COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Suffolk Superior Court
Trial Court Department

JULIAN GREEN and EUGENE IVEY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION, and CAROL MICI, Commissioner of the Massachusetts Department of Correction, in her official capacity,

Defendants.

Docket No:

HEARING REQUESTED

10/5/2021

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs Julian Green and Eugene Ivey respectfully submit this memorandum in support of their motion for a preliminary injunction against Defendants Carol Mici in her official capacity and the Massachusetts Department of Correction (together, the "DOC").

INTRODUCTION

Plaintiffs seek a preliminary injunction to stop the DOC from using a highly inaccurate field drug test (the Sirchie NARK 20023) to inflict unwarranted punishment on people in custody. The field test has an error rate that grossly exceeds the DOC's requirement of less than 0.05%—based on the DOC's own records, the NARK 20023 has generated at least 122 false positive results in a period of less than two years. Despite its egregious rate of false positives, the DOC insists on using the NARK 20023 on incoming legal mail. If the test returns a "positive" result, the DOC imposes immediate, severe penalties. It then gives the recipient the choice of either admitting to a crime they did not commit for a reduced penalty or losing all their privileges and waiting in solitary confinement until such time as the DOC does a proper laboratory test, which can take months. Knowledge of this practice has spread throughout the DOC and incarcerated people are refusing to accept legal mail for fear of being falsely accused and punished.

Inflicting punishment based on this flawed test serves no purpose. The DOC retains control over the mail and the recipient during the time it takes to do an accurate test, eliminating any danger that contraband could get through or a wrongdoer could evade liability. The DOC's practice violates the due process rights and rights to counsel of the people it punishes and chills communications between all incarcerated people and their attorneys. It is inflicting immediate and irreparable injuries not only to people incarcerated at DOC facilities, but to the very integrity of the criminal justice system itself.

The standard for a preliminary injunction is easily satisfied.

First, Plaintiffs are overwhelmingly likely to prevail on the merits. The DOC's own policy prohibits purchasing tests that have an error rate over .05%. The field test at issue generates false positives at a staggeringly higher rate. Further, although NARK 20023 is ostensibly being used to detect synthetic cannabinoids (marijuana), it cannot detect the vast majority of the varieties of synthetic cannabinoids currently in circulation and is therefore useless for its stated purpose. Finally, DOC's entire punishment scheme targets *recipients* of mail without any evidence that the addressee solicited or had any knowledge of the mail's contents, a blatant violation of due process.

Absent relief from the Court, Plaintiffs and other incarcerated people will suffer irreparable injury. As a result of the DOC's arbitrary field test—used only on legal mail—Plaintiffs (and other similarly situated individuals) are chilled from obtaining advice of counsel. The DOC's practice of punishing innocent people based on false test results is so widely known that incarcerated people are refusing to accept mail from their lawyers. Further, the punishments DOC is meting out based on its inaccurate test, alone, create irreparable harm. At least 122 people have spent weeks, if not months, in solitary confinement—a form of punishment that has been recognized as a form of torture by the United Nations—based on "positive" tests that DOC now admits were incorrect.[1] In solitary confinement people also are deprived of visits from family, are forced to interrupt their education, and lose their prison job—irreparable losses that frustrate rehabilitation.

[1] UN News, *Solitary confinement should be banned in most cases, UN expert says*, https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says (Oct. 18, 2011).

The balance of the equities tilts strongly in Plaintiffs' favor. In contrast to the irreparable injuries Plaintiffs face, the DOC will not suffer any harm by delaying punishment until a reliable test has been done. The DOC can still punish people who are actually involved in drug trafficking after doing a proper laboratory test and investigation. Mail recipients are already incarcerated and will not be able to avoid liability if they are, in fact, trafficking in contraband.

A preliminary injunction is also in the public interest. Arbitrary punishment is antithetical to the founding principles of our democracy and the basic purposes of incarceration. The right to counsel forms the backbone of our legal system, and any public action that violates that right is contrary to public policy both of Massachusetts and of the United States.

For all these reasons, the Court should issue a preliminary injunction prohibiting the DOC from imposing any punishment based on the results of the NARK 20023 field test.

FACTS

A. The Parties

Plaintiff Julian Green is a citizen of the Commonwealth of Massachusetts. He is currently incarcerated at MCI-Norfolk. (Leonida Decl. ¶ 5.) Mr. Green has been incarcerated for fourteen years. (*Id.* ¶ 5(a).) While in custody, Mr. Green has taken every opportunity to advance his education, even taking college classes at Boston University. (*Id.* ¶ 5(b).) He also runs a program called the Young Men's Committee, which plans events and brings outside speakers into the prison. (*Id.*).

Plaintiff Eugene Ivey is a citizen of the Commonwealth of Massachusetts. He was incarcerated at the DOC's Northeastern Correctional Center in Concord until August 19, 2021, when he was released on parole. (Ivey Decl. ¶¶ 4-5.) During the 26 years Mr. Ivey was incarcerated, he made every effort to rehabilitate himself by participating in extensive

programming, including taking courses in the Tufts University Prison Initiative of Tisch College. (*Id.* ¶ 6.)

