SJC-13125

STEPHEN FOSTER[1] & others[2] vs. COMMISSIONER OF CORRECTION & others.[3]

Suffolk. September 10, 2021. - November 18, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Commissioner of Correction. Commissioner of Public Safety. Imprisonment, Safe environment. Constitutional Law, Imprisonment, Cruel and unusual punishment.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on April 17, 2020.

Following review by this court, 484 Mass. 698 and 484 Mass. 1059 (2020), and transfer to the Superior Court Department, a motion for a preliminary injunction was heard by Robert L. Ullmann, J.

The Supreme Judicial Court granted an application for direct appellate review.

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[1] On behalf of himself and all others similarly situated.

[2] Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Palladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans, and Hendrick Davis, on behalf of themselves and all others similarly situated.

[3] Chair of the parole board and Secretary of the Executive Office of Public Safety and Security.

Bonita P. Tenneriello (David Milton also present) for the plaintiffs.

Stephen G. Dietrick for Commissioner of Correction & another.

KAFKER, J. The plaintiffs, a class of inmates in Department of Correction (DOC) facilities, have brought suit contending that the conditions of their confinement during the COVID-19 pandemic constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution. In Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 730, 733 (2020), S.C., 484 Mass. 1059 (2020) (Foster I), this court denied the plaintiffs' first motion for a preliminary injunction, concluding that the plaintiffs had failed to demonstrate a likelihood of success of proving deliberate indifference to inmates' health. Here, we reach the same conclusion regarding the plaintiffs' second motion for a preliminary injunction. We emphasize, as did the Superior Court judge who heard the second motion (motion judge), that because the DOC has continued to implement the measures that were discussed in Foster I, and has undertaken additional measures, including in particular the offer of vaccination to all medically eligible prisoners, the plaintiffs have not demonstrated a likelihood of success of proving deliberate indifference necessary to constitute a constitutional violation.

We therefore affirm the motion judge's denial of the plaintiffs' second request for a preliminary injunction.

Background. 1. Procedural history. In April 2020, the plaintiffs filed a class action complaint and an emergency motion for a preliminary injunction in the county court. In seeking preliminary relief from the single justice, the plaintiffs alleged that the risk to DOC inmates of contracting COVID-19 created unconstitutional conditions of confinement and sought to enjoin the DOC to use various measures to reduce the incarcerated population, thus allowing for physical distancing to be maintained in DOC facilities.[4] The single justice reserved and reported the case to the full court while remanding to the Superior Court for expedited fact finding. On the basis of the factual findings that the motion judge submitted to us in May 2020, we denied the plaintiffs' first motion for a preliminary injunction and transferred the case to the Superior Court for a final adjudication on the merits. See Foster I, 484 Mass. at 733-734. The judge subsequently certified a class of all prisoners housed in DOC facilities.

[4] The plaintiffs also moved the court to require the parole board to expedite the release of certain categories of prisoners, to consider the dangers posed by COVID-19 to incarcerated persons in making parole decisions, and to adopt a presumption in favor of release on parole for all parole-eligible inmates.

On December 24, 2020, the plaintiffs filed their second emergency motion for a preliminary injunction in the Superior Court, alleging that their ongoing conditions of confinement, and the DOC's limited efforts to decrease the prison population after Foster I, were violative of the Eighth Amendment because they were unreasonably dangerous to prisoners' health. The plaintiffs' motion sought an order requiring the defendants to adopt specific measures that would achieve an immediate reduction in the incarcerated population. The measures urged included the immediate implementation of a home confinement program, the release of prisoners on furloughs, the maximization of the award of good conduct deductions, and the expeditious granting of medical parole to all eligible inmates.[5]

[5] The plaintiffs' second motion also sought to enjoin the defendant chair of the parole board to adopt rules in her decision-making that would expand the availability of parole, such as considering a potential parolee's risk of contracting COVID-19 while incarcerated in assessing the impact of his or her release on the welfare of society, establishing a presumption in favor of granting parole to all parole-eligible inmates, and ignoring technical violations that would otherwise lead to parole revocation. The motion judge ruled in favor of the parole board, concluding that it had "made numerous adjustments in its operations during the pandemic, including but not limited to remote parole hearings, expediting certain types of hearings, and expanding living arrangements for prospective parolees through contractual arrangements." Because the plaintiffs presented no arguments specifically addressing their claims against the parole board in their brief filed with this court, we decline to consider their claims against the chair of the parole board. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019) (requiring that appellant's brief contain "the contentions of the appellant with respect to the

