UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI by his Next Friend Migdaliz Quinones; and JUSTIN RODRIGUEZ by his Next Friend Jacklyn Romanoff; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

----------x

Civil Action No.
20-CV-1590
(Kovner, J.)
(Mann, M.J.)

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, upon the accompanying Memorandum of Law in Support of Respondent's Motion to Dismiss; the Declarations of Lieutenant Commander D. Jordan, RN/BSN (Dkt. No. 47-1) and Associate Warden Milinda King (Dkt. Nos. 18-1, 21); and the pleadings herein, Respondent, by his attorney, Richard P. Donoghue, United States Attorney for the Eastern District of New York, James R. Cho, Seth D. Eichenholtz, Joseph A. Marutollo, Paulina Stamatelos, Assistant United States Attorneys, of counsel, will move this Court, before the Honorable Rachel P. Kovner, United States District Judge for the Eastern District of New York, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at a date and time to be designated by the Court, to dismiss the First Amended Class Action Petition Seeking Writ of Habeas Corpus Under 28 U.S.C. § 2241, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and granting such other and further relief as this Court deems proper.

Dated: Brooklyn, New York
April 24, 2020

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To: All Counsel of Record (by ECF)

UNITED STATES DISTRICT COURT
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Civil Action No.
20-CV-1590
(Kovner, J.)
(Mann, M.J.)

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(6), OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

RICHARD P. DONOGHUE
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April 24, 2020

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PRELIMINARY STATEMENT

Petitioners Hassan Chunn, Nehemiah McBride, Ayman Rabadi, Justin Rodriguez, Elodia Lopez, James Hair (collectively, "Petitioners"), and a putative class of potentially all inmates at the Metropolitan Detention Center in Brooklyn ("MDC"), request, pursuant to 28 U.S.C. § 2241, that this Court short-circuit the entire criminal justice process by (1) ordering, via a civil action, their immediate and unwarranted release from prison due to concerns related to the novel coronavirus ("COVID-19"); and (2) appointing a Special Master to essentially determine which convicted criminals and which charged criminals (who have already been judicially determined to be dangerous and/or risks of flight) may be released from prison—thereby divesting the judges of this Court and other courts of the authority to control their own criminal dockets. Respondent, MDC Warden Derek Edge, respectfully submits this memorandum of law in support of his motion to dismiss the First Amended Class Action Petition (Dkt. No. 60) ("Pet." or "Petition") pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), or, alternatively, for summary judgment pursuant to Fed. R. Civ. P. 56. As demonstrated below, Petitioners' claims are subject to dismissal.

As a threshold matter, this Court does not have jurisdiction over Petitioners' claims. The claims of Chunn and McBride must be dismissed on mootness grounds, as they are no longer in MDC custody. *See, e.g.*, *Muhammad v. City of New York Dep't of Corrections*, 126 F.3d 119 (2d Cir. 1997). In addition, the claims of Rabadi and Rodriguez must be dismissed on *res judicata* grounds. Subsequent to the commencement of this action, on April 14, 2020, two federal district judges of the Southern District of New York rejected the requests of Rabadi and Rodriguez—based on the same arguments raised here—to be released from prison due to the threat or risk of COVID-19 at the MDC. Although the Second Circuit has construed 28 U.S.C. § 2241 as permitting challenges to unconstitutional conditions of confinement, the relief Petitioners seek here—essentially the modification or reduction of their criminal sentence—has not been

recognized as an available remedy to habeas petitioners challenging conditions of confinement in the Second Circuit. In short, Rabadi and Rodriguez want two bites of the same apple: having been denied their requested relief from their sentencing judges, they now want a different federal judge in a civil proceeding in a different district to order the same requested relief. Their claims are barred by *res judicata*. Moreover, the newly added petitioner, Lopez has a pending application for her release before her sentencing judge. Hair has a motion challenging his conviction under 28 U.S.C. § 2255 pending in the District of Maryland. Thus, all four remaining incarcerated Petitioners seek relief from multiple courts, in addition to this Court, to secure their immediate release.

Significantly, Petitioners cannot cite any legal authority empowering this Court to order the "immediate" release of approximately 533 other MDC inmates—approximately one-third of the MDC's inmate population—because those inmates allegedly "suffer various[]" health problems and risk illness should they become infected with COVID-19. Pet. ¶ 4. The implications of such an extraordinary order would be staggering; under Petitioners' theory of appropriate habeas relief, a judge in a federal civil action would be permitted to commute the sentences of hundreds of post-conviction inmates and free hundreds of dangerous pretrial inmates without any conditions of release. Petitioners completely overlook 18 U.S.C. § 3626, which is the component of the Prison Litigation Reform Act ("PLRA") that establishes that courts are strictly limited in ordering the release of inmates "in any civil action in Federal court with respect to prison conditions" and that a single district judge is precluded from doing so. *See id.* § 3626(a)(3)(B).

In any event, Petitioners cannot establish any violation of their Fifth Amendment or Eighth Amendment rights arising out of current conditions at the MDC. As this Court previously acknowledged, the Bureau of Prisons ("BOP") "is taking steps to address [the] health risk[s]"

created by the COVID-19 pandemic.[1] And, as set forth in the Declarations of Lieutenant Commander D. Jordan, RN/BSN (Dkt. No. 47-1) ("Jordan Decl.") and Associate Warden Milinda King ("King Decl.") (Dkt. Nos. 18-1, 21), BOP staff nationwide and at the MDC have taken an escalating series of steps to avoid the transmission of COVID-19 into or within MDC. As described below, Petitioners have not alleged sufficient facts to state a constitutional violation related to their conditions of confinement or that Respondent has acted with deliberate indifference to Petitioners' medical needs or safety.

Lastly, this Court should strike the Petition's class action allegations. Petitioners' request for a sweeping and indiscriminate order certifying a class of roughly 1700 inmates—presumably every inmate at MDC—should be rejected. Petitioners' request is fundamentally incompatible with class-wide relief, as the putative class is not ascertainable and has no commonality or typicality. Indeed, the putative class would feature a hodgepodge of inmates, each of whom has his or her unique set of circumstances (including projected release dates, disciplinary histories, medical histories, bases for judicially imposed criminal sentences, and bases for judicial findings of dangerousness to the community and risk of flight) that would need to be considered by the judge presiding over their criminal proceeding, including any claim for bail or compassionate release. Accordingly, the Court should dismiss the Petition in its entirety.

FACTUAL BACKGROUND

I. The BOP's Action Plan for COVID-19

The MDC houses approximately 1700 inmates (Pet. ¶ 14). In January 2020, BOP became aware of the first identified COVID-19 cases in the United States and took steps to prevent its introduction and spread in BOP institutions, including the MDC. Jordan Decl. ¶ 6. To date, BOP's

[1] April 1, 2020 Hearing, Tr. 89:5.

response to COVID-19 has occurred over six distinct "phases." *Id.* ¶¶ 7-17. In January 2020, the Bureau began Phase One of its Action Plan for COVID-19. *Id.* ¶ 7. Phase One activities included, among other things, seeking guidance from the BOP's Health Services Division and other stakeholders regarding the COVID-19 disease and its symptoms, where in the U.S. infections occurred, and the best practices to mitigate its transmission. *Id.*

On March 13, 2020, BOP implemented Phase Two of its Action Plan during which, for an initial period of 30 days, in order to reduce the spread of COVID-19 into or through the MDC, the facility suspended, with certain limited exceptions: social visits; legal visits; inmate facility transfers; official staff travel; staff training; contractor access; volunteer visits; and tours. *Id.* ¶ 8. During Phase Two, inmates were subjected to new screening requirements and newly arriving BOP inmates were screened for COVID-19 symptoms and "exposure risk factors," including, for example, if the inmate had traveled from or through any CDC-determined high-risk COVID-19 locations, or had had close contact with anyone testing positive for COVID-19. *Id.* ¶ 9. Asymptomatic inmates with exposure risk factors were quarantined, and symptomatic inmates with exposure risk factors were isolated and evaluated for possible COVID-19 testing by local BOP medical providers. *Id.* Staff also were subjected to enhanced health screening and were required to self-report any symptoms consistent with COVID-19, as well as any known or suspected COVID-19 exposure, and to have their temperature taken upon entry into any BOP facility. *Id.* ¶ 10. The MDC also began staggering meal and recreation times to limit congregate gatherings. *Id.* ¶ 11. The BOP established a set of quarantine and isolation procedures for known or potential cases of COVID-19. *Id.* On March 18, 2020, BOP implemented Phase Three of the COVID-19 Action Plan to maximize telework. *Id.* ¶ 12.