Defendant Massachusetts Department of Correction is an agency of the Commonwealth of Massachusetts responsible for overseeing the Massachusetts prison system. The DOC manages 16 institutions and oversees approximately 8,000 incarcerated people throughout the Commonwealth. The DOC has a place of business in Suffolk County.

Defendant Carol Mici is the Commissioner of the Massachusetts Department of Correction. By statute, Defendant Mici is responsible for the administration of all state correctional facilities in Massachusetts. *See* Mass. Gen. Laws ch. 124, § 1. Defendant Mici's responsibilities include overseeing the operations and personnel of the DOC statewide, including DOC facilities and personnel in Suffolk County. Plaintiffs sue Defendant Mici in her official capacity.

B. DOC's Use of the Nark 20023 Drug Test

Since at least 2018, the DOC has used NARK 20023 field tests manufactured by Sirchie Acquisition Co. LLC ("Sirchie") on mail sent by attorneys and other legal professionals to their incarcerated clients at facilities throughout the Commonwealth. When those tests return "positive" results, the DOC imposes immediate punitive measures against incarcerated people and keeps those measures in place while an outside laboratory conducts additional tests, which often takes months. (Jacobstein Decl. ¶¶ 10-13; Leonida Decl. ¶ 5(c)-(i).)

As further detailed below, the NARK 20023 field tests return levels of false positives *and* false negatives that far exceed the maximum error rate the DOC purports to accept. (*See* Schlabs Decl., Ex. A ("False positives shall not exceed .05%.").) In addition, applicable industry

standards require that any "positive" field test result be confirmed by laboratory testing before the result can be relied upon.

C. The NARK 20023 Field Tests Return Extremely High Rates of False Positives

The NARK 20023 field tests return false positive results at extremely high rates. In response to a Public Records Act request, the DOC has produced a record of tests that were presumptively positive but were revealed to be false positives when subjected to proper laboratory testing. (Jacobstein Decl. ¶¶ 20-23, Exs. A-B (data provided in response to public records request); Schlabs Decl. Exs. D-E (document provided in response to public records request listing false positives.) Between July 2019 and March 2021, at least 122 items that had tested positive with NARK 20023 were revealed to be negative for the presence of contraband. (*Id*.) In January of 2020 alone, NARK 20023 field tests produced 17 false positives. (*Id*.)

The NARK 20023's high rate of false positives is a result of a number of factors. First, "synthetic cannabinoids" is a catch-all category that refers to a diverse array of hundreds chemical compounds. (Harris Decl. ¶ 16.) Because there are so many varieties of compounds under this umbrella, many synthetic cannabinoids have little or nothing in common with one another and cannot be detected by any single test. Moreover, the type of test Sirchie sold to the DOC is designed to react with a variety of structurally similar chemical compounds, many of which are found in innocuous products—such as commercial paper and ink. (Harris Decl. ¶ 12.) Sirchie has recognized as much: in a 2012 publication, Sirchie acknowledged that the unique features of synthetic cannabinoids "make[] it almost impossible" to develop a "field test that will not have too many unacceptable false positives." (Schlabs Decl. Ex. B.)

The faulty nature of the NARK 20023 field tests has been well documented. In 2019, for instance, visitors to Rikers Island jail sued New York City, alleging that they had been

improperly accused of bringing synthetic cannabinoids into the facility based solely on Sirchie's tests.[2] Over the course of discovery in that case, New York City disclosed that out of the twenty cases between 2017 and 2020 in which visitors were accused of bringing liquid synthetic cannabinoids into the jail, sixteen cases—80% of the total—were subsequently dismissed. (*See* Schlabs Decl. Ex. F (*Camacho v. City of New York*, 1:19-cv-11096 (Dkt. No. 113) (S.D.N.Y., July 16, 2020)).) The case settled in December 2020—but in August 2020, while it was still pending, New York state prisons suspended their use of Sirchie's NARK II tests (including the NARK 20023), adjourned all disciplinary hearings based on the results of those tests, and terminated all disciplinary confinements imposed as a result of NARK II tests.[3] The Massachusetts DOC is aware that New York decided to stop using Sirchie's tests due to their unreliability. In October 2020, Sergeant Jennifer Turgeon, a DOC employee, asked a representative of Defendant Premier Biotech about the "reliability" and "integrity" of Sirchie's tests in light of the "issues" in New York. (Schlabs Decl. Ex. C.)

