UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

-- X

KACI HICKOX

Plaintiff,

-against-

CHRISTOPHER JAMES CHRISTIE, MARY E. O'DOWD, CHRISTOPHER RINN, GARY LUDWIG, and JOHN DOE and JANE ROE, unidentified employees of the New Jersey Department of Health,

Defendants.

-- X

Hon. Kevin McNulty, U.S.D.J.

Docket No. 2:15-cv-7647-KM-JBC

Civil Action

ORAL ARGUMENT REQUESTED

DOCUMENT FILED ELECTRONICALLY

Motion Return Date: May 16, 2016

BRIEF IN OPPOSITION TO MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) ON BEHALF OF PLAINTIFF, KACI HICKOX

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ORAL ARGUMENT REQUESTED

Plaintiff hereby requests oral argument pursuant to Local Civil Rule 78.1(b).

PRELIMINARY STATEMENT AND STATEMENT OF FACTS

On October 24, 2014, Plaintiff, Kaci Hickox ("Hickox"), returned to the United States after approximately one month working for Médecins Sans Frontières ("MSF") in Sierra Leone in connection with the Ebola outbreak there. Complaint ("Compl.") ¶¶ 13, 28. Upon arrival at Newark Liberty International Airport, Hickox was questioned regarding her time in Sierra Leone and her temperature was taken and found to be normal. *Id.* ¶¶ 29-35. After this questioning, the Newark Airport office for the U.S. Center for Disease Control ("CDC") cleared Hickox. *Id.* ¶ 38. Nevertheless, Defendants, pursuant to New Jersey's mandatory quarantine policy under the Additional Screening Protocols for Ebola at John F. Kennedy International Airport in New York and at Newark Airport ("Additional Screening Protocols"), decided around 3:00 p.m. to quarantine Hickox. *Id.* ¶ 40.

Only after the decision was made to place Hickox under quarantine, did a temporal scanning thermometer indicate that Hickox had an elevated temperature. Compl. ¶¶ 31, 40, 45, 48-49. Subsequently, Hickox was moved to University Hospital. *Id.* ¶ 53. From the time of her arrival at the hospital, oral thermometer readings indicated that Hickox's temperature was in the normal range, or slightly above, but at all times well below 100.4 degrees, a benchmark for fever caused by

infection or illness. *Id.* ¶¶ 56-62, 66. Inexplicably, the less-reliable temporal scanning thermometer on occasion indicted that Hickox had a fever. *Id.* ¶¶ 56-8, 60. By midnight, or thereabouts, on October 25, Hickox's temperature readings consistently indicated that she was not ill. *Id.* ¶¶ 61-62.

At the hospital Hickox's blood was taken and sent to two agencies for testing to determine if she was infected with Ebola. The first set of results were received from the New York City Department of Health around 3:14 a.m. on October 25. Compl. ¶ 65. It indicated that Hickox was negative for Ebola. *Id.* Nevertheless, around 8:04 a.m. an epidemiologist at the New Jersey Department of Health ("NJDOH") recommended—without justification—that Hickox be held an additional 72 hours. *Id.* ¶ 67. The second set of results was received from the CDC that afternoon around 3:14 p.m. and also showed that Hickox was negative for Ebola. *Id.* ¶ 70. Ironically, only after NJDOH had received these results, did Hickox receive a copy of the Administrative Order Declaring Quarantine and Isolation of Kaci Hickox ("Quarantine Order"). Compl. ¶ 72. Despite these unambiguous test results and Hickox's displaying no signs of illness, *Id.* ¶ 61-62, 66, Defendants continued to hold Hickox until October 27 around 1:30 p.m. *Id.* ¶ 98. In fact, she was detained in custody even after she was no longer under quarantine. *Id.* ¶ 98.

Defendants are not entitled to dismissal of Hickox's constitutional claims based on qualified immunity. The foregoing clearly indicates that when the decision was

made to quarantine Hickox her temperature was normal, she was entirely asymptomatic and she had been cleared by the CDC. Compl. ¶¶ 31, 38, 40, 45, 48. Thus, there was no probable cause to quarantine Hickox, which violated her clearly established Fourth Amendment rights. Furthermore, Hickox did not receive an individualized assessment of dangerousness prior to quarantine and quarantine was not the least restrictive means of protecting the public health. Hickox's quarantine therefore violated her clearly established Fourteenth Amendment substantive due process rights.

Even if, arguendo, Hickox's quarantine was initially constitutional, it ceased to be constitutional when Defendants received the first set of blood test results indicating that Hickox was negative for Ebola, Compl. ¶ 65, given Hickox's temperature readings were consistently indicating that she was not ill, *Id.* ¶¶ 61-2. From that point forward, Hickox's quarantine was unconstitutional because, under clearly established law, the nature and duration of Hickox's confinement were no longer reasonably related to protecting the public health.

Thus, as the Complaint makes clear, Defendants initially quarantined, and continued to quarantine, Hickox without legal justification. Hickox's quarantine therefore violated clearly established law even under the quarantine precedent relied on by Defendants.

Further, Defendants clearly violated Hickox's procedural due process rights

because the notice, and the process it described, failed to provide Hickox with the right to any hearing (much less a prompt hearing) before a neutral decision-maker.

With respect to the false imprisonment claim, Defendants possess only limited immunity under New Jersey's Tort Claims Act ("TCA") for Hickox's quarantine and questions of fact preclude dismissal at this stage. With respect to the false light invasion of privacy claim, Hickox has adequately pled all elements of the claim and the newsworthiness defense does not apply to Defendant Christie's statements.

ARGUMENT

I. DEFENDANTS VIOLATED CLEARLY ESTABLISHED LAW AND ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Hickox does not contest that under a state's police power state officials may impose quarantine measures to protect the public health. Nevertheless, Hickox's quarantine constituted a drastic deprivation of her basic liberty and freedom and violated her clearly established rights under the Fourth and Fourteenth Amendments. Thus, Defendants are not entitled to qualified immunity because they (1) violated constitutional rights that (2) were "clearly established" at the time. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

As explained below, it is clearly established that (1) government officials violate the Fourteenth Amendment's substantive due process protection when they civilly confine a person without an individualized assessment of risk that shows the person is a danger, or when the confinement is not the least restrictive method of

protecting the public;[1] (2) government officials violate the Fourth Amendment's protection against unreasonable seizures when they confine a person without probable cause to do so; and (3) government officials violate the Fourteenth Amendment's procedural due process requirements when they fail to provide or give notice of an opportunity to be heard before a neutral decision maker. Hickox has sufficiently pled facts that, if found true, prove Defendants violated these clearly established constitutional standards.

A. Courts Look To Closely Analogous Situations To Determine Clearly Established Law, And Civil Commitment Precedent Can Clearly Establish Rights In The Quarantine Context

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted). It is not necessary for there to be "a case directly on point," *id.*, nor is it necessary "'that the very action in question [have] previously been held unlawful. . . . [O]fficials can still be on notice that their conduct violates established law . . . in novel factual circumstances.'" *Schneyder v. Smith*, 653 F.3d 313, 329 (3d Cir. 2011) (*quoting Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 377-78 (2009) (citation omitted)).

The Third Circuit "has adopted a broad view of what constitutes an established right of which a reasonable person would have known," *Kopec v. Tate*, 361 F.3d 772,

[1] Quarantines are part of New Jersey's emergency health powers and defined as "physical separation and confinement" of individuals. N.J. Stat. Ann. § 26:13-2.

