

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk, ss.

No. SJ 2020-\_\_\_\_\_

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

v.

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

**COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF AND  
RELIEF UNDER G. L. c. 211, § 3<sup>1</sup>**

1. Plaintiffs Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers (collectively, Plaintiffs) file this complaint due to changed circumstances that have altered the human and constitutional dimensions of incarceration during the pandemic. Specifically, the Houses of Correction (HOCs) failure to conduct routine, comprehensive COVID-19 testing and to meaningfully reduce their populations, as well as five HOCs' failure to provide meaningful, timely, and confidential modes of communication between incarcerated individuals and their lawyers, violate constitutional guarantees concerning cruel and unusual punishment, due process, and the right to counsel.

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<sup>1</sup> Unless otherwise noted, this complaint cites data current as of December 17, 2020.

2. At the start of the pandemic, plaintiffs filed an emergency petition seeking release of incarcerated individuals. See *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, SJC-12926, Dkt. #5 (March 26, 2020) (hereinafter, SJC-12926). Within a week—to the credit of all parties and the Court—the case was briefed and argued. And on April 3, the Court held “that a reduction in the number of people who are held in custody is necessary;” announced a presumption of release for certain pretrial detainees; and ordered data reporting via a Special Master. *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 445, 447, 453 (2020) (hereinafter, *CPCS*). The Court noted that the reporting process could “facilitate any further response necessary.” *Id.* at 453.

3. The record generated by that process now reveals constitutional violations necessitating a further response.

4. First, the HOCs’ failure to conduct routine, comprehensive testing of prisoners and staff constitutes deliberate indifference to the substantial risk COVID-19 poses to incarcerated individuals, in violation of the Eighth Amendment and art. 26 rights of sentenced prisoners and the due process rights of pretrial detainees. Despite some testing of non-symptomatic individuals in some counties, *none* of the HOCs routinely and comprehensively tests incarcerated individuals and staff. This practice is unjustifiable now that weekly or twice-weekly non-symptomatic testing has been shown to be necessary to identify and limit COVID-19 outbreaks in congregate living environments.

5. Second, the HOCs’ failure to use their statutory authority to meaningfully decrease their incarcerated populations constitutes deliberate indifference to the substantial risk COVID-19 poses to incarcerated individuals, in violation of the Eighth Amendment and art. 26 rights of sentenced prisoners and the due process rights of pretrial detainees. The Court has held, and experts have confirmed, that the number of incarcerated individuals must be reduced to limit

COVID-19 transmission. Yet although population levels dipped after the Court’s decision, the incarcerated population in four counties is now at least 92% of the population at the start of reporting, and the overall pretrial population now *exceeds* the population on April 3, 2020.<sup>2</sup> The HOCs’ refusal to use their statutory authority to reduce these numbers is similarly unjustifiable.

6. Third, the HOCs in five counties—Bristol, Essex, Hampden, Plymouth, and Worcester—are unreasonably interfering with the constitutional right to counsel under the state and federal constitutions because the communication options they offer fail to provide timely, confidential, and meaningful access to counsel in the midst of the pandemic.

7. Plaintiffs, who are also Petitioners in SJC-12926, have worked in good faith with the Special Master and the HOCs for months, and will continue to do so. However, as Massachusetts enters a deadly holiday season, these three issues now urgently warrant the Court’s intervention.

### **PARTIES**

8. Plaintiff Committee for Public Counsel Services (CPCS) is a statutorily created statewide agency whose responsibility is “to plan, oversee, and coordinate the delivery” of legal services to certain indigent litigants through staff attorneys and the supervision of bar advocates. G. L. c. 211D, §§ 1 et seq. CPCS attorneys and bar advocates represent individuals who are incarcerated both pretrial and post-conviction, and they have a strong interest in safeguarding the constitutional rights of their clients.

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<sup>2</sup> Compare SJC-12926, Dkt. #70 App’x 2; App’x 4; App’x 7; App’x 8 (Apr. 13, 2020) with SJC-12926, Dkt. #132 App’x 4-6; App’x 10-12; App’x 28-30; App’x 31-33; App’x 52-54 (Dec. 17, 2020); Compare Massachusetts Dep’t of Correction, *Weekly Count Sheet: December 14, 2020* at 7 (listing total county jail population as 4,279) (Dec. 14, 2020), <https://www.mass.gov/doc/weekly-inmate-count-12142020/download>, with Massachusetts Dep’t of Correction, *Weekly Count Sheet: April 6, 2020* at 7 (listing total county jail population as 4,193) (Apr. 6, 2020), <https://www.mass.gov/doc/weekly-inmate-count-462020/download>.

9. Plaintiff Massachusetts Association of Criminal Defense Lawyers (MACDL) is a non-profit organization representing more than one thousand trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL's mission includes seeking the release of pretrial detainees and sentenced prisoners in the Commonwealth and protecting the state and federal constitutional rights of criminal defendants and incarcerated people.

10. Defendant Barnstable County Sheriff's Office operates the Barnstable County Correctional Facility. The Barnstable County Sheriff is James M. Cummings.

11. Defendant Berkshire County Sheriff's Office operates the Berkshire County Jail and House of Correction. The Berkshire County Sheriff is Thomas Bowler.

12. Defendant Bristol County Sheriff's Office operates the Bristol County House of Correction and Jail and the Ash Street Jail and Regional Lockup. The Bristol County Sheriff is Thomas M. Hodgson.

13. Defendant Dukes County Sheriff's Office operates the Dukes County Jail and House of Correction. The Dukes County Sheriff is Robert W. Ogden.

14. Defendant Essex County Sheriff's Department operates the Essex County Correctional Facility, the Essex County Pre-Release and Re-Entry Center, and the Women in Transition Center. The Essex County Sheriff is Kevin F. Coppinger.

15. Defendant Franklin County Sheriff's Office operates the Franklin County Jail and House of Correction. The Franklin County Sheriff is Christopher J. Donelan.

16. Defendant Hampden County Sheriff's Department operates the Hampden County Correctional Center, the Western Massachusetts Regional Women's Correctional Center, and the Western Massachusetts Recovery and Wellness Center (Mill Street Center). The Hampden County Sheriff is Nicholas Cocchi.

17. Defendant Hampshire County Sherriff's Office operates the Hampshire County Jail and House of Correction. The Hampshire County Sheriff is Patrick J. Cahillane.

18. Defendant Middlesex Sheriff's Office operates the Middlesex Jail and House of Correction. The Middlesex County Sheriff is Peter J. Koutoujian.

19. Defendant Norfolk County Sheriff's Office operates the Norfolk County Correctional Facility. The Norfolk County Sheriff is Jerome P. McDermott.