D. NARK 20023 Field Tests Cannot Reliably Detect Most Synthetic Cannabinoids

Equally troubling, however, is the fact that NARK 20023 field tests return high rates of false *negatives*—and are therefore unable to reliably detect synthetic cannabinoids. This is a result both of the unique features of synthetic cannabinoids and the tests' faulty design. There are hundreds of different types of synthetic cannabinoids in circulation, and the most popular formulations change and evolve as drug producers attempt to stay ahead of law enforcement. (Harris Decl. ¶¶ 16-19.) As a result, the NARK 20023 field tests the DOC is using today are

[2] *Camacho v. City of New York*, 1:19-cv-11096 (S.D.N.Y.)
[3] *See* Gothamist, *NY State Prisons Abruptly Suspend Drug Tests For Contraband*, https://gothamist.com/news/ny-state-prisons-abruptly-suspend-drug-tests-contraband (Aug. 26, 2020)

incapable of detecting the synthetic cannabinoids most commonly found in circulation over the last five years. (Harris Decl. ¶¶ 19-23; *see also* Schlabs Decl. Ex. G (National Forensic Laboratory Information System reports describing most common synthetic cannabinoids from 2016 to 2020, which show decreasing prevalence of formulations detected by NARK 20023, such that by 2019 and 2020, none of the targeted formulations was included in list of fifteen most common synthetic cannabinoid formulations).)

In other words, even assuming (a) that there are Massachusetts defense attorneys who are attempting to send synthetic cannabinoids into prisons through legal mail[4] and (b) that NARK 20023 field tests can accurately detect the eight types of synthetic cannabinoids they purport to detect, the tests are *still* ineffective in preventing an (assumed) influx of synthetic cannabinoids in the mail.

E. Even If NARK 20023 Field Tests Worked as Advertised, They Must Be "Confirmed" By Laboratory Testing

Finally, even if NARK 20023 field tests could reliably detect synthetic cannabinoids in legal mail, the DOC's practice of imposing immediate punishment on the basis of a "positive" test violates all applicable standards, which require subsequent confirmatory laboratory testing.

By their very nature—and as recognized by the United Nations standards—field tests like the NARK 20023 can detect only broad categories of chemical compounds and are unable to identify any specific chemical.[5] As such, all applicable standards require proper laboratory

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[4] *See Breest v. Dubois*, No. CIV.A. 94-4665H, 1997 WL 449898, at *5 (Mass. Super. July 28, 1997) ("It would seem unlikely that inmates would attempt to plan criminal conspiracies with such pre-approved, licensed professionals, who co[u]ld be subject to loss of license and other discipline.").

[5] United Nationals International Drug Control Programme, *Rapid Testing Methods of Drugs of Abuse: Manual for Use by National Law Enforcement and Narcotics Laboratory Personnel*, https://www.unodc.org/pdf/publications/st-nar-13-rev1.pdf (1994).

testing of any "positive" results and warn against taking any actions whatsoever in reliance solely on an initial result from a "colorimetric" test like the NARK 20023. For instance, the Scientific Working Group for the Analysis of Seized Drugs (the "Working Group")—whose recommendations are widely adopted by forensic drug labs—classify colorimetric field tests in the lowest level of selectivity, and do not endorse reliance on these tests as an appropriate means of identifying controlled substances.[6]

The National Institute of Justice ("NIJ") similarly requires that colorimetric test results must always be confirmed by laboratory testing.[7] The NIJ specifically directs manufacturers like Sirchie to communicate this requirement to users by including "[a] statement that the kit is intended to be used for presumptive identification purposes only, and that all substances tested should be subjected to more definitive examination by qualified scientists in a properly equipped crime laboratory."[8]

In short, even if NARK 20023 field tests worked as advertised, the DOC's practice of punishing incarcerated people based solely on an initial "positive" test without performing testing in a laboratory violates the applicable standards.

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[6]Scientific Working Group for the Analysis of Seized Drug (SWGDRUG) Recommendations, https://swgdrug.org/Documents/SWGDRUG%20Recommendations%20Version%208_FINAL_ForPosting_092919.pdf (June 13, 2019).

[7] National Institute of Justice, *Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse, NIJ Standard-0604.01*, https://nij.ojp.gov/library/publications/color-test-reagentskits-preliminary-identification-drugs-abuse-nij-standard (June 2000).

[8] *Id*. § 4.1.4(a).

F. DOC Relies Solely on NARK 20023 Field Tests to Punish Incarcerated People

Despite the failings of the NARK 20023 field test, the DOC continues to use these tests on incoming legal mail—and to impose immediate punitive measures against incarcerated people whose mail tests "positive" for months before conducting actual laboratory testing.

When the DOC receives legal mail addressed to an incarcerated person, an Inner Perimeter Security Officer or other DOC employee ("Corrections Officer" or "CO") brings the mail to the individual to whom it was addressed. (Leonida Decl. ¶ 5(d); Ivey Decl. ¶¶ 7-8.) Before the DOC permits the incarcerated person to receive the mail, it requires them to confirm, in writing, that they are accepting the mail. The incarcerated person must make this decision before he is allowed to see contents of the mail or to otherwise confirm the mail's legitimacy. (Leonida Decl. ¶ 5(d); Ivey Decl. ¶¶ 7-8.) The CO will then open the mail and, if he or she determines that the mail is "suspicious," the CO will remove the mail and perform a NARK 20023 field test on it. (Leonida Decl. ¶ 5(d); Ivey Decl. ¶¶ 7-9.)

