDP population is currently being deprived of adequate time out of their cells for exercise and programming and have been living under these conditions for months and, for some, upwards of two years. On many housing units—even units not designated as segregation units—people have been living in conditions equivalent to solitary confinement, regularly getting little to no time out of their cells.[19] These conditions are harmful and dangerous for everyone and especially for the many class members with mental illness diagnoses and physical and psychiatric

[19] Solitary confinement is any type of detention that involves removal from the general prisoner population, whether voluntary or involuntary; placement in a locked room or cell, whether alone or with another prisoner; inability to leave the room or cell for the vast majority of the day, typically 22 hours or more; extremely limited or no opportunities for direct and normal social contact with other human beings; and extremely limited or no opportunities for purposeful out-of-cell activity. *See Porter v. Clarke*, 290 F. Supp. 3d 518, 528 (E.D. Va. 2018) (citing U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 3 (Jan. 2016)); Craig Haney, Brie Williams, Jules Lobel, Cyrus Ahalt, Everett Allen & Leann Bertsch, *Consensus Statement from the Santa Cruz Summit on Solitary Confinement and Health*, 115 NW U. L. REV. 335, 337 (2020).

disabilities.[20] *See Talley v. Clark*, 851 F. App'x 306, 310–11 (3d Cir. 2021); *Palakovic*, 854 F.3d at 225–26.

That these conditions result in large part from the lack of sufficient staffing is no defense. Indeed, "[a]lthough … logistical problems, such as inadequate staffing … may make it difficult for jail officials to provide adequate exercise to detainees, … the wholesale, routine deprivation of … meaningful recreation activities" is unacceptable because "[l]ogistical problems, without more, cannot justify serious civil rights violations such as the deprivation of a basic human need." *Shorter*, 895 F.3d at 1186 (cleaned up). While occasional, temporary deprivations of exercise time due to emergency conditions may not violate the Constitution, when, as here, "the emergency has become the normal and [incarcerated people] ha[ve] repeatedly been denied out-of-cell time," court intervention is necessary. *Henrickson*, 2021 U.S. Dist. LEXIS 54485, at *4.

2. Medical Care

Delays in the provision of medical care, including medications and trips to outside medical providers, have become routine in the PDP due in part to the severe staffing shortage, leading to deprivations of necessary care in violation of the Fourteenth Amendment. "Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care[, so a] prison that deprives prisoners of … adequate medical care is incompatible with the concept of human dignity and has no place in civilized society." *Brown*, 563 U.S. at 510–11. Depriving pretrial detainees of necessary medical care is thus a form of punishment that is impermissible under the

[20] As of 2017, 40% of people incarcerated in PDP's jails were taking psychotropic medications and 17% had a serious mental illness such as schizophrenia, bipolar disorder, or major depression. *See* Samantha Melamed, *Can Pennsylvania find a way out for thousands of mentally ill inmates languishing in county jails?*, PHILADELPHIA INQUIRER (April 4, 2017), available at https://www.inquirer.com/philly/news/politics/Can-PA-find-a-way-out-for-thousands-of-mentally-ill-inmates-languishing-in-county-jails.html.

Fourteenth Amendment. *Davis*, 285 F. Supp. at 751 (citing *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 583 (3d Cir. 2003)).

As explained above, the Eighth Amendment deliberate indifference standard is relevant as well because it establishes a constitutional "floor." *Hubbard*, 399 F.3d at 165–66. Prison officials violate the Eighth Amendment when they are deliberately indifferent to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). A medical need is serious "if it is one that has been diagnosed by a physician as requiring treatment[,] one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention," or "if unnecessary and wanton infliction of pain results as a consequence of denial or delay in the provision of adequate medical care." *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987). Prison officials are deliberately indifferent when they "(1) know[] of a prisoner's need for medical treatment but intentionally refuse[] to provide it; (2) delay[] necessary medical treatment based on a non-medical reason; or (3) prevent[] a prisoner from receiving needed or recommended medical treatment." *Rouse*, 182 F.3d at 197.