On March 26, 2020, BOP implemented Phase Four and revised its preventative measures

for all institutions; the agency updated its quarantine and isolation procedures to require all newly admitted inmates to be assessed using a screening tool and temperature check. Thus, all new arrivals to the MDC—even those who were asymptomatic—were placed in quarantine for a minimum of 14 days or until cleared by medical staff. *Id.* ¶ 14. Symptomatic inmates were placed in isolation until they tested negative for COVID-19, or were cleared by medical staff as meeting CDC criteria for release from isolation. *Id.*

The MDC implemented Phase Five on April 1, 2020. Starting on that day, and for 14-days immediately thereafter: (i) all inmates were confined to their living quarters for the majority of the day; (ii) meals, commissary items, laundry, recreation materials, education materials, medical services and psychology services were delivered directly to inmates' housing units; and (iii) inmates were released from their cells in small groups to engage in activities such as showers, exercise, phone calls, and email access via BOP's "TRULINCS" system. During these time periods, inmates have been directed to maintain appropriate physical distancing. *Id.* ¶¶ 15-16.

On April 13, 2020, BOP ordered the implementation of Phase Six of its COVID-19 Action Plan. In implementing Phase Six, the MDC extended the measures enacted in the nationwide actions in Phase 5, which includes continuing to perform rigorous medical screening, limiting inmate gathering, daily rounds, limiting external movement, and fit testing, until May 18, 2020. *Id*. ¶ 17.

MDC has taken a number of additional measures in response to the COVID-19 pandemic to prevent the introduction and spread of COVID-19 into its facility, including providing inmate and staff education; conducting inmate and staff screening; engaging in testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; ordering enhanced cleaning and medical supplies; and taking a number of other preventative measures. *Id.* ¶ 19. All

inmates at the MDC have access to sinks, water, and soap at all times, newly admitted inmates automatically receive soap, and all inmates may receive new soap upon request. For inmates without sufficient funds to purchase soap in the commissary, soap is provided at no cost to the inmate. *Id.* ¶ 51. MDC inmates are able to wash their clothing and linens twice weekly. *Id.* All common areas in inmate housing units are cleaned daily, and are typically cleaned by inmate orderlies multiple times throughout the day, with a designated disinfectant known to kill human coronavirus. *Id.* ¶ 52. MDC has made this disinfectant available to all inmates so that they may use it to clean their own living areas on a regular basis. *Id.* Common areas outside inmate living areas, including the lobby, bathrooms, cafeteria, etc., are also cleaned with the same disinfectant on a daily basis (and often multiple times per day). *Id.* ¶¶ 52-56.

Each housing unit has been stocked with cleaning supplies for use by inmate orderlies and other inmates to clean both the common areas and their individual housing areas on a daily basis. *Id.* ¶ 53. Staff have regular, consistent access to soap and hand sanitizer. Soap is located in staff restrooms and hand sanitizer is located in various staff common areas. *Id.* ¶ 54. Correctional staff have been provided protective equipment to be used in appropriate locations throughout MDC such as quarantined areas, isolation units, and screening sites. *Id.* ¶ 55. MDC has sufficient personal protective equipment (PPE) on hand, including N-95 respirator masks, surgical masks, and rubber gloves, to meet its current and anticipated needs, as well as the ability to order additional PPE should the need arise. *Id.* On April 5, 2020, all inmates and staff were provided protective face masks for daily use, and were provided new masks on April 12, 2020. *Id.* ¶ 56.

II. The Petition and Alleged Facts

The gravamen of Petitioners' allegation is that, because of their age and/or medical conditions, they have elevated risk of serious, adverse outcomes if they contract COVID-19 and must be released because detention at the MDC *per se* poses an increased risk of health

complications or death from COVID-19. *See* Pet.

A. Petitioners Hassan Chunn and Nehemiah McBride Already Have Been Released From the MDC

On April 7, 2020, Southern District of New York District Judge Denise L. Cote, granted McBride's motion for compassionate release and ordered his release. *See* Order, *United States v. McBride*, No. 15 Cr. 876 (S.D.N.Y. Apr. 7, 2020), Dkt. No. 73. On April 8, 2020, Judge Brian M. Cogan granted Chunn's motion for compassionate release. *See United States v. Chun*, No. 16 Cr. 388 (E.D.N.Y. Apr. 8, 2020), Dkt. No. 32.

B. Petitioner Ayman Rabadi

Rabadi is fifty-nine years old, and scheduled for release on July 19, 2020. Pet. ¶ 10; Prayer for Relief. On October 19, 2018, S.D.N.Y. District Judge Kenneth Karas issued an arrest warrant for Rabadi based on a Petition for Violation of Supervised Release. Rabadi was then serving a term of supervised release after having served a three-year term of imprisonment for his conviction, in June 2014, of engaging in a wire fraud scheme that involved impersonating a federal officer. *See United States v. Rabadi*, No. 13 Cr. 353 (KMK) (S.D.N.Y.), Dkt. No. 87 ("Rabadi, Dkt. No. __").

According to the Petition, Rabadi has been diagnosed with a serious heart condition, anxiety and diabetes; suffered a heart attack approximately six years ago, and thereafter had several stents placed in his heart; has a tumor on one of his kidneys which is being monitored via ultrasound; and takes medication for high blood pressure, cholesterol, and blood thinners. Pet. ¶ 91. He seeks relief due to the purported risk of being exposed to COVID-19. *Id.*

Approximately one week after the filing of the original Petition, on April 3, 2020, Rabadi filed a motion seeking compassionate release—based on the same concerns related to being exposed to COVID-19 as alleged here—before Judge Karas, who previously sentenced Rabadi.

See Rabadi, Dkt. No. 84.[2] On April 14, 2020, the court denied Rabadi's motion without prejudice after determining that the court lacked authority to order the relief Rabadi sought under the compassionate release statutory provision, 18 U.S.C. § 3582(c)(1)(A), because Rabadi had failed to exhaust his administrative remedies. *See United States v. Rabadi*, No. 13 Cr. 353, 2020 WL 1862640, at *1 (S.D.N.Y. Apr. 14, 2020). The court denied Rabadi's "application without prejudice to renewal if the BOP does not act upon his request within thirty days of its receipt." *Id.* at *4.

