SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Matter of JOSEPH AGNEW, ANTHONY GANG, TYRONE GREENE and KAMER REID,

On behalf of themselves and all others similarly situated,

Petitioners,

For a judgment under Article 78 of the Civil Practice Law and Rules

--against--

NEW YORK CITY DEPARTMENT OF CORRECTION,

Index No. _____/2021

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 MANDAMUS TO COMPEL PETITION AND MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Petitioners seek this Court's assistance in remedying an urgent crisis in the New York City jails. Petitioners, who are individuals in Respondent New York City Department of Correction's (DOC or Department) custody and others who are similarly situated, have been aggrieved by DOC's refusal to discharge its mandatory, non-discretionary obligations to afford access to medical services. Petitioners have consistently sought this access, which is guaranteed under relevant laws and rules, but DOC has refused to provide it. Meanwhile, individuals in DOC custody are suffering, languishing in extreme pain, and facing risk of serious injury or death.

In a confinement setting, correctional staff are the necessary link between patients and their doctors, as correctional policies govern all movement and operations within the jails. The Department is failing to afford people in its custody access to the most basic components of the correctional medical system, including sick call and escorts to medical clinics. These obligations, while "ministerial" (and therefore can be compelled through mandamus), are nonetheless critical to ensuring individuals in DOC custody access to medical care, including treatments that can relieve them of extreme suffering and risk of death. The Department's nonfeasance is especially egregious considering the barbarous conditions—which in recent months reached a nadir in DOC facilities—and the threat those conditions pose to the health and lives of incarcerated people.

Petitioners respectfully request that this Court grant their requested relief and order the Department to discharge its mandatory obligations and certify a class of individuals at DOC facilities who are being or will be denied access to medical care as a result of DOC's nonfeasance.

BACKGROUND

New York City's jails are in a full-blown humanitarian crisis. For months, incarcerated people and their advocates have sounded the alarm as conditions in the jails have grown more dire.

On September 15—after weeks of inaction—Mayor Bill de Blasio declared a state of emergency in the City's jails, noting that "excessive staff absenteeism" is affecting health operations and creating "a serious risk to the necessary maintenance and delivery of sanitary conditions, access to basic services including showers, meals, visitation, religious services, commissary, and recreation; and prompt processing at intake."[1] The horrifying conditions within the jails have led to widespread suffering and at least twelve deaths in 2021.[2] This is the highest number of fatalities in years.[3] And, after no reported deaths by suicide in the jails in 2018, 2019, and most of 2020, five people have died by suicide in the first nine months of this year.[4]

A key contributor to these horrific outcomes is the complete collapse of the medical care delivery system in the jails. The Department has ceased providing regular access to sick call,[5] the primary gateway to medical care in the jails, and is failing to produce individuals to their medical appointments. DOC publishes, on a monthly basis, the number of instances of non-production of

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** Incorporated by reference herein is Petitioners' Verified Petition – Article 78*

[1] Affirmation of Micaela D. Manley In Support of Article 78 Mandamus to Compel Petition and Motion for Class Certification (Manley Aff) Exhibit (Ex) 37 (Emergency Exec. Order No. 241, Declaration of Local State of Emergency [Sept. 15, 2021]).
[2] Manley Aff Ex 49 (Jonah E. Bromwich & Jan Ransom, *12th Death in Custody This Year Signals Growing Crisis in N.Y.C. Jails*, N.Y. Times [Sept. 22, 2021]).
[3] Manley Aff Ex 33 (Jonah E. Bromwich & Jan Ransom, *10 Deaths, Exhausted Guards, Rampant Violence: Why Rikers Is in Crisis*, N.Y. Times [Sept. 15, 2021]) at 3 (noting that 2021 has seen "the largest death toll at the jail in years").[4] Manley Aff Ex 22 (New York City Board of Correction Statement on Recent Suicides in the New York City Jails (Sept. 1 BOC Statement on Recent Suicides)).
[4] Manley Aff Ex 22 (New York City Board of Correction Statement on Recent Suicides in the New York City Jails (Sept. 1 BOC Statement on Recent Suicides)).
[5] *See, e.g.*, Manley Aff Ex 17 (Michael Gartland, *NYC jails medical staff fear for safety, blame staffing shortage: 'Nobody wants to die at work*,' New York Daily News [Aug. 15, 2021]) (noting that medical staff report that the absence of DOC staff to serve as escorts is depriving people of access to vital medical appointments, significantly delaying the provision of treatment, if any medical treatment is accessible at all).

a person in custody to their medical appointment, by category of reason why the person was not produced. According to the most recent report on file, in August 2021 DOC reported 10,964 instances in which an incarcerated person who had requested medical attention was not produced to the clinic. 4,313 of these non-productions are attributed to reasons categorized as "other."[6] The "other" category in these DOC reports includes "instances where an incarcerated individual chooses to instead attend a work assignment, law library, school, religious services, or commissary, ***when an escort is not available***, or when movement is limited due to a lockdown, search, or alarm."[7] The August 2021 number of non-productions categorized as "other" represents a nearly ***2500%*** increase over the 175 such instances in June 2020.[8]

There is reason to believe that the number attributable to DOC's failure to provide escorts is even higher than 4,313 instances last month: Of the 10,964 instances of non-production in August 2021, over 6,000 are attributed to purported "refusals" by the incarcerated person; however, those in DOC custody and their advocates have long-reported a practice by the Department of documenting that a person has "refused" treatment when they in fact have not.[9] Indeed, DOC has acknowledged that staffing issues are a major driver of this increase in non-production, stating beginning in June 2021: "The Department aims to produce as many individuals

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[6] Manley Aff Ex 14 (New York City Department of Correction, Monthly Report on Medical Appointment Non-Production August 2021) at 1.
[7] *Id.*
[8] Manley Aff Ex 5 (New York City Department of Correction, Monthly Report on Medical Appointment Non-Production June 2020) at 1 (emphasis added).
[9] Manley Aff Ex 20 (Rachel Sherman, *Rikers Staffing Crisis Limits Access to Medical Care*, N.Y. Focus [Aug. 26, 2021]) ("What Williams calls the 'if you're not dying don't bother me' mentality has led to officers documenting that a person has refused treatment when they haven't, and at times has even led to officers forging signatures on refusal documents, said Samantha Catalanotto, a social worker with the Bronx Defenders."); De Avila Aff ¶ 26.

to the clinic as possible. The Department's current staffing level is contributing to the increase in overall non-production numbers."[10] For days or even weeks on end, incarcerated individuals are languishing in intake units, where they are being deprived of any access to medical services and struggling to survive in overcrowded and filthy conditions, including standing in feces and sleeping on the floor next to overflowing toilets.[11]

