UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI, by his Next Friend MIGDALIZ QUINONES; 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.	No. 20 Civ. 1590 (RPK)

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Cardozo Civil Rights Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 1003
(212) 790-0871

Alexander A. Reinert
55 Fifth Avenue, Room 1005
New York, NY 1003
(212) 790-0403

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INTRODUCTION

Petitioners Hassan Chunn, Nehemiah McBride, Ayman Rabadi, Justin Rodriguez, Elodia Lopez, and James Hair ("Petitioners"), on behalf of themselves and others similarly situated, submit this memorandum of law in opposition to Respondent's Motion to Dismiss the Amended Petition. Respondent's motion should be denied. His jurisdictional arguments disregard relevant and controlling case law, and are in essence not arguments against jurisdiction but against the availability of particular remedies. His arguments in favor of dismissal for failure to state a claim ignore Petitioners' allegations, which establish Respondent's deliberate indifference to a serious risk of harm. This is all that is needed at this stage.

FACTUAL BACKGROUND

A. The COVID-19 Crisis in the United States.

The novel coronavirus that causes COVID-19 has led to a global pandemic. As of April 22, 2020, COVID-19 had infected more than 2,600,000 people worldwide and caused more than 46,000 deaths in the United States. Pet. ¶ 20.[1] New York City has reported more than 147,000 cases, with more than 15,000 deaths, although the number of infections is likely drastically understated. Pet. ¶ 32. Certain populations—those over the age of 50 and those with specific underlying medical conditions—are particularly vulnerable to serious illness and death from COVID-19. Pet. ¶¶ 22-23. People aged 60-69 have a mortality rate 18 times higher than people under the age of 40; the rate is 40 times higher for people aged 70-79 years old. Pet. ¶ 22. The mortality rate for people of any age with cardiovascular disease, diabetes, hypertension, chronic respiratory disease, and cancer, is significantly elevated as well. Pet. ¶ 23. Even if the COVID-19 infection is not fatal, it will often require highly specialized care for people over the age of 50

[1] Citations to "Pet." Refer to the Amended Petition that was filed on April 23, 2020.

and will result in longstanding medical complications. Pet. ¶¶ 24, 29. Serious complications can develop rapidly, as little as five days after the first symptoms first appear. Pet. ¶ 26.

B. COVID-19 Poses Significant Dangers for Incarcerated People and Correctional Staff.

New York has been in a state of emergency since March 7, 2020, and people must remain in their homes to the greatest extent possible, wear masks when they leave their homes, not gather in groups of any size, and remain six feet away from others at all times. Multiple authorities have agreed that "social distancing" and rigorous hygiene practices, including washing hands with soap and water, are critical. Pet. ¶¶ 30-31, 34.

Taking these measures is virtually impossible in prisons and jails without conscientious interventions. Pet. ¶¶ 33, 35-37. For this reason, correctional public health experts have responded to the COVID-19 pandemic by recommending the release from custody of people most vulnerable to COVID-19. Pet. ¶¶ 38; 45-46. Release protects these people, mitigates the risk of infection for all people held and working in a correctional setting, and lessens the burden on the region's health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. Pet. ¶ 38.

Judges in this circuit and across the country have ordered release and other measures of injunctive relief to reflect these risks. *See Banks v. Booth*, No. 20 Civ. 849 (CKK), 2020 WL 1914896, at *13-*15 (D.D.C. Apr. 19, 2020) (ordering injunctive relief in case involving local jail); *Cameron v. Bouchard*, No. 20 Civ. 10949, 2020 WL 1929876, at *2–3 (E.D. Mich. Apr. 17, 2020), *modified on reconsideration*, No. 20 Civ. 10949, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020) (granting injunctive relief to a class of pretrial detainees and convicted individuals); *Coronel v. Decker*, No. 20 Civ. 2472 (AJN), 2020 WL 1487274, at *10 (S.D.N.Y. Mar. 27, 2020) (granting release of four medical vulnerable immigration detainees); *Basank et al. v.*

Decker et al., No. 20 Civ. 2518 (AT), __ F.Supp.3d __, 2020 WL 1481503, at *1 (S.D.N.Y. Mar. 26, 2020) (granting release of ten medically vulnerable immigration detainees who "face[] an imminent risk of death or serious injury . . . if exposed to COVID-19").

C. Respondent Is Disregarding Known Risks by Failing to Take Proper Precautions to Protect Petitioners and the Class.

Respondent has not prepared the MDC to mitigate the risks of COVID-19 spread. Necessary social distancing is virtually impossible, toilets, sinks, and showers are shared without disinfection between each use, communal food preparation and service leaves little opportunity for surface disinfection, and staff arrive and leave without proper screening for new infection. Pet. ¶¶ 54, 59. Since March 4, 2020, the Federal Defenders has engaged in extensive efforts to get Respondent to address the risks associated with the spread of COVID-19 at the MDC, to little avail. Pet. Ex. 1 (Declaration of Deirdre D. von Dornum, dated March 27, 2020 ("von Dornum Decl.")) ¶¶ 3-7, 9-11, 20, 21, 23. The Federal Defenders asked that the MDC take specific measures to reduce the spread of infection, *id.* ¶ 4, but the MDC's response has been insufficient.

As of March 11, 2020, the MDC did not anticipate having a testing protocol for COVID-19 and it had no policy to address staff who presented with COVID-19 risk factors. von Dornum Decl. ¶¶ 4, 6. Unfortunately, there is no evidence that Respondent has taken any additional steps since March 11, even as the pandemic has spread. Out of approximately 1,700 people held at the facility, only 12 incarcerated people had been tested at the time of filing. Pet. ¶ 48. Just before this case was filed, the MDC had approximately nine test kits and had only tested one person. Pet. ¶ 84. Despite being ordered to disclose such information by the Chief Judge of this Court, the MDC still has not developed any set testing protocol for COVID-19. May 5, 2020 letter from BOP to Chief Judge Mauskopf, *available at* https://www.nyed.uscourts.gov/pub/bop/MDC_MCC_20200505_042614.pdf.

Nor has the MDC instituted appropriate screening measures. Doctors have not even been present to evaluate people in the housing units. von Dornum Decl. ¶ 9. The MDC has not provided adequate PPE or cleaning supplies, and has not taken basic steps to prevent spread of the infection. Pet. ¶¶ 59, 69-71, 75. Adding insult to injury, Respondent has not instituted basic and common-sense steps to prevent the spread of the highly contagious infection. Incarcerated people have irregular access to basic hygiene supplies like soap. Pet. ¶¶ 59, 75.

Respondent's current practices in the MDC fail to protect detainees who are particularly vulnerable to the effects of COVID-19. Pet. ¶¶ 54, 57, 77. Respondent has not provided high-risk detainees with any additional protection or surveillance for COVID-19 symptoms. *Id.* High-risk detainees share cells with other people. Pet. ¶ 77.

