SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Stefen R. Short, Esq., on behalf of JOHN FRATESCHI, DIN 11B0827; ALBERT JACKSON, DIN 18A4662; THOMAS JACKSON, DIN 20R0016; RICARDO LOPEZ, DIN 18R1196; and MICHAEL YANCY, DIN 16A4993,

Petitioners,

– against –

WILLIAM FENNESSY, Superintendent, Mid-State Correctional Facility; PATRICK REARDON, Superintendent, Marcy Correctional Facility; and ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondents.

Index No. ECFA 2020-000910

RJI No. 32-20-0220

Hon. David A. Murad, J.S.C.

**PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE VERIFIED PETITION FOR HABEAS CORPUS**

Petitioners John Frateschi, Albert Jackson, Thomas Jackson, Ricardo Lopez, and Michael Yancy submit this memorandum of law in opposition to Respondents' motion to dismiss the petition and in further support of their petition for *habeas corpus*. As the verified petition states, Petitioners' age and pre-existing medical conditions render them susceptible to serious complications or death if they contract COVID-19. Due to the uniquely cloistered infrastructure in prisons—with tight corridors, dormitory-style housing, and other congregate spaces—and notwithstanding Respondents' purported plans to manage the virus, it is virtually impossible for Respondents to effectively implement the necessary hygiene, cleaning, and social distancing measures to mitigate the spread of COVID-19. Petitioners are therefore sitting ducks.

Respondents simply cannot provide Petitioners with constitutionally compliant conditions during the COVID-19 pandemic. Short of release, no remedy will vindicate Petitioners' constitutional rights. Habeas corpus is therefore wholly warranted, and Respondents' motion must be rejected. The court should also reject Respondents' extraneous arguments concerning Petitioners' crimes of conviction, release dates, and release plans, as well as Respondents' decontextualized statistics concerning community and prison spread of the virus.

## REPLY ARGUMENT

The two-part constitutional inquiry underlying the petition is simple and straightforward. First, are Petitioners—who are prevented from social distancing by the state's choice to house them in crowded congregate settings—exposed to a substantial risk of harm in violation of their constitutional rights? (*Helling v McKinney*, 509 US 25 [1993].) Given prison architecture, the state's housing choices, and Petitioners' vulnerabilities to COVID-19, the answer is yes. Second, can this Court cure Respondents' constitutional violations by any remedy short of release? As set forth in the affidavit of Dr. Greifinger, who is intimately familiar with the

architecture and layout of New York State's prisons (which have not meaningfully changed since he left DOCCS), the answer is clearly no. Because social distancing—or other mitigation measures—is impossible to implement in the prisons at issue here, the *only* way to abate the constitutional violation is through release. (Verified Pet. ¶¶ 53-85; Greifinger Aff. ¶¶ 23-24, 26.)

**POINT 1: Habeas relief is appropriate where, as here, no other remedy besides release could abate the ongoing violations of Petitioners' rights under the Federal and State constitutions.**

Respondents first take the incredulous position that habeas corpus is unavailable to a person whose confinement has become illegal due to unconstitutional conditions that cannot be cured without release from physical custody. Their stunted view of the habeas writ is inconsistent with its history, well-settled case law, and the plain language of CPLR Article 70.

For centuries, habeas corpus has been recognized as the "great and efficacious writ in ***all manner of illegal confinement.***" (*See* William Blackstone, 3 *Commentaries on the Laws of England* *131, 1768, *available at* https://cutt.ly/byk3FCy [last accessed May 5, 2020].) Even Blackstone recognized that habeas, in appropriate circumstances, contemplates challenges not only to the fact of imprisonment, but to the *manner* of imprisonment. (*See id*.) In contrast, Respondents' narrow view of habeas relief is inconsistent with the modern consensus, emanating from Blackstone, that habeas is the proper vehicle to challenge prison conditions where the proper remedy is release. (*See Thompson v Choinski*, 525 F3d 205, 209 [2d Cir 2008] ["This court has long interpreted (the federal habeas statutes) as applying to challenges to the execution of a federal sentence, including such matters as the ... type of detention ***and prison conditions***"] [internal quotation marks omitted, emphasis added]; *see also Kahane v Carlson*, 527 F2d 492, 498 [2d Cir 1975] [Friendly, J., concurring] [contending that the federal habeas statutes would furnish "a wholly adequate remedy" for a federal prisoner who sought orders requiring prison

officials to accommodate his First Amendment right to free exercise of religion]; *cf. Boumediene v Bush*, 553 US 723, 739 [2008] ["The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom"]; *Preiser v Rodriguez*, 411 US 475, 484 [1973] ["(T)he essence of habeas corpus is an attack by a person in custody upon the legality of that custody"].)