Non-medical prison officials are liable for their deliberate indifference to prisoners' serious medical needs no less than medical staff, including when they are aware of, but fail to correct, inadequacies in the medical care being provided to incarcerated people. *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 324, 327 (3d Cir. 2014), *rev'd on other grounds*, *Taylor v. Barkes*, 575 U.S. 822 (2015). Prison officials are likewise deliberately indifferent when their actions or policies deny prisoners needed medical care for non-medical reasons, including cost and other administrative factors. *See Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014); *Chimenti v. Wetzel*, No. 15-3333, 2018 U.S. Dist. LEXIS 115961, at *27–28 (E.D. Pa. July 12, 2018). Prison officials are liable under the Eighth and Fourteenth Amendments when "systemwide deficiencies in the

provision of medical … care" subject incarcerated people to a "substantial risk of serious harm and cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." *Brown*, 563 U.S. at 505 n.3; *see also Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) ("Deliberate indifference … may be shown … by proving that there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.") (cleaned up). Crucially, the fact that some medical care is being provided does not prevent a finding of deliberate indifference. *Shifflett v. Korszniak*, 934 F.3d 356, 367 (3d Cir. 2019); *Palakovic*, 854 F.3d at 228.

Here, where systemic staffing and administrative failures on the part of the Defendants are causing systemic deprivations of necessary medical care in the form of missed medications, cancelled and missed outside medical appointments, and lapses in the treatment of chronic conditions, injunctive relief is appropriate. *See, e.g.*, *Braggs v. Dunn*, No. 14-601, 2021 U.S. Dist. LEXIS 245576, at *69 (M.D. Ala. Dec. 27, 2021) (finding that "egregious correctional staffing deficiencies ma[d]e providing constitutionally adequate mental-health care impossible"); *Braggs v. Dunn*, No. 14-601, 2021 U.S. Dist. LEXIS 245633, at *11–26 (M.D. Ala. Dec. 27, 2021) (ordering remedial relief to address staffing deficiencies); *Rasho v. Walker*, 376 F. Supp. 3d 888, 893–94 (C.D. Ill. 2019) (finding "systemic and gross deficiencies in staffing that effectively denied the Plaintiffs access to adequate medical care" and entering a permanent injunction).

3. Failure to Protect from Violence and Respond to Emergencies

As is evident from the unusually high number of assaults, homicides, and other deaths in PDP over the past year, members of the Plaintiff class face a substantial risk of serious harm due to Defendants' systemic failures, including lack of sufficient staffing on housing units and inoperable or ignored emergency call buttons. Prison officials have a duty to provide for the

"reasonable safety" of incarcerated people and to protect them "from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833; *see also Shelton v. Bledsoe*, 775 F.3d 554, 564–65 (3d Cir. 2015) (emphasizing that "the Eighth Amendment … protects against the risk—not merely the manifestation—of harm").

Prison officials are liable when they know that incarcerated people "face a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. Defendants cannot escape liability by "refus[ing] to verify underlying facts that [they] strongly suspect[ ] to be true, or declin[ing] to confirm inferences of risk that [they] strongly suspect[ ] to exist." *Id.* at 843 n.8. Nor is it a valid defense that the defendant "did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 843. As the Supreme Court as explained, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Id.*

Prison officials are liable when incarcerated people are attacked by other incarcerated people on unsupervised housing units or are unable to call for help to address medical issues and other emergencies. *Thomas v. City of Phila.*, No. 21-441, 2021 U.S. Dist. LEXIS 78999, at *23 (E.D. Pa. Apr. 23, 2021); *see also Velez v. Johnson*, 395 F.3d 732, 736 (7th Cir. 2005) (holding that pushing an emergency call button is "a clear indication that an emergency was at hand" and that disregarding it is deliberate indifference); *Greer v. Cty. of San Diego*, No. 19-378, 2021 WL 615046, at *5–6 (S.D. Cal. Feb. 17, 2021) (holding that the plaintiff stated a Fourteenth Amendment claim where he alleged the defendant "either intentionally muted or reduced the volume of the emergency intercom device or failed to ensure the device was working at the

beginning of his shift" despite the fact that the defendant "would not have known Plaintiff was suffering from a medical emergency"); *May v. Higgins*, No. 20-826, 2020 WL 4919562, at *1 (E.D. Ark. Aug. 7, 2020), *report and recommendation adopted,* 2020 WL 4905833 (E.D. Ark. Aug. 20, 2020) (allowing failure to protect claim to proceed when plaintiff alleged that "when he feels suicidal or otherwise needs assistance he cannot get help because the emergency call button has been broken for several months, and deputies only come into his Unit three times a day"); *Solivan v. Dart*, 897 F. Supp. 2d 694, 703 (N.D. Ill. 2012) (permitting claim to proceed when plaintiff, who was "was attacked inside his cell and screamed for two-and-a-half-hours without an officer coming to his aid," alleged that guard did not leave the "bubble," from where he could not see into cells or hear noises coming from the cells, for three hours and cell doors could be manipulated by inmates).