On September 10, 2021, Dr. Ross MacDonald, the Chief Medical Officer of New York City Correctional Health Services (CHS), which provides medical services to those in custody in City jails, sounded the alarm regarding the impact of this dysfunction on the provision of medical care in a letter to the New York City Council.[12] Dr. MacDonald decried a "collapse in basic jail operations," concluding that the "City is [not] capable of safely managing the custody of those it is charged with incarcerating."[13] He noted that "[w]hile some might ascribe recent deaths and the 'disorder and chaos' reported by the federal monitor to longstanding dysfunction of Rikers Island, it represents a new and worsening emergency that has developed over the course of the last year."[14] Dr. MacDonald stated that "[u]navailability of staff has resulted in delays in transferring patients to clinics for care, to mental health units or to the hospital, even when 911 has been activated and

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[10] Manley Aff Ex 12 (New York City Department of Correction, Monthly Report on Medical Appointment Non-Production June 2021 (June 2021 DOC Non-Production Report)) at 1.
[11] Manley Aff Ex 27 (Letter from Ross MacDonald to Council Member Keith Powers [Sept. 10, 2021] (MacDonald Letter)) at 1 ("These include sustained failure to process and house new admissions to jail within 24 hours, resulting in pervasive problems of overcrowded pens where incarcerated people are held for days on end. The overcrowding leads to people kept for prolonged periods in temporary spaces such as showers, at times standing in feces. These conditions lead to fights over necessities including food."); Manley Aff Ex 22 (Sept. 1 BOC Statement on Recent Suicides).
[12] *See* Manley Aff Ex 27 (MacDonald Letter).
[13] *Id.*
[14] *Id.*

EMS has arrived to transport them" and that DOC is "failing to provide correctional staff to supervise some housing areas or observe incarcerated people placed on suicide watch."[15] Asserting that "the severity of the situation represents gross mismanagement, which threatens the health and safety of those incarcerated in the jails and all who work there," Dr. MacDonald implored the City Council for immediate assistance, including relief that would "secur[e] clinical spaces so that healthcare staff can perform their duties safely and with adequate production of patients to clinic . . . ."[16]

The Department, too, has acknowledged that it is not affording people in its custody access to medical care. DOC Commissioner Vincent Schiraldi recently stated that "[t]he situation in the jails is worse than [he] imagined." He added, "[t]here are sometimes posts with no staff on them and that makes it extremely difficult for us to provide basic services and maintain the level of safety that our officers, civilian workers and people in custody deserve."[17] Last month, Schiraldi admitted that, "[t]hings are getting canceled all the time here . . . [w]hen you don't have enough staff, it creates lots and lots of problems—and producing people to sick call is one of them."[18] In a September 1, 2021 statement on the dramatic increase in suicides at DOC facilities this year, the

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[15] *Id.*
[16] *Id.*
[17] Manley Aff Ex 41 (*Hochul Orders Release of 191 Detainees as Rikers Crisis Deepens*, N.Y. Times [Sept. 17, 2021]). By design, housing units have "A" officers and "B" officers. "A" officers remain in the "bubble," the security station separate from the housing unit. "B" officers are stationed on the floor of the housing units to maintain security and address the needs of incarcerated people. Reports that units are unstaffed typically refer to instances where there is no "B" officer on the unit. *See* De Avila Aff ¶ 28.
[18] Manley Aff Ex 20 (Sherman) at 1; Manley Aff Ex 34 (September 15, 2021 City Council Hearing (September 15 Hearing)) at 01:51:24 (testimony of Commissioner Vincent Schiraldi) ("[T]he sole reason for missed [medical] appointments is inadequate staff. [DOC] literally do not have enough staff. There's an officer on a post by herself and no one to bring people to the clinic.")).

NYC Board of Correction ("BOC"), which is an oversight board that regulates, monitors, and inspects the correctional facilities of the City,[19] recognized that failure to "provide[ ] appropriate housing and medical care for persons in custody" was a particular issue contributing to the crisis.[20] A recent lawsuit brought by the City against the correctional officers' union alleged that the "poor conditions" at DOC facilities include "medication not being delivered to detainees, emergent conditions simply being ignored or not addressed, and meals significantly delayed or not provided altogether."[21]

Staffing Mismanagement, Absenteeism, and Operational Dysfunction Result in the Denial of Access to Medical Care

Mass absenteeism and other mismanagement of Department staff are significant contributing factors to the denial of medical care. Of 8,370 uniform members of service, 1,789 of them were out sick and another 93 were AWOL on September 14, 2021.[22] In 2021, there have been 2,304 instances of staff AWOL each month, representing a 198% increase from 2020 and a 215% increase from 2019.[23] By contrast, prior to early 2020, an average of 400-500 staff members called out sick per day; today, an average of one third of uniformed staff call out sick, are AWOL, or on are on medically modified duty per day. This means that on a typical day, approximately one

[19] *See* Manley Aff Ex 56 (About NYC Board of Correction).
[20] Manley Aff Ex 22 (Sept. 1 BOC Statement on Recent Suicides, n 4, *supra*).
[21] Manley Aff Ex 44 (NY St Cts Elec Filing (NYSCEF) Doc. No. 23, mem. of law in support of TRO and prelim. inj., in *City of New York v Corr. Officers' Benevolent Assn., Inc.*, Sup Ct, NY County, index No. 453067/2021 (COBA Mem. of Law)).
[22] Manley Aff Ex 34 (September 15 Hearing, n 18, *supra*) at 01:35:06 (testimony of Dana Wax).
[23] Manley Aff Ex 43 (NYSCEF Doc. No. 1, verified complaint, in *City of New York v Corr. Officers Benevolent Assn., Inc.*, Sup Ct, NY County, Sept. 20, 2021 index No. 453067/2021 (COBA Complaint)) at 7.

third of uniformed staff are unable to work with incarcerated persons.[24] The City has stated that "[t]here is no plausible explanation for this dramatic increase across the board other than a concerted effort by correction officers to engage in an unlawful job slowdown through mass absenteeism," which the City alleged in a recent lawsuit against the Correctional Officers' Benevolent Association "constitutes an illegal strike and/or work slowdown."[25] This mass absenteeism has caused numerous understaffed or unstaffed units and areas of the correctional facilities, and widespread operational failure.[26]

Absenteeism is hardly the only cause of this crisis. Recently, federal monitor Steve Martin—whose Eleventh Monitor's Report in *Nuñez v City of New York*, 11-CV-5843 (LS/THK) [SDNY], a case addressing use of force at DOC facilities, was released in May of this year—expressed that despite the "abnormally high absenteeism, the Department ***still*** has an extraordinarily large number of Staff to operate the jails."[27] Yet, "[t]he Department struggles to manage its large number of Staff productively, to deploy them effectively, to supervise them responsibly, and to elevate the base level of skill of its Staff."[28] The *Nuñez* monitor expressed "grave concerns about the conditions and ***pervasive level of disorder and chaos*** in the New York City Jails," which has "further deteriorated in the past few months" resulting in a "denial of

