



Plaintiffs argue that DOC's failure to modify its visitation protocol<sup>3</sup> violates their clients' right to effective counsel under Article 1, Section 11 of the Constitution of the State of Alaska and the Sixth Amendment to the United States Constitution, as well as Alaska regulatory and statutory law.

On March 16, 2021, Defendants filed their *Opposition to Motion for Preliminary Injunction*. Defendants argue that Plaintiffs' motion is moot because DOC has provided an updated policy, effective March 17, 2021 which "allows for attorney-client visitation provided that the inmate is 'fully vaccinated' and the attorney and inmate follow standard Covid-19 protocols."<sup>4</sup> Defendants further argue that their policy is constitutional under *Turner v. Safley*,<sup>5</sup> because: (1) there is a valid, rational connection between the policy and the government interest; (2) DOC has provided alternate means of communication via video conferences between attorneys and clients; and (3) there are no ready alternatives to their newly implemented policy.

On March 23, 2021, Plaintiffs filed their *Reply to Alaska Department of Corrections' Opposition to Plaintiffs' Motion for Preliminary Injunction*. Plaintiffs argue that due to DOC's vaccination mandate for inmates to receive visitation, the case is not moot. Plaintiffs further invoke the public interest exception to the mootness doctrine, arguing that "it is quite possible that a new variant of the virus renders the vaccine ineffective, or

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<sup>3</sup> Plaintiffs' concede DOC's initial reaction to the COVID-19 Pandemic was reasonable, but contest the duration that these initial emergency measures remain unchanged.

<sup>4</sup> Defendant's Opposition to Motion for Preliminary Injunction at 2,3.

<sup>5</sup> 482 U.S. 78, 91 (1987).

another public health crisis arises that leaves inmates without access to their attorneys for over a year.”<sup>6</sup>

On March 23, 2021 the Court heard oral argument from Plaintiffs and Defendants. Plaintiffs argued that the issue before the Court remains a live controversy, and in the alternative, that the public interest exception applies. Defendants assert that they are not arguing that the entire case is moot, but only that the Court should refrain from granting injunctive relief at this early stage. Further, they argue the DOC has a rational basis for its policy.

Having considered those arguments and the evidence before the Court at this early stage of the proceedings, the Court now grants Plaintiffs’ Motion for Preliminary Injunction.

## BACKGROUND

On March 3, 2020, in response to the emerging COVID-19 pandemic, DOC instituted a policy suspending “[a]ll visiting” “to include outside volunteers and other tours and groups who routinely come into the institutions” at DOC facilities across Alaska.<sup>7</sup> DOC ended this press release by stating “DOC will be reevaluating all protocols and procedures in 30 days.”<sup>8</sup> A year has passed, and DOC is only now making changes to this policy as of March 17, 2021. According to DOC’s latest press

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<sup>6</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 3.

<sup>7</sup> Plaintiffs’ Motion for Preliminary Injunction, at 2 (citing DOC Mitigation & Response Press Release (March 3, 2020) available at <https://doc.alaska.gov/commish/pressreleases/DOC%20Press%20Release%20-%20COVID-19%20Outbreak%20Response%20Plan.pdf> (last visited March 24, 2021)).

<sup>8</sup> *Id.*

release, in order for attorney-client visitation to take place, the inmate must be fully vaccinated, in addition to all typical Covid-19 safety precautions.<sup>9</sup>

## THE PRELIMINARY INJUNCTION STANDARD

“Equitable injunctive relief is an extraordinary remedy that is appropriate only where the party requesting relief is likely to otherwise suffer irreparable injury and lacks an adequate remedy at law.”<sup>10</sup> As discussed below, a moving party may obtain a preliminary injunction by meeting either the balance of hardships standard or the probable success on the merits standard.<sup>11</sup>

### A. Balance of Hardships

The balance of hardships standard requires the Court to balance the harm the plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant.<sup>12</sup> A preliminary injunction is warranted under the balance of hardships standard when three factors are present:

- (1) the plaintiff must be faced with irreparable harm;
- (2) the opposing party must be adequately protected; and

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<sup>9</sup> “Typical safety precautions” here meaning: entry screenings, temperature checks, face masks, and no physical contact. Defendant’s Opposition to Motion for Preliminary Injunction at 2 (citing Exhibits 1 and 2).

