UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

John DOE I and John DOE II, individually and on behalf of all others similarly situated,	)	**No. 20-CV-2183 (BMC)**
***Petitioners*,**	)	**(Hon. Brian M. Cogan)**
v.	)	
Ralph SOZIO, United States Marshal for the Southern District of New York; Bryan T. MULLEE, Acting United States Marshal for the Eastern District of New York; THE GEO GROUP, INC.; and William ZERILLO, Facility Administrator, Queens Detention Facility,	)	
***Respondents*.**	)	

U.S. MARSHALS' MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS AND MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS

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PRELIMINARY STATEMENT

Petitioners John Doe I and John Doe II are awaiting sentencing for serious federal crimes. They are currently incarcerated at the Queens Detention Facility ("QDF"), a 230-bed private jail in Jamaica Plains that is run by GEO Secure Services, a division of Respondent The GEO Group, Inc. ("GEO"), under a contract with the United States Marshals Service ("USMS" or "the Marshals"). Doe I tested positive for the novel coronavirus in mid-April, during a hospitalization for an asthma attack. On April 15, he filed an application under 18 U.S.C. § 3145 with the judge presiding over his criminal case, seeking release from custody based on his concern that GEO had not taken sufficient measures to prevent the spread of COVID-19 at QDF. [redacted] the judge denied Doe I's bail application on April 18, [redacted].[1] Meanwhile, Doe II, a convicted sex trafficker and member of a violent street gang, has never applied for bail to the judge presiding over his criminal proceeding. He claims to have been exposed months ago in QDF to the novel coronavirus, and he believes he actually contracted the disease, but because he has never had a fever or exhibited symptoms sufficiently severe to warrant testing under guidelines published by the Centers for Disease Control ("CDC") and the City Department of Health ("DOH"), GEO has not given him a coronavirus test.

The two John Does filed this action on May 13 against the Marshals, GEO, and the QDF administrator, William Zerillo. The Petition (ECF No. 1) seeks a writ of habeas corpus under 28 U.S.C. § 2241, claiming that the conditions of Petitioners' confinement at QDF are unconstitutional because GEO's alleged failure to protect them from COVID-19 constitutes deliberate indifference to a substantial risk of harm in violation of the Eighth Amendment. Petitioners seek "immediate release from GEO Queens

[1] Aspects of Petitioners' criminal cases are sealed. To protect Petitioners' anonymity and the sealed details of their criminal cases, we have redacted certain passages from the publicly-filed version of this Memorandum and will file an unredacted version under seal.

confinement, with such conditions as may be necessary or appropriate." Petition, at 42. Alternatively, they ask the Court to effectively take over the management of QDF from GEO, either by ordering a litany of specific COVID-19 mitigation measures, or by appointing a special master to determine who should be released or what mitigation measures should be taken. Petition, at 42-43.

Along with their habeas petition, Petitioners filed a motion for a temporary restraining order ("TRO") and a preliminary injunction ("PI") (ECF No. 4). This motion seeks the same relief as the habeas petition, except that the main *ad damnum* is differently worded, seeking "immediate release *on bail* from pretrial or presentence detention at Queens Detention Facility, with such conditions as may be necessary or appropriate." On May 19, this Court denied the TRO, combined the habeas petition and the PI motion, and directed the Marshals and GEO to respond by May 25.

The Petition must be dismissed, and the PI motion denied. There is no basis to release either of the Petitioners from federal custody. For each Petitioner, the proper procedure for seeking such release is through the Bail Reform Act, 18 U.S.C. §§ 3141 *et seq*., in the court where they were convicted, not a habeas petition in a new forum. Doe I applied for bail in his criminal case, [redacted] but it was denied [redacted]; Doe II never even bothered to seek bail, and has not shown why he cannot do so now. Even assuming a habeas petition under 28 U.S.C. § 2241 is a proper vehicle, it must be dismissed for failure to exhaust administrative remedies; because the petition challenges the conditions of Petitioners' confinement rather than the fact or duration of confinement, the exhaustion requirement set forth in the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, applies. Plaintiffs have not alleged or shown that they exhausted administrative remedies before filing suit, but instead incorrectly claim that QDF does not have a grievance procedure available. Even if they had exhausted, habeas would still not be allowed because the PLRA bars release for conditions of confinement except by a three-judge court. *See* 18 U.S.C. § 3626.

With respect to the injunctive relief Petitioners alternatively seek by their petition and PI motion, Petitioners lack standing to seek the prospective prophylactic relief described in their papers, which cannot

redress their injury since they have long since been exposed to, and in fact claim to have already contracted, COVID-19. To the extent standing exists, GEO – not the Marshals – is the proper respondent with respect to injunctive relief. Although the Marshals are the Petitioners' legal custodian, USMS does not run QDF on a day-to-day basis and is not responsible for managing conditions of confinement there, including attending to the daily jail medical needs of inmates. GEO handles these tasks under the terms of its contract.

Petitioners' demand that the Court take over the management of QDF in the midst of a rapidly-evolving pandemic or appoint a special master to do so is wholly inappropriate, both because of its sheer impracticality and because it flies in the face of decades of precedent cautioning deference to the expertise of prison administrators. Meanwhile, GEO has repeatedly advised the Marshals and Chief Judge Mauskopf that it has taken and is taking all coronavirus mitigation measures called for by the CDC, and while the Marshals have not independently verified every detail of these reports, USMS has no reason at this juncture to doubt their veracity or to question GEO's compliance with the terms of its contract. [redacted]. The role of the judiciary is not to serve as "super wardens" of detention facilities or to ensure that jail inmates have no exposure to contagious diseases but rather to ensure that facilities such as QDF fulfill their legitimate penological objectives within the bounds of the Constitution. Petitioners have shown no right to relief here, and should receive none.[2]

[2] Petitioners purport to sue on behalf of themselves and "all others similarly situated," and their habeas petition includes allegations in pursuit of class certification. However, because Petitioners have not moved for class certification under Fed. R. Civ. P. 23 and this Court's May 18 scheduling order did not direct the Government to respond to such a purported motion, this Memorandum only addresses the allegations and claims of the Petitioners themselves and not any other detainees at QDF. In the event Petitioners subsequently move for class certification, the Government will respond separately. *See* ECF No. 28. In the meantime, the Government respectfully submits that classwide relief here is categorically inappropriate because, *inter alia,* (a) any inmate seeking habeas or injunctive relief for conditions of confinement must independently exhaust his administrative remedies before seeking such relief, and (b) whether any specific pretrial or presentence inmate merits release or injunctive relief based on his conditions of confinement requires an individualized assessment of that inmate's specific medical history and condition, as well as the procedural history and posture of his criminal case and the nature of his criminal conduct. Put otherwise, under no circumstances would Petitioners be able to satisfy the commonality, typicality, and ascertainability requirements of Fed. R. Civ. P. 23.

