UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CLIFTON BELTON, JR., JERRY BRADLEY, CEDRIC FRANKLIN, CHRISTOPHER ROGERS, JOSEPH WILLIAMS, WILLIE SHEPHERD, DEVONTE STEWART, CEDRIC SPEARS, DEMOND HARRIS, and FORREST HARDY, individually and on behalf of all others similarly situated, Plaintiffs, v. SHERIFF SID GAUTREAUX, in his official capacity as Sheriff of East Baton Rouge; LT. COL. DENNIS GRIMES, in his official capacity as Warden of the East Baton Rouge Parish Prison; CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE, Defendants.	Case No. 3:20-cv-000278-BAJ-SDJ

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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INTRODUCTION

Plaintiffs understand that it is challenging to ask this Court to revisit the correctness of its prior decision. Yet Plaintiffs respectfully submit that the vulnerability of the detainees in the East Baton Rouge Parish Prison ("EBRPP" or "jail"), who still face a heightened risk of infection and harm from a once-a-century pandemic, and the plain factual oversights and legal errors in the opinion dismissing this case with prejudice both merit this motion and the relief it requests.

First, the opinion appears to reverse the presumption of review for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) by crediting *Defendants' version* of events, rather than viewing the complaint holistically, accepting Plaintiffs' allegations as true, and drawing all reasonable inferences in their favor. The opinion isolates stray references in the Amended Complaint ("complaint") about "protective measures implemented by Defendants since the onset of the pandemic" to conclude that the complaint effectively concedes that Defendants' efforts are constitutionally sufficient. R. Doc. 115, at 3-4. But, in doing so, the opinion fails to: (1) recognize that the complaint's predicate references to such measures are only in order to demonstrate that the specific measures were themselves insufficient; (2) acknowledge how the myriad allegations about the insufficiency of measures such as quarantining/social distancing, cleaning/sanitation, provision of protective equipment, and solitary confinement further show that Defendants have failed to implement necessary safety measures; and (3) credit inferences in Plaintiffs' favor from such myriad allegations. The opinion instead accepts the best version of the complaint viewed from Defendants' perspective, running afoul of well-established pleading standards. The Fifth Circuit has often reversed district court opinions for exhibiting these errors.

Second, the opinion improperly imports a heightened deliberate-indifference standard into the test governing Fourteenth Amendment conditions-of-confinement challenges, which Supreme

Court and Fifth Circuit precedent mandate derives from the *Bell v. Wolfish* "reasonable relationship" test. Respectfully, the opinion erred by conflating the reasonable relationship standard that governs conditions claims with the deliberate-indifference standard for an alternative "episodic acts or omissions" theory, which the opinion based on a stray remark about the episodic-acts theory in one Fifth Circuit case, taken out of context. In fact, that case as well as subsequent precedent clarify that the two theories are governed by different tests and, specifically, that conditions-of-confinement claims are not subject to a deliberate-indifference standard. Viewed in the light most favorable to Plaintiffs, the complaint's voluminous allegations show that subjecting pre-trial detainees to a serious risk of illness or death does not bear a reasonable relationship to a continued interest in detention, particularly given non-carceral alternatives to satisfy the government's asserted interest in assuring attendance at court hearings.

Third, in reviewing Plaintiffs' Eighth Amendment claim for post-trial detainees, the opinion erred in importing a requirement that Plaintiffs show Defendants bore ill-intent in carrying out their responses to the pandemic. Clear Fifth Circuit precedent underscores that there is no such intent requirement and that subjective indifference requires only objectively unreasonable conditions and a subjective awareness of the inadequacy of such conditions. Governing Supreme Court and Fifth Circuit precedent also counsels that the standard for deliberate indifference does not permit crediting just *any* actions Defendants may take in responding to the pandemic. The Constitution creates a floor for the standards by which someone—including those who have been convicted of crimes—must be treated, and nominal efforts and good intentions alone are plainly below that floor.

Finally, there was no need for the opinion to dismiss Plaintiffs' claims *with* prejudice, given repeated admonitions from the Fifth Circuit that dismissal of claims pursuant to Rule 12(b)(6)

should presumptively be without prejudice to permit Plaintiffs an opportunity to supplement or cure their pleadings.

LEGAL STANDARD

In the Fifth Circuit, a motion for reconsideration that "challenges the prior judgment on its merits" is treated as "either a motion to alter or amend [the judgment] under Rule 59(e) or a motion for relief from judgment under Rule 60(b)." *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990)). If filed within twenty-eight days of the challenged judgment, the motion is governed by Rule 59(e). *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 n.1 (5th Cir. 2004).[1]

A district court has considerable discretion to resolve a motion for reconsideration under Rule 59(e), where the desire for finality must be balanced against "the need to render just decisions on the basis of all the facts." *Factor King, LLC v. Block Builders, LLC*, 192 F. Supp. 3d 690, 693 (M.D. La. 2016) (quoting *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004)). A Rule 59(e) motion is a proper vehicle for challenging "the correctness of a judgment," *Fernandez v. Tamko Bldg. Prods., Inc.*, 2 F. Supp. 3d 854, 868 (M.D. La. 2014), and correcting "a manifest error of law or fact," *Factor King*, 192 F. Supp. 3d at 692.

The various manifest errors of law and fact outlined throughout this memorandum warrants granting Plaintiffs' motion for reconsideration.[2]

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[1] The "ten-day" time limit identified in *Shepherd v. International Paper Company* was extended to twenty-eight days when the Federal Rules of Civil Procedure were amended in 2009. *See Namer v. Scottsdale Ins. Co.*, 314 F.R.D. 392, 394 n.7 (E.D. La. 2016) (citing Fed. R. Civ. P. 59(e)).

[2] Even if the Court determines that Rule 60(b) is controlling, Plaintiffs remain successful under the standard in that rule. Rule 60(b) provides that a district court may relieve a party from a final judgment or order for "(1) mistake . . . [or] (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). Although a final judgment should not be disturbed lightly, Rule 60(b) "should be liberally construed in order to achieve substantial justice." *La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 484 (S.D. Tex. 2008) (quoting *Fed. Deposit Ins. Corp. v. Castle*, 781 F.2d 1101, 1104 (5th Cir. 1986)). Where, as here, there are "error[s] of law" that must be corrected, Rule 60(b) authorizes the district court to reopen and revise the judgment. *Castle*, 781 F.2d at 1104 (quoting *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977)).

ARGUMENT

I. THE OPINION FAILED TO VIEW THE COMPLAINT'S WELL-PLED FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS

A. The Court Was Required to View the Facts in the Light Most Favorable to Plaintiffs, to Construe All Reasonable Inferences in Plaintiffs' Favor and Not to Evaluate Defendants' Contrary Inferences.