778 (3d Cir. 2004) (citation omitted), and "has interpreted the phrase 'clearly established' to mean 'some but not precise factual correspondence' between relevant precedents and the conduct at issue, and . . . '[a]lthough officials need not predict[t] the future course of constitutional law, they are required to relate established law to analogous factual settings.'" *McLaughlin v. Watson*, 271 F.3d 566, 571 (3d Cir. 2001) (*quoting Ryan v. Burlington County*, 860 F.2d 1199, 1208–09 (3d Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989)).[2]

Furthermore, as stated in *Hope v. Pelzer*, 536 U.S. 730 (2002): "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 unlawful." *Id.* at 741 (citations omitted). The Third Circuit has explained that

> '[t]o determine whether a new scenario is sufficiently analogous to previously established law to warn an official that his/her conduct is unconstitutional, we inquir[e] into the general legal principles governing

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[2] According to Defendants, "courts cannot analogize to other subjects when deciding whether a right is 'clearly established.'" Brief in Support of Motion to Dismiss ("Def.Br.") 19. Defendants point to language in *Mullenix* that the clearly established inquiry "must be analyzed 'in light of the specific context of the case.'" *Id.* But this language merely expands upon the requirement that the right at issue be defined with specificity, as is plain from the full sentence: "The inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 136 S. Ct. at 308 (citation omitted) Defendants also quote *Mullenix* for the proposition that whether a right is clearly established must "'follow immediately' from extant case law." Def.Br. 19. But this language merely indicates that the right at issue must be a direct application of the established principles. It does not indicate that courts may not analogize when determining whether a right is clearly established.

> analogous factual situations . . . and . . . determin[e] whether the official should have related this established law to the instant situation.'

Schneyder, 653 F.3d at 330 (*quoting Burns v. PA Dep't of Corr.*, 642 F.3d 163, 177 (3d Cir. 2011)). Furthermore, "[a] plaintiff 'can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendant's conduct was unconstitutional.'" *Id.* (*quoting Estate of Escobedo v. Bender*, 600 F.3d 770, 779-80 (7th Cir. 2010) (*citing Hope*, 536 U.S. at 739-40)).

Consequently, when determining what law is clearly established in the quarantine context, it is consistent with Third Circuit law to look to other cases where the government has civilly confined a person in order to protect the public. In other words, according to Third Circuit law, other cases concerning civil confinement can clearly establish constitutional principles and rules of action that a reasonable official would have known were applicable in the quarantine context.

Anaya v. Crossroads Managed Care Systems, Inc., 195 F.3d 584 (10th Cir. 1999) offers a directly pertinent example of analogizing to existing law in the qualified immunity context. In *Anaya* the Tenth Circuit considered "what standard for seizures of the allegedly intoxicated is appropriate under the Fourth Amendment." *Id.* at 590. Looking to the standards for detaining the mentally ill for emergency health evaluations, *id.* at 590-91, the court concluded that "such arrests are appropriate only with probable cause to believe the arrestee is a danger to himself or others." *Id.* at 590. Moreover, the court denied defendants qualified immunity because "it was clearly

established . . . that civil seizures without probable cause to believe a person was a danger to himself or others violated the Fourth Amendment." *Id.* at 595. In so doing, the court found that "the context of protecting the public from the mentally ill is directly analogous to that of protecting the public from the intoxicated," *id.*, and relied on cases finding that "an officer must have probable cause to seize a person under a civil provision premised on protecting the seized person and others." *Id.* at 594.

The same reasoning applies in this case. The same fundamental liberty interests are at stake and the same clearly established principles apply with respect to a quarantine measure as with respect to civil commitment. Consequently, precedent in the civil commitment context has clearly established standards applicable to quarantines, which put reasonable officials on notice that Hickox's quarantine violated her constitutional rights. *See, e.g., Best v. St. Vincents Hosp.*, No. 03 CV.0365 RMB JCF, 2003 WL 21518829, at *6-*9 (S.D.N.Y. July 2, 2003), Exhibit A,[3] *report and recommendation adopted sub nom. Best v. Bellevue Hosp. Ctr.*, No. 03CIV.365(RMB)(JCF), 2003 WL 21767656 (S.D.N.Y. July 30, 2003), Ex. B, *aff'd in part, vacated in part, remanded sub nom. Best v. Bellevue Hosp. New York, NY*, 115 F. App'x 459 (2d Cir. 2004), Ex. C, (finding that the substantive due process standards applicable to civil commitment also applied to quarantine).[4]

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[3] All Exhibits ("Ex.") are attached to the Affirmation of Edward Barocas, Esq. dated March 15, 2016.
[4] The Second Circuit vacated in part on procedural grounds.

B. Hickox's Substantive Due Process Rights Are Clearly Established

1. Clearly Established Substantive Due Process Standards Require An Individualized Assessment Of Dangerousness And The Least Restrictive Means To Protect The Public[5]

The Supreme Court of the United States "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425 (1979) (listing cases); *see also Vitek v. Jones*, 445 U.S. 480, 491 (1980) (describing civil commitment as a "massive curtailment of liberty"). Under Supreme Court jurisprudence, that due process protection includes clearly established substantive due process rights requiring the state to show by clear and convincing evidence that (1) it has undertaken a particularized assessment of the individual's danger to him/herself or others, and this assessment shows the individual is actually dangerous,[6] and (2) there

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[5]Despite Defendants' contentions to the contrary, the Fourth Amendment prohibition of unreasonable seizure and substantive due process under the Fourteenth Amendment protect distinct rights in the civil commitment context. *See Glass v. Mayas*, 984 F.2d 55 (2d Cir. 1993) (analyzing the constitutionality of involuntary commitment under the due process clause of the Fourteenth amendment and separately under the Fourth amendment); *Maag v. Wessler*, 960 F.2d 773, 775 (9th Cir. 1991) ("Although confinement of the mentally ill by state action generally is analyzed under the due process clause of the fourteenth amendment, we analyze here the distinct right to be free from an unreasonable governmental seizure of the person for whatever purpose.").

[6] Defendants' analysis of this right is inapposite: it is predicated on their incorrect conclusion that Hickox derived this right from *Rodriguez v. City of New York*, 72 F.3d 1051 (2d Cir. 1995). However, even under the standards articulated in *Rodriguez*, Hickox's quarantine violated substantive due process. Hickox was

are no less restrictive alternatives to confinement that would protect the public.[7]

With respect to the first requirement, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), has been interpreted as requiring for civil commitment that an individual's "potential for doing harm, to himself or others, is great enough to justify such a massive curtailment of liberty." *See, e.g., Suzuki v. Yuen*, 617 F.2d 173, 176 (9th Cir. 1980). Shortly after *Humphrey*, in *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), the Supreme Court held that mentally ill individuals may be confined only if they are dangerous, stating, "there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." The

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asymptomatic when Defendants decided to quarantine her. Compl. ¶¶ 31, 40, 45, 48. Therefore, her quarantine did not comport with the standards generally accepted in the medical community, which are reflected in the CDC Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure ("CDC Interim Guidance"), updated Oct. 29, 2014, and call for direct active monitoring of persons at "some risk," Compl. ¶¶ 100-01, such as Hickox. *See also* Jeffrey M. Drazen, M.D, et al., Editorial, *Ebola and Quarantine*, THE NEW ENG. J. OF MED. (Nov. 20, 2014), http://www.nejm.org/doi/full/10.1056/NEJMe1413139?af=R&rss=currentIssue&. At a minimum, "the question of what the generally accepted standards [are] is a question of fact," *Rodriguez*, 72 F.3d at 1063, which precludes dismissal at this stage.