BACKGROUND

A. The Marshals' Role at QDF.

USMS detains federal pretrial and presentence inmates that have been remanded to its custody by a federal judicial officer pursuant to 18 U.S.C. §§ 3142, 3143. *See* Declaration of Bud G. Spellman, III (annexed), ¶ 3. It has no authority to release prisoners in its custody, absent an order from the U.S. District Court that issued the remand order. *Id.* As USMS does not own or maintain detention facilities, it houses federal prisoners in its custody in Bureau of Prisons (BOP) pretrial facilities, in state and local detention facilities pursuant to Intergovernmental Agreements (IGA), or in private jails pursuant to contracts. *Id.* ¶ 4. GEO's QDF falls in this last category, *id.* ¶¶ 5-6, and provides the USMS bed space for up to 230 prisoners at a fixed daily contract rate. *Id.* ¶ 6. As of May 22, 2020, USMS was utilizing 166 of the 230 contracted prisoner beds at QDF. *Id.* ¶ 10.

Under its agreement with USMS, GEO is responsible for the day-to-day management of QDF, including all conditions of confinement. It is required to provide secure custody, safekeeping, housing, subsistence, and care of USMS prisoners in accordance with all federal, state, and local laws, standards, regulations, policies, and all applicable court orders. *Id.* ¶ 8. GEO is also responsible for providing all inmate medical care at QDF, including monitoring and maintaining the health of all prisoners housed there. *Id.* ¶ 9. GEO is required to house USMS prisoners pursuant to the Federal Performance-Based Detention Standards ("FPBDS"),[3] and/or any other standards delineated in its contract. USMS's principal method of ensuring compliance with the FPBDS and the contract terms is by conducting a yearly on-site Quality Assurance Review ("QAR"), the most recent of which took place in September 2019 (before the pandemic commenced), when QDF's overall facility operation received a rating of Satisfactory. *Id.* ¶ 8. Additionally, USMS assigns an on-site Detention Contract Monitor ("DCM") as a tool to help maximize contract compliance. Owing to the pandemic, however, USMS's administrative personnel, including the DCM, have not been able to maintain a physical on-site presence at QDF since March 15, 2020; during that time, USMS

[3] Available at https://www.usmarshals.gov/prisoner/detention-standards.pdf and as Spellman Decl. Exh. B.

has been exercising these functions remotely, including by obtaining updates from GEO as to the steps it has been taking regarding the pandemic. Circumstances permitting, USMS plans to resume its physical on-site presence at the facility in mid-June. *Id.*

Because USMS does not own or maintain detention facilities, it does not itself have an administrative remedy program for inmate grievances but instead relies on its partners who manage detention facilities to implement such programs. GEO has a robust administrative remedy program at QDF that complies with the FPBDS, and all inmates housed there are made aware of this program at intake. *Id.* ¶ 7 & Exh. A.

As is true for the rest of the country, the COVID-19 pandemic has created unique and significant operational challenges for QDF, but GEO has mapped out a containment and mitigation strategy informed by guidance from CDC and DOH. On April 2, the Chief Judge issued Administrative Order 2020-14, which ordered QDF along with the two BOP facilities in the City to submit biweekly status reports "concerning the incidence of infection of COVID-19 at each facility and the measures undertaken to mitigate the spread of COVID-19 within each facility." *See* Spellman Decl. ¶ 12. In accordance with that order, GEO has submitted 15 reports outlining the steps it has taken at QDF and the results of those steps. *See* **Error! Hyperlink reference not valid.**. GEO has provided copies of these reports to USMS upon submitting them to the Court. Spellman Decl. ¶ 12. USMS has not independently verified the accuracy of GEO's reports by vetting their details or factual bases, but to date it has no basis for believing that GEO's representations as to mitigation measures or the results thereof are inaccurate. *Id.*

B. The Petitioners.

1. John Doe I

Doe I is a 26 year old man who has been detained at QDF since March 18, 2019, while awaiting sentencing. Petition ¶ 11 [redacted]

[redacted]. Doe I has a history of intermittent asthma. According to the petition, he began "experiencing symptoms of COVID-19 on April 11, 2020." Petition ¶ 11. On April 13 he was sent to Franklin Hospital for symptoms of shortness of breath, treated, and released back to QDF the same day. Declaration of John Doe I ("Doe I Decl.") (ECF No. 6) ¶ 7.

While hospitalized, Doe I was tested for the novel coronavirus, the results of which, he was told on the morning of April 15, came back positive. *Id.* ¶ 8. Doe I does not allege showing any signs of fever since daily temperature checks began in early April. *See, e.g.,* Doe I Decl. ¶ 10 & Exh. C (showing afebrile as of April 19 and 24 and mentioning frequent temperature checks but omitting mention of any fever).

[redacted]

[redacted] Doe I has not made any further applications to his sentencing court.

2. John Doe II

Doe II is a 35 year-old man who has been detained at QDF since March 19, 2018. Petition ¶ 13. [redacted]

[redacted]

Since pleading guilty more than two years ago, Doe II has never filed a motion for bail or release with the district court presiding over his criminal case, even after the coronavirus pandemic began. *Id.* ¶ 8.

[redacted]

According to the Petition, Doe II "has suffered from asthma since childhood and also has hypertension; he is pre-diabetic and clinically obese. Due to his pulmonary issues, GEO Queens placed him on its list of inmates at 'high risk' from COVID-19." Petition ¶ 12. He contends that he was exposed to the coronavirus by close contact for a long time with inmates who were COVID-19 positive, and believes that he in fact "contracted COVID-19." Doe II Decl. (ECF No. 6) ¶ 7, 12-13. Doe II alleges that he experienced "symptoms consistent with COVID-19" *in February,* including "shortness of breath and sore throat." *Id.* ¶ 6;

Petition ¶ 12. He currently claims only mild symptoms, such as congestion, sore throat, and chest pain that he treats with his asthma pump, along with hypertension. Doe II Decl. ¶ 17. He does not allege that he has ever had a fever in the last few months and says this is the reason he has not been tested. *Id.* ¶ 7 Doe II admits he has not sought a doctor's appointment since April 24, and that when his lungs were checked on that date they were found clear to auscultation, as was true on his previous visit. *See id.* ¶ 10 & Exhs. A, C.

ARGUMENT

I. THERE IS NO BASIS TO RELEASE EITHER PETITIONER FROM FEDERAL CUSTODY, AND THE § 2241 HABEAS PETITION MUST BE DISMISSED.

A. It is Questionable Whether § 2241 Habeas May Even be Sought to Challenge Conditions of Confinement.

The Supreme Court has repeatedly drawn a line between "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991). Challenges to the fact or duration of confinement are those in which the prisoners' success would "necessarily imply the invalidity of their convictions or sentences." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). By contrast, challenges to the conditions of confinement are those in which petitioners "allege[] unconstitutional treatment of them while in confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

The categorization of a prisoner's challenge determines whether the prisoner's proper avenue for relief is through a petition for habeas corpus or a civil rights action. "[W]here an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," that claim "fall[s] within the 'core' of federal habeas." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). "By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core." *Nelson*, 541 U.S. at 643. The Supreme Court has held that a prisoner who is not "seeking a judgment at odds with his conviction or with the State's calculation of time to be served" is not raising a claim "on which habeas relief could [be] granted on any recognized theory." *Muhammad v. Close*, 540 U.S. 749, 754–755 (2004) (*per curiam*). Moreover, courts have repeatedly held that habeas is an inappropriate form of collateral attack when unsentenced detainees can seek release in their

pending criminal cases, as they can here. *See Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 246–48 (3d Cir. 2018); *Medina v. Choate*, 875 F.3d 1025, 1029 (10th Cir. 2017); *Falcon v. BOP*, 52 F.3d 137, 139 (7th Cir. 1995); *Fassler v. United States*, 858 F.2d 1016, 1017–19 (5th Cir. 1988).