20. Defendant Plymouth County Sheriff's Department operations the Plymouth County Correctional Facility. The Plymouth County Sheriff is Joseph D. McDonald, Jr.

21. Defendant Suffolk County Sheriff's Department operates the Nashua Street Jail and the South Bay House of Correction. The Suffolk County Sheriff is Steven W. Tompkins.

22. Defendant Worcester County Sheriff's Office operates the Worcester County Jail and House of Correction. The Worcester County Sheriff is Lewis G. Evangelidis.

#### **JURISDICTION AND VENUE**

23. Jurisdiction and venue are proper under G. L. c. 231A, § 1; G. L. c. 214, § 1; G. L. c. 211, § 3.

24. Jurisdiction and venue are also proper under Supreme Judicial Court's order in SJC-12926, Dkt. #137 (Dec. 23, 2020).

## FACTS

### I. The Supreme Judicial Court ordered the HOCs to regularly report COVID-related data to facilitate any further necessary response to the pandemic.

25. To save lives during the pandemic, Plaintiffs filed an emergency petition seeking to reduce the number of incarcerated individuals on March 24, 2020. The next day, the Court appointed a Special Master.

26. The petition did not raise constitutional claims, and the Court held that it could neither order the Trial Court to revise and revoke sentences, nor exercise supervision over the sheriffs, “absent a violation of constitutional rights.” *CPCS*, 484 Mass. at 442, 446, 453.

27. The Court did conclude, however, that pretrial detainees who were neither held under G. L. c. 276, § 58A nor charged with certain offenses were entitled to a rebuttable presumption of release. And the Court ordered the HOCs and the DOC to provide daily reports of their incarcerated populations, releases, COVID-19 tests, and confirmed-positive results, and asked the Special Master to file weekly reports with the Court.

28. As the Court recently explained, “[t]he purpose of this critical monitoring . . . was to provide information and guideposts to the judiciary, as well as to the legislative and executive branches, during this unprecedented period, to allow informed decision-making to best protect incarcerated individuals and staff within the various facilities.” *Commonwealth v. Nash*, Mass., No. SJC-12976, slip op. at 9 (Dec. 14, 2020).

29. On June 23, 2020, the Court added several new reporting requirements— including a facility breakdown of the total number of tests and confirmed-positive results since the last report, the number of active COVID-19 cases, and the number of COVID-19 deaths—and switched the cadence from daily to weekly reporting. The Court also ordered the parties to “continue to consult

with the special master and, in particular, work to facilitate means to reduce the population of convicted and sentenced inmates.” SJC-12926, Dkt. #104 (June 23, 2020).

30. Since mid-May, Plaintiffs have participated in weekly phone calls with the Special Master’s team and the Sheriffs’ designated representatives.

31. During these calls, the Sheriffs’ representatives have repeatedly stated that the HOCs are not conducting routine, comprehensive testing of non-symptomatic prisoners or staff.<sup>3</sup>

32. The Sheriffs’ representatives have claimed that the HOCs instead test only those who are symptomatic or who are considered close contacts of infected individuals.

33. In October, following a COVID-19 outbreak at the Essex County House of Correction, Plaintiffs reiterated their view that the HOCs should routinely and comprehensively test non-symptomatic prisoners and staff.

34. Plaintiffs also requested written testing policies and procedures from the HOCs.

35. After the Sheriffs’ designated representative informed the Special Master they would not provide these protocols, Plaintiffs sent public records requests to each HOC in the last week of October. As of this filing, four had not yet produced testing protocol documents.<sup>4</sup>

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<sup>3</sup> Plaintiffs regard the Special Master discussions with the Respondents as court proceedings, and are prepared to submit a declaration as to their content to the extent the content of those discussions is disputed.

<sup>4</sup> Barnstable has indicated that they are working on the request; Bristol has requested a \$2,000 fee; and on December 17, Plymouth requested a \$400 fee. In addition, Essex has produced documents responsive to a request regarding the number of attorneys who had entered the HOC since October 1, 2020, but has not yet produced any documents regarding their testing policies.

**II. During the past nine months, there have been significant changes in scientific understanding of COVID-19, in COVID-19 testing policies in congregate living facilities, and in the breadth of COVID-19 transmission.**

**A. Advancements in scientific understanding of COVID-19.**

36. Scientific understanding of COVID-19 transmission, impact, and treatment has advanced in at least three ways since April 2020.

37. First, new research has clarified the degree to which “asymptomatic and presymptomatic infection are significant contributors” to COVID-19 transmission.<sup>5</sup> We now know that infected individuals are likely at highest risk of spreading the illness *before* symptoms develop.<sup>6</sup>

38. According to the CDC’s best estimate, 50% of COVID-19 transmission occurs prior to the onset of symptoms.<sup>7</sup> The CDC also estimates that 40% of COVID-19 cases are “asymptomatic,” *i.e.*, entirely without symptoms, and that these cases are 75% as likely as symptomatic cases to transmit the virus.<sup>8</sup>

39. Second, it is now understood that even mild COVID-19 cases can cause devastating long-term impacts, including impaired memory, limited concentration, and extreme fatigue.<sup>9</sup>

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<sup>5</sup> See Centers for Disease Control and Prevention, *Guidance for Expanded Screening Testing to Reduce Silent Spread of SARS-CoV-2*, (hereinafter, CDC Silent Spread), <https://www.cdc.gov/coronavirus/2019-ncov/php/open-america/expanded-screening-testing.html> (last visited Dec. 18, 2020).

<sup>6</sup> See Emily A. Wang, Bruce Western, Emily P. Backes and Julie Schuck, eds., *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity and Safety*, National Academies of Sciences, Engineering, and Medicine, at 2-2 (hereinafter, NASEM Report), <https://www.nap.edu/catalog/25945/decarcerating-correctional-facilities-during-covid-19-advancing-health-equity-and>.

<sup>7</sup> See Centers for Disease Control and Prevention, *Pandemic Planning Scenario*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited Dec. 18, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> See Rita Rubin, *As Their Numbers Grow, COVID-19 “Long Haulers” Stump Experts*, J. of Am. Med. Ass’n (Sept. 23, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2771111>.