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[24] Manley Aff Ex 35 (Testimony before the New York City Council, Committee on Criminal Justice [Sept. 15, 2021]) at 5 (testimony of Commissioner Vincent Schiraldi).
[25] Manley Aff Ex 43 (COBA Complaint, n 23, *supra*).
[26] Manley Aff Ex 34 (September 15 Hearing, n 18, *supra*) at 02:31:20 (testimony of Commissioner Schiraldi ("Yesterday, there were approximately 70 . . . housing units that did not have a B officer [the officer assigned to work the floor] in them.")).
[27] Manley Aff Ex 6 (NYSCEF Doc No. 368, eleventh report of the *Nuñez* Independent Monitor, in *Nuñez* v City of New York, US Dist Ct, SD NY, 1:11-cv-05845) at 6.
[28] *Id.*

services and protections."[29] Further, the monitoring team emphasized "that while certain issues within the jails may be *exacerbated* by the high level of Staff absenteeism, the many failures to provide adequate security and basic services were not created by the recent staffing problems . . . and the Department's rate of Staff absenteeism is [n]either a valid defense nor an acceptable excuse for the current conditions."[30]

This failure to provide access to medical care is particularly egregious against a backdrop of the extremely unsanitary conditions at DOC facilities that have developed in recent months. Elected officials who inspected the jails in mid-September noted people "sharing bags as toilet bowls[,] . . . [p]eople sleeping in filth and feces,"[31] garbage everywhere, and "rotting food with maggots, cockroaches, [and] worms in the showers."[32] New York City Council Member Daniel Dromm described the scene at Rikers during his September 2021 visit as "barbaric," stating, "I've never been as traumatized by what I witnessed as I was today."[33] Intake areas were consistently described by those who visited the facilities as the most alarming, where "dozens of people without masks were packed into cells with overflowing toilets, unable to see their lawyers because they have yet to be booked."[34] In his letter to the Council, Dr. MacDonald noted that people who are

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[29] *Id.* (emphasis added)
[30] Manley Aff Ex 24 (NYSEF Doc No 380, letter to Judge Swain from the Office of the Monitor, in *Nuñez v. City of New York*, US Dist Ct, SD NY, No. 1:11-cv-05845 [Sept. 2, 2021]).
[31] Manley Aff Ex 42 (Lauren Cook & Dan Mannarino, *People sleeping in filth, in feces: Jumanne Williams talks Rikers crisis on both sides of the bars*, PIX11 [Sept. 19, 2021]).
[32] Manley Aff Ex 31 (Emily Gallagher, (@EmilyAssembly), Twitter [Sept. 14, 2021, 10:35 AM]).
[33] Manley Aff Ex 38 (Daniel Dromm (@Dromm25), Twitter [Sept. 16, 2021 2:39 PM]).
[34] Manley Aff Ex 33 (Jonah E. Bromwich & Jan Ransom, *10 Deaths, Exhausted Guards, Rampant Violence: Why Rikers Is in Crisis*, N.Y. Times [Sept. 15, 2021]).

stuck in intake "spend prolonged periods of time in temporary spaces such as in showers, at times standing in feces."[35]

It should come as little surprise, then, that in these conditions the rates of COVID-19 in the jails have increased ten-fold in recent weeks: As of September 17, 2021, 69 people had active infection; by comparison, in all of June and July of this year there were never more than seven infections on any given day.[36] Even still, Rachael Bedard, the Director of Geriatrics and Complex Care for Correctional Health Services, recently explained that she is "not as panicked about [the] delta [variant] as [she is] about the rest of the ways that people held on Rikers are currently in danger."[37]

The Department's Failure to Provide Access to Medical Care Has Injured Petitioners

Petitioners are all currently in custody at DOC facilities and have experienced a denial of access to medical care, either through the Department's failure to provide them access to sick call, respond to their sick call requests, escort them to a medical appointment, or provide sufficient security so CHS can provide them care. For instance, Petitioner Anthony Gang is suffering from an abdominal hernia that developed after he was stabbed in the fall of 2020. *See* Verified Petition – Article 78 of the CPLR (Petition), ¶ 71 . Despite having been twice referred for surgery by CHS, Mr. Gang's surgery has not happened. *Id.* ¶¶ 72-73. Mr. Gang's symptoms have observably worsened. Despite regularly requesting sick call, he has repeatedly missed appointments and has been told by DOC that no staff is available to escort him to the clinic. *Id.* ¶ 76.

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[35] Manley Aff Ex 27 (MacDonald Letter, n 11, *supra*) at 1.
[36] Manley Aff Ex 52 (NYC Board of Correction Weekly Covid-19 Updates *Week of September 11—September 17, 2021*) at 13.
[37] Manley Aff Ex 18 (Rachael Bedard, MD (@rachaelbedard), Twitter [Aug. 20, 2021, 8:53 AM]).

Petitioner Tyrone Greene suffers from a serious heart condition and underwent surgery to have multiple stents inserted. *Id.* ¶ 78. Although he requires daily heart medication and evaluation of his vital signs, both of which require a clinic visit, his requests to be brought to the clinic to receive his medication and monitoring have frequently been denied. *Id.* ¶¶ 78, 80. Each denial of Mr. Greene's medication increases the likelihood that he could suffer another heart attack, stroke, or aneurysm. *Id.* ¶ 81.

Petitioner Joseph Agnew suffers from asthma and has a history of seizures. *Id.* ¶ 63. Petitioner Agnew has suffered with asthma since he was six-years old and over the course of his life has suffered several serious asthma attacks, some that required hospitalization. *Id.* ¶ 63. After being stabbed in his side, Mr. Agnew's lung was punctured and collapsed. *Id.* ¶ 64. Following his September 2021 arrest, several police officers threw Mr. Agnew to the ground, which led to serious injuries. *Id.* ¶ 65. Between the holding cells in Brooklyn Criminal Court and the bus to Rikers Island, Mr. Agnew endured further physical abuse and was denied access to food, water, a toilet, or medical care. *Id.* ¶ 66. After being in intake for 6 days, and sprayed with a chemical agent every day, Mr. Agnew struggled to breathe and had no access to his inhaler or any medical care. *Id.* ¶ 67. Despite frequent requests to have his lungs and breathing evaluated, Mr. Agnew's requests have been denied. *Id.* ¶ 69. He was even denied an inhaler until after being incarcerated for weeks. *Id.* Despite having received his inhaler, Mr. Agnew continues to have difficulty breathing. *Id.* ¶ 70.