<sup>10</sup> *Lee v. Konrad*, 337 P.3d 510, 517 (Alaska 2014) (citing *Carroll v. El Dorado Estates Div. No. Two Ass’n, Inc.*, 680 P.2d 1158, 1160 (Alaska 1984); *Sharp v. 251st St. Landfill, Inc.*, 925 P.2d 546, 549 (Okla.1996); and *Grimes v. Enter. Leasing Co. of Philadelphia, LLC.*, 66 A.3d 330, 340 (Pa.2013)).

<sup>11</sup> *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm’n*, 470 P.2d 537, 540 (Alaska 1970) [modified in other respects]).

<sup>12</sup> *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm’n*, 470 P.3d 537, 540 (Alaska 1970)).

(3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.<sup>13</sup>

When applying the balance of hardships standard, the Court “is to assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction, and to assume the defendant ultimately will prevail when assessing the harm to the defendant from the injunction.”<sup>14</sup> An injunction under this standard is appropriate when “the injury which will result from the temporary restraining order... is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted.”<sup>15</sup>

#### **B. Clear Showing of Probable Success On The Merits**

If the party seeking a preliminary injunction does not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued, the party requesting the preliminary injunction must meet a

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<sup>13</sup> *Id.* (quoting *State v. Kluti Kaab Native Village of Copper Center*, 831 P.2d 1270, 1273 (Alaska 1992)).

<sup>14</sup> *Id.* (citing *A.J. Indus., Inc.* at 540).

<sup>15</sup> *Id.* (citing *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378–79 (Alaska 1991)(citations omitted) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified on other grounds*, 483 P.2d 198 (Alaska 1971); *Alaska Pub. Utils. Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 554 (Alaska 1975))).

different standard: they must make a clear showing of probable success on the merits.<sup>16</sup>

### C. Mootness Doctrine

“A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails.”<sup>17</sup>

The public interest exception to mootness considers three factors: “(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.”<sup>18</sup>

## ANALYSIS

### A. The Case is Not Moot

Defendants begin by arguing that Plaintiffs’ claims for injunctive relief are already moot, because DOC’s new policy does allow for in-person visitation “provided that the inmate is ‘fully vaccinated’ and the attorney and inmate follow

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<sup>16</sup> *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1274 (Alaska 1992) (quoting *A.J. Indu., Inc. v. Alaska Pub. Serv. Comm’n*, 470 P.2d 537, 540 (Alaska 1970)).

<sup>17</sup> *Mitchell v. Mitchell*, 445 P.3d 660, 663 (Alaska 2019) (quoting *Fairbanks Fire Fighters Association, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002)).

<sup>18</sup> *Kodiak Seafood Processors Association v. State*, 900 P.2d 1191, 1196 (citing *Pelosa v. Freus*, 871 P.2d 687, 688 (Alaska 1994)).

standard Covid-19 protocols” effective March 17, 2021.<sup>19</sup> In response to this argument, Plaintiffs claim that “DOC’s changes do not vitiate the live controversy at issue here.”<sup>20</sup> Specifically, Plaintiffs take issue with DOC’s policy requiring inmates to be “fully vaccinated”. Under DOC’s new policy, this means “two weeks must have passed since inmates received their second dose of a two-dose series (Moderna or Pfizer) or at least two weeks after the inmate receives a single dose vaccine (Johnson & Johnson).”<sup>21</sup> Plaintiffs point to the extreme delays in visitation that this policy would cost (a minimum of 36 days for Pfizer and 42 days for Moderna).<sup>22</sup> Plaintiffs therefore posit that “less than ten percent of the inmate population would qualify for in-person visits under DOC’s revised visitation protocol.”<sup>23</sup>

Because of this extremely limiting policy proposed by DOC in order to address the issues of visitation, and the near certainty that DOC will revisit the policy again in the future, the Court finds that this issue is not moot. Specifically, the Court finds that the inclusion of “full vaccination” as a prerequisite to receiving the constitutionally protected right to effective counsel is a live controversy in need of resolution.

However, even if this policy was modified to be less restrictive than it currently stands, the Court finds that this case would still not be moot under the public interest exception. Specifically, the Court finds (1) the dispute regarding DOC’s policies could

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<sup>19</sup> Opposition to Motion for Preliminary Injunction at 2.