40. As the CDC has acknowledged, “people who are not hospitalized and who have mild illness can experience persistent or late symptoms.”<sup>10</sup> According to the co-director of a post-COVID clinic at Johns Hopkins, “more than half of our patients have at least a mild cognitive impairment” and they are “also seeing substantial mental health impairments.”<sup>11</sup>

41. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, describes these long-term COVID-19 symptoms as “quite real and quite extensive.”<sup>12</sup>

42. Third, the Food and Drug Administration has now approved two COVID-19 vaccines.<sup>13</sup>

43. Governor Baker has announced that individuals living and working in congregate settings—including jails and prisons—will be the fourth group to receive the vaccination in phase one.<sup>14</sup>

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<sup>10</sup> Centers for Disease Control and Prevention, *Long Term Effects of COVID-19*, [https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html?ACSTrackingID=USCDC\\_425-DM42580&ACSTrackingLabel=Weekly%20Summary%3A%20COVID-19%20Healthcare%20Quality%20and%20Worker%20Safety%20Information%20%E2%80%93%20November%2016%2C%202020&deliveryName=USCDC\\_425-DM42580](https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html?ACSTrackingID=USCDC_425-DM42580&ACSTrackingLabel=Weekly%20Summary%3A%20COVID-19%20Healthcare%20Quality%20and%20Worker%20Safety%20Information%20%E2%80%93%20November%2016%2C%202020&deliveryName=USCDC_425-DM42580) (last visited Dec. 18, 2020).

<sup>11</sup> Pam Belluck, *Covid Survivors with Long-Term Symptoms Need Urgent Attention, Experts Say*, N.Y. Times (Dec. 5, 2020), <https://www.nytimes.com/2020/12/04/health/covid-long-term-symptoms.html>.

<sup>12</sup> *Id.*

<sup>13</sup> See Laura Crimaldi, *Inmates, Correctional Workers to be Among First to get Vaccine in Mass. but Rollout Plan is Hazy*, Boston Globe (Dec. 12, 2020) (hereinafter Crimaldi, *Vaccine*), <https://www.bostonglobe.com/2020/12/12/metro/inmates-correctional-workers-be-among-first-get-vaccine-mass-rollout-plan-is-hazy/>; FDA Press Release, *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine* (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid>.

<sup>14</sup> See Press Release, *Baker-Polito Administration Announces Initial Steps for COVID-19 Vaccine Distribution* (Dec. 9, 2020) (hereinafter Phase One Press Release), <https://www.mass.gov/news/baker-polito-administration-announces-initial-steps-for-covid-19-vaccine-distribution>; Crimaldi, *Vaccine*.

44. The completion of this first phase is not anticipated until at least February 2021, however, and it “remains unclear just how officials plan to roll out a vaccination program for an estimated 22,000 people who work or are incarcerated in jails and prisons.”<sup>15</sup>

45. What is more, given that Massachusetts is now anticipating that it will receive 20% fewer doses than originally expected by the end of the year,<sup>16</sup> this timing may be pushed back even further.

**B. Testing policies in congregate living facilities.**

46. Consistent with the prevalence of asymptomatic and pre-symptomatic spread, studies demonstrate that symptoms-based screening does not prevent COVID-19 outbreaks in communal living environments.

47. Thus, “in congregate living environments like prisons and jails, any reasonable response to the COVID-19 pandemic includes routine, comprehensive testing of residents and staff without symptoms.” Affidavit of Dr. Monik C. Jiménez, attached to Supporting Memorandum of Law as Exhibit B (hereinafter Jiménez) ¶ 30.

48. Indeed, “public health and infectious diseases researchers and officials recognize that, particularly in vulnerable communal living environments, the frequent testing of individuals without symptoms is necessary to contain the pandemic.” Affidavit of Dr. Yonatan Grad and Emma Accorsi, attached to Supporting Memorandum of Law as Exhibit A, ¶ 22.

49. At a minimum, weekly or twice-weekly testing is necessary to effectively identify and isolate infected individuals before the virus can spread more broadly.

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<sup>15</sup> Crimaldi, *Vaccine*; see also Phase One Press Release.

<sup>16</sup> Katie Lannon, *Mass. Will Receive Fewer Pfizer Vaccine Doses This Month Than Expected*, WBUR (Dec. 18, 2020), <https://www.wbur.org/commonhealth/2020/12/18/mass-will-receive-fewer-pfizer-vaccine-doses-than-planned>.

50. For this reason, federal, state, and private communal-living facilities have adopted broad-based testing strategies.

51. At the federal level, the CDC has emphasized the need for “expanded screening testing . . . to rapidly identify [COVID-19 positive] people without symptoms who are contributing to the silent spread of infection.”<sup>17</sup> It has therefore instructed jurisdictions to prioritize asymptomatic testing of staff and individuals incarcerated in correctional facilities.<sup>18</sup>

52. For those facilities within communities that are at moderate or high risk (based on either the cumulative number of new cases per 100,000 persons within the last seven days or the percentage of viral tests that are positive during the last seven days), the CDC recommends weekly or twice-weekly testing, respectively.<sup>19</sup>

53. In Massachusetts, the DOC conducted an initial round of universal testing of non-symptomatic prisoners in May and June, and continued with more targeted non-symptomatic testing for particular prisoners and facilities throughout the summer and fall. A second round of universal testing at all DOC facilities that began mid-November also included mandatory staff testing.<sup>20</sup>

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<sup>17</sup> CDC Silent Spread.

<sup>18</sup> See *id.*; see also Centers for Disease Control and Prevention, *Testing in Correctional & Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html#asymptomatic-no-exposure> (last visited Dec. 18, 2020).

<sup>19</sup> See CDC Silent Spread.

<sup>20</sup> See Press Release, DOC Implements Modified Operations at Facilities Statewide (Nov. 14, 2020), <https://www.mass.gov/news/doc-implements-modified-operations-at-facilities-statewide>; Deborah Becker, *New Coronavirus Testing for All State Prisoners and DOC Staff*, WBUR (Nov. 14, 2020), <https://www.wbur.org/news/2020/11/14/mass-prisons-limit-visitors-for-2-weeks-as-it-conducts-more-coronavirus-tests>.

54. In the analogous context of nursing homes, the Massachusetts Department of Public Health mandated universal baseline testing of all staff members and weekly testing of all of its staff.<sup>21</sup>

55. Under this policy, in the event of a positive result, all residents must be tested as soon as possible and within 48 hours.<sup>22</sup>

56. “Nursing facilities and rest homes are required to comply with [this] surveillance testing regimen, and may be subject to financial sanctions for non-compliance.”<sup>23</sup>

57. As of December 17, 407 out of 427 facilities were complying with this weekly testing mandate.<sup>24</sup>

58. Finally, more than 100 public and private colleges throughout New England have required universal non-symptomatic testing of students once or twice a week.<sup>25</sup>

59. “[S]chools that have done frequent testing of asymptomatic students have kept their rates at well below 1% positivity,” while those that test only “symptomatic [individuals] or only contacts of positives, have a rate at least tenfold higher.”<sup>26</sup>

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<sup>21</sup> Memo from Kevin Cranston and Elizabeth Daake Kelley, Mass. Dep’t of Public Health, to Skilled Nursing Facilities, Rest Homes, Assisted Living Residences 1 (Dec. 7, 2020), <https://www.mass.gov/doc/updates-to-long-term-care-surveillance-testing-1123/download>, attached to Supporting Memorandum of Law as Exhibit S.

