UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

P.G.,

Plaintiff,

v.

JEFFERSON COUNTY, NEW YORK; COLLEEN M. O'NEILL, as the Sheriff of Jefferson County, New York; BRIAN R. MCDERMOTT, as the Undersheriff of Jefferson County, New York; and MARK WILSON, as the Facility Administrator of the Jefferson County Correctional Facility,

Defendants.

Case No. 5:21-cv-388 (DNH/ML)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Dated: May 27, 2021
New York, New York

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PRELIMINARY STATEMENT

The medical evidence before the Court in this case is clear and unrebutted: P.G. faces immediate, excruciating, and life-threatening harm when Defendants end his methadone treatment at the Jefferson County Jail.

Resisting that unassailable conclusion, Defendants deploy a series of flawed arguments aimed at shirking their obligation to afford P.G. access to life-sustaining treatment for his disability: Continuing P.G.'s methadone treatment, they say, is not legal; not necessary; and not the County's problem.

Each of these remarkable claims is false, of course. But buried in the morass of Defendants' mistruths in this case is one deeper truth about their practice at the jail: As their vigorous opposition to relief for P.G. lays bare, given the chance, Defendants will deny him access to the care he desperately needs.

As P.G.'s life hangs in the balance, Defendants remain unmoved. P.G. has met his burden for the preliminary injunctive relief he seeks, and the Court should grant this motion.

ARGUMENT

I. P.G. Will Succeed on the Merits of His Due Process Claim.

A. The Court Should Reject Defendants' Invitation to Reassign Constitutional Responsibility for P.G.'s Medical Care.

Courts long have recognized that the Constitution obliges the government to meet the serious medical needs of people in pretrial detention.[1] *See Youngberg v. Romeo*, 457 U.S. 307,

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[1] As P.G. argued in his opening brief, the Due Process Clause of the Fourteenth Amendment applies here. Pls.' Br. at 17, n.9. Defendants implicitly concede this point. *See* Opp. at 6 (applying to Plaintiff the right of pretrial detainees to be free from punishment, and citing to *Bell v. Wolfish*, 441 U.S. 520 (1979)). In any case, the Eighth Amendment also guarantees the right to medical care. *See Estelle v. Gamble*, 429 U.S. 97 (1976).

321–22 (1989); *Charles v. Orange Cnty.*, 925 F.3d 73, 85 (2d Cir. 2019). That obligation inheres in the due process principle that the government assumes an affirmative duty to care for those it confines. *See Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

Yet Defendants disclaim any obligation to continue P.G.'s life-sustaining treatment, and instead assert the burden lies with Credo—or even P.G. himself—to identify the means for ensuring P.G.'s serious medical needs are met at the Jail. *See* Opp. at 2; *id.* at 6. No legal authority supports this remarkable assertion: Due process obliges Defendants alone to ensure P.G.'s serious medical needs are met while detained. *See Charles*, 925 F.3d at 85. The Court should decline Defendants' invitation to reassign their constitutional responsibility for P.G.'s medical care.

B. Defendants' Claim that P.G. Does Not Require Methadone Treatment Has No Basis in Fact or Law.

Despite maintaining that a jail medical exam must precede their decision to continue P.G.'s treatment, *see* Opp. at 8–9,[2] Defendants implicitly concede their decision is already made: In their opposition papers, Defendants repeatedly assert their right to end P.G.'s treatment, vigorously challenging both the efficacy and necessity of methadone to treat P.G.'s OUD. *See id.* at 6–7. But the Court should reject these assertions, which are unsupported by any evidence and run counter to the only expert testimony before the Court.[3] *See* Supplemental Declaration of Richard N. Rosenthal ("Rosenthal Supp. Decl.") ¶ 1.

[2] Defendants repeatedly claim P.G. has demanded they not conduct a medical exam. Opp. at 2, 8–9. But as Defendants' own filings reflect, that claim is a fiction. *See* Dkt. 29–8 at 7 (noting that Plaintiff "do[es] not object to a medical examination," and requesting that Defendants disclose any proposed bases for discontinuing treatment other than medical contraindications identified by the American Society of Addiction Medicine).