If the NARK 20023 field test returns a "positive" result—as it often does, in light of the extremely high rate of false positives—the DOC takes immediate punitive measures against the person to whom the mail was addressed. (Leonida Decl. ¶¶ 5(e)-(h); Ivey Decl. ¶¶ 9-12; Jacobstein Decl. ¶¶ 10-13.) These punitive measures include, among other things, the immediate placement of the incarcerated person into solitary confinement, severe curtailment of the person's eligibility for parole or transfer, limitations on their ability to communicate with attorneys and family members, and termination of their ability to hold a job or participate in educational and other programming. (Leonida Decl. ¶¶ 5(e)-(h); Ivey Decl. ¶¶ 9-12; Jacobstein Decl. ¶ 10.)

By continuing to punish incarcerated people in reliance on the faulty drug tests, the DOC causes irreparable injury to members of the Class. People whose legal mail tests "positive" are subject to draconian punishments based solely on a faulty drug test. The DOC imposes such punishments immediately, even before it sends the legal mail out for laboratory testing—and certainly before it receives any results from such laboratory testing. And because laboratory testing takes weeks or months, incarcerated people remain subject to ongoing punitive measures while they wait for those results

But the irreparable injuries flowing from the DOC's conduct are much broader than the harms suffered by the individuals who are directly punished as a result of a "positive" NARK 20023 field test. Incarcerated people throughout the Commonwealth have learned of (or witnessed) the DOC's practices and are now scared that they might be subject to unjustified punishment if they accept incoming legal mail. As a result, many incarcerated people are either refusing to sign for incoming mail or are directing their counsel not to send any mail into DOC facilities. (Leonida Decl. ¶ 6; Ivey Decl. ¶¶ 14-15; Jacobstein Decl. ¶ 10.) The DOC's practices therefore deprive incarcerated people of the opportunity to receive and review copies of materials relevant to their cases and make it difficult or impossible for them to meaningfully participate in their own defense. This harm is especially acute in the context of the COVID-19 pandemic, when in-person prison visits are much riskier and more difficult.

Finally, the DOC's practice of opening legal mail and inspecting or copying it out of sight of the recipient imposes separate harms by intruding into privileged attorney-client communications. (Ivey Decl. ¶¶ 14-15; Leonida Decl. ¶¶ 5(j), 6; Jacobstein Decl. ¶¶ 13-19.) Even the perception that the DOC may have an opportunity to read and substantively review

incoming legal mail chills the willingness of both attorneys and clients to communicate and makes it impossible for incarcerated people to receive the benefit of legal representation.

ARGUMENT

Courts grant preliminary injunctions if the plaintiff shows "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction." *Loyal Order of Moose, Inc. v. Board of Health of Yarmouth,* 439 Mass. 597, 601 (2003) (quotations, citation, and alterations omitted); *see also Packing Indus. Group, Inc.* v. *Cheney,* 380 Mass. 609, 616-17 (1980). Where, as here, a requested order would enjoin governmental action, the court must further "determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Loyal Order of Moose*, 439 Mass. at 601 (2003) (quoting *Com. v. Mass. CRINC*, 392 Mass. 79, 89 (1984)); *see also Doe v. Worcester Pub. Sch.*, 484 Mass. 598, 604 n.12 (2020) (affirming grant of preliminary injunction against government).

I. PLAINTIFFS' CLAIMS ARE LIKELY TO SUCCEED

Plaintiffs advance two claims under the Massachusetts Civil Rights Act ("MCRA") against the DOC: one is based on the DOC's deprivation of their due process rights and the other is based on the resulting interference with incarcerated peoples' right to counsel. (Compl. ¶¶ 108-121; 133-135.) As relief for each claim, Plaintiffs seek to enjoin the DOC from using the results of the NARK 20023 field test to impose punishment on anyone in DOC custody, at least until such time as a confirmatory laboratory test has been performed. For the reasons below, Plaintiffs are overwhelmingly likely to succeed on the merits of each of these claims.

A. The DOC's Imposition of Punishment in Reliance on NARK 20023 Field Tests Violates the Massachusetts and United States Constitutions

The MCRA authorizes any person to bring a civil action seeking an order enjoining conduct that interferes with the exercise or enjoyment of rights secured by the United States Constitution, the Massachusetts constitution, or other laws. *See* Mass. Gen. Laws ch. 12, § 11I. Actionable "interference" under the MCRA occurs when a person "interfere[s] by threats, intimidation or coercion, or attempt[s] to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the U.S. or the commonwealth." *Id.*, § 11H(a)(1). To establish an MCRA violation, a plaintiff need only show that "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Larocque v. Turco*, No. SUCV202000295, 2020 WL 2198032, at *13 (Mass. Super. Feb. 28, 2020).

For the reasons set out below, Plaintiffs have demonstrated a likelihood of success on their separate claims for violation of the constitutional rights to counsel and due process.