When reviewing the sufficiency of a pleading under Rule 12(b)(6), all well-pled facts must be taken as true and viewed in the light most favorable to the plaintiff. *Hale v. King*, 642 F.3d 492, 498-99 (5th Cir. 2011) (en banc). The Court's inquiry should "focus on the complaint as a whole," rather than consider discrete portions in isolation. *U.S. ex rel. Bias v. Tangipahoa Parish Sch. Bd.*, 816 F.3d 315, 321 (5th Cir. 2016). The Court must determine whether the plaintiffs' allegations "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hale*, 642 F.3d at 499 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007)). That ends the Court's inquiry on a motion to dismiss, as the Court is not permitted to indulge competing inferences that favor the defendants. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 267 (5th Cir. 2009). The Fifth Circuit has reversed district courts when rulings on motions to dismiss "erroneously failed to accept all of the facts alleged as true, to consider them in the context of all facts alleged by the complaint and to draw all plausible inferences favorable to the plaintiff." *Id.* at 265; *see also Arnold v. Williams*, 979 F.3d 262, 268 (5th Cir. 2020); *Pub. Emps.' Ret. Sys. of Miss. v. Amedisys*, 769 F.3d 313, 317 (5th Cir. 2014); *Doe v. McKesson*, 945 F.3d 818, 822-23 (5th Cir. 2019).

B. The Opinion Frequently Credits Defendants' Inferences and Ignores Plaintiffs Allegations Supporting the Plausibility of their Claims.

The opinion granting the motions to dismiss failed to properly view the allegations in the

complaint in Plaintiffs' favor and adopted inferences that contradicted the well-pled facts.[3] Certain allegations were improperly isolated and stripped of their context. For example, the opinion states that the complaint "details multiple protective measures implemented by Defendants since the onset of the pandemic," such as "'quarantining' the general population according to housing 'line,'" providing cleaning supplies and personal protective equipment, and "testing prisoners[4] for COVID-19." R. Doc. 115, at 3-4. An examination of the cited paragraphs (as well as their neighboring allegations and the complaint as a whole) reveals the inaccuracy of this written summary and the Defendant-friendly inference the opinion draws. These paragraphs describe and create the reasonable inference that Defendants *failed* to implement these measures adequately and failed to undertake other known and necessary protective measures. Plaintiffs have never claimed that Defendants did absolutely nothing in response to the pandemic, and no such showing is required to plausibly suggest a Fourteenth and Eight Amendment violation. *See infra* Sections II, III. Indeed, to the extent that the complaint describes attempted curative efforts, Plaintiffs'

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[3] The opinion also states that "[o]ne Plaintiff (Jerry Bradley) alleges that he contracted COVID-19 while imprisoned," R. Doc. 115, at 3 (citing R. Doc. 4, ¶ 17)), raising the possible inference that the complaint identifies only one person who contracted the novel coronavirus inside the jail. But the complaint specifically describes or infers that several other plaintiffs caught the virus in the jail as well. *See* R. Doc. 4, ¶ 19-22, 24 (detailing that Plaintiffs Christopher Rogers, Joseph Williams, Willie Shepherd, and Devonte Stewart were confined on the B-3 solitary confinement line for COVID-19 positive detainees and Plaintiff Demond Harris was confined on the C01 and A1 solitary confinement lines for COVID-10 positive detainees); *see also* Decl. of Dr. Fred Rottnek ("Rottnek Decl"), R. Doc. 4-10, ¶ 37 (describing testimony from Plaintiffs Christopher Rogers, Devonte Stewart, Demond Harris, and Cedric Franklin regarding their COVID-19 infections). The Complaint also outlines a brief timeline of COVID-19 infections in the jail, which shows that many people in the jail became infected:

> On March 28, 2020, the jail detected its first detainee with COVID-19. The second would come a day later. By April 9, 2020, there were eight positive coronavirus cases in the East Baton Rouge Parish Prison, and four detainees had been sent to Our Lady of the Lake Hospital for severe medical issues from the coronavirus. And by May 14, 2020, the jail reported that 93 detainees tested positive for the virus. As of April 5, 2020, three Sheriff's deputies tested positive, and at least one Sheriff's deputy who had direct contact with detainees had died from the virus.

R. Doc. 4, ¶ 78. Plaintiffs' allegations and the evidence filed with their complaint demonstrate that significantly more than one individual has contracted the virus in East Baton Rouge's jail.

[4] Plaintiffs note that the putative classes they seek to represent are largely comprised of pretrial detainees. R. Doc. 4, ¶ 2 (noting that nearly 90 percent of the people detained in the jail have not been convicted of the crimes for which they are detained and are therefore presumed innocent). Those who have been convicted received shorter sentences that permitted them to serve their time in jail. *See id.* ¶ 137b (defining the post-conviction subclass).

allegations here and throughout the complaint are designed to—and do—highlight the inadequacy and neglect of Defendants' overall response.

1. Factual allegations show Defendants' failure to properly quarantine.

The complaint cannot be properly read at this stage in the proceedings—particularly with the context in the document as a whole—to suggest that Defendants properly "'quarantin[ed]' the general population according to housing 'line.'" *See* R. Doc. 115, at 3 (quoting R. Doc. 4, ¶ 85). Instead, the complaint emphasizes that "[t]he over 1,000 people still jailed at EBRPP continue to sleep less than three feet apart from each other; breathe the same contaminated air; share showers, toilets, and telephones; and congregate in enclosed spaces for mandated roll calls and pill calls."[5] R. Doc. 4, ¶ 5. Plaintiffs' allegations repeatedly note the impossibility of social distancing within the housing lines, given the refusal to reduce the population inside the jail,[6] *see, e.g.*, *id.* ¶¶ 7, 8, 86-89, 95, and the fact that the furniture is "bolted to the floor" such that detained individuals cannot create more distance for themselves on their housing lines, *id.* ¶¶ 89, 90. As the complaint alleges, congregate settings such as those inherent in a jail create a high risk of COVID-19 infection. R. Doc. 4, ¶¶ 31, 46; *see also* Decl. of Dr. Susan Hassig ("Hassig Decl."), R. Doc. 4-28, ¶¶ 3, 7; Decl. of Dr. Fred Rottnek ("Rottnek Decl."), R. Doc. 4-10, ¶ 16. Forcing individuals into congregate settings where they must live, breathe, eat, and sleep within six feet of many other people in the midst of a pandemic does not create a reasonable inference of proper quarantining.