Here, Petitioners do not challenge the fact or duration of their confinement – they have pled guilty and are awaiting sentencing. They solely challenge the *conditions* of that confinement. Although the Second Circuit has never explicitly held that prisoners can bring a habeas petition under 28 U.S.C. § 2241 to challenge the conditions rather than the fact or duration of their confinement,[4] *dicta* in several appellate decisions suggest that such petitions could theoretically proceed. *See, e.g., Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008); *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001); *Carmona v. BOP*, 243 F.3d 629, 632 (2d Cir. 2001); *Roba v. United States,* 604 F.2d 215, 219 (2d Cir. 1979); *Kahane v. Carlson*, 527 F.2d 492, 498-99 (2d Cir. 1975) (Friendly, J., concurring). None of these *dicta* discuss the Supreme Court precedent cited above (with the exception of Judge Friendly's concurrence in *Kahane*, which briefly discusses *Preiser*), or the decisions of sister Circuits holding the opposite way. Nevertheless, a number of judges within this Circuit, including this Court, have cited these *dicta* to allow § 2241 petitions challenging the conditions of confinement. For the reasons set forth below, however, the Court should not recognize a habeas remedy in this case.

B. Habeas is Unavailable Because the PLRA Bars Release for Conditions of Confinement Except by a Three-Judge Court.

The Prison Litigation Reform Act, or PLRA, creates a carefully reticulated scheme for "the entry and termination of prospective relief in civil actions challenging prison conditions." *Miller v. French*, 530 U.S. 327, 331 (2000). And it broadly defines a "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison," while excluding "habeas corpus

[4] Such a holding would be at odds with the decisions of most other Circuits, which have unequivocally held that suits challenging conditions of confinement are not cognizable in habeas. *See, e.g., Spencer v. Haynes*, 774 F.3d 467, 469-470 (8th Cir. 2014); *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013); *Cardona v. Bledsoe*, 681 F.3d 533, 535-537 (3d Cir.), *cert. denied*, 568 U.S. 1077 (2012); *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035-1038 (10th Cir. 2012); *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005). *But see Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014).

proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). As the Supreme Court has explained, the PLRA tracks the distinction discussed above between habeas suits challenging the "fact or duration of confinement itself," and civil actions "challenging the conditions of confinement." *Porter v. Nussle*, 534 U.S. 516, 527-528 (2002).

Again, Petitioners here indisputably challenge only the conditions of their confinement and do not attack the fact or duration of their detention. In neither their Petition nor their motion do Petitioners make any claims or allegations regarding the fact or duration of their detention. The mere fact that they seek release from custody does not automatically convert their civil rights action to a habeas "fact or duration" challenge, since the PLRA clearly contemplates that actions challenging "prison conditions" may lead to release in rare circumstances where the conditions cannot be redressed; indeed, the statute sets out detailed requirements governing how and when such a "prisoner release order" may be issued. *See* 18 U.S.C. § 3626(a). In *Brown v. Plata*, 563 U.S. 493, 507-08, 511 (2011), the Supreme Court considered the application of that PLRA provision to two cases in which California prisoners alleged that overcrowding and deficiencies in medical care constituted an Eighth Amendment violation that entitled them to orders granting the release or transfer of a portion of the state prison population. The Court never once questioned that the suit was a challenge "to prison conditions" that was squarely governed and limited by the PLRA. *Id.* at 530; *see also Porter*, 534 U.S. at 532 (recognizing that the PLRA covers "all inmate suits about prison life").

Congress enacted the PLRA to "revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns[,]" in order to remove the federal judiciary from day-to-day prison management. *Gilmore v. California*, 220 F.3d 987, 991, 996-97 (9th Cir. 2000) (citing 141 Cong. Rec. S14418, at S14418-19 (1995); H.R. REP. NO. 104-378, at 166 (1995); *and* H.R. REP. NO. 104-21, at 24 n.2 (1995)). 18 U.S.C. § 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms ... restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population,'" *Plata*, 563 U.S. at 511. The PLRA's

"requirements ensure that the 'last remedy' of a population limit is not imposed 'as a first step.'" *Id.* at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)).

The PLRA precludes this Court from ordering the primary relief Petitioners seek here. Under the PLRA, "the authority to release prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court." *Plata*, 563 U.S. at 500; *see* 18 U.S.C. § 3626(a)(3)(B) ("In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court[.]").[5] Moreover, such an order may not be entered unless "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). Additionally, a three-judge court may order prisoners released to remedy unconstitutional prison conditions "only if the court finds by clear and convincing evidence" that "crowding is the primary cause of the violation" and "no other relief will remedy [it.]" 18 U.S.C. § 3626(a)(3)(E)(i)-(ii). Therefore, to the extent Petitioners seek an order that would require their "release promptly on bail" (or the release of any other detainees at QDF), the PLRA expressly precludes that relief.

Petitioners' sole rejoinder to this is a footnote claiming that the PLRA "provision concerning appropriate remedies with respect to prisons conditions, 18 U.S.C. § 3626, does not limit this Court's authority to grant such relief in this case." Pet. Mem. Mot. for P.I. (ECF No. 4-1), at 16 n.35. Petitioners are simply wrong. They disingenuously cite *Carmona*, but that decision does not help them. *Carmona* was not a systemic conditions of confinement case but instead a challenge to a BOP disciplinary decision that caused the inmate to lose good-time credits and therefore ultimately affected the duration of his confinement. *Carmona* did not discuss 18 U.S.C. § 3626 at all but instead mentioned, in fleeting *dicta*, that a different provision of the PLRA (dealing with court filing fees, 28 U.S.C. § 1915(a)(2)), had been held inapplicable in

[5] Under the PLRA, a "prisoner release order" "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4).

habeas proceedings brought under 28 U.S.C. § 2254. *Carmona,* 243 F.3d at 634. The decision has no bearing on this case. Nor do Petitioners cite any other authority for the notion that the PLRA does not apply here.

In sum, Petitioners have no legal basis to seek the relief they are pursuing through a habeas petition. As another district court recently recognized, although "the issue of inmate health and safety is deserving of the highest degree of attention," an "order imposing a court-ordered and court-managed 'process' for determining who should be released" from a state prison in response to the COVID-19 pandemic falls "squarely within Section 3626(a)(3) – which forbids this Court from granting it." *Money v. Pritzker*, No. 20-CV-2093, 2020 WL 1820660, at *1, *13 (N.D. Ill. April 10, 2020) (citing 18 U.S.C. § 3626(a)(3)(B)); *see also Plata v. Newsom*, __ F. Supp. 3d __, No. 01-cv-01351-JST, 2020 WL 1908776, at *2 (N.D. Cal. Apr. 17, 2020) (denying emergency motion regarding prevention and management of COVID-19 and noting that, pursuant to the PLRA, the court lacked authority to grant the release or transfer, finding that a "prisoner release order" could only be granted by a three-judge court.). "[T]he release of inmates requires a process that gives close attention to detail, for the safety of each inmate, his or her family, and the community at large demands a sensible and individualized release plan – especially during a pandemic." *Money,* 2020 WL 1820660, at *1.