<sup>20</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 2.

<sup>21</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 2.

<sup>22</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 2.

<sup>23</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 2.

arise again at any time if there is no legal order preventing them from reverting their policies to disallow visitation or modify visitation criteria; (2) mootness would allow circumvention of the issue of visitation in this circumstance; and (3) even if this was not the case, the issue of adequate representation is so important to the public at large as to justify overriding the mootness doctrine.

**B. Plaintiffs have met the balance of the hardships standard.**

Plaintiffs ask this Court to apply the three-prong balance of the hardships test.<sup>24</sup>

**1. Plaintiffs Have Shown They Will Suffer Irreparable Harm.**

On the first prong, Plaintiffs claim that they have suffered, and will continue to suffer, irreparable harm as a result DOC's policies impeding the ability of criminal defense attorneys to visit with their in-custody clients, whether or not those clients have been vaccinated. The Court agrees.

Plaintiffs have explained in great detail the intimate process of consultation involved in the attorney-client relationship, the significantly increased difficulty in communication since the new policy,<sup>25</sup> and the critical role of in-person preparation for trial.<sup>26</sup> Plaintiffs state that "prior to the pandemic, nearly every lawyer-client

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<sup>24</sup> Plaintiffs' Motion for Preliminary Injunction at 5.

<sup>25</sup> Plaintiffs' Motion for Preliminary Injunction at 6 (citing affidavit of Ben Muse at ¶ 7).

<sup>26</sup> Plaintiffs' Motion for Preliminary Injunction at 6, 7 (citing *McKinnon v. State*, 526 P.2d 18, 22 (Alaska 1974),



relationship commenced with an in-person visit, rather than a phone call, at the inmate's designated correctional facility."<sup>27</sup> However, now that criminal defense attorneys have been limited to phone calls and video conferences, the ability to conduct physical demonstrations, conduct mock cross-examinations, and otherwise communicate empathically and effectively has been severely impaired, to the detriment of the incarcerated defendants and their cases. Plaintiffs also note that the lack of in-person visits severely restricts their ability to assess the mental health of the incarcerated clients, which is a major factor in making decisions regarding pleas, trial, and overall competency.<sup>28</sup>

Here, Plaintiffs have successfully identified major, irreparable harm. The lack of in-person visitation for unvaccinated clients has a demonstrable negative impact in the quality of the advocacy of criminal defense lawyers, as has been attested to in several of Plaintiffs' submitted affidavits. Further, the potential harm of an underprepared attorney on the viability of a client's future case can neither be disputed nor understated. With the imminent return to criminal jury trials, any delay in case preparation, especially given the inherently large caseload of defense lawyers, might prove fatal to the liberty interests of countless currently incarcerated Alaskans.

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<sup>27</sup> Plaintiffs' Motion for Preliminary Injunction at 6 (citing Affidavit of Ben Must at ¶ 4, Affidavit of Julio Moudy at ¶ 3).

<sup>28</sup> Plaintiffs' Motion for Preliminary Injunction at 9.

Moreover, the distinction between vaccinated and unvaccinated inmates is not rationally related to DOC's safety concerns.<sup>29</sup> DOC staff is not required to be vaccinated to interact with the prison population. Nor is the Court distinguishing or prioritizing cases involving vaccinated defendants over unvaccinated defendants. Given the significant precautions to be put in place for in-person visits with counsel – precautions which Plaintiffs agree are wholly appropriate – the distinction between vaccinated and unvaccinated inmates does not hold water.

In addition to the irreparable harm of inadequate trial advocacy, Plaintiffs point to the difficulty of establishing trust with clients that stems from severely restricted, digital or telephonic only meetings. Kevin Coe, an Assistant Public Advocate, has found that his new clients “are extremely [distrustful] of [him] and making progress in either negotiating their case or developing defense strategies has stalled.”<sup>30</sup> Further, Plaintiffs posit that due to this lack of trust, an increasing number of “jailhouse lawyers” are taking the place of legitimate attorneys due to the eroding trust between the incarcerated and their estranged attorneys.<sup>31</sup> Another criminal defense lawyer, Julia Moudy indicated that “in-person visits are the only way [the client’s concerns] are allayed” and further that “[f]requently clients will reject the advice of counsel that they

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<sup>29</sup> “There must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Court does not intend to usurp DOC’s policy-making ability. However, under the circumstances, the distinction between vaccinated and unvaccinated inmates does not appear to meet even the low burden of a valid, rational connection.