1. The DOC Has Violated Plaintiffs' Due Process Rights

To comply with due process requirements, the DOC's drug tests must be "sufficiently reliable to avoid any significant risk of an erroneous deprivation of liberty." *Querubin v. Com.*, 440 Mass. 108, 118 (2003). In other words, due process "requires that the government act in a fair manner when there is a deprivation of a constitutionally protected liberty or property interest." *Doe v. Att'y Gen.*, 426 Mass. 136, 140 (1997). Because the NARK 20023 is unreliable, the DOC's reliance on it to deprive Plaintiffs of their liberty is simply not fair, and the DOC's practices therefore violate Plaintiffs' due process rights.

(a) Plaintiffs Have a Right to Due Process of Law

The Massachusetts Constitution establishes a right to due process that is co-extensive with the rights established by the United States Constitution, and courts have "consistently equated as comparable, both generally and in the prison environment, the due process protections of the two fundamental documents." *Hudson v. Comm'r of Correction*, 46 Mass. App. Ct. 538, 543 (1999), *aff'd* 431 Mass. 1 (2000) (collecting cases). Massachusetts courts recognize that there "is no iron curtain drawn between the Constitution and the prisons of this country" and that incarcerated people may therefore "not be deprived of life, liberty, or property without due process of law." *O'Malley v. Sheriff of Worcester Cty.*, 415 Mass. 132, 135 (Mass. 1993) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)). Massachusetts courts have further held that "the procedural protections of due process apply . . . [where] there is an existing liberty or property interest at stake." *O'Malley*, 415 Mass. at 135 (citing *Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972)).

Incarcerated people have cognizable liberty interests in, among other things, "freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Torres v. Comm'r of Correction*, 427 Mass. 611, 617 (Mass. 1998) (quoting *Sandin v. Conner*, 515 U.S. 472, 486 (1995)). In other words, incarcerated people have cognizable liberty interests in avoiding punishment and restraints that are more severe than ordinarily imposed on other incarcerated people.

The "State may also create a protected liberty interest by placing 'substantive limitations on official discretion.'" *O'Malley*, 415 Mass. at 137 (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). For instance, "regulations containing 'explicitly mandatory language in connection with requiring specific substantive predicates' can create protected liberty interests"—and the

DOC cannot deprive incarcerated people of those liberty interests without due process. *Id.* (quoting *Lamoureux v. Superintendent, Mass. Correctional Inst., Walpole*, 390 Mass. 409, 417 (Mass. 1983)).

In short, Plaintiffs possess protected liberty interests in avoiding punishment and confinement that imposes an "atypical and significant hardship" when compared to ordinary life in a carceral context. And as set out below, Massachusetts regulations have created separate cognizable liberty interests in avoiding a disciplinary ticket or placement in Restrictive Housing. The DOC therefore cannot deprive members of the Class of such interests without due process.

(b) The DOC Has Interfered with the Right to Due Process

The DOC is nevertheless depriving members of the Class of their liberty interests by imposing severe punishment based solely on "positive" results from NARK 20023 field tests. These practices violate Plaintiffs' due process rights in at least three ways.

First, setting aside the faulty nature of the NARK 20023 field tests, the DOC's practice of punishing incarcerated people based on mail that is addressed to them, without providing any meaningful opportunity to confirm the legitimacy of the mail, violates any potential articulation of the right to due process. It is well established that the goal of the due process requirement is to prevent "unfair or mistaken deprivations," *Carey v. Piphus*, 435 U.S. 247, 260 (1978), so as to defend against "arbitrary encroachment" of protected interests, *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Incarcerated people have no control over who sends them mail, and the imposition of punishment without any evidence that the addressee had any responsibility for its contents (or even knew that it was being sent) is the definition of an "unfair" and "arbitrary" deprivation—and therefore violates due process. Indeed, the Massachusetts Court of Appeals has thrown out disciplinary sanctions based on nothing more than the receipt of contraband mail, where there

was no evidence that the recipient actually knew about or encouraged the appearance of said contraband. *See Alves v. Superintendent*, 54 Mass. App. Ct. 1110 (2002); *see also Jordan v. Superintendent, Massachusetts Corr. Inst., Cedar Junction*, 53 Mass. App. Ct. 584, 589 (2002) (overturning disciplinary sanctions based on the plaintiff's mere possession of contraband hidden in a newspaper, based on the lack of evidence of the plaintiff's knowledge).