C. Petitioner Justin Rodriguez

Rodriguez is twenty-six years old. His term of incarceration is set to expire on June 9, 2020. Pet. ¶¶ 11; 92. On June 21, 2017, Rodriguez pled guilty to participating in a conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. Pursuant to a plea agreement, he admitted responsibility for distributing at least 500 grams but less than 2 kilograms of cocaine; that he was responsible for possessing a firearm in furtherance of the narcotics conspiracy; and, that he used violence or made a credible threat of violence in connection with the offense. *See United States v. Erazo-Ayala et al.*, No. 16 Cr. 167 (LAP) (S.D.N.Y.), Dkt. No. 331 (hereafter "Rodriguez, Dkt. No. __"). Rodriguez alleges he is at risk for a COVID-19 infection because of his "significant health problems," namely, asthma. Pet. ¶ 92. Rodriguez alleges that at some unspecified time he requested an inhaler but that the MDC did not provide one to him. *Id.* He seeks relief due to the purported risk of being exposed to COVID-19. *Id.*

On March 27, 2020, Rodriguez submitted a letter to the Respondent requesting home confinement under 18 U.S.C. § 3624. *See* Rodriguez, Dkt. No. 329-2. Respondent denied the request because Rodriguez was ineligible for home confinement based on his status as a holdover

[2] Rabadi filed a request for compassionate release with the MDC Warden on April 3, 2020, as well.

inmate. *Id.* Construing Rodriguez's request also as one for compassionate release under 18 U.S.C. § 3582, Respondent denied it, finding that Rodriguez had not identified any significant changes to his medical condition reflecting a "terminal or debilitated medical condition." *Id.*

On April 5, 2020, one week after commencing this action, Rodriguez filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), or, in the alternative, home confinement, with S.D.N.Y. District Judge Loretta A. Preska, his sentencing judge. *See* Rodriguez, Dkt. No. 329. In that motion, Rodriguez sought "to modify his sentence to time served or immediate[] release … to home confinement for the remainder of his term of incarceration to be followed by the previously imposed period of supervised release" based on the "*threat*" of COVID-19. *See* Rodriguez, Dkt. No. 329 at 1 (emphasis added). Rodriguez's motion did not indicate that Rodriguez had sought to appeal the Respondent's decision through the Administrative Remedy Procedure. *See* 28 C.F.R. § 571.63(a).

By Order dated April 14, 2020, the Court denied Rodriguez's motion noting that Rodriguez had been disciplined multiple times during his incarceration at MDC. *See United States v. Rodriguez*, No. 16 Cr. 167 (LAP), 2020 WL 1866040, at *2 (S.D.N.Y. Apr. 14, 2020). The Court added that:

> [Rodriguez] has offered no evidence to suggest the MDC and the BOP more broadly are not taking seriously the pandemic or his own personal medical history. To the contrary, as set out in the Government's papers, *the BOP has made significant efforts to respond, and these measures have provided quite successful so far.*

Id. at *3 (emphasis added). The Court recounted the steps BOP and the MDC have taken to address the COVID-19 threat, and those steps "belie any suggestion that the BOP is failing meaningfully to address the risks posed by COVID-19 or take seriously the threat the pandemic poses to current inmates." *Id.* The Court added that, "[t]o the contrary, it shows that the BOP has taken the threat

very seriously, and has mitigated it to an extraordinary degree." *Id.* The Court concluded that Rodriguez had "not set forth a basis to believe that there are extraordinary and compelling reasons for him to be released early" because "[a]ll he has done is to note that he has asthma, he is in prison, and there is a COVID-19 outbreak nationwide" which "is not enough." *Id.* at *4.

Lastly, the Court denied Rodriguez's request for home confinement, concluding that BOP, "not the Court, has the sole authority to prescribe home confinement post-incarceration" under 18 U.S.C. § 3624(c). *See Rodriguez*, 2020 WL 1866040, at *4. In addition, the Court ruled that BOP:

> with its professional medical staff and its systemic measures to address the spread of COVID-19, is well situated to make a determination as to whether Rodriguez should be eligible for home confinement, consistent with the Attorney General's Memorandum for Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic (March 26, 2020), or could otherwise be accommodated at the facility. This is especially so because the BOP staff at the MDC are uniquely situated to understand the circumstances in the facility; the risk to Rodriguez; and whether, if other defendants who are deemed at high risk of COVID-19 and who would qualify under other release programs are released to home confinement, there is a way to accommodate Rodriguez at the MDC in a safe manner.

Id. Finally, the Court noted that "Rodriguez has also not explained how he would be safer outside of prison, where authorities could not enforce isolation and quarantines—a particular concern for someone who has on multiple occasions failed to abide by the terms of his incarceration" and given his "disciplinary record at the MDC and his recent failure . . . he is not amenable to complying with any conditions of release." *Id.*

D. Petitioner Elodia Lopez

Lopez is fifty-five years old. Her term of incarceration is set to expire on June 9, 2020. Pet. ¶¶ 12; 93. Lopez is serving a 15-month sentence in connection with a conviction for selling marijuana. *Id.* ¶ 93. Lopez allegedly has a lung infection, in addition to diabetes, high blood pressure and high cholesterol, that makes her "particularly vulnerable to COVID-19." *Id.* Lopez alleges the MDC has not given her medication for the lung infection since arriving at the MDC

four months ago. *Id.* Lopez is housed in a dormitory for female inmates at the MDC "where she shares a bathroom, tables, and chairs with other women" including a woman "who has recently been displaying COVID-19 symptoms." *Id.* On April 9, 2020, Lopez filed an emergency motion for compassionate release through her attorney at the Federal Defenders Office in Albany, New York. *See United States v. Elodia Lopez*, No. 93 Cr. 306 (FJS) (N.D.N.Y.), Dkt. No. 84 (hereafter "Lopez, Dkt. No. __"). On April 22, 2020 (two days ago), Lopez, filed a second brief in support of her compassionate release application. Lopez, Dkt. No. 87. The Court has not ruled on Lopez's compassionate release application.

E. Petitioner James Hair

Hair is twenty-nine years old. *Id.* ¶ 19. His term of incarceration is set to expire on August 15, 2026. *Id.* ¶ 94. Hair was allegedly diagnosed with multiple sclerosis in or around 2018. *Id.* ¶ 94. He also purportedly suffers from asthma and suffers from extreme pain in his lower left back because of kidney issues. *Id.* ¶ 94. Although the Petition is silent with respect to Hair's conviction, he recently pleaded guilty to conspiracy to distribute and possess with intent to distribute cocaine. *See United States v. Hair*, 780 F. App'x 86 (4th Cir. 2019). On April 20, 2020, Hair filed a 28 U.S.C. § 2255 habeas petition to set aside his conviction on ineffective assistance of counsel grounds. *See United States v. James Hair*, No. 93 CR 306 (FJS) (D. Md.), Dkt. No. 60.

III. Petitioners' Requested Relief

Petitioners request broad and extraordinary relief, including the immediate release of 537 vulnerable persons (inclusive of the four remaining Petitioners) with undefined "appropriate precautionary public health measures" and the appointment of a "Special Master on an emergency basis to Chair a Coronavirus Release Committee to evaluate Vulnerable Persons and make recommendations for ameliorative action for other persons at the MDC." Pet., p. 37. Petitioners also ask the Court to order Respondent "to mitigate" COVID-19-related risk at the MDC, and to

certify the Petition as a Class Action. *Id.* p. 36.

IV. The Court's Denial of Petitioners' Motion for a Temporary Restraining Order

On April 8, 2020, this Court denied Petitioners' motion for a temporary restraining order (TRO). *See* Dkt. Entry dated April 8, 2020 Order. The Court denied the TRO motion and noted on the record that: (i) the appointment of a Special Master is not appropriate in connection with the grant of a TRO which is "ordinarily . . . an order of short duration to address imminent harm that's going to occur;" and (ii) the "extraordinary remedy of a mandatory injunction [ordering Petitioners' release] is [not] warranted [] at this point." Tr. at 21-22.