Respondents' narrow view of habeas relief is also inconsistent with New York law, which provides that a habeas petition may be brought by "[a] person illegally . . . restrained in his liberty within the state." CPLR 7002[a]. Even authorized imprisonment becomes an illegal restraint on liberty, actionable under habeas, when it includes unconstitutional conditions of confinement. Here, Petitioners have shown that they are illegally restrained—that is, restrained in excess of lawful standards—because they are being confined in prisons where social distancing to prevent the spread of the novel coronavirus is physically impossible, yet necessary to protect the medically vulnerable Petitioners, and because prison officials have not released enough people from DOCCS custody in order to make social distancing it possible. Petitioners are therefore proper habeas petitioners by virtue of the State's illegal restraint. (*See id*.)

New York State courts have also long recognized that habeas is the proper vehicle through which to obtain relief from unconstitutional conditions of confinement where no other remedy, short of release, will cure the violation. The Court of Appeals has held that habeas petitions may be used to address "restraint in excess of that permitted by . . . constitutional guarantees." (*People ex rel. Brown v Johnston*, 9 NY2d 482, 485 [1961].) The term "restraint in excess" refers to confinement that is legally authorized but which includes unconstitutional conditions of confinement. (*See id*. ["the writ of habeas corpus has traditionally been relied upon to alleviate the oppression of unlawful imprisonment ***and*** *abuses of similar character*"]

[emphasis added]; *see also Kaufman v. Henderson*, 64 AD2d 849, 850 [4th Dept 1978] ["(W)hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment"]; *People ex rel. Rockey v Krueger*, 62 Misc2d 135, 136 [Sup Ct, Nassau County 1969] [in a habeas action brought by Muslim detainee who was forced to shave his beard and was placed in solitary confinement, holding that "(n)otwithstanding that relator does not contest the propriety of his confinement on the underlying charge, he may by a writ raise the issue whether restraint in excess of that permitted is being imposed upon him"] [citing *Brown*, 9 NY2d at 485]; *see also Matter of Mental Hygiene Legal Servs. v Wack*, 75 NY2d 751 [1989] [approving, *sub silencio*, the use of a writ of habeas corpus to secure the transfer of a mentally ill individual to a less restrictive institution].

In recent weeks, several New York State courts have held that habeas is the proper vehicle through which to seek release as the only adequate remedy for unconstitutional conditions of confinement (*See e.g.*, *Haynes v Harder*, Index No. EFCA 2020000846 [Sup Ct, Broome County May 1, 2020] [holding that habeas is the "proper remedy to raise the health concerns of the incarcerated" and finding that "the case law states that if release from confinement is the only meaningful remedy available, then, at a minimum, habeas corpus relief is permissible when required by 'practicality and necessity'"] [*citing People ex rel. Keitt v McMann* 18 NYS2d 257, 262 [1966]; *People ex rel. Coleman on behalf of Alvarez v Brann* [Sup Ct, Bronx County Apr. 21, 2020] [attached as Exhibit 1].).

New York State courts have also *granted* habeas relief to vulnerable persons confined in facilities where social distancing is impossible to protect individuals from the spread of the novel coronavirus. (*See, e.g.*, *People of the State of New York ex rel. Gregor v Reynolds*, 2020 NY Slip Op 20086 [Sup Ct, Essex County Apr. 20, 2020] [attached as Exhibit 2]; *People of the State of*

*New York ex rel. Stoughton v Brann*, 2020 NY Slip Op 20081 [Sup Ct, NY County Apr. 6, 2020] [attached as Exhibit 3].) For these reasons, Respondents are simply incorrect when they assert that habeas relief is categorically unavailable to a person challenging unconstitutional conditions of confinement that cannot be remedied short of release.