C. The Proper Procedure for these Presentence Inmates to Seek Their Release from Custody is the Bail Reform Act, Not a Habeas Petition.

Courts have repeatedly held that habeas is an inappropriate method of collateral attack on custody when pretrial and presentence detainees can seek release in their pending criminal cases, as Petitioners can here. *See Reese*, 904 F.3d at 246–48; *Medina*, 875 F.3d at 1029; *Falcon*, 52 F.3d at 139; *Fassler*, 858 F.2d at 1017–19. For each Petitioner here, the proper procedure for seeking release from custody is through the Bail Reform Act (BRA), 18 U.S.C. §§ 3141 *et seq.*, not a habeas petition.

The BRA provides the process by which the judge presiding over an inmate's criminal proceeding can assess *all* aspects of the decision to detain or release him, including not only his health and the conditions in which he is held in custody but also the danger he would pose to the community if he were to be released, as well as his risk of flight. *See, e.g.,* 18 U.S.C. § 3142 (in determining "whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and

the community," the court "shall ... take into account the available information concerning," *inter alia*, "the history and characteristics of the person, including ... the person's ... physical and mental condition[.]").[6] Individual motions for release under the BRA allow judges to undertake the necessary inmate-specific inquiry, and are the proper legal vehicle for pretrial and presentence inmates to attempt to obtain release due to health risks posed by the COVID-19 pandemic.[7] *See United States v. Pejcinovic*, No. 18-CR-767 (VM), 2020 WL 2489593, at *1–2 (S.D.N.Y. May 14, 2020) (considering application for release under BRA and holding COVID-19 threat "to the health of inmates with serious medical conditions ... may present a compelling reason warranting certain defendants' temporary release on bail. However, numerous courts have nevertheless denied bail to defendants with underlying health conditions where the risks that justified the defendants' initial detention continued to outweigh the risks that continued incarceration might pose for the defendants' health"); *United States v. Chambers*, 20-CR-135 (JMF), 2020 WL 1530746, at *1 (S.D.N.Y. Mar. 31, 2020) (denying bail to defendant with asthma who cited threat from COVID-19; based upon his criminal history and the nature of the present charges which involved at least two gunpoint robberies, "Chambers is far too great a danger to the community to justify his release."); *United States v. Hamilton*, 19-CR-5401 (NGG), 2020 WL 1323036, at *1-2 (E.D.N.Y. Mar. 20, 2020) (denying bail to defendant with history of stroke and heart attack; "[G]iven the risks that Mr. Hamilton's release would pose, the court concludes that the possibility of an outbreak at MDC is not a 'compelling circumstance' justifying his release").[8]

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[6] In addition to the standard motions for release by pretrial defendants, 18 U.S.C. § 3142(b), or for post-conviction release, 18 U.S.C. § 3143, or bail pending appeal, 18 U.S.C. § 3143(b)(1), a pretrial defendant may seek release under 18 U.S.C. § 3142(i), which provides that a "judicial officer may, by subsequent order, permit the temporary release of [a] person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." Certain extreme medical circumstances may present "compelling reasons" that could warrant a highly circumscribed release.

[7] There is, of course, a presumption of detention under § 3143 for convicted defendants awaiting sentencing.

[8] The courts in the following cases also have considered applications for release by pre-sentence detainees based on COVID-19 under the BRA: *United States v. Perez*, No. 19-CR-297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (granting release pursuant to Section 3142(i) in light of COVID-19); *United States v. Stephens*, No. 15-CR-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (same); *United States v. Hadjiev*, No. 19-CR-548, 2020 WL 2494698, at *2 (E.D. Pa. May 14, 2020) ("A defendant seeking temporary release under § 3142(i) has already been subject to a Court determination that his pretrial detention was warranted ... the Court takes into consideration whether Defendant has presented such compelling reasons [potential exposure to COVID-19] that effectively override or at least sufficiently counterbalance the findings that originally justified the pretrial detention order."); *United States v. Gongda Xue*, No. 18-CR-122, 2020 WL 2307339, at *10 (E.D. Pa. May 8, 2020)("while the Court acknowledges that Defendant may suffer from some sort of asthma or

Tellingly, Petitioners' papers are entirely silent as to the nature of their criminal offenses, or the serious charges to which they pled guilty. Doe II, for example, is a violent gang member who pled guilty to sex trafficking by force, fraud, and coercion, and interstate transportation of individuals to engage in commercial sexual activity. He used violence, intimidation, threats, fraudulent promises, and controlled substances to compel at least four victims to engage in commercial sex, and controlled when the victims could eat and sleep. All of this information, along with his criminal history and his history of violating terms of supervision, is relevant to any decision whether he should be released from custody pending sentencing – a decision which should be made by the judge who will deliver that sentence. On an application for release under the BRA, which Doe II has never submitted, these factors would be closely considered alongside any claim that Doe II's health is jeopardized in custody. By tendentiously bringing a Petition for habeas and motion for PI that present an incomplete and one-sided picture of the relevant facts, he is attempting to undermine the very purpose of the BRA, not to mention the authority of his sentencing judge. *See, e.g., Gon v. Gonzales*, 534 F. Supp. 2d 118, 120 (D.D.C. 2008) ("In Gon's criminal case, Magistrate Judge Kay ordered Gon to be detained pre-trial under the federal bail statute. The court docket in Gon's case reflects that he is challenging the detention order before the assigned district judge. That is the appropriate path for Gon to follow. Filing this petition, by contrast, potentially abuses the writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional remedies afforded to safeguard Gon's liberty interests.").

Similarly, Doe I, who *did* apply for release under the BRA just a few weeks ago, unsuccessfully raising the same arguments he does now, is seeking a second bite at the apple, perhaps believing that by hiding his conduct history and focusing solely on what he alleges are GEO's inadequacies he can persuade this Court to give him what his own court of conviction would not. Such efforts should be rejected outright.

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respiratory condition and shares his concern about COVID-19, his case does not present a compelling reason to justify release pursuant to Section 3142(i)"); *United States v. Green*, 19-CR-539-ccb-1, 2020 WL 1873967, at *3 (D. Md. Apr. 15, 2020) ("in the context of the COVID-19 pandemic, Congress, through the Bail Reform Act, has tasked this Court with responsibilities to the community at large that go beyond COVID-19 such that the Court must give full consideration to *all* the consequences of a defendant's release as it impacts community safety"); *United States v. Cox*, No. 2:19-CR-271 (RFB) (VCF), 2020 WL 1491180, at *2 (D. Nev. Mar. 27, 2020). ("Based on the totality of the circumstance here [risk of prisoner with diabetes contracting Covid-19], and having conducted an individualized analysis, this Court does not find, at this time, that a 'compelling reason' exists under § 3142(i) to merit Mr. Cox's temporary release").