STANDARDS OF REVIEW

An action is properly dismissed under Rule 12(b)(1) "when the district court lacks the statutory or constitutional power to adjudicate" the case. *See Doyle v. Midland Credit Mgmt., Inc*., 722 F.3d 78, 80 (2d Cir. 2013) (citation omitted). When "deciding a Rule 12(b)(1) motion, the court may also rely on evidence outside the complaint," including competent affidavits. *See Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.à.r.l*, 790 F.3d 411, 417 (2d Cir. 2015).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted where a complaint fails to plead facts to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "In deciding a Rule 12(b)(6) motion, the court may consider, in addition to the factual allegations of the complaint, documents attached to the complaint as exhibits or incorporated in it by reference, matters of which the court may take judicial notice, and documents in the plaintiff's possession or of which she had knowledge and relied on in bringing suit." *Ru Jun Zhang v. Lynch*, No. 16-CV-4889 (WFK), 2018 WL 1157756, at *4 (E.D.N.Y. Mar. 1, 2018). "Agency determinations and administrative findings are public records of which a court may properly take judicial notice." *Lia*

v. Saporito, 909 F. Supp. 2d 149, 161 (E.D.N.Y. 2012).[3]

ARGUMENT

I. This Court Lacks Jurisdiction Over This Petition

A. Claims Brought By Petitioners Chunn and McBride Are Moot

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). The lack of jurisdiction here is self-evident: because Chunn and McBride have already received the relief they seek and are no longer in MDC custody, there is nothing more the Court can do for them. When a plaintiff's claim seeks to compel a federal official to act, and the official has already performed that act, the claim is moot. *See Barrett v. United States*, 105 F.3d 793, 794-95 (2d Cir. 1996); *Feng Chen v. Sessions*, 321 F. Supp. 3d 332, 337 (E.D.N.Y. 2018). In the absence of an active case or controversy, the claims of Chunn and McBride must be dismissed from this action. *See generally Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (federal judicial power is limited by Article III, section 2 of the Constitution to the resolution of actual "cases" and "controversies").

B. The Court Lacks Jurisdiction to Release Rabadi, Rodriguez, Lopez, and Hair

1. This Court Lacks Authority to Divest BOP and Sentencing Courts of Their Jurisdiction to Place Inmates in Home Confinement or The Sentencing Judge's Authority to Amend a Term of Imprisonment

Petitioners Rabadi, Rodriguez, Lopez, and Hair seek to change the terms of their sentence in light of the pandemic. However, "'[a] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 824 (2010) (quoting 18 US.C. §

[3] Alternatively, should the Court construe the present motion as one for summary judgment, summary judgment is appropriate where, as here, "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

3582(b)). As the Supreme Court has recognized, finality is an important attribute of criminal judgments, and one "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion). Accordingly, it is well-established that once a district court has pronounced sentence and the sentence becomes final, even that district court has no inherent authority to reconsider or alter that sentence. Rather, it may do so only pursuant to statutory authorization. *See, e.g.*, *United States v. Addonizio*, 442 U.S. 178, 189 & n.16 (1979). Consistent with this principle of finality, 18 U.S.C. § 3582(c) provides that a court generally "may not modify a term of imprisonment once it has been imposed," except in three circumstances: (1) upon a motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A); (2) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," 18 U.S.C. § 3582(c)(1)(B); and (3) where the defendant was sentenced "based on" a retroactively lowered sentencing range, 18 U.S.C. § 3582(c)(2); *United States v. Gotti*, No. 02 Cr. 743-07 (CM), 2020 WL 497987, at *1-*6 (S.D.N.Y. Jan. 15, 2020) (noting that "[a] court is not required to reduce a sentence on compassionate release grounds, even if a prisoner qualifies for such reduction because of his medical condition.").

Although the Second Circuit has construed section 2241 as permitting habeas petitioners to raise challenges to prison conditions, "[s]ection 2241 does not provide an avenue for challenging the length of a sentence" based on poor conditions of confinement. *See Grant v. Terrell*, No. 10-CV-2769 (MKB), 2014 WL 2440486, at *3 (E.D.N.Y. May 29, 2014) (reasoning that "[s]ection 2241 permits habeas petitioners to challenge the post-conviction administration of a sentence, but it does not provide an avenue for challenging the length of a sentence" and denying petitioner's request for "a two-level sentence reduction and an order of immediate release, based on the conditions of confinement" of petitioner's prison); *Medina-Rivera v. Terrell*, No. 11-CV-0734,

2011 WL 3163199 (BMC), at *2 (E.D.N.Y. July 26, 2011) (noting that the petitioner's "desired remedy—a sentence reduction—is not of the type that can be granted in response to [§ 2241] claims regarding conditions of confinement"); *Serra v. Terrell*, No. 10-CV-03044 (DLI), 2013 WL 5522850, at * 1 (E.D.N.Y. Sept. 30, 2013) (same).

Courts in other circuits also have held that § 2241 does not permit release based on conditions of confinement. *See, e.g., United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008) (holding that a court has jurisdiction to alter a sentence only as specifically permitted by statute); *Wright v. Terrell*, No. 10-CV-3492 (PGS), 2011 WL 5117851, at *2 (D.N.J. Oct. 26, 2011) (rejecting § 2241 petition by a petitioner who claimed not to challenge the imposition of his sentence upon finding that "[p]etitioner is actually seeking a modification of his sentence based on the conditions of his confinement at the MDC, which is not cognizable in a habeas petition under § 2241"); *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (holding that "[i]f an inmate establishe[s] that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option" (citation omitted)); *Gomez v. United States*, 899 F.2d 1124 (11th Cir. 1990) (same); *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) (same); *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979) (same). Indeed, "[a] court may not modify a term of imprisonment once it has been imposed except pursuant to statute." *United States v. Gotti*, No. 02 Cr. 743-07 (CM), 2020 WL 497987, at *6 (S.D.N.Y. Jan. 15, 2020) (nothing that "[a] court is not required to reduce a sentence on compassionate release grounds, even if a prisoner qualifies for such reduction because of his medical condition.").

Therefore, this Court should not permit Rabadi, Rodriguez, Lopez, and Hair, to seek improperly a reduction in their criminal sentences via a § 2241 petition, based on the allegedly

unconstitutional conditions of confinement at the MDC. Further, Petitioners are not entitled to have this Court release more than 1700 inmates from the MDC. There are specific legal avenues for consideration of the release or transfer of these inmates. Those include bail, home confinement and compassionate release. Petitioners do not even attempt to establish that this Court has authority to release prisoners based on these avenues for release.

Regarding home confinement, the BOP may place a prisoner in home confinement only for the shorter of 10 percent of the term of imprisonment or 6 months.[4] *See* 18 U.S.C. § 3624(c)(2). Under the recently enacted CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020), "if the Attorney General finds that emergency conditions will materially affect" the BOP's functioning, the BOP Director may "lengthen the maximum amount of time for which [he] is authorized to place a prisoner in home confinement" under 18 U.S.C. § 3624(c)(2). On April 3, 2020, the Attorney General authorized the Director of the Bureau to immediately maximize appropriate transfers to home confinement of all appropriate inmates held in BOP facilities. *See* April 3, 2020 Memo from the Attorney General, "Increasing Use of Home Confinement at Institutions Most Affected by COVID-19" (https://www.justice.gov/coronavirus/DOJresponse).