Despite the unusually high number of violent incidents and medical emergencies that have occurred in PDP, Defendants have failed to take reasonable measures to abate the risk. Housing units are left unmonitored or with only an officer in the bubble, and emergency call buttons are still dysfunctional and, when functional, frequently ignored. While the lack of functioning emergency call buttons ***alone*** may not constitute a constitutional violation, *see Thomas*, 2021 U.S. Dist. LEXIS 78999, at *22–23, the situation is altogether different when, as here, violent incidents are prevalent, the incarcerated population is under heightened stress due to the pandemic and other conditions in the jails, and there are insufficient numbers of staff to monitor housing units. *See Mammana*, 934 F.3d at 373–74 ("[S]ome conditions of confinement may establish [a constitutional] violation in combination when each would not do so alone."); *Hubbard*, 399 F.3d at 160 (stating that the constitutional inquiry must "consider the totality of circumstances within an institution"). A "remedy for unsafe conditions need not await a tragic event." *Helling v.*

McKinney, 509 U.S. 25, 33–34 (1993), so, here, where there have already been numerous tragic events, court intervention is necessary to prevent additional serious injuries and deaths.

4. Excessive Force

PDP corrections officers have used unjustified physical force against incarcerated people, including punching, kicking, and pepper spray. This includes the frequent use of force, especially pepper spray, to punish or retaliate against incarcerated individuals for real or perceived slights, rather than to protect themselves or others. These incidents are dangerous not just for the individuals targeted by corrections officers, but also for others on the same unit who are exposed to the pepper spray, especially those with respiratory ailments and psychiatric disabilities.

Incarcerated people have the right to be free from "the unnecessary and wanton infliction of pain." *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). To prevail on an excessive force claim, pretrial detainees "must show only that the force purposely or knowingly used against [them] was objectively unreasonable." *Kingsley*, 576 U.S. at 396–97. Considerations that may bear on the reasonableness of force used include:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. at 397.

Deploying pepper spray against an incarcerated person in response to verbal provocation alone is an unconstitutional use of force. *See Harper v. Barbagallo*, No. 14-7529, 2016 U.S. Dist. LEXIS 132261, at *11-13 (S.D. W. Va. Sept. 27, 2016) ("[The prison officials] do not argue—nor reasonably could they—that a prison official may use physical force against an inmate for nothing more than a mere insult."); *see also Brown v. City of Golden Valley*, 574 F.3d 49, 500 (8th Cir.

2009) ("In pepper spray cases, we have held that a basis for an Eighth Amendment claim exists when, as alleged here, an officer uses pepper spray without warning on an inmate who may have questioned the officer's actions but who otherwise poses no threat.") (cleaned up). Likewise, when a corrections officer deploys additional bursts of pepper spray after an incarcerated person has attempted to comply with orders, such facts indicate "that the amount of force used was disproportionate to the need for force." *Iko v. Shreve*, 535 F.3d 225, 240 (4th Cir. 2008). Moreover, the continued spraying of people when they react neither "violently" nor in a "confrontational" manner tends to show that corrections officers have acted unreasonably *Id.* And finally, when officials do not seek any medical treatment or change the inmate's clothing, they show a lack of effort to temper the severity of their use of force against the inmate, which weighs in favor of a finding of unreasonableness. *Id.*

Where, as here, there is "a pattern of similar incidents and inadequate responses to those incidents," supervisory and municipal defendants are liable. *Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir. 1996). Excessive force, including the over-use of pepper spray, has increased to unconstitutional levels and the Defendants have failed to respond to these incidents adequately. Court intervention is necessary to protect members of the Plaintiff class from further risk of physical injury at the hands of correctional officers.

B. Defendants are interfering with Plaintiffs' ability to access legal counsel and the courts, in violation of the First, Sixth, and Fourteenth Amendments.

As the overwhelming majority of people incarcerated in the PDP are pretrial detainees, their ability to communicate with their attorneys and attend court proceedings is especially important; disruptions in these essential services cause people to spend more time in jail than they otherwise would. This not only harms those directly affected, but also impacts everyone else in the jails, as reductions in the jail population would benefit all incarcerated people, especially in

the midst of the current unprecedented staffing crisis. When prison policies interfere with pretrial detainees' rights to counsel and to access the courts, injunctive relief is appropriate. *See, e.g.*, *Cobb v. Aytch*, 643 F.2d 946, 961 (3d Cir. 1981) (ordering injunction where the right to counsel was disturbed when pretrial trainees were transferred to distant prisons).