On December 29, 2020, after the plaintiffs had filed their second motion, the Legislature enacted a budget line item addressing the threat of COVID-19 in DOC facilities. The line item directed the DOC to use or consider using various measures to reduce the prison population, consistent with public safety. St. 2020, c. 227, § 2, line item 8900-0001. In light of the passage of this line item, the plaintiffs submitted a reply brief on January 27, 2021, the same day as the scheduled hearing on the plaintiffs' second motion, advancing for the first time arguments based on the line item. The motion judge set an expedited briefing schedule for the defendants to respond to the plaintiffs' reply brief and for all parties to address additional issues raised by the judge, including, in particular, the current status of the DOC's vaccination program. Final submissions by the parties were made on February 10, 2021, and the judge heard oral arguments on that day.

The motion judge subsequently denied the plaintiffs' second motion for preliminary relief in a memorandum and order dated February 17, 2021. He ruled that a preliminary injunction should not issue because the plaintiffs had not shown a likelihood of success on the merits of their underlying Eighth

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issues presented, and the reasons therefor," and providing that "[t]he appellate court need not pass upon questions or issues not argued in the brief").

Amendment claim. The judge did not rule on whether, under the objective element of the test for unconstitutional conditions of confinement, the plaintiffs faced a substantial risk of serious harm, professing himself unable to predict plaintiffs' ultimate likelihood of success on that issue, given the DOC's vaccination program. The judge's decision was instead based on his finding that the DOC's response to the threat of COVID-19 to inmates did not demonstrate the deliberate indifference required under the subjective element of the test for unconstitutional prison conditions. Because he concluded that the plaintiffs had not demonstrated a likelihood of success on the merits, the judge denied their motion without ruling on the other elements required for a preliminary injunction.

Following the motion judge's denial of preliminary relief, the plaintiffs filed a petition for review in the Appeals Court pursuant to G. L. c. 231, § 118, and a single justice of that court referred the plaintiffs' petition to a full panel of the court. While the case was pending before the Appeals Court, the plaintiffs filed a petition for direct appellate review by this court, which we granted.

2. The DOC's response to the threat of COVID-19 to inmates. a. Nonpharmaceutical interventions. As we noted in our Foster I decision, the DOC began implementing a suite of measures to control COVID-19 in March 2020, informed by

recommendations issued by the Centers for Disease Control (CDC) regarding the control of COVID-19 in correctional facilities.[6] Foster I, 484 Mass. at 704-709. Given that vaccines against COVID-19 had yet to be developed then, the measures recommended by the CDC and adopted by the DOC were nonpharmaceutical interventions (NPIs) designed to disrupt the transmission of COVID-19 among those who worked at and were housed in DOC facilities.

Crediting representations made by the Commissioner of Correction (commissioner) in two affidavits submitted to the Superior Court, the motion judge determined that the DOC maintained or updated almost all of these NPIs since we issued our decision in Foster I.

Thus, the DOC retained mask-wearing policies and reiterated to inmates the importance of wearing masks in protecting against COVID-19 transmission.[7] Heightened cleaning and disinfection protocols were also continued. To reduce the risk of COVID-19 being introduced into DOC facilities from the outside,

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[6] See Centers for Disease Control, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/MXY3-ETDL].

[7] All DOC employees are required to wear masks when not in their own workspaces and alone, and every prisoner has been issued cloth masks.

nonattorney in-person visits were suspended and replaced with a virtual visitation program using video conferencing technology.[8] To timely detect new infections, the DOC conducted regular asymptomatic testing of inmates and staff, as well as contact tracing by testing the close contacts of inmates who tested positive.[9] Inmates with a positive COVID-19 test or presenting with COVID-19 symptoms were moved into medical isolation. The DOC also continued with policies to promote social distancing, including advising inmates of the importance of physical distancing in infection prevention, and having inmates take their meals in their cells or units. Nevertheless, it is undisputed that because roughly one-half of the inmate population is not housed in single cells, many prisoners are not in fact able to keep a six-foot distance from others at all times.

