

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR FERNANDEZ-RODRIGUEZ, ROBER
GALVEZ-CHIMBO, SHARON HATCHER,
JONATHAN MEDINA, and JAMES WOODSON,
individually and on behalf of all others similarly
situated,

Petitioners,

-v.-

MARTI LICON-VITALE, in her official capacity
as Warden of the Metropolitan Correctional Center,

Respondent.

No. 20 Civ. 3315

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

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Petitioners Cesar Fernandez-Rodriguez, Rober Galvez-Chimbo, Sharon Hatcher, Jonathan Medina, and James Woodson (collectively, “Petitioners”) respectfully submit this memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 65, for a temporary restraining order and a preliminary injunction directing Respondent, the Warden of the Metropolitan Correctional Center in Manhattan (“MCC”), to take immediate action to address the uncontrolled spread of the COVID-19 virus in the facility and thereby protect the health of its inmate population.

PRELIMINARY STATEMENT

The MCC has responded to the ongoing outbreak of COVID-19 within the jail with a toxic mix of incompetence and indifference. More than a month after the first case, the MCC has no idea how far the virus has spread within its walls: it has failed to procure even a *single* COVID-19 test kit; and clearly symptomatic inmates linger for days in tightly-packed dorms where the virus can spread rapidly. Inmates want for soap, for masks, and for basic sanitation that is critical to fighting this pandemic. Plastic bags draped across unit entrances substitute for isolating the sick and protecting those who are well. And so COVID-19 spreads silently and unchecked across a dilapidated and overcrowded jail, housing over 200 inmates that the MCC itself has identified to be at high risk of serious illness or death from the disease. Three of the five Petitioners here have already suffered its symptoms.

The MCC’s failures are all the more egregious because they are preventable.

U.S. Attorney General William Barr, acting under new legislative authority, has directed federal correctional facilities to immediately reduce their populations. Yet the MCC has yet to release a single inmate under this authority, and continues to operate at 50 percent above capacity. The Centers for Disease Control and Prevention (“CDC”) has issued clear guidance as to what

correctional institutions must do to combat the spread of this deadly disease. The MCC has ignored it. The Federal Bureau of Prisons (“BOP”) itself has stressed the importance of widespread testing of both symptomatic and asymptomatic inmates. The MCC has tested almost no one.

The Court must act to stop this tragedy-in-the-making. The utter disregard the MCC has shown for protecting the health of those under its watch violates rights guaranteed under the Fifth and Eighth Amendments to the U.S. Constitution. The steps the MCC must take to combat the virus are clear. It must be ordered to take them.

FACTUAL BACKGROUND

The facts summarized below are based on the accompanying declarations of each Petitioner, Deirdre D. von Dornum (the attorney-in-charge of the Federal Defenders for the Eastern District of New York), and Dr. Jonathan Giftos (a doctor with extensive experience dealing with jail populations).

I. The MCC is Facing an Uncontrolled COVID-19 Outbreak.

On March 23, 2020, the MCC reported its first inmate to test positive for COVID-19. von Dornum Decl. ¶ 17. The inmate had exhibited symptoms for several days prior to being transported to the hospital for testing. *Id.* ¶ 18. Predictably, the virus had already begun spreading to others in the facility. Two additional inmates soon tested