The determination of whether to place a prisoner in home confinement is solely in the discretion of the BOP and "not reviewable by any court." 18 U.S.C. § 3621(b); 18 U.S.C. § 3624(c)(4). The factors to be considered are: the inmate's age and vulnerability to COVID-19 per CDC guidelines, the inmate's conduct in prison including violence and gang activity, the inmate's recidivism risk, the inmate's reentry plan, the inmate's danger to the community. 18 U.S.C. § 3621(b). Some offenses, such as sex offenses, will render an inmate ineligible for home

[4] The BOP's policy and procedures regarding home confinement are outlined in BOP Program Statement 7320.01, *Home Confinement* and BOP Operations Memorandum, *Home Confinement under the First Step Act*, both of which are available on www.bop.gov via the Resources tab. *See* 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541.

confinement. *Id.* Notably, regarding compassionate release, neither BOP nor this Court has the authority to provide inmates with "early release." A reduction of an inmate's federal sentence can only be accomplished by the inmate's sentencing judge. However, upon an inmate's request, the Director of the BOP may make a motion to an inmate's sentencing judge to reduce a term of imprisonment under 18 U.S.C. § 3582(c)(1)(A).[5]

Importantly, while the BOP is processing these requests as expeditiously as possible, the statute gives the BOP 30 days to evaluate compassionate release requests before any motion may be presented in the sentencing court. 18 U.S.C. § 3582(c)(1)(A). Further, the ultimate decision lies with the sentencing judge. *Id.* Here, as noted, *supra*, Judge Preska denied Rodriguez's motion for compassionate release and reached the merits (over the government's objection) *despite* Rodriguez's failure to exhaust, and Judge Karas determined he would not reach the merits of Rabadi's request until he exhausted his administrative remedies. Lopez's compassionate release application remains pending before her sentencing judge.

By filing this action, the Petitioners are not only trying to circumvent these prior adverse decisions, but also trying to create a mechanism through which any unfavorable ruling from a sentencing judge can be challenged in another district court. Petitioners' efforts to forum shop, or create new forums would have the result of depriving sentencing judges from the ability to maintain control over the inmate sentences they have issued.

By seeking release through this civil action, Petitioners also are essentially seeking to divest the BOP of its statutory and regulatory discretion as to which inmates should be placed in home confinement and to divest sentencing judges of their ability to determine the potential

[5] This process is outlined in the U.S. Dep't of Justice Fed. Bureau of Prisons, Compassionate Release/Reduction In Sentence Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g), Program Statement 5050 (Jan. 17, 2019) (http://www.bop.gov/policy/progstat/5050_050_EN.pdf).

reduction of sentences individuals convicted in their court. Recently, a Louisiana district court dismissed a § 2241 habeas petition with prejudice brought by six petitioners in a federal prison, who also sought class certification on behalf of a prospective class and sub-class of inmates vulnerable to the COVID-19 threat, ruling that the Court lacked subject matter jurisdiction "to order BOP" to release inmates to a "lesser form of detention" because "[s]uch a designation and/or classification falls squarely within BOP's authority and outside the purview of this Court." *See Livas v. Myers*, No. 20-CV-422 (TAD)(KK), 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020). The Court succinctly added, "[t]o rule otherwise would make this Court "a de facto 'super' warden" of the BOP facility. *Id.* at *8.

Petitioners should not be granted such sweeping and unprecedented relief when existing administrative and statutory proceedings can grant them the relief they seek, if appropriate, as demonstrated by the release of Chunn and McBride

2. *Res Judicata* Bars Petitioners' Immediate Release

Res judicata bars a plaintiff from relitigating the same issues that *were* or *could have been* raised in a prior action. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Freeman v. Sikorsky Aircraft Corp.*, 151 F. App'x. 91, 92 (2d Cir. 2005) (affirming dismissal of an action as barred by *res judicata* because claim had already been decided on the merits and action was raising the precise issues, arising from same events, as raised in petitioner's first complaint); *Staffer v. Bouchard Transp. Co., Inc.*, 878 F.2d 638, 643 (2d Cir. 1989) (explaining that "[*r*]*es judicata*, or claim preclusion, bars the revival of claims that already have been litigated" and adding that "[*r*]*es judicata* can also operate to bar claims that were not originally asserted.") (citation omitted)). "The doctrine of *res judicata*, or claim preclusion, holds that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150,

157 (2d Cir. 2017) (quotation omitted). The purpose of the *res judicata* bar "is based on the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event." *Robinson v. Purcell Constr. Corp.*, 647 F. App'x 29, 30 (2d Cir. 2016) (quotation omitted).

Both Rabadi and Rodriguez filed motions for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) (Section 3582 motion), citing the same allegedly unconstitutional conditions of confinement in their Section 3582 motions as set forth in the Petition. Both of their sentencing judges denied their Section 3582 motions. To the extent Rabadi and Rodriguez seek immediate release from the MDC, the rulings by Judges Karas and Preska, respectively, preclude their claims here for immediate release. Rabadi and Rodriguez do not simply get a do-over in the Eastern District of New York after their same claims were rejected by their sentencing judges in the Southern District of New York.

Rabadi and Rodriguez should be estopped from doing so; Petitioners received adverse rulings in connection with their request for immediate release due to the threat of COVID-19 and Petitioners, if circumstances warrant, can go back to those courts to request release under the compassionate release statutes. Petitioners have already availed themselves of that forum which remains available to them should circumstances so warrant. *See, e.g., Brown v. Felsen*, 442 U.S. 127, 139, n.10 (1979) ("collateral estoppel treats as final … those questions actually and necessarily decided in a prior suit"). Further, Lopez's compassionate release application remains pending in the Northern District of New York, before her sentencing judge, who has the statutory authority to grant Lopez's release; this Court has no analogous authority.

3. Section 3626 Precludes the Remedy Requested By Petitioners

Petitioners request habeas relief and the release of hundreds of inmates from the MDC. However, 18 U.S.C. § 3626, titled "Appropriate remedies with respect to prison conditions," places

strict limits on Courts' ability to order the release of inmates "in any civil action with respect to prison conditions," and precludes a single district judge from doing so. *Id.* § 3626(a)(3)(A)-(B). That law applies to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2). In such a suit, the Court "may enter a temporary restraining order or an order for preliminary injunctive relief," but such injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). Under Section 3626, a "prisoner release order"—which "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison," 18 U.S.C. § 3626(g)(4)—may "be entered only by a three-judge court," *id.* § 3626(a)(3)(B), and then only if certain conditions have been met. Among other requirements, "no court shall enter a prisoner release order unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A).

Congress enacted the PLRA "to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997); *see also Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (*en banc*) (Calabresi, J., concurring) ("The in banc majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect.").

"Congress intended the PLRA to revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns." *Gilmore v. California*, 220 F.3d 987, 991, 997 (9th Cir. 2000). "Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." *Brown v. Plata*, 563 U.S. 493, 511 (2011). Section 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Plata*, 563 U.S. at 511 (quoting 18 U.S.C. § 3626(g)). The PLRA's "requirements ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'" *Plata*, 563 U.S. at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). "The release of prisoners in large numbers . . . is a matter of undoubted, grave concern." *Plata*, 563 U.S. at 501.

Insofar as the Petitioners in this case are seeking release as a remedy for the allegedly unconstitutional conditions at the MDC—either for themselves or for their putative class members—Section 3626 prevents this Court from granting that relief. Under Section 3626, "[t]he authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court." *Plata*, 563 U.S. at 500 (citing 18 U.S.C. § 3626(a)); 18 U.S.C. § 3626(a)(3)(B) ("In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court.").

Moreover, such an order may not be entered unless "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought

to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). And even a three-judge court may order prisoners released to remedy unconstitutional prison conditions "only if the court finds by clear and convincing evidence" that "crowding is the primary cause of the violation" and "no other relief will remedy [it.]" *Id.* § 3626(a)(3)(E)(i)-(ii).