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[8] Since June 1, 2021, in-person visits have resumed on a restricted basis, with each inmate limited to one visit per week. See Department of Correction, Press Release, DOC to Resume In-Person Visits Next Week with Continued Health & Safety Protocols (May 28, 2021), https://www.mass.gov/news/doc-to-resume-in-person-visits-next-week-with-continued-health-safety-protocols [https://perma.cc/79Q2-CQHJ].

[9] The DOC's testing efforts are aided by the use of wastewater surveillance, in which samples of wastewater from various facilities are analyzed for special concentrations of the virus, which provides an early indicator of outbreaks. Where wastewater surveillance points to an outbreak at a particular facility, the DOC intensifies asymptomatic testing there.

While acknowledging the DOC's conscientious efforts in implementing measures to mitigate the COVID-19 risk within its facilities, the motion judge concluded that there was sufficient evidence to establish that the DOC did not achieve perfect compliance with its COVID-19 policies. The judge also concluded that the lapses were sporadic rather than systematic.

b. The end of full lockdown. We noted in Foster I that, beginning in April 2020, the commissioner had instituted a "system-wide lockdown," which left inmates housed in cells confined there for twenty-three hours per day, and inmates living in dormitory settings confined in their units at all times. Foster I, 484 Mass. at 705. Since then, the motion judge determined, the DOC has ended the full lockdown. While some restrictions remain to allow for physical distancing among inmates during activities that involve social interaction, prisoners' outdoor yard time has been restored, and educational and vocational programs, through which inmates can earn sentence-reduction credits, have resumed. Some industrial programs have also been restored.

c. Vaccination of inmates and DOC staff. A key development since our ruling in Foster I has been the availability of vaccines against COVID-19. The motion judge found that the DOC had offered the vaccine to all medically eligible inmates, and had undertaken a campaign to educate

inmates about the benefits of vaccination. By February 2, 2021, of the ninety-four percent of inmates deemed medically eligible for vaccination, seventy-one percent had receive their first dose of the two-dose Moderna COVID-19 vaccine.[10]

d. COVID-19 outcomes in the inmate population. Unfortunately, the DOC's efforts to mitigate the risk of COVID-19 to the incarcerated population did not succeed in fully sparing DOC inmates from the effects of the pandemic. Between May 4, 2020, and February 10, 2021, which roughly corresponds to the period between when the factual findings that supported our Foster I were made and the motion judge's decision denying the plaintiffs' second motion for preliminary relief, there were more than 2,700 confirmed new COVID-19 cases among DOC inmates, and at least nineteen inmates died because of the virus.[11]

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[10] Since the time that the motion judge ruled on the plaintiffs' second motion for preliminary relief, the vaccination campaign within DOC facilities has continued. The defendants represent in their brief that as of July 7, 2021, seventy-eight percent of DOC inmates are fully vaccinated. At oral argument, the defendants also called our attention to the Governor's executive order mandating that all executive branch employees, including all DOC employees, receive COVID-19 vaccination no later than October 17, 2021. See Executive Order No. 595 (Aug. 19, 2021), https://www.mass.gov/doc/august-19-2021-executive-department-employee-vaccination-order/download [https://perma.cc/VYQ4-4E3V].

[11] See the Special Master's Weekly Report (Feb. 11, 2021) in Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, S.C., 484 Mass. 1029 (2020), at 62-64, https://www.mass.gov/doc/sjc-12926-special-masters-weekly-report-2112021/download [https://perma.cc/P25S-4YHF].

As the motion judge observed, however, the COVID-19 emergency within DOC facilities has not occurred in isolation. The waves of COVID-19 infection within the population of DOC inmates have largely tracked background changes in the spread and containment of COVID-19 in Massachusetts at large. When infections waned in Massachusetts during the summer and early fall months of 2020, COVID-19 transmission inside DOC facilities was low.[12] It was only as COVID-19 infections began to surge again in Massachusetts in the late fall of 2020, reaching a peak in December 2020 and January 2021, that DOC facilities experienced a parallel wave of infections.

e. The budget line item. The Legislature enacted a budget line item in December 2020 that directed the commissioner and the DOC to use various measures, consistent with public safety, to reduce the prison population in light of the "continued prevalence and threat of COVID-19 within [DOC] facilities." St. 2020, c. 227, § 2, line item 8900-0001. The line item provided that the commissioner "shall release, transition to home confinement or furlough individuals in the care and custody of the [DOC] who can be safely released, transitioned to home confinement or furloughed." Id.

