17-1558

United States Court of Appeals
for the
Second Circuit

LIBERIAN COMMUNITY ASSOCIATION OF CONNECTICUT, on behalf of themselves and those similarly situated, LOUISE MENSAH-SIEH, on behalf of herself and her minor children B.D. and S.N., on behalf of themselves and those similarly situated, VICTOR SIEH, on behalf of themselves and those similarly situated, EMMANUEL KAMARA, on behalf of themselves and those similarly situated, ASSUNTA NIMLEY-PHILLIPS, on behalf of themselves and those similarly situated, LAURA SKRIP, on behalf of themselves and those similarly situated, RYAN BOYKO, on behalf of themselves and those similarly situated, ESTHER YALARTAI, on behalf of themselves and those similarly situated, BISHOP HARMON YALARTAI, on behalf of themselves and those similarly situated, MARY JEAN O, on behalf of themselves and those similarly situated,

Plaintiffs-Appellants,

NATHANIEL SIEH, on behalf of themselves and those similarly situated,

Plaintiff,

v.

DANNEL P. MALLOY, Governor, RAUL PINO, Commissioner of Public Health, JEWEL MULLEN, Former Commissioner of Public Health,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut

No. 3:16-cv-00201-AVC, Hon. Alfred V. Covello, Judge Presiding

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PRELIMINARY STATEMENT

In October 2014, amidst media frenzy over the Ebola epidemic and a closely contested gubernatorial race, Connecticut officials quarantined eight individuals, including two minor children, who had recently arrived in Connecticut from Liberia. Defendant Jewel Mullen, then-Commissioner of Public Health, subjected these individuals to involuntary confinement even though (1) her representatives repeatedly stated that the "[p]eople under quarantine are not sick and *do not present a risk to public health*;" (2) the Centers for Disease Control and Prevention had recommended only self-monitoring, a far less restrictive means of protecting public health, for low-risk arriving travelers like Plaintiffs; and (3) existing law expressly required Defendants to use the "least restrictive" means to protect public health in precisely such circumstances. Other Plaintiffs, while not detained in 2014, regularly travel between Connecticut and Liberia for personal, religious, business, and humanitarian reasons, and reasonably fear that Connecticut will apply its unlawful quarantine policies and practices to them in the future.

Together, Plaintiffs filed suit seeking damages for those quarantined in 2014 and class-wide declaratory and injunctive relief against future illegal

quarantines. The District Court denied class certification and dismissed all claims, concluding qualified immunity was appropriate as to the damages claims, Plaintiffs lacked standing for injunctive relief, and the class was not sufficiently numerous. In so holding, Judge Covello failed to credit Plaintiffs' well-pled allegations on this Rule 12(b)(6) motion, found other facts not in the Complaint, and relied on *Lochner*-era dicta and a sixty-year old district court case rather than applicable constitutional decisions rendered over the past half-century.

Plaintiffs do not dispute the State's power to impose quarantines when necessary to prevent or contain the spread of a deadly infectious disease. Plaintiffs, who include two public health students, an infectious disease doctor, and immigrants from Liberia, understand better than most the devastating impact of the Ebola virus. What Plaintiffs challenge is the unlawful infliction of confinement—when less restrictive alternatives existed and scientific justification for detention did not, and when Defendants failed to provide notice or a meaningful opportunity to be heard. Instead of protecting the public, Defendants inflamed the Ebola hysteria, stigmatized Plaintiffs and communities with West African roots,

undermined the public health response to the epidemic, and harmed Plaintiffs individually in lasting ways.

Defendants' actions contravened clearly established substantive and procedural constitutional safeguards that were known or should have been known to Defendants from, among other things, a state statute that expressly restricts quarantines to situations in which they are "necessary and the least restrictive alternative to protect or preserve the public health." Conn. Gen. Stat. § 19a-131b(a) (2011 & supp. 2017). Defendants knew the quarantines were unnecessary and unlawful, yet they detained Plaintiffs anyhow and deprived them of the opportunity to meaningfully challenge their confinement. The District Court erred in dismissing Plaintiffs' claims for damages and injunctive relief and in denying their motion for class certification.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 2201. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the District Court entered judgment dismissing the action on May 3, 2017, and Plaintiffs-Appellants filed a timely notice of appeal on May 12, 2017.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in dismissing Plaintiffs' damages claims on the basis of qualified immunity, where:

   a. Substantive due process requires that fundamental liberty deprivations be narrowly tailored and, in the case of quarantine, be the least restrictive means available to protect the public;

   b. Procedural due process requires that involuntarily confined persons be given notice and an opportunity for independent review; and

   c. The Fourth Amendment requires that involuntary seizures be subject to a probable cause determination and, in any event, be reasonable.

2. Whether the District Court erred in dismissing claims for prospective relief for lack of standing where, at the time the Complaint was filed, Plaintiffs faced an imminent threat of unlawful quarantine as a result of Defendants' practices and policies and the recent arbitrary application thereof; Plaintiffs suffered present harm from the reasonable anticipation of imminent quarantine; and Plaintiffs suffered present adverse effects from past quarantines and from the quarantine policies and practices in place at that time.

3. Whether the District Court erred in denying class certification on the basis that the proposed class was speculative and did not meet the

numerosity requirement, where the Complaint pled facts showing that, in addition to the twelve named Plaintiffs, the proposed class includes at least twenty and likely more than 100 members.

STATEMENT OF THE CASE

Plaintiffs-Appellants initiated this action to challenge Defendants-Appellees' substantively unjustified and procedurally deficient quarantines of eight individuals who arrived in Connecticut from Liberia during the 2014 Ebola epidemic, and to seek prospective relief to ensure that Defendants' policies and practices would not interfere with their freedom to travel for humanitarian, religious, business, and personal reasons. On August 1, 2016, the District Court denied Plaintiffs' motion for class certification as to their claims for injunctive relief. *See* JA-132 to 152 (*Liberian Cmty. Ass'n of Conn. v. Malloy*, Civil No. 3:16-cv-00201 (AVC) (Aug. 1, 2016) (Slip Op.) [hereinafter, Aug. 1, 2016 Slip Op.]).[1] On March 30, 2017, the District Court issued an opinion granting the Defendants' motion to dismiss the action. *See* JA-154 to 194 (*Liberian Cmty. Ass'n of Conn. v. Malloy*, Civil No. 3:16-cv-00201 (AVC) (Mar. 30, 2017) (Slip Op.) [hereinafter, Slip Op.]). The District Court entered

[1] References to the Joint Appendix are designated "JA-__." The Complaint, at JA-20 to 68, is referenced as "Compl."

judgment for the Defendants on May 3, 2017. *See* JA-196 (*Liberian Cmty. Ass'n of Conn. v. Malloy*, Civil No. 3:16-cv-00201 (AVC) (May 3, 2017) (Order)). Plaintiffs-Appellants timely appealed.

A. Factual Background

1. The 2014 Ebola Crisis and Connecticut's Response

In March 2014, the World Health Organization ("WHO") announced an Ebola outbreak in the West African countries of Guinea, Liberia, and Sierra Leone. Compl. ¶ 18. By the fall of that year, the outbreak was a regional epidemic, and volunteers from around the world rushed to provide critical support and prevent further spread of the disease. *Id.* ¶ 21. Despite the severity of the situation locally, the crisis was contained to those three countries, with fewer than forty cases of Ebola developing elsewhere. *Id.* ¶ 22.

The localized nature of the crisis reflects that, while deadly, the Ebola virus does not transmit easily. The virus is contagious only through direct contact with the bodily fluids of a symptomatic infected person or a person who has died of the disease, and not via the air or drinking water. *Id.* ¶ 19. Symptoms are overt, and include fever, headache, joint and muscle aches,

diarrhea, and vomiting. *Id.* The incubation period—the time from infection to onset of symptoms—ranges from two to 21 days. *Id.*

In August 2014, with the outbreak ongoing, the Center for Disease Control and Prevention ("CDC") released guidance for how to safely manage asymptomatic persons traveling from West Africa. Consistent with the science of Ebola transmission, the CDC's guidance was bifurcated. One set of guidelines covered travelers who had direct, unprotected contact with infected bodily fluids and were therefore at high risk of developing Ebola. A different set of guidelines governed travelers who had *not* been in contact with infected bodily fluids and were therefore at "no risk," "low risk," or only "some risk" of developing Ebola. *Id.* ¶¶ 23-24.

For high-risk individuals, the CDC advised "controlled movement" for 21 days after leaving West Africa, meaning these individuals were required to inform public health officials of any intended travel and avoid long-distance public transportation. *Id.* ¶ 24. For individuals who had not been exposed to infected fluids, the CDC recommended only self-monitoring or active monitoring for the onset of possible symptoms.[2] *Id.*

[2] "Self-monitoring" refers to a practice whereby people check their own temperature and monitor themselves for symptoms. "Active monitoring"

¶ 23. The CDC guidelines expressly stated that states should not impose "movement restrictions" such as quarantine for asymptomatic individuals who "ha[d] no exposure" to the disease. *Id.* ¶ 32 (internal quotation marks omitted).