Respondent has failed to take protective measures even in the face of known infections at the MDC. The MDC has relied on incarcerated people, rather than professional cleaners or staff, to clean units where confirmed positive people have been housed. von Dornum Decl. ¶¶ 12-13. According to one person confined at the MDC, others who were housed with a person who tested positive eventually showed symptoms. Pet. ¶ 68. To "clean" their own cells, people are provided only with diluted hand soap or nothing at all. Pet. ¶ 71. Furthermore, high touch surfaces, such as phones and computers, are not being cleaned between uses. Pet. ¶ 75.

D. The MDC Is Not Prepared to Treat Individuals Who Contract COVID-19.

Anyone who contracts COVID-19 at the MDC is at a high risk of developing serious symptoms because the MDC lacks the medical resources to care for symptomatic individuals. Pet. ¶ 81. The MDC has no separate medical unit for sick people, unlike many Federal Correctional Institutions and even Rikers' Island. von Dornum Decl. ¶ 41. There are only three doctors available at the MDC to care for all 1,700 people held there. *Id.*

These resources will be inadequate to treat people who contract COVID-19, particularly the Vulnerable Persons sub-class. Pet. ¶ 86. Further, the MDC's staffing shortage will only increase with the epidemic, leaving officers less able to monitor the health of the incarcerated population. Pet. Ex. 2 (Declarations of Jonathan Giftos, M.D., dated March 27, 2020 ("Giftos Decl.")) ¶ 18. If Petitioners or class members contract COVID-19, they will encounter significant delays in obtaining medical care, further exacerbating the risks they face.

E. Petitioners Are Particularly Vulnerable.

Because of their age and/or medical conditions, Petitioners are particularly vulnerable to serious illness or death if infected by COVID-19. Mr. Rabadi is 59 years old and suffers from many health problems, including serious heart problems, hypertension, diabetes, and a kidney tumor. Pet. ¶ 91. He also had a heart attack about six years ago. *Id.* Ms. Lopez is 55 years old and has a number of serious medical problems, including a lung infection that interferes with her breathing, type 2 diabetes, high blood pressure, and high cholesterol. Pet. ¶ 93. Mr. Hair suffers from multiple sclerosis, kidney pain, and asthma, and has been taken to the hospital because of an asthma attack. *Id.* ¶ 94. Mr. Rodriguez suffers from asthma but had not received an inhaler at the time of filing of the Petition. Pet. ¶ 92.

SUMMARY OF ARGUMENT

Respondent's motion to dismiss is founded on several legal errors. Although styled in part as a motion to dismiss for lack of jurisdiction, almost none of Respondent's arguments is jurisdictional.[2] Instead, Respondent's arguments about "jurisdiction" actually relate to what remedies are available to Petitioners. None of these arguments support dismissal, and in any event, they are meritless. Section 2241 authorizes an action based on conditions of confinement, as the Second Circuit has held. *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008). And release is one of the remedies available under Section 2241, as numerous courts already have established in the COVID-19 context. *See infra* Part I.A.1. Respondent's contention that habeas cannot override his statutory and regulatory authority flies in the face of the Great Writ, which, absent suspension, is always available to check unconstitutional conduct by the executive. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

Respondent's invocation of res judicata, based on the fact that two of the Petitioners, at Respondent's and the Court's urging, sought compassionate release *after* filing this Petition, is without basis. Unsurprisingly, Respondent does not cite a single case applying res judicata in a case like this one. Respondent's Section 3626 fails as well. This action is not encompassed by Section 3626, and Petitioners do not ask for a "prisoner release order" within the meaning of Section 3626.

[2] Petitioners concede that Petitioners Chunn and McBride's requests for release are currently moot because they have been released from the MDC and served the entirety of their sentences. They are therefore subject to dismissal without prejudice for lack of jurisdiction.

Respondent's arguments that Petitioners fail to state a claim for a violation of the constitution fare no better. Petitioners' allegations are sufficient to establish that Respondent is acting with deliberate indifference towards an objectively serious risk of harm. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). At the motion to dismiss stage, where Petitioners' factual allegations must be taken as true, the Amended Petition easily clears the bar for stating a claim. And Petitioners' allegations for class-wide relief are sufficient at this stage as well.

ARGUMENT

A. None of Respondent's Jurisdictional Arguments Suffices as a Basis for Dismissal of the Amended Petition

None of Respondent's four "jurisdictional" arguments is, in fact, jurisdictional, and none has any merit. Notably, Respondent makes no claim that this Court lacks jurisdiction to order injunctive relief to mitigate the conditions at the MDC.

1. This Court Has Jurisdiction and Authority to Order Release and Other Relief Requested by Petitioners Under 28 U.S.C. § 2241.

This court has jurisdiction and authority to provide all of the relief sought by Petitioners. As Respondent must concede, the Second Circuit has held that Section 2241 is an appropriate vehicle for challenging conditions of confinement. *Thompson*, 525 F.3d at 209; *see also Roba v. United States*, 604 F.2d 215, 219 (2d Cir. 1979). Respondent's argument that *release* is not available to Petitioners rests on mischaracterizing the Amended Petition as seeking to "amend a term of imprisonment" or to order home confinement. Resp. Mem. Supp. Mot. Dismiss ("Resp. Mem."), at 13. Moreover, Respondent's contentions relate *only* to Petitioners'

requests for release, ignoring entirely the other injunctive relief Petitioners requested. Pet. 36-37.

(a) This Court has the Authority to Entertain a Challenge to Prison Conditions Under 28 U.S.C. § 2241.

Respondent tries to restyle this Petition as a request to amend a sentence in order to end-run the Second Circuit's clear statement that a habeas petition is an appropriate vehicle under which to challenge conditions of confinement. Section 2241(c)(3) authorizes courts to grant habeas corpus relief where a person is "in custody in violation of the Constitution or laws or treaties of the United States." The Second Circuit has "long interpreted § 2241 as applying to challenges to the execution of a federal sentence, including such matters as . . .prison conditions." *Thompson*, 525 F.3d at 209 (internal quotation marks omitted). This includes challenges to detention where conditions pose a threat to Petitioners' medical wellbeing. *See Roba*, 604 F.2d at 218–19 (approving the use of Section 2241 to challenge a prisoner's transfer where that transfer created a risk of fatal heart failure).

The district court cases Respondent cites to support the contention that Petitioners request a "sentence reduction" are inapposite (Resp. Mem. 14-15). All three of those district court cases involved requests to amend a sentence based on the United States Sentencing Guidelines' applicability to their particular circumstances. *See Grant v. Terrell*, No. 10-CV-2769 (MKB), 2014 WL 2440486, at *3 (E.D.N.Y. May 29, 2014) (rejecting habeas challenge where "[p]etitioner argues that § 2241 is the appropriate avenue for bringing his habeas petition because he was notified after he had been sentenced that he was to serve 57 months of his term of imprisonment at the MDC"); *Serra v. Terrell*, No. 10-CV-03044 (DLI), 2013 WL 5522850, at *1 (E.D.N.Y. Sept. 30, 2013) ("Petitioner requests a sentence reduction based on a misunderstanding of Sentencing Guidelines § 5K2.0, which permits downward departures from

the Guidelines for harsh pre-trial conditions of confinement, but which cannot be applied retroactively to reflect post-conviction conditions."); *Medina-Rivera v. Terrell*, No. 11-CV-734 (BMC), 2011 WL 3163199, at *2-3 (E.D.N.Y. July 26, 2011) (denying petitioner's habeas application requesting "his sentence be reduced '[p]ursuant to United States Sentencing Guidelines 5K2.0'" as a result of adverse conditions.).