<sup>30</sup> Plaintiffs’ Motion for Preliminary Injunction at 8,9 (citing Affidavit of Kevin Coe at ¶ 8).

<sup>31</sup> Plaintiffs’ Motion for Preliminary Injunction at 8 (citing affidavit of Burke Wonnell at ¶ 9). The Court is intimately familiar with the problem of jailhouse lawyers.

do not trust or with whom there is no rapport,” furthering the case for in-person visitation.<sup>32</sup>

Here again, Plaintiffs have articulated irreparable harm. The attorney-client relationship should be considered sacred by all attorneys, and this sacrament is easily desecrated due to a lack of trust. Furthermore, the fact that trust has been so eroded in legitimate attorneys that inmates are instead turning to other inmates, “jailhouse lawyers,” creates a disastrous risk for miscarriages of justice. It should be apparent to any attorney that in order to provide any kind of advice, one must be versed in the facts of the matter. If those incarcerated turn to each other for advice, then inevitably an increase in “jailhouse confessions” or even just the appearance of such, may be the result. This once again has the double effect of not only denying effective counsel, but providing worse than no counsel – “counsel” that not only isn’t bound by attorney-client privilege – but in many is cases actually incentivized to betray the “client.”

Accordingly, there can be no doubt that this prong has been met. While Defendants argue in essence that telephonic or even virtual meetings are just as good, the reality of the situation, as indicated above, is that this is nowhere close to realistic. Defendants argue that inmates should not be allowed to dictate DOC policy decisions by expressing irrational distrust for communication methods, but the Court is not relying just on what inmates believe; rather, the Court finds that lawyers who

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<sup>32</sup> Plaintiffs’ Motion for Preliminary Injunction at 9, 10 (quoting affidavit of Julia Moudy at ¶ 4).

represent those inmates are in the best position to address what will allow those lawyers to establish effective, meaningful communication with their clients.

Accordingly, this Court finds that irreparable harm has already occurred, and continues each day that defense lawyers cannot meet face-to-face with all of their clients.

2. Plaintiffs Have Shown that Defendants Will Be Adequately Protected.

As to the second prong, Plaintiffs claim that DOC will be adequately protected because “there is no possible injury Defendants will suffer as a result of such an order, beyond spending limited resources in complying with the previously existing regulations affording inmates and counsel access to visitation.”<sup>33</sup> Plaintiffs preempt possible objections regarding safety risks, pointing to the undisputed fact DOC is offering both staff and inmates access to vaccines.<sup>34</sup> Further, given the high rate of vaccination available to the public, and that Alaska Attorneys now qualify as “essential workers” in terms of vaccination priority, Plaintiffs argue that DOC will have ample ability and resources to protect its inmate population.<sup>35</sup> Finally, Plaintiffs’ note that at least 38 states have successfully adapted to the pandemic to permit attorney-client visits, and there is no reason why Alaska should not join their ranks.<sup>36</sup>

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<sup>33</sup> Plaintiffs’ Motion for Preliminary Injunction at 10.

<sup>34</sup> Plaintiffs’ Motion for Preliminary Injunction at 10.

<sup>35</sup> Plaintiffs’ Motion for Preliminary Injunction at 10.

<sup>36</sup> Plaintiffs’ Motion for Preliminary Injunction at 10.

Conversely, Defendants argue that “Plaintiffs cannot show that DOC’s interest in protecting the health and safety of inmates would be ‘adequately protected’ if any of the requirements for attorney-client visitation in place were removed.”<sup>37</sup> Defendants further claim that there “are no ‘ready alternatives’” to their current and now recently changed policy.<sup>38</sup>

Here again, Plaintiffs’ argument holds more merit. DOC cannot possibly expect the Court to believe that no alternatives exist when the country at large – all of which is dealing with the same pandemic – is full of ready examples. Furthermore, even acknowledging DOC’s interest in protecting the health of its employees and its inmates, the Court finds that the *uncontested* COVID-19 safety measures are as of this time sufficient to protect said interests. These uncontested measures include Covid-19 screening of visiting attorneys, requiring visiting attorneys to submit to temperature readings, and requiring visiting attorneys and inmates to wear protective face coverings – in addition to whatever other sanitation measures DOC finds reasonable.<sup>39</sup>

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<sup>37</sup> Opposition to Motion for Preliminary Injunction at 4.