The reasoned response of federal authorities contrasts sharply with Connecticut's approach, where the apex of the distant epidemic and the frenzied media coverage of the crisis coincided with the final weeks of Defendant Governor Dannel Malloy's tight re-election race. *Id.* ¶ 25. On October 7, 2014, Governor Malloy issued an order pursuant to Conn. Gen. Stat. § 19a-131a declaring a public health emergency for the state ("Emergency Declaration"). *Id.* ¶ 26. The Emergency Declaration authorized Defendant Mullen, the State Commissioner of Public Health, to isolate or quarantine individuals whom she "reasonably believe[d] to have been exposed to, infected with, or otherwise at risk of passing the Ebola virus." *Id.* Under Connecticut law, she could exercise this authority only if

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refers to the "monitoring of travelers by health departments." CDC, *Notes on the Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure* (Feb. 19, 2016), www.cdc.gov/vhf/ebola/exposure/monitoring-and-movement-of-persons-with-exposure.html; Compl. ¶ 63.

"quarantine . . . [was] necessary and the least restrictive alternative to protect or preserve the public health." Conn. Gen. Stat. § 19a-131b.

On October 16, 2014, Defendants Malloy and Mullen announced that *all* asymptomatic individuals arriving from an affected country—regardless of whether they had any past contact with Ebola-infected persons—were to be quarantined at home for 21 days. Compl. ¶ 31. Governor Malloy's office touted this new quarantine program as "more stringent than the guidelines thus far issued by the Federal Center for Disease Control and Prevention (CDC)." *Id*. This was an apt description. Connecticut's quarantine program—unique among several states that imposed measures to prevent the spread of Ebola—did not provide for individuated risk assessments of travelers from affected countries. Rather, Defendants imposed a blanket quarantine that categorically restricted asymptomatic individuals far more than scientifically necessary to prevent the spread of Ebola. *Id.* ¶¶ 31-34. In so doing, Defendants ignored the substantive due process requirement under the Fourteenth Amendment to use the least restrictive means available, *see Shelton v. Tucker*, 364 U.S. 479, 488 (1960), a state statute imposing the same restriction, *see* Conn. Gen. Stat. § 19a-131b(a), and procedural due process and Fourth Amendment requirements.

2. Plaintiffs Are Quarantined Despite the Absence of a Public Health Risk

During the period in which the Emergency Declaration was in effect, Defendants quarantined eight uninfected, low-risk or no-risk individuals who all became Plaintiffs in this action: Ryan Boyko, Laura Skrip, and the six members of the Mensah-Sieh family.[3] Compl. ¶¶ 65-88, 111-26. As repeatedly stated by a DPH spokesperson, and as Defendants Malloy and Mullen knew, the quarantined Plaintiffs were "not a risk to public health." *Id.* ¶ 33.

Ryan Boyko and Laura Skrip: Plaintiffs Boyko and Skrip were doctoral candidates at the Yale School of Public Health. *Id.* ¶¶ 9-10. In September 2014, Mr. Boyko and Ms. Skrip traveled to Liberia to help the Liberian government improve its tracking of the outbreak with data analysis. *Id.* ¶¶ 44, 46. They did not volunteer in a health care capacity, had no contact with Ebola-symptomatic individuals,[4] and took a variety of

[3] Quarantined Plaintiff Nathaniel Sieh is not appealing the District Court judgment.

[4] Plaintiffs Boyko and Skrip saw an asymptomatic person at their Monrovia hotel who later developed symptoms of Ebola. Compl. ¶ 54. CDC assured Boyko and Skrip that any interactions they had with the person were "no risk" interactions involving an asymptomatic individual. *See id.*

precautions to avoid exposure. *Id.* ¶¶ 47-49, 54. When Mr. Boyko and Ms. Skrip returned to the United States together on October 11, they were screened by CDC personnel under the CDC-DHS policy, who cleared them to enter the country. *Id.* ¶ 55. After returning to Connecticut, they self-monitored for symptoms, emailing their temperatures twice daily to the Yale Health Center. *Id.* ¶ 57. On October 15, Mr. Boyko developed a fever and promptly reported this to health authorities, who transported him to Yale-New Haven Hospital for testing in an abundance of caution. *Id.* ¶¶ 58-60. A blood test for Ebola came back negative on October 16, which was consistent with a test Mr. Boyko had taken shortly before departing Liberia. *Id.* ¶¶ 53, 61, 64. The CDC confirmed the negative result on October 17. *Id.* ¶ 66.

When Mr. Boyko's doctors received the CDC's confirmation, they removed their protective gear and shook his hand. *Id.* ¶ 67. But Dr. Mullen, amid the media's hysterical coverage of Ebola, ordered Mr. Boyko quarantined in his home for the next two weeks. *Id.* ¶¶ 65, 68. She then ordered Ms. Skrip quarantined for the same time period. *Id.* ¶ 72. Ms. Skrip was not provided written notice of her rights, information about how to challenge the quarantine, or even a written notice of her quarantine until five days after its implementation. *Id.* ¶¶ 73-74. Nor did Defendants initiate a

judicial probable cause hearing as to Mr. Boyko or Ms. Skrip at any time.[5] *Id.* ¶ 93. Defendants took these actions even though they knew or should have known that quarantining Mr. Boyko and Ms. Skrip was unnecessary and not the least restrictive means available to protect public health. *Id.*

The quarantine severely affected Mr. Boyko. It damaged his relationships with his son and his girlfriend and left him unable to satisfy professional and educational obligations. *Id.* ¶¶ 83-85, 89-91. After seeking psychological care to cope with the impact of the quarantine, Mr. Boyko left his assigned laboratory and dropped out of the Ph.D. program at Yale University. *Id.* ¶ 91. Ms. Skrip, too, grappled with adverse effects of the quarantine, including professional consequences that continued even after the quarantine ended. *Id.* ¶ 92. Dr. Mullen knew or should have known that the quarantine would cause Mr. Boyko and Ms. Skrip apprehension, interrupt their ability to perform important public health work, and inflict emotional distress. *Id.* ¶¶ 93, 95.

[5] Under Conn. Gen. Stat. § 19a-131b, a quarantine hearing may be initiated at the request of a quarantined individual. That statute requires the State to provide quarantined persons with notice of their hearing rights, but does not require the State to initiate judicial review proceedings.

The Mensah-Sieh Family: Until October 2014, Plaintiffs Louise Mensah-Sieh, her husband Nathaniel Sieh, and their children B.D., S.N, Victor Sieh, and Emmanuel Kamara lived in Liberia. *Id.* ¶¶ 4-5, 97. In June 2013, the family won the U.S. Diversity Visa Lottery. *Id.* ¶ 98. After undergoing health tests, the U.S. Department of Homeland Security ("DHS") and the U.S. Embassy approved the family for entry in Fall 2014. *Id.* ¶ 100.

On October 18, 2014, the Mensah-Sieh family arrived at John F. Kennedy Airport. *Id.* ¶ 101. They were screened by DHS personnel under the CDC-DHS policy and cleared to enter the United States. *Id.* ¶¶ 102-03, 105. Plaintiff Assunta Nimley-Phillips, Louise Mensah-Sieh's sister, picked up the family from the airport and took them to her home in West Haven, Connecticut. *Id.* ¶¶ 105-06. Two days later, on October 20, the West Haven Director of Public Health called Ms. Nimley-Phillips to tell her that the entire Mensah-Sieh family was not permitted to leave the house for 21 days. *Id.* ¶¶ 111-12. This quarantine was ordered by Dr. Mullen and enforced by police officers stationed around-the-clock outside Ms. Nimley-Phillips's home. *Id.* ¶ 114. Defendants failed to provide the family with adequate resources including food. *Id.* ¶ 121.

As Defendants Mullen and Malloy knew or should have known, quarantining the Mensah-Siehs was unnecessary and not the least restrictive means available to protect the public health. *Id.* ¶ 146. In addition, the Mensah-Sieh family never received a written quarantine order or other information about quarantine practices, such as the family's right to judicial review of the order. *Id.* ¶¶ 116-18. Defendants did not initiate a judicial probable cause hearing as to members of the family, either. *Id.* ¶ 146.

Quarantine was a trying experience for the family, especially the minor children B.D. and S.N. They were confined together in a cramped, poorly insulated, and frigid basement for the 21-day period. *Id.* ¶¶ 119-20. They experienced feelings of shame and fear, and physical discomfort. *Id.* ¶¶ 134-39. The delays in enrolling the children in school and finding employment, and the enduring stigma from the quarantine, impinged their ability to adjust to their new country. *Id.* ¶¶ 140–45, 147.

3. Defendants Purport to Revise Their Ebola Policies But Fail to Re-Assess Quarantine Orders Against Plaintiffs

On October 27, 2014, eight days before the gubernatorial election and after several news reports had criticized blanket quarantine protocols,

Defendants revised their Ebola policies. *Id.* ¶ 35.[6] Instead of categorical quarantine, the State now required "mandatory active monitoring" for low-risk, asymptomatic travelers arriving in Connecticut from Guinea, Liberia, and Sierra Leone.[7] *Id.* The revised policy further provided that, before ordering more restrictive measures such as quarantine, epidemiological experts would perform an individuated risk assessment based on the person's travel history and potential exposure to Ebola. *Id.* ¶ 36. This revision failed to cure many of the policy's legal defects: It did nothing to ensure quarantined individuals would receive timely written notice, a State-initiated probable cause hearing, or adequate food and other resources.

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[6] *See, e.g.*, Amy Maxmen, *Ebola Panic Looks Familiar to AIDS Activists*, NEWSWEEK, Nov. 11, 2014, www.newsweek.com/2014/11/14/ebola -panic-looks-familiar-aids-activists-281545.html; *Student Tests Negative for Ebola, Quarantined Anyway*, THE RACHEL MADDOW SHOW, MSNBC, Oct. 27, 2014, www.msnbc.com/rachel-maddow-show/watch/student-tests-negative-quarantined-anyway-348614723804; *Bioethicist: 7 Reasons Ebola Quarantine Is a Bad, Bad Idea*, NBC NEWS, Oct. 26, 2014, www.nbcnews.com/storyline/ebola-virus-outbreak/bioethicist-7-reasons-ebola-quarantine-bad-bad-idea-n234346.