<sup>22</sup> *Id.* at 1-2.

<sup>23</sup> Massachusetts Dep’t of Public Health, *Weekly COVID-19 Public Health Report* at 56 (Dec. 17, 2020) (hereinafter DPH Dec. 17 Weekly COVID Report), <https://www.mass.gov/doc/weekly-covid-19-public-health-report-december-17-2020/download> (last visited Dec. 18, 2020).

<sup>24</sup> *Id.* at 56-73. For other residential congregate care programs, EOHHS has mandated universal baseline testing of all staff members and a staff surveillance program that tests all staff every two to four weeks, where a positive test result triggers testing of all residents and staff who share physical space. See Massachusetts Executive Office of Health and Human Services, *Residential and Congregate Care Programs: 2019 Novel Coronavirus (COVID-19) Surveillance Testing Guidance* (Dec. 17, 2020), <https://www.mass.gov/doc/eohhs-congregate-care-surveillance-testing-guidance> (last visited Dec. 18, 2020).

<sup>25</sup> See Carey Goldberg, *Initial Results from a Massive Experiment: Over 3 Million Coronavirus Tests as New England Colleges*, WBUR (Nov. 25, 2020), <https://www.wbur.org/commonhealth/2020/11/25/on-campus-testing-colleges-broad>.

**C. The pandemic’s deadliest phase.**

60. This is the most dangerous moment of the pandemic.

61. “From an epidemiological perspective, the COVID-19 risks are higher now than at any other point, including the first surge in the spring.” Jiménez ¶ 5.

62. When Plaintiffs filed their emergency petition in March, Massachusetts had reported 777 COVID-19 cases *in total*, but the Commonwealth now regularly reports thousands of new cases *each day*.<sup>27</sup>

63. Governor Baker has acknowledged that there is now “community transmission across the Commonwealth,” and, in a troubling sign of what is to come, field hospitals are re-opening.<sup>28</sup>

64. Hospitalizations and deaths in Massachusetts rose 100% in the three weeks between the end of November and the start of December.<sup>29</sup>

65. Total COVID-19 deaths in Massachusetts have topped 11,000 and are trending upward.<sup>30</sup>

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<sup>26</sup> See Carey Goldberg, *Initial Results from a Massive Experiment: Over 3 Million Coronavirus Tests as New England Colleges*, WBUR (Nov. 25, 2020), <https://www.wbur.org/commonhealth/2020/11/25/on-campus-testing-colleges-broad>.

<sup>27</sup> See, e.g., Massachusetts Dep’t of Public Health, *COVID-19 Dashboard of Public Health Indicators* (Dec. 17, 2020) (reporting 4,985 newly reported confirmed cases on Dec. 17) (hereinafter DPH Dec. 17 Daily Dashboard), <https://www.mass.gov/doc/covid-19-dashboard-december-17-2020/download> (last visited Dec. 18, 2020).

<sup>28</sup> Jeremy C. Fox and Travis Andersen, *Baker Says Record-Setting Number of COVID-19 Cases In State Shows Widespread Community Transmission*, Boston Globe (Dec. 3, 2020), <https://www.bostonglobe.com/2020/12/03/metro/baker-says-high-number-covid-19-cases-state-shows-widespread-community-transmission>.

<sup>29</sup> See Shirley Leung, Tim Logan, and John Hilliard, *Public Health Expert and Some Boston-area Mayors Urge More Action on COVID-19*, Boston Globe (Dec. 6, 2020), <https://www.bostonglobe.com/2020/12/06/business/with-no-new-covid-19-restrictions-state-top-health-expert-some-boston-area-mayors-urge-more-action/>; see also <https://twitter.com/ashishkjha/status/1335433924202418176>.

<sup>30</sup> See DPH Dec. 17 Daily Dashboard.

66. After months of no reported COVID-19 deaths among Massachusetts prisoners, two individuals died of COVID-19 in late November less than a day after they were released from DOC custody,<sup>31</sup> one COVID-19 positive prisoner died in DOC custody on December 4, and two more died in DOC custody within the past week.<sup>32</sup>

67. The head of the CDC has warned that the months ahead could be “the most difficult in the public health history of this nation.”<sup>33</sup>

### III. The HOCs have not adequately responded to these dramatic changes.

#### A. The HOCs have not conducted adequate testing.

68. Although a few HOCs are testing more than the rest, none have conducted routine, comprehensive asymptomatic testing of incarcerated individuals or staff throughout their facilities.

69. As of December 17, according to CDC’s guidance indicators, nine Massachusetts counties were in the high infection tier, for which weekly or twice-weekly screening is recommended, while the remaining five were in the moderate infection tier, for which weekly screening testing is recommended.<sup>34</sup>

70. Not one HOC has hit this benchmark.

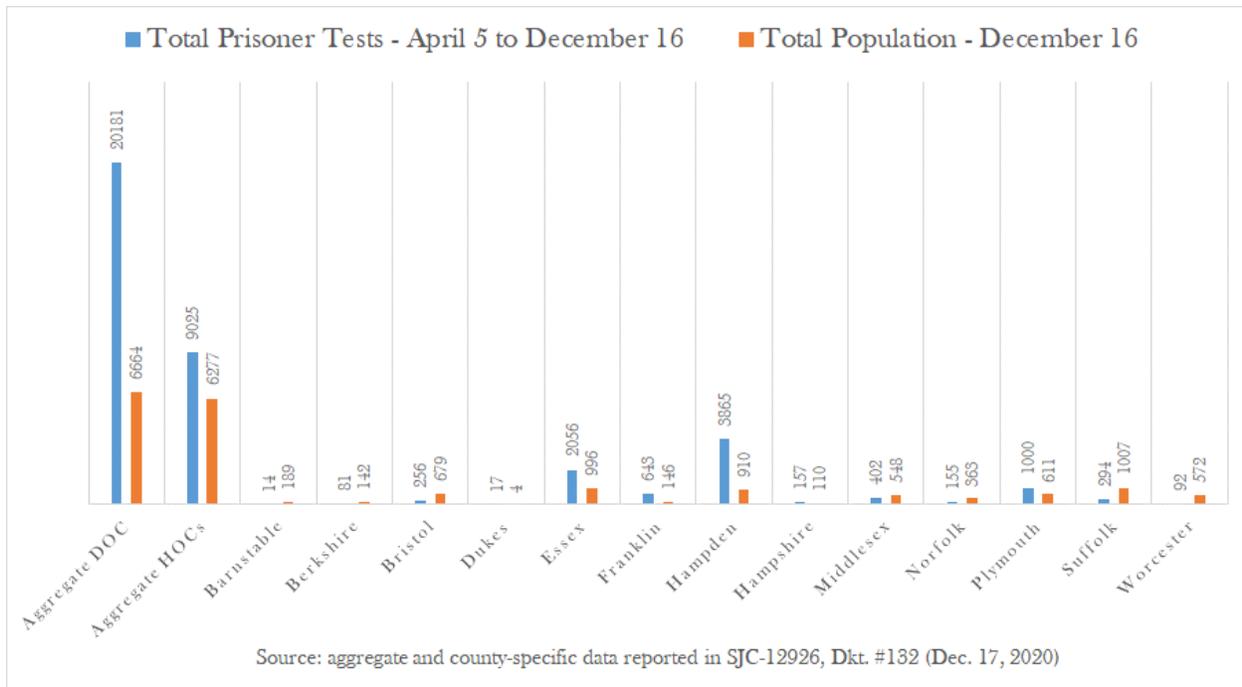
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<sup>31</sup> See Deborah Becker, *2 Mass. Prisoners Hospitalized with COVID-19 a Day After Being Granted Medical Parole*, WBUR (Dec. 4, 2020), <https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths>.