Second, the imposition of punishment based solely on a "positive" NARK 20023 field test separately violates the right to due process. The NARK 20023 field test returns false positives at extremely high rates—the DOC is aware of at least 122 occasions in the past two years where the test returned a false positive result. Moreover, standards promulgated by the United Nations, the NIJ, and the Working Group all require proper laboratory testing to confirm any presumptive test. In this context, with a test as grossly inaccurate as the NARK 20023, it is improper and unfair for the DOC to impose *any* deprivation based on a "positive" test result. Here, the violation of due process is especially stark: incarcerated people, including Plaintiffs Green and Ivey have been placed in solitary confinement and deprived of educational opportunities, vocational training, and family visits based on erroneous NARK 20023 field test results. (Leonida Decl. ¶¶ 5(f)-(h); Ivey Decl. ¶¶ 10-12). This illegal deprivation far outweighs any government interest in maintaining the current testing and punishment scheme, especially in light of the fact that the DOC retains the ability to punish people who are actually involved in drug trafficking after doing a proper laboratory drug test and investigation. *See Querubin*, 440 Mass. at 117 ("In determining what process is due . . . this court 'must balance the interests of the individual affected, the risk of erroneous deprivation of those interests and the government's interest in the efficient and economic administration of its affairs.'"); *Doe*, 426 Mass. at 136 ("The due process test requires a balancing of the individual interest at stake and the risk of an

erroneous deprivation of liberty or property under the procedures that the State seeks to use against the governmental interest in achieving its goals.").

And third, because the DOC has violated its own mandatory regulations, it has deprived Plaintiffs of liberty interests *it* created. That deprivation constitutes a separate due process violation. *See O'Malley*, 415 Mass. at 137; *Lamoureux*, 390 Mass. at 417. The DOC may only issue disciplinary tickets when it "has reason to believe a disciplinary offense has been committed"—and for the reasons set out above, a positive NARK 20023 field test cannot form a reasonable basis for such belief. 103 DOC 525.08(C)(2). Similarly, the DOC may only confine "an inmate in Restrictive Housing [*i.e.*, solitary confinement] upon a finding by the Superintendent that "(a) the inmate poses an unacceptable risk to the safety of others, of damage or destruction [of] property, or to the operation of a correctional facility; (b) the inmate requires protection from harm by others; and/or (c) the inmate is serving a disciplinary detention sanction." 103 CMR 423.06.

None of those situations exists for people held in solitary confinement based only on a positive NARK 20023 field test. A "positive" NARK 20023 result presents no evidence whatsoever that a person presents any "risk to the safety of others, of damage or destruction [of] property, or to the operation of a correctional facility." Nor does a positive NARK 20023 field test demonstrate that the person requires protection from harm by others. Finally, forcing people into solitary confinement before they have even been formally accused of a disciplinary violation, much less been through a hearing and had a disciplinary sanction imposed, cannot itself constitute a "disciplinary detention sanction" justifying that same confinement under CMR 423.06.

For these reasons, among others, the DOC's imposition of punishment in reliance on NARK 20023 field tests has violated the due process rights of members of the Class.

(c) DOC Has Accomplished Such Interference Through "Threats, Intimidation, or Coercion"

Finally, the DOC has accomplished this interference through threats, intimidation, and coercion. Under the MCRA a "'threat' consists of 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'; 'intimidation' involves 'putting in fear for the purpose of compelling or deterring conduct'; and 'coercion' is 'the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Glovsky v. Roche Bros. Supermarkets, Inc*., 469 Mass. 752, 763 (2014) (quoting *Haufler v. Zotos*, 446 Mass. 489, 505 (2006)).

The DOC has interfered with incarcerated peoples' due process rights by threatening to impose severe disciplinary measures immediately upon the return of a "positive" drug test that is more likely to be wrong than right. Because the NARK 20023 field tests return false positive results at extremely high rates, incarcerated people know they might be punished for receiving *any* legal mail. (*See* Leonida Decl., ¶ 6; Ivey Decl. ¶¶ 14-15; Jacobstein Decl., ¶ 10.) Moreover, the DOC attempts to intimidate and coerce incarcerated people to plead guilty to disciplinary charges premised on the faulty drug tests by threatening that, unless they plead out, incarcerated people will remain subject to ongoing punishment while formal laboratory testing is being performed—which could take weeks or months. (*Id.*) And in an attempt to dissuade incarcerated people from even seeking laboratory testing, the DOC *also* threatens that they will be forced to bear the cost of such testing if the test comes back positive. (*Id.*)

Because the DOC deprives Plaintiffs and the Class of their right to due process by way of threats, intimidation, and coercion, Plaintiffs have demonstrated a likelihood of success on the merits of their MCRA claim for deprivation of the right to due process.

2. The DOC Has Violated Plaintiffs' Right to Counsel

The DOC is also interfering with incarcerated people's right to counsel by, among other things, using NARK 20023 field tests on legal mail and imposing immediate punitive measures based on "positive" test results.

(a) Plaintiffs Have a Right to Counsel

Incarcerated people and those accused of criminal offenses have the right to counsel and to access the courts. This right is secured by the Sixth and Fourteenth Amendments to the United State Constitution. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996) (recognizing the constitutional rights of incarcerated people to "meaningful access to the courts") (quoting *Bounds v. Smith*, 430 U.S. 817, 823 (1977) (same). This right is separately secured by Article 12 of the Massachusetts Declaration of Rights, which provides that "every subject shall have a right . . . to be fully heard in his defense by himself, or his council at his election."