[7] Notably, revised CDC guidance released that same day did not recommend quarantine for any asymptomatic individuals and in fact recommended "no restrictions on travel, work, public conveyances, or congregate gatherings" for asymptomatic individuals who had been in an affected country but had no known exposure. Compl. ¶ 35.

Despite a professed commitment to individualized assessment, the revised plan did not prompt Defendants Mullen and Malloy to review or cause the review of the quarantine orders against Mr. Boyko, Ms. Skrip, or the Mensah-Sieh family. *Id.* ¶¶ 86, 126. These Plaintiffs therefore continued to be quarantined under the revised policies, even though they fell squarely within the category of low-risk, asymptomatic travelers. On November 4, 2014, Governor Malloy was re-elected.

Connecticut's insistence on the continued quarantining of eight asymptomatic low-risk and no-risk individuals contrasted sharply with Defendants' post-election treatment of Plaintiff Dr. O. Unlike those quarantined in October 2014, Dr. O worked directly with Ebola patients and handled blood samples as a volunteer at several Ebola Healthcare Units in West Africa. *Id.* ¶¶ 162-63. However, when she returned to Connecticut in February 2015 after Governor Malloy had been re-elected, Defendants merely told Dr. O to self-monitor but did not quarantine her.

4. Governor Malloy Withdraws the Emergency Declaration After Plaintiffs File This Lawsuit

Between November 2015 and January 2016, the WHO declared Sierra Leone, Guinea, and Liberia Ebola-free. Compl. ¶ 37. Governor Malloy's

Emergency Declaration remained in effect, however, reserving the power to impose Ebola quarantines on asymptomatic travelers contra CDC guidance and scientific evidence. *Id.* ¶¶ 40-43. The ongoing state of emergency, the arbitrary manner in which the revised policies were applied, and Defendants' demonstrated willingness to flout statutory and constitutional requirements—including by failure to provide notice, failure to initiate judicial review, and failure to provide food and adequate basic supplies—placed present and future travelers to West Africa at a real and immediate risk of being subjected to Defendants' unlawful quarantine policies and practices. *Id.* ¶ 43. These travelers include volunteers like Dr. O, Mr. Boyko, and Ms. Skrip, who play a critical role in responding to public health crises like the Ebola epidemic; and the Mensah-Sieh family, members of the Liberian Community Association of Connecticut ("LCAC"), Ms. Nimley Phillips, Bishop Harmon Yalartai, and Esther Yalartai, all of whom travel between Connecticut and Liberia for personal, religious, or professional reasons.

Plaintiffs filed this action on February 8, 2016. On that date, Laura Skrip, Bishop Yalartai, and his wife Esther Yalartai were in Liberia. Compl. ¶¶ 149, 151, 155. Ms. Skrip had returned to Liberia to develop institutional

and technological capacity to improve responses to public health crises, and she was due to return to Connecticut on February 18, 2016. *Id.* ¶¶ 150-51. The Yalartais had traveled to conduct humanitarian work with Liberian schools, visit family members, and attend the Annual Convention of the Faith Revival Temple Churches, a group of churches and preaching points in Liberia and Connecticut of which Bishop Yalartai is the religious leader. They were due to return to Connecticut on February 20, 2016. *Id.* ¶ 155.

On April 1, 2016, Governor Malloy terminated the Emergency Declaration authorizing the Commissioner of Public Health to quarantine travelers from West Africa. JA-111 to 112 (Defs.' Mem. Supp. Mot. Dismiss, Ex. 2). Defendants never disavowed or rescinded the quarantine practices or policies adopted under the Emergency Declaration, and continue to defend them to this day.

5. Subsequent Ebola Flare-Ups and the Recent Outbreak

When the Ebola crisis in West Africa was brought under control, public health experts warned that future Ebola outbreaks in that region are highly likely, and risk of another large Ebola crisis persists. Compl. ¶ 38. On January 14, 2016, the WHO cautioned that Guinea, Liberia, and Sierra Leone "remain at high risk of additional small outbreaks of Ebola, like the most

recent one in Liberia. To date, ten such flare-ups have been identified that were not part of the original outbreak . . . ." JA-84, 88 (Wishnie Decl. ¶ 11 & Ex. A, at *2). On January 25, 2016, the WHO Director-General stated:

> On 14 January, WHO declared that the outbreak in Liberia, the last country reporting cases, was over, but warned that the risk of further flare-ups would persist. The warning was well-founded. The next day, Sierra Leone confirmed its first new case since September of last year. . . . The Ebola virus is stubborn. I have no doubt that further flare- ups will occur.

JA-84, 92-93 (Wishnie Decl. ¶ 12 & Ex. B, at *2-3). Indeed, after the District Court dismissed this action, the CDC recognized an Ebola outbreak in the Congo. *See* CDC, *Outbreak Summaries: 2000-2017: 2017 Democratic Republic of the Congo, Bas Uélé District* [hereinafter, CDC, *DRC Outbreak Summary*] (June 15, 2017), www.cdc.gov/vhf/ebola/outbreaks/drc/2017-may.html.[8] While

[8] This Court may—and should—take judicial notice of the information contained on the official webpage of the CDC describing the May 2017 outbreak of Ebola in the Democratic Republic of the Congo. *See* Fed. R. Evid. 201 ("[t]he court . . . may take judicial notice on its own" of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Hotel Emps. & Rest. Emps. Union, Local 100 of N.Y., N.Y. & Vicinity, AFL CIO v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (noting that judicial notice may be taken on appeal); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, No. 14-CV-9783, 2015 WL 5122590, at *7 (S.D.N.Y. Aug. 31, 2015) (stating that it is "clearly proper to take judicial notice" of "documents retrieved from official government websites").

it appears that this outbreak has been contained, there were eight suspected cases of Ebola and four patients died from the disease. *See id.*

B. Procedural History

1. The Complaint and Motion for Class Certification

Plaintiffs filed suit on February 8, 2016. Mr. Boyko and members of the Mensah-Sieh family seek damages under federal and state law against Dr. Mullen, in her personal capacity, based on their unlawful quarantines in Fall 2014.

They are joined by Ms. Nimley-Phillips, Dr. O, Ms. Skrip, the Yalartais, and LCAC in a claim for declaratory and injunctive relief against Defendants Malloy and Pino in their official capacities. These Plaintiffs travel regularly to West Africa for humanitarian and other purposes, and some of them plan to do so specifically in the event of an Ebola outbreak. Compl. ¶¶ 152, 156, 165-66, 172-73. With respect to such future travels, these Plaintiffs face a real and immediate threat of being subjected to an unlawful and scientifically unjustified quarantine, imposed pursuant to unlawful procedures, by Defendants Malloy and current Commissioner of Public Health Raul Pino upon their return. *Id.* ¶¶ 153, 171, 174. They therefore seek declaratory

judgment and an injunction against the continuation of Defendants' illegal and unjustified quarantine policies and practices.

Plaintiffs also moved to certify a class consisting of "persons who will or intend to travel from Ebola-affected countries to Connecticut" and place themselves at risk of being subjected to unlawful quarantines by doing so. *Id.* ¶ 178; *see also* JA-132 to 152 (Aug. 1, 2016 Slip Op.). The Court denied the motion for class certification on August 1, 2016.[9]

2. The District Court's Dismissal of the Action

The District Court dismissed Plaintiffs' damages claims, holding that Dr. Mullen is entitled to qualified immunity because she "did not violate clearly established law," or alternatively, because "her actions were objectively reasonable." JA-178 (Slip Op. at 25). In so ruling, the District Court held that the circumstances under which Mr. Boyko, Ms. Skrip, and the Mensah-Sieh family were quarantined presented the closest similarities

[9] After the parties started discovery, Defendants moved for a protective order seeking recognition of an evidentiary privilege (the "disease response privilege") and requesting a stay of discovery. Defs.' Mot. Protective Order, District Ct. ECF No. 39. The Court did not rule on this motion until after granting the motion to dismiss, at which time it denied the discovery motion as moot. Order Finding Moot Defs.' Mot. Protective Order, District Ct. ECF No. 56.

to a 1963 district court case that upheld the isolation of a woman who had a history of unsuccessful vaccinations and had arrived from a smallpox-infected area. *See* JA-181, 185 (Slip. Op. at 28, 32) (discussing *U.S. ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 790-91 (E.D.N.Y. 1963)). The District Court further held that modern decisions of the Supreme Court and Second Circuit governing civil commitment are "not sufficiently analogous" to constitute "clearly established law" with respect to Plaintiffs' substantive and procedural due process claims. JA-187 (Slip Op. at 33-34).

The District Court also held that Dr. Mullen did not violate clearly established Fourth Amendment law because Plaintiffs' potential exposure to the Ebola virus provided "probable cause" for their quarantine. JA-190 (Slip Op. at 37). In so holding, the District Court failed to accept as true Plaintiffs' well-pleaded allegations on this Rule 12(b)(6) motion that Plaintiffs were not a risk to public health, and that Dr. Mullen knew it. Compl. ¶¶ 31-33, 35, 53-54, 58-64, 66.