[3] Defendants have declined to support their argument with any medical testimony.

First, Defendants argue methadone is unnecessary. *See* Opp. at 6–7. Based on P.G.'s current subtherapeutic dosage,[4] they speculate that unspecified "other medications" will suffice to alleviate P.G.'s withdrawal symptoms when they end his treatment. *Id.* at 7. But Defendants' guesswork is wrong: P.G.'s current dosage does not suggest forced withdrawal is safe. *See* Rosenthal Supp. Decl. ¶ 4; Declaration of Richard N. Rosenthal ("Rosenthal Decl.") ¶ 57. And without methadone P.G. "remain[s] at high risk of relapse and overdose," regardless of any attempt to manage his withdrawal with other medications. Rosenthal Supp. Decl. ¶ 6; *see also id.* ¶ 7 ("Fundamentally, no measures aimed at managing P.G.'s withdrawal would adequately mitigate the risks of relapse, overdose, and death that results from interrupting his methadone treatment.").

Second, Defendants suggest that methadone is ineffective for P.G. based on his prior relapses while receiving treatment. Opp. at 7. But this bald assertion, too, disregards the expert evidence. *See* Rosenthal Supp. Decl. ¶ 8 ("P.G.'s use of illicit drugs on a few isolated occasions while . . . receiving methadone treatment does not indicate that continued treatment . . . is unnecessary."). Notwithstanding numerous predictable bumps in P.G.'s journey towards recovery, the only competent record evidence before this Court is that methadone is the only effective means to treat P.G.'s OUD. *See id.* ¶ 2; Declaration of Daniel Pisaniello ("Pisaniello Decl.") ¶ 7. The Court should credit the testimony of those clinicians over Defendants' say-so.

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[4] Defendants characterize P.G.'s reduced dosage as "voluntary," but that characterization ignores the circumstances in which their policy has placed him. P.G. is "terrified"—with reason—that Defendants will again force him off methadone treatment, subjecting him to potentially weeks of excruciating withdrawal. Declaration of P.G. ("P.G. Decl.") ¶ 8; *see also id.* ¶ 9 (describing experience of withdrawal). That he—like many others, *see* Rosenthal Decl. ¶ 55—feels compelled to receive a subtherapeutic dosage, at great pain on a daily basis, hardly renders that decision "voluntary."

Consistent with broad scientific consensus on the importance of MOUD in treating opioid addiction, a growing array of courts, including in this circuit, recognize that denying methadone for OUD in jails and prisons can violate the Constitution and ADA. *See* Pls.' Br. at 18, 21 (collecting constitutional cases); *id.* at 15 (collecting ADA cases).

Ignoring this groundswell in modern caselaw, Defendants rely on a handful of cherry-picked cases to argue P.G. has no constitutional right to methadone treatment while at the jail.[5] But none of those cases is instructive. *Norris v. Frame*, 585 F.2d 1183 (3d Cir. 1978), and *Holly v. Rapone*, 476 F. Supp. 226 (E.D. Pa. 1979), two out-of-circuit decisions from the 1970s, predate important advances in scientific understanding of OUD by decades, *see, e.g.*, Rosenthal Decl., Exs. 7, 8, 20, 22. Moreover, despite finding no constitutional right to *begin* methadone treatment, the *Norris* court recognized refusing to *continue* methadone treatment could unconstitutionally "operate[] to deprive [a plaintiff in pre-trial detention] of a liberty interest without due process of law." 585 F.2d at 1185. In *Boyett v. Cnty. of Washington*, the court's holding in favor of a Utah county jail depended on its finding of "no evidence negating the

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[5] Because Defendants contest P.G.'s right to methadone treatment only on constitutional grounds, they have waived their opposition to his ADA claims. *See* Opp. 6–7; *Jackson v. Fed. Exp.*, 766 F.3d 189, 198 (2d Cir. 2014) ("[A] court may . . . infer from a party's partial opposition that relevant claims or defenses that are not defended have been abandoned.").