Here, there can be no dispute that the instant lawsuit is a "civil action with respect to prison conditions" governed by Section 3626, which defines "civil action with respect to prison conditions" broadly to mean "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but [that term] does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2).[6]

Accordingly, Section 3626 strictly limits the relief that this Court may grant and precludes the Court from releasing inmates from the MDC as requested by Petitioners. *Id.* § 3626(a)(3)(B).

C. The Court Lacks Jurisdiction to Appoint a Special Master to Essentially Sit as an Article III Judge

Petitioners ask this Court to "[a]ppoint[] a Special Master on an emergency basis to Chair a Coronavirus Release Committee to evaluate Vulnerable Persons and make recommendations for ameliorative action for other persons at the MDC." Pet., p.36 (Prayer for Relief) ¶ D. Petitioners' request must be soundly rejected.

First, the Court cannot give a Special Master powers that even it does not have. *See Livas*, 2020 WL 1939583, at *8 (denying habeas petition seeking release of inmates due to COVID-19

[6] One court recently reached this conclusion in an identical case. In *Money v. Pritzker*, Nos. 20-cv-2093 & 20-cv-2094, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020), inmates from various Illinois Department of Correction facilities brought purported class action lawsuits seeking release of prisoners over 12,000 prisoners in light of the COVID-19 pandemic. The Court held that the PLRA prevented it from entering the relief requested by Petitioners for the release of inmates. *Id.* at *14.

as the Court cannot serve as "a de facto 'super' warden" of the BOP facility). Federal courts are "ill equipped" to deal with problems of prison administration. *See Turner v. Safley*, 482 U.S. 78, 84 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85 ("Prison administration is [] a task that has been committed to the responsibility of [the legislative and executive branches], and separation of powers concerns counsel a policy of judicial restraint.").

And even if the Court had the authority to appoint a Special Master, no Special Master would have the powers conjured up by the Petitioners. In short, a Special Master does not, and indeed, cannot, possess the attributes that Article III of the Constitution demand here. "The role of the Special Master is not meant to supplant the role of the court." *Board of Governors of the Federal Reserve System v. Pharaon*, 140 F.R.D. 642, 649 (S.D.N.Y.1991); *Idan Comput., Ltd. v. Intelepix, LLC*, No. CV-09-4849 (SJF)(ARL), 2010 WL 3516167, at *3 (E.D.N.Y. Aug. 27, 2010) (appointment of a special master is the exception, not the rule) (citations omitted).

Indeed, a Special Master would be ill-equipped to take over the authority (let alone have the collective depth of knowledge and experience) of BOP officials, prosecutors, district and magistrate judges to make the individualized, case-specific custody determinations that Petitioners seek here. *See In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991) (granting writ of mandamus against a district judge because the judge "has no discretion to impose on parties against their will 'a surrogate judge,' a substitute from the private bar charged with responsibility for adjudication of the case."); *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir.

1992) ("Because Rule 53 cannot retreat from what Article III requires, a master cannot supplant the district judge."). Indeed, it is long established that "Article III bars a district court 'of its own motion, or upon the request of one party' from 'abdicat[ing] its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.'" *Stauble*, 977 F.2d at 695 (quotation omitted).

Moreover, appointing a Special Master to chair Petitioners' requested "release committee" is outside what Section 3626 permits. Section 3626 limits appointments of Special Masters to two specific contexts: to "conduct hearings on the record and prepare proposed findings of fact," and, "during the remedial phase of the action," to assist if the "remedial phase will be sufficiently complex to warrant the appointment." 18 U.S.C. § 3626(f)(1)(A)-(B); *Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003) (affirming rejection of request to appoint a Special Master in prisoner litigation alleging violations of Eighth Amendment as inappropriate under 18 U.S.C. § 3626(a)(1)(A)).

Finally, Petitioners fail to address Rule 53(a)'s restrictions on the appointment of a Special Master. *See* Fed. R. Civ. P. 53. For example, Petitioners make no attempt to explain why criminal defendants cannot "effectively and timely" have their claims addressed by the "available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C). Indeed, incarcerated criminal defendants have already raised their COVID-19 concerns in other cases in this district. *See, e.g., United States v. Hamilton*, No. 19 Cr. 54-01 (NGG), 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020); *United States v. Redzepagic*, No. 17 Cr. 228 (DRH) (AKT), Dkt. No. 118 (E.D.N.Y. Mar. 30, 2020). Additionally, as Respondent does not consent to the appointment of a Special Master, the Court should not take the unusual step of appointing one absent such consent. *See Wasley Prod., Inc. v. Bulakites*, Nos. 3:03-cv-383(MRK)(WIG), 3:03-cv-1790 (MRK)(WIG),

2006 WL 3834240, at *11 (D. Conn. May 31, 2006) ("impermissible to refer fundamental issues of liability to a special master over the objection of one or more parties."). Accordingly, Petitioners' request for appointment of a Special Master should be denied.

II. Even if the Court had Jurisdiction, Petitioners' Claims are Subject to Dismissal

Even if the Court had jurisdiction (which it does not, as explained above), Petitioners' claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6).

A. Applicable "Deliberate Indifference" Standard

The Eighth Amendment protects against the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. To satisfy the Eighth Amendment standards, prison officials "must provide humane conditions of confinement," specifically they "must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

Inmates alleging Eighth Amendment violations based on unsafe prison conditions must demonstrate that prison officials were deliberately indifferent to their health or safety by subjecting them to a substantial risk of serious harm. *See Farmer*, 511 U.S. at 834. Prison officials display a deliberate indifference to an inmate's well-being when they consciously disregard an excessive risk of harm to the inmate's health or safety. *See Farmer*, 511 U.S. at 838-40. It is "only 'the unnecessary and wanton infliction of pain' . . . [which] constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

"[I]f a particular condition or restriction . . . is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). "[T]he effective management of the detention facility . . . is a valid objective that may justify imposition of conditions" that are discomforting and restrictive, without the inference that such restrictions are intended as punishment. *See Bell*, 441 U.S. at 540. Moreover,

"[it] is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

"[A] prison official violates the Eighth Amendment only when two requirements are met"—both an objective and a subjective component. *See Farmer*, 511 U.S. at 834. First, the objective component of an Eighth Amendment claim requires that the deprivation must be "sufficiently serious." *Farmer*, 511 U.S. at 833. "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' . . . are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). In claims like this, an inmate must show that he is incarcerated under conditions posing a substantial risk of harm. *See Farmer*, 511 U.S. at 834. "[T]he alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (internal quotation marks and citation omitted).

Second, the subjective component relates to the defendant's state of mind, and requires deliberate indifference. *See Farmer*, 511 U.S. at 834. "[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834 (quotation omitted). The subjective prong or second requirement that must be shown before an Eighth Amendment violation can be found is that the prison official must have a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 833; *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006) (requiring "a sufficiently culpable state of mind.") (citing *Wilson*, 501 U.S. at 300). "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more

than ordinary lack of due care for the prisoner's interests or safety." *Whitley*, 475 U.S. at 319. As the Supreme Court explained "[i]n prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834 (quotation omitted). Thus, to establish a violation of the Eighth Amendment, the inmate must show prison officials "knows of and *disregards* an excessive risk to inmate health or safety." *Id*. at 837 (emphasis added).

To prove the second element, Petitioners must show that "the charged official act[ed] or fail[ed] to act while actually aware of a substantial risk that serious inmate harm will result. . . . The reckless official need not desire to cause such harm or be aware that such harm will surely or almost certainly result. Rather, proof of awareness of a substantial risk of the harm suffices." *Salahuddin*, 467 F.3d at 280 (citing *Farmer*, 511 U.S. at 835-37, 842).