Likewise, the Court's conclusion that Defendants' attempt at quarantining by line (which the allegations otherwise show was insubstantial) showed that Defendants properly implemented protective measures is misguided because the complaint alleges that there was no proper *cohort*

[5] This is similarly true on the COVID-19 solitary confinement lines. *See, e.g.*, R. Doc. 4, ¶¶ 112, 113; *see also* Rottnek Decl., R. Doc. 4-10, ¶ 52.

[6] Indeed, the complaint notes that Sheriff Gautreaux himself "admitted that a single case inside the facility could spread rapidly and that the jail's close confines made social distancing all but impossible." R. Doc. 4, ¶ 66.

quarantining even within lines. Cohort quarantining in groups of over 100 people, as the jail did, is not an effective method of quarantining and directly violated the Governor's emergency order to avoid gatherings of more than ten people—an order necessary to prevent against viral spread. *See* R. Doc. 4, ¶ 63; *see also* Hassig Decl., R. Doc. 4-28, ¶ 9 ("Cohort quarantining . . . as implemented in the case of the East Baton Rouge Parish Prison (EBRPP) in groups ranging from 40-100 inmates, does not meet the most basic necessity of distance between detainees to prevent further transmission of the virus in the cohort."). The complaint outlines how the jail routinely mixed different cohorts of individuals with different COVID-19 infections statuses (e.g., infected, suspected/awaiting test results, exposed and unexposed), which only served to increase the likelihood of transmission. *See* R. Doc. 4, ¶¶ 102, 103, 104, 107. Even in the COVID-19 solitary confinement lines, which sometimes housed fewer than ten people, the cells on the lines were so close together and had only bars on the fronts, such that aerosolized droplets from sick detainees could move between cells and infect or reinfect other detainees on the line. *Id.* ¶¶ 110, 112.

Taken altogether, and viewed to credit Plaintiffs'—not Defendants'—inferences, the complaint demonstrates that Defendants flagrantly permitted the virus to spread by failing to adhere to social distancing protocols, improperly quarantining different cohorts of detainees, and not isolating those detainees suspected of having COVID-19.

2. The Factual Allegations in the Complaint Show that Cleaning Supplies Were Inadequate to Protect Detainees from Viral Transmission

The complaint does not suggest that sufficient cleaning supplies or soap were provided to detainees to allow them to protect themselves from transmission of the virus. R. Doc. 115, at 4 (citing R. Doc. 4, ¶¶ 93, 97, 114). The complaint instead details the filth and squalor evident within the jail—indeed, the very paragraphs cited in the opinion granting the motions to dismiss explain that the "limited cleaning supplies" provided amount to no more than a mop, old rags, and dirty

water that, only on occasion, is mixed with diluted cleaning solution. R. Doc. 4, ¶ 93. The soap that detainees receive is not effective against the virus and often does not last a full week, forcing many detainees to be without any soap in the midst of a pandemic for days at a time until their meager ration is belatedly replenished. *Id*. ¶ 97; *see also id*. ¶ 94 (describing how the bathrooms are "covered in mold and scum so thick the men can scrape it off the wall with their fingernails even after the shower has been cleaned"), ¶ 96 (detainees are not provided chemicals or cleaning wipes to clean high-touch surfaces like the phones between use, so they resort to putting a sock on the phone to attempt to protect themselves from virus spread). Plaintiffs' allegations demonstrate that Defendants' efforts are wholly inadequate and raise a reasonable inference of knowing neglect.

3. The Factual Allegations Show that Temperature Checks and Testing Practices Were Inadequate to Track, Prevent, and Treat the Rapid Spread of COVID-19 in the Jail

Although the opinion notes the provision of "universal temperature checks beginning in April 2020," as well as COVID-19 "testing," R. Doc. 115, at 3-4 (citing R. Doc. 4, ¶¶ 102, 105), the complaint makes clear that any such efforts were inappropriately belated, placed detainees at heightened risk, and were in any event fleeting. The temperature checks occurred only *after* the jail experienced its first COVID-19-related death and numerous detainees filed "sick calls" begging for medical aid for symptoms of COVID-19. *Id*. ¶ 102. Viewed in a manner that properly credits Plaintiffs' allegations, this delay was unnecessary and dangerous. When jail staff completed temperature checks, pill calls, and roll call during twice-daily shift changes, they forced potentially sick detainees to stand close to others on the housing lines, *id*. ¶¶ 5, 88, 102, further risking infection and threatening the detainees' health. Even when someone had an elevated temperature, jail staff failed to ensure that the symptomatic detainees were moved off their general population lines—they remained, likely infected and transmitting the virus to those around them,

for up to twelve hours before they were moved. *Id.* ¶ 103. The jail stopped providing universal temperature checks or COVID-19 tests just a few weeks later, in late April or early May. *Id.* ¶¶ 9 (discussing "the jail's lack of meaningful testing"), 105, 108 (noting that even staff are not regularly tested). These allegations do not describe a sufficient response—rather, they portray medical neglect and delay. *Cf. id.* ¶ 76 & n.156 (describing the community call for universal testing and highlighting that need in a congregate detention setting); *see also* Hassig Decl., R. Doc. 4-28, ¶ 10 (explaining that without regular testing in an environment like the jail where social distancing was not implemented, it would be impossible to track the spread of COVID-19). Indeed, the complaint repeatedly outlines the broader issue of medical neglect inside the jail, especially for detainees who are medically vulnerable and/or suspected of COVID-19 infection, which was largely absent from the opinion's discussion of the complaint. *See, e.g.*, R. Doc. 4, ¶¶ 104, 106, 107, 119, 122. These facts together meet the pleading standard for suggesting a constitutionally insufficient response to the pandemic by Defendants.

4. The Factual Allegations in the Complaint Show Inadequate Personal Protective Equipment (PPE) to Protect Against Spread of the Virus

The opinion also notes that Defendants "suppl[ied] masks" or "cloth bandanas" to detainees and "provid[ed] personal protective equipment to [jail] staff," R. Doc. 115, at 4 (citing R. Doc. 4, ¶¶ 91, 123), but these very same complaint paragraphs outline the profound inadequacy of any such effort. The complaint details how detainees' masks are not replaced when torn or dirty and how detainees were forced to re-wear the same mask or bandana for an entire week before the masks were inadequately cleaned and then redistributed among the population. R. Doc. 4, ¶ 91. It was improper for the opinion to read and credit part of an allegation referencing a measure, but not the remainder of the allegation showing the inadequacy of that same measure. Moreover, the jail rejected donations of N-95 masks for the people detained at the jail, which would have

provided more protection for the vulnerable people trapped inside. *Id.* ¶ 77.