And even if the Court construes Defendants' constitutional argument as responsive to P.G.'s ADA claims, that argument fails to establish a non-pretextual justification for denying treatment to P.G. *See Dimperio v. New York State Dep't of Corr. & Cmty. Supervision*, No. 9:13-CV-1010, 2015 WL 1383831, at *5 (N.D.N.Y. Mar. 25, 2015) (Hurd, J.) (setting forth burden-shifting framework for Title II claims), *aff'd*, 653 F. App'x 52 (2d Cir. 2016). Defendants' contention that maintaining P.G.'s treatment would require them to violate the law has no basis in the regulations cited and contradicts their practice of providing that treatment to pregnant people. *See infra* Part II; *Hart v. City of Johnstown*, No. 6:16-CV-619, 2019 WL 1385612, at *14 (N.D.N.Y. Mar. 27, 2019) ("Pretext may be shown by . . . 'inconsistencies[] or contradictions'" in proffered rationale (quoting *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013))).

appropriateness of prescribing substitute medications." No. 2:04-CV-1173, 2006 WL 3422104, at *27 (D. Utah Nov. 28, 2006), *aff'd*, 282 F. App'x 667 (10th Cir. 2008). No such finding is appropriate here. *See* Rosenthal Supp. Decl. ¶¶ 6–9; Pisaniello Decl. ¶¶ 6–11. And in *McNamara v. Lantz*, a magistrate judge predicated her recommendation on the erroneous finding that methadone withdrawal is "much less severe" than heroin withdrawal. No. 3:06-CV-93(PCD), 2008 WL 4277790, at *3 (D. Conn. Sept. 16, 2008). In fact, the opposite is true. *See* Rosenthal Supp. Dec. ¶ 2 ("[T]he effects of withdrawal from methadone are frequently more severe than the effects of withdrawal from heroin[.]").

II. Affording P.G. Continued Access to Methadone Treatment Is Consistent with Applicable Regulations.

Defendants' contention that P.G.'s requested relief is illegal rests on a faulty premise: that P.G. is asking the jail to "dispense" his methadone on Sundays and holidays, when Credo is closed. But P.G. seeks only Defendants' permission to *self-administer* on those days, which the governing regulations plainly allow, and Defendants' other objections are similarly misplaced.

Ensuring P.G. receives methadone on Sundays does not require that Defendants "dispense" methadone, as Defendants assert. Opp. at 4. To "dispense" means to deliver to the "ultimate user." 42 C.F.R. § 8.02. Here, Credo would be dispensing the take home dose to P.G. for self-administration on Sundays. The regulations explicitly contemplate that Credo can do so. *See id.* § 8.12(i) (an OTP may "dispense" methadone to "[any patient" for unsupervised use on Sundays and holidays); N.Y. Off. Addiction Servs. & Supports Reg. 822.16(c)(2) (same).[6] P.G. asks only that Defendants permit him to self-administer his take home dose. State and federal

[6] Defendants point to regulations that have no bearing on the issue at hand. For instance, 42 C.F.R. § 8.12(i)(2) pertains only to dispensing methadone "beyond" Sundays and holidays, meaning for days other than when the clinic is closed for business.

regulators agree that nothing in the relevant regulations forbids Defendants from doing so. Dkt. 29-3 (New York Office of Addiction Supports and Services (OASAS) confirming that a jail may observe self-administration of take home methadone and that they "strongly support" MAT for incarcerated people); Dkt. 29-1 at 59 (SAMHSA, the federal regulator of OTPs, has explicitly contemplated doses of methadone being picked up from an OTP and consumed inside the jail). Indeed, other jails that are not OTPs have provided doses within their facilities. *See, e.g.*, *Finnigan v. Mendrick*, No. 21-cv-341 (N.D. Ill. Feb. 24, 2021) (minute order) (noting that jail had no "weekend concerns" regarding treatment), Dkt. 69.