Similarly, Kamer Reid was stabbed twice from behind while in DOC custody in June 2021. Petition ¶ 82. He was taken to the emergency room in Elmhurst Hospital with a collapsed lung and spent 4-5 days in the intensive care unit with a breathing tube. Petition ¶ 83. After being discharged from the hospital, Mr. Reid was returned to Rikers where he spent two days in the GRVC intake

area without access to medical personnel. *Id.* ¶ 84. He made requests to see medical staff to check his wounds and provide pain relief but received no medical attention. *Id.* ¶ 84. When Mr. Reid left the GRVC intake area, he had an open wound on his chest from a chest tube, which had been inserted while he was in the hospital. *Id.* ¶ 86. Mr. Reid has not received wound care since being released from the hospital, all while recovering from a stab wound and a collapsed lung. *Id.* Mr. Reid has been experiencing severe chest pain and coughing up blood for several days without any response to his requests for medical care. *Id.* ¶ 87. Moreover, Mr. Reid also requires the use of hearing aids and has several food allergies, including fish. *Id.* ¶¶ 87-88. A few weeks ago, Mr. Reid was given a meal, which contained fish and caused his throat to swell and his breathing troubled. *Id.* ¶ 87. Despite requesting emergency medical attention, Mr. Reid remained untreated until another inmate provided him with Benadryl. *Id.*

Petitioners Seek an Order Certifying a Class of Similarly Situated Individuals and Directing DOC to Discharge its Mandatory Duties as to that Class

Petitioners seek relief in the form of an order directing the Department to discharge its non-discretionary obligations to provide people in DOC custody with access to medical services. As discussed further below, the Department has a mandatory duty to keep people in DOC custody safe through the provision of access to medical services, including by discharging their ministerial duties to provide regular access to sick call and to provide sufficient security to escort individuals to the medical unit. These obligations do not allow for discretion on behalf of the Department; for example, DOC is not permitted under relevant law to determine when and whether sick call should be provided. Nor is it permitted to evaluate whether a person needs to attend their medical appointment or can stand to wait indefinitely while DOC fails to abate massive staff absenteeism and mismanagement. Rather, DOC is obligated to provide sick call on a specified schedule, provide security to escort individuals in custody to medical appointments, and to refrain from

denying or delaying medical care. The relief Petitioners seek is therefore appropriate in an Article 78 mandamus to compel proceeding.

Petitioners seek relief on behalf of themselves as well as a class of similarly situated individuals. Petitioners thus further request that the Court grant certification of a class of all current and future persons in DOC custody who have been or will be denied access to medical care based on the Department's failure to discharge its non-discretionary duties to provide people incarcerated in the City's jails with access to medical services. Because the Department's failure to discharge its ministerial obligations to provide access to medical care are widespread and well-documented, it is clear that Petitioners are not the sole individuals being negatively affected by the Department's nonfeasance—all individuals in DOC custody are being affected.

With every day that passes, the situation at DOC facilities becomes more urgent, and Petitioners and unnamed class members face grave health consequences because of the Department's unjustified failure to act. Indeed, DOC continues to fail to meet its mandatory obligations to provide access to medical care, at the grave and traumatic expense of those in its care. Petitioners respectfully request that this Court grant the instant mandamus to compel petition and provide relief to the thousands of individuals suffering without access to medical care under the harrowing conditions that the Department has created and allowed to continue.

ARGUMENT

Petitioners are entitled to relief because the Department has failed to perform mandatory, non-discretionary ministerial duties enjoined upon it by law which facilitate access to medical services for individuals in DOC's custody. As set forth below, New York law—the Administrative Code of the City of New York, the Correction Law, and minimum standards set by the New York

City Board of Correction (BOC)—compels the Department to provide these services. There is no excuse for the Department's failure to perform them.

Petitioners are further entitled to relief because they have complied with all procedural requirements to bring an Article 78 mandamus to compel proceeding. DOC is a local body with responsibility to discharge the mandatory obligations at issue in this proceeding. The Department's failure to provide these services is final and non-appealable within the meaning of CPLR articles 2 and 78, as interpreted by New York State courts. Finally, Petitioners filed the instant proceeding within the applicable statute of limitations following DOC's failure to perform (which failure is continuous up to and including the date of this filing).

Finally, Petitioners have demonstrated that class treatment is appropriate in this action. Petitioners bring suit on behalf of a putative class of thousands of similarly situated individuals who have legal claims involving common issues of law and fact, arising out of the same course of conduct by DOC. Petitioners will adequately represent the class and have no interests adverse to other class members, and Petitioners' class counsel has the requisite experience and knowledge to represent the class. Affirmation of Veronica Vela ¶¶ 3-9, October 4, 2021 (Vela Aff); Affirmation of Brooke Menschel ¶¶ 2-10, October 4, 2021 (Menschel Aff); Affirmation of Sean M. Murphy ¶¶ 2-8, October 4, 2021 (Murphy Aff). Finally, a class action is superior to other forms of relief because the unnamed class members number in the thousands, are transient by nature, and, as incarcerated individuals, generally lack the resources or ability to initiate individual lawsuits and obtain timely relief. Class action treatment will permit many similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions engender.

I. THE DEPARTMENT OF CORRECTION HAS FAILED TO PERFORM A CLEAR DUTY ENJOINED UPON IT BY LAW

Under Article 78, a petitioner can bring a mandamus to compel proceeding to force a state official to perform a legal duty where there is a "clear legal right" to the relief requested. *Klostermann v Cuomo*, 61 NY2d 525, 539 [1984] (citation omitted). Mandamus relief is available "to compel [an administrative officer] to perform a legal duty." *Id.* at 540; *see also Tango v Tulevech*, 61 NY2d 34, 41 [1983] ("[A] ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."); *Grisi v Shainswit*, 119 AD2d 418, 420 [1st Dept 1986] (characterizing ministerial acts as "nondiscretionary and nonjudgmental") (citation and internal quotation marks omitted). The availability of the remedy depends "not on the [petitioner's] substantive entitlement to prevail, but on the nature of the duty sought to be commanded -- i.e., mandatory, nondiscretionary action." *Matter of Hamptons Hosp. & Med. Ctr.*, 52 NY2d 88, 97 [1981]; *Burr v Voorhis*, 229 NY 382, 387 [1920] (explaining that for mandamus to lie, the right to performance "must be so clear as not to admit of reasonable doubt or controversy"). In other words, a petitioner can compel the performance of a non-discretionary, "ministerial act" that the officer or agency has failed to perform. *Legal Aid Soc'y of Sullivan County, Inc. v Scheinman*, 53 NY2d 12, 16 [1981].

Although ministerial acts include "administrative acts, such as the recording of deeds and the timely signing and return of warrants, they also include . . . the care of prisoners." *Kagan v State*, 221 AD2d 7, 10 [2d Dept 1996]. Here, due to extreme mismanagement, the Department has failed to discharge its non-discretionary duty to provide individuals in DOC custody with access to medical care pursuant to local rules and state law. The results have been catastrophic. The relevant ministerial acts provide the essential link between incarcerated people and medical services. When DOC fails to discharge these acts, people in DOC custody are deprived of medical

care. Sick call is the incarcerated person's "point of contact with a prison's health care program," *Estelle v Gamble*, 429 US 97, 110 n 3 [1976] (Stevens, J., dissenting). Moreover, systemic failure to provide a functioning system of access to medical care, even where the deprivation is caused by administrative, procedural, or staffing issues, can rise to a constitutional violation. *See, e.g.*, *Todaro v Ward*, 565 F2d 48, 52 [2d Cir. 1977] (holding that "systematic deficiencies in staffing, facilities or procedures [which] make unnecessary suffering inevitable" constitute deliberate indifference); *Anderson v County of Kern*, 45 F3d 1310, 1316 [9th Cir. 1995] (explaining that failure to provide a translator for medical encounters can constitute deliberate indifference).[38] Although Petitioners do not bring a constitutional claim in this action, constitutional jurisprudence shows the risk of harm inherent in DOC's failure to discharge its non-discretionary duty to provide access to medical care.