<sup>38</sup> Opposition to Motion for Preliminary Injunction at 3.

<sup>39</sup> Plaintiffs’ Reply to State’s Opposition to Preliminary Injunction Motion at 2.

3. Plaintiffs Have Raised Serious and Substantial Questions Going To The Merits of the Case.

Plaintiffs argue they have raised serious and substantial questions going to the merits of this case.<sup>40</sup> Plaintiffs cite to both 22 AAC 05.545 and AS 12.25.150(b), arguing that defendants have the right to physically visit with an attorney.<sup>41</sup> Plaintiffs further cite to the Sixth Amendment to the U.S. Constitution and Article 1, Section 11 of the Alaska Constitution, reiterating the essential right to effective assistance of counsel.

Conversely, Defendants argue that Plaintiffs are not likely to succeed on the merits of the case, citing to *Turney v. Safley*,<sup>42</sup> stating that their conditions are rational to fight the spread of Covid-19 among prisoners and staff.<sup>43</sup> They claim requiring inmates to be vaccinated “greatly reduces the risk that the disease could be transmitted from an attorney to an inmate and spread throughout the facility.”<sup>44</sup> Defendants then claim that the alternate means – video and phone visitation – are adequate for prisoners to exercise their right.<sup>45</sup> They then argue that there are “no ‘ready alternatives’” to their policy, and thus, their policy should be constitutional.<sup>46</sup>

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<sup>40</sup> Plaintiffs’ Motion for Preliminary Injunction at 11.

<sup>41</sup> Plaintiffs’ Motion for Preliminary Injunction at 11.

<sup>42</sup> The constitutionality of prison regulations that burden constitutional rights looks at four factors: (1) whether there is a valid, rational connection between the regulation and a legitimate government interest; (2) whether there are alternative means for the prisoners to exercise their right; (3) the impact of the accommodation of the asserted constitutional right; and (4) the absence of ready alternatives. *Turner v. Safley*, 482 U.S. 78, 91 (1987).

<sup>43</sup> Opposition to Motion for Preliminary Injunction at 3.

<sup>44</sup> Opposition to Motion for Preliminary Injunction at 3.

<sup>45</sup> Opposition to Motion for Preliminary Injunction at 3.

<sup>46</sup> Opposition to Motion for Preliminary Injunction at 3.

The Court does not need to issue a definitive answer as to which parties will ultimately prevail on the merits of this case in order to grant this preliminary injunction. It is sufficient to say Plaintiffs stand a fighting chance in this case. Furthermore, Plaintiffs have pointed out that future strains of Covid-19, or other ailments might render current vaccinations inadequate. The Court does not believe that access to justice should be limited indefinitely by the vagaries of modern medicine. Thus, the Court finds that Plaintiffs have successfully raised serious and substantial questions going to the merits of this case.

### CONCLUSION

Plaintiffs' request for a preliminary injunction and declaratory relief is GRANTED as follows:


1. DOC shall not distinguish in its visitation policies between vaccinated and unvaccinated inmates.
2. DOC shall open, and keep open, its visiting facilities to attorneys provided that visiting attorneys follow social distancing, masking, and other safety requirements in accordance with the most recent CDC guidelines and DOC policies.
3. Attorneys wishing to conduct visits with clients shall notify DOC at least 24 hours in advance to allow DOC to accommodate these visits according to the most recent guidelines regarding building maximum capacities.

4. DOC will not deny attorneys access to facilities absent good cause (for example, an attorney or her client testing positive for COVID-19). If such instances occur, these instances must be documented and submitted to the Court, along with sworn affidavits from at least two DOC personnel in supervisory positions.

SO ORDERED this 21<sup>st</sup> day of March, 2021, at Anchorage Alaska.

  
UNA S. GANDBHIR  
Superior Court Judge

I certify that on 4/5/21  
a copy of the above was mailed/mailed to  
each of the following at their address of record:

 Cashman / Christensen / Cuntre / Dattani  
R. Davis, Judicial Assistant Mohrsky / Crotte / Robinson