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,

Respondent.

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

Index No. 813431/2021E

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

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PRELIMINARY STATEMENT

In the face of a clearly-established humanitarian crisis and evidence of scores of people being denied access to medical care, Respondent the Department of Correction's defense is to concede the facts but ask the Court to allow the Department to remain "free of judicial oversight." Such a result misses the mark, lacks any legal justification, and leaves the named Petitioners and thousands of others incarcerated in New York City without any recourse. This Court's intervention is not only appropriate but critical.

ARGUMENT

I. RESPONDENT FAILS TO REBUT PETITIONERS' SHOWING OF ENTITLEMENT TO MANDAMUS.

Mandamus relief is appropriate where, as here, the uncontroverted record shows that Respondent has failed to discharge mandatory, non-discretionary duties. "[M]andamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." *Klostermann v Cuomo*, 61 NY2d 525, 541 [1984]. As the Court of Appeals explained in *Klostermann*, "to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties." *Id.* at 463.

Respondent (DOC or the Department) readily acknowledges that it is obligated, but failing, to comply with the duties identified by Petitioners: "Respondent does not dispute the applicability of the mandates and has freely acknowledged deficiencies in its ability to escort individuals in custody to clinic appointments, primarily due to lack of staff in the jails." Opp. Br. at 1.[1] The Court

[1] Memorandum of Law in Support of Respondent's Verified Answer to the Verified Petition (NYSEF Doc. No. 76, (Opp. Br.)).

need not read further to find for Petitioners and order the requested relief. Moreover, the substantial evidence submitted by Petitioners in support of their application demonstrates the scope of the Department's failure and the very real harms incurred as a result.

Respondent's brief contains a list of the Department's purported efforts to combat staff mismanagement and improve conditions. But the Department does not argue that those actions have meaningfully improved its ability to discharge its ministerial duties to provide access to sick call or produce people to medical appointments, or even that it will be able fulfill those functions soon. Absent clear evidence that Respondent's actions have rectified its failure to discharge its non-discretionary ministerial duties, the efforts cited by Respondent are not germane to this Court's inquiry. There is no "best efforts" defense to a mandamus to compel ministerial duties, and Respondent cites no law in support of one.

Perhaps most surprisingly, the Department recognizes the severity of the crisis in the jails yet simultaneously argues that it "does not believe that an order of mandamus can meaningfully change the present circumstances." Opp. Br. at 6. The import of the Department's statement is that—while it "freely acknowledge[s]" it is not discharging its mandatory duties—this Court's exercise of its enforcement powers would not prompt compliance with the law. Petitioners disagree. The Department's position seems to be that judicial intervention may be useful in ordinary times but is relatively unhelpful in extraordinary times. History is replete with examples showing the opposite.

The Department's claim that there is nothing more it can do is also contradicted by the record. The record reflects that despite "abnormally high absenteeism, the Department still has an extraordinarily large number of Staff to operate the jails." *See* 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); *see also* Roshan Abraham, *The Real Reason Behind the Crisis at Rikers Island*, SLATE [Sept. 29, 2021] ("Rikers has a dramatically higher staffing ratio than any other jail across the country—even on days when roughly 2,000 people are unavailable to work.").[2] Thus, while the Department has significant staff available, it has failed to properly manage that staff to ensure compliance with its nondiscretionary ministerial duties to provide mandated access to medical care.

This is unacceptable. It cannot be that, in 2021, New Yorkers can legally be deprived of their liberty, locked up in dilapidated, overcrowded cells, forced to sleep in filth and feces, denied food, showers, and basic services, and then on top of all that—especially considering the grave health consequences that can and do occur in these conditions—be denied any meaningful access to medical care. New York State and City laws require more. The Department does not have the discretion to deprioritize the health and wellbeing of those entrusted to its care, which is why the mandatory ministerial duties at issue exist in the first place. And the Department does not contend that it has this discretion. Petitioners are therefore entitled to a mandamus order directing the Department to discharge its mandatory obligations.

II. RESPONDENT'S ARGUMENT AGAINST CLASS CERTIFICATION IS WITHOUT MERIT.

The Department does not contest that Petitioners have established the first four requirements for class certification; they merely contest the final element: whether a class action is the most appropriate means of relief. Their argument fails. The Department's argument relies on the *Fisher* decision, which is inapposite here. *See* Opp. Br. at 7–8 (citing *Fisher v The City of*

[2] Available at https://slate.com/news-and-politics/2021/09/rikers-island-is-in-crisis-its-not-caused-by-understaffing.html.

New York, 2021 N.Y. Slip Op. 30210[U], 1 [Sup Ct, NY County 2021], at *1 [Sup Ct, NY County Jan. 25, 2021]. *Fisher* is a decision on a motion for a preliminary injunction under NY CPLR 6301 and for a declaratory judgment. As the *Fisher* court noted: "[A]n action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality." *Id.* at 7. *Fisher* explained that class action suits may be unnecessary in the specific context where relief interpreting or enjoining a challenged statute would apply to everyone potentially affected. *See id.*

Here, Petitioners are not seeking declaratory relief or challenging the constitutionality of a policy or procedure. Instead, Petitioners seek to compel the Department to discharge specific nondiscretionary ministerial obligations. Without class treatment, an order to discharge these duties as to the four Petitioners would leave thousands, for whom the Department has already conceded it is failing to ensure access to medical care, without a remedy. Each would be forced to file their own individual mandamus action to obtain relief.[3] This kind of inefficiency is exactly why the class action device exists, particularly for a universe like the putative class, which includes many indigent people whose lives and health are in immediate jeopardy, and whose ability to pursue individual litigation is impeded by their confinement. *See Tindell v Koch,* 164 AD2d 689, 695 [1st Dept 1991] (granting class certification where class consisted primarily of indigent elderly people for whom commencement of individual actions would be "oppressively burdensome" and members of class faced immediate threat of having to forego necessities in order to pay rent);

[3] It is unlikely that these thousands of individuals would enjoy the assistance of counsel in any individual action they might consider filing – thereby reinforcing that class status is the most appropriate form of action to remedy the failure of DOC to provide mandated access to medical care.

Hurrell-Harring v. State, 81 AD3d 69, 74 [3d Dept 2011] (granting class certification where class consisted of indigent criminal defendants seeking systemic reforms to state's public defense system because of the risk of multiple duplicative lawsuits and inconsistent rulings and because of overwhelming precedent in favor of certifying classes in cases seeking systemic reform).

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' Memorandum of Law in Support of Article 78 Mandamus to Compel Petition and Motion for Class Certification [ECF No. 6], Petitioners respectfully request that this Court order the requested relief by entering the proposed Order Granting the Petitioners' Mandamus to Compel and proposed Order Granting Petitioners' Motion for Class Certification [ECF Nos. 3, 77].

Dated: November 5, 2021
New York, New York

/s/ *Katherine Kelly Fell*
Katherine Kelly Fell

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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 1,322 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: November 5, 2021

/s/ Katherine Kelly Fell
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