Petitioners seek class-wide relief in the form of an order directing DOC to discharge these non-discretionary duties so that people in City custody can access medical care. Without this relief, members of the putative class will experience continued medical harm, potentially including "death, degeneration or extreme pain." *See Hathaway v Coughlin*, 37 F3d 63, 66 [2d Cir. 1994]

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[38] *See also, e.g.*, *Harris v Thigpen*, 941 F2d 1495, 1505 [11th Cir. 1991] ("In institutional level challenges to prison health care . . . , systemic deficiencies can provide the basis for a finding of deliberate indifference."); *DeGidio v Pung*, 920 F2d 525, 529 [8th Cir. 1990] (holding that lack of "adequate organization and control in the administration of health services" could constitute deliberate indifference); *Berry v City of Muskogee*, 900 F2d 1489, 1498-99 [10th Cir. 1990] (holding that repeated negligent acts indicating systemic deficiencies in the method of providing medical care may amount to "deliberate indifference"); *Ramos v Lamm*, 639 F2d 559, 574 [10th Cir. 1980] (stating that the duty to provide medical care "necessarily requires that the State make available to inmates a level of medical care which is reasonably designed to meet the routine and emergency health care needs of inmates") (citation and internal quotation marks omitted); *Bass by Lewis v Wallenstein*, 769 F2d 1173, 1184, 86 [7th Cir. 1985] (facts showing that officials were aware of "gross deficiencies in the sick call procedure, staffing, and personnel" that "effectively denied access to adequate medical care" supported finding of deliberate indifference)).

(quoting *Nance v Kelly*, 912 F2d 605, 607 [2d Cir. 1990] (Pratt, J., dissenting) (addressing the conditions in which deliberate indifference may constitute an Eighth Amendment violation)).[39]

A. DOC Has Failed to Provide Access to Medical Care by Refusing to Provide Sick Call on Regular Intervals Specified by Law

The Department of Correction is required to provide the people in its custody with access to medical care through performance of its non-discretionary duties to provide a functioning sick call system. Under the New York Administrative Code, the Department "shall provide all housing units with access to sick call on weekdays, excluding holidays."[40] Administrative Code of the City of New York (NYC Admin. Code) § 9-108 (c). This requirement for a functioning sick call system is further specified in BOC minimum standards, which provides that, "Sick-call shall be available at each facility to all inmates at a minimum of five days per week within 24 hours of a request or at the next regularly scheduled sick-call."[41] Rules for the City of New York Board of Correction (40 RCNY) § 3-02 (c) (4). This duty to provide access to sick call on regular, specified intervals (subject to narrow exceptions) is mandatory and non-discretionary. Sick call is the bridge between individuals who require medical attention and the correctional medical officials who are prepared

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[39] As set forth in the Petition's Prayer for Relief, if DOC indicates that it will not discharge its ministerial duties to provide access to medical care, or fail to comply with an order from this Court to do the same, Petitioners will seek leave of the Court to bring a *habeas* proceeding pursuant to CPLR 7001 et seq. on behalf of certain class members for whom the deprivation of medical services and DOC's sustained inability to remedy that deprivation makes their continued detention illegal.

[40] This law is subject to exclusions set forth in the Board of Correction's rules or through a variance issued by the Board, *see* NYC Admin. Code § 9-108 (c). But no such exceptions or variances exist.

[41] The Board of Correction must "adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law." NY City Charter § 1043 (a) (1). Under the New York City Charter, the Board is responsible for specifying the rules establishing "minimum standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the" Department of Correction. NY City Charter § 626 (e).

to deliver it. *See* NYC Admin. Code § 9-108 (a) (defining "sick call" as "the department's process by which an incarcerated individual requests to be seen by a health care professional for the purpose of assessing or treating such incarcerated individual's non-emergency medical complaint"). In a federal district court action challenging the quality of medical care on Rikers Island, the current chief medical officer of CHS, Ross MacDonald, explained the purposes of sick call and how it is supposed to work on Rikers Island:

> Inmates may be housed in general population or in "segregated" settings, where they stay in individual cells. Regardless of an inmate's housing location, he or she has access to medical care through sick call . . . [and] emergency care.
>
> Inmates housed in general population may request a visit to the clinic by signing up for a sick call visit, offered Money [sic] through Friday, on lists maintained by DOC. Sick call requests are generally accommodated within 24 hours. Additionally, inmates have access to medical services through emergency sick call. Inmates who require evaluation or treatment beyond what is available in most of the facility clinics are transported either to the West Facility on Rikers Island, which is capable of providing additional services, or to Elmhurst Hospital in Queens or Bellevue Hospital in Manhattan for specialty care or emergency room evaluation.
>
> Inmates requiring emergency treatment are escorted to the clinic immediately and may be transported to Urgicare — an emergency medical clinic on Rikers Island staffed by Emergency Medicine physicians — or to units at Elmhurst or Bellevue for treatment as necessary.

Doc No. 169, ¶¶ 7-9, declaration of Ross MacDonald, MD in *Jeffers v City of New York*, US Dist Ct, ED NY 14-CV-6173 (CBA) (ST).

The New York City Council has explicitly required the Department to provide sick call at specified intervals, *i.e.* "on weekdays, excluding holidays," NYC Admin. Code § 9-108 (c), and the Board of Correction has further specified that sick call be made available five days per week within "24 hours of a request or at the next regularly scheduled sick-call," 40 RCNY § 3-02 (c) (4). It is thus clear that DOC has ministerial duties to make medical care available, through sick call, every weekday except holidays. These duties afford no room for discretion, either as to timing or

as to the task to be performed. *See Trump v N.Y. State Joint Comm'n on Pub. Ethics*, 47 Misc3d 993, 996 [Sup. Ct. Albany County 2015] (indicating that a duty is likely ministerial, not discretionary, "when there is 'a clear expression of intent in the statute to require a set timeline in all instances'" (quoting *Shaw v King*, 123 AD3d 1317, 1319 [3d Dept 2014])); *see also Tango*, 61 NY2d at 41 (a duty is ministerial if it does not "involve the exercise of reasoned judgment"). DOC has no discretion to suspend sick call, to provide it on a less frequent interval than that specified in the relevant law and standards, or to use a different system for requests for medical care in lieu of sick call.