Belying Defendants' position in this litigation that providing methadone on Sundays inside the facility is illegal, Opp. at 3–4, they have already allowed dosing of methadone on Sundays for pregnant people. Declaration of Caryn White ("White Decl.") ¶¶ 5, 8. Just as Defendants did not need to become a federally certified OTP to provide this service for pregnant people, they need not do so now. Defendants' reluctance to store methadone in the jail for one day does not absolve them of their duty to provide healthcare in a constitutionally adequate and non-discriminatory manner. *See Charles v. Orange Cnty.*, 925 F.3d 73, 85 (2d Cir. 2019); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272, 279 (2d Cir. 2003). And while Defendants try to shift blame to Credo for not being open on Sunday, it is Defendants, not Credo, that have the constitutional duty to provide adequate health care to P.G. *See supra* Part I.

Nor does Defendants' purported "serious safety concern" discharge them of the responsibility to provide necessary medical care. *Smith v. Aroostook Cnty.*, 922 F.3d 41, 41 (1st Cir. 2019) (finding that a county jail had a variety of available options to administer methadone); Opp. at 8. P.G. has described in detail the policies and procedures that other correctional facilities have put in place to safely administer methadone. *See* Declaration of Edmond Hayes ¶¶

9–25. Notably, the jail has failed to explain why it could not use the *exact* procedures it uses to administer methadone to pregnant people with OUD with P.G. White Decl. ¶ 5.

Defendants next argue that they must be able to complete a medical evaluation before they can "dispense" methadone, Opp. at 4, but this is also no bar to relief. First, P.G. does not object to a medical evaluation, as his counsel stated explicitly in the very email exchange that Defendants attach to their response. Dkt. 27-1 at 7. P.G. merely proposed an evaluation grounded in accepted medical criteria. *Id.* Second, Defendants' citation to 42 C.F.R. § 8.12(f)(2) is inapposite because that regulation requires OTPs to perform a physical exam "before admission to the OTP." The jail is not an OTP. Here, P.G. has already been admitted to Credo, so there is no need for an additional physical exam. Third, no New York state law or regulation requires a physical exam for a jail to observe self-administration of a take home dose of methadone. Contrary to Defendants' contention, Section 32.05(b) of the Mental Hygiene Law prohibits only the *prescription* of methadone by anyone other than an OTP, which P.G. is not asking the jail to do. Dkt. 29 at ¶ 15.

Finally, Defendants are not being asked to start a guest dosing program. Opp. at 8. A guest dosing program is only necessary when methadone is being dispensed from an OTP that is not the patient's home clinic. American Association for the Treatment of Opioid Dependence, *AATOD Guidelines for Guest Medication*, http://www.aatod.org/advocacy/policy-statements/aatod-guidelines-for-guest-medication (last visited May 26, 2021). Here, the methadone would be dispensed by Credo, which is P.G.'s home clinic. Pisanello Decl. at ¶ 4.

III. P.G.'s Claims Are Ripe.

P.G.'s claims are ripe because there is a substantial risk Defendants will deny him methadone treatment, and because he *already* has been harmed by their ban. *See Trump v. New York*, 141 S. Ct. 530, 539 (2020) (plaintiff "need not demonstrate [the injury] is literally certain"

because a "substantial risk" is sufficient); *accord MPM Silicones, LLC v. Union Carbide Corp.*, 966 F.3d 200, 233 n.47 (2d Cir. 2020). Defendants' arguments to the contrary are unpersuasive.

The risk that Defendants will detain P.G. and deny him access to methadone is substantial. P.G. has an outstanding arrest warrant for a probation violation related to new charges, for which his probation officer told him he would be put in jail. Declaration of P.G. ("P.G. Decl.") ¶ 25.[7] In Jefferson County, defendants are nearly always detained pending adjudication of a probation violation, and violations related to new charges require multiple months for preparation. Declaration of David Antonucci ¶¶ 2–3. Thus, P.G. will almost certainly spend multiple months detained pending adjudication, even if he is ultimately acquitted. *Id.* ¶ 4.