Respondents also argue that the habeas writ is categorically unavailable to a person serving their sentence because state law purportedly prevents a sentenced individual from vindicating their federal and state constitutional rights. They appear to argue that Criminal Procedure Law § 430.10 dictates that individuals serving a sentence can never bring a habeas action to challenge unconstitutional conditions of confinement. In *Brown*, however, the Court of Appeals squarely considered and rejected this illogical contention:

> In spite of the fact that it is well settled that one may not by means of a writ of habeas corpus challenge imprisonment or restraint by virtue of the final judgment . . . of a competent tribunal of . . . criminal jurisdiction, it seems quite obvious that ***any further restraint in excess of that permitted by the judgment or constitutional guarantees should be subject to inquiry***. An individual, once validly convicted and placed under the jurisdiction of the Department of Correction[s and Community Supervision], is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society. If these situations were placed without the ambit of the writ's protection, we would thereby encourage the unrestricted, arbitrary and ***unlawful treatment*** of prisoners[.].

*Brown*, 9 NY2d at 485 [emphasis added, internal citations and quotation marks omitted]. Curiously, the sole case on which respondents rely—*People ex rel. Tillem v Barometre*, Index No. EF002321-2020 [Sup Ct, Orange County Apr. 14, 2020,] attached to the Carafa Affirmation as Exhibit F—does not cite or discuss *Brown*'s explicit authorization of habeas actions by

sentenced individuals challenging intractably unconstitutional conditions of confinement.[1] In fact, *Tillem* does not cite *any* cases interpreting Criminal Procedure Law § 430.10. Because *Tillem* fails to cite any authority in support, and is contrary to binding authority of the Court of Appeals, there is no reason for this court to follow it.[2]

In any event, Criminal Procedure Law § 430.10 has no bearing on this petition. Petitioners are not asking this Court to "chang[e], suspend[] or interrupt[]" their sentences. They are instead asking this Court to release them from DOCCS' physical custody because their continued incarceration violates the State and Federal Constitutions. Even if release pursuant to a writ of habeas corpus could be construed as a sentence modification governed by § 430.10, that provision permits changes to be made to a sentence as "authorized by law." Petitioners' requested relief—release from DOCCS' physical custody while the conditions of such custody violate Petitioners' constitutional rights—is clearly authorized by Article 70 and the Federal and State constitutions.

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[1] In *Brown*, the Court of Appeals considered whether the predecessor statute to Criminal Procedure Law § 430.10 prevents a person serving their sentence from seeking habeas relief. Criminal Procedure Law § 430.10 and its predecessor are substantially similar, and therefore *Brown*'s holding – that sentenced individuals may use the habeas remedy to challenge conditions of confinement that cannot be remedied without release – remains sound.

[2] In support of their arguments that Petitioners are not entitled to release, Respondents cite several other cases that are either materially distinguishable or wrongly decided. They first rely on *People v Burgan*, Supreme Court, Bronx County, Indictment No. 2948/08 and 2922/11 [Apr. 22, 2020]. But in that case, the court states at the outset that petitioner sought medical parole, which can only be awarded in an Article 78 proceeding, and denied Article 78 relief on that basis. It also construed the application as a motion under Criminal Procedure Law § 440.20, and denied it on jurisdictional grounds. It never squarely addressed habeas relief except in dicta. Respondents next rely on *People ex rel. Moulter (Crockett) v Brann and Annucci*, 2020 NY Slip Op 50536(u) [Sup Ct Bronx County Apr. 16, 2020] [¶ 23]. There, the court denied habeas relief to the petitioners because, in its view, it would have been "unprecedented" to order Petitioners' release. While it is correct that no appellate court has yet passed on the merits of a habeas petition during this pandemic, it is certainly incorrect that it would have been unprecedented. It is unclear whether the *Moulter* court was aware of the Court of Appeals decision in *Brown*, or the Supreme Court decisions in *Gregor* and *Stoughton*, *infra*. Respondents last rely on *People ex rel. Goldberg v Reardon,* EFCA 2020-900 [Sup Ct, Oneida County, Apr. 30, 2020], which states that a deliberate indifference claim can never result in immediate release because "injunctive relief, or some form of institutional reform, not aimed at release of an individual complainant," is the proper remedy. But the Court of Appeals in *Brown* directly contemplated immediate release in circumstances like these. And in any event, *Brown v. Plata*, 563 U.S. 493, relied upon by this Court in resolving *Goldberg*, applied a remedy under federal law. But to accept that a prison release order under the federal Prison Litigation Reform Act is the only remedy in this situation would be to accept its corollary: New York law can provide no relief to persons in Petitioners' unenviabale situation. That simply cannot be.