Lastly, the District Court dismissed Plaintiffs' claims for prospective relief for lack of standing, finding that "*at the time of the filing of the complaint*, there was not a 'real and immediate' threat of injury[.]" JA-172 (Slip Op. at 19) (emphasis added). In determining whether standing existed, the District

Court attached great significance to the fact that Defendants elected not to quarantine Dr. O upon her return to Connecticut in February 2015. JA-174 (Slip Op. at 21). Contrary to the well-established standard for motions to dismiss, the District Court did not accept as true Plaintiffs' allegations regarding the high likelihood of a future Ebola outbreak, and instead made extra-record findings that there is no more than a "potential for small flare ups of a localized nature." *Id*.

SUMMARY OF THE ARGUMENT

Under the District Court's ruling, Plaintiffs who were subjected to unconstitutional quarantine orders are barred from obtaining damages on the basis that the government official who ordered the quarantines did not violate clearly established law. And the broader group of Plaintiffs, including individuals who regularly travel to West Africa and face a real risk of illegal quarantine in the future, cannot obtain protection from future unjustified quarantine for lack of standing.

The District Court erred in dismissing Plaintiffs' damages claims because the quarantine of eight persons, including two minor children, without scientific justification or procedural safeguards violated clearly established law under substantive due process, procedural due process, and

the Fourth Amendment. The District Court applied the wrong body of law to Plaintiffs' substantive due process claims; Dr. Mullen had notice of the substantive standards governing her conduct; and Dr. Mullen knew, or should have known, that quarantining Plaintiffs was not necessary to protect the public. Likewise, the District Court erred in dismissing Plaintiffs' procedural due process claims in a cursory footnote devoid of legal analysis or even citation. For similar reasons, the District Court erred in dismissing Plaintiffs' Fourth Amendment Claims. Finally, Dr. Mullen's conduct was not "objectively reasonable."

The District Court also erred in dismissing Plaintiffs' prospective claims for lack of standing. Specifically, the District Court disregarded allegations demonstrating that the quarantine policies in place at the time the Complaint was filed, coupled with Defendants' arbitrary application of these policies, presented a real and imminent threat to Plaintiffs. The District Court also failed to consider the *present* harm suffered by Plaintiffs from their reasonable anticipation that they were at risk of illegal quarantines, as well as the lingering harm from the stigma that attached to several of the Plaintiffs as a result of the past quarantines and the quarantine policies and practices in place at that time.

Lastly, the District Court erred in denying class certification for lack of numerosity. In addition to the named Plaintiffs, the Complaint alleged facts showing that more than 100 other Connecticut residents face a real and immediate threat of illegal confinement.

Fundamentally, the District Court's analysis suggests government officials cannot be held accountable for quarantines until there are further developments in the law, but that clarifying the legal standards governing quarantine must wait until the next emergency. In combination, these decisions deprive government officials, humanitarian volunteers, and other travelers of clear standards for inevitable future epidemics, undermining efforts to protect public health. This scenario, deriving from a violation of fundamental constitutional rights without a remedy or even review on the merits of the claim, is not supported by the law.

For these reasons, this Court should reverse the District Court's dismissal of this action and vacate its ruling denying class certification.

STANDARD OF REVIEW

This Court reviews decisions granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) *de novo*. *See, e.g.*, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). In so doing, this Court

must "assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Id.* at 88 (internal citations and quotation marks omitted); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The District Court's ruling denying class certification is reviewed for abuse of discretion. *Mazzei v. Money Store*, 829 F.3d 260, 270 (2d Cir. 2016). Denials of class certification are afforded less deference than decisions granting class certification. *Id.*

ARGUMENT

I. The District Court Erred in Ruling that Plaintiffs' Federal Damages Claims Are Barred by Qualified Immunity.

Plaintiffs' allegations of executive detention absent procedural safeguards of individuals who, according to scientific consensus as well as CDC guidance could not have transmitted Ebola and had not even been exposed to the disease, state well-established claims of due process and Fourth Amendment violations. In holding that Dr. Mullen's actions are

nevertheless immune from judicial scrutiny, the District Court relied on *Lochner*-era dicta and a sixty-year old district court case rather than applicable constitutional decisions rendered over the past half-century. This was error. Plaintiffs' due process and Fourth Amendment rights are firmly established; their applicability to Dr. Mullen's conduct is straightforward; and Dr. Mullen was put on clear notice of Plaintiffs' federal right that quarantine be imposed only when scientifically justified and procedurally sound.

A. Dr. Mullen Violated Clearly Established Substantive Due Process Law.

1. Governing Law

The District Court dismissed Plaintiffs' substantive due process claims[10] based on dicta in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905), and a district court decision, *U.S. ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 790-91 (E.D.N.Y. 1963).[11]

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[10] Compl. ¶¶ 191-99 ("First Claim for Relief").

[11] JA-184 (Slip Op. at 31) ("The question for the court, under clearly established quarantine case law, is not whether the quarantine was the least restrictive means available, but whether the state's policies were 'exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel

Jacobson upheld a Massachusetts law that imposed a small fine for refusing to comply with a municipal vaccination requirement. *Jacobson*, 197 U.S. at 12. The petitioner refused a compulsory smallpox vaccine and challenged the fine under the Due Process Clause. *Id.* at 13. In rejecting the petitioner's challenge, the Supreme Court acknowledged the power of local governments to protect the public from public health threats, including by the use of quarantine, *id*. at 29, but went on to emphasize a limiting principle:

> [I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31.

In *Shinnick*, the court upheld the isolation of the relator, a woman who had arrived from Stockholm, where there was a smallpox outbreak, and who last had a successful smallpox vaccine many decades before. *Shinnick*, 219 F. Supp. at 790. The court explained that "isolation is not to

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the courts to interfere for the protection of such persons.'" (quoting *Jacobson*, 197 U.S. at 28)); JA-180 to 185, 191-92 (Slip Op. at 27-32, 38-39) (discussing and relying upon *Shinnick*, 219 F. Supp. at 790-91).

be substituted for surveillance unless the health authority considers the risk of transmission of the infection by the suspect to be exceptionally serious[.]" *Id.* at 791. The court found that standard satisfied because "three medical men who testified manifestly shared a concern that was evident and real and reasoned[,]" they provided additional testimony that was "forthright, reasoned and circumstantially reassuring[,]" and the decision to isolate was "reached in obvious good faith . . . ." *Id.*

Even under the terms of *Jacobson* and/or *Shinnick*, Plaintiffs should prevail.[12] However, in relying on *Jacobson* and *Shinnick* to dismiss Plaintiffs' federal civil rights damages claims, the District Court bypassed fifty years of

[12] The District Court's evaluation of Plaintiffs' substantive due process claims under *Jacobson* and *Shinnick* failed to credit Plaintiffs' well-pled allegations. Although *Jacobson* stated that an individual who is "free from disease himself" may be held in quarantine until "the danger of the spread of the disease among the community at large has disappeared," JA-182 to 183 (Slip Op. at 29-30) (quoting *Jacobson*, 197 U.S. at 29), that has no application where, as here, the State's representative acknowledged that the Plaintiffs were "not a risk to public health," Compl. ¶ 33, and where quarantine was contrary to scientific consensus and CDC recommendations. The same factors distinguish this case from *Shinnick*, which relied upon record testimony demonstrating a "real and reasoned" and "good faith" basis for isolation. *Shinnick*, 219 F. Supp. at 790. With further respect to *Jacobson*, quarantine, as a form of confinement, implicates fundamental liberty interests in a way that vaccination does not. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

development in the law mediating the balance between coercive government action and individual liberties in the context of multiple forms of civil detention. *Jacobson* was decided in 1905, the same year as *Lochner v. New York*, 198 U.S. 45 (1905), and long before the development of today's substantive and procedural due process law. *Shinnick* was decided in 1963, when that jurisprudence was just emerging. *Shinnick* is furthermore a district court case that cannot supplant the pronouncements of the Supreme Court and Second Circuit, and the case did not involve claims based on due process, fundamental liberty, or the requirements of the U.S. Constitution. Simply put, these cases do not reflect Plaintiffs' rights as they were clearly established in 2014. Because quarantines—a form of civil detention—implicate fundamental liberty interests, existing law clearly establishes that officials may impose them only when necessary to achieve a compelling state interest and in the absence of less restrictive means. *See Lawrence v. Texas*, 539 U.S. 558, 593 (2003); *Shelton*, 364 U.S. at 488.

The "least restrictive means" test is axiomatic and properly governs this case. Among personal liberties, no right is more fundamental than "[f]reedom from bodily restraint[, which] has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S.

71, 80 (1992). And a government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, 364 U.S. at 488. Thus, the Fourteenth Amendment requires that the curtailment of fundamental liberties such as freedom from confinement "be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*; *see also Burgin v. Henderson*, 536 F.2d 501, 504 (2d Cir. 1976) (same).

Cases in multiple civil commitment settings confirm that substantive due process analysis applies whenever, as with quarantine, a state civilly confines an individual ostensibly to protect the public. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 358-60 (1997) (explaining that dangerousness alone is an insufficient ground upon which to justify involuntary commitment under substantive due process); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection.") (emphasis added); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("[T]here is [] no constitutional basis for confining [mentally ill] persons involuntarily if they are dangerous to no one and can live safely in freedom."); *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) ("[T]he

principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment[.]").

In dismissing Plaintiffs' substantive due process claims, the District Court disagreed that the general principles from these cases govern Dr. Mullen's conduct, or at least disagreed that they apply with sufficient clarity to put Dr. Mullen on notice that her actions were unlawful. JA-187 (Slip Op. at 34) ("[C]ase law in the civil commitment context is not sufficiently analogous to a quarantine set of facts to have clearly established that Dr. Mullen's actions violated the law."); *see also* JA-188 (Slip Op. at 35) (in 2014, "it would not have been apparent to a public health official in implementing a quarantine order to consider another body of case law, i.e. civil commitment law, before imposing said order"). The District Court's analysis is misplaced.