<sup>32</sup> See SJC-12926, Dkt. #132 at App’x 62 (Dec. 17, 2020).

<sup>33</sup> Amanda Kaufman, *Winter Could be “Most Difficult Time in the Public Health History” of the U.S.*, *C.D.C. Director Says*, Boston Globe (Dec. 2, 2020), <https://www.bostonglobe.com/2020/12/02/nation/winter-could-be-most-difficult-time-public-health-history-us-cdc-director-says>.

<sup>34</sup> See CDC Silent Spread; see also DPH Dec. 17 Weekly COVID Report at 25 (Dec. 17, 2020), <https://www.mass.gov/doc/weekly-covid-19-public-health-report-december-17-2020/download> (last visited Dec. 18, 2020) (Barnstable, Berkshire, Franklin, Hampshire, and Norfolk, had average daily incidents rates of between 27.9 and 47.3, thus falling into the CDC’s definition of moderate infection tier; Bristol, Dukes & Nantucket, Essex, Hampden, Middlesex, Plymouth, Suffolk, and Worcester Counties had average daily incidents rates of 54.3 to 101.5, thus falling into the CDC’s definition of high infection tier.); see also DPH Nursing Home Memo.



71. Testing in seven counties—Barnstable, Berkshire, Bristol, Middlesex,<sup>35</sup> Norfolk, Suffolk and Worcester—has been especially sparse. At these HOCs, the total number of tests since April 5 is less than their mean population, meaning they likely have not tested every prisoner *even once* in the span of nearly nine months.<sup>36</sup>

72. Barnstable has not tested any incarcerated individuals since October 14,<sup>37</sup> while Bristol, Worcester, and Norfolk have tested just 67, 39, and 4 since September 3.<sup>38</sup>

<sup>35</sup> According to the produced public records, Middlesex has conducted sporadic asymptomatic testing of select groups of incarcerated individuals in the past.

<sup>36</sup> See SJC-12926, Dkt. #132 at App'x 4-6; App'x 7-9; App'x 10-15; App'x 43-45; App'x 46-48; App'x 52-57; App'x 58-60 (Dec. 17, 2020). In addition to these seven counties, Hampshire—which reports testing of prisoners and detainees upon intake—has tested a total of 157 incarcerated individuals since April 4, during which time it always had a population above 106. See SJC-12926, Dkt. #132 App'x at 40-42 (Dec. 17, 2020).

<sup>37</sup> See SJC-12926, Dkt. #132 App'x at 5-6 (Dec. 17, 2020).

<sup>38</sup> See SJC-12926, Dkt. #132 at App'x 10-15; App'x 46-48; App'x 52-57; App'x 58-60 (Dec. 17, 2020).

73. While other facilities have conducted more tests of non-symptomatic prisoners, they fall far short of the necessary routine, comprehensive testing.

74. Franklin has tested a total of 643 incarcerated individuals throughout the pandemic.<sup>39</sup>

75. Hampden has tested a total of 3,308 incarcerated individuals, and in response to the public records request, reported two facility-wide tests in the spring and late fall, as well as plans for another round.<sup>40</sup>

76. In addition, Essex<sup>41</sup> and Plymouth<sup>42</sup> conducted a round of facility-wide testing after outbreaks erupted at each facility this fall,<sup>43</sup> and Plymouth recently stated that it would conduct weekly testing in one unit until there were no new positive cases in that unit for two straight weeks.<sup>44</sup>

77. This testing puts these four HOCs ahead of some others, but leaves them still short of the weekly or biweekly testing of non-symptomatic individuals that is the minimum required to effectively mitigate COVID-19 transmission in congregate living spaces.<sup>45</sup>

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<sup>39</sup> See SJC-12926, Dkt. #132 App'x at 30 (Dec. 17, 2020). Franklin reported that they test all prisoners and detainees at intake.

<sup>40</sup> See SJC-12926, Dkt. #132 App'x at 33 (Dec. 17, 2020). Hampden reported that they test all prisoners and detainees at intake.

<sup>41</sup> Deborah Becker, *Middleton Jail in Essex County Closes to Visitors Amid Outbreak*, WBUR (Oct. 4, 2020), <https://www.wbur.org/news/2020/10/04/covid-outbreak-essex-jail>. See SJC-12926, Dkt. #132 App'x at 20-21 (Dec. 17, 2020). Through September 30, Essex had tested just 196 prisoners; by October 7, it had tested 1,270; since that time, Essex has tested an additional 708 prisoners.

<sup>42</sup> Joe Difazio, *Plymouth County Jail sees COVID-19 Spike; More than 40 Inmates, Two Dozen Correctional Officers Test Positive*, The Patriot Ledger (Dec. 10, 2020), <https://www.patriotledger.com/story/news/2020/12/09/more-than-40-inmates-test-postive-covid-19-plymouth-county-jail/6506628002/>. See SJC-12926, Dkt. #132 at App'x 51 (Dec. 17, 2020). Through December 2, Plymouth had tested just 224 incarcerated individuals; by December 9, it had tested 936. Plymouth has tested an additional 64 prisoners since that time.