Petitioners here are not asking for amended sentences, they are asking for release, injunctive relief, and other appropriate relief to reduce the risk that they will be infected by COVID-19 because of Respondent's failure to mitigate the spread of the virus at the MDC. Pet. ¶¶ 54-94. If habeas is a vehicle for challenging conditions of confinement, by definition courts must be able to grant relief that *might* result in an earlier release for individual incarcerated people. If anything, courts in this circuit have made clear that habeas actions, not Section 3582 motions, are the proper vehicles for claiming "legal wrongs." *United States v. Lisi*, No. 15-CR-457 (KPF), 2020 WL 881994, at *4 (S.D.N.Y. Feb. 24, 2020), *reconsideration denied*, No. 15-CR-457 (KPF), 2020 WL 1331955 (S.D.N.Y. Mar. 23, 2020) (holding that "it would be both improper and inconsistent with the First Step Act to allow Lisi to use 18 U.S.C. § 3582(c)(1)(A) as a vehicle for claiming legal wrongs, *instead of following the normal methods of a direct appeal or a habeas petition*.") (emphasis added). Indeed, the Government itself has stated that challenges to the location and conditions of confinement are "civil matter[s] subject to review under § 2241, with jurisdiction in the district of incarceration," as opposed to compassionate release motions which must be lodged with the sentencing court. Gov't Resp. to Mot. for Compassionate Release Pursuant to 18 U.S.C. § 3582(c)(1)(A), *United States v. Carr*, 16-CR-54, Dkt. 513, at 7 (D. Col. October 10, 2019); *see also Alvarado v. United States*, Nos. 08-CV-631, 06-CR-1195 (LAB), 2008 WL 5111326, at *1 (S.D. Cal. Dec. 4, 2008) ("[N]either a motion

pursuant to § 3582 nor a petition under § 2255 is the proper method of challenging conditions of confinement.").

Moreover, courts in this circuit have held that Section 2241 is the appropriate vehicle to address this exact issue: the effect of COVID-19 on the wellbeing of incarcerated people. *See Basank v. Decker*, No. 20-CV-2518 (AT), 2020 WL 1953847, at *8 (S.D.N.Y. Apr. 23, 2020) ("An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing."); *Valenzuela Arias v. Decker*, No. 20-CV-2802 (AT), 2020 WL 1847986, at *6 (S.D.N.Y. Apr. 10, 2020) (holding Section 2241 is appropriate vehicle and ordering petitioners released from ICE custody). The immigration context in which those cases arise is not relevant to the question of whether Section 2241 authorizes release – just as in the criminal context, immigration detainees may seek release through means other than Section 2241. *See*, *e.g.*, 8 U.S.C. § 1182(d)(5)(A) (permitting humanitarian parole); *id.* § 1226(a)(2) (governing release on bond); 8 C.F.R. § 236.1(c)(8) (governing conditional release).

When a Section 2241 petition establishes that an individual is held in violation of the constitution, district courts in this circuit have exercised the authority to order their release. In *Valenzula Arias*, for example, the court ruled that release was necessary because "conditions in the Essex County Jail plainly do not allow for the social distancing measures recommended by the CDC—most obviously, maintaining *at least* six feet of distance from other persons at all times." 2020 WL 1847986, at *7. As Petitioners have shown, conditions in MDC similarly do not allow for such distancing, putting everyone at high risk for contracting the virus and those with underlying conditions or age-related sensitivity at an unacceptably high risk for serious

illness or death. Petitioners have requested several forms of relief, but if Respondent is unable to create safe conditions at the MDC, release is the only adequate solution.

(b) Other Circuit and District Court Rulings Support Using Section 2241 to Request Relief for Medical Conditions, Particularly in the Situation of Covid-19.

Respondent cites several cases from other circuits that disallow the use of Section 2241 to challenge prison conditions or to order release. Resp. Mem. at 15. These cases have little bearing in a circuit where the governing law has approved the use of such petitions for decades. *See Roba*, 604 F.2d at 218–19. Respondent's reliance on *Livas v. Myers*, No. 20-CV-422 (TAD), 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020), for example, has little application here. Unlike the Second Circuit, the Fifth Circuit has never "allow[ed] conditions of confinement claims to be brought under § 2241." *Id.* To the extent out-of-circuit precedent is instructive, other circuits have also approved of the use of Section 2241 for challenging medical conditions in prisons and jails. *See e.g., Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014) ("Our precedent establishes that one in custody may challenge the conditions of his confinement in a petition for habeas corpus"); *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) ("[P]etitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241").

Moreover, the Sixth Circuit, notwithstanding prior circuit case law disapproving of the use of Section 2241 to address prison conditions, *see Velasco v. Lamanna*, 16 F. App'x 311, 314 (6th Cir. 2001), recently denied a stay of a district court's decision that affirmed the use of Section 2241 to seek the release of people held in federal prison in Ohio. *Wilson v. Williams*, No. 20-3447, Dkt. 23-2 (6th Cir. May 4, 2020). And two district courts in the Sixth Circuit have recently held that under *these emergency conditions* they could and would entertain Section 2241

challenges to prison conditions. *Awshana v. Adducci*, No. 20-10699, 2020 WL 1808906, at *2 (E.D. Mich. Apr. 9, 2020) (ruling that, even though the Sixth Circuit has ruled against use of Section 2241 for conditions of confinement challenges in some cases, "emergency conditions" of COVID-19 made it the proper vehicle); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *2-3 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (same).

Respondent's invocation of his regulatory and statutory authority cannot displace the federal judiciary's role in enforcing the constitution through the Great Writ. At its core, the writ of habeas corpus is aimed at checking Executive overreach. *St. Cyr*, 533 U.S. at 301. Thus, Respondent's criticism that Petitioners have not addressed whether this Court can order release based on "bail, home confinement and compassionate release" misses the mark. Whatever discretion Respondent enjoys under the statutes and regulations that govern him, he is not free to act in violation of the Constitution. Statutes and regulations govern the Executive's exercise of discretion in the immigration detention context, and that has not stopped courts across the country from granting Section 2241 petitions seeking release from custody. In this case, where recourse to the compassionate release process has been shown to be futile, and where the BOP has more broadly demonstrated that it will not exercise its authority to move for compassionate release based on the COVID-19 crisis, Respondent's invocation of his authority rings particularly hollow.[3] This Court's role in enforcing the constitution via Section 2241 is not subordinate to Respondent's claimed discretion..