D. Even Assuming a 28 U.S.C. § 2241 Habeas Petition is the Proper Vehicle to Seek Release, it Must be Dismissed for Failure to Exhaust Administrative Remedies.

Inmates seeking habeas corpus under 28 U.S.C. § 2241 based on conditions of confinement are subject to two separate exhaustion requirements, one statutory and one prudential. As Petitioners have complied with neither, their habeas petition must be dismissed.

First, the PLRA imposes a statutory exhaustion requirement mandating that "[n]o action shall be brought with respect to prison conditions under … any … Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) ("Exhaustion … is mandatory."). Under the PLRA's broad definition of "action," this requirement applies to any suit challenging conditions of confinement, whether labeled a habeas petition or a civil rights action. The PLRA's mandatory exhaustion requirement applies equally to pretrial and presentence criminal detainees, 42 U.S.C. § 1997e(h), and, indeed, "all inmate suits about prison life[.]" *Porter*, 534 U.S. at 532; *see also Cutter v. Wilkinson*, 544 U.S. 709 n.12 (2005). Exhaustion requires compliance with "all steps" of the facility's grievance system. *Woodford*, 548 U.S. at 88, 90–91. Claims that were not properly and fully exhausted prior to filing suit are barred. *Jones v. Bock*, 549 U.S. 199, 211 (2007). "This exhaustion obligation is mandatory—there are no 'futility or other judicially-created exceptions to the statutory exhaustion requirements." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)).

Second, regardless whether the petition challenges the fact/duration of confinement or the conditions of confinement, it is well-settled that an inmate must exhaust his administrative remedies prior to filing *any* habeas petition under 28 U.S.C. § 2241. *See Carmona,* 243 F.3d at 634 ("federal prisoners must exhaust their administrative remedies prior to filing a petition for habeas relief"); *accord Medina-Rivera v. Terrell*, No. 11-CV-734 (BMC), 2011 WL 3163199, at *1 (E.D.N.Y. Jul. 26, 2011) (dismissing *habeas* claim based on conditions of confinement for failure to exhaust administrative remedies). This mandatory requirement is not statutory, but rather prudential. *See id.*; *see also Stergios v. United States*, 09-CV-5108 (SLT), 2010 WL 169484, at *2 n.1 (E.D.N.Y. Jan 15, 2010). The purpose of this prudential exhaustion requirement is to "protect[] the authority of administrative agencies, limit[] interference with agency affairs, develop the factual record to

make judicial review more efficient, and resolve issues to render judicial review unnecessary." *Owusu-Sakyi v. Terrell*, No. 10–CV–507 (KAM), 2010 WL 3154833, at *3 (E.D.N.Y. Aug. 9, 2010); *see also Lopez v. Terrell*, No. 09 Civ. 8148(RJH), 2010 WL 2834830, at *1 (S.D.N.Y. Jun. 4, 2010). An inmate's failure to exhaust available administrative remedies results in a procedural default, which bars habeas review unless the petitioner persuades the court that the failure to administratively exhaust should be excused. *See Carmona*, 243 F.3d at 634; *Medina-Rivera*, 2011 WL 31363199, at *1; *Bogarty v. BOP*, No. 09-CV-3711 (RJD), 2009 WL 4800089, at *1 (E.D.N.Y. Dec. 11, 2009).

Here, Petitioners do not allege that they have exhausted administrative remedies and instead concede that they have not. *See* Petition ¶ 22. They allege that GEO does not offer an administrative grievance or remedy program at QDF, but this is patently false. In fact, GEO has a robust administrative remedy program at QDF that complies with the FPBDS, and all inmates housed there are made aware of this program at intake. Spellman Decl. ¶ 7 & Exh. A (*see* Section C.8).

Petitioners argue they are exempt from the prudential exhaustion requirement that applies under § 2241. Petition ¶ 22. For the reasons discussed in the following paragraph, the grounds they articulate for such an exemption entirely lack merit, but they face a more fundamental problem: they are required to comply *both* with the PLRA's statutory exhaustion requirement applicable to conditions of confinement challenges *and* with the prudential requirement applicable to habeas petitioners. They do not claim exemption from the PLRA's requirements, nor can they. As the Supreme Court has made clear, the PLRA's "exhaustion obligation is mandatory—there are no 'futility or other judicially-created exceptions to the statutory exhaustion requirements." *Booth*, 532 U.S. at 741 n.6.

Petitioners argue that prudential exhaustion can be excused where inmates may suffer irreparable harm to their health from exposure to COVID-19 without immediate judicial relief. Petition ¶ 23. Even assuming the cases they cite articulate valid principles of law, Petitioners here have made so such showing: Doe I has, by all signs, fully recovered from his bout with the virus, and Doe II, who believes he contracted COVID-19 long ago, has by his own admission not sought a doctor's visit since April 24, at which time his

lungs were clear. Neither of them alleges he has been febrile in the last few months, and nothing in their submissions indicates that their conditions are so dire that the time it would take to exhaust administrative remedies would lead to their demise.[9] Petitioners also contend that the exhaustion requirement should be excused "[b]ecause there are no other avenues for relief," *id.*, but as already seen Petitioners are incorrect, insofar as they have recourse through the BRA and may also pursue a tort action against GEO for alleged negligence in failing to prevent them from contracting COVID-19.

In the absence of administrative exhaustion, the habeas petition must be dismissed. *See Medina-Rivera*, 2011 WL 31363199, at *1; *Bogarty*, 2009 WL 4800089, at *2; *Stergios*, 2010 WL 169484, at *2.

II. PETITIONERS HAVE SHOWN NO ENTITLEMENT TO INJUNCTIVE RELIEF, AND THEIR PI MOTION MUST BE DENIED.

In addition to their request for habeas relief seeking immediate release, petitioners seek preliminary injunctive relief addressing the alleged conditions of their confinement by "compel[ling] GEO Queens to lessen the risk of serious illness or death of individuals in its care [by] implement[ing] immediate improvements to its testing, tracing, treatment, sanitation, and isolation measures for those who remain." Petition ¶ 8. Petitioners claim that they are entitled to such relief because the conditions at QDF establish deliberate indifference to their medical needs which expose them to an unreasonable risk of serious harm, in violation of their Eighth Amendment rights. Petition ¶¶ 59-69. Petitioners seemingly direct their PI motion to "respondents" without differentiating whether the Marshals or GEO supposedly created or failed to remediate the allegedly unconstitutional conditions. As discussed below, the Marshals are not proper parties to the PI claim. In any event, whether Petitioners seek injunctive relief against GEO and Warden Zerillo alone or seek to include the Marshals in their request, they will be unable to satisfy the exacting standards necessary to obtain such relief, and their motion must be denied.