First, as described above, it has been the law of the land for decades that "'commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection.'" *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (quoting *Addington*, 441 U.S. at 425) (emphasis added); *accord Foucha*, 504 U.S. at 80. These cases do not narrowly concern

institutionalization, but instead address the liberty rights trigged by involuntary confinement: "Indeed, '[t]here can be no doubt that involuntary commitment to a mental hospital, *like involuntary confinement of an individual for any reason*, is a deprivation of liberty which the State cannot accomplish without due process of law.'" *Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) (emphasis added) (quoting *O'Connor*, 422 U.S. at 580 (Burger, C.J., concurring)). "Any purpose" means any purpose, and "any reason" means any reason. There is no indication in the case law that quarantine is exempt from what due process generally requires for involuntary confinement.[13]

Second, a district court in the Second Circuit previously applied *Shelton* and its progeny to the infectious disease context in weighing the permissibility of an isolation order related to tuberculosis. *See Best v. St.*

[13] The recent New Jersey district court decision in *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016), does not counsel otherwise. In that case, the district court ruled that infectious disease nurse Kaci Hickox's quarantine did not violate clearly established quarantine law. However, the court relied heavily on the fact that Hickox "conceded" "exposure, or at least the risk of exposure" to Ebola: "The facts do not suggest arbitrariness or unreasonableness as recognized in the prior [quarantine] cases—*i.e.*, application of the quarantine laws to a person . . . who had no exposure to the disease at all." *Hickox*, 205 F. Supp. 3d at 593. Here, Plaintiffs pled exactly that: no exposure to Ebola at all.

Vincents Hosp., No. 03 CV.0365 RMB JCF, 2003 WL 21518829, at *7 (S.D.N.Y. July 2, 2003), *aff'd in relevant part sub nom. Best v. Bellevue Hosp. New York, NY*, 115 F. App'x 459 (2d Cir. 2004). The court in *Best* set forth *Shelton* as governing the constitutionality of the order, and explained that "[t]he existence of a substantial government interest is not enough to satisfy substantive due process . . . unless the State utilizes the least restrictive means available to advance that interest." *Id.* *Best* specifically mentioned the analytic relationship to the Supreme Court's civil commitment cases, noting that *Shelton* "has been applied by courts in reviewing the civil commitment of mentally ill individuals[,]" too. *Id.* at *8. *Best* cannot be reconciled with the District Court's assessment that "it would not have been apparent to a public health official in implementing a quarantine order to consider . . . civil commitment law . . . ." JA-188 (Slip Op. at 35).

Third, Dr. Mullen knew or should have known that quarantine is legal, reasonable, and/or justifiable only if it is the least restrictive means available, because that touchstone standard of substantive due process has been incorporated as an express requirement of the Connecticut quarantine statute under which Dr. Mullen operated. Under that law, "the commissioner . . . may order into quarantine . . . any individual . . . if the

commissioner determines that such individual or individuals pose a significant threat to the public health and *that quarantine . . . is necessary and the least restrictive alternative to protect or preserve the public health.*"[14] Conn. Gen. Stat. Ann. § 19a-131b(a) (emphasis added). Far from not being "apparent" or being confined to "another body of case law," this standard was expressly enshrined in the Connecticut statute governing quarantines.

A "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held

[14] Connecticut first incorporated "least restrictive alternative" language into its quarantine statute in 2003, *see* S.H.B. No. 6676, 2003 Leg. Reg. Sess. (Conn. 2003), www.cga.ct.gov/2003/act/Pa/2003PA-00236-R00HB-06676-PA.htm, when that language was already a familiar term of art. "[W]hen the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes and the effect that its action or nonaction will have upon any one of them . . . ." *McCoy v. Comm'r of Pub. Safety*, 300 Conn. 144, 155 (2011). In adding a "least restrictive alternative" requirement, the state legislature incorporated due process protections afforded in analogous contexts with similar statutory language and constitutional requirements. *See, e.g.*, Conn. Gen. Stat. § 45a-650(f) (requiring courts adjudicating involuntary representation proceedings to ensure that appointment of a conservator is the least restrictive means of assisting an incompetent respondent); Conn. Gen. Stat. § 54-63b(b) (requiring that jail release criteria reflect least restrictive condition sufficient to reasonably ensure safety of others).

unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Further, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Such is the case here with Dr. Mullen and the applicability of substantive due process tailoring requirements generally and the "least restrictive means" requirement specifically. The Court should conclude that substantive due process standards are applicable in the quarantine context, and moreover that this was clearly established at the time of Dr. Mullen's October 2014 quarantines.

2. The Quarantines Imposed by Dr. Mullen Were Unnecessary.

The District Court held in the alternative that the quarantine of Plaintiffs was "objectively reasonable."[15] JA-178, 184 (Slip Op. at 25, 31).

[15] The District Court applied the incorrect legal standard in its alternative holding. The Second Circuit has explained that, "[e]ven where the law is clearly established . . . the qualified immunity defense also protects an official if it was objectively reasonable for him at the time of the challenged action to believe his acts were lawful." *Taravella v. Town of Wolcott*, 599 F.3d 129, 134 (2d Cir. 2010). Yet, here, the District Court held that a government official is immune from liability for violating clearly established law if the official's actions are nevertheless reasonable. JA-178, 184, 192 (Slip Op. at 25, 31, 39 n.22) The District Court's formulation incorrectly suggests that even if a court has determined that a defendant knew or should have known that their conduct violated clearly established law, a court can still find conduct

This was error. Dr. Mullen knew or should have known that her decision to deprive Plaintiffs of fundamental freedoms was unnecessary, and was thus an unreasonable infringement upon Plaintiffs' clearly established rights under *Shelton* and its progeny. *See Foucha*, 504 U.S. at 80. Plaintiffs do not dispute the State's power to quarantine when scientifically justified (and implemented with procedural requirements). But where less restrictive alternatives will suffice to protect the public health, quarantine violates substantive due process requirements. The Plaintiffs sufficiently allege that the decision to quarantine them was neither tailored nor objectively reasonable, much less the least restrictive means to protect the public health.

As pled in the Complaint, scientific consensus existed well before the 2014 epidemic that Ebola cannot be transmitted until a person develops symptoms.[16] Compl. ¶ 32. Quarantine of asymptomatic individuals is

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immunized if the court finds the conduct itself reasonable. This is not the standard articulated by *Taravella*, and it is contrary to Plaintiffs' allegations that Defendant Mullen knew or should have known her conduct was unjustified. Compl. ¶¶ 93-95, 133, 146-48.

[16] Centers for Disease Control and Prevention, *Review of Human-to-Human Transmission of Ebola Virus* (Oct. 1, 2015), www.cdc.gov/vhf/ebola/transmission/human-transmission.html; Jeffrey M. Drazen, et al., *Ebola and Quarantine*, New Eng. J. Med. 371 at 2029 (Nov. 20, 2014).

therefore unjustified unless they are unwilling or unable to comply with a monitoring regimen. Thus, CDC guidance during the Ebola crisis recommended active monitoring rather than quarantine for asymptomatic, "no risk" or "low risk" travelers from West Africa, and recommended the intermediate scrutiny of "controlled movement" for asymptomatic individuals at "high risk" of contraction.[17] *Id*. ¶¶ 23-24; 35. Consistent with this approach, the CDC recommended that states impose *no* movement restrictions on asymptomatic individuals without exposure to Ebola. *Id*. ¶ 32. Even at the height of the Ebola outbreak in October 2014, the CDC's port-of-entry screening approved travelers from West Africa to exit the airport if they had no symptoms, fever, or known history of exposure to the disease. *Id*. ¶ 30.

Here, the quarantined Plaintiffs were asymptomatic for the duration of their quarantines. This includes Ryan Boyko, who was confirmed three

[17] As a counterexample to Dr. Mullen's conduct, a state court in Maine ordered active monitoring in lieu of quarantine in the case of Kaci Hickox who, unlike Plaintiffs, had been in direct contact with Ebola-infected patients in West Africa. *Mayhew v. Hickox*, No. CV-2014-36 (Me. Dist. Ct., Fort Kent Oct. 31, 2014).

times over *not* to have Ebola when Dr. Mullen ordered him quarantined.[18] *Id.* ¶¶ 53, 64, 66. Also, none of the quarantined Plaintiffs were unwilling or unable to comply with less restrictive measures. Plaintiffs Boyko and Skrip readily complied with monitoring measures, taking their own temperatures and reporting the results to Yale Health Center staff twice daily before Dr. Mullen quarantined them. *Id.* ¶ 57. Plaintiff Assunta Nimley-Phillips purchased a standard thermometer and a more expensive infrared thermometer to take the temperature of each member of the Mensah-Sieh family three times daily during the quarantine. *Id.* ¶ 131. Also, all Plaintiffs had no known exposure to Ebola.[19] *Id.* ¶ 35.

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[18] The District Court held that "Dr. Mullen acted in an objectively reasonable manner because one of the plaintiffs, Boyko, demonstrated signs of Ebola infection," and because Skrip "had been traveling with Boyko." JA-184 to 185 (Slip Op. at 31-32). However, Dr. Mullen ordered Boyko quarantined *after* the CDC confirmed that Boyko's blood tested negative for Ebola and doctors at Yale-New Haven Hospital told Boyko that he was healthy, without symptoms, and had no reason to take any kind of further precautions. Compl. ¶¶ 66-68.