The complaint further alleges that jail staff do not change gloves when handing food to people on different lines, leading to the reasonable inference that the virus may be transmitted between lines on a daily basis, and that they "[s]ometimes . . . do not wear masks or gloves on the line at all" because they allegedly believed that "such protections were no longer necessary." *Id.* ¶ 99. Such allegations cannot be reconciled with an inference that Defendants adequately provided or enforced the use of PPE as a secondary mitigation measure to protect detainees from viral spread within the jail and via the guards coming and going into the community.

5. The Factual Allegations in the Complaint Show the Clinical Inadequacy—and, Indeed, the Horror—of the COVID-19 Solitary Confinement Wings

Finally, the opinion's interpretation of Plaintiffs' allegations regarding the jail's so-called "COVID-19 isolation wings" is contradicted by Plaintiffs' well-pled factual allegations. R. Doc. 115, at 3-4, 13-14 n.2. As the opinion notes, Plaintiffs allege that "the risks posed by . . . housing [people] in a condemned portion of the prison are objectively intolerable." *Id.* at 13 n.2; *see also* R. Doc. 4, ¶ 71 (noting that Baton Rouge policymakers and the Sheriff himself have acknowledged that the condemned portion of the jail "is unfit" to safely detain people and should be shut down). However, Plaintiffs' allegations address more than the formal condemnation of these spaces. Plaintiffs note that when these condemned lines reopened, the jail failed to repair or thoroughly clean the cells before people were forcibly moved there. *Id.* ¶ 109. The lines "remain[ed] filthy and unsafe," plagued with "black mold," "large rats and spiders," and "questionably potable water." *Id.* It is in these conditions—locked into their cells—that severely symptomatic detainees were confined "for almost 24 hours every day without adequate access to the medical care they need." *Id.* ¶ 6. How the Court concluded that this forcible relocation and punitive confinement reflected a good faith "desire to abate" the spread of COVID-19 is not clear. R. Doc. 115, at 14

n.2. Jail staff or nurses did not regularly check detainees' breathing, temperatures, or symptoms, and the people detained there—who were at high risk of infection or visibly sick with COVID-19—were abandoned for hours at a time. R. Doc. 4, ¶¶ 111, 119. Detainees were forced to resort to "beat[ing] on the door or kick[ing] their walls" to get the attention of jail staff, and when they asked for extra time out of their solitary-confinement cells to shower or make a phone call, guards "beat up, mace[d], or threaten[ed]" these detainees. *Id.* ¶ 111.

In short, Plaintiffs allege that these so-called "COVID-19 isolation wings," which "Defendants use to warehouse people who have contracted COVID-19 or are displaying symptoms," are "incredibly punitive and indistinguishable from the lines used for disciplinary segregation." *Id.* ¶ 116. They are not in any way comparable to adequate medical isolation spaces, such as negative-pressure rooms or even spaces that contain proper ventilation and regular medical care. *Cf.* R. Doc. 4, ¶ 71 (noting Sheriff Gautreaux's admission that the old part of the jail—including the COVID-19 solitary confinement lines—has "issues with ventilation."); *see also* Rottnek Decl., R. Doc. 4-10, ¶¶ 18-19 (explaining that, because most jails lack negative pressure rooms, it is difficult to contain illnesses and care for those who have become infected).

The opinion granting the motions to dismiss provides two explanations for why Plaintiffs' allegations regarding the use of condemned lines do not plausibly allege a constitutional violation, R. Doc. 115, at 13 n.2, but neither can be reconciled with the facts identified in the complaint. First, the opinion claims that "Plaintiffs allege that a detainee's assignment to the condemned quarantine lines is temporary, lasting no longer than it takes to receive two successive negative COVID-19 tests." *Id.* This is not so. The complaint alleges that many detainees have trouble receiving two negative tests in a row due to the conditions evident in these solitary confinement lines, including medical neglect and filth, and that "some . . . have spent over a month on solitary

confinement to date." R. Doc. 4, ¶ 124. A month-long duration in inhumane solitary confinement where people remain infected in part due to medical neglect does not raise the reasonable inference of a constitutionally permissible "temporary" assignment of "a few days." *See* R. Doc. 115, at 13 n.2 (quoting *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998) ("A filthy, overcrowded cell . . . might be tolerable for a few days and intolerably cruel for weeks or months.")).

Second, the opinion states that the Court "must . . . look to Defendants' motivations for placing detainees [in these solitary confinement lines]" and that "Plaintiffs' allegations establish that Defendants' motivation is to create a quarantined space for infected detainees." R. Doc. 115, at 13 n.2. This standard is incorrect. *See infra* Section III.C. But, in any event, the opinion improperly ignores and contradicts Plaintiffs' allegations detailed above, which raise the plausible inference that Defendants' motivation was to punish, abandon, or ignore those detainees who most needed medical attention and support during this pandemic.

C. Reconsideration of the Opinion is Warranted Based on the Improper Approach to these Factual Issues Alone

As established above, reconsideration is warranted where, as here, an opinion fails to properly review the sufficiency of Plaintiffs' pleading in the most favorable light. *See, e.g.*, *Arnold*, 979 F.3d at 268 ("it is inappropriate for a district court to weigh the strength of the allegations . . . instead, the district court must simply decide if the complaint plausibly alleges a claim for relief" (internal citations omitted)); *Masel v. Villarreal*, 924 F.3d 734, 752 (5th Cir. 2019) (reversing in part the district court's grant of a motion to dismiss for failure to state a claim of securities fraud because the plaintiffs adequately alleged a number of elements); *Doe*, 945 F.3d at 822-23 (reversing the district court's decision to dismiss a police officer's claim of negligence and stating that "[w]hen considering a motion to dismiss under Rule 12(b)(6), we will not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim that would

entitle him to relief").

II. THE COURT INCORRECTLY DISMISSED THE PRETRIAL PLAINTIFFS' CLAIMS BY IMPROPERLY IMPORTING A HEIGHTENED DELIBERATE INDIFFERENCE REQUIREMENT INTO THE GOVERNING FOURTEENTH AMENDMENT STANDARD.

Eight of the ten named plaintiffs and 89% of the putative class are held at the jail in pre-trial detention and thus bring suit under the Fourteenth Amendment. R. Doc. 4, ¶¶ 7-9, 37; *Cleveland v. Gautreaux*, 198 F. Supp. 3d 717, 733 (M.D. La. 2016) (deGravelles, J.) ("The constitutional rights of a pretrial detainee flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment." (citing *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999))).