[12] Between June 1, 2020, and September 23, 2020, there were never more than three new infections per week among prisoners across all DOC facilities. See Special Master's Weekly Report (Feb. 11, 2021), supra at 62-63.

To that end, the law further provides that the DOC "shall consider" at least the following policies: (1) home confinement; (2) expedited review of medical parole petitions by superintendents and the commissioner; (3) furloughs; (4) maximization of good time by eliminating, for prisoners close to their release dates, the requirement to participate in programming to earn good time; and (5) awarding credits to provide further sentence remissions for time served during periods of declared public health emergencies where prison operations are disrupted. Id.

The parties disagree sharply about the line item's effect on the statutory duties and authority of the commissioner and the DOC. In denying the plaintiffs' second motion, the motion judge did not rule on the issue of the disputed interpretation of the line item and its effect on the Massachusetts statutory scheme governing prison administration. The judge simply allowed the plaintiffs to move on an expedited basis for leave to amend their complaint to assert new statutory claims and to establish that they have a private right of action under the law.

f. The DOC's limited use of programs to reduce the inmate population. While the motion judge declined to rule on how, if at all, the budget line item changed the DOC's statutory authority and duties, he did find -- as an "essentially

undisputed" fact -- that the DOC made only limited use of home confinement, "good time credit," and medical parole to bring down the prison population level, and has not used furloughs at all for that purpose, as the judge found that the DOC does not consider furloughs to be good policy.

For example, although the commissioner initiated a home confinement program, only a small number of prisoners were released on electronic monitoring under the program, because the commissioner determined that State law and DOC regulations severely limit the types of inmates who are eligible for home confinement. The commissioner also declined to deviate from the DOC's policy of requiring participation in programming, such as educational, journaling, vocational, and employment programs, as a condition for earning good time, even for prisoners nearing release.

Discussion. 1. Standard of review. A party moving for a preliminary injunction must show the following: first, that success is likely on the merits; second, that if the injunction is denied, the moving party faces a substantial risk of irreparable harm; and third, that this risk of irreparable harm, considered in light of the moving party's chances of prevailing on the merits, outweighs the nonmoving party's probable harm. See Massachusetts Port Auth. v. Turo Inc., 487 Mass. 235, 239 (2021) (Turo Inc.); Doe v. Worcester Pub. Sch., 484 Mass. 598,

601 (2020); John T. Callahan & Sons, Inc. v. Malden, 430 Mass. 124, 130-131 (1999); Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). "Where a party seeks to enjoin government action, the judge also must determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public" (quotation and citation omitted). Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018).

Among the factors the motion judge must consider to determine whether a preliminary injunction should issue, likelihood of success on the merits is especially important. As we have previously emphasized: "[T]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry. [I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Foster I, 484 Mass. at 712, quoting Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 152 (1st Cir. 2012).

Where, as here, we review a denial of a motion for a preliminary injunction, we inquire into whether the judge abused his or her discretion. John T. Callahan & Sons, Inc., 430 Mass. at 130. To test for an abuse of discretion, we ask "whether the judge applied proper legal standards and whether there was reasonable support for his [or her] evaluation of factual

questions." Turo Inc., 487 Mass. at 239. Where the judge's findings were "predicated solely on documentary evidence," we "may draw our own conclusions from the record." John T. Callahan & Sons, Inc., supra, quoting Packaging Indus. Group, Inc., 380 Mass. at 616. As for the motion judge's conclusions of law, we subject them to de novo review. See Doe, 484 Mass. at 601; Fordyce v. Hanover, 457 Mass. 248, 256 (2010), quoting Packaging Indus. Group, Inc., supra ("On review, the motion judge's 'conclusions of law are subject to broad review and will be reversed if incorrect'").

2. The plaintiffs' likelihood of success on their Eighth Amendment claim. The plaintiffs seek preliminary relief on the claim that their Eighth Amendment rights have been violated by their conditions of confinement in DOC facilities, because of the unacceptable COVID-19 threat they face there. As we explained in Foster I, a prisoner's claim that his or her conditions of confinement violate the Eighth Amendment, as applied to the States through the Fourteenth Amendment to the United States Constitution, includes both objective and subjective elements. Foster I, 484 Mass. at 717, citing Wilson v. Seiter, 501 U.S. 294, 298 (1991). The objective element requires a plaintiff inmate to show that his or her conditions of confinement pose a "substantial risk of serious harm." Foster I, supra, quoting Farmer v. Brennan, 511 U.S. 825, 834

(1994). The subjective element requires the plaintiff to show that "prison officials acted or failed to act with deliberate indifference." Foster I, supra, citing Estelle v. Gamble, 429 U.S. 97, 106 (1976). Accord Wilson, supra at 302-303.