[3] Respondent has made clear that he does not consider the risk of COVID-19 transmission to be a ground for compassionate release, and this appears to be how the BOP writ large has approached the issue. By way of example, the Government recently informed a federal court in Ohio that FCI Elkton had reviewed 243 medically vulnerable people for compassionate release in light of COVID-19 and had found that only one person met the criteria. Resp. Status Report, *Wilson v. Williams*, No. 20-CV-794, Dkt. 49 (N.D. Ohio. May 6, 2020). This is because the BOP's guidance makes clear that a medical condition will qualify as a compelling circumstance only when it is debilitating or terminal. *See* BOP Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), at 4-5 (Jan. 17, 2019).

B. Respondent Has Not Established That Res Judicata Applies to Bar Petitioners' Request for Relief.

Respondent argues that Petitioners Rabadi and Rodriguez are barred by *res judicata* from litigating the issues presented in this case, but Respondent overlooks several critical requirements that he must establish before res judicata obtains. *O'Connor v. Pierson*, 426 F.3d 187, 194 (2d Cir. 2005) ("Claim preclusion is an affirmative defense; it does not go to subject-matter jurisdiction."). The doctrine of *res judicata* "applies to preclude later litigation if the earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *In re Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir.1985); *see also Jackson v. Connecticut Dep't of Pub. Health*, 795 F. App'x 64, 66 (2d Cir. 2020). *Res judicata* does not apply here, nor would it lead to dismissal, because it does not apply to Ms. Lopez or Mr. Hair's claims.

First, putting aside the problem that neither Rabadi nor Rodriguez filed a *claim* in their criminal cases, addressed separately below, there has been no final judgment on the merits of Mr. Rabadi's motion for compassionate release. Instead, Mr. Rabadi's sentencing judge determined that the court lacked jurisdiction to entertain the motions because Mr. Rabadi had not satisfied Section 3582's exhaustion requirement. *See United States v. Rabadi*, No. 13-CR-353 (KMK), 2020 WL 1862640, at *4 (S.D.N.Y. Apr. 14, 2020) ("For the reasons discussed above, the Court denies the application without prejudice to renewal if the BOP does not act upon his request within thirty days of its receipt."). "It is well established that a dismissal without prejudice has no res judicata effect on a subsequent claim." *Camarano v. Irvin*, 98 F.3d 44, 47 (2d Cir. 1996).

Second, neither Mr. Rabadi nor Mr. Rodriguez filed claims of any kind in their criminal cases. They simply filed a motion seeking a change in sentence. The sentencing court's

jurisdiction was limited to considering that request and could not have ordered any of the other relief requested by Petitioners in this action. The sentencing court could not even have exercised habeas jurisdiction in either of their cases, because only the Eastern District of New York has jurisdiction over Petitioners' Section 2241 claims. *See, e.g.*, *United States v. Cabrera*, No. 06-CR-1165 (JFK), 2017 WL 398384, at *2 (S.D.N.Y. Jan. 27, 2017) (considering Section 3582 motion on the merits but dismissing Section 2241 petition for lack of jurisdiction because petitioner was not confined in Southern District); *Guidice v. United States*, No. 89-CV-1259, 1989 WL 80046, at *1 (E.D.N.Y. July 7, 1989) (holding that Section 2241 petitions challenging conditions of confinement must be brought in the federal district where person is in custody). Indeed, this is precisely the position the Government took in a COVID-19 case in the Southern District pending before Judge Jesse Furman. *See* Gov't Letter to J. Jesse M. Furman, *United States v. Nkanga*, No. 18-CR-713, Dkt. 90 (S.D.N.Y. April 1, 2020) (objecting to S.D.N.Y.'s consideration of Section 2241 petition on venue grounds because defendant was confined at the MDC). As the Second Circuit has stated, *res judicata* is geared towards "the sensible goal that where possible all related claims be resolved in one proceeding." *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 109 (2d Cir. 2001). "Thus, *Epperson* stands for the proposition that if there is no jurisdictional theory upon which a plaintiff can assert all of his claims, *res judicata* will not bar the prosecution of a subset of those claims under a different jurisdictional theory." *Boyd v. J.E. Robert Co.*, No. 15-CV-2302 (BMC), 2016 WL 1359521, at *3 (E.D.N.Y. Mar. 29, 2016), *aff'd sub nom. Boyd v. NYCTL 1996-1 Tr.*, 697 F. App'x 720 (2d Cir. 2017). Here the sentencing court would not have been able to assert jurisdiction over Petitioners' habeas claims, and even if it could have done so, the court could not have ordered all of the relief sought by Petitioners.

Third, the common law doctrine of claim preclusion applies when a plaintiff in the first case subsequently files a second case. Where a defendant in the first case subsequently files a claim in the second case, common-law claim preclusion does not apply – instead, in federal court, Rule 13's compulsory counterclaim rule provides the source of preclusion. But even if Petitioners are viewed as claimants in their criminal case, and even if (contrary to basic procedural doctrine), the Federal Rules of *Civil* Procedure somehow applied in Petitioners' criminal case, Federal Rule 13(a)(2)(A) does not require litigation of claims that already are the subject of a pending litigation when a defending party brings a claim. Fed. R. Civ. P. 13(a)(2)(A).

Respondent cites no case establishing that a decision on a Section 3582 motion, let alone a denial of such motion without prejudice, could be considered *res judicata* as to any Section 2241 petition, let alone in these circumstances. That is because there is no support for that proposition. Indeed, the Second Circuit has specifically disapproved of a district court *sua sponte* converting a Section 3582 motion into a Section 2241 motion without notice because of the concern that it would prejudice a separate habeas action. *Simon v. United States*, 359 F.3d 139, 144 (2d Cir. 2004). Implicit in *Simon* is that a petitioner could bring a separate habeas claim even after denial of a Section 3582 motion – otherwise there would be no prejudice in the conversion deemed "improper" by the court. *Id.*; *see also Lisi*, 2020 WL 881994, at *4.

Finally, even if Respondent had satisfactorily established all of the requirements of the *res judicata* defense, basic principles of fairness would bar its application here for several reasons. None of the discovery devices available to Petitioners here – document demands, inspection of the facility, and depositions, to name but a few – were available in their criminal case. They therefore cannot be said to have had a full and fair opportunity to litigate their

constitutional claims in their compassionate release proceedings. *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 626 (2d Cir. 2007) ("*Res judicata* does not require the precluded claim to actually have been litigated; its concern, rather, is that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the claim."); *United States v. E. River Hous. Corp.*, 90 F. Supp. 3d 118, 153 (S.D.N.Y. 2015) (finding that preclusion cannot apply where administrative proceeding did not involve discovery, witness interviews, or hearings). "Were the result otherwise, given Plaintiff's inability to conduct discovery at the [prior] hearing, a 'manifest injustice would otherwise ensue.'" *Johnson v. Cty. of Nassau*, 480 F. Supp. 2d 581, 609 (E.D.N.Y. 2007) (quoting *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 44 (2d Cir.2005)).