1. Interference with Legal Visits and Legal Mail

Pretrial detainees are entitled to effective assistance of counsel in their criminal cases under the Sixth and Fourteenth Amendments. Whether or not there is an ongoing criminal case, all incarcerated people retain "those First Amendment rights that are not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974), *overruled in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989). These First Amendment rights include the right of access to the courts and the right to consult with attorneys. *Lewis v. Casey*, 518 U.S. 343, 350 (1996) (recognizing First Amendment right of access to the courts); *Jones v. Brown*, 461 F.3d 353, 358–61 (3d Cir. 2006) (recognizing First Amendment right to confidential communications with attorneys). Practices that "unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

The right of access to the courts includes confidential visitation with counsel. *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990); *see also Dreher v. Sielaff*, 636 F.2d 1141, 1145 (7th Cir. 1980) (recognizing the importance of private legal visitation to the right of access to the courts). For individuals who have criminal cases pending, like the vast majority of the Plaintiff class, adequate and confidential legal visits are also protected by the Sixth Amendment right to counsel. *Fed. Defs. of New York, Inc. on behalf of Metro. Det. Ctr. - Brooklyn v. Fed. Bureau of Prisons*,

416 F. Supp. 3d 249, 251 (E.D.N.Y. 2019); *Mitchell v. Untreiner*, 421 F. Supp. 886, 902 (N.D. Fla. 1976); *Inmates of Suffolk Cty. Jail v. Eisenstadt*, 360 F. Supp. 676, 689–90 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1974).

Additionally, incarcerated people have a First Amendment right to use the mail, including—and especially—for communications with legal counsel. *Bieregu v. Reno*, 59 F.3d 1445, 1456 (3d Cir. 1995), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996) ("Of all communications, attorney mail is the most sacrosanct."); *Taylor v. Sterrett*, 532 F.2d 462, 475 (5th Cir. 1976) (explaining that the free speech interest in one's legal mail is "uninhibited communication with attorneys"). Courts have found the delayed delivery of legal mail to incarcerated individuals, or the failure to deliver such mail altogether, can be unconstitutional. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1431–32 (7th Cir.1996); *Gramegna v. Johnson*, 846 F.2d 675, 677 (11th Cir. 1988).

By causing long delays in the distribution of legal mail and preventing attorneys from being able to visit with their clients, Defendants are thus unduly burdening Plaintiffs' rights to counsel under the First, Sixth, and Fourteenth Amendments.

2. Interference with Attendance at Court Proceedings

The First, Sixth, and Fourteenth Amendments protect pretrial detainees' right to attend court proceedings in their pending criminal cases. *Lewis*, 518 U.S. at 346 (acknowledging "the fundamental constitutional right of access to the courts"). An access-to-courts claim requires a showing of "actual injury." *Jones*, 461 F.3d at 359 (citing *Lewis*, 517 U.S. at 349–53).

Here, by engaging in unreasonable quarantine and housing practices that cause people to miss their court dates, Defendants have unduly burdened Plaintiffs' Sixth and Fourteenth Amendment rights to attend their criminal court proceedings. Moreover, Defendants have caused

sufficient actual injury to sustain an access-to-courts claim, as cancelled court dates frequently lead to members of the Plaintiff class spending more time incarcerated pretrial than they otherwise would.

C. Defendants are depriving Plaintiffs held in segregation of liberty and property without due process, in violation of the Fourteenth Amendment.

Defendants are violating Plaintiffs' right to due process by keeping members of the Plaintiff class in solitary confinement and charging them money for alleged violations of jail rules without providing the constitutionally-required procedural protections. The Due Process Clause of the Fourteenth Amendment "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "To prevail on a procedural due process claim, a litigant must show (1) that the state deprived him of a protected interest in life, liberty, or property and (2) that the deprivation occurred without due process of law." *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 285 (3d Cir. 2008) ("*Burns I*").

1. Plaintiffs have protected liberty and property interests in avoiding disciplinary segregation and assessments on their prison accounts.