In the Fifth Circuit, there are two distinct legal theories under which individuals who are in pre-trial detention may bring a Fourteenth Amendment Due Process claim: (1) the "conditions of confinement" theory, which challenges general policies or conditions such as access to medical care, food quality, or lack of safety, and (2) the "episodic act or omission" theory, where a plaintiff challenges a specific act or set of acts, usually by an individual actor within the facility. *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996). Under *Hare*, each theory requires independent consideration under different legal standards. Challenges to episodic acts or omissions are subject to a deliberate indifference standard, equivalent to the test articulated in *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), and discussed further in Section III, *infra*. In contrast, challenges to general conditions are subject only to a "reasonable relationship" test, as articulated in *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979), which asks whether the conditions "are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to" that purpose. *Id.* at 561.

Plaintiffs asserted their Fourteenth Amendment claim under both theories. Yet the Court's

summary discussion of Plaintiffs' Fourteenth Amendment claims addressed *only* Plaintiffs' secondary episodic-acts-or-omissions theory of liability; it failed entirely to address Plaintiffs' predominant theory: that the *conditions of confinement* at the jail, when objectively considered, bear no reasonable relationship to any legitimate, nonpunitive government interest and therefore violate Plaintiffs' Fourteenth Amendment rights.[7] Even more, the Court failed to properly analyze Plaintiffs' conditions-of-confinement theory by misquoting the seminal *Hare* case and improperly importing a heightened deliberate indifference standard that, as *Hare* and subsequent cases make clear, has no application to conditions claims. Because the Court applied the wrong legal standards in a manner that materially affected the outcome of the case, reconsideration is warranted on Plaintiffs' conditions-of-confinement claim. Plaintiffs do not seek reconsideration of the Court's decision on any episodic-acts-or-omissions theory.

A. The Court Erred When It Applied a Deliberate Indifference Standard to Pretrial Plaintiffs' Conditions-of-Confinement Claim

The Court misstated the Fourteenth Amendment standard for challenges to conditions of confinement when it concluded that the appropriate standard is "deliberate indifference or its 'functional equivalent.'" R. Doc 115, at 15. *Hare*, the case cited by the Court for that premise, makes clear that the deliberate indifference test applies *only* to distinct episodic-act-or-omission claims. *Hare* and subsequent Fifth Circuit precedent unequivocally state—and Supreme Court precedent demands—that the proper inquiry for pretrial conditions-of-confinement claims is *not* deliberate indifference; rather, the correct test asks whether there is a reasonable relationship between a challenged policy and a legitimate government interest in pretrial detention. *See Hare*,

[7] The vast majority of Plaintiffs' briefing to date on the Fourteenth Amendment claim focused on the conditions of confinement. While Plaintiffs argue that Defendants are also liable under an episodic-acts-or-omissions theory of liability, briefing clearly demonstrates that Plaintiffs' primary argument, and the bulk of the alleged facts and supporting arguments provided, focus on the conditions-of-confinement theory.

74 F.3d at 644; *see also Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979); *Estate of Bonilla v. Orange Cty.*, 982 F.3d 298, 308-09 (5th Cir. 2020); *Cadena v. El Paso Cty.*, 946 F.3d 717, 727 (5th Cir. 2020); *Sanchez v. Young Cty. (Sanchez II)*, 956 F.3d 785, 796 (5th Cir. 2020) (all articulating and affirming the proper standard of inquiry under Fourteenth Amendment conditions claims).

Although *Hare* notes that the two tests are "functionally equivalent," that statement—in the context of that case and clear Fifth Circuit and Supreme Court precedent—does not support the categorical conflation of the two tests. This aside was intended to assuage advocates that the court's newly articulated deliberate-indifference test for *episodic claims* should not create a higher bar for detainees to state a claim under that theory, not that established standards governing *conditions claims* would be in any way ratcheted up; the *Hare* court goes to great lengths to detail the distinct analyses required under each test, noting that a key difference between the tests is whether Defendants' intent must be established (which it confirms is required only for episodic-acts claims). *Hare*, 74 F.3d at 643-48; *see also Shepherd v. Dall. Cty.*, 591 F.3d 445, 455 (5th Cir. 2009) (limiting application of the deliberate-indifference standard to episodic-acts claims only and not to conditions claims).

Hare makes clear that the very prong on which the Court held Plaintiffs had failed—establishing Defendants' subjective deliberate indifference—is not an independent requirement in conditions claims. *See Sanchez I*, 866 F.3d at 279 ("The 'unconstitutional conditions' theory rests on the idea that the County has imposed what amounts to punishment in advance of trial on pretrial detainees, and it requires no showing of specific intent on the part of the County. The 'episodic acts and omissions' theory, in contrast, requires a finding that particular jailers acted or failed to act with deliberate indifference to the detainee's needs."); *Shepherd*, 591 F.3d at 452 (same).[8] This

[8] *See also Duvall v. Dall. Cty. Tex.*, 631 F.3d 203, 207 (5th Cir. 2011) ("We addressed this issue, *en banc*, in *Hare v. City of Corinth*, making clear that a plaintiff must show deliberate indifference on the part of the

Court's decision elides this critical distinction by citing a passage in *Hare* discussing why deliberate indifference is the appropriate test for pretrial detention *episodic* claims and using that misconstrued passage to assert the broader proposition that deliberate indifference is the standard for *all* Fourteenth Amendment claims. R. Doc. 115, at 15. Reading the cited passage in its full context within the *Hare* decision demonstrates that the Fifth Circuit came to the opposite conclusion than that reached by this Court: namely, that deliberate indifference is the appropriate standard for pre-trial detainees only when asserting episodic claims, not when the theory of liability is a conditions claim.

Having applied the wrong test to Plaintiffs' Fourteenth Amendment conditions claims, the Court failed to evaluate and weigh Plaintiffs' allegations properly. The complaint's voluminous allegations—which must be taken as true and weighted in Plaintiffs' favor, *see infra* Section I, plainly demonstrate the absence of a reasonable relationship between conditions that produce a risk of infection and death and the continued detention of pre-trial detainees; instead, this detention amounts to unconstitutional punishment, particularly where there are non-carceral alternatives to meeting the government interest in preventing pre-trial flight. *See Hare*, 74 F. 3d at 644 ("[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices" and violates the *Wolfish* standard); *Shepherd*, 591 F.3d at 454 ("A pervasive pattern of serious deficiencies" that subjects an individual in detention

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municipality only in a case in which the constitutional violation resulted from an episodic act or omission of a state actor. In cases like Duvall's, that are grounded in unconstitutional conditions of confinement, the plaintiff need only show that such a condition, which is alleged to be the cause of a constitutional violation, has no reasonable relationship to a legitimate governmental interest."); *Campos v. Webb Cty*., 597 F. App'x 787, 791 (5th Cir. 2015) ("This court made this distinction, in part, because when a jail implements a condition or policy, this 'manifests an avowed intent to subject a pretrial detainee to that rule or restriction.' But, '[w]ith episodic acts or omissions, intentionality is no longer a given,' and this accordingly requires a higher showing of subjective deliberate indifference, demonstrating that the 'official had the requisite mental state to establish his liability as a perpetrator.'" (quoting *Hare*, 74 F.3d at 644-45)).

to the risk of serious injury or death likewise amounts to impermissible punishment under *Wolfish*).