Applying *res judicata* would be particularly unfair in the context of this case. Petitioners Rabadi and Rodriguez filed their Section 2241 petitions before their compassionate release motions. Indeed, they only filed their compassionate release motions because the Court indicated, at Respondent's encouragement, that it would not rule on their TRO request until they had first sought relief before their sentencing court. If this Court now accepts Respondent's argument regarding *res judicata*, the resulting catch-22 would be perverse: having taken a procedural step Petitioners viewed as unnecessary and unwarranted, Petitioners would now be barred from obtaining relief via the device and proceeding that they pursued in the first instance. *See Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1477–1478 (6th Cir. 1990) (holding that "it would be unjust to place the plaintiff in a catch 22 position" and apply *res judicata* where the plaintiff "was persuaded by the court to dismiss the contempt proceeding which Pepsi claims became her exclusive remedy once she elected it.") (internal quotation marks

and citations omitted); *see also* Wright & Miller § 4404, Sequence of Actions and Judgments, 18 Fed. Prac. & Proc. Juris. § 4404 (3d ed.) ("If the court itself suggests that one action be dismissed so that common issues may be resolved in another action, for example, reliance on the court's suggestion may justify relaxation of ordinary claim-preclusion rules…A defendant who expressly asserts that one part of a claim should not be advanced in one action because it is properly the subject of a separate pending action should lose any claim-splitting argument, whether as a matter of express consent or estoppel.").

C. The PLRA's Procedures Regarding "Prisoner Release Orders" Do not Apply Here.

Respondent argues that 18 U.S.C. § 3626 deprives this Court of authority to order Petitioners' release.[4] This argument is without merit for several reasons. First, contrary to Respondent's blithe assumption, this action is not a "civil action with respect to prison conditions" within the meaning of the Prison Litigation Reform Act. 18 U.S.C. § 3626(g)(2). To the extent that Petitioners seek release from custody because there are no set of conditions that would be consistent with the requirements of the constitution, this action is a habeas proceeding challenging the "fact or duration of confinement" and therefore is specifically excluded from the coverage of Section 3626(g)(2). The Sixth Circuit recently adopted this very reasoning in a Section 2241 case related to the COVID-19 crisis in federal prisons:

> Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement. *See Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011); *cf. Terrell v. United States*, 564 F.3d 442, 446−48 (6th Cir. 2009). Petitioners' proper invocation of § 2241 also forecloses any argument that the PLRA applies given its express exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its ambit. 18 U.S.C. § 3626(g)(2).

[4] Respondent does not argue that the Court lacks authority under the PLRA to order other injunctive relief aimed at risk mitigation and infection control sought by Petitioners. Pet. at 36-7.

Wilson, 20-03447, Dkt. 23-2, at 3.

Along similar lines, the Second Circuit has specifically held that habeas petitions challenging the fact or duration of confinement are not "civil actions" with respect to other portions of the PLRA. *Jones v. Smith*, 720 F.3d 142, 145-47 (2d Cir. 2013).[5] In this case, Petitioners have requested release as a remedy precisely because they cannot currently be held at the MDC under conditions consistent with the Constitution. Pet. ¶ 99. Petitioners request that appropriate mitigating measures be instituted for anyone who remains at the MDC, but this is an alternative that is relevant to Petitioners only to the extent that this Court denies their request for release out of the MDC. Therefore, to the extent Petitioners seek release from confinement precisely because there are no conditions under which they can be constitutionally held by Respondent, this action is not a "civil action" within the meaning of 18 U.S.C. § 3626.

Second, Petitioners are not asking for a "prisoner release order" within the meaning of Section 3626. Although Petitioners are requesting release from the MDC, because the Court can impose conditions on their release, including that they remain within the custody of the BOP, their requested relief does not qualify as a prisoner release order. *Wilson v. Williams*, No. 20-CV-794, 2020 WL 1940882, at *10 (N.D. Ohio Apr. 22, 2020), *stay denied*, *Wilson*, 20-3447, Dkt. 23-2 (rejecting application of Section 3626 because "the Court is not ordering the release of the prisoners. Instead, the inmates will remain in BOP custody, but the conditions of their confinement will be enlarged.").

The legislative text, legislative history, and familiar principles of statutory construction also establish that the phrase "prisoner release order" in Section 3626 is tied to constitutional

[5] In dictum, the *Jones* Court distinguished application of the PLRA based in part on the nature of relief sought. Habeas claims seeking relief that is "analogous" to that sought in Section 1983 claims might be covered by the PLRA, according to the court. *Jones v. Smith*,720 F.3d 142, 145 n.3 (2d Cir. 2013). In this case, because release is more analogous to the kind of relief sought in habeas cases, not Section 1983 cases, the *Jones* dictum is not applicable.

claims based on overcrowding. Statutory phrases must be read in context, not in isolation. *United States v. Morton*, 467 U.S. 822, 828 (1984); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 195 (2d Cir. 2004). "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal quotation marks omitted). Moreover, "equitable principles have traditionally governed the substantive law of habeas corpus," and the Court may not "construe a statute to displace courts' traditional equitable authority absent the clearest command." *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (internal quotation marks and citation omitted); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Unless a statue in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.") (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

Each of these principles leads to the conclusion that Petitioners are not seeking a "prisoner release order." To read the statute as a whole, one must "harmoniz[e] the definition of 'prisoner release order' with the requirements for entering one." *Reaves v. Dep't of Correction*, 404 F. Supp. 3d 520, 523 (D. Mass. 2019) (citing *Plata v. Brown*, No. 01-CV-1351, ––– F.Supp.3d ––––, 2013 WL 12436093, at *10 (N.D. Cal. June 24, 2013)). One of the conditions necessary for entering a "prisoner release order" is that a three-judge panel find by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right." 18 U.S.C. § 3626 (a)(3)(E)(i). If Respondent is correct that the release remedy sought by Petitioners constitutes a "prisoner release order," then a court could only order release when overcrowding caused a violation of Petitioners' rights, but not if the violation was caused for any other

unconstitutional reason. *Reaves*, 404 F. Supp. 3d at 523 (citing *Plata*, 2013 WL 12436093, at *10). Nothing in the legislative history of the PLRA "evidences Congressional intent to limit the protection of inmates' constitutional rights in this way." *Id*. at 523. Doing so would raise serious constitutional concerns in cases where only release could remedy a constitutional violation that was tied to something other than overcrowding. Moreover, it would amount to a significant restriction on the equitable power of federal courts absent clear congressional intent. In fact, the legislative history suggests that the "[s]ponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators' failure to comply with the terms of consent decrees designed to eliminate overcrowding." *Gilmore v. California*, 220 F.3d 987, 998 n.14 (9th Cir. 2000); *see also* 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole) (highlighting Congress's concern that population caps were a "pernicious form of micromanagement" that required legislative attention).

Where, as here, the purpose of a release relates to the prisoners' medical needs or vulnerabilities, it does not implicate the limitations on "prisoner release orders." *See Plata*, 2013 WL 12436093, at *9–10, 15; *Reaves*, 404 F. Supp. 3d at 523–24 (denying a stay pending appeal and explaining why the PLRA permitted the court to order the transfer of a quadriplegic prisoner to a medical facility equipped to care for him).