[9] To be sure, COVID-19 presents unusual circumstances, in which decisions regarding grievances should be made expeditiously. But permitting prisoners to ignore the PLRA's mandatory exhaustion requirement, even in these unusual times, would frustrate Congress's objective to "eliminate unwarranted federal-court interference with the administration of prisons," and "reduce the quantity and improve the quality of prisoner suits." *Woodford*, 548 U.S. at 93 (*quoting Porter*, 534 U.S. at 524). More problematically, permitting prisoners to ignore the PLRA's mandatory exhaustion requirement would deprive prisons of "a fair opportunity to correct their own errors," *id.* at 93, as Petitioners have done here by filing this lawsuit.

A. The Marshals are Not the Proper Respondent on the PI Motion.

To the extent Petitioners are seeking to mandate changes to the way QDF operates, GEO – not the Marshals – is the proper respondent. Although the Marshals are the Petitioners' legal custodian, USMS does not run QDF on a day-to-day basis and is not responsible for managing the conditions of confinement there, including attending to the daily medical needs of inmates; GEO handles these tasks under its contract with the Marshals. *See* Spellman Decl. ¶ 8. GEO is required to provide secure custody, safekeeping, housing, subsistence, and care of USMS prisoners in accordance with all applicable laws, orders, and policies; it is also responsible for providing all daily inmate medical care at QDF, including monitoring and maintaining the health of all prisoners housed there. *Id.* ¶¶ 8-9. In the event the Court were to issue an injunction along the lines Petitioners seek, it would fall to GEO, not the Marshals, to take steps to comply with such an injunction. The Marshals are therefore not the proper respondent.

B. Standard for a Preliminary Injunction

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013). An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted. *Mazurek*, 520 U.S. at 972.

Petitioners have the high burden of proving the need for injunctive relief; Respondents bear no burden to defeat the motion. *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442-43 (1974). And where, as here, "[a] plaintiff ... seeks a preliminary injunction that will alter the status quo," that plaintiff must go beyond a showing of a mere likelihood of success and "must demonstrate a 'substantial' likelihood of success on the merits." *New York Progress*, 733 F.3d at 486; *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is ... to preserve the relative positions of the parties."); *N.*

Am. Soccer League, LLC v. United States Soccer Fed., Inc., 883 F.3d 32, 37 (2d Cir. 2018) ("Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits."); *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000) (where "the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme," and would alter the status quo, injunction is appropriate only if the moving party has a "clear" or "substantial" likelihood of success on the merits).

C. Petitioners Have Not Shown a Substantial Likelihood of Success on the Merits.

Petitioners have not shown a clear and substantial likelihood of success on the merits of their claims. Far from it – they have shown that their claims have no merit at all. To the extent that Petitioners by their PI motion seek their release from custody, their motion fails abjectly for all of the reasons stated in Part I, not the least of which is their failure to exhaust administrative remedies. To the extent that Petitioners seek injunctive relief against the Marshals with respect to the conditions of confinement, the motion lacks merit for the reasons stated in Section A of this Part. To the extent Petitioners seek injunctive relief against GEO to compel changes to its COVID-19 mitigation steps, the Marshals defer to GEO to address the details of Petitioners' allegations and claims, but offer the following observations as friends of the Court.

1. Petitioners lack standing to seek injunctive relief.

As an initial matter, both Petitioners lack standing to seek the injunctive relief described in their motion. A party invoking federal jurisdiction bears the burden of establishing standing for each type of relief sought. *See Summers v. Earth Island*, 555 U.S. 488, 493 (2009). In order to establish standing, a plaintiff must show, as "the irreducible constitutional minimum," that: (1) he has suffered "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). When seeking injunctive relief, a plaintiff "'cannot

rely on past injury to satisfy the injury requirement but must show a likelihood that he ... will be injured in the future.'" *Shain v. Ellison,* 346 F.3d 211, 215 (2d Cir. 2004).

Here, Petitioners cannot satisfy the third element of standing – redressability of the alleged injury through injunctive relief. Both of them allege that they have already contracted COVID-19. *See* Doe I Decl. ¶ 8; Doe II Decl.¶ 7. Doe I tested positive on April 14, some six weeks ago, and the disease has almost certainly run its course. Doe II has never been tested (having never shown signs of fever), but states under penalty of perjury *that he believes that he was exposed to and contracted COVID-19 long ago*. Doe II Decl. ¶¶ 7, 12-15. At the very least, the gist of his declaration is that, in close living quarters and for an extended duration, he has been exposed extensively to those testing positive as well as those simply symptomatic for this extremely contagious disease. *See* Doe II Decl. ¶¶ 7, 11-13, 17.

The injunction Petitioners seek is an order directing GEO to implement contact tracing, expanded testing, augmented hygiene and PPE supplies, appropriate isolation and quarantine for COVID-19 positive inmates, and professional cleaning of the facility. Whether these measures are advisable is beside the point. None of these measures would in any way change or redress the fact that both Petitioners already contracted COVID-19 and survived it, as evidenced by their own sworn statements. As Doe I's sentencing judge said in denying his bail application, [redacted] Doe I bemoans that it is impossible for him to practice social distancing, stay adequately clean, or protect himself from the virus with the inadequate PPE that he has allegedly received, but none of this matters if he has already had the disease and recovered from it, as he alleges he has.

As the Second Circuit has made clear, Petitioners "cannot rely on past injury" to obtain prospective relief. *Shain,* 346 F.3d at 215. If Petitioners believe that GEO's alleged negligence in operating the facility caused them to suffer those past injuries, they have remedies at law they can pursue,[10] but they have no basis

[10] *Cf. Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001) ("federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities…. This case demonstrates as much, since respondent's complaint in the District Court arguably alleged no more than a quintessential claim of negligence. It maintained that named and unnamed defendants were 'negligent in failing to obtain requisite medication ... and were further negligent by refusing ... use of the elevator.' It further maintained that respondent suffered injuries '[a]s a result of the

to seek prospective remedies such as those they seek here. *See Coalition of Mercury-Free Drugs v. HHS*, 671 F.3d 1275, 1279-80 (D.C. Cir. 2012) (dismissing for lack of standing claims for injunctive relief, reasoning that *past* injuries cannot be redressed by, and thus cannot establish standing for, *prospective* injunctive relief).[11]

2. Doe I is estopped from contradicting the statements in his bail application.

Judicial estoppel "bars a party from asserting a position in a later litigation that is inconsistent with his position in an earlier litigation." *Thomas v. Digglio*, No. 15-CV-3236 (BMC), 2016 WL 7378899, at *8 (E.D.N.Y. Dec. 20, 2016) (citing *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999)). The doctrine has three requirements: (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) judicial acceptance of the inconsistent positions would create the perception that one of the courts was misled; and (3) the party asserting an inconsistent positon would derive an unfair advantage if not estopped. *See Thomas*, 2016 WL 7378899, at *8 (*citing New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)). All three elements are present here.

Contrary to the position he now takes in this case, [redacted]

negligence of the Defendants.'"). *See also Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (equitable injunctive relief is not available in federal court "in any case where plain, adequate and complete remedy may be had at law"); *Dillon v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980); *Times Newspapers, Ltd. (of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, Appx. A (C.D. Cal 1974) (recognizing persuasive authority that "[i]njunction won't lie where there is adequate remedy at law").