Because DOC is failing to provide sick call regularly, and on the intervals required by Section 9-108 (c) and 40 RCNY § 3-02 (c) (4), Petitioners' access to medical care is unduly restricted. Importantly, Petitioners are not challenging the adequacy of medical services provided through sick call, or the decisions of medical professionals in treating people in DOC custody. *See Klostermann*, 61 NY2d at 540 (discussing discretionary duties inappropriate for a mandamus to compel). Rather, Petitioners contend that DOC is failing to provide those in their custody a meaningful "point of contact with a prison's health care program," *Estelle*, 429 US at 110 n 3, due to a complete collapse of the DOC's sick call system. Indeed, Commissioner Schiraldi has admitted as much, recently stating: "Things are getting canceled all the time here . . . [w]hen you don't have enough staff, it creates lots and lots of problems—and producing people to sick call is one of them."[42]

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[42] Manley Aff Ex 20 (Sherman) at 1; Manley Aff Ex 34 (September 15 Hearing, n 18, *supra*) at 01:51:24 (testimony of Commissioner Vincent Schiraldi) ("[T]he sole reason for missed [medical] appointments is inadequate staff. [DOC] literally do not have enough staff. There's an officer on a post by herself and no one to bring people to the clinic.")); Manley Aff Ex 22 (Sept. 1 BOC

These deficiencies are borne out in Petitioners' experiences. For instance, Petitioner Agnew asked numerous officers to be taken to sick call and placed multiple calls to the CHS headline to assess and treat his breathing, persistent headaches, and weak knees. Petition ¶¶ 68-70. Despite daily requests, no appointment or treatment ever materialized. *Id*. In one instance, Mr. Agnew—who, to date, has not had a medical assessment while in DOC custody—was told that in order to get to medical he would have to fall to the ground and pretend to have a medical emergency. *Id.* ¶ 69. Class members have reported that there are no staff members to whom they can make a sick call request, or that staff ignores their sick call requests. De Avila Aff ¶¶ 24, 25 . Accordingly, DOC has failed to discharge its mandatory duties to provide sick call on regular, specified intervals as set forth in NYC Admin. Code § 9-108 (c) and further articulated in 40 RCNY § 3-02 (c) (4), and this Court should order the Department to comply with its duties.

B. DOC Has Failed to Provide Access to Medical Care Through Its Safekeeping and Related Duties by Refusing to Produce Individuals to Medical Appointments

The Department is also required to provide the people in its custody with access to health care through its non-discretionary duty to produce individuals to medical appointments. Under the Correction Law, the DOC commissioner "shall [] safely keep in the county jail of his county each person lawfully committed to his custody." Correction Law § 500-c (4); *cf*. *Kemp v Waldron*, 115 AD2d 869, 870-71 [3d Dept 1985] (holding that Correction Law § 500-c creates a duty to protect

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Statement on Recent Suicides, n 4, *supra*) at 1 (stating that a failure to "provide[ ] appropriate housing and *medical care for persons in custody*" was a particular issue contributing to record number of suicides on Rikers Island in 2021); Manley Aff Ex 44 (COBA Mem. of Law, n 21, *supra*) (City of New York (on behalf of DOC) alleging that the "poor conditions" at DOC facilities include "*medication not being delivered* to detainees, *emergent conditions simply being ignored or not addressed*, and meals significantly delayed or not provided altogether.").

incarcerated persons from harm). Among the safekeeping duties in Correction Law § 500-c (4) is the duty to "provid[e] necessary medical care to inmates." Bonacquist, McKinney's Practice Commentaries, N.Y. Correction Law § 501 (2017); *see also id.* § 505 (2021) ("The chief administrative officer of a local correctional facility must 'receive and safely keep' all inmates committed to his custody. Generally, this requires that inmates be provided with necessary medical, dental, and mental health care." (quoting Correction Law § 500-c (4))).

There are specific, non-discretionary actions that DOC must perform in furtherance of this safekeeping requirement in the medical care context set forth in the BOC minimum standards.[43] Specifically, the standards impose a mandatory, non-discretionary obligation on DOC to produce individuals to the medical clinic for care, stating "[t]he Department of Correction *shall provide* sufficient security for inmate movement to and from health service areas." 40 RCNY § 3-02 (c) (1) (emphasis added). The standards further state "[c]orrectional personnel shall never prohibit, delay, or cause to prohibit or delay an inmate's access to care or appropriate treatment," 40 RCNY § 3-02 (b) (4), or "an inmate's access to medical or dental services." *id*. § 3-02 (c) (2) (i).

These ministerial duties are mandatory and non-discretionary. DOC does not have the discretion to fail to provide security to support movement by incarcerated persons to and from health services. And the Department does not have the discretion to delay or deny "an inmate's access to care" due to staff mismanagement or for any other reason. Yet that is exactly what they are doing, as DOC Commissioner Vincent Schiraldi admitted under oath to the City Council on

[43] As discussed n 41, *supra*, under the New York City Charter, the Board is responsible for specifying the rules establishing "minimum standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the" Department of Correction. NY City Charter § 626 (e).

September 15, 2021, stating: "[T]he sole reason for missed [medical] appointments is inadequate staff."[44]

Petitioners have repeatedly been denied access to medical care due to DOC's unlawful inaction. For instance, Petitioner Anthony Gang, who is suffering from an abdominal hernia that developed after he was stabbed in the fall of 2020, has not had his surgery. Petition ¶ 77. Despite regularly requesting sick call, he has been told by DOC that no staff is available to escort him to the clinic. *Id.* As a result, Mr. Gang has been forced to wait as his symptoms have worsened over the past several months, resulting in extreme pain. *Id.* Petitioner Tyrone Greene suffers from a serious heart condition and underwent surgery to have multiple stents inserted. *Id.* ¶ 78. Although he requires daily heart medication and evaluation of his vital signs, his requests to be brought to the clinic to receive the medication and testing have frequently been denied. *Id.* ¶ 80. The denials of Mr. Greene's medication increase the likelihood that he could suffer another heart attack, stroke, or aneurysm. *Id.* ¶ 81.

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[44] Manley Aff Ex 34 (September 15 Hearing, n 18, *supra*) at 01:51:24 (testimony of Commissioner Vincent Schiraldi ("[T]he sole reason for missed [medical] appointments is inadequate staff. [DOC] literally do not have enough staff. There's an officer on a post by herself and no one to bring people to the clinic.")); Manley Aff Ex 20 (Sherman) at 1 (testimony of Commissioner Vincent Schiraldi "[t]hings are getting canceled all the time here . . . [w]hen you don't have enough staff, it creates lots and lots of problems—and producing people to sick call is one of them."); Manley Aff Ex 27 (MacDonald Letter, n 11, *supra*) at 1 ("Unavailability of staff has resulted in delays in transferring patients to clinics for care, to mental health units or to the hospital, even when 911 has been activated and EMS has arrived to transport them . . . ."); Manley Aff Ex 44 (COBA Mem. of Law, n 21, *supra*) at 9 (alleging that the "poor conditions" at DOC facilities include "medication not being delivered to detainees, [and] emergent conditions simply being ignored or not addressed . . . .").

Accordingly, by not producing individuals to medical appointments the DOC is failing to provide access to medical care and this Court should order the Department to discharge these ministerial duties.

II. THE COURT SHOULD CERTIFY A CLASS UNDER CPLR 901 ET SEQ.

A. Numerosity Is Met Because Thousands of Persons Are or Will Be Injured

Numerosity is met when the class is so numerous that joinder of all members is impractical. CPLR 901 (a) (1). This condition is substantially similar to the numerosity requirement for federal class actions. *See* Federal Rules of Civil Procedure 23 (a) (1). Here, the requirement is easily met.