[7] Defendants reject the least restrictive means standard. Instead, they contend that "the nature and duration of civil commitment need only bear a reasonable relationship to its purposes" to satisfy due process. Def.Br. 26-7. However, (1) the least restrictive means standard appropriately applies to determine whether the decision to commit someone is appropriate in the first place or the legitimate government purpose can be achieved through less restrictive means, and (2) the standard requiring that the nature and duration of civil commitment only bear a reasonable relationship to its purpose appropriately applies when considering the conditions of the confinement. Hickox challenges her quarantine both because it was not the least restrictive means for addressing public health concerns and because the nature and duration of her confinement did not bear a reasonable relationship to its purpose.

Court subsequently held that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity," *Addington*, 441 U.S. at 427, that civil commitment must be based on, at a minimum, clear and convincing evidence, *id.* at 433, stating that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state," *id.* at 427. Accordingly, the state must prove that the particular individual subject to commitment is in fact dangerous, which requires an individualized assessment. *See Best*, 2003 WL 21518829, Ex. A, at *7 (finding, based on *O'Connor* and *Humphrey*, that "the Supreme Court has found that the individual must exhibit behavior that puts himself or others in danger").

With respect to the second requirement, in *Shelton v. Tucker,* 364 U.S. 479, 488 (1960), the Supreme Court held that it is an axiom of due process that the governmental infringement on liberty be the least "drastic means for achieving the same basic purpose." Applying this principle to the civil commitment context,[8] courts

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[8] In rejecting the least restrictive standard, Defendants rely on inapposite cases that are either wholly irrelevant or deal with the conditions of confinement as opposed to whether someone should have been confined at all. *See Jackson v. Indiana,* 406 U.S. 715, 737 (1972) (dealing not with the initial decision to commit but with the conditions within confinement); *Seling v. Young*, 531 U.S. 250 (2001) (same); *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (same); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (same); *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002) (same); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (same); *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983) (same). Additionally, *S.H. v. Edwards*, 886 F.2d 292 (11th Cir. 1989), *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987), and *Garrity v. Gallen*, 522 F. Supp. 171, 237 (D.N.H. 1981) did not deal with any

across the country have required the state to show there were no less restrictive alternatives available to the "drastic curtailment" of rights inherent in actual confinement. *See, e.g., Lynch v. Baxley*, 744 F.2d 1452, 1458 (11th Cir. 1984) ("While jail confinement necessarily keeps society safe from [those who threaten immediate and serious violence to themselves or others], such detention is not the least restrictive means for achieving that goal."); *Covington v. Harris,* 419 F.2d 617, 623 (D.C. Cir. 1969) ("[T]he principle of the least restrictive alternative . . . inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty justifiable only when the respondent . . . is likely to injure himself or other persons if allowed to remain at liberty."); *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) ("Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection."); *Stamus v. Leonhardt*, 414 F. Supp. 439, 452-3 (S.D. Iowa 1976) (statute violated due process because it did not mandate exploration of least restrictive alternatives to confinement); *Welsch v. Likins*, 373 F. Supp. 487, 502 (D. Minn. 1974) *supplemented,* 68 F.R.D. 589 (D. Minn. 1975) *aff'd*, 525 F.2d 987 (8th Cir. 1975) (pointing to "the widespread acceptance by the courts of a constitutional duty on the part of State officials to explore and provide the least stringent practicable alternatives to confinement of noncriminals"); *Lessard v. Schmidt*, 349 F.Supp. 1078, 1096 (E.D.Wis. 1972) (three

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governmental interference with liberty but with the standard of care for habilitation, not relevant here.

judge court), *vacated and remanded on other grounds*, 414 U.S. 473 (1974) (finding Wisconsin civil commitment procedure constitutionally defective because, *inter alia*, it did not require consideration of less restrictive alternatives to commitment).

As discussed above in Part I.A., quarantine is sufficiently analogous to civil commitment to put reasonable officials on notice that in order for a quarantine to comply with substantive due process the subject individual must be given an individualized assessment showing that the individual is dangerous and quarantine must be the least restrictive means of protecting the public health. The *Best* decision exemplifies that these substantive due process standards for quarantine follow immediately from the clearly established principles in the civil commitment context: *Best* relied on civil commitment cases in holding that "the fact that an individual has active TB does not itself justify involuntary detention; rather, that individual's circumstances must be analyzed to determine whether he or she would constitute a danger to society," and in requiring that the "State utilize[] the least restrictive means available to advance [its] interest." *Best,* 2003 WL 21518829, Ex. A, at *7,*8.

Recently, state courts have also applied the civil commitment standards in quarantine situations. While state law is not directly relevant to whether a constitutional right is clearly established, it does reflect the widespread acceptance of the principles at issue. *Anaya,* 195 F.3d at 595 ("[W]hile we do not look to state law in determining the scope of federal rights, the fact that the Colorado Supreme Court and

legislature limited the power of police over the intoxicated in precisely the manner the Fourth Amendment would limit such power is indicative of the degree to which the Fourth Amendment limit was established."). For example, in *City of Newark v. J.S.*, 652 A.2d 265, 277 (N.J. Super. Ct. Law Div. 1993) the court held that confinement of someone with TB was permissible, "but only under circumstances consistent with due process." The court endorsed the position that "the primary issues are the danger the patient presents to others and the existence of less restrictive alternatives to confinement that might protect the public equally well." *Id.* (citation omitted). Further, according to the court, "each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned," *id.* at 276 (citation omitted), and "[c]ommitment is an absolute last resort," *id.* at 279 n.12. Additionally, "[i]n order to fulfill the requirement of using the least restrictive alternative, public health officials will usually have to show that they attempted step-by-step interventions." *Id.*

Similarly, in *City of New York v. Antoinette R.*, 165 Misc. 2d 1014, 1015 (N.Y. Sup. Ct. 1995), the court noted the due process protections provided by New York's statute permitting forcible detentions of individuals with TB, including "an appraisal of the risk posed to others and a review of less restrictive alternatives which were

attempted or considered."[9]

2. *Plaintiff's Clearly Established Substantive Due Process Rights Were Violated*

Hickox did not receive an individualized assessment of dangerousness. The Additional Screening Protocols impose "a mandatory quarantine for . . . any medical personnel having performed medical services to individuals infected with the Ebola virus." Compl. ¶ 42.[10] The automatic quarantine of any healthcare worker who treated Ebola patients clearly does not allow for an individualized assessment of dangerousness. Indeed, an individualized assessment would have established that quarantine was not warranted. Hickox did not exhibit any symptoms when Defendants decided to quarantine her. *Id.* ¶¶ 31, 40, 45,48.[11] Asymptomatic

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[9] *See also Greene v. Edwards*, 263 S.E.2d 661 (W. Va. 1980), which applied the procedural due process standards for involuntarily hospitalization to quarantine or isolation under the state's Tuberculosis Control Act "because involuntary commitment for having communicable tuberculosis impinges upon the right to 'liberty, full and complete liberty' no less than involuntary commitment for being mentally ill." *Id.* at 663.