For these reasons, habeas corpus is the appropriate vehicle to challenge exposure to unconstitutional conditions of confinement—that is, "restraint in excess of that permitted by . . . constitutional guarantees" *Brown*, 9 N.Y.2d at 485—where no other remedy short of release would cure the constitutional violations at issue.

**POINT 2: Petitioners are not required to show that they would be "safer" if released.**

Respondents argue that Petitioners are safer in DOCCS facilities than they would be in the community. This argument is a red herring aimed at distracting the Court from the relevant legal inquiry. As explained above, habeas corpus is the proper remedy where Petitioners show that Respondents' deliberate indifference can be remedied only by release. Petitioners have shown that despite what may be Respondents' best efforts, COVID-19 is unmanageable in New York State prisons. (Verified Pet. ¶¶ 54-85; Greifinger Aff. ¶¶ 33-37.) Petitioners' showing is buttressed by a well-developed national and international consensus, which has led to a spate of court-ordered prison releases. (Verified Pet. ¶¶ 88-93.)

Respondents have not squarely confronted Petitioners' diagnoses or claims of medical vulnerability, even though the evidence with which they could have challenged Petitioners' medical conditions is squarely within their control. Moreover, Respondents have not contested Petitioners' claims of susceptibility to serious complications or death from COVID-19. And Respondents have offered no evidence to rebut the adequacy of Petitioners' release plans. Instead, Respondents improperly attempt to broaden the Court's inquiry, suggesting that to empower a Court to vindicate Petitioners' constitutional rights, Petitioners must first introduce voluminous quantitative data and robust release plans showing that they would be safer in the community than they are in prison. Setting aside the flawed nature of Respondents' argument, Petitioners are not required to prove that the community to which they would be released is safer

than their jailers' facilities. Nor are Petitioners required to prove that their release plans are satisfactory to their jailers. Petitioners are only required to show that their constitutional rights are violated by the conditions in which Respondents confine them, and that release is the only adequate remedy for these ongoing constitutional violations during the current pandemic. Therefore, pages 7 through 14 of Respondents' affirmation, which seeks to distract the Court from this inquiry, are irrelevant to this analysis.

Despite their legal insignificance, Respondents' arguments are equally problematic and baseless on their merits. First, Respondents fail to report that although statewide COVID-19 infection rates have indeed decreased, state prison infection rates have in fact steadily increased.[3] By taking their own data out of context, Respondents ignore the reality that DOCCS' curve is ballooning dangerously while the community's curve is flattening.[4] Public health authorities have slowed the spread of the virus in cities and towns throughout New York State.[5] But Respondents have not slowed that spread in DOCCS facilities.[6]

Additionally, Respondents fail to contextualize DOCCS' raw infection data. Multiple variables account for why these numbers remain low relative to raw statewide numbers. First,

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[3] *Compare* Daily Totals, Persons Tested and Persons Tested Positive, NYSDOH COVID-19 Tracker, New York State Department of Health, *available at* https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n [last accessed May 5, 2020] [showing a steady decrease in statewide COVID-19 cases], *with* DOCCS COVID Report, Exhibit 4 [showing a steady increase in state prison COVID-19 cases].

[4] *See* Rosa Goldensohn, Anna Choi, and Reuven Blau, *State Prison Virus Cases Mounting as Outside Figures Plateau*, The City, Apr. 19, 2020, *available at* https://thecity.nyc/2020/04/new-york-prison-virus-cases-mounting-as-state-city-plateau.html [last accessed May 5, 2020] ["Even with limited testing, positive COVID-19 cases in the prisons are mounting in a curve that follows New York City and the State's outbreak -- but about two weeks behind, an analysis by The City shows. The trajectory, suggesting an increasingly dire crisis behind bars, added renewed urgency to advocates' calls to release more prisoners."].