<sup>43</sup> Plaintiffs only learned about this through a federal filing, as Plymouth has not yet produced records in response to Plaintiffs' public records request, responding on December 17 with \$400 fee request. See *Nizeyimama v. Moniz*, No. 20-cv-10685-ADB, Dkt. #289 at 2 (D. Mass. Dec. 1, 2020).

<sup>44</sup> See *Nizeyimama v. Moniz*, No. 20-cv-10685-ADB, Dkt. #297 at 2 (D. Mass. Dec. 23, 2020).

78. This is particularly notable because, under the CDC’s guidelines, Hampden, Essex, and Plymouth all currently fall within the higher infection tier which for which weekly or twice-weekly testing is recommended. See *supra* n.35.

**B. The HOCs have not adequately used their statutory authorities to release meaningful numbers of people.**

79. The HOCs have not used their statutory authority to meaningfully reduce their incarcerated populations.

80. Immediately following the Court’s order in *CPCS v. Chief Justice of the Trial Court*, the total HOC population decreased from 7,173 on April 7 to 5,565 by June 21.<sup>46</sup>

81. As of December 16, however, the total HOC population was back up to 6,277.<sup>47</sup>

82. Four counties—Barnstable, Bristol, Franklin, and Hampden—were at 92% or higher of their incarceration levels on December 16 than at the start of reporting.<sup>48</sup>

83. This trend of increasing incarceration is especially pronounced with respect to pretrial detainees, who were incarcerated in greater numbers on December 14 than on the date of the Court’s initial decision.<sup>49</sup>

84. After an initial uptick in releases in the wake of the Court’s April 3 decision, most

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<sup>45</sup> For example, between November 19 and December 16, Hampden tested 1,131 prisoners with a mean population of 783. SJC-12926, Dkt. #132 at App’x 33 (Dec. 17, 2020). By way of comparison, twice-weekly testing would have resulted in 1,556 tests, while weekly testing would have resulted in 3,132 tests.

<sup>46</sup> Compare SJC-12926, Dkt. #70 App’x 1 (Apr. 13, 2020), with SJC-12926, Dkt. #132 App’x 1 (Dec. 17, 2020).

<sup>47</sup> See SJC-12926, Dkt. #132 App’x 1 (Dec. 17, 2020).

<sup>48</sup> Compare SJC-12926, Dkt. #70 App’x 2; App’x 4; App’x 7; App’x 8 (Apr. 13, 2020) with SJC-12926, Dkt. #132 App’x 4-6; App’x 10-12; App’x 28-30; App’x 31-33; App’x 52-54 (Dec. 17, 2020).

<sup>49</sup> Compare Massachusetts Dep’t of Correction, Weekly Count Sheet: December 14, 2020 at 7 (listing total county jail population as 4,279) (Dec. 14, 2020), <https://www.mass.gov/doc/weekly-inmate-count-12142020/download>, with Massachusetts Dep’t of Correction, Weekly Count Sheet: April 6, 2020 at 7 (listing total county jail population as 4,194) (Apr. 6, 2020), <https://www.mass.gov/doc/weekly-inmate-count-462020/download>.

HOCs now report almost no releases pursuant to the Court's order.

85. Since the beginning of May, Barnstable, Suffolk, Berkshire, and Dukes have each reported releasing one individual pursuant to the Court's order.<sup>50</sup>

86. Similarly, since the beginning of June, Plymouth and Essex have each reported releasing one individual pursuant to the Court's order; Hampshire and Middlesex have each reported releasing two individuals, and Bristol has reported releasing three.<sup>51</sup>

87. The HOCs have statutory authority to release more individuals.

88. Under G. L. c. 127, § 49, the HOCs have the power to transfer prisoners to home-confinement programs.

89. But the HOCs' exercise of this authority has been very limited.

90. Three HOCs—Bristol, Plymouth, and Suffolk—do not even have home-confinement programs.

91. The nine HOCs that have home-confinement programs have failed to use them to achieve meaningful population reductions.

92. Five of the HOCs with home-confinement programs—Barnstable, Berkshire, Essex, Norfolk, and Worcester—had zero people on home confinement as of November 5.

93. Three others—Franklin, Hampden, and Hampshire—had three or fewer people on home confinement on that same date.

94. Overall, just 16 people were on home confinement as of November 5, even though an estimated total of 427 individuals were eligible for such release as of December 11.

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<sup>50</sup> See SJC-12926, Dkt. #132 App'x at 4-6; App'x at 7-9; App'x at 16-18; App'x at 52-54 (Dec. 17, 2020).

<sup>51</sup> See SJC-12926, Dkt. #132 App'x at 10-12; App'x 19-21; App'x at 40-42; App'x 43-45; App'x 49-51 (Dec. 17, 2020).

95. In addition to home confinement, the HOCs have other depopulation tools at their disposal.

96. Under G. L. c. 126, § 26, when a “disease breaks out in a jail or other county prison” that “may endanger the lives or health of the prisoners to such a degree as to render their removal necessary,” a Sheriff may remove incarcerated individuals to another designated location “until they can safely be returned” to the HOC.

97. Nevertheless, to the best of Plaintiffs’ knowledge, none of the Sheriffs have exercised their authority to move prisoners to a new location under G. L. c. 126, § 26.

98. Finally, under G. L. c. 127, § 20B, the HOCs can release pretrial detainees into pretrial diversion programs.

99. But the HOCs have similarly failed to use this tool to meaningfully decrease their pretrial populations. Indeed, Barnstable, Berkshire, Essex, Franklin, Hampden, Hampshire, Norfolk, and Suffolk all held more pretrial detainees on December 14 than on April 6.<sup>52</sup>

**C. Bristol, Essex, Hampden, Plymouth, and Worcester do not currently provide meaningful access to counsel.**

100. The available communication options at Bristol, Essex, Hampden, Plymouth, and Worcester (the Five HOCs) do not provide meaningful access to counsel in the midst of the pandemic.

101. In-person attorney visits to the HOCs are not a sufficient option for attorney-client meetings during the pandemic.

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<sup>52</sup> Compare Massachusetts Dep’t of Correction, *Weekly Count Sheet: December 14, 2020* at 7, <https://www.mass.gov/doc/weekly-inmate-count-12142020/download>, with Massachusetts Dep’t of Correction, *Weekly Count Sheet: April 6, 2020* at 7, <https://www.mass.gov/doc/weekly-inmate-count-462020/download>.

102. Specifically, a combination of justifiable safety fears about COVID-19, lack of confidentiality, and limited access renders in-person attorney visits insufficient on their own to provide meaningful access to counsel.

103. Many attorneys cannot visit the HOCs because, given the high rates of COVID-19 in the facilities, they do not feel safe doing so.

104. The HOCs' failure to conduct routine testing of incarcerated people and staff increases attorneys' concerns that in-person visits could expose them to an undetected outbreak.