[19] The District Court held quarantine of the Mensah-Sieh family was permissible because, "while the Mensah-Sieh family denied any exposure to the Ebola virus, Dr. Mullen was not required to accept their assertions as true." JA-185 (Slip Op. at 32) (citing *Shinnick*, 219 F. Supp. at 791). In addition to applying the wrong legal standards, the District Court's analysis in this respect is contrary to the allegations of the Complaint, which state that Dr. Mullen knew that the Mensah-Siehs were not a risk to public health

Against this backdrop, the Complaint pleads that Dr. Mullen possessed actual notice that quarantining the Plaintiffs was not necessary to protect the public health. In initially announcing on October 16, 2014 that *all* individuals who had traveled to affected areas in West Africa were to be quarantined at home for twenty-one days, regardless of their symptoms or risk of exposure, the Governor's Office boasted that the state's Ebola response policies were "more stringent than the guidelines thus far issued by the Federal Center for Disease Control and Prevention (CDC)." *Id.* ¶ 31. As to Plaintiffs specifically, Dr. Mullen's own spokesperson repeatedly stated, with Dr. Mullen's approval, that persons "under quarantine [we]re not sick and not a risk to public health." *Id.* ¶ 33. Dr. Mullen ordered eight Plaintiffs, including minor children, quarantined anyway.

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and lacked a good faith belief that quarantine was necessary, or even advisable, to protect the public health. Compl. at 2, ¶¶ 33, 42. On this Rule 12(b)(6) motion, those allegations must be taken as true. They also mark important differences from the facts of *Shinnick*, where testimony of multiple medical officials persuaded the court that that decision to isolate was "reached in obvious good faith" and borne of genuine, particularized concern. *Shinnick*, 219 F. Supp. at 791. Dr. Mullen has not provided any testimony in this case and has not stated anything on the record to contradict Plaintiffs' well-pled allegations that she lacked a good faith belief that quarantine was necessary to protect the public health.

On October 27, 2014, Connecticut adopted revised policies that substantially pared back the blanket quarantine policy under which Plaintiffs were confined. *Id.* ¶ 35. It is thus undisputed that, no later than October 27, 2014, Dr. Mullen understood that her initial quarantine policies were overinclusive and not necessary to protect the public health. Indeed, Plaintiffs were not candidates for quarantine under the new policy. *Id.* ¶ 35. Yet, Dr. Mullen continued to detain all quarantined Plaintiffs after the new policy went into effect, without reviewing whether Plaintiffs continued to qualify for quarantine. *Id.* ¶¶ 36, 86-88, 119, 126. There can be no argument that, at least from October 27 until their release from quarantine, the eight Plaintiffs were knowingly confined by Dr. Mullen when not the least restrictive means to protect the public health.

In sum, the Complaint pleads that quarantine of Plaintiffs was not the least restrictive means available to protect the public health, *see Shelton,* 364 U.S. at 488, and that Dr. Mullen knew it.[20] Dr. Mullen is not entitled to the

[20] In discussing Plaintiffs' Fourth Amendment claims, the District Court also concluded that Dr. Mullen's actions were "objectively reasonable." JA-192 (Slip Op. at 39, n.22). The District Court held that "A public health official quarantining individuals, returning from a region facing a deadly epidemic, for the incubation period of the illness sought to be prevented is entirely reasonable and in furtherance of their efforts to prevent the spread

protection of qualified immunity, and Plaintiffs' claims for violation of substantive due process should not have been dismissed on this motion.

B. The District Court Erred in Dismissing Plaintiffs' Procedural Due Process Claims.

Even "when government action depriving a person of life, liberty, or property survives substantive due process scrutiny," procedural due process guarantees that the action "must still be implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987). Dr. Mullen violated Plaintiffs' procedural due process rights by failing to: (1) make an individualized assessment of Plaintiffs' risk to the public health; (2) provide timely notice of the process for judicial review (and, in some cases, to provide notice altogether); and (3) initiate a judicial hearing where Plaintiffs could be represented by counsel, present evidence and argument, and cross-examine witnesses.

The District Court disposed of Plaintiffs' distinct procedural due process claims in a single-sentence footnote, citing no authority but merely

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of the deadly illness." *Id.* This conclusion is contrary to the well-pled allegations of the Complaint and improper on a Rule 12(b)(6) motion. Nor, of course, has Dr. Mullen yet provided testimony regarding what, if anything, she believed about the lawfulness of her actions.

stating: "Nor do the plaintiffs cite to any case clearly establishing an individual's right to procedural due process in a quarantine situation." JA-184 (Slip Op. at 31, n.17); Compl. ¶¶ 200-205 ("Second Claim for Relief"). That procedural due process applies to involuntary confinement, however, is well-settled. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). This is because "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Id*. at 348; *see also Hamdi*, 542 U.S. at 529 (describing *Mathews* balancing test for determining "the process due in any given instance"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (explaining that deprivation of liberty must "be preceded by notice and opportunity for hearing appropriate to the nature of the case" (internal quotation marks omitted)); *Project Release,* 722 F.2d at 974 (without the "numerous provisions in the statute for notice and hearing and

reassessment[,]" the court "would indeed be inclined to question the statute's constitutional validity").

In addition to notice, procedural due process also requires an individualized assessment of substantive propriety, and an independent hearing to assess the same. *See id.*; *O'Connor*, 422 U.S. at 580 (Burger, J., concurring) ("[T]he reasons for committing a particular individual must be established in an appropriate proceeding."). Although "the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty," *Zinermon v. Burch,* 494 U.S. 113, 127 (1990), "post-deprivation hearings are appropriate and constitutionally permissible in emergency situations." *Bailey v. Pataki*, 708 F.3d 391, 406 (2d Cir. 2013).

Consistent with these basic mandates, Connecticut law guarantees a written quarantine order that informs the recipient of the right to a hearing and how to request it; an individuated assessment of risk; and an opportunity to seek post-deprivation judicial review. Conn. Gen. Stat. § 19a-131b. However, Dr. Mullen did not comply with these established procedures, and the allegations in the Complaint demonstrate quintessential violations of the Due Process Clause. For the duration of their quarantine,

Plaintiffs Nimley-Phillips and the Mensah-Sieh family did not receive written notice of the quarantine order or any information about their right to challenge the quarantine order. Compl. ¶¶ 116-118. Ms. Skrip did not receive such information, either, until she requested it five days after she was orally informed of her quarantine. *Id.* ¶¶ 72-74. Nor did Defendants initiate any judicial review themselves, either pre-quarantine or post-quarantine. *Id.* In clear violation of *Mathews*, Dr. Mullen failed to provide these Plaintiffs with "notice of the case against [them] and opportunity to meet it." *See* 424 U.S. at 348.

In addition, the District Court erred in placing the burden on Plaintiffs to demonstrate that qualified immunity does not apply to this claim. Under the law of this Court, "[t]he defendant bears the burden of pleading and proving the affirmative defense of qualified immunity." *Blissett v. Coughlin*, 66 F.3d 531, 539 (2d Cir. 1995); *see also Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011). In the District Court briefing, Defendants sought dismissal of all federal damages claims based on qualified immunity, but Defendants made no specific argument with respect to procedural due process. Defs.' Mem. Supp. Mot. Dismiss, District Ct. ECF. No. 38-1, at 27, 29-33. In response, Plaintiffs argued that "[i]t is Defendants' burden to show that qualified

immunity is warranted, *see Jackler*, 658 F.3d at 242, and a burden cannot be carried where an argument is not even made."[21] Pls.' Mem. Opp'n Defs.' Mot. Dismiss, District Ct. ECF No. 47, at 17. In dismissing the procedural due process claim, the District Court did not address Plaintiffs' argument regarding Defendants' failure to carry their burden.

C. Dr. Mullen Violated Plaintiffs' Clearly Established Fourth Amendment Rights.

Dr. Mullen violated Plaintiffs' Fourth Amendment rights by seizing their persons without obtaining affirmative judicial approval or possessing probable cause to quarantine. *See* U.S. Const. Amend. IV; *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297 (1972) (discussing application of Fourth Amendment warrant requirement in non-criminal electronic surveillance context); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (holding that persons arrested without warrant be afforded judicial determination of probable cause within forty-eight hours of arrest).

In addition, "a seizure in the civil context must . . . be reasonable." *Milner v. Duncklee*, 460 F. Supp. 2d 360, 369 (D. Conn. 2006). The District

[21] Defendants' reply brief objected to this characterization. Reply Mem. Supp. Defs.' Mot. Dismiss, District Ct. ECF No. 50, at 7-9.

Court found Dr. Mullen's detention of Plaintiffs reasonable because they "were returning from a region that was suffering from a devastating Ebola crisis . . . ." JA-191 (Slip Op. at 38). On this theory, officials could detain hundreds of thousands of persons traveling from a disease-affected country, without regard to CDC guidance or scientific consensus, their (non)exposure to anyone with the disease, or any scientifically-grounded assessment of their (non)threat to the public health. For instance, on this reasoning, every person who attended the 2016 Olympic Games in Brazil could have been quarantined because they were "traveling from a [Zika]-affected country." JA-132 (Slip Op. at 1). This is not the law.