[5] *Id.*

[6] *Id.*

the virus entered DOCCS several weeks after it entered the community.[7] Second, while the virus was initially contained at several DOCCS facilities, now that it has entered DOCCS facilities and has proliferated throughout the DOCCS system, it has indeed "spread like wildfire," as experts predicted.[8] DOCCS' raw infection numbers also are artificially minimized by many of the testing flaws Petitioners identify, such as the high false negative rate, the lack of asymptomatic testing, and the dearth of reliable access to tests. (Verified Pet. ¶¶ 53-54; Greifinger Aff. ¶19-26, 28-29, 31.)

Respondents similarly misrepresent the status of Petitioners' release plans. On the one hand, Respondents belabor the point that no Petitioner is within eight months of their maximum expiration date. On the other hand, Respondents emphasize that DOCCS has not yet approved Petitioners' release plans, implying that those plans are dubious. As Respondents know, DOCCS does not begin its pre-release procedures until, at the earliest, an incarcerated person serving an indeterminate sentence is scheduled for an interview with the Parole Board for discretionary release.[9] Therefore, the fact that DOCCS has not approved Petitioners' release plans is merely a product of Respondents' own discharge planning procedures, which delay the address approval process until the 11th hour. If Respondents were truly concerned about the integrity of Petitioners' release plans, they would expedite Petitioners' discharge planning.

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[7] *Compare* Melanie Grayce West, *First Case of Coronavirus Confirmed in New York State*, Wall Street Journal, Mar. 1, 2020, *available at* https://www.wsj.com/articles/first-case-of-coronavirus-confirmed-in-new-york-state-11583111692 [last accessed May 5, 2020] [stating that the first coronavirus case in New York was confirmed on March 1, 2020] *with* Daniel Gross, *"It Spreads Like Wildfire:" The Coronavirus Comes to New York's Prisons*, The New Yorker, Mar. 24, 2020, *available at* https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons [last accessed May 5, 2020] [stating that the first coronavirus cases in New York State prisons were confirmed on March 22, 2020].

[8] *See* Gross, *supra* note 5. *See also* Exhibit 4.

[9] DOCCS Directive 8710, Certificate of Release to Community Supervision, July 22, 2019, *available at* https://doccs.ny.gov/system/files/documents/2019/07/8710%20%20Certificate%20of%20Release%20to%20Community%20Supervision.pdf [last accessed May 5, 2020].

Here, in spite of Respondents' misrepresentations, the Court must accept Petitioners' allegations as true for purposes of this motion. (*City of Syracuse v Comerford*, 13 AD3d 1109 [2004] [on a motion pursuant to CPLR 3211[a][7] the Court "must accept as true the facts alleged in the complaint and in the submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit within any cognizable legal theory"] [quoting *MetLife Auto & Home v Joe Basil Chevrolet,* 303 AD2d 30, 31, *affd* 1 NY3d 478 [2007]].) This includes Petitioners' allegations concerning their release plans and release locations, which have been sworn to and partially verified by counsel. (Verified Pet. ¶¶ 27, 32, 35, 37.) Respondents admit "the best way to prevent illness is to avoid being exposed to this virus." Given this admission, it is hard to understand Respondents' argument that Petitioners can better avoid exposure in 50-person prison dorms, or cloistered cellblocks, rather than at home under quarantine.

Respondents similarly rely on a classic logical fallacy—the slippery slope —to generate fear on the part of the Court and the public.[10] Respondents imply that by releasing these elderly, medically vulnerable petitioners, this Court will sanction the mass release of thousands upon thousands of incarcerated people. This argument is alarmist and ignores the facts.

First, Petitioners are *uniquely* vulnerable. Each of the Petitioners is of advanced age and currently diagnosed with a serious medical condition that renders them vulnerable to serious illness or death if infected by COVID-19. Respondents seek to minimize these facts by reference to a Bureau of Justice Statistics study, but fail to contextualize this study, which distinguishes

[10] *See* Slippery Slope, Your Logical Fallacy Is, *available at* https://yourlogicalfallacyis.com/slippery-slope [last accessed May 5, 2020] ["You said that if we allow A to happen, then Z will eventually happen too, therefore A should not happen. The problem with this reasoning is that it avoids engaging with the issue at hand, and instead shifts attention to extreme hypotheticals. Because no proof is presented to show that such extreme hypotheticals will in fact occur, this fallacy has the form of an appeal to emotion fallacy by leveraging fear. In effect, the argument at hand is unfairly tainted by unsubstantiated conjecture."].

between a current diagnosis and a prior diagnosis, and defines the term "chronic condition" broadly to include conditions other than those the Centers for Disease Control and Prevention has determined increase susceptibility to serious complications from COVID-19.[11] Respondents fallaciously equate prisoners who report a *past* diagnosis of a chronic condition with the Petitioners in this action, all of whom have a *current* diagnosis of a chronic condition that renders them susceptible to serious complications from COVID-19.