The opinion's conflation of the conditions and episodic-acts tests constitutes an error of law that requires reconsideration. The Fifth Circuit has regularly held that a claim can fail under one of these theories but succeed under the other and has remanded cases that fail to independently analyze each theory. For example, in *Sanchez I*, the Fifth Circuit affirmed the district court's dismissal of an episodic-acts claim but remanded for consideration of the plaintiffs' conditions-of-confinement claim, which the district court had not specifically addressed. 866 F.3d at 279. When the district court subsequently granted summary judgment to the defendants on the conditions-of-confinement claim, the circuit court reversed in part and remanded, holding that the plaintiffs had stated a claim under a conditions-of-confinement theory even though they had not under an episodic-acts-or-omissions theory. *Sanchez II*, 956 F.3d at 796; *see also Shepherd*, 591 F.3d at 453 n.2 (plaintiff stated a conditions-of-confinement claim but not an episodic-acts-or-omissions claim). Reconsideration is warranted to undertake evaluation of Plaintiffs' allegations under the distinct "reasonable relationship" test mandated for Fourteenth Amendment conditions claims.[9] Proper consideration of Plaintiffs' allegations under this test demonstrates that Plaintiffs have stated a plausible Fourteenth Amendment claim for relief.

III. THE COURT INCORRECTLY APPLIED *FARMER V. BRENNAN*'S "DELIBERATE INDIFFERENCE" STANDARD TO FIND THAT PLAINTIFFS HAD NOT ADEQUATELY PLED A VIABLE EIGHTH AMENDMENT CLAIM

The opinion also misinterpreted the standard governing Eighth Amendment claims

[9] Plaintiffs note that a number of individual plaintiffs have successfully pled conditions-of-confinement theories against the jail, raising nearly identical claims about the physical infirmities and unconstitutional health care system. *See generally Zavala v. City of Baton Rouge/Parish of E. Baton Rouge*, No. 17-656-JWD-EWD, 2018 WL 4517461 (M.D. La. Sept. 20, 2018) (deGravelles, J.); *Cleveland v. Gautreaux*, No. 15-744-JWD-RLB, 2018 WL 3966269 (M.D. La. Aug. 17, 2018) (deGravelles, J.); *Colbert v. City of Baton Rouge/Parish of East Baton Rouge, et al.*, No. 3:17-cv-00028-BAJ-EWD, R. Doc. 82 (M.D. La. Jan. 9, 2018) (Jackson, J.) (denying the Sheriff's motion to dismiss plaintiff's conditions-of-confinement claim); *Lewis ex rel. Johnson v. E. Baton Rouge Parish*, No. 16-352-JWD-RLB, 2017 WL 2346838 (M.D. La. May 30, 2017) (deGravelles, J.) ; *O'Quin v. Gautreaux*, No. 14-98-BAJ-SCR, 2015 WL 1478194 (M.D. La. Mar. 31, 2015) (Jackson, J.).

applicable to post-conviction Plaintiffs. Exacerbating the failure to consider all the complaint's allegations and construe inferences in Plaintiff's favor, the opinion improperly held that Defendants could evade constitutional scrutiny by taking *any* affirmative step to abate the risk of COVID-19 or by showing that they did not subjectively *intend* to deprive Plaintiffs of their constitutional rights. *Farmer v. Brennan*, 511 U.S. 825 (1994), however, requires more than nominal efforts and good intentions.

A. Defendants Cannot Avoid a Finding of Deliberate Indifference by Merely Showing That They Took *Some* Affirmative Step to Abate a Constitutional Violation

The Court held that post-trial Plaintiffs are unlikely to establish a violation of their Eighth Amendment rights because prison officials took "affirmative steps . . . to contain the virus"—without evaluating the adequacy of those steps consistent with the Plaintiff-friendly inferences required at the motion to dismiss stage. R. Doc. 115, at 13 (quoting *Valentine v. Collier*, 978 F.3d 154, 163 (5th Cir. 2020)). On its face, the standard this Court advances would mean that a Defendant would satisfy its constitutional obligation by merely lifting a finger to abate the risk of COVID-19. The proper inquiry is not whether *anything* was done, but whether *enough* was done. *See Farmer*, 511 U.S. at 847 (a defendant is deliberately indifferent when they fail to take "*reasonable measures* to abate" a known, substantial risk) (emphasis added); *Lawson v. Dallas Cty.*, 286 F.3d 257, 262 (5th Cir. 2002) (finding an Eighth Amendment violation where defendants took action to care for paraplegic plaintiff, but failed to act in line with hospital discharge orders).[10]

[10] In the Fourteenth Amendment episodic-acts-or-omissions context, the Fifth Circuit, applying a deliberate indifference standard, found a constitutional violation where the defendants could have controlled a viral outbreak "through tracking, isolation, and improved hygiene practices." *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 209 (5th Cir. 2011). Although the defendants in *Duvall* had taken *some* steps to control the outbreak, the inadequacy of their response compelled a finding that a constitutional violation had taken place. *See id*. at 208-09 (finding constitutional violation where defendants did not take recommended steps of installing hand washing stations or providing alcohol-based hand sanitizer to control viral outbreak). The Fifth Circuit has held that the deliberate indifference standard for Fourteenth Amendment episodic-acts-or-omissions claims is identical, at least in safety and medical care contexts, to the Eighth Amendment deliberate-indifference standard. *See Hare*, 74 F.3d at 649.