Courts determine numerosity on a case-by-case basis. *Friar v Vanguard Holding Corp*., 78 AD2d 83, 96 [2d Dept 1980]; *Stewart v Roberts*, 163 AD3d 89, 94 [3d Dept 2018] ("[T]here is no bright-line test for determining whether the requirement of numerosity has been met; rather, each case depends on the particular circumstances of the proposed class.").

Notwithstanding the lack of a bright-line rule, the Court of Appeals has noted that the "legislature contemplated classes with as few as 18 members." *Borden v 400 E. 55th St. Assocs., L.P*., 24 N.Y.3d 382, 399 (2014); *see also Zeitlin v N.Y. Islanders Hockey Club, L.P*., 49 Misc 3d 511, 515-17 [Sup. Ct. Nassau County 2015] (reviewing cases and concluding that the lower limit for class sizes is approximately 20 members). "Only some evidence is required to demonstrate the numerosity of a putative class, and this evidence need not be exact in number but merely needs to consist of a reasonable class estimate." *Mascol v E & L Transp., Inc.*, No. 03-3343, 2005 WL 1541045, at *3 [ED NY June 29, 2005].

In this case, the numerosity requirement is readily satisfied. Although the exact size of the class is unknowable, Petitioners believe that it likely includes all or a significant portion of the population currently incarcerated at Rikers Island and other DOC facilities, which is approximately

6,000 individuals as of the filing of this action.[45] This is a reasonable inference because there is evidence that jail populations have relatively high medical needs,[46] and Petitioners allege that there has been a complete collapse of the medical care system at DOC caused by DOC's failure to discharge its ministerial duties. Moreover, as discussed above, the DOC admits that there have been thousands of instances each month where individuals were not produced to medical appointments because an escort has not been available—all of those individuals are members of the putative class.[47] As a result of this and other evidence of pervasive failure to provide access to medical services through the discharge of the ministerial duties discussed above,[48] it is not unreasonable to assume that the class size is in the thousands.

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[45] *See* Manley Aff Ex 21 (New York State Division of Criminal Justice Services, *Monthly Jail Population Trends*) at 3 (showing census population of 5,839 as of August 2021, a 47% increase over the August 2020 census); Manley Aff Ex 52 (New York City Board of Correction, *Weekly COVID-19 Update Week of September 11 – September 17, 2021*) at 4 (indicating the total BOC population on September 17, 2021 was 6088).

[46] Manley Aff Ex 9 (Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. Times [Nov. 30, 2020]) (quoting Dr. Charles Lee, president-elect of the American College of Correctional Physicians: "From my experience, their physiological age [of people in custody] is generally 20 years greater than their chronologic age — from drugs, from fights, from being incarcerated and homeless, and not getting health care" and noting that "[u]p to 40 percent of incarcerated adults are Black, [ ] a group with higher rates of chronic diseases, such as diabetes, hypertension and asthma.").

[47] *See supra* pp. 2-4 (discussing the dramatic increase in non-production numbers and DOC's admission that the increase is driven by failure to provide escorts).

[48] *See* Sections I.A, I.B, *supra*; *see also, e.g.*, Manley Aff Ex 32 (Emma G. Fitzsimmons, Jonah E. Bromwich & Jan Ransom, *With Rikers in Crisis, Critics Wonder: Where is Bill de Blasio?*, N.Y. Times [Sept. 15, 2021]) at A17; Manley Aff Ex 45 (Jonah E. Bromwich, *N.Y.C. Sues Jail Officers, Saying Illegal Strike Worsened Rikers Crisis*, N.Y. Times [Sept. 20, 2021]); Manley Aff Ex 49 (Jonah E. Bromwich & Jan Ransom, *12th Death in Custody This Year Signals Growing Crisis in N.Y.C. Jails*, N.Y. Times [Sept. 22, 2021]); Manley Aff Ex 51 (NYSCEF Doc No. 27, decision & order on mot., in *City of New York v Corr. Officers Benevolent Assn. Inc.*, Sup Ct, NY County, Sept. 21, 2021, No. 453067/2021, (Sup Ct NY County Sept. 21, 2021)); Manley Aff Ex 22 (Sept. 1 BOC Statement on Recent Suicides, n 4, *supra*); Manley Aff Ex 46 (New York Attorney General Letitia James's Statement on Visit to Rikers Island [Sept. 21, 2021]); Manley Aff Ex 55 (Executive

Moreover, joinder would be impracticable, notably because the members who make up the class are in constant flux; the membership of the class is fluid as members continuously enter and leave New York City's correctional facilities. *See Alexander A. ex rel. Barr v Novello*, 210 FRD. 27, 33 [ED NY 2002] ("[B]ecause children are constantly entering and leaving the class, the membership of the class is fluid and, thus, joinder is impracticable.").

B. Common Questions of Fact and Law Predominate

Commonality is met when there are questions of law or fact common to the class. CPLR 901(a) (2). This condition ensures a minimal level of commonality within the class so that a class-wide determination on the common issues can fairly resolve those issues for each class member.

The main issue under commonality analysis is "whether the group asserting class status is seeking to remedy a common legal grievance." *Lamboy v Gross*, 129 Misc 2d 564, 572 [Sup Ct NY County 1985] (citation omitted), *aff'd*, 126 AD2d 265 [1st Dept 1987]. It is well established therefore that where the "paramount issue" is whether a defendant failed to perform a duty enjoined upon it by law resulting in class-wide injury, common questions of law and fact predominate. *Friar*, 78 AD2d at 98. Here, the commonality requirement is met because Petitioners seek to remedy the harms—on a class-wide basis—caused by the Department of Correction's failure to discharge its ministerial duties in violation of the Board of Correction's Minimum Standards, the NYC Admin. Code § 9-108 (c), and Correctional Law § 500-c (4).

Order No. 5 (Declaration of a Disaster Emergency in the Counties of the Bronx, Kings, New York, Richmond and Queens Due to Conditions at Rikers Island Correctional Center) of the Governor of the State of New York [Sept. 28, 2021]); Manley Aff Ex 19 Office of the Monitor's letter to the Honorable Laura T. Swain discussing the Monitoring Team's long-standing concerns regarding the systemic dysfunction in the jail facilities [Aug. 24, 2021]; and Manley Aff Ex 27 (MacDonald Letter, n 11, *supra*).

Petitioners' description of the proposed class alone sufficiently establishes commonality: Petitioners seek to certify a class consisting of all current and future persons incarcerated in DOC facilities who have been or will be denied access to medical care based on DOC's failure to discharge the ministerial duties described *supra* in Section I.[49]

Questions of law and fact common to the class members include: (1) whether DOC's failure to provide access to medical care by providing sick call at regular intervals violates NYC Admin. Code § 9-108 (c) and BOC minimum standards set forth in 40 RCNY §§ 3-02 et seq.; and (2) whether DOC's failure to perform its safekeeping duty by not providing for movement of incarcerated individuals to and from health services, and delaying or denying access to medical care, violates Correction Law 500-c(4) and BOC minimum standards set forth in Rules of the City of New York 40 §§ 3-02 et seq.