[10] New Jersey's Ebola Preparedness Plan ("EPP"), which was issued before the Additional Screening Protocols, did not require this mandatory quarantine policy, rather it permitted such quarantining. Compl. ¶ 27. However, the Additional Screening Protocols, *id.* ¶ 42, and Governor Christie's subsequent public statements indicate that New Jersey's policy changed after the issuance of the EPP, such that at the time of Hickox's quarantine, New Jersey policy was to require the quarantine of all returning healthcare workers. *See, e.g.*, Hunter Schwarz, *Christie defends quarantine for Ebola medical workers returning from W. Africa*, WASH. POST, Oct. 26, 2014, https://www.washingtonpost.com/news/post-politics/wp/2014/10/26/ christie-defends-quarantine-for-ebola-medical-workers-returning-from-w-africa/

[11] Further, at all times that she was caring for patients, Hickox adhered to MSF's strict infection control policies, including wearing full personal protective

individuals cannot transmit the disease to others, and, critically, fever precedes the contagious stage. *Id.* ¶ 17.[12]

In addition, quarantine of Hickox was not the least restrictive means of protecting the public health because direct active monitoring would have protected the public from any possible threat Hickox might theoretically have posed. In fact, for healthcare professionals who wore PPE at all times, such as Hickox, the CDC recommended direct active monitoring. Compl. ¶¶ 100-01.[13] And, the only court to consider the appropriate treatment of such healthcare workers found that quarantine was not necessary, requiring that the plaintiff, also Hickox, "[p]articipate in and cooperate with 'Direct Active Monitoring' as that term is defined by the [CDC

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equipment ("PPE"), Compl. ¶¶ 22-3, and while in Sierra Leone, Hickox never experienced an incident that would put her at risk for actual exposure or infection, such as accidentally being pricked by a needle or being splashed with possibly infectious fluids from an Ebola patient. *Id.* ¶ 24.

[12] See also Drazen, *supra* note 5.

[13] The CDC Interim Guidance defines direct active monitoring:

> Active monitoring means that the state or local public health authority assumes responsibility for establishing regular communication with potentially exposed individuals, including checking daily to assess for the presence of symptoms and fever . . . . Direct active monitoring means the public health authority conducts active monitoring through direct observation.
>
> . . .
>
> For direct active monitoring, a public health authority directly observes the individual at least once daily to review symptom status and monitor temperature; a second follow-up per day may be conducted by telephone in lieu of a second direct observation. . . .

The CDC Interim Guidance also stated that public health authorities may take certain additional restrictions based on an assessment of the individual's risk, but these "additional restrictions" did not include quarantine or isolation. Compl. ¶ 101.

Interim Guidance], and (2) [c]oordinate her travel with public health authorities to ensure uninterrupted Direct Active Monitoring."[14] *Mayhew v. Hickox*, Docket No. CV-2014-36, at *3 (Me. Dist. Ct., Fort Kent, Oct. 31, 2014), Ex. D, *order extended by agreement so ordered by the court* (Nov. 3, 2014), Ex. E.

3. *The Nature And Duration Of Hickox's Confinement Was Not Reasonably Related To Protecting The Public Health*

Defendants are correct that when assessing the constitutionality of the conditions of a person's confinement—as opposed to whether a person may be confined at all—the appropriate due process standard is that "'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" Def.Br. 28 (*quoting Jackson*, 406 U.S. at 738). However, at the least, given that oral thermometer readings belied the temporal thermometers' high temperature readings,[15] and consistently showed Hickox was not ill, Compl. ¶¶ 56-62, once Hickox tested negative for Ebola, *id.* ¶ 65, both the nature and duration of her confinement no longer bore a reasonable relation to protecting the public health.

That the nature of her confinement was no longer reasonable is evidenced by

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[14] The court also required that Hickox "[i]mmediately notify public health authorities and follow their directions if any symptom appears." *Mayhew*, Docket No. CV-2014-36, Ex. D, at *3 (emphasis in original).

[15] While temporal thermometer readings showed heightened temperatures, Compl. ¶¶ 49, 56-8, 60, Hickox alleges those readings are belied by the more accurate oral thermometer readings that were never above 99.5 degrees, well below the 100.4 degree benchmark for fever caused by infection or illness. *Id.* ¶¶ 56-62. Whether Hickox could be deemed to have fever, as Defendants contend, is therefore a question of fact that precludes dismissal.

the Quarantine Order, which called for Hickox to be held in isolation only until "medical testing is able to show that she does not have Ebola" and "she does not present an immediate danger to the public health." Compl. ¶ 81. The duration of Hickox's confinement, which was unconstitutional in the first place, became unreasonable, at a minimum, when the first blood test results indicated that she was negative for Ebola, given temperature readings consistently showed Hickox was not ill. *Id.* ¶¶ 61-2. At that point, Defendants were constitutionally required to release Hickox. *See O'Connor*, 422 U.S. at 574-5 (finding it was not "enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.").

Defendants cannot justify Hickox's continued confinement after she tested negative for Ebola. Defendants did not need "a reasonable amount of time to test and observe" Hickox once the test results were received. Def.Br. 32. Additionally, her continued detention did not conform to generally accepted medical standards. The epidemiologist's recommendation that Hickox be held an additional 72 hours after the first test results were received, Compl. ¶ 67, bore no relation to Hickox's health or to the 21-day incubation period. Indeed, given there were no changes in Hickox's health from the time she tested negative to the time she was released, Defendants' releasing Hickox prior to the recommended 72 hours and the end of the 21-day incubation

period shows that Defendants knew they had no basis for Hickox's continued confinement.

C. Clearly Established Fourth Amendment Law Indicates That Defendants Lacked Probable Cause To Quarantine Hickox

As Defendants indicate, it is well-established that the Fourth Amendment applies in the civil confinement context and that officials must have probable cause for civil confinement. Def.Br. 20-21, n.10. Furthermore, Defendants rightly point out that with respect to civil commitment "probable cause exists where the facts and circumstances within the officer's knowledge at the time of the seizure are sufficient for a reasonable person to conclude that an individual is mentally ill and poses a substantial risk of serious harm." *Id.* 21 (citations omitted). And, the probable cause determination "is not affected by subsequent developments." *Id.*

Defendants argue that

> [n]o reported federal cases . . . suggest that Defendants should have known the criteria they used to find probable cause in this case were lacking, just as there are "no cases that define 'dangerousness' with the requisite particularity or explain what type or amount of evidence would be constitutionally sufficient to establish probable cause of a dangerous condition."

Def.Br. 23 (*quoting Gooden v. Howard Cnty., Md.*, 954 F.2d 960, 967 (4th Cir. 1992)). Even if the precise contours of dangerousness are not clearly established, it has been clearly established that probable cause exists only where there is at least some evidence of dangerousness: "the law in no way permits random or baseless

detention of citizens for psychological evaluation." *Gooden*, 954 F.2d at 968; *see also* *Bailey v. Kennedy*, 349 F.3d 731, 741 (4th Cir. 2003) (lack of clarity as to "dangerousness" in the context of a mental health seizure "[did] not automatically immunize police officers from liability for every [such] seizure," and where there was no evidence of dangerousness, "the contours of probable cause were sufficiently clear that the unlawfulness of seizing someone in such a situation would have been apparent to reasonable officers").

Here, the facts indicate that the quarantine of Hickox was "baseless" and thus it was clearly established that Defendants lacked probable cause and violated Hickox's rights under the Fourth Amendment. The decision to quarantine Hickox was made prior to any elevated temperature readings. Compl. ¶¶ 31, 40, 45, 48. Therefore, at the relevant time, Hickox was entirely asymptomatic and in no way contagious, *id.* ¶ 17, and there was no reasonable basis to conclude that Hickox posed any threat to herself or others. Any subsequent temperature readings are irrelevant to the probable cause inquiry.