As pretrial detainees, Plaintiffs have a protected liberty interest in avoiding placement in "disciplinary segregation for violation of prison rules and regulations." *Kanu v. Lindsey*, 739 F. App'x 111, 116 (3d Cir. 2018); *see also Stevenson*, 495 F.3d at 70–71.[21] And all incarcerated people, whether pretrial or sentenced, have a protected property interest in the funds in their prison accounts. *Burns I*, 544 F.3d at 286. This property interest protects incarcerated people not only

[21] Unlike people serving criminal sentences, people detained pretrial need not establish that their confinement in segregation "imposes atypical and significant hardship … in relation to the ordinary incidents of prison life," *Sandin v. Conner*, 515 U.S. 472, 484 (1995), because, as the Third Circuit has repeatedly stated, "*Sandin*'s 'atypical and significant hardship' test applies only to sentenced inmates." *Bistrian v. Levi*, 696 F.3d 352, 373 (2012).

from actual seizures of funds but also from mere assessments on their prison accounts, "even absent any attempt [by prison authorities] to seize the funds." *Id.* at 286, 291. Thus, prison officials cannot impose assessments on incarcerated people's prison accounts for alleged rule violations or place them in disciplinary segregation without first providing due process. *Burns v. Pa. Dep't of Corr.*, 642 F.3d 163, 171 (2011) ("*Burns II*") (citing *Burns I*, 544 F.3d at 291); *Stevenson*, 495 F.3d at 70–71; *Kanu*, 739 F. App'x 111 at 116.

Here, where members of the Plaintiff class have been sentenced to disciplinary segregation and have had financial assessments levied on their prison accounts, they easily demonstrate that they have constitutionally protected interests that warrant due process protections.

2. Defendants have not provided Plaintiffs with the process they are due.

"The Supreme Court has repeatedly stated that 'the core of due process is the right to notice and a meaningful opportunity to be heard.'" *Stevenson*, 495 F.3d at 69 (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). Although "due process is flexible" and the procedural protections required vary, *Mathews*, 424 U.S. at 334, binding precedent makes clear that, before pretrial detainees can be placed in disciplinary segregation or have assessments levied against their prison accounts in response to alleged rule violations, they must be provided the procedural protections delineated in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Stevenson*, 495 F.3d at 70–71; *Kanu*, 739 F. App'x 111 at 116 ("[T]he imposition of disciplinary segregation for violation of prison rules and regulations cannot be imposed without providing the due process protections set forth in *Wolff*."); *Burns II*, 642 F. 3d at 172 (rejecting argument that *Wolff* only applies to deprivations of liberty and stating that "*Wolff* itself notes that its due process analysis applies regardless of whether the deprivation is of liberty or property.").

The required protections are (1) "written notice of the charges at least 24 hours before the hearing," (2) a hearing with "the opportunity to present witnesses and documentary evidence," and (3) "a written statement of the reasons for the disciplinary action taken and the supporting evidence." *Kanu*, 739 F. App'x at 116 (citing *Wolff*, 418 U.S. at 563–66); *see also Stevenson*, 495 F.3d at 70–71. Even when these procedures are provided (which here they were not), they may nonetheless be constitutionally deficient if they are executed in a "perfunctory" manner. *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986). After all, "[t]he most fundamental right of due process [is] a ***meaningful*** opportunity to be heard." *Id.* (emphasis in original). A "hearing" conducted without the accused present is obviously insufficient. *See White v. City of Phila.*, No. 21-2688, 2021 U.S. Dist. LEXIS 173903, at *13 (E.D. Pa. Sep. 13, 2021) (allowing procedural due process claim to proceed where PDP pretrial detainee was held in segregation on a misconduct charge but "had no opportunity to present a defense" and "the hearing [was conducted] without him being present").

Members of the Plaintiff class who remain in solitary confinement or who have financial assessments on the prison accounts are thus entitled to immediate relief to remedy the obvious due process deficiencies preceded their disciplinary sanctions.

D. Current conditions in PDP are particularly burdensome for individuals with disabilities and constitute unlawful discrimination under the ADA.