CPLR 901 (a) (2) requires only that the common questions predominate over the individual ones, which is the case here. Even when some questions of fact affect certain individual members of the class but not others, that is not a reason to deny class certification. *See Weinberg v Hertz Corp*., 116 AD2d 1, 6 [1st Dept 1986], *aff'd* 69 NY2d 979 [1987]; *Brad H. v City of New York*, 185 Misc 2d 420, 424 [Sup Ct NY County], *aff'd*, 276 AD2d 440 [1st Dept 2000]. Critically, this case does not ask the Court to evaluate the adequacy of any course of medical care for particular

[49] Courts routinely grant certification of classes including future class members where the relief sought is a change in government policy or practice. *See, e.g.*, *Alexander A. ex rel. Barr v Novello*, 210 FRD 27, 33 [ED NY 2002] ("All New York State children with psychiatric disabilities who have been or *will be found* by defendants to be appropriate for placement in a Residential Treatment Facility and who have not been or *will not be* provided with such placement with reasonable promptness. […] Here, plaintiffs are seeking injunctive relief to reform a continuing government policy or practice. Their complaint is about defendants' institutional failure to provide reasonably prompt placement in RTFs; it is 'not merely a cumulation of individual cases.'").

incarcerated people; it asks solely whether DOC is discharging mandatory duties that provide a point of access to medical care. Given the common issues in this case concerning the Department's failures to comply with the BOC's Minimum Standards, the NYC Admin. Code § 9-108 (c), and Correction Law 500-c (4), adjudication of this Article 78 class action would be far superior to a series of lawsuits on these claims. Furthermore, under CPLR article 9, this Court has "considerable flexibility in overseeing a class action[;] 'an action may be brought or maintained as a class action with respect to particular issues.'" *City of New York v Maul*, 14 NY3d 499, 513 [2010] (quoting CPLR 906 (1)).

C. Petitioners' Claims Are Typical of Class Claims

The typicality requirement is satisfied when each class member's claims arise from the same course of events, and each class member's arguments are based on the same legal theory. *See SEC v Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F2d 285, 291 [2d Cir. 1992]; *Friar*, 78 AD2d at 708. Minor variations among individual petitioners' fact patterns do not undermine the typicality requirement. *See Robidoux v Celani*, 987 F2d 931, 937 [2d Cir. 1993]. "To be typical, it is not necessary that the claims of the named plaintiff be identical to those of the class. The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class." *Pruitt v Rockefeller Ctr. Props. Inc*., 167 AD2d 14, 676 [1st Dept 1991] (citations and internal quotation marks omitted).

Here, the named Petitioners' claims are typical of the class claims because they arise from DOC's same general failure to discharge their ministerial duties pursuant to state and local laws. The same unlawful conduct is directed at and affects (or will affect) both the named Petitioners and the class sought to be represented. Accordingly, Petitioners have met the requirement of typicality.

D. Petitioners Will Be Adequately Represented by Class Counsel

The "adequate representation" requirement has two prongs: "First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, the class members must not have interests that are antagonistic to one another." *D'Alauro v GC Servs. Ltd. P'ship*, 168 FRD 451, 457 [ED NY 1996] (citations and internal quotation marks omitted); *Konig v TransUnion, LLC*, No. 18-7299, 2020 WL 550285, at *6 [SD NY Feb. 4, 2020]. This requirement is also met here.

Petitioners' counsel, The Legal Aid Society and Brooklyn Defender Services, have extensive experience representing incarcerated individuals, including in litigation against the DOC and in class actions. *See generally* Vela Aff; Menschel Aff. Petitioners' counsel, Milbank LLP, is competent and experienced in litigating large class actions in state and federal courts and has represented incarcerated individuals in individual and class action litigation, including litigation related to conditions of confinement and similar circumstances. *See generally* Murphy Aff. Similarly, the named Petitioners are competent representatives. They will fairly protect the interests of the class members. They have no interests antagonistic to class members and will vigorously pursue this suit via the attorneys representing them. The requested relief will benefit all class members equally through the systemic provision of access to medical services.

E. A Class Action Is the Most Efficient and Appropriate Means of Relief

CPLR 901(a) (5) explicitly requires that all class actions be "superior to other available methods for the fair and efficient adjudication of the controversy." In essence, the superiority inquiry involves a case-specific comparative process, which weighs the efficiency of a class action against alternative forms of adjudication.

In this instance, a class action is the superior adjudicative method for two reasons. First, the only means of remedying both the harms suffered by Petitioners and those suffered by members of the class is class certification. Indeed, joinder of all class members is impractical because there are too many people similarly situated to the Petitioners and they generally lack the financial resources or the organizational ability to initiate a lawsuit and obtain timely relief. If a class action were not available, class members would have no realistic day in court.

Second, class action litigation is the most efficient way to seek a judgment against DOC requiring it to immediately comply with its ministerial duties. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense, which numerous individual actions engender. Indeed, the superiority of the class action as a method is demonstrated by the fact that the other prerequisites for class certification under CPLR 901 (a) are satisfied.[50]

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition, certify a class of all current and future persons incarcerated in New York City Department of Correction facilities who have been or will be denied access to medical care based on DOC's failure to discharge non-discretionary duties which are required to provide people who are incarcerated with access to medical services, and order DOC to discharge such duties.

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[50] Appellate courts hold that motions under CPLR 902 made prior to the time to answer are timely so long as respondent has an opportunity to be heard on the merits of the motion. *E.g.*, *David B. Lee & Co. v Ryan*, 266 AD2d 811, 812 [4th Dept 1999]; *see also, e.g.*, *Evans v City of Johnstown*, 96 Misc 2d 755, 772 [Sup Ct, Fulton County 1978]. Pursuant to the [Proposed] Order to Show Cause filed herewith, Respondent has such an opportunity.

Dated: October 4, 2021
New York, New York

/s/ *Katherine Kelly Fell*
Katherine Kelly Fell

THE LEGAL AID SOCIETY
199 Water Street,
6th Floor
New York, New York 10038
Tel: 212-577-3300

BROOKLYN DEFENDER SERVICES
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
Tel: (718) 254-0700

MILBANK LLP
55 Hudson Yards
New York, NY 10001-2163
Telephone: (212) 530-5000
Facsimile: (212) 530-5219

Veronica Vela
Philip Desgranges
Stefen R. Short
Robert Quackenbush
David Billingsley
Kayla Simpson
Barbara Hamilton
Alexander Lesman
Alexandra Anthony
Mary Lynne Werlwas
Corey Stoughton

Brooke Menschel
Hanna Perry
Alyssa Briody
S. Lucas Marquez
Eugenie Montaigne

Sean M. Murphy
Katherine Kelly Fell
Michael Scerbo
Micaela D. Manley
Mariella Montplaisir Bazan
Chassity Bobbitt

Counsel for Petitioners and the Putative Class

WORD COUNT CERTIFICATION

I, Katherine Kelly Fell, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 5,529 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Date: October 4, 2021

/s/ Katherine Kelly Fell
Katherine Kelly Fell