Because the motion judge declined to rule on the objective element of the plaintiffs' claim,[13] focusing instead on the

[13] In our review of the plaintiffs' first motion for a preliminary injunction, we concluded that the heightened risk of COVID-19 transmission in congregate settings like prisons made it "almost certain[]" that persons incarcerated in DOC facilities would succeed in showing that their conditions of confinement posed a "substantial risk of serious harm" as required to prevail on the objective element of their Eighth Amendment claim. Foster I, 484 Mass. at 717, 718. We further suggested that the lockdown measures instituted by the DOC to combat COVID-19 transmission were themselves potential sources of serious harm to inmates' health, particularly their mental health. Id. at 731-732.

Nonetheless, because of two developments since Foster I, the motion judge adjudicating the plaintiffs' second motion determined that he could not "predict plaintiffs' ultimate likelihood of success on the objective element of their Eighth Amendment claim at a future trial." First, the DOC had launched a vaccination campaign, with seventy-one percent of eligible inmates receiving a first dose by February 2, 2021. The arrival of a mass vaccination scheme changed the calculus of the risk that COVID-19 posed to inmate health. Second, the full, system-wide lockdown had been replaced with a regime of less onerous restrictions, which provided inmates with expanded opportunities for recreation, education, and work, and allowed inmates to renew contact with loved ones, even if only via video conferencing.

We agree that these two developments may have significantly altered the risk calculus, such that confident predictions of the plaintiffs' ultimate success in demonstrating a substantial risk of serious harm are now much more difficult. Moreover, at the time of the motion judge's decision on the plaintiffs' second motion, it was too early to reliably assess the full

subjective element, which he considered dispositive, in reviewing the ruling we proceed directly to analyze this key issue: whether the plaintiffs can demonstrate a likelihood of success on the subjective element of their Eighth Amendment claim.

The United States Supreme Court has explained that the showing of deliberate indifference necessary to satisfy the subjective element of a claim of unconstitutional conditions of confinement involves a demonstration that prison officials had a "culpable state of mind" in the form of "'deliberate indifference' to inmate health or safety." Farmer, 511 U.S. at 834, quoting Wilson, 501 U.S. at 297, 303. The level of culpability involved in deliberate indifference tracks the criminal-law standard of recklessness, which requires the "'conscious[] disregar[d]' [of] a substantial risk of serious harm." Farmer, supra at 839, quoting Model Penal Code § 2.02(2)(c). We have similarly described deliberate

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impact of the DOC's vaccination campaign on the inmate population's vulnerability to disease and death from COVID-19. In their brief, the defendants represent that from April 15, 2021, to July 12, 2021, there have not been more than four confirmed COVID-19 cases among inmates at any one time, and that as of July 12, 2021, there were no active confirmed cases at all among DOC inmates.

As we need not decide the difficult issue of the objective element of the plaintiffs' Eighth Amendment claim to assess the plaintiffs' over-all likelihood of success on the merits, we, like the motion judge, decline to do so.

indifference as "'recklessly disregarding' a substantial risk of harm," which is the standard of "'subjective recklessness' [that] would apply in the criminal context." Foster I, 484 Mass. at 719, quoting Farmer, supra at 836, 839-840.

Under this standard, a prison official shows deliberate indifference only if he or she "knows of . . . an excessive risk to inmate health or safety," yet "disregards" that risk. Farmer, 511 U.S. at 837. In establishing an "excessive" risk standard, the Court recognizes that some risk is inevitable in the prison context. Id. at 844-845 (prison officials have "unenviable task of keeping dangerous men in safe custody under humane conditions" [citation omitted]). Prison officials are not expected or required to make the prison risk free but to respond reasonably to "excessive" risk.