105. As a result, many attorneys go to the HOCs less frequently, for shorter periods of time, or not at all, and experts are reluctant to go to the jails as well.

106. Even non-contact attorney visits still pose a hazard if correctional officers are infected with COVID-19.

107. For attorneys who are able to enter the facilities, the resulting visits still sometimes fail to provide meaningful attorney access.

108. In Bristol, Essex, Hampden, and Worcester, non-contact visits are not always confidential.

109. Of the Five HOCs that sometimes offer confidential, in-person visitation, they do not all offer such visitation for all detainees.

110. In Worcester, for example, detainees who are quarantined due to possible COVID-19 exposure cannot have even non-contact attorney visits.

111. Moreover, the Five HOCs do not offer the type of virtual communications options necessary to provide meaningful access to counsel in light of the limitations of in-person visits during the pandemic.

112. Although the Five HOCs all provide the opportunity for some telephone communications with attorneys, they do not all do so in a way that provides meaningful access.

113. The Five HOCs do not always assure confidential legal telephone communications.

114. Clients can sometimes call their attorneys from the general-use telephones on their units; in Bristol, Essex, Hampden, and Worcester, however, the general-use telephones are on the tier, which means that such calls must occur during their recreation time and in a common space occupied by other prisoners.

115. In addition, although each HOC has a procedure whereby an attorney can ask the facility to relay a message for their client to call them, the resulting call is not always confidential in Bristol, Essex, Hampden, or Worcester.

116. Timely access to phone calls of sufficient length is not always assured.

117. In Bristol County, attorneys can only request a phone call between 10:00 a.m. and 2:00 p.m., and all scheduled calls must occur during these hours no sooner than the following day.

118. In Hampden, an incarcerated individual's request to make an attorney phone call may be denied or not honored for many days.

119. Quarantined individuals in Hampden and Worcester may have an hour or less on the tier to call their attorneys—as well as satisfy any other pressing needs including showering and calling loved ones—and that hour may fall outside of business hours.

120. Further, in Bristol and Hampden, the calls are sometimes cut short.

121. Finally, the inherent limitations of the medium render telephone communication inadequate on its own to provide meaningful access to counsel.

122. Over the phone, the ability to review discovery with clients is limited or nonexistent; clients cannot watch videos; and attorneys cannot watch their clients for non-verbal cues that would indicate misunderstanding or confusion.

123. The Five HOCs are not currently providing adequate access to videoconferencing for attorney-client meetings even though they each currently facilitate court appearances by videoconference for some individuals.

124. At this time, there are no opportunities for attorney-client videoconferencing at Bristol HOC.

125. In Hampden County, video conferences are only permitted in very limited circumstances, such as when a client is hearing-impaired.

126. In Worcester, attorney-client videoconferences are limited to just three days a week, the calls are not always confidential, and video calls are not facilitated for people in quarantine.

127. In Plymouth, videoconferences are of limited duration.

128. The videoconferencing at Essex is often cancelled or of poor quality. Moreover, the videoconferencing at Essex neither allows interpreters to attend nor permits screen sharing.

129. The lack of meaningful access to counsel at the Five HOCs is most acutely felt by those defendants with upcoming court dates such as § 58A hearings to determine whether a defendant will be held pretrial.

130. Due to non-existent or insufficient capacity and rules surrounding the movement of quarantined individuals, it is often impossible to schedule a video call prior to the short turnaround time for a § 58A hearing.

**IV. The HOCs' failure to adequately respond to COVID-19 harms Plaintiffs and their clients.**

131. The HOCs' failures to adequately respond to the pandemic as described above directly impact CPCS's ability to provide high-quality representation and to safeguard the rights of its clients.

132. CPCS clients are, in general, seeking release from incarceration, in addition to other forms of relief.

133. The lack of timely, confidential attorney-client communications at Bristol, Essex, Hampden, Plymouth, and Worcester Houses of Correction frustrates CPCS's ability to represent its pretrial and postconviction clients. The lack of virtual attorney-client communications also forces some CPCS attorneys to assume the risk of visiting clients in person.

134. In addition, the HOCs' failure to conduct routine, comprehensive testing and to exercise their statutory authorities to decrease their incarcerated populations endanger CPCS clients and attorneys, and deter CPCS attorneys from visiting the facilities, thereby impacting their ability to represent their clients.

135. Since the beginning of the pandemic, the HOCs' violations have also caused CPCS to expend resources that it would otherwise devote to providing representation to its clients.

136. Attorneys are required to spend significant amounts of time scheduling phone and video calls, and also rescheduling these calls when they are cancelled.

137. Attorneys have also spent time going to the jail only to be turned around at the door due to a medical quarantine.

138. Attorneys could otherwise spend this time working on their clients' cases.

139. The HOCs' failures to protect incarcerated people from COVID-19 similarly frustrates MACDL's mission of safeguarding individuals' constitutional rights to be free from unconstitutional conditions of confinement.

140. Furthermore, the HOCs' failure to provide broad-based COVID-19 testing to incarcerated people or staff frustrates MACDL's mission of ensuring high-quality representation to criminal defendants in the Commonwealth.

141. The low COVID-19 testing rates at the Houses of Correction make it impossible for MACDL members to assess the extent of the outbreaks at the Houses of Correction, and therefore make MACDL members hesitant to visit their clients in person.

142. In addition, at Bristol, Essex, Hampden, Plymouth, and Worcester Houses of Correction, the lack of timely, confidential, and meaningful access to counsel impedes MACDL members' abilities to provide effective representation to their clients.

143. Since the start of the pandemic, the HOCs' violations have forced MACDL to expend resources that would have otherwise been spent fulfilling the organization's goals.

144. For example, MACDL has had to funnel resources toward training criminal defense attorneys to protect their incarcerated clients from harm, and has had to expend resources participating in litigation addressing the humanitarian and constitutional violations in the Commonwealth's prisons and jails. As a result, MACDL has been unable to expend as many resources on other projects, for example, activities addressing the effect of race in the criminal legal system.

145. For both CPCS and MACDL clients, the massive volume of claims, the urgency of the need, the difficulty of accessing courts during the pandemic, and the limitations on attorney-client communications render incarcerated individuals unable to litigate the HOCs' constitutional violations on their own behalf.

146. These obstacles can be especially severe for those clients held in quarantine, may have an even greater need to communicate with their counsel given their circumstances, but frequently cannot have confidential communications with their attorneys until they are returned to general population.