D. This Court has the Power to Appoint A Special Master to Administer the Relief Petitioners Have Requested.

Respondent makes three arguments against the appointment of a Special Master. It alleges that (1) "the Court cannot give a Special Master powers that even it does not have."; (2) even if the Court had the authority to appoint a Special Master, one is not necessary in this case; and (3) that section 3626 does not permit a Special Master to chair a release committee. (Resp't.

Mem. 22-24). None of these contentions is a barrier to this Court appointing a Special Master nor investing them with the power to administer the relief requested by Petitioners.

1. This Court has the Authority to Appoint A Special Master.

The Court has inherent equitable power to appoint a Special Master to help the Court bring the MDC's response to the coronavirus in line with the Constitution. "The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011) (internal quotation marks and citation omitted). "[A]s with any other [equitable] remedial tool" a district court has "broad discretion" to appoint a Special Master. *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (per curiam).

Petitioners have not asked that the Court invest the Special Master with powers it does not possess. They have merely asked the Court to appoint a Special Master to administer whatever injunctive relief this Court deems necessary. As advisory committee notes to Rule 53 explain: "Courts have come to rely on masters to assist in framing and enforcing complex decrees" and that "[t]he master's role in enforcement may extend to investigation." Fed. R. Civ. P. 53(a)(1)(C) advisory committee's note to 2003 amendment. There is no reason to believe that facilitating relief in this case falls outside the ability of an appropriate Special Master. The Court is certainly able to appoint a Special Master who is familiar with BOP operations and/or our federal criminal legal system, so the suggestion that he or she would be incapable of collecting the knowledge possessed by "BOP officials, prosecutors, district and magistrate judges" (Resp't. Mem. 23) should be of no concern. In short, this Court has the power and authority to appoint a Special Master to administer the relief requested by Petitioners.

2. A Special Master is A Necessary and Efficient Way to Administer Relief in this Case.

Respondent's suggestion that incarcerated people are able to "timely" and individually press their petitions for release and injunctive relief is contrary to everything we know about COVID-19 and the federal district court's dockets. As Rule 53 of the Federal Rules of Civil Procedure makes clear, the very purpose of a Special Master is "to address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C).

COVID-19 spreads rapidly without social distancing and sanitation measures. (Pet. ¶¶ 1, 31-35, 46). As the Amended Petition and supporting documents make clear, neither proper social distancing, nor sanitary measures are in place at the MDC. (Pet. ¶¶ 3, 5, 14, 54-64). Respondent, however, asserts that waiting weeks, for *each* incarcerated person's petition to make its way through the federal district court docket is sufficient. Not only is it a danger to the lives of vulnerable incarcerated persons, particularly those who do not have attorneys available to press their claims, but it is an extremely inefficient mechanism for sorting through these claims, many of which apply to every person at the MDC.

Here, Petitioners seek the appointment of a Special Master to ensure compliance with any injunctive relief ordered by this Court aimed at ameliorating conditions at the MDC, including by assisting with developing pathways for release of Vulnerable People, where appropriate. For example, a Special Master could be a conduit to the courts for appropriate cases to be distributed to sentencing judges, prioritize the BOP's list of Vulnerable People, and systematically propose solutions on a group-wide basis to achieve faster, more consistent results. A Special Master with correctional health expertise will also assist the Court with the complexities of evaluating conditions at the MDC and will make recommendations to the Court based on evolving public-

health knowledge regarding COVID-19. *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995) (appointing special master to monitor compliance with injunctive relief ordered in case involving health care delivered in prison). The Court can direct the Special Master's responsibilities, reporting schedule, and interaction with stakeholders in a manner that supplements existing frameworks that would otherwise move too slowly to address the immediate needs presented by the pandemic. This is well within the power of the Court. *See, e.g.*, *United States v. State of Conn.*, 931 F. Supp. 974, 985 (D. Conn. 1996) (appointing a special master to review the care and treatment of residents in an institution for the mentally disabled, to formulate specific methods to implement the required changes, and to work with the parties to effectuate those changes).

Respondent ignores the many ways in which a Special Master can help administer relief short of release. Instead, he focuses specifically on release, contending that a Special Master cannot administer a release program under the PLRA, 18 U.S.C. §3626. (Resp't. Mem. 24). Yet, Respondent concedes that the PLRA allows special masters to "conduct hearings on the record and prepare proposed findings of fact." (Resp't. Mem. 24). This is exactly how the special master should function in this case. Specifically, given the exigency of the crisis and the broad review that must be undertaken, a special master could review the files of individual detainees and make recommendations to the Court regarding all forms of relief requested by Petitioners, including, but not limited to, release. The Court would be under no obligation to accept those recommendations. Rather, the Court could and would still exercise its discretion in choosing whether or not to follow the recommendation. Appointing a special master in this fashion does not violate the PLRA, especially when the government implicitly concedes that this is a permissible practice. Given the urgent needs of those in the MDC and the relative ease with

which this Court could avoid an impermissible delegation, appointing a special master is not only permissible, it makes good sense.

For the foregoing reasons, this Court has the authority to appoint a Special Master to administer the relief Petitioners request.

E. Respondent's Motion to Dismiss for Failure to State a Claim Should Be Denied

Respondent argues that Petitioners fail to adequately plead a deliberate indifference claim despite Petitioners' significant allegations concerning Respondent's failure to adequately respond to a state of emergency acknowledged by the Attorney General, and continued incarceration of Petitioners in conditions that expose them to a significant risk of harm posed by COVID-19 transmission.[6] In fact, the allegations in the Petition state a compelling case of an urgent medical emergency and deliberate indifference in responding to that emergency. *See Helling v. McKinney*, 509 U.S. 25, 34 (1993) (noting with approval Eighth Amendment claims based on exposure to serious contagious diseases); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (correctional official violates Eighth Amendment by consciously failing to prevent "a substantial risk of serious harm"). Petitioners' allegations are therefore sufficient to defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Banks*, 2020 WL 1914896, at *11 ("Based on the current record, Plaintiffs have provided evidence that Defendants are aware of the risk that COVID-19 poses to Plaintiffs' health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus.")

[6] The named Petitioners are convicted and therefore their treatment is governed by the Eighth Amendment. Class members who are detained for pretrial purposes, however, are protected from deliberate indifference by the Fifth Amendment. Although pretrial class members may be entitled to even greater protection from unsafe conditions than convicted class members, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished."), for present purposes the distinction is immaterial because Respondent's continued detention of the class plainly violates the Eighth Amendment.