And while Defendants claim P.G.'s detention is uncertain, their conduct bespeaks the opposite. Defense counsel have inquired whether P.G. intends to self-surrender—confirming that he is subject to arrest. *See* Dkt. 16-3. By Defendants' own account, they have taken multiple steps to determine how to provide methadone to P.G. at the jail. Paulsen Aff. ¶¶ 6–7, 17–21. Other than a passing reference in their opposition brief, Defendants have at no point suggested (much less submitted evidence indicating) that P.G. might not be arrested or detained.

The record also clearly establishes P.G. will be removed from treatment. Defendants assert that treatment is unnecessary and impossible to provide, Opp at 3–5, 7, leaving little doubt it will be denied. The record supports this conclusion. In 2019 multiple jail officials told P.G. the jail does not provide methadone. P.G. Decl. ¶ 23. He was then forcibly withdrawn. *Id.* And Credo, the jail's only methadone provider, *see* Answer ¶ 116, confirms the jail does not provide

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[7] Contrary to Defendants' insinuation, *see* Opp. 3, P.G. need not specifically identify his probation officer, *see Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 537–38 (2d Cir. 1992) (party need not identify opposing party's agent for purpose of vicarious admission)—particularly given that the County undoubtedly maintains information on the officer's identity.

methadone to non-pregnant people. White Decl. ¶ 6. Defendants offer no evidence rebutting the existence of a methadone ban—only their counsel's say-so. Opp. at 1.

P.G.'s claims are also ripe because he is currently harmed by Defendants' ban. P.G. is receiving a subtherapeutic dosage of methadone in anticipation of being subjected to it, resulting in daily cravings and a heightened risk of relapse. *See* P.G. Decl. ¶ 26; Pisaniello Decl. ¶¶ 10–11; Rosenthal Decl. ¶¶ 54–56; Rosenthal Supp. Decl. ¶¶ 4–5; *cf., e.g.*, *Mead v. Holder*, 766 F. Supp. 2d 16, 26 (D.D.C. 2011) (plaintiffs had standing where they alleged they were "setting aside money to pay the anticipated penalties" resulting from challenged conduct).

Defendants suggest the Court delay consideration of P.G.'s claims until he is detained and they perform a physical exam, but an exam is unnecessary to determine if treatment is appropriate. Rosenthal Supp. Decl. ¶¶ 9–10; *see also Pesce v. Coppinger*, 355 F. Supp. 3d 35, 44 (D. Mass. 2018) (claims ripe where plaintiff "has a prescription for methadone, his physician recommends continued treatment[,] and Defendants will not provide [treatment]"). And whereas Plaintiff's treating physician and expert are OUD specialists, Defendants refuse to confirm even that the exam would be grounded in addiction medicine. Ex. A to Bennett Aff. at 6, 1–5.

The record also makes clear that Defendants' practice of categorically denying methadone to non-pregnant people is the product of policy not medical decisions, *see supra* at 8, meaning "[n]o medical assessment is . . . necessary for the Defendants to change their position." *Smith v. Aroostook Cnty.*, 376 F. Supp. 3d 146, 157 (D. Me. 2019); *see also id.* (claims ripe where jail "stopped short of telling the Plaintiff [it] will provide her with [MOUD]"). And unlike in *Finnigan v. Mendrick*, No. 21-cv-341, 2021 WL 736228 (N.D. Ill. Feb. 24, 2021), Defendants have made no assurances they will provide continuing treatment absent a recognized medical contraindication, and they have effectively "ruled out the possibility of prescribing [him]

methadone." *Id.* at *6; *see also Finnigan*, Dkt. 68 at 14:12–18 (ensuring treatment if determined medically safe by qualified physicians). In addition, within hours of being removed from treatment, P.G. will experience withdrawal and be at significant risk of relapse. Delaying consideration until an emergency has arisen thus would entail only greater time pressure and greater risks to P.G. *See Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (plaintiff need not "await the consummation of a threatened injury" or "tragic event" to obtain injunctive relief).

CONCLUSION

For all these reasons, the Court should grant Plaintiff's motion for a preliminary injunction.

Dated: May 27, 2021
New York, New York

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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