## CLAIMS FOR RELIEF

**First Cause of Action – Cruel and/or Unusual Punishment of Sentenced Prisoners  
Violation of art. 26 of the Declaration of Rights  
and the Eighth Amendment to the U.S. Constitution  
(All Defendants)**

147. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

148. COVID-19 poses a substantial risk of serious harm to sentenced prisoners incarcerated in the HOCs.

149. The HOCs know that COVID-19 poses a substantial risk of serious harm to sentenced prisoners in their custody.

150. The HOCs have been deliberately indifferent to this risk because they have knowingly failed to undertake the reasonable step of routine, comprehensive COVID-19 testing of prisoners and staff to mitigate this risk.

151. The HOCs have been deliberately indifferent to this risk because they have knowingly failed to undertake the reasonable step of exercising their statutory authority to meaningfully decrease their incarcerated populations.

152. The HOCs are therefore violating art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the United States Constitution because they are not taking basic measures to protect sentenced prisoners from COVID-19.

153. Therefore, Plaintiffs are entitled to declaratory and equitable relief pursuant to G. L. c. 231A, § 1; G. L. c. 214, § 1; and G. L. c. 211, § 3.

**Second Cause of Action – Denial of Due Process to Pretrial Detainees  
Violation of arts. 1, 10, and 12 of the Declaration of Rights  
and the Fourteenth Amendment to the U.S. Constitution  
(All Defendants)**

154. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

155. COVID-19 poses a substantial risk of serious harm to pretrial detainees incarcerated in the HOCs.

156. The HOCs know that COVID-19 poses a substantial risk of serious harm to pretrial detainees in their custody.

157. The HOCs' failure to conduct routine, comprehensive testing of prisoners to mitigate this risk is objectively unreasonable.

158. The HOCs' failure to use their statutory authority to meaningfully decrease their incarcerated population is objectively unreasonable.

159. The HOCs have been deliberately indifferent to the risk posed by COVID-19 because they have knowingly failed to undertake the reasonable step of routine, comprehensive testing of prisoners and staff to mitigate this risk.

160. The HOCs have been deliberately indifferent to the risk posed by COVID-19 because they have knowingly failed to undertake the reasonable step of exercising their statutory authority to meaningfully decrease their incarcerated populations.

161. The HOCs are therefore violating art. 1, 10, and 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution because they are not taking basic measures to protect pretrial detainees from COVID-19.

162. Therefore, Plaintiffs are entitled to declaratory and equitable relief pursuant to G. L. c. 231A, § 1; G. L. c. 214, § 1; and G. L. c. 211, § 3.

**Third Cause of Action - Denial of Right to Counsel  
Violation of arts. 1, 10, and 12 of the Declaration of Rights  
and the First, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution  
(Bristol, Essex, Hampden, Plymouth, and Worcester)**

163. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

164. In-person attorney visits are not a sufficient option on their own for attorney-client communications during the pandemic.

165. Bristol, Essex, Hampden, Plymouth, and Worcester Houses of Correction do not provide timely, confidential legal telephone communications, which, in all events, cannot provide meaningful access to counsel on their own due to the inherent limitations of the technology.

166. Bristol, Essex, Hampden, Plymouth, and Worcester Houses of Correction do not provide timely, confidential legal videoconferencing.

167. As a result of these failures, Bristol, Essex, Hampden, Plymouth, and Worcester Houses of Correction do not provide sufficient attorney access to individuals incarcerated in their facilities under the extraordinary circumstances of the pandemic.

168. Bristol, Essex, Hampden, Plymouth, and Worcester have not justified this heavy burden on the constitutionally protected right to counsel with legitimate administrative interests.

169. Bristol, Essex, Hampden, Plymouth, and Worcester are therefore violating the right to counsel under the Massachusetts Declaration of Rights and United States Constitution because they are not currently facilitating meaningful attorney-client communication.

170. Therefore, Plaintiffs are entitled to declaratory and equitable relief pursuant to G. L. c. 231A, § 1; G. L. c. 214, § 1; and G. L. c. 211, § 3.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

- 1) Declare that the HOCs' failure to conduct routine, comprehensive testing of all incarcerated individuals and staff violates the state and federal constitutional rights of all individuals in their custody.
- 2) Declare that the HOCs' failure to consider home confinement for all eligible prisoners and to exercise their additional statutory authority to decrease their populations violates the state and federal constitutional rights of all individuals in their custody.
- 3) Declare that Bristol, Essex, Hampden, Plymouth, and Worcester HOCs' failure to provide meaningful attorney-client communications within the context of the pandemic violates the state and federal constitutional rights of all individuals in their custody.
- 4) Order the HOCs to conduct routine, comprehensive testing of incarcerated individuals and staff, to consider home confinement for all eligible prisoners, and to decrease their incarcerated populations.
- 5) Order the Bristol, Essex, Hampden, Plymouth, and Worcester HOCs to provide meaningful access to timely, confidential phone calls between counsel and their clients during business hours, and timely access to confidential videoconferences upon counsel's request.
- 6) Order the HOCs to:
  - a. Alert the parties and the Special Master to outbreaks by automatically reporting when five or more prisoners, detainees, and/or staff members at a facility test positive for COVID-19 in one day; and
  - b. Regularly report the bases of detention for individuals who are being held pretrial and their date of entry.
- 7) Exercise its supervisory powers over the trial courts under G. L. c. 211, § 3 by modifying the presumption of release for pretrial HOC detainees set in *CPCS v. Chief Justice of the Trial Court* to:
  - a. Narrow the scope of excludable offenses in Appendix A; and
  - b. Specify that the Commonwealth can overcome the presumption only with proof by clear and convincing evidence.
- 8) Set a status conference to review the HOCs' progress toward complying with this Court's orders.

9) Grant Plaintiffs such other and further relief as the Court considers just and proper.

Respectfully submitted,

/s/ Rebecca A. Jacobstein

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Dated: December 24, 2020

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\* Plaintiffs also acknowledge the important contributions to this filing by Legal Fellow Rebecca G. Krumholz, who is pending admission to the Massachusetts Bar.

**Verification of Complaint as to the Committee for Public Counsel Services**

I, Anthony Benedetti, Chief Counsel of CPCS, hereby affirm under the pains and penalties of perjury that the allegations in the Complaint that relate to CPCS are true and correct to the best of my information and belief.

*/s/ Anthony Benedetti*

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Anthony Benedetti

12/24/20

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Date

**Verification of Complaint as to the Massachusetts Association of Criminal Defense Lawyers**

I, Victoria Kelleher, President of MACDL, hereby affirm under the pains and penalties of perjury that the allegations in the Complaint that relate to MACDL are true and correct to the best of my information and belief.

*/s/ Victoria Kelleher*

\_\_\_\_\_  
Victoria Kelleher

12/24/20

\_\_\_\_\_  
Date