Even if the court finds that Hickox's initial seizure was supported by probable cause, it ceased to exist once the first set of blood test results indicated that Hickox was negative for Ebola, given that temperature readings indicated she was not ill. Compl. ¶¶ 61-62. "[N]umerous courts have reached the almost tautological conclusion that an individual in custody has a constitutional right to be released from

confinement 'after it was or should have been known that the detainee was entitled to release.'" *Schneyder*, 653 F.3d at 330 (*quoting Cannon v. Macon Cnty.*, 1 F.3d 1558, 1563 (11th Cir. 1993)).

Defendants argue that the mere fact that Hickox treated Ebola patients, albeit while wearing full PPE, was probable cause to believe that she posed a substantial danger to herself or others, relying on the definitions of quarantine and isolation as the "governing legal standard." Def.Br. 22. However, the proper governing standards are those provided by the statutes authorizing quarantine and/or isolation, which were relied on in the Quarantine Order. Under the standards set out by these statutes, it is plain that Defendants lacked probable cause.

Defendants cannot rely on the standards set forth in N.J. Stat. Ann. § 26:4-2e because that section applies only to persons who are "infected with a communicable disease."[16] At the time the decision to quarantine Hickox was made, she did not have an elevated temperature, Compl. ¶¶ 31, 40, 45, 48, and there was no plausible reason to believe that she was infected with Ebola. Likewise, N.J. Admin. Code § 8:57-1.11 applies only to persons who are actually exposed to or infected with a communicable

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[16] N.J. Stat. Ann. § 26:4-2e states, "In order to prevent the spread of disease affecting humans the Department of Health . . . shall have the power to: . . . [r]emove any person infected with a communicable disease to a suitable place . . ." Compl. ¶ 78 (emphasis added). The Quarantine Order also relied on N.J. Stat. Ann. § 26:4-2d, but this provision merely addresses the location of quarantine or isolation, indicating that it may be established "wherever deemed necessary." Compl. ¶¶ 75-76.

disease and only when it is "medically and epidemiologically necessary."[17] *Id.* ¶ 79. Under neither of these statutes does the mere possibility of exposure to a communicable disease provide probable cause to quarantine.[18] *Id.* ¶ 80. At the time the decision to quarantine was made, Hickox was asymptomatic, *id.* ¶ 31, 40, 45, 48, and had worn full PPE and followed all MSF infection control protocols at all times, *id.* ¶¶ 22-3. There was no evidence that would lead a reasonable person to conclude that Hickox had actually been exposed to or infected with Ebola.

Furthermore, quarantine or isolation must be medically and epidemiologically necessary to prevent or control the spread of disease. As alleged, because Hickox was

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[17] N.J. Admin. Code § 8:57-1.11 states:

> (a) A health officer or the Department, upon receiving a report of a communicable disease, shall, by written order, establish such isolation or quarantine measures <u>as medically and epidemiologically necessary</u> to prevent or control the spread of the disease.
>
> 1. If, in the medical and epidemiologic judgment of the health officer or the Department, it is necessary to hospitalize the <u>ill person</u> in order to provide adequate isolation, a health officer or the Department shall promptly remove, or cause to be removed, that person to a hospital.
>
> . . .
>
> (c) The Department . . . may, by written order, isolate or quarantine any person <u>who has been exposed</u> to a communicable disease as <u>medically or epidemiologically</u> necessary to prevent the spread of the disease, providing such period of restriction shall not exceed the period of incubation of the disease.
>
> Compl. ¶ 79 (emphasis added).

[18] The distinction between risk of exposure and actual exposure to a communicable disease was recognized in *In re Smith*, 101 Sickels 68, 40 N.E. 497 (N.Y. 1895), where the court interpreted a statute that empowered the local board of health to "require the isolation of all persons and things infected with or exposed to such disease . . ." *Id.* at 74. Referring to this language, the court held that it referred to "the actual fact and not a mere possibility" of exposure. *Id.* at 76.

asymptomatic when the decision was made to place her under quarantine she was not contagious and there was no possibility that Hickox could spread the disease. Compl. ¶ 17. It cannot be argued that quarantine or isolation was medically and epidemiologically necessary to prevent or control the spread of disease. Therefore, under the relevant, clearly-established legal standards, Defendants lacked probable cause to quarantine Hickox, as a reasonable official would have known.

D. Defendants' Quarantine Of Hickox Violated Clearly Established Limits On The Power To Quarantine Under Existing Quarantine Precedent

The quarantine precedent relied on by Defendants clearly establishes that the Constitution requires quarantine measures to bear a real or substantial relation to protecting the public health. In the case of Hickox, as a reasonable official would have known, quarantine did not comply with this standard. Consequently, Defendants are not entitled to qualified immunity under existing quarantine precedent.

Defendants rely heavily on *Jacobsen v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), to justify the quarantine of Hickox. In that case, the Court upheld a mandatory vaccination law. But in so doing the Court found that in order to pass constitutional muster a "statute purporting to have been enacted to protect the public health" must bear a "real or substantial relation to those objects" and cannot constitute "a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. Moreover, the Court cautioned:

> [I]t might be that an acknowledged power of a local community to

> protect itself against an epidemic threatening the safety of all might be 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 the courts to interfere for the protection of such persons.

Id. at 28; *see also id.* at 38.

Defendants claim that a hypothetical in *Jacobsen* "expressly endorsed the concept of *preventative* quarantine."[19] Def.Br. 16 (emphasis in original). While this hypothetical may suggest that preventative quarantine can be constitutional it also makes clear that the mere possibility of exposure to disease is not sufficient to justify quarantine. The court explicitly stated that only in "some circumstances"—i.e. not all circumstances—could a person "apparently free from disease himself" be quarantined. *Jacobsen*, 197 U.S. at 29. The Court did not define which circumstances would justify such "preventative quarantine" but the fact that there is a limited set of circumstances plainly indicates that something more than the mere possibility of exposure to disease upon a ship is required.

Furthermore, *Jacobsen* actually confirmed prior courts' holdings as to the limits on the state's power to quarantine. In 1895, the New York Court of Appeals emphasized the limits on the legislature's ability to enact "measures as will protect all persons from the impending calamity of a pestilence." *In re Smith*, 101 Sickels at 77.

[19] The hypothetical concerned the arrival of a person at port on a ship on which there had been cases of yellow fever or Asiatic cholera during the voyage. *Jacobsen*, 197 U.S. at 29.

Specifically, the court stated, "That those powers would be conferred without regulating or controlling their exercise is not to be supposed, and the legislature has not relieved officials from the responsibility of showing that the exercise of their powers was justified by the facts of the case." *Id.* Although this was a state case, it was relied on, indeed the above language was quoted, by the circuit court in *Jew Ho. v. Williamson*, 103 F. 10, 20 (C.C.N.D. Cal. 1900) in striking down a resolution of the board of health of San Francisco requiring the quarantine of a section of the city.