At the motion to dismiss stage, Plaintiffs were required to plead facts to plausibly support their claim that Defendants "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Not only does Plaintiffs' complaint expose the harrowing reality of life inside the jail, it compels the common-sense inference that Defendants knew of and disregarded this reality. As highlighted above and detailed in the complaint, Defendants are aware that (i) over one thousand detainees are forced to live and sleep in close proximity, often less than three feet apart; (ii) leaking roofs, moldy walls, bodily fluids, and rat infestations are prevalent throughout the facility; (iii) those with suspected or known COVID-19 infections—arguably some of the most vulnerable people in the jail—are confined in condemned lines that were reopened without proper cleaning; (iv) detainees do not receive even the most basic supplies for cleaning, or personal protective equipment necessary during the pandemic; and (v) universal temperature checks or testing are not being conducted. *See supra* Section I; *see also* R. Doc. 4, ¶ 5. Against this backdrop, it was not appropriate for the Court, at this stage, to conclude that "quarantining" detainees in a condemned section of the jail or temporarily conducting temperature checks (which have since been discontinued) "confirms" they were not deliberately indifferent. R. Doc. 115, at 12-13. *See Womble v. Harvanek*, 739 F. App'x 470, 473-74 (10th Cir. 2017) (plaintiff adequately alleged deliberate indifference through allegations that warden denied grievances personally despite being aware of the harm being caused to plaintiff from not acting on grievance); *Cantwell v. Sterling*, No. CV W-12-CA-082, 2013 WL 12177066, at *2-5 (W.D. Tex. Oct. 11, 2013) (plaintiff sufficiently pled claim of deliberate indifference by alleging prison officials were aware of his medical condition but failed to provide an inhaler when needed because discovery and further factual development was needed to determine if defendants "acted . . . in a proper fashion, in a negligent or gr[o]ss negligent fashion, or with deliberate indifference in violation of Plaintiff's

Eighth Amendment rights"); *Ravenell v. Republic Tobacco Co.*, No. CIV. A. W-94-CA-363, 1996 WL 33317575, at *2-3 (W.D. Tex. Apr. 4, 1996) (allegations that prison officials ignored a list of medical conditions plaintiff suffered from were sufficient to state an Eighth Amendment claim).

Plaintiffs have also pled, among other things, that the jail is over-crowded preventing social distancing, that Defendants are not providing an adequate supply of hygiene products (such as soap) to allow detainees to protect against COVID-19, and that Defendants are not treating COVID-19 symptoms on the general population line. *See* R. Doc. 4, ¶¶ 5, 86, 104-05, 115; see *also supra* Section I. Further, Plaintiffs have alleged that Defendants are well aware of the need to socially distance, but they flagrantly disregard the need for such practices by lining up detainees in close proximity to one another every day to receive prescription medication and participate in roll call. R. Doc. 4, ¶¶ 88, 102. Each of these allegations alone reflect Defendants' knowledge and disregard for inmate safety, their understanding of the steps needed to slow the spread of the virus, and their refusal to take common-sense actions to protect the detainees entrusted to their care. Construing the allegations properly at the motion to dismiss stage, the complaint sufficiently shows that Defendants were aware of the dangers of a life-threatening disease and chose to ignore recommended and common-sense techniques to prevent harm in contravention of the Eighth Amendment.[11]

B. The Court Improperly Applied Recent Fifth Circuit Case Law to Justify the Dismissal of Plaintiffs' Eighth Amendment Claims, and This Error Also Merits Reconsideration

The Court further relied on *Valentine v. Collier*, 978 F.3d 154, 163 (5th Cir. 2020), and

[11] To the extent the Court is relying on the fact that the risk of harm from COVID is not immediate or may not impact all members of the class, that reasoning is incorrect. The Supreme Court has found that where detainees are crowded into cells with "infectious maladies" and no ability to protect themselves from exposure, they are entitled to a remedy under the Eighth Amendment, "even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682, (1978)).

Marlowe v. Leblanc, 810 F. App'x 302, 305 (5th Cir. 2020), to find that Plaintiffs' Eighth Amendment claim failed because the allegations could not show that Defendants demonstrated subjective deliberate indifference. The Court's ruling, however, reflects a misapplication of these cases and the standards for evaluating Plaintiffs' allegations. *Valentine* was not decided on a motion to dismiss standard, but rather under a completely different standard used to determine whether to grant a stay of judgment. The latter requires a court to weigh the likelihood of success on the merits of a claim, among other factors. *Valentine*, 928 F.3d at 160; *see also Stockade Cos., LLC v. Kelly Rest. Grp., LLC*, No. A-17-CV-143 RP, 2018 WL 3018177, at *5 (W.D. Tex. June 15, 2018) ("[T]he standard . . . likelihood of success on the merits, is higher than the one [plaintiffs] must surpass to defeat defendants' motion to dismiss." (internal quotation omitted); *Satra Metallurgical, Inc. v. Delmar Int'l, S.A.*, No. CIV. A. 94-3282, 1994 WL 577433, at *2 (E.D. La. Oct. 18, 1994) ("The standard for granting a motion to dismiss is not the likelihood of success on the merits, but whether the plaintiff is entitled to offer evidence to support his claim.").

The Court's misapplication of *Valentine* ostensibly led it to conclude that Plaintiffs were unlikely to succeed on the merits of their claim due to the "affirmative steps" taken by the jail. Plaintiffs were not required to make this showing and instead were entitled to the Court's favorable reading of the complaint under a motion to dismiss standard, which requires only that they plead a *plausible* claim for deliberate indifference. *See, e.g., Graves v. Cain*, 734 F. App'x 914, 915 (5th Cir. 2018) (reversing district court's dismissal because it was possible plaintiff could "state a claim of deliberate indifference that was at least plausible on its face" because his allegations were not "fantastic or delusional" or the legal theories "indisputably meritless"). Plaintiffs have alleged that Defendants are aware of numerous unsafe conditions relating to COVID-19 and yet failed to do anything to correct those issues. *See, e.g.*, R. Doc 4, ¶¶ 2, 33, 76, 105, 108 (inadequate testing);

id. ¶¶ 43, 80, 141 (daily arrival of new people); *id.* ¶¶ 5, 82, 98-99, 109, 112-114 (unsanitary conditions); *id.* ¶¶ 5, 8, 86-90, 95, 110, 112 (lack of distancing/overcrowding). At the pleading stage, this is sufficient to survive a motion to dismiss.

The Court's application of *Marlowe* is similarly flawed. Like *Valentine*, *Marlowe* was decided on a motion to stay a temporary restraining order and thus rests on a standard that is inapposite to the present case. *Marlowe*, at bottom, is a case about the level of factual findings that would be required to issue a preliminary injunction in an Eighth Amendment case.[12] As an initial matter, with respect to the Eighth Amendment standard, the *Marlowe* court concluded that the plaintiffs there had not met their burden to prove the first prong of the deliberate-indifference analysis—that the plaintiffs faced an objectively substantial risk. *See Marlowe*, 810 F. App'x at 305. That is not the case here, where the Court correctly held that Plaintiffs *did* carry their burden to satisfy the objective prong of the deliberate indifference standard. R. Doc. 115, at 12.[13]

Accordingly, even if the Court is not persuaded that Plaintiffs can succeed on the ultimate merits of their claim, Plaintiffs have nevertheless met their burden at the motion to dismiss stage.