[11] Petitioners also contend that, without the injunctive relief they seek, they might contract COVID-19 a second time. These contentions do not pass muster under the first element of standing, injury-in-fact, which must be "actual and imminent" and may not be "conjectural and hypothetical." *Defenders of Wildlife*, 504 U.S. at 560. John Doe I's sentencing judge [redacted] The same is true for the PI relief sought here. *See Shain,* 346 F.3d at 216 ("[T]o establish a sufficient likelihood of a future unconstitutional strip search, Shain would have to show that if he is arrested in Nassau County and if the arrest is for a misdemeanor and if he is not released on bail and if he is remanded to NCCC and if there is no particularized reasonable suspicion that he is concealing contraband, he will again be strip searched. Such an accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective injunctive relief."); *Vaughn v. Consumer Home Mort. Co.*, No. 01-CV-7937(ILG), 2006 WL 2239324, at *5 (E.D.N.Y. Aug. 4, 2006) (finding that plaintiff had failed to plead a concrete injury, where such required an "accumulation of inferences" that, for example, plaintiff would again enter the home market, would be tricked by predatory lenders, and would discover that HUD had failed to do its job).

[redacted]

In this case, Doe I takes a diametrically opposed position that cannot be reconciled with his position from just a few weeks ago. To obtain the relief Doe I seeks here, he would have to persuade this Court that GEO has not actually taken the measures it has reported and that he will not receive appropriate care at QDF[redacted]. Doe I would derive an unfair advantage were this Court to adopt his inconsistent position: [redacted]. Such a result is plainly barred by the principles underlying the doctrine of judicial estoppel: "to "preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions and to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." *Thomas*, 2016 WL 7378899, at *8 (quoting *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037 (2d Cir. 1993)).

3. Petitioners have not shown that GEO is being deliberately indifferent to their medical needs or otherwise violating their constitutional rights.

Petitioners can succeed on their ultimate constitutional claims only if they can demonstrate that Respondents acted with "deliberate indifference" towards their well-being by consciously disregarding an excessive risk of harm to their health or safety. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment"). This requires proving two elements: first, Petitioners must show, objectively, that

Respondents' actions "constitute an unnecessary and wanton infliction of pain or [are] repugnant to the conscience of mankind." *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). In the context of exposing prisoners to risk of disease, a claim must be dismissed if the exposure does not pose a threat that is so severe that it would be "contrary to current standards of decency for anyone to be so exposed." *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Farmer v. Brennan*, 511 U.S. 825, 844-45 (1994) ("prison official's duty under the Eighth Amendment is to ensure 'reasonable safety,' a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions.").

Second, the petition must show that the respondent, subjectively, both "knows of and disregards an excessive risk to inmate health or safety"; that is, the respondent "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and ... must also draw the inference." *Farmer*, 511 U.S. at 837; *see also Baez v. Moniz*, No. 20-cv-10753 (LTS), 2020 WL 2527865 (D. Mass. May 18, 2020) (denying motion for a PI where petitioners failed to show deliberate indifference with respect to claims of Eighth Amendment violations at their facility, as petitioners had not established a likelihood of success on their constitutional claims); *Toure v. Hott*, No. 20-CV-395 (LO), 2020 WL 2092639 (E.D. Va. Apr. 29, 2020) (denying detainees' motion for a PI due to a purported COVID-19 outbreak at a detention facility, as "[p]laintiffs have not clearly established the defendants are deliberately indifferent to the complained-of risk, because the officials are not disregarding that risk."). Critically, even where "prison officials … actually knew of a substantial risk to inmate health or safety" and that particular harm ultimately occurs, the officials "may be found free from liability if they responded reasonably to the risk." *Farmer*, 511 U.S. at 844. Indeed, "officials who act reasonably cannot be found liable." *Id.* at 845.

Importantly, "a court cannot impose the same standards of medical care upon a prison as it would expect from a hospital." *Hutchinson v. West*, No. 04-CV-0135F, 2004 WL 1083194, at *3 (W.D.N.Y. Apr. 2, 2004); *see also Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir. 1986) (vacating preliminary injunction and explaining that a "correctional facility is not a health spa, but a prison in which convicted felons are incarcerated"; so long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not

give rise to an Eighth Amendment violation); *Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir. 1982) (the "Constitution does not command that inmates be given the kind of medical attention that judges would wish to have for themselves"), *vacated in part as moot*, 688 F.2d 266 (5th Cir. 1982).

Here, although Petitioners claim to be dissatisfied with the measures GEO has taken to protect inmates at QDF from the coronavirus, it is highly doubtful that they will prevail on a claim that GEO's response to the pandemic has been constitutionally inadequate or amounts to deliberate indifference to their well-being. Petitioners have fallen far short of establishing both that they have been deprived of "the minimal civilized measure of life's necessities," and that any such deprivation results from prison officials' "deliberate indifference," as the Eighth Amendment requires. *Farmer*, 511 U.S. at 834.

As discussed above, GEO has mapped out a mitigation strategy informed by guidance from CDC and DOH; it has submitted to the Chief Judge 15 reports outlining the steps it has taken at QDF and the results of those steps. *See* https://www.nyed.uscourts.gov/covid-19. USMS has not independently verified the accuracy of GEO's reports by vetting their factual bases, but to date it has no basis for believing that GEO's representations as to measures or the results thereof are inaccurate. Spellman Decl. ¶ 12. Petitioners have raised a litany of disputes concerning GEO's representations, to which GEO will respond in the first instance, but these claims of deliberate indifference should be taken with a grain of salt given that both Petitioners have either declined or not sought medical treatment in the last several weeks.

4. Petitioners' demand that the Court take over management of QDF or appoint a special master to do so is totally inappropriate.

Petitioners' demand that the Court effectively take over the management of QDF in the midst of a rapidly-evolving pandemic, or that it appoint a special master to do so, is not remotely appropriate, both because of its sheer impracticality and because such a request flies in the face of decades of precedent cautioning deference to the expertise of prison administrators.[12] The Supreme Court has repeatedly

[12] Despite asking the Court to short-circuit the criminal justice process through the appointment of a special master, Petitioners fail to even address the requirements for such an appointment in Fed. R. Civ. P. 53. Contrary to Rule 53(a)(1)(C), petitioners make no attempt to explain why criminal defendants cannot "effectively and timely" address their claims by the

admonished against invoking the Eighth Amendment to engage in judicial second-guessing of prison officials' response to difficult and evolving situations. *See Farmer*, 511 U.S. at 834, 836-37; *Turner v. Safley*, 482 U.S. 78, 85 (1987) ("[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *Jones v. Bergami*, No. 20-CV-132-DB, 2020 WL 2575566, at *2 (W.D. Tex. May 21, 2020) (denying putative class action and writ of habeas corpus where inmates alleged that facility had failed to respond appropriately to the COVID-19 pandemic, explaining that "the Court is mindful the Supreme Court has said 'federal courts ought to afford appropriate deference and flexibility to [prison] officials trying to manage a volatile environment.'") (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)).[13] It has also recognized that, even in normal times, an order requiring the release or transfer of prisoners "is a matter of undoubted, grave concern." *Plata*, 563 U.S. at 501. Such orders carry a high risk of jeopardizing public safety and inappropriately interjecting the Judicial Branch into difficult decisions regarding prison security and administration, despite the deference that is owed "to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." *Id.* at 511. That is all the more so when prison administrators must address the impact of a pandemic affecting the Nation at large.