In *Jew Ho* the circuit court ordered a quarantine to be discontinued "by reason of the fact that it is unreasonable, unjust, and oppressive, and therefore contrary to the laws limiting the police powers of the state and the municipality in such matters." *Jew Ho.*, 103 F. at 26. The court found that "[t]o justify the state in thus interposing its authority in behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* at 20. The court continued, "the question therefore arises as to whether or not the quarantine established by the defendants in this case is reasonable, and whether it is necessary, under the circumstances of this case." *Id.* at 20-21. Proceeding from this understanding, the court rejected the quarantine at issue, relying heavily on the fact that the quarantine ran contrary to scientific practice: "defendants have proceeded from erroneous theories to still more erroneous and unscientific practices and methods of dealing with [the spread of said disease]." *Id.* at 21.

The more modern cases cited by Defendants conform to the standard articulated in *Jacobsen*. In both cases, the standards imposed by the regulations or law at issue ensure that the deprivation of liberty was substantially related to protecting the public health. In *U.S. ex rel Siegel v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y. 1963), the regulations required not only that Siegel be "exposed to infection" but also that she "be capable of spreading [small pox]." *Id.* at 791. Moreover, "isolation [was] not to be substituted for surveillance unless the health authority considers the risk of transmission of the infection by the suspect to be exceptionally serious." *Id.* In *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973), the statute limited detention to persons "who were 'reasonably suspected' of being infected with venereal disease by virtue of the fact that they had been arrested and charged with a violation of certain enumerated offenses." *Id.* at 1381. Detention was not justified "solely by reference to the risks inherent in the plaintiff's employment in the sex trade," as claimed by Defendants. Def.Br. 17. Critically, the isolation upheld in *Shinnick* was premised on the risk of transmission and the detention upheld in *Reynolds* was based on risk of infection, thereby ensuring that the real or substantial relation standard was met. In contrast Hickox's quarantine was premised on the mere risk of exposure. Compl. ¶ 82.

As the foregoing shows, the law is clearly established that quarantine must bear a "real or substantial relation" to protecting the public health. The quarantine of Hickox was no more scientific or reasonable than that at issue in *Jew Ho* and did not

bear a "real or substantial relation" to protecting the public health. At the time that the decision was made to place Hickox under quarantine, she was entirely asymptomatic, Compl. ¶¶ 31, 40, 45, 48, and the scientific consensus was that an asymptomatic individual was not contagious and could not spread the disease. *Id.* ¶ 17. This consensus was reflected in the CDC Interim Guidance, which recommended not quarantine but direct active monitoring of asymptomatic healthcare workers such as Hickox. *Id.* ¶¶ 100-01. Under the CDC Interim Guidance, such healthcare workers are classified as being at "some risk" of exposure to—not infection with—Ebola. *Id.* ¶ 100. They are not considered to be at "high risk" of exposure. *Id.* Thus the scientific consensus was that detention, quarantine and/or isolation were not necessary to protect the public health. *See also Mayhew*, Docket No. CV-2014-36, Ex. D, at *3 (ordering direct active monitoring).

Further, at a minimum, the continued quarantine of Hickox must be considered arbitrary and oppressive once her first blood test showed she was negative for Ebola, Compl. ¶ 65, given that her temperature readings indicated she was not ill, *id.* ¶ 61-62. From that moment, there was no reasonable basis to continue the quarantine. Her continued detention at this point was in no way related to protecting the public health. As discussed above, the NJDOH epidemiologist's recommendation that Hickox be held for another 72 hours was entirely arbitrary, related neither to the incubation period nor to any symptoms displayed by Hickox at the time. *Id.* ¶¶ 61-62.

E. Hickox's Procedural Due Process Rights Were Clearly Established

Hickox's procedural due process rights are clearly established and a reasonable official, acting in good faith, would have known that the notice and process afforded to Hickox under the Quarantine Order were constitutionally deficient.

1. Clearly Established Procedural Due Process Law Requires Notice And A Prompt Hearing Before A Judge Or Other Neutral Decision Maker

At its most basic, procedural due process requires notice, *see Mullane v. Central Hanover-Trust Co.*, 339 U.S. 306, 313 (1950), and the right to be heard "at a meaningful time and in a meaningful manner," *B.S. v. Somerset County*, 704 F.3d 250, 271 (3d Cir. 2013) (*quoting Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)). In the context of quarantines, judicial review ensures that the government does not have unfettered discretion to confine someone who is not a danger to the public, and it enables the court to "guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science." *J.S.*, 652 A.2d at 275. In determining what process is constitutionally required, a court should consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Involuntary confinement is "a massive curtailment of liberty." *Vitek*, 445 U.S. at 491; *Humphrey*, 405 U.S. at 509. This is true of a "civil confinement for any purpose," *Addington*, 441 U.S. at 425, including involuntary confinement based on a perceived contagious disease. *See, e.g., J.S.*, 652 A.2d at 271 (in case involving confinement of tuberculosis patient, holding that "[h]ardly any individual interest is higher than the liberty interest of being free from confinement"). That said, a state has a significant interest in protecting the public from communicable diseases. *Id.*

In general, the government should provide notice and an opportunity to be heard prior to a deprivation of liberty. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). However, in emergency situations, the government can effectuate a deprivation prior to notice and a hearing. *See, e.g. Goss v. Lopez,* 419 U.S. 565, 582-583 (1975) (suspension of student who posed continuing danger to others); *Patterson v. Armstrong County Children & Youth Services*, 141 F. Supp. 2d 512, 531 (W.D.Pa. 2001) (post-deprivation hearing permissible in child custody case where an imminent danger to child existed).

When a deprivation occurs without a prior hearing, "the necessary notice and…hearing should follow as soon as practicable." *Goss*, 419 U.S. at 582-83. In a case of civil confinement, because "personal freedom is at issue[,] due process at least demands that a person's legal status be determined at the earliest possible time." *In re Barnard*, 455 F.2d 1370, 1375 (D.C. Cir. 1971); *see also French v. Blackburn*, 428 F.

Supp. 1351, 1354 (M.D.N.C. 1977) ("Every court which has addressed this issue has held that due process demands that some sort of hearing be held within a reasonable time after confinement or custody.").

While courts differ on the precise time in which a hearing must be held to justify a civil commitment, all courts require either a full hearing or a hearing on probable cause before a neutral decision maker—almost exclusively a judicial officer—within a relatively short period of time. *See, e.g., Project Release v. Prevost*, 722 F.2d 960, 975 (2d Cir. 1983) (requiring hearing within 5 days of a request for a hearing); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1982) ("[D]ue process requires a probable cause hearing after the 72-hour emergency detention period."); *In re Barnard*, 455 F.2d at 1374-5 (probable cause hearing must be available within first 2 days of 7-day commitment).[20] Regardless of where courts place the outer limit of time by which a hearing takes place, *all* courts set a reasonable time from the point of commitment by which a hearing before a neutral decision-maker (generally a judicial

[20] Numerous district courts have also imposed review before a neutral decision-maker within a reasonable period of time. *See, e.g., Luna v. Van Zandt*, 554 F. Supp. 68, 75 (S.D.Tex. 1982) (requiring probable cause hearing "within 72 hours after a patient is taken into protective custody"); *Wessel v. Pryor*, 461 F. Supp. 1144, 1147 (E.D.Ark. 1978) (probable cause hearing required within 72 hours of first appearance before the court); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D.Neb. 1975) (requiring probable cause hearing "promptly after the emergency detention" and a full hearing "within a reasonable time" thereafter); *Lessard*, 379 F. Supp. at 1381 (probable cause hearing required within 48 hours and a full hearing within 14 days); *Brown v. Jensen*, 572 F. Supp. 193, 198 (D.Colo. 1983) (appointed counsel can request a mandatory hearing after 10 days).

officer) must be held.