Respondent's arguments with respect to both risk of harm and deliberate indifference are grounded primarily in declarations which are not properly considered in a motion to dismiss. *See, e.g.*, Resp't. Mem. at 28 (citing Declarations of Lieutenant Commander D. Jordan, RN/BSN (Dkt. No. 47-1) and Associate Warden Milinda King (Dkt. Nos. 18-1, 21)). A motion to dismiss a habeas petition is reviewed under the same standard as a motion to dismiss a civil complaint under Fed. R. Civ. P. 12(b)(6). *See Purdy v. Bennett*, 214 F. Supp. 2d 348, 353 (S.D.N.Y. 2002). In ruling on a motion to dismiss, however, the Court must construe the complaint liberally, accepting all factual allegations as true, and "drawing all reasonable inferences in the [petitioner's] favor." *Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The Petition is more than sufficient to overcome a Rule 12(b)(6) motion, containing ample "plausible" allegations concerning risk of harm and deliberate indifference. As to risk of harm, the Petition asserts that Petitioners are likely being exposed to COVID-19 while at the MDC, placing them at risk of serious harm because of their vulnerable medical conditions. The Amended Petition describes the virulent nature of COVID-19 (Pet. ¶¶ 20-30), the risks to petitioners (Pet. ¶¶ 31-53), the particular concerns with MDC's response to date (Pet. ¶¶ 54-64); the failure to respond to cases within the facility (Pet. ¶¶ 65-79); and the lack of adequate treatment options for particularly vulnerable petitioners (Pet. ¶¶ 81-94). All of the allegations are well-documented with references to material incorporated by reference in the Amended Petition, including, e.g., material from the World Health Organization (Pet. ¶ 23, n.5-6); the Attorney General (Pet. ¶ 42); and medical doctors (Pet. ¶ 45, n.15).

As to deliberate indifference, government officials act with deliberate indifference when they "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," even when "the complaining inmate shows no serious current symptoms." *Helling*, 509 U.S. at 33. The reach of the Fifth and Eighth Amendments includes "exposure of inmates to a serious, communicable disease." *Id.*; *see also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"). This Court need not "await a tragic event" to find that Respondent is maintaining unconstitutional conditions of confinement. *Helling*, 509 U.S. at 33. Nor is it necessary for Petitioners to *plead* such an event in the Petition. Alleging that the conditions of confinement "pose an unreasonable risk of serious damage to [Petitioners'] future health" is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35) (alteration omitted).

The Petition alleges that Respondent is failing to take specific action to prevent spread of COVID-19 to high risk individuals, and this can meet the objective requirement of the deliberate indifference test. *Coronel v. Decker*, 2020 WL 1487274, at *4, *10 (granting release of four medical vulnerable immigration detainees). Even where detention facilities have taken some measures to protect detainees – screening, providing soap and hand sanitizer, and increasing cleaning – it can amount to deliberate indifference when officials could not "represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another" and could not "provide the Court with any information about steps taken to protect high-risk detainees like Petitioners." *Basank*, 2020 WL 1481503, at *5 ("Confining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health 'pose[s] an unreasonable risk of serious damage to

[their] future health,' and demonstrates deliberate indifference.") (*quoting Phelps*, 308 F.3d at 185 (internal citation omitted)).

The Supreme Court's decision in *Helling* is particularly instructive. In *Helling*, the Court recognized that an Eighth Amendment violation could be shown based on prison officials' tolerance of a potential future harm to health. 509 U.S. at 33 ("Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms."). Continuing to detain Petitioners in the midst of the COVID-19 pandemic while failing to take measures to protect them and the putative classes poses a significantly greater risk than that faced by the plaintiff in *Helling*. COVID-19 is already inside the MDC. The facility has not taken adequate measures to ascertain the prevalence of the disease, stop its spread, or treat people who become ill. And Petitioners are at an increased risk because of their age and/or underlying medical conditions. As one court recently summed up, "Given the asymptomatic nature of transmission, the impossibility of adequate social distancing in communal detention spaces, and the inability or unwillingness to test all inmates and staff, [medically vulnerable people] remain[] at an unreasonable and substantial risk of infection and consequently of dire health consequences, including death." *Malam v. Adducci*, No. 20-10829, 2020 WL 1899570, at *4 (E.D. Mich. Apr. 17, 2020). Accordingly, Petitioners have pleaded plausible allegations in support of their claims, which is all that is required under *Iqbal*.

Respondent's brief contains a series of unsworn and unsupported statements attesting to their response to the COVID-19 crisis, but these are irrelevant for several reasons. First, at the motion to dismiss stage, it is the contents of the Petition, not Respondent's briefs, that provides the factual basis upon which the motion must be resolved. Second, the adequacy of

Respondent's measures is directly before the Court in the pending preliminary injunction proceeding and that is an appropriate place for Respondent to provide evidence of their efforts, if any exists. And finally, even if Respondent could establish, at the motion to dismiss stage, that they have taken some steps to respond to the COVID-19 crisis, Petitioners still can establish deliberate indifference. In an injunctive case, the "'the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct:' their attitudes and conduct at the time suit is brought and persisting thereafter." Farmer, 511 U.S. at 845 (*quoting Helling*, 509 U.S. at 36 (internal citation omitted)). Thus, if this Court finds that Petitioners currently face an objectively serious risk of harm because of current conditions of confinement, and Respondents continue to tolerate those conditions, they will be acting with deliberate indifference. *Sulton v. Wright*, 265 F.Supp.2d 292, 300 (S.D.N.Y. 2003) ("[E]ven if an inmate receives 'extensive' medical care, a claim is stated if . . . the gravamen of his problem is not addressed.").

Respondent's motion to dismiss invokes Rule 56 as an alternative grounds for dismissal, but Respondent makes no effort to shoulder his burden of establishing an entitlement to summary judgment. Most notably, Respondent has not met his burden of establishing "[t]he absence of any genuine issue of material fact." *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 340 (2d Cir. 2010). Respondent's only reference to the summary judgment standard is in a footnote (Resp't. Mem. 13 n.3). *See Lawson v. Rubin*, No. 17 Civ. 6404, 2018 WL 7958928, at *1 (E.D.N.Y. June 11, 2018) (noting that to raise an issue, a litigant "must both state the issue and advance an argument."); *Phoenix Light SF Ltd. v. Bank of New York Mellon*, No. 14 Civ. 10104, 2017 WL 3973951, at *20 n.36 (S.D.N.Y. Sept. 7, 2017) (noting that district courts "routinely decline[ ] to consider arguments mentioned only in a footnote on the grounds that

those arguments are inadequately raised."). Finally, Respondent has made no effort to comply with Local Rule 56.1, and as the Court is aware, the parties have only engaged in limited discovery in this case. *See* Local Civil Rule 56.1 (noting that motion for summary judgment may be denied based on failure to submit Rule 56.1 statement).

F. The Class Allegations at Paragraphs 109-121 Are More Than Sufficient to Satisfy the Requirements of Fed. R. Civ. P. 23(a)

Respondent's request to strike Petitioners' class allegations as not meeting the requirements of Fed. R. Civ. P. 23(a) should be denied.