Recently, in *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020) (*per curiam*), the Fifth Circuit stayed an injunction granting relief to a class of "disabled and high-risk" inmates in a state "prison for the elderly and infirm" that had experienced an outbreak of COVID-19 and several related deaths. The district court injunction did not order release or transfer, but instead imposed a series of requirements such as increased

"available district judge or magistrate judge of the district." *Id.* Indeed, incarcerated pre-conviction criminal defendants have already raised their COVID-19 concerns in other cases in this District and elsewhere.

[13] The "formidable task of running a prison" falls to the Executive Branch, and "separation of powers concerns counsel a policy of judicial restraint" and "deference to the appropriate prison authorities." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987). Prison officials, not special masters or judges, are the ones who "make the difficult judgments concerning institutional operations." *Pesci v. Budz*, 935 F.3d 1159, 1166 (11th Cir. 2019) (citing *Turner*, 482 U.S. at 89); *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018) (explaining the "substantial deference to the decisions of prison administrators because of the complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.").

cleaning and the provision of additional sanitizers and paper products. *Id.* at 799-800. Nonetheless, the Fifth Circuit held that the "intrusive order[]" inflicted irreparable harm on both the State and the public by diverting resources from the prison system's implementation of a systemic response to the pandemic. *Id.* at 803-804. And it found it apparent that the district court had erred in finding an Eighth Amendment violation. Although it recognized that "the district court might do things differently," the Fifth Circuit made clear that such disagreement with the officials' actions demonstrated no deliberate indifference to inmate welfare. *Id.* at 803; *see also Marlowe v. LeBlanc*, No. 20-30276, 2020 WL 2043425, at *2-*3 (5th Cir. Apr. 27, 2020) (*per curiam*) (staying a COVID-19 based preliminary injunction involving a "particularly vulnerable" inmate in a facility where "the virus has spread").

The Eleventh Circuit similarly stayed a COVID-19 injunction obtained by prisoners purporting to represent "a 'medically vulnerable' subclass of inmates" at a jail where "several inmates … ha[d] tested positive for the virus." *Swain v. Junior*, No. 20-11622, 2020 WL 2161317, at *1 (11th Cir. May 5, 2020) (*per curiam*). Like the Fifth Circuit, the *Swain* court determined that prison officials were likely to succeed on appeal because the district court's focus on the facility's "increase in COVID-19 infections" to show that officials "deliberately disregarded an intolerable risk" had misunderstood the Eighth Amendment inquiry and the requirements for a preliminary injunction. *Id.* at *4.[14] The same factors apply here.

D. <u>Petitioners Have Not Demonstrated Irreparable Harm.</u>

Assuming *arguendo* that Petitioners could somehow establish a clear and substantial likelihood of success on the merits, their motion still fails because they cannot establish the second prong, that they are "likely to suffer irreparable harm in the absence of preliminary relief." *New York Progress*, 733 F.3d at 486. As discussed above in Section C.1, Petitioners' alleged harm – that their continued detention increases the risk of harm from COVID-19 – is entirely speculative given that they have already contracted and recovered

[14] In a somewhat different context, the Ninth Circuit has largely stayed a preliminary injunction directing the release of immigration detainees and imposing numerous other requirements based on a parallel COVID-19 claim of deliberate indifference under the Due Process Clause. *Roman v. Wolf*, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020); *see Roman v. Wolf*, No. 20-cv-768, 2020 WL 1952656, *10-*12 (C.D. Cal. Apr. 23, 2020).

from the disease. Such harm is in any event hardly irreparable, both because Petitioners have recourse at law if their exposure to the disease was caused by GEO's negligence, and because they can seek release under the BRA if their condition warrants it. For those reasons alone, Petitioners' application demonstrates *no likelihood* that absent release, transfer, or mandated mitigation measures, they will suffer irreparable harm.

E. The Public Interest and Balance of Equities Favor Denying the PI.

Petitioners also fail to establish "that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *New York Progress,* 733 F.3d at 486. Petitioners base their equities argument on the claim that the health and safety of inmates are an important public value, arguing that if Petitioners contract the disease, get very sick, and are hospitalized, they will use hospital beds that the general public might need. *See* Pet. Br. 23-24. These arguments fall of their own weight when one considers that both Petitioners have already contracted and survived this disease. They have already passed through the eye of the needle, so to speak, rendering their fear of using up hospital beds speculative and illusory.

In any event, there are strong countervailing interests against issuing injunctive relief. In seeking detailed changes at QDF ranging from augmented PPE, to sanitation, to quarantine, to social distancing, to increased testing (some of which go well beyond what CDC currently recommends for correctional facilities), Petitioners essentially ask the Court to function as a "super-warden," which is not in the public interest. *See Swain,* 2020 WL 2161317, at *5 (staying injunction requiring prison's implementation of numerous measures to prevent COVID-19 spread, reasoning in part that "the district court assumed the role of 'super warden' that our decisions repeatedly condemn" and that "the injunction transfers the power to administer the Mero West facility in the midst of the pandemic from public officials to the district court," despite the fact that those officials are the ones with "years of experience running correctional facilities"); *see also Livas v. Myers*, No. 2:20-CV-00422, __ F. Supp. 3d __, 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020) (denying petitioners' motion for release of purportedly vulnerable inmates from a facility and dismissing action because, *inter alia*, court cannot serve as a "a de facto 'super' warden" of the facility)..

Indeed, just over two weeks ago, a district judge in San Diego considering a very similar case (detainees at a private contract facility sought injunctive relief in a habeas action against USMS) held that the inmates had not shown the balance of equities warranted injunctive relief. As Judge Sabraw held:

> [T]he Court could not issue injunctive relief without unfairly intruding on Defendants' operation of the prison system and defying Congress's clear policy determinations regarding challenges to prison conditions and prison orders. In addition, the public interest does not favor the immediate release of a class of inmates who may lack viable housing outside of [the prison facility] and may be deprived of access to food, means of personal hygiene and medical care if released ....

*Alvarez v. Laros*e, 20-cv-00782-DMS (AHG), 2020 WL 2315807, at *5 (S.D. Cal. May 9, 2020).[15] The reasoning of *Alvarez* applies with full force here. Because the public interest and balance of equities militate against injunctive relief, Petitioners' motion for a PI should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be dismissed, and the motion for preliminary injunction denied.

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[15] The district court in *Alvarez* also noted that, as Petitioners' "claims are based solely on the current conditions inside [the prison] given the COVID-19 pandemic," the claims "cannot be characterized as a 'habeas corpus proceeding challenging the fact or duration of confinement in prison,'" and are subject to the PLRA, including its exhaustion requirements. *Alvarez*, 2020 WL 2315807 at *3 (quoting 18 U.S.C. § 3626(g)(2)).