Additionally, the person being deprived of her liberty should not bear the burden of initiating process. Rather, the government, in seeking the deprivation, must bear the burden and must initiate the hearing. *B.S.*, 704 F.3d at 272 (state bears the burden of providing opportunity to be heard); *Luna*, 554 F. Supp. at 75 (due process demands a mandatory, state-initiated probable cause hearing). As stated in *Doe*, 657 F.2d at 1022: "Conditioning a probable cause hearing on the request of the individual reverses the usual due process analysis in cases where potential deprivation is severe and the risk of error is great."

Finally, "a right to counsel exists where an individual's physical liberty is threatened by the state's action." *Project Release*, 722 F.2d at 976. That right exists not only in cases of criminal detentions, but in matters of civil commitments as well. *Id.* (recognizing right to counsel in civil commitment hearings); *In re Barnard*, 455 F.2d 1375-6 ("there is a constitutional right to counsel at this [mental health commitment] hearing").

2. *Defendants Violated Hickox's Clearly Established Procedural Due Process Rights*

The Quarantine Order set forth the process Hickox would be afforded, Compl. ¶ 84; a process that was grossly deficient under the clearly established procedural due process rights discussed above. The process described did not provide for <u>any</u> post-

deprivation review before a neutral decision maker. *Id.* The only available review of the order was by the very person who authorized the quarantine in the first place: Defendant O'Dowd. *Id.* ("Any person or persons subject to this Order may seek relief from the Commissioner from the provisions of the Order by making a written application within 10 days . . ."). [21]

Second, Hickox was entitled not merely to judicial review, but to review enabling her to be heard "at a meaningful time." *See, e.g., B.S.*, 704 F.3d at 272 (holding, in child removal case, "being heard much later, after the deprivation, fails to address the harm"). Yet, the Quarantine Order provided no timeframe by which the Commissioner must make a decision and reply to the written request. Compl. ¶ 84.[22]

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[21] The notice provided Hickox did not even comply with New Jersey law. When, as here, there has been no declaration of a public health emergency, one who is quarantined has the right to request "immediate judicial review of a[n]...order in lieu of proceeding with the...[internal] appeal process." N.J. Admin. Code 8:57-1, Appx. B § 1.7(d). The government "may consent to immediate jurisdiction of a court with jurisdiction when requested by the subject or subjects of a board order and justice so requires." *Id.* A person also has a right to judicial review following the departmental appeal process described in the order. *Id.* § 1.7(c). Hickox's notice did not inform her even of those procedures (which themselves do not comport with due process).

[22] Indeed, the requirement that the opportunity to be heard occur "at a meaningful time" should have dictated a more expeditious hearing in the context of quarantining a person not yet known to have a communicable disease. A delay of even a few days (much less an undefined amount as existed here) will often render the issue moot: the government will have been permitted to quarantine a person during the entire time they seek to do so without any oversight into whether the initial decision to quarantine (or the need to continue the quarantine throughout that period) was appropriate. Further, the gathering of pertinent information (here, two negative blood tests) can be (and was) obtained in extremely short order, so delay of more than about 24 hours is unnecessary.

Third, the process for review put the onus on the person quarantined to seek relief from the Quarantine Order. Compl. ¶ 84. And finally, the order provided no affirmative right to counsel. *Id.* Hickox was not provided with counsel, and the private counsel that attempted to meet with her was foreclosed from doing so until the evening before her release. *Id.* ¶¶ 93-95.

There was no valid reason for Defendants to deny Hickox more meaningful process. Clearly, "the probable value…of additional or substitute procedural safeguards" (which must be considered under *Mathews*), namely prompt judicial review, would have been significant. *J.S.,* 652 A.2d at 274 (describing importance of judicial review in quarantine case). Providing judicial review would not have created any undue fiscal or administrative burdens. Under New Jersey law, prompt judicial review is already afforded to all persons quarantined during public health emergencies, N.J. Stat. Ann. § 26:13-15, and New Jersey has utilized emergency judges for such reviews. *See J.S.*, 652 A.2d at 268 (referring to obtaining a temporary commitment order and an order to show cause before "the emergent duty judge" in the quarantine context).[23]

Due to the woeful lack of process afforded Hickox, she bore the entire risk of

[23] As a case about quarantine, *J.S.* is informative. The court, in order to comply with due process, required the government to (at a minimum) follow the same procedure that was required when committing someone to a psychiatric hospital. 652 A.2d at 275-6, 277. That process includes a judicial hearing within a reasonable time of confinement. *Id.* at 275. That judicial process "enhance[d] fairness and reduce[d] the risk of error and abuse." *Id.*

an erroneous deprivation of her liberty. Here, the question that should have been heard before a judge (or other neutral decision maker) was whether Hickox's confinement was "medically and epidemiologically necessary to prevent or control the spread of the disease." Compl. ¶ 79. Yet there was no review of Defendants' discretion in making that determination, even though it was strongly and consistently in dispute. Indeed, the risk of error here was especially great because Defendants decided to utilize a standard for quarantine that departed from the CDC Interim Guidelines. *Id.* ¶¶ 42, 82, 100-101. The decision to quarantine Hickox was initially made without her showing any symptoms. *Id.* ¶¶ 31, 40, 45, 48. When a "symptom" did arise, its existence was disputed. *Id.* ¶¶ 49, 56-62, 66. And the quarantine was continued even though Defendants became aware of two negative blood tests within roughly the first 24 hours of confinement and Hickox's temperature readings consistently showed she was not ill. *Id.* ¶¶ 61-2, 65-7, 70-1, 87-98. Ultimately, the determination that Hickox's detention was "medically or epidemiologically necessary" to protect the public proved to be incorrect. *Id.* ¶¶ 97-8.

Not surprisingly, Defendants do not defend, or even mention, the unconstitutional notice and process to which Hickox was subjected. Rather, they focus on the fact that, under that unconstitutional system, she was released after 80 hours. Def.Br. 33-36. Yet that fact does not justify dismissal or excuse the constitutional violation. The flawed process, and the flawed notice, caused damage in and of

themselves. Being informed of a particular (and here unconstitutional) process affects one's decision making and one's state of mind. *Vitek*, 445 U.S. at 496 ("[N]otice is essential to afford the [person confined] an opportunity…to understand the nature of what is happening to him.").

II. HICKOX HAS STATED CAUSES OF ACTION UNDER STATE LAW

A. Questions Of Fact Preclude Dismissal Of Hickox's Claim Of False Imprisonment.

There is no general immunity against claims of false imprisonment under New Jersey's Tort Claims Act ("TCA"), N.J. Stat. Ann. § 59:3-1 *et seq*. The general immunity provision "excludes both claims based on false arrest and false imprisonment entirely." *Leang v. Jersey City Bd. of Educ.*, 969 A.2d 1097, 1112 (N.J. 2009) (*citing* N.J. Stat. Ann. § 59:3-3).