Second, Petitioners have not brought before this Court a request for the mass release of every medically vulnerable person in state custody. Petitioners merely request an order releasing five people out of over 43,000 people in DOCCS custody, or .01% of the state prison population. Petitioners request their release from two of the 52 DOCCS prisons. Respondents' floodgates argument amounts to nothing more than fear-mongering.

Finally, Respondents misread Dr. Greifinger's expert affidavit. Dr. Greifinger's principal conclusion is that prisons and jails cannot contain the spread of COVID-19 absent the release of medically vulnerable individuals. (Greifinger Aff. ¶¶ 34-37.) In this respect, Dr. Greifinger's affidavit mirrors medical consensus. (Verified Pet. ¶ 90.) Respondents attempt to bog the Court down in the details of their COVID plans and Dr. Greifinger's purported lack of familiarity with those plans. But Dr. Greifinger does not opine on Respondents' plans because his expert opinion is that they are insignificant—the limits of prison infrastructure, which has not changed in the 25

[11] Special Report, Medical Problems of State and Federal Prisoners and Jail Inmates, United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Feb. 2015, *available at* https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf [last accessed May 5, 2020] ["Inmates were asked whether a doctor, nurse, or other health care provider ever told them they had select noninfectious medical conditions which were categorized as chronic conditions. Chronic medical conditions involve persistent health problems that have long-lasting effects, and include but are not limited to, the select conditions that were asked about in the NIS-3. This measure indicated a diagnosis of having the condition at least once in their lifetime, but does not mean that the inmate currently has the medical condition ... The percentage of inmates who reported currently having a chronic condition was lower than those who reported ever having a chronic condition because over time, a past condition may have been resolved, gone into remission, or no longer required treatment."].

years since Dr. Greifinger left DOCCS, renders these plans as *de facto* ineffectual to stop the spread of COVID-19.

**POINT 3: Petitioners have demonstrated that Respondents are deliberately indifferent to the serious risk of harm that COVID-19 poses to Petitioners.**

Respondents cite DOCCS' history of "successfully managing" infectious disease, and DOCCS' plan for the management of COVID-19, to support their argument that DOCCS has not been deliberately indifferent to the risk COVID-19 poses to Petitioners. The Court must reject these arguments for two primary reasons: first, the Court must accept as true Petitioners' allegations that DOCCS has failed to implement the recommendations of the CDC and WHO concerning cleaning, hygiene, and social distancing; and second, the Court must accept as true robust medical consensus, including the expert opinion of Dr. Greifinger, that irrespective of their plans, corrections agencies are incapable of managing the spread of COVID-19 in a prison environment.

As an initial matter, DOCCS has *not* "successfully managed" infectious outbreaks in the past. Counsel themselves have spent decades litigating to enforce DOCCS' constitutional responsibility to provide adequate medical care during infectious disease outbreaks. Many of these cases have resulted in reported decisions, and each case has resulted in comprehensive settlement agreement and prospective injunctive relief. *See e.g.*, *Milburn v Coughlin*, 79-cv-5077 [SDNY 1979] [active class action filed in 1979 challenging DOCCS' provision of grossly inadequate medical care at Green Haven Correctional Facility, including DOCCS' gross mismanagement of drug-resistant tuberculosis]; *Todaro v Ward*, 565 F2d 48 [2d Cir. 1977] [challenging DOCCS' provision of grossly inadequate medical care at Bedford Hills Correctional Facility, including DOCCS' gross mismanagement of HIV]; *Anderson v Coughlin*,