Massachusetts has long recognized that the "'essential element of fairness in the administration of justice depends' on the right to counsel." *Com. v. Murphy*, 448 Mass. 452, 465 (2007) (quoting *Guerin v. Com.*, 339 Mass. 731, 734 (1959)). As such, Massachusetts courts have held that the "constitutional right of access to the courts requires correctional officials" to "provide access that is adequate, effective, and meaningful when viewed as a whole." *See, e.g., Cacicio v. Secretary of Public Safety*, 422 Mass. 764, 773 (1996). Massachusetts courts have further interpreted the Declaration of Rights "so as to provide broader protection to criminal defendants than is available under corresponding provisions in the United States Constitution."

Com. v. Aponte, 391 Mass. 494, 506 (1984); *see also Attorney Gen. v. Colleton*, 387 Mass. 790, 795-96 (1982).

Massachusetts courts routinely hold that the right to counsel encompasses the ability to communicate with counsel. As a result, "practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Com. v. Bloom*, No. CRIM. 102871, 1997 WL 625474, at *2 (Mass. Super. Sept. 17, 1997), *aff'd*, 426 Mass. 1006 (1997) (quoting *Procunier v. Martinez*, 416 U.S. 410, 419 (1974)). Federal courts have reached similar conclusions. *See, e.g., Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) ("[T]he right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement.").

Plaintiffs and incarcerated people throughout the Commonwealth have a right to counsel and to the courts—as well as the right to reliable and confidential communication with their counsel.

(b) DOC Has Interfered with the Right to Counsel

The DOC has presented incarcerated people with an unconstitutional and untenable dilemma: they can either accept incoming legal mail and the attendant risk that the mail will return a "positive" result subjecting them to immediate punishment, or they can reject legal mail and forego the ability to communicate with counsel or participate in their own legal defenses or appeals. The DOC has relied on the faulty drug tests since at least 2018, and incarcerated people in DOC facilities are now aware that they could be punished just for receiving legal mail. Incarcerated people across the Commonwealth have recognized this risk and have begun refusing legal mail or instructing their attorneys to stop sending them legal documents altogether. (Jacobstein Decl. ¶¶ 10, 18.) Other incarcerated people have asked their counsel only to hand-

deliver legal documents, resulting in significant delays and the imposition of undue burdens and expenses on counsel, who must now travel across the state to deliver documents they should have been able to send by mail. (Jacobstein Decl. ¶¶ 13-19.)

The DOC's continued practice of imposing harsh punishments in reliance on a meaningless drug test has erected a significant barrier to effective attorney-client communications. That practice therefore constitutes interference with incarcerated peoples' constitutional rights for the purposes of the MCRA's second element.

(2) The DOC Has Accomplished Such Interference Through "Threats, Intimidation, or Coercion"

The DOC has deprived members of the Class of their ability to communicate with their attorneys by threatening, intimidating, and coercing them. As set out above, the DOC attempts to coerce incarcerated people into admitting offenses based on the faulty NARK 20023 field test and waiving their right to a laboratory drug test. (*See* Leonida Decl. ¶ 5(g); Ivey Decl. ¶¶ 10-11.) Among other things, the DOC threatens incarcerated people with the possibility that they will be forced to bear the cost of any laboratory testing—thereby incentivizing them to admit to something they are not guilty of in order to avoid that risk. (*Id.*) The DOC also coerces false admissions by continuing to impose draconian punishments while incarcerated people wait weeks or months for the results of laboratory drug tests. (*Id.*; *see also* Jacobstein Decl. ¶¶ 10-13.) During all of this, the DOC refuses to provide incarcerated people with the legal mail in question—instead keeping that mail in "evidence" and creating the opportunity for COs to improperly review the substance of those privileged communications in violation of the DOC's own regulations concerning the treatment of legal mail. *See* 103 CMR 481.10.

B. Plaintiffs Are Entitled to Declaratory Relief

Plaintiffs have separately demonstrated a likelihood of success on the merits of their claim under the Massachusetts Declaratory Judgment Act, which provides a procedure

> to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated.

G.L. Ch. 231A § 2. As the Massachusetts Supreme Court has recognized, the Act is intended "to afford a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations," "is to be liberally construed and administered," and provides "an appropriate method of relief" when incarcerated people challenge the constitutionality of DOC procedures. *Nelson v. Comm'r of Correction*, 390 Mass. 379, 379 (Mass. 1983); *see also Ivey v. Comm'r of Correction*, 88 Mass. App. Ct. 18, 22 (Mass. Ct. App. 2015) ("Because they allege that the policy violates DOC regulations, the plaintiffs properly brought this action under the declaratory judgment act.").