Defendants therefore invoke the TCA's "quarantine immunity" pursuant to N.J. Stat. Ann. § 59:6-3. "Quarantine immunity" precludes an action against a public official that challenges a "decision to perform or not to perform any act to promote the public health…." *Id.* However, as noted in every case Defendants cite for support, "quarantine immunity" is not absolute; rather, only limited immunity exists. *Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc.*, 155 A.2d 536, 545 (N.J. 1959); *Valentine v. Englewood*, 71 A. 344, 346 (N.J. 1908). As explained by the New Jersey Supreme Court, immunity is only available when the "administrative official exercised his judgment and discretion in good faith" and "immunity would be

inapplicable where the administrative official's action was actuated by malice or bad faith." *Bedrock Foundation, Inc.*, 155 A.2d at 545; *see also Valentine*, 71 A. at 346 (immunity applied because there was no "fraud or malice").[24] Further, under the TCA, "the burden...to prove" immunity is on the public employee. *Leang*, 969 A.2d at 1112. A defendant "'must come forward with proof of the nature and character [that] would exclude any genuine dispute of fact' as to the application of immunity." *Id.* (*quoting Kolitch v. Lindedahl*, 497 A. 2d 183, 189 (N.J. 1985)).

Therefore, the question as to whether Defendants are entitled to immunity for Hickox's false imprisonment claim, *i.e.*, whether the actions taken were in good faith, is purely factual. Hickox has made sufficient allegations to require this factual question to proceed, thereby precluding dismissal. Hickox alleges two specific aspects of her confinement that support the contention that Defendants' actions were not taken in good faith, and Defendants have not met their burden to "come forward with proof of the nature and character [that] would exclude any genuine dispute of fact as to the application of immunity." *Leang*, 969 A.2d at 1112 (citation omitted). First, "the decision to quarantine Hickox was made when she was asymptomatic and there had been no elevated temperature readings." Compl. ¶ 48; *see also id.* ¶¶ 31, 40, 45. And, as alleged, persons who are asymptomatic are not infectious. *Id.* ¶ 17. Since the

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[24] Defendants admit that *Bedrock Foundation, Inc.* and *Valentine* are the controlling authorities and that the "quarantine immunity" rule is to be read "consistent with the recognized approach taken by the New Jersey Courts [in those cases]." Def.Br. 37.

quarantine decision was thus made "without medical or epidemiological justification," *id.* ¶ 111, it was a decision not made in good faith. Second, despite two blood tests that were negative for Ebola, *id.* ¶¶ 65, 70, temperature readings that consistently showed Hickox was not ill, *id.* ¶¶ 61-62, and thus complete lack of medical or epidemiological justification for quarantine, *id.* ¶ 111, Defendants continued to hold Hickox against her will for almost another 48 hours, *id.* ¶¶ 98-9. The continued confinement thereafter no longer bore even a reasonable relation to public health, *id.* ¶¶ 111-12, and was in bad faith.[25]

In both *Bedrock Foundation, Inc.* and *Valentine*, the question of immunity was addressed not at the motion to dismiss stage but on a summary judgment motion, *Bedrock Foundation, Inc.*, 155 A.2d at 539, or following trial, *Valentine*, 71 A. at 345. And in addressing the summary judgment motion in *Leang*, the New Jersey Supreme Court highlighted the proper analysis and the presumptions in favor of the truth of a plaintiff's allegations: "[V]iewed in light most favorable to plaintiff, her factual allegations suffice....[I]n the end, plaintiff will be left to her proofs." 969 A.2d at 1114.[26] Hickox likewise deserves the right to prosecute her claims and not have

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[25] As further evidence of bad faith, the notice Defendants provided to Hickox did not apprise her of a right to seek immediate judicial review. Thus, Defendants ignored New Jersey's model procedures set forth in N.J. Admin. Code § 8:57-1, Appx. B.
[26] Given that Defendants bear the burden related to "good faith," Hickox does not believe it is necessary for her to make a specific allegation (beyond those described above) that Defendants acted in bad faith or with malice. However, if the court deems it necessary, Hickox requests the opportunity to amend her complaint to do so,

determinations of fact rendered prematurely. Defendants' motion to dismiss the false imprisonment claim must therefore be rejected.

B. Hickox Has Adequately Pled All Elements Of A False Light Claim

New Jersey recognizes a cause of action for "publicity that unreasonably places the other in a false light before the public." *Leang*, 969 A.2d at 1115 (citation omitted). Liability for this form of privacy invasion is found when:

> [o]ne . . . gives publicity to a matter concerning another that places the other before the public in a false light [and]
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E. Such a claim protects the individual's interest "in not being made to appear before the public in an objectionable false light or false position." *Id.*, Comment b.

Defendants question whether Defendant Christie's statement that Hickox was "obviously ill" can be considered "highly offensive to a reasonable person." [27] Def.Br.

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pursuant to Fed. R. Civ. P. 15.

[27] Defendants suggest that the Complaint "elided" Christie's statements, and imply that he did not say she was obviously ill. Def.Br. 10. However, the article Defendants cite clearly states: "Christie acknowledges to reporters . . . that Hickox tested negative for Ebola, but said she is 'obviously ill.'" Matt Arco, *Ebola: Timeline of events, actions by Chris Christie*, http://www.nj.com/politics/index.ssf/2014/10/ebola_timeline_of_events_actions_by_chris_christie.html. Additionally, despite Defendants' implication otherwise, it is irrelevant to the false light inquiry that Defendant Christie did not refer to Hickox by name. When the statements at issue were made, Hickox

38. First, when Defendant Christie made that statement, Hickox's temperature was consistently showing that she was not ill, Compl. ¶¶ 61-62, 66, 69, 129, and there was no truth to the statement that she was "obviously ill." Second, while Defendant Christie acknowledged that Hickox had tested negative for Ebola, his reference to his concern over the "inconvenience that could occur from having folks that are symptomatic and ill out amongst the public," *id.* ¶ 69, implied that Hickox was a threat to the public health when she clearly was not. A reasonable person would find it highly offensive to be falsely portrayed as being or having been a threat to the public.

Defendants also argue that Hickox has failed to allege the second prong for a false light claim – that the speaker had knowledge of or acted with reckless disregard as to the falsity of the matter. However, Hickox clearly alleged this prong in her Complaint. As stated above, it was known at the time of the statements in question not only that Hickox was negative for Ebola, but also that Hickox did not have a fever and was not ill in any way. Compl. ¶¶ 61-62, 65-7, 69, 129. Nevertheless, Defendant Christie falsely stated that Hickox was "obviously ill" and falsely implied that she was a threat to the public health. *Id.* ¶ 69. Accordingly, the Complaint specifically alleges actual malice, the second prong of a false light claim, in that it sets forth factual allegations indicating that Defendant Christie "knew the statement to be false" or at a minimum "made the statement with a high degree of awareness of its probable

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was known to be the healthcare worker who had been detained in New Jersey and was identifiable as the subject of Defendant Christie's statements. Compl. ¶ 69.

falsity." Def.Br. 39 (citations omitted).

Defendant Christie also raises the "newsworthiness" defense in his motion. It has been held that "[t]he 'newsworthiness' defense in privacy-invasion tort actions is available to bar recovery where the subject matter of the publication is one in which the public has a legitimate interest." *Romaine v. Kallinger*, 537 A.2d 284, 293 (N.J. 1988). Once a matter is found to be within the sphere of public interest, otherwise private *facts* are publishable. *Id.* at 294 (emphasis added). Here, Defendant Christie did not publish *facts* about plaintiff. He published falsehoods: Hickox was not obviously ill nor was she, or had she ever been, a threat to the public. Defendant Christie cannot take cover from a false light claim under the "newsworthiness" defense when his statements were knowingly false and reckless to begin with.

CONCLUSION

For the foregoing reasons, the Court should not grant Defendants' motion to dismiss.

Respectfully submitted,

Dated: March 15, 2016

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