A showing of the subjective "deliberate indifference" element "requires more than negligence, but less than conduct undertaken for the very purpose of causing harm." *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994) (citing *Farmer*, 511 U.S. at 835). That is, the "deliberate indifference" prong requires Petitioners to show that a prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Hathaway*, 37 F.3d at 66 (quoting *Farmer*, 511 U.S. at 837). As discussed below, Petitioners here cannot establish a constitutional violation.[7]

[7] Although the remaining Petitioners are not pretrial detainees, Petitioners assert violations under the Fifth Amendment. For pretrial detainees, the Fifth Amendment prohibits deliberate indifference to health or safety. Respondent assumes, for purposes of this motion only, that the analysis of a pretrial federal detainee's claim of deliberate indifference to his medical needs under the Due Process Clause of the Fifth Amendment is the same as that for a convicted federal inmate under the Eighth Amendment. *See Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); Petitioners themselves view any distinction between the Fifth and Eighth Amendment standards as "immaterial." Pet. ¶ 94 n.26. Under the Fifth Amendment, as under the Eighth Amendment, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

B. Petitioners Are Not Subject to an Unreasonable Risk of Harm at the MDC

Deliberate indifference does not cover all medical care or all harms, but rather "constitute[s] an unnecessary and wanton infliction of pain or [is] repugnant to the conscience of mankind." *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). "[O]nly such indifference that can offend 'evolving standards of decency" can establish a violation of the Eighth Amendment. *See Estelle*, 429 U.S. at 105-06. In the context of exposing prisoners to risk of communicable disease, a claim must be dismissed if it does not reach the law's threshold of a threat that is so severe that it would be "contrary to current standards of decency for anyone to be so exposed." *Helling v. McKinney*, 509 U.S. 25, 35 (1993). "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional." *Rhodes*, 452 U.S. at 347. "A prison official's duty under the Eighth Amendment is to ensure 'reasonable safety,' a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Farmer*, 511 U.S. at 844-45.

Here, Petitioners cannot establish that they have suffered a "sufficiently serious" deprivation. *See Wilson*, 501 U.S. at 297. Since first learning of COVID-19, BOP has instituted a multi-step action plan and taken extensive measures to mitigate the risks COVID-19 poses throughout its inmate population, including with respect to the inmate population at the MDC. Those measures, which are outlined in detail in the Declarations of Lieutenant Commander D. Jordan, RN/BSN (Dkt. No. 47-1) and Associate Warden Milinda King (Dkt. Nos. 18-1, 21), include strict limitations on inmate movement within the MDC, suspension of most visits to the MDC, enhanced screening of staff and inmates, and the implementation of the BOP's "modified operations" plan. *See* Jordan Decl. ¶¶ 4-56. These measures have, thus far, been successful at preventing the transmission of COVID-19 into the MDC. To date, there are limited confirmed positive cases, inmate or staff, of COVID-19, and further limited number of inmates with serious

health conditions requiring transport to a hospital for treatment.

One of the Petitioners' primary arguments is that inmates cannot effectively "socially distance" within the MDC. *See, e.g.*, Pet. ¶¶ 1, 33, 54. As described in detail in the Jordan and King Declarations, movement in and out of the MDC, and movement within the facility, has been minimized as much as possible. *See* Jordan Decl. ¶ 48; King Decl. (Dkt. No. 21) ¶ 4. Each housing unit has been provided with cleaning supplies. *See* Jordan Decl. ¶ 53. All inmates and staff have been provided masks to wear. *See* Jordan Decl. ¶ 56. Accordingly, Petitioners are not subject to an unreasonable risk of harm. *See Hines v. Youssef*, No. 1:13-cv-00357-AWI-JL, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015) ("Unless there is something about a prisoner's conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate.").

C. The BOP Has Not Shown Deliberate Indifference and Has Taken Appropriate Measures to Protect the Health of Inmates at the MDC and the Public

Petitioners likewise cannot prove that the official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. The test is subjective, meaning "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference." *Id.* To support a claim for deliberate indifference to *future* health problems, the condition of confinement complained about must be "sure or very likely to cause serious illness." *Helling*, 509 U.S. at 33 (regarding exposure to environmental tobacco smoke). BOP's significant efforts to mitigate infections at the MDC do not "shock the contemporary conscience" as required for the Petitioners to succeed on their constitutional claims. *See Charles v. Orange County*, 925 F.3d 73, 85 (2d Cir. 2019).

The Second Circuit has delineated the requirements of a conditions-of-confinement claim

brought by inmates alleging inadequate medical care. In *Charles v. Orange County*, the Second Circuit held that "[i]n order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Charles*, 925 F.3d 73, 85 (2d Cir. 2019) (citation and quotation marks omitted). In particular, an inmate raising a constitutional challenge to the medical care provided in detention must establish "(1) that [the inmate] had a serious medical need . . . and (2) that the Defendants acted with deliberate indifference to such needs." *Charles*, 925 F.3d at 86. To establish deliberate indifference in the context of an inmate's medical needs, the inmate had to prove that the defendant failed to provide treatment while having actual or constructive knowledge that doing so would pose a substantial risk to the detainee's health. *Id*. at 87.

The BOP's efforts to date have been effective, minimizing the spread of the contagion at the MDC. Petitioners claim that they face conditions of crowding and scant medical care resources. These claims lack merit. Petitioners ask that this Court second-guess the experts at the BOP during an ongoing and uncertain public health crisis, and immediately release a number of inmates into the general public. But Petitioners have failed to show that the BOP's efforts to prevent the Petitioners' infections with COVID-19, and its provision of medical care to Petitioners should they become ill, amounts to deliberate indifference to their medical needs.[8]

[8] Multiple courts in this district agree and have denied requests for compassionate release and bail applications by inmates housed by the BOP with medical concerns complaining of their conditions of confinement as grounds for release. *See, e.g.*, *United States v. Carpenter*, No. 19-70, 2020 WL 1909098, at *1 (2d Cir. Mar. 25, 2020) (affirming denial of inmate's motion for bail so that he can stay isolated at home until the risk of COVID-19 in prison decreases, finding that his "medical situation is not significantly different from that of most inmates."); *United States v. Passley*, No. 19 Cr. 534, 2020 WL 1815834, at *1, *4 (E.D.N.Y. Apr. 9, 2020) (denying defendant's motion seeking a temporary order of pre-trial release on a secured bond, finding that his compromised immune system does not merit release); *United States v. Deutsch*, No. 18 Cr. 00502, 2020 WL 1694358, at *1 (E.D.N.Y. Apr. 7, 2020) (denying defendant's motion for temporary release, explaining that defendant "does *not* have Type 1 or Type 2 diabetes, he does not suffer from any pre-existing respiratory issues, he is young, and his medical condition [-- diabetes --] appears well managed throughout his pretrial detention."); *United States v. Amato*, No. 19 Cr. 442 (ILG) (E.D.N.Y. Mar. 27,

Petitioners' assertions are overly generalized and do not relate to the MDC specifically, or the measures implemented there. Indeed, Petitioners fail to recognize many of the implemented policies and procedures discussed above. The BOP has taken steps to provide all MDC inmates with adequate medical care, both with respect to the prevention of infection with COVID-19 as well as the treatment should they become infected with COVID-19.