The Court has also carefully explained what constitutes disregard of an excessive risk to inmate health and safety. Crucially, prison officials do not disregard such a risk if they "respond[] reasonably" to that risk. Farmer, 511 U.S. at 844. Indeed, the Court has made clear that "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." Id. Accord Foster I, 484 Mass. at 720 ("Where the risk of serious harm is substantial, but prison officials have undertaken

significant steps to try to reduce the harm and protect inmates, courts have concluded that there was no Eighth Amendment liability").

In sum, prison officials' constitutional duty under the Eighth Amendment is to "to ensure reasonable safety" by taking "reasonable measures" to mitigate excessive risk (quotation and citation omitted). Farmer, 511 U.S. at 844, 847. Ultimately, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." Id. at 845.

We conclude, as did the motion judge, that the plaintiffs did not demonstrate that they are likely to succeed in proving deliberate indifference. As the motion judge found, the DOC continued to implement most of the NPIs that we characterized in Foster I as "significant steps" toward reducing the COVID-19 risk to inmates, probative of a reasonable response to that risk. See Foster I, 484 Mass. at 720, 721-724. These continued measures included restrictions on in-person visits, mask wearing, heightened cleaning and disinfectant, program limitations to improve social distancing, regular asymptomatic testing, and the medical isolation of confirmed COVID-19 patients.

Significantly, in addition to these NPIs, the DOC took full advantage of the availability of COVID-19 vaccines by launching an effort to vaccinate all prisoners in its custody. The DOC's

vaccination campaign involved outreach to educate inmates about the benefits of vaccination as well as the offer of the COVID-19 vaccine to all medically eligible inmates -- the overwhelming majority of the prison population -- with the result that at least seventy-one percent of the eligible inmate population had received a first dose by the time of the motion judge's decision.[14] The scientific community has recognized that vaccination is highly effective in protecting against COVID-19 infection, and especially against serious outcomes like severe illness, hospitalization, and death.[15] In implementing a comprehensive inmate vaccination program, then, the DOC was adopting the state-of-the-art medical response in combatting COVID-19. See Foster I, 484 Mass. at 722 (emphasizing importance of compliance with professional guidance). This was eminently reasonable.

Additionally, the DOC changed its previous full lockdown policy to alleviate the burdens that its harsh restrictions had

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[14] In fact, first doses of the Moderna COVID-19 vaccine were made available to DOC inmates as early as January 2021, before the general public in Massachusetts had access to the vaccine. See Department of Public Health, Massachusetts' COVID-19 Vaccination Phases, https://www.mass.gov/info-details/massachusetts-covid-19-vaccination-phases [https://perma.cc/KJM3-VHDV].

[15] See Centers for Disease Control and Prevention, COVID-19 Vaccines Work, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html [https://perma.cc/5D8P-XLHZ].

placed on inmates' mental health, while still retaining guardrails to control COVID-19 transmission by, for example, scaling down programs and scheduling activities to maintain social distancing. Again, this approach was reasonable as a strategy to manage two interlocking health risks to prisoners.

We recognize, as did the motion judge, that there were lapses in the implementation of DOC policies and procedures to contain the COVID-19 threat. However, these lapses were, as he found, inadvertent and sporadic. They thus fall far short of the standard needed to establish deliberate indifference, which tracks that of criminal recklessness, not civil negligence. See Lee v. Young, 533 F.3d 505, 509 (7th Cir. 2008), citing Farmer, 511 U.S. at 836-837 (explaining that to establish deliberate indifference, "negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense"). Hence, unless "lapses in enforcement" of prison policies to combat COVID-19 were "ignor[ed] or approv[ed]" by prison officials, the mere fact that lapses unfortunately occurred does not establish deliberate indifference. Swain v. Junior, 958 F.3d 1081, 1089 (11th Cir. 2020). See Swain v. Junior, 961 F.3d 1276, 1287-1288 (11th Cir. 2020) (noting that deliberate indifference inquiry focuses on "the defendants' entire course of conduct" rather than on "isolated failures").

The plaintiffs contend nonetheless that the package of measures undertaken by the DOC still constituted deliberate indifference because it did not include prison depopulation efforts. In addressing this argument, the motion judge pointed out that there had been a seventeen percent decline in the prison population. He also, however, acknowledged that even with such a reduction, prisoners could not keep a six-foot distance from each other at all times, and that roughly one-half of all inmates were not housed in single cells. Additionally, he recognized that the DOC chose not to use, or at least use to its maximum advantage, various programs that could have achieved further prison depopulation and even greater risk reduction. His findings are well supported, and we adopt them in our own analysis.