Indeed, Plaintiffs Mensah-Siehs had never been exposed to an individual with the disease.[22] Compl. ¶ 35. Meanwhile, Plaintiffs Boyko and Skrip had been assured by CDC representatives that any interactions with a

[22] The District Court invoked *Shinnick* for the proposition that Dr. Mullen was not required to rely on the family members' assertions about exposure. JA-191 to 192 (Slip Op. at 38-39). However, *Shinnick* involved testimony and record evidence from public health officials who the court found shared a genuine, reasonable, and particularized belief about potential disease exposure and risk. *See* 219 F. Supp. at 791. Here, as discussed above, Plaintiffs allege that Defendants had no such belief with respect to the October 2014 quarantines. No testimony was had in this matter and discovery was effectively stayed until this action was dismissed.

cameraman who later developed symptoms posed "no risk," *id.* ¶ 54, and Mr. Boyko had undergone three blood tests prior to quarantine definitively confirming that he did not have Ebola. *Id.* ¶¶ 53, 58-64, 66. And, as a public statement approved by Defendant Mullen stated, the "[p]eople under quarantine [we]re not sick and not a risk to public health." Compl. ¶¶ 31-33. Dr. Mullen's over-inclusive sweep was not reasonable under the Fourth Amendment.

D. The Court Should Address the Constitutional Questions Presented.

Plaintiffs respectfully submit that, under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), this Court should address the merits of the constitutional issues even if the Court were to conclude that Dr. Mullen's conduct is shielded by qualified immunity.

As the Supreme Court has noted, addressing the merits, even when finding conduct immunized, "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* That is precisely the scenario here. Quarantines are rarely imposed and even less frequently litigated, and the result is under-

developed and outdated quarantine-specific case law—particularly in light of the substantial scientific and constitutional developments in the century since *Jacobson*. In such instances, courts properly exercise their discretion to address the constitutional issue, even where they subsequently grant qualified immunity. *See, e.g.*, *Jones v. Chandrasuwan*, 820 F.3d 684, 691-96 (4th Cir. 2016); *Morgan v. Swanson*, 569 F.3d 359, 371-88 (5th Cir. 2011); *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), *vacated in part on other grounds*, 563 U.S. 692 (2011).

In declining to review the merits, the District Court denied public health officials clarification of their constitutional duties, placing standards of official conduct "in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Future public health crises are inevitable, and public officials may again be tempted to resort to the *most* rather than least restrictive means of responding. It is difficult, however, to imagine that persons confined, stigmatized, and traumatized by their detention will have the wherewithal to launch and fully litigate federal civil rights litigation, including trial and appeal, while quarantined for 21 days. The result, apart from contests about mootness over any suits that are filed in that window of time, will likely be continuing uncertainty. In addition to increasing the likelihood of

unjustified quarantine, such uncertainty may discourage doctors and aid workers from traveling to the source of epidemics, ultimately harming efforts to protect the public health.

Further, even if it is possible to fully litigate core legal questions during a period of quarantine, deciding those questions now avoids the need to resolve them in the first instance during an emergency. Relative to the environment of fear and public panic that exists in midst of a public health crisis, the present case offers an opportunity for orderly adjudication and judicial deliberation regarding how due process and Fourth Amendment protections apply in the context of modern quarantine. As Justice Breyer recently explained, "[a] damages action . . . is typically brought after the emergency is over, after emotions have cooled, and at a time when more factual information is available. In such circumstances, courts have more time to exercise such judicial virtues as calm reflection and dispassionate application of the law to the facts." *Ziglar v. Abbasi*, ___ S. Ct. ____, 2017 WL 2621317, at *44 (June 19, 2017) (Breyer, J., dissenting). Adjudicating Plaintiffs' claims on the merits, as permitted under *Pearson v. Callahan*, 555 U.S. at 236, would allow those same judicial virtues to flourish.

II. The District Court Erred in Dismissing Plaintiffs' Prospective Claims for Lack of Standing.

A plaintiff has standing when he or she has (1) "suffered an 'injury in fact' that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical;" (2) the injury is "fairly traceable" to the defendant's challenged conduct; and (3) it is likely that the injury will be redressed by a favorable decision by the courts. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Importantly, to assess standing, courts "must look to the facts and circumstances *as they existed at the time [the] suit was initiated*." *Etuk v. Slattery*, 936 F.3d 1433, 1440-41 (2d Cir. 1991) (emphasis added); *see also Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (describing standing as an analysis of a litigant's "personal stake at the outset of the litigation").

Plaintiffs meet these criteria, and the District Court's ruling to the contrary is in error. First, the Complaint shows that, at the time of filing, Plaintiffs were facing a substantial risk of future injury as a result of the policies and practices in place at that time. Second, the Complaint sufficiently alleges present harm resulting from Plaintiffs' reasonable anticipation of future application of the quarantine policy. And third,

Plaintiffs plead that they suffered present adverse effects of the past quarantines and the policy in place at the time of filing.[23]

A. Plaintiffs' Complaint Pleads a Substantial Risk of Harm.

1. Several Plaintiffs Faced an Imminent Threat of Unlawful Quarantine When the Complaint Was Filed.

In dismissing Plaintiffs' prospective claims as conjectural, JA-172 to 173 (Slip Op. at 19-20), the District Court failed to consider the facts as they existed *at the time of the filing of the Complaint*. At that time, three of the Plaintiffs—including Ms. Skrip, who had been previously quarantined under the Revised DPH Plan that was still in effect at that time—were in Liberia and scheduled to return to Connecticut. These individuals faced an imminent threat that the quarantine policies and practices would be unconstitutionally applied to them.

These individuals' well-founded fear of being unlawfully quarantined upon their return constitutes a sufficiently concrete injury for standing purposes, because "[a]n allegation of future injury may suffice if . . . *there is*

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[23] The District Court assumed, without deciding, that LCAC has organizational standing. JA-175 (Slip Op. at 22, n.13). Organizational standing exists for the reasons identified by Plaintiffs in their opposition to the motion to dismiss in the court below. *See* Pls.' Mem. Opp'n Defs.' Mot. Dismiss, at 30-31.

a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (emphasis added) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)); *see also Clapper*, 133 S. Ct. at 1150 n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about . . . [W]e have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.").

Based on Defendants' past practices, Plaintiffs had strong reasons to believe that the October 2014 revisions to the DPH Plan would not prevent unlawful quarantines. After all, these revisions had not prevented the continued quarantine of eight asymptomatic individuals, including Ms. Skrip, who at the time the Complaint was filed was planning her return to Connecticut from Liberia. *See Schroedel v. N.Y. Univ. Med. Ctr.*, 885 F. Supp. 594, 598 (S.D.N.Y. 1995) ("[P]ast wrongs consist of evidence bearing on whether there is a real and immediate threat of repeated injury . . . .").

The District Court observed that "[i]f Dr. O was not placed in quarantine after her return from performing medical services in areas severely impacted by Ebola, it is not likely that the other plaintiffs would

be." JA-174 (Slip Op. at 21). But far from inspiring confidence, Defendants' irrational execution of the revised policy—arbitrarily continuing the quarantines of no- and low-risk individuals even after the post-election policy revisions and continuing to defend the legality of their actions thereafter—exemplifies that their quarantining decisions are based on expedience, rather than scientific and public health criteria. This arbitrariness is exactly why Plaintiffs are at a substantial risk of being subjected to unlawful quarantines.

In sum, at the time the Complaint was filed, the three Plaintiffs who were in Liberia faced a substantial risk that they would be harmed in the very near future by Defendants' execution of the DPH Plan. That satisfies the standing requirements as to these Plaintiffs.

2. The Complaint's Predictions That Ebola Outbreaks Would Re-Occur Are Not Conjectural.

Additionally, *all* Plaintiffs faced harm in case of future outbreaks of Ebola, which the Complaint alleged was likely. Compl. ¶ 38 (citing "expert public health opinion" noting that "Liberia, Sierra Leone, and Guinea remain at high risk of future Ebola outbreaks and . . . could potentially face another large outbreak"). The District Court did not properly credit these allegations

despite its obligation to "assume [the] veracity" of "well-pleaded factual allegations" at the motion to dismiss stage. *Iqbal*, 556 U.S. at 679. Indeed, the WHO recently acknowledged an Ebola outbreak in the Congo, showing that public health experts' predictions regarding outbreaks mentioned in the Complaint are far from hypothetical. *See* CDC, *DRC Outbreak Summary*.

These allegations are sufficient to establish standing. Plaintiffs need not plead that any anticipated Ebola outbreaks will have "the size of the previous epidemic" and "warrant[] a similar response[.]" JA-174 (Slip Op. at 21). Dr. O in particular intends to support prevention and containment efforts and stands ready to travel to West Africa as soon as an Ebola outbreak of any size occurs. Compl. ¶¶ 165-166. Ms. Skrip continued her public health work in Liberia, as demonstrated by her return trip to that country. *Id.* ¶ 9. While she did not work in a clinical capacity, that circumstance did not prevent her from being quarantined before. *Id.* ¶¶ 47-49, 54.

In light of the past quarantines of individuals who were not only asymptomatic but were at a low risk of exposure, Plaintiffs could reasonably anticipate that Defendants will not hesitate to impose unlawful quarantines again, even in the event of a much smaller Ebola outbreak.

B. Plaintiffs Suffered a Present Harm Due to the Substantial Likelihood They Would Be Subjected to Illegal Quarantines.

The substantial likelihood of future quarantines, based on the policy and practice in place at the time the Complaint was filed—including the illegal application of the policy against the quarantined Plaintiffs—also inflicted *present* harm on the Plaintiffs. Specifically, the quarantine policy restricted Plaintiffs' freedom by greatly increasing the potential monetary, time, and personal costs of traveling to Liberia—a country to which several of them have deep familial, personal, professional, and religious connections—and other countries in which an Ebola outbreak was, and continues to be, likely to materialize. *See, e.g.*, Compl. ¶ 153.