For all of the reasons set out above, the DOC's practices interfere with incarcerated people's right to counsel and due process—as well as with the regulations governing the DOC. Plaintiffs have therefore also demonstrated a likelihood of success on the merits of their claim for declaratory judgment.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM EACH DAY THE DOC IMPOSES PUNISHMENT BASED ON THE FAULTY TESTS

Incarcerated people suffer concrete, irreparable harm each day that the DOC continues with its policy of punishing the recipients of legal mail solely on the basis of faulty NARK 20023 field tests, and this factor strongly supports Plaintiffs' requested relief. These irreparable harms take a variety of forms: among other things, incarcerated people whose legal mail tests

"positive" are (i) immediately placed into solitary confinement, (ii) issued disciplinary tickets, (iii) denied the opportunity to participate in educational programs or to hold jobs, (iv) denied eligibility for parole or transfer, (v) restricted in their ability to communicate with their family members or lawyers, (vi) denied various other amenities, such as the ability to purchase food from the prison commissary. (*See* Leonida Decl., ¶¶ 5(f)-(h); Jacobstein Decl., ¶¶ 10-13.)

The DOC's continued reliance upon defective NARK 20023 field tests also imposes broader irreparable harm on *all* people incarcerated in DOC facilities. As set out above, incarcerated people across the Commonwealth are now aware that the DOC is imposing draconian punishments on recipients of legal mail that falsely tests "positive" for drugs. (*See* Ivey Decl., ¶ 15; Jacobstein Decl., ¶¶ 10, 18.) Incarcerated people are also aware that the DOC regularly opens legal mail and inspects it outside the presence of the addressee—giving rise to legitimate fears that the DOC is intruding into privileged attorney-client communications. (*Id.*) In order to protect themselves from arbitrary punishment and to ensure that their privileged communications remain confidential, many incarcerated people have begun refusing to accept incoming mail or directing their attorneys not to send any materials through the mail. (Jacobstein Decl., ¶¶ 10, 18.) As a result, incarcerated people are unable to communicate with counsel effectively and cannot receive the benefits of meaningful legal representation.

All of these harms will continue to accrue each day that the DOC persists in using the NARK 20023 field tests on incoming legal mail and on relying on the results of those tests to punish incarcerated people. The requested preliminary injunctive relief would put an end to these harms while the Court hears Plaintiffs' case.

III. THE BALANCE OF EQUITIES TILTS STRONGLY IN FAVOR OF A PRELIMINARY INJUNCTION

The final issue before the Court is whether the "the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction." *Loyal Order of Moose, Inc.*, 439 Mass. at 601. Here, the requested order would cause *no* harm to the DOC, so this factor, too, cuts strongly in favor of granting the instant motion.

The only reason the DOC uses NARK 20023 field tests on incoming legal mail is to detect drugs that are supposedly being smuggled into DOC facilities by defense attorneys. Even assuming that NARK 20023 field tests could perform as advertised and detect eight varieties of synthetic cannabinoids, the fact remains that those eight varieties of synthetic cannabinoids have not been in regular circulation for years. (Schlabs Decl., Ex. G.) In 2019 and 2020, none of the formulations detected by the NARK 20023 was included on the National Forensic Laboratory Information System's list of the 15 most prevalent synthetic cannabinoid formulations. (*Id.*). For 2019, those 15 accounted for 82.41% of synthetic cannabinoids, and the remaining 17.59% include hundreds of other formulations, including the eight detected by the tests. (*Id.*) In fact, according to data provided by the University of Massachusetts Drugs of Abuse Laboratory, which evaluates suspected drug samples found in DOC facilities, the eight formulations the NARK 20023 purports to test for were not found on incoming legal mail or anywhere else even *once* in nineteen months of testing. (*E.g.*, Jacobstein Decl., Ex, B.) In other words, the NARK 20023 field tests purport to detect specific formulations of synthetic cannabinoids that are *extremely* unlikely to be sent into DOC facilities.

As a result, an order preventing the DOC from relying on NARK 20023 field tests would not have any impact on the DOC's ability to detect and prevent drug smuggling into DOC facilities. Even if the DOC were confronting an unlikely epidemic of criminal defense attorneys

smuggling drugs to their clients via legal mail, the NARK 20023 field tests simply could not detect those drugs. The proposed order would therefore cause no harm to the DOC.

IV. A PRELIMINARY INJUNCTION PROMOTES THE PUBLIC INTEREST

Finally, the requested relief both "promotes the public interest" and "will not adversely affect the public." *Loyal Ord. of Moose, Inc.*, 439 Mass. at 601 (reversing lower court denial of preliminary injunctive relief against government agency). While the public has an interest in the orderly operation of correctional facilities throughout the Commonwealth, the DOC's use of faulty NARK 20023 field tests does not further that goal. As set out above, those tests are both overbroad—in that they return false "positive" results from a wide array of innocuous materials—and unduly narrow—in that they are unable to identify the most common synthetic cannabinoids in circulation today.

Because NARK 20023 field tests cannot detect reliably drugs, the DOC's continued use of those tests inflicts serious harm on wrongly accused people while failing to stanch the (imagined) flow of drugs supposedly being sent by Massachusetts defense attorneys into DOC facilities.

CONCLUSION

Plaintiffs respectfully request that the Court enter a temporary restraining order and preliminary injunction ordering the DOC to stop imposing any punishment whatsoever based on "positive" NARK 20023 field test results.

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**Pro hac vice* applications forthcoming