Courts typically do not evaluate motions to strike class action allegations under Fed. R. Civ. P. 12(b)(6), but rather under 12(f), which permits courts to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); *see Guariglia v. Procter & Gamble Co.*, 15-cv-04307, 2018 WL 1335356, at *11 (E.D.N.Y. Mar. 14, 2018). Motions to strike class allegations at the pleading stage are "disfavored and rarely granted because they require 'a reviewing court to preemptively terminate the class aspects of litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification.'" *Woods-Early v. Corning Inc.*, 330 F.R.D. 117, 122 (W.D.N.Y. 2019) (*quoting Belfiore v. Procter & Gamble Co.*, 94 F.Supp.3d 440, 447 (E.D.N.Y. 2015)); *see also Guariglia*, 2018 WL 1335356, at *11 (Rule 12(f) motions to strike class allegations are "rarely successful.") (*quoting Reynolds v. Lifewatch, Inc.*, 136 F. Supp. 3d 503, 511 (S.D.N.Y. 2015). Here, Respondent cannot meet the stringent Rule 12(f) requirement for striking class allegations.

Respondent's argument that Petitioners' class allegations are lacking at the pleading stage with respect to the requirements of Fed. R. Civ. P 23(a) are unavailing.[7] Respondent does not contest that the proposed class of all present and future individuals detained at the MDC during the pandemic meets the rule's numerosity requirement, but rather suggests that they do not meet its implied requirement of ascertainability because the class is "a constant moving target." (Resp't. Mem. 33). Respondent cites no authority in support of its contention that a class of current and future jail detainees cannot be maintained because no such authority exists; courts have repeatedly certified classes defined just like this one, without any concern that the class is unascertainable. *Butler v. Suffolk Cty*., 289 F.R.D. 80, 101 (E.D.N.Y. 2013) (holding that class including those who will be detained in the future met ascertainability requirement); *see also Williams v. Conway*, 312 F.R.D. 248, 251, 254 (N.D.N.Y. 2016) (certifying class including people detained in the future); *Nunez v. City of New York*, No. 11 Civ. 5845, 2015 WL 10015955, at *2 (S.D.N.Y. July 10, 2015) (noting that court certified class of all present and future people detained in the New York City jails). Given that all BOP facilities conduct a census count five times per day, Respondent's argument on ascertainability is baffling. *See* BOP Correctional Services Procedures Manual, Ch. 3 at 1.[8]

The questions of law and fact raised here are "common to the class," Fed. R. Civ. P. 23(a)(2), because their "resolution will affect all or a significant number of the putative class members." *Johnson v. Nextel Commc'ns Inc*., 780 F.3d 128, 137 (2d Cir. 2015). Commonality requires the identification of an issue that by its nature "is capable of classwide resolution—

[7] Petitioners have more fully addressed class certification in their Motion for Preliminary Injunction, in which they ask this Court to rely on its general equity powers to certify the class and/or conditionally certify the class for purposes of issuing a preliminary injunction. Pet'r Mot. Prelim. Inj. 30-35.

[8] Available at https://www.bop.gov/policy/progstat/5500_014_CN-1.pdf.

which means that 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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The commonality requirement is perfectly met in cases, like this one, seeking injunctive relief to remedy constitutional violations. *See Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001) ("[t]here is an assumption of commonality where plaintiffs seek certification of an injunctive class under Rule 23(b)(2) to right alleged constitutional wrongs."). And in the context of prisons and jails, courts routinely find common questions of law and fact when those incarcerated "have a common interest in preventing the recurrence of the objectionable conduct." *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 24 (2d Cir. 1971); *see also V.W. v. Conway*, 236 F. Supp. 3d 554, 575 (N.D.N.Y 2017) (finding commonality because incarcerated plaintiffs alleged a "common course of unlawful conduct" and because litigation will be resolved by whether conduct should be enjoined).

The common question of law and fact to be resolved here is: whether Respondent's failure to take adequate steps to mitigate the risk of harm posed by COVID-19 to people incarcerated at the MDC constitutes deliberate indifference in violation of the Eighth and Fifth Amendment to the Constitution and the Supreme Court's decision in *Helling*, 509 U.S. 25 (1993). All of the class members either have been, or will be, subjected to these common conditions, and a determination that Respondent's conduct is unconstitutional will therefore "resolve an issue that is central to the validity" of each and every class member's detention. *Dukes*, 564 U.S. at 350 (2011). That there are factual differences among the named representatives, such as in their ages, medical histories and length of time left on their sentences (Resp't. Mem. 34) does not defeat commonality. *Butto v. Collecto Inc.*, 290 F.R.D. 372, 392 (E.D.N.Y. 2013) (collecting cases).

Rule 23's requirement that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class" is satisfied here. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d. Cir. 1993), That the extent of an incarcerated class member's exposure to particular prison conditions and the "exact nature of their injuries will necessarily differ from those of the proposed class members" does not defeat typicality. *Butler*, 289 F.R.D. at 99 (citations omitted). As one court recently noted in the COVID-19 context, "[t]he likelihood that some people would need to be released as part of the effort to alleviate dangerous conditions at the jail … is not a reason to deny provisional class certification. *Rivas v. Jennings*, No. 20 Civ. 2731, 2020 WL 2059848, at *1, *4 (N.D. Cal. Apr. 29, 2020).

The adequacy requirement under Rule 23(a)(4) "is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). "Courts that have denied class certification based on the inadequate qualifications of plaintiffs have done so only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit." *In re Frontier Ins. Grp., Inc., Sec. Litig.*, 172 F.R.D. 31, 47 (E.D.N.Y. 1997) (internal quotations marks and citation omitted). Here, the interests of the named class representatives are not in conflict with those of the class members. They have all been subjected to the same conduct and have brought this suit to remedy Respondent's woefully inadequate response to the pandemic which has rendered the conditions in which they are held unconstitutional. Additionally, class counsel here are

"qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000), and also meet the requirements of Rule 23(g). (Pet. ¶ 117).

The proposed classes also meet the Rule 23(b)(2) requirement that "the party opposing the class has acted or refused to act on grounds that apply generally to the class" so that injunctive relief as to the entire class is appropriate. Fed. R. Civ. P. 23(b)(2). Respondent does not contest that Petitioners meet the Rule 23(b)(2) requirements, which Petitioners have addressed more fully in their motion for a preliminary injunction. *See* Pet'rs Mot. Prelim. Inj. at 34-35.

CONCLUSION

For the reasons set forth above, Respondent's Motion to Dismiss the Amended Petition should be denied.

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New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: /s/ Katherine Rosenfeld
Katherine Rosenfeld
O. Andrew F. Wilson
Samuel Shapiro
Scout Katovich
600 Fifth Avenue, 10th Floor
New York, NY 10020
(212) 763-5000

CARDOZO CIVIL RIGHTS CLINIC
Betsy Ginsberg
Cardozo Civil Rights Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 10003
(212) 790-0871

Alexander A. Reinert
55 Fifth Avenue, Room 1005
New York, NY 10003
(212) 790-0403

DEBEVOISE & PLIMPTON LLP
Yeugenia (Jane) Shvets
Noelle E. Lyle
919 Third Avenue
New York, NY 10022
(212) 909-6000

Attorneys for Petitioners and Putative Class