By restricting Plaintiffs' freedom of movement, Defendants' policies inflicted an actionable present injury. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010) (farmers had standing where defendants' conduct would cause them to incur costs of crop testing to avoid harm from that conduct); *Laidlaw*, 528 U.S. at 184-85 (finding standing where defendant's conduct caused plaintiffs to reasonably avoid a river they had used for recreation); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 229 (D.N.J. 2003) (noting that "today's deterrence from visiting a place of public

accommodation known to be out-of-compliance with the ADA can constitute an actual and present injury as surely as tomorrow's visit to the same location can constitute a threatened and imminent one").

The concreteness of the quarantine threat in this action distinguishes Plaintiffs' claim for prospective relief from the one rejected by the Supreme Court in *Clapper*. While the *Clapper* plaintiffs' assertion that their communications would be targeted for surveillance was found to be based on speculation, *see* 133 S. Ct. at 1147-50, Plaintiffs here faced a high likelihood of imminent injury. And whereas the *Clapper* plaintiffs sought to assert a claim based on the anticipated application of a new statute, *see id.* at 1146, Plaintiffs' prospective claim here is based on an executive policy that was firmly in place at the time of filing and had already been applied against several of them.

Plaintiffs have standing based on the present harm caused by the substantial likelihood of being quarantined after a visit to Liberia or other countries affected by Ebola.

C. Plaintiffs Experienced Continuing, Present Adverse Effects of Defendants' Quarantine Policies.

Finally, standing to pursue prospective relief exists based on the "continuing, present adverse effects" of Defendants' practices and policies. *See, e.g.*, *Clark*, 213 F.R.D. at 229 (noting that a "showing of imminence" of future injury is not required if a plaintiff "seeks injunctive relief to remedy today's 'actual harm,' or 'continuing, present effects' from his past exposure to Defendants' allegedly illegal conduct" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 565 n.2 (1992))); *VanBrocklen v. Gov't Employees Ins. Co.*, No. 08-CV-254, 2009 WL 414053, at *3 (N.D.N.Y. Feb. 18, 2009) (collecting cases and noting that standing to seek prospective relief based on "continuing, present adverse effects" is appropriate "where the plaintiff suffers continuing injury from past wrongdoing."); *cf. O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (cautioning that "[p]ast exposure to illegal conduct does not *in itself* show a present case or controversy regarding injunctive relief . . . *if unaccompanied by any continuing, present adverse effects*." (emphases added)).

At the time the Complaint was filed, the scientifically unjustified quarantines, coupled with Defendants' refusal to disavow the policies on

which those quarantines were based, created continuing adverse effects for the Plaintiffs who had been quarantined. The experience had life-altering consequences for Mr. Boyko, who eventually dropped out of his Ph.D. program at Yale. Compl. ¶ 91.

The quarantines also complicated the integration of members of the Mensah-Sieh family into the United States. *Id.* ¶¶ 134-145. LCAC similarly received reports regarding stigma from members of the Liberian immigrant community who had not personally been quarantined. *Id.* ¶ 171; *see Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048-49 (9th Cir. 2010) (standing existed where "Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the City's hostility to their church and their religion"). Humanitarian and health workers who were instrumental to containing the Ebola crisis similarly suffered from stigma as a result of the policies and practices that heightened hysteria surrounding the Ebola outbreak. Compl. ¶ 2.

Prospective relief would redress some of these harms by mitigating the stigmatizing effect of past quarantines. Specifically, a court ruling that quarantining asymptomatic individuals was unconstitutional would reduce

discrimination and stigma through better education of the public. Plaintiffs therefore have standing due to the "present adverse effects" they suffered as a result of the past quarantines and continuing quarantine policies.

III. Plaintiffs' Prospective Claims Have Not Been Rendered Moot by Subsequent Developments.

Whereas the standing requirements demand a "personal stake" at the outset of a case, "the mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal." *Cook*, 992 F.2d at 19 (citations omitted). Dismissal for mootness "would be justified only if it were *absolutely clear* that the litigant no longer had *any need* of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (emphases added); *see also N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 91 (2d Cir. 1998) ("The burden to demonstrate mootness 'is a heavy one.'" (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953))).

The District Court dismissed Plaintiffs' prospective claims for lack of standing, and did not reach the question of whether these claims have been mooted as a result of developments that took place after the Complaint was filed. For the reasons submitted in the Court below, *see* Pls.' Mem. Opp'n

Defs.' Mot. Dismiss at 32-33, Plaintiffs' claims are not moot. Plaintiffs have a current, live interest in a prospective injunction that will mitigate the harms suffered due to Defendants' past conduct and refusal to disavow their policies and practices. They also have an interest in ending an official policy that leaves the imposition of unlawful quarantines highly likely.

Alternatively, the prospective claim is justiciable under a mootness exception. *See id.* at 33-36. First, Governor Malloy's post-Complaint termination of the 2014 Public Health Emergency, JA-111 to 112 (Defs.' Mem. Supp. Mot. Dismiss, Ex. 2), triggers the voluntary cessation doctrine, under which "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Laidlaw*, 528 U.S. at 189 (internal quotation marks omitted) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

Second, the prospective relief claims come within the exception for challenged actions that are "capable of repetition, yet evading review." This doctrine revives mooted claims where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a *reasonable expectation* that the same complaining party [will] be subjected to the same action again." *Honig v. Doe*, 484 U.S. 305, 333 (1988)

(emphasis added) (internal quotation marks omitted) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*)); *see also Van Wie v. Pataki*, 267 F.3d 109, 113-14 (2d Cir. 2001). Here, durational barriers would prevent full litigation of Plaintiffs' claims in either state or federal court during even the maximum period of quarantine, which is twenty days absent renewal of the quarantine order. *See* Conn. Gen. Stat. § 19a-131b(c). Moreover, Plaintiffs have familial, professional, and religious ties to Liberia, a country that remains at risk of an Ebola outbreak, meaning there is a reasonable expectation that Plaintiffs will be subject to the same unlawful quarantines again.

For these reasons, Plaintiffs' prospective relief claims should not be dismissed on mootness grounds.

IV. The District Court's Denial of Class Certification Should Be Reversed.

The District Court ruled that Plaintiffs' "proposed class is too speculative to be sufficiently numerous" under Fed. R. Civ. P. 23(a)(1). JA-152 (Slip Op. at 21). In so holding, the District Court ignored the clearly established risk that Defendants will subject the class members to unlawful

and scientifically unjustified quarantine as well as the harms *presently* suffered by the class members.

Plaintiffs have established that Ebola outbreaks continue to threaten a multitude of countries around the world. *See* Compl. ¶ 38; Mem. Supp. Pls.' Mot. Certify Class & Appoint Class Counsel, District Ct. ECF No. 9-1, at 4; JA-84, 86-89, 91-98 (Wishnie Decl. ¶¶ 11-12 & Exs. A, B). In fact, a number of outbreaks have occurred since the filing of this lawsuit, including one at the time of the filing of this appeal. *See* CDC, *DRC Outbreak Summary*. Plaintiffs have also demonstrated the inconsistent and politically-motivated manner in which Defendants have implemented their quarantine policies and practices. *See* JA-40 to 42, 50-51 (Compl. ¶¶ 100, 111-12, 162-64) (asymptomatic travelers never exposed to Ebola, such as the Mensah-Sieh family, were quarantined in anticipation of a contested election, while travelers directly exposed to Ebola, such as Dr. O, were required only to self-monitor following the election).

Against this factual backdrop, a large number of Connecticut residents are at real and immediate risk of being subject to unlawful and scientifically unjustified quarantine. *See* JA-106 (Freeman Decl. ¶¶ 2, 4) (LCAC membership includes more than 230 Liberian immigrants with ties to West

Africa, of whom approximately twenty, or nearly ten percent, travel to Liberia annually); *id.* ¶ 5 (there are approximately 1,000 Liberian residents of Connecticut, who travel to Liberia at approximately the same annual rate as LCAC members).

Additionally, the District Court failed to consider the existence of class members who are *presently* harmed by Defendants' policies and practices, in the form of stigma, a reasonable fear of future harm, or both. *See* Parts II.B.–C., *supra*; JA-84, 99-104 (Wishnie Decl. ¶ 13 & Ex. C) (U.S. census data show that there are 8,351 individuals residing in Connecticut who were born in West Africa, including 916 individuals born in Liberia and 203 individuals born in Sierra Leone); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (upholding standing where plaintiff had a "reasonable fear" of civil litigation under the challenged statute, despite State's assurance that it had "no intention of suing [plaintiff] for its activities").

The District Court's denial of class certification was premised on errors of fact and should, at a minimum, be vacated.[24]

[24] This Court may also find that the Plaintiff class should have been certified, as the class meets the other requirements of Rule 23. *See Marisol A. v. Giuliani*, 126 F.3d 372, 375-76 (2d Cir. 1997) ("Before certifying a class, a

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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district court must determine that the party seeking certification has satisfied the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. . . . Furthermore, the party seeking certification must qualify under one of three criteria set forth in Rule 23(b).").

* Application for attorney admission pending.
** Motion for law student appearance pending.

[25] This brief does not purport to state the views of Yale Law School, if any.

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This brief complies with the type-volume limitation of Fed. R. App. 32(e) and Local Rule 32.1(4)(a) because this brief contains 13,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the 2013 version of Microsoft Word in 14-point Book Antiqua font.

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