Members of the Plaintiff class with disabilities are especially burdened by each of the issues discussed above, and Defendants are violating Title II of the Americans with Disabilities Act ("ADA") by allowing these issues to persist without making accommodations for individuals with disabilities. Title II of the ADA bars public entities from excluding individuals with disabilities from its services, programs, or activities or from otherwise subjecting individuals with disabilities to discrimination. 42 U.S.C. § 12132. The phrase "program, service, or activity," is

"extremely broad in scope and includes anything a public entity does." *Furgess v. Pa. Dep't of Corr.*, 933 F.3d 285, 288–89 (3d Cir. 2019). To state a claim under the ADA, a plaintiff "must allege that he is a qualified individual with a disability, who was precluded from participating in a program, service, or activity, or otherwise was subject to discrimination, by reason of his disability." *Id.*

Incarcerated persons are "qualified individuals" under the ADA. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210–11 (1998). A disability is a mental or physical impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1). Major life activities include, among others, walking, lifting, sleeping, concentrating, thinking, communicating, and brain function. § 12102(2). An impairment need not be permanent to bring an individual within the protections of the ADA, and even an impairment lasting less than 6 months can be substantially limiting. 29 C.F.R. § 1630.2(j)(1)(ix). The 2008 amendments to the ADA require courts to construe the definition of "disability" in the ADA "in favor of broad coverage of individuals." § 12102(4)(A); *see also* 28 C.F.R. § 35.101 ("[T]he definition of 'disability' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA."). Thus, individuals with psychiatric disabilities, as well as those with permanent and temporary physical disabilities, are protected by the ADA. *See* 28 C.F.R. § 35.108(d)(2)(iii) (stating that it "should easily be concluded" that mental illnesses including, among others, major depressive disorder, bipolar disorder, and post-traumatic stress disorder, at a minimum, substantially limit brain function and, thus, that individuals with those conditions have disabilities within the definition of the ADA).

"[D]iscrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for

a plaintiff's disabilities." *Haberle v. Troxell*, 885 F.3d 171, 180 (3d Cir. 2018) (cleaned up); *see also Pratt v. Ann Klein Forensic Ctr.*, No. 15-5779, 2019 U.S. Dist. LEXIS 159479, at *12 (D.N.J. Sep. 18, 2019) ("The plaintiff need not demonstrate discriminatory animus.") (citing *Haberle*, 885 F.3d at 179). Public entities are required to make reasonable modifications to their programs, services, and activities unless they can show that the proposed modifications "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). Importantly, the ADA's text "demonstrates a recognition by Congress that discrimination against persons with disabilities differs from discrimination on the basis of, for example, gender, or race … [in that] a person with a disability may be the victim of discrimination precisely because [they] did not receive disparate treatment when [they] needed accommodation." *Presta v. Peninsula Corridor Joint Powers Bd,* 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998). The implementing regulations of the ADA "make clear" that discrimination "occurs when disabled persons, because of their disability, cannot derive a benefit from the state's services … even though [they] are given the exact same services or benefits as those afforded" to the non-disabled. *Belton v. Erickson,* No. 10-583, 2012 U.S. Dist. LEXIS 44681, *26 (N.D. Ga. March 20, 2012) (citing 28 C.F.R. § 35.130(b)(1)(ii)-(iii)). Moreover, public entities have an affirmative obligation to take "pro-active measures to avoid the discrimination proscribed by Title II" even in the absence of a specific request for an accommodation. *See Chisolm v. McManimon*, 275 F.3d 315, 324–25 (3d Cir. 2001); *Armstrong v. Davis*, 275 F.3d 849, 876 (9th Cir. 2001); *Purcell v. Pa. Dep't of Corr.*, No. 00-181J, 2006 U.S. Dist. LEXIS 42476, at *30–31 (W.D. Pa Mar. 31, 2006).

Each of the issues raised in this motion—especially lack of out-of-cell time, inadequate medical care, excessive force, and unlawful solitary confinement—especially burdens people with physical and psychiatric disabilities. Defendants thus have an obligation to modify their practices

to ameliorate these negative effects, and their failure to do so constitutes unlawful discrimination under the ADA. Courts have frequently recognized ADA failure-to-accommodate claims by incarcerated individuals and, when necessary, have ordered injunctive relief. *See, e.g.*, *Armstrong v. Newsom*, No. 94-2307, 2020 U.S. Dist. LEXIS 169120, at *93-95 (N.D. Cal. Sep. 8, 2020); *Partridge v. Smith*, No. 17-2941, 2020 U.S. Dist. LEXIS 31693, at *34 (D. Colo. Feb. 25, 2020); *Ga. Advocacy Office v. Jackson*, No. 19-1634, 2019 U.S. Dist. LEXIS 238805 (N.D. Ga. Sep. 23, 2019); *Sardakowski v. Clements*, Civil Action No. 12-1326, 2013 U.S. Dist. LEXIS 91996 (D. Colo. Mar. 26, 2013), at *25–26, *recommendation adopted*, 2013 U.S. Dist. LEXIS 91992 (D. Colo. July 1, 2013); *Owens v. Chester Cty*, No. 97-1344, 2000 U.S. Dist. LEXIS 710, *36–37 (E.D. Pa. Jan. 28, 2000).