We conclude that the plaintiffs have not established a likelihood of success in demonstrating deliberate indifference, even absent greater prison depopulation efforts. The deliberate indifference inquiry, as explained above, centers on whether the DOC has responded reasonably to the risks presented by COVID-19. The DOC's approach of combining existing NPI measures with a comprehensive vaccination program appears, on this record, to have been a reasonable response resulting in reasonably safe conditions of confinement. Farmer, 511 U.S. at 844. The scientific community has clearly established that vaccination is

a powerful tool in protecting against the risk of COVID-19 infection and especially against severe outcomes from the virus. The NPI measures implemented by the DOC, such as mask wearing, testing, and social distancing, also have a well-supported scientific basis.[16]

In choosing between reasonable alternatives to combat COVID-19, the DOC could have relied on increased prison depopulation as one of its tools of risk reduction. That being said, the DOC was not required to employ or exhaust every measure that would offer a risk-reduction benefit for its COVID-19 response to be "reasonable" under Farmer. See Wilson v. Williams, 961 F.3d 829, 844 (6th Cir. 2020) (rejecting contention that prison officials respond unreasonably to risk to inmate health if they do not make "full use of the tools available" or "take every possible step to address a serious risk of harm"). A reasonable response is one that takes steps to mitigate excessive risk, not one that adopts every available measure to eliminate risk. The DOC may, consistent with mounting a reasonable response to the COVID-19 threat, choose one risk-reduction strategy over another, particularly when the choice implicates other penological considerations.

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[16] As we noted in Foster I, the DOC's package of NPI measures is aligned with the guidance issued by the CDC for the containment of COVID-19 in correctional facilities. Foster I, 484 Mass. at 721-723.

The reasonableness inquiry thus takes into account officials' over-all responsibilities, recognizing and giving due deference to officials' consideration of the full range of "the legitimate goals and policies of the penal institution." Bell v. Wolfish, 441 U.S. 520, 546 (1979). See O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (urging judicial deference in reviewing Eighth Amendment claims to "considered judgment of prison administrators" on matters regarding "evaluation of penological objectives").[17]

Absent vaccination, prison officials may have had no other reasonable choice but to rely on greater prison depopulation measures. In Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 445, S.C., 484 Mass. 1029 (2020), prior to the development of vaccines, we described the conditions inside jails and prisons to be "urgent and unprecedented," such that "a reduction in the number of people who are held in custody [was] necessary." The evaluation of deliberate indifference is not, however, "a static determination." Foster I, 484 Mass. at 719. With the DOC implementing a comprehensive vaccination scheme in addition to

[17] We note that among the DOC's most important responsibilities is public safety. The early release of prisoners to achieve prison depopulation would appear to require a careful, individualized, and time-consuming determination whether the release of a given prisoner poses a danger to the community in which he or she would be released.

the suite of NPIs it already had in place, we cannot conclude that the plaintiffs would likely be able to establish that prison officials were deliberately indifferent to inmate health without the prison depopulation measures that the plaintiffs advocate. The DOC's over-all choice of measures to combat COVID-19 reflected a reasonable risk-reduction response.

Finally, we address briefly the passage of the budget line item in the midst of the injunction proceedings in the Superior Court. We conclude that the motion judge properly allowed the plaintiffs to amend their complaint. As the briefing here demonstrates, it is not clear on its face what changes in existing law the line item permitted or required. Although its recent passage precludes a finding of deliberate indifference at the time of the preliminary injunction hearing in early February 2021, as the DOC had little to no time to comply with whatever changes in the law the line item had brought about, allowing the complaint to be amended ensures that the budget provision, and the DOC's response, be given appropriate consideration as the case proceeds.

Conclusion. Based on the record before us, which demonstrates that the DOC added a comprehensive vaccination program to the NPI measures previously adopted, the plaintiffs have not established that they are likely to succeed in proving that the defendants showed deliberate indifference to inmate

health. Because the plaintiffs are thus unlikely to prevail on their Eighth Amendment claim, we affirm the Superior Court's denial of their second motion for preliminary relief. The matter is remanded to the Superior Court, where the case shall continue to proceed as an emergency matter.

So ordered.