80-cv-3037 [SDNY 1980] [challenging, in part, DOCCS' provision of grossly inadequate medical care to people housed in solitary confinement units statewide]; *Eng v Coughlin*, 80-cv-3859 [WDNY 1980] [challenging, in part, DOCCS' provision of grossly inadequate medical care in solitary confinement units at Attica Correctional Facility]; *Cunningham v Coughlin*, 92-cv-0579 [NDNY 1992] [challenging DOCCS' provision of grossly inadequate treatment and testing for drug-resistant tuberculosis, and increased exposure caused by overcrowding at ten New York prisons]; *Inmates with AIDS v Cuomo*, 90-cv-252 [NDNY 1991] [challenging DOCCS' provision of grossly inadequate treatment for HIV statewide]; *Rivera v. Coughlin* [Sup Ct, Chemung County 1991]; [challenging aspects of medical care at Southport Correctional Facility, a supermax prison]. Contrary to Respondents' assertions, DOCCS has a long history of providing grossly inadequate medical care during infectious disease outbreaks, which have only been remedied as a result of judicial intervention.

Respondents point to an "emergency control plan" that the public has not seen and, to Petitioners' knowledge, DOCCS has not even invoked. It is unclear whether DOCCS' emergency control plan pertains to infectious disease, extreme weather events, prison conditions emergencies, national security emergencies, or some other "emergency." Respondents also insist that DOCCS retains supplies, equipment, and other resources for provision during an emergency. But again, it is unclear as to what "supplies, equipment, and other resources" Respondents are referring to. Similarly, Respondents say only that these resources "can be" available. By contrast, Petitioners maintain that necessary supplies and equipment, including hygiene and cleaning supplies, are not available. (Verified Pet. ¶¶ 55-84.) At this stage of this proceeding, the Court must accept Petitioners' allegations as true. Petitioners' allegations concerning the dearth of cleaning and hygiene supplies are consistent with reports from people incarcerated

across the state. It is no secret that incarcerated people have trouble accessing hygiene and cleaning supplies, even during normal times. It is difficult to believe that this dynamic has improved amidst a global pandemic.[12]

Supply shortages render irrelevant Respondents' argument that incarcerated people have "received information on preventative measures to stay healthy." Respondents rely on their assertion that they have recommended the regular use of soap and water, but Petitioners allege that neither hot water nor a sufficient supply of soap are available in DOCCS facilities. (Verified Pet. ¶¶ 56, 60-68, 107; Greifinger Aff. ¶ 13.) DOCCS' other measures are similarly flawed in that they notably omit social distancing, the number one intervention to reduce the spread of the virus, and an intervention that is impossible in a prison setting. (Verified Pet. ¶¶ 51, 55, 69-80, 107; Greifiner Aff. ¶¶ 13, 23-24, 26.)

Most importantly, Respondents' unverified representations concerning DOCCS' "emergency control plan" and stockpiling of certain supplies do not refute Petitioners' ultimate argument, which is reinforced by medical consensus—prisons are structurally indifferent to COVID-19 transmission. (Verified Pet. ¶¶ 53-85; Greifinger Aff. ¶¶ 23-24, 26.) The virus cannot be managed in the prison environment. Nothing short of release will protect Petitioners.

**CONCLUSION**

[12] Reuven Blau, *New York Prisons Scramble to Fill Medical Jobs as COVID Cases Rise*, The City, Apr. 30, 2020, *available at* https://thecity.nyc/2020/04/new-york-prisons-try-to-fill-medical-jobs-as-covid-19-rises.html [last accessed May 5, 2020] ["Nearly one-quarter of the state DOCCS medical positions are vacant, according to department spokesperson Thomas Mailey. That represents approximately 315 open slots that prison sources said cover anything from nurses to doctors to physician's assistants . . . Prisoners who seek medical treatment must be seen by a nurse within two and a half hours, according to departmental policy. But some with more serious medical needs go days without being seen by a doctor or checked in a hospital, according to advocates and death review reports."].

For all the foregoing reasons, and the reasons set forth in Petitioners' Verified Petition, this Court should deny Respondents' motion to dismiss, grant Petitioners' habeas petition, and order Respondents to release Petitioners from custody.

Respectfully submitted,

Dated: New York, New York
May 5, 2020

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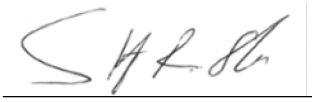

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