To prevent further disability-based discrimination, the Court should enter injunctive relief that requires Defendants to make reasonable modifications to their programs and services to ameliorate the especially detrimental effects of the current crisis on individuals with disabilities.

II. Plaintiffs are likely to be irreparably injured if preliminary relief is not granted.

Plaintiffs have been and continue to be irreparably harmed by the conditions described above, and these injuries will only multiply in the absence of injunctive relief. The sorts of physical and psychological harms caused by Defendants' systemic failures cannot be repaired with money damages alone and, thus, cause irreparable harm. *See Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977) ("Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate.").

Moreover, "[d]eprivation of a constitutional right alone constitutes irreparable harm as a matter of law, and no further showing of irreparable harm is necessary." *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 396 (M.D. Pa. 2014). When plaintiffs are likely to prevail on the

merits on a claimed violation of constitutional rights, "it clearly follows that denying them preliminary injunctive relief will cause them to be irreparably injured." *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *see also Musser's Inc. v. United States*, No. 10-4355, 2011 U.S. Dist. LEXIS 109629, at *22 (E.D. Pa. Sep. 26, 2011) (noting that "[d]eprivation of a constitutional right has been recognized [by the Third Circuit] as irreparable harm"); *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citing 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995)).

III. Defendants will not be harmed if a preliminary injunction is issued.

In contrast to the ongoing deprivations Plaintiffs are experiencing, Defendants will not suffer any meaningful, cognizable harm by a preliminary injunction. Government officials can have no valid interest in the continued enforcement of unconstitutional policies. *See N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388–89 (3d Cir. 2012) ("[T]he State does not have an interest in the enforcement of an unconstitutional law[.]") (citation and quotation marks omitted). Insofar as Defendants might claim to be harmed by being compelled to expend resources to remedy the unconstitutional conditions in their jails, such "harm" is of no moment. *See Bowers v. City of Philadelphia*, No. 06-3229, 2007 U.S. Dist. LEXIS 5804, at *92 (E.D. Pa. Jan. 25, 2007) ("The only harm to Defendants is the cost associated with providing conditions of detention that pass constitutional muster while the cost to Plaintiffs, denial of constitutional rights, is far greater.").

IV. Issuing a preliminary injunction is in the public interest.

"As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994). This is especially so when, as here, constitutional rights are at issue—because "[i]n the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Hooks*, 121 F.3d at 884; *accord Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002). *See also N.J. Retail Merchs. Ass'n.*, 669 F.3d at 389 ("[G]ranting a preliminary injunction would be in the public's interest … because the public interest [is] not served by the enforcement of an unconstitutional law.") (cleaned up); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1992) ("The public has a strong interest in the prevention of any violation of constitutional rights.").

It is as true in the context of prisons as elsewhere that the public interest favors the protection of constitutional rights. *See, e.g.*, *Hildalgo v. Pa. Dep't of Corr.*, No. 15-203, 2016 U.S. Dist. LEXIS 124591, at *9 (W.D. Pa. Sep. 14, 2016) (citing *Hooks* and finding that a preliminary injunction ordering prison staff to provide an incarcerated man with traditional foods for the celebration of a religious festival was in the public interest); *Bowers*, 2007 U.S. Dist. LEXIS 5804, at *93 ("[G]ranting injunctive relief in this case would certainly serve the public interest [because] [a]s has been noted in other prison conditions cases, '[t]he degree of civilization in a society can be judged by entering its prisons.'") (citation omitted).

CONCLUSION

For the reasons discussed above, the Court should grant Plaintiffs' Motion for Preliminary Injunction and enter an order for remedial relief to address Defendants' systemic, pervasive violations of Plaintiffs' rights.

Respectfully submitted,

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DATE: January 7, 2022

CERTIFICATE OF SERVICE

I, Matthew A. Feldman, hereby certify that a true and correct copy of Plaintiffs' Motion for Preliminary Injunction and the accompanying Memorandum of Law was served upon counsel for Defendants via ECF on January 7, 2022.

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