While Petitioners may ultimately disagree whether the measures taken by the BOP are sufficient to protect and treat inmates (while carrying out its mission to effectuate detention and criminal sentences), a difference of medical judgment cannot support deliberate indifference. *See Hill v. Curcione*, 657 F.3d 116, 123 (2d Cir. 2011) ("a prisoner does not have the right to choose his medical treatment as long as he receives adequate treatment."); *Victor v. Milicevic*, 361 F. App'x 212, 215 (2d Cir. 2010) (fact that a prisoner might prefer different treatment does not give rise to Constitutional violation) (internal quotation marks and citations omitted); *Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014) (difference of opinion over expert medical judgment fails to rise to the level of a constitutional violation). Public health officials are entitled to heightened deference when exercising science-based public health judgment during a public health emergency. *United States ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963) ("judgment required is that of a public health officer and not of a lawyer used to insist on positive evidence to support action; their task is to measure risk to the public."); *Hickox v. Christie*, 205 F. Supp. 3d 579, 594 (D.N.J. 2016) (Court will not second-guess discretionary judgments of public health officials).

Even if the rate of infection at the MDC were higher than reported based on the alleged

2020), Dkt. No. 254 (Court had already determined defendant was a danger to the community and declining to release defendant based on COVID-19 pandemic for 54-year-old who cited poor health and family history); *United States v. Lipsky*, No. 19 Cr. 203 (NGG) (E.D.N.Y. Mar. 24, 2020), Dkt. Entry dated Apr. 21, 2020 (declining to release defendant, previously detained as a danger to the community, based on general risks of COVID-19 pandemic).

limited testing of inmates, the BOP has already taken significant steps to mitigate the spread of infection and taken steps to treat inmates with symptoms of infection. *See, e.g.,* Jordan (Dkt. No. 47-1) and King (Dkt. Nos. 18-1, 21) Declarations. Petitioners must show that the MDC is deliberately indifferent to their medical needs as a result of the COVID-19 pandemic. But to the contrary, the MDC has actively responded to the pandemic and taken steps to prevent its spread and isolate infected inmates, if and when there is a need. The BOP has not been deliberately indifferent to the needs of the MDC inmates.

Another Court reached the same conclusion where the virus had already spread among inmates and staff at the facilities at issue. *See Money v. Pritzker*, Nos. 20-cv-2093, 20-cv-2094, 2020 WL 1820660, at *3, *18 (N.D. Ill. Apr. 10, 2020). Prison officials came forward "with a lengthy list of the actions they have taken to protect [the facility's] inmates," and recognized that prison officials there (like BOP staff here) "are trying, very hard, to protect inmates against the virus and to treat those who have contracted it." *Id.* at *18. There was no evidence to "support any suggestion that [prison officials] have turned the kind of blind eye and deaf ear to a known problem that would indicate 'total unconcern' for the inmates' welfare." *Id.* (quotation omitted). Accordingly, the actions of prison officials were not deliberately indifferent but, instead, "easily pass constitutional muster." *Id.*

Even if Petitioners disagree with the Respondent's efforts to prevent the spread and treatment of COVID-19, the relevant standard here is deliberate indifference. The Respondent's ongoing efforts to respond to the COVID-19 crisis soundly rebut any showing of deliberate indifference in this instance. Petitioners cannot establish that the conditions at the MDC, in light of the precautions being taken, are "sure or very likely" to lead to serious or fatal COVID-19 cases or that the facility has been deliberately indifferent to the risk of exposure. Petitioners have failed

to state an Eighth Amendment claim because they have not pleaded sufficient facts that could support the necessary conclusions that conditions at the MDC are of the sort that would be "repugnant to the conscience of mankind," or that officials have shown any indifference, much less deliberate indifference, to the risks posed by COVID-19. Instead, Petitioners have merely shown that they disagree with BOP's approach to treating this medical crisis. As such, they have failed to state an Eighth Amendment claim, and this matter should be dismissed.

III. The Petition's Conclusory Putative Class Action Allegations Must Be Stricken

Notwithstanding Petitioners' failure, to date, to move to certify their putative class, the putative class fails to satisfy Fed. R. Civ. P. 23(a)'s requirements of ascertainability, commonality, or typicality. First, the proposed class is not ascertainable. The key to class certification is defining the class in a way that makes administrative sense. *See Scaggs v. New York State Dep't of Educ.*, No. 06-CV-0799 (RRM) (WDW), 2009 WL 890587, at *2 (E.D.N.Y. Mar. 31, 2009). Although Rule 23 "contains no express requirement regarding ascertainability, the rule impliedly prohibits certification of a class that is not identifiable by reference to objective criteria." *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 116 (E.D.N.Y. 2012).

Here, Petitioners "seek to represent a class consisting of all current and future detainees in custody at the MDC during the course of the COVID-19 pandemic," which may exceed well over 1,700 individuals. Pet. ¶ 110. Petitioners' putative class is inherently ill-defined, as the putative class becomes a constant moving target. Because Petitioners have provided no evidence to show that they can meet the requirement of ascertainability, their putative class fails. *See John v. Nat'l Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (where apparent from pleadings that there is no ascertainable class, court may dismiss the class allegation on the pleadings).

Next, there are no questions of law or fact common to the putative class. To show commonality, "[w]hat matters . . . is not the raising of common 'questions'—even in droves—but,

rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (to satisfy Rule 23(a)(2) each class member's claim must depend upon a common contention "of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). Petitioners' putative class is incapable of classwide resolution, as it does not account for any of the myriad factors that are left to the discretion of both Article III judges and the BOP in making determinations that are central to whether a particular inmate should be released. Petitioners' putative class seeks to blend pretrial, post-conviction, and post-sentencing inmates, despite the fact that these inmates have different criminal charges or convictions, have different lengths of remaining periods of imprisonment, feature different disciplinary histories, pose different dangers to the community and risks of flight, have different ages and medical histories, and rely on different resources should they be released from custody. Pet. ¶ 4. Indeed, during the April 1, 2020 TRO Hearing, this Court questioned if Petitioners' action could be "an appropriate class action when there are . . . individual issues that would go to release, individual issues that could go to the medical circumstances." *See* April 1, 2020 Tr. at 113:3-6.

Moreover, typicality requires that the named Petitioners' claims be typical of *each other* and overlap factually and legally in a manner indicative of the claims of unnamed class members. *See Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010). Petitioners have no basis to allege the unity or alignment of interests, either among themselves or with the other members of the proposed class, necessary to meet this requirement. Simply stated, in light of their widely-varying factual circumstances and procedural postures, Petitioners cannot represent "typical" claims of *any* single class. Petitioners' claims of typicality are, in any event, self-defeating. For if the claims of the

named Petitioners are typical of the rest of the class, then the defenses to those claims also apply classwide. *See Pagan v. Abbott Labs.*, 287 F.R.D. 139, 146 (E.D.N.Y. 2012) (typicality requirement "ensure[s] that the class representative is not subject to a unique defense which could potentially become the focus of litigation."). Petitioners' claims are subject to dismissal. Chunn and McBride have already been released from the MDC, while Rabadi, Rodriguez, Lopez, and Hair are post-conviction inmates (unlike the hundreds of pretrial detainees also in MDC custody). Petitioners are inadequate class representatives for these reasons. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). Accordingly, the Court should strike the class action allegations because it is clear from the Petition itself that the requirements for maintaining a class action cannot be met. *See Johnson v. Connecticut Dept. of Admin. Serv.*, No. 3:11-cv-1106 (VLB), 2012 WL 414996, at *2 (D. Conn. Feb. 9, 2012).

CONCLUSION

The Court should dismiss the Petition in its entirety pursuant to Fed. R. Civ. P. 12(b)(1) or, alternatively, 12(b)(6). Petitioners, on behalf of themselves only, can raise their requests for release to the BOP or the appropriate trial or sentencing judge for individualized determinations.

Dated: Brooklyn, New York
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