C. The Court Erred in Holding that the Subjective Intent of Defendants is Dispositive of the Deliberate Indifference Claim

The Court also erred in importing a malicious-intent requirement into the subjective element of the deliberate-indifference standard and thus holding that Defendants' good intentions in creating an isolation ward was dispositive of the deliberate indifference claim. R. Doc. 115, at 13 & n.2. Yet the Fifth Circuit has explicitly rejected articulations of subjective deliberate

[12] *Marlowe* is also inapposite because it involved an injunction that ordered the jail to follow its own policies, in violation of the holding in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that "a district court cannot enjoin a state facility to follow state law." *Marlowe*, 810 F. App'x at 304. Plaintiffs here do not seek an injunction that merely requires Defendants to follow their own policies.

[13] The *Marlowe* plaintiffs also conceded that "everyone here is trying their very, very best to make sure that nobody gets sick at [the facility]." *Marlowe*, 810 F. App'x at 305. Here, Plaintiffs plead the opposite and have raised the inference that Defendants did not do their best to ensure the safety of individuals detained at the facility.

indifference that require a showing of intent. In *Garza v. City of Donna*, the Fifth Circuit noted that such a standard would impermissibly heighten the subjective deliberate-indifference standard beyond what is contemplated in *Farmer v. Brennan* and Fifth Circuit caselaw. *See Garza v. City of Donna*, 922 F.3d 626, 634-36 (5th Cir. 2019).[14] *Garza* explained that the language in *Hare* and other decisions that alluded to "intent" was taken out of context by the district court in that case and clarified that subjective deliberate indifference does *not* require an inquiry into the intent of the individual, but only a showing that there was an objective risk of substantial injury or death and that Defendants were actually (*i.e.*, subjectively) aware of that risk. *Id.*; *see also Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) ("[Deliberate indifference] requires more than an allegation of mere negligence, but less than an allegation of purpose or knowledge."). To that end, "the obviousness of a risk may also serve as sufficient evidence to establish an official's subjective awareness." *E.A.F.F. v. Gonzalez*, 600 F. App'x 205, 211 (5th Cir. 2015) (citation omitted).[15] Again, Plaintiffs' voluminous allegations plausibly show that Defendants knew of the risk Plaintiffs faced from the lethal pandemic and that Defendants' measures were inadequate to abate the risk. This plausibly shows deliberate indifference under the Eighth Amendment.

IV. THE OPINION INCORRECTLY DISMISSED PLAINTIFFS' CLAIMS WITH PREJUDICE

Finally, the dismissal of Plaintiffs' claims with prejudice merits reconsideration. The Fifth

[14] Although *Garza* is a Fourteenth Amendment episodic-acts case, the test for subjective deliberate indifference for such claims in the Fifth Circuit is identical to the test under the Eighth Amendment. *Id.* at 634.

[15] The opinion granting the motions to dismiss relies, incorrectly, on *Burleson v. Texas Dep't of Criminal Justice*, 393 F.3d 577, 589 (5th Cir. 2004), for the proposition that "the Court must still look to Defendants' motivations" even if "[t]he risks posed by temporarily housing inmates in a condemned portion of the prison are objectively intolerable." R. Doc. 115, at 13 n.2. Yet *Burleson* never mentions the defendant's motives as a relevant factor in an Eighth Amendment inquiry—nor could it, given the law governing subjective deliberate indifference. *See Garza*, 922 F.3d at 634-36. *Burleson* simply reaffirms the standard that the defendant must have and the plaintiff must allege actual knowledge of a substantial risk. Relocating sick Plaintiffs to uninhabitable, condemned wings blatantly disregards standard safety measures and medical-care requirements, highlighting the plausibility of Plaintiffs' Eighth Amendment claims. *See, e.g.*, R. Doc. 110, at 26-27 (summarizing allegations in the complaint); R. Doc. 4, ¶ 71 (Warden Grimes admitting parts of EBRPP are in "deplorable condition").

Circuit has instructed that plaintiffs be afforded "at least one opportunity to cure pleading deficiencies before dismissing a case" and has emphasized that granting leave to amend is "especially appropriate" when the district court "has dismissed the complaint for failure to state a claim." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Dismissal with prejudice is permitted only in limited circumstances, such as where "it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal," *Great Plains Trust Co.*, 313 F.3d at 329, or where the plaintiff was "given ample opportunity to amend" but "chose not to do so," *Rodriguez v. United States*, 66 F.3d 95, 98 (5th Cir. 1995).

As the opinion itself acknowledged, Fifth Circuit precedent evinces a presumption "in favor of granting leave to amend." R. Doc. 115, at 16. To the extent the Court found 12(b)(6) pleading deficiencies in Plaintiffs' complaint, such defects were curable and merited an opportunity to amend.[16] Nowhere in their filings did Plaintiffs advise the Court that amendment was futile—indeed, they indicated that they were willing and able to amend in a manner that would avoid dismissal. *See* R. Doc. 99, at 9 (noting in their opposition to the motion to dismiss that in the exceptional case where a complaint is found deficient under Rule 12(b)(6), the proper remedy is to allow the plaintiff to amend the complaint to cure any deficiencies rather than dismissing the matter with prejudice). Accordingly, even in the event dismissal was merited, Plaintiffs were entitled to the opportunity to cure or supplement their pleadings. Reconsideration of this dismissal

[16] The sole reason offered by the opinion for dismissing Plaintiffs' claims with prejudice is that "amendment would be futile in light of Plaintiffs' allegations defeating their assertions of Defendants' subjective deliberate indifference." R. Doc. 115, at 16. But, as explained above, the Court's heightened standard of subjective deliberate indifference, as well as its application of this standard to the "reasonable relationships" test under the Fourteenth Amendment, were legally unsound and constitute independent bases for reconsideration.

with prejudice is therefore warranted.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant their Motion for Reconsideration, deny Defendants' motions to dismiss, and set this matter for a scheduling conference as soon as possible or, at a minimum, permit Plaintiffs leave to amend.

Respectfully submitted, this 4th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2021 a copy of the foregoing was filed electronically with the Clerk of the Court, using the CM/ECF system. Notice of this filing will be sent by operation of the court's electronic filing system and/or via U.S. Postal Service to counsel of record.

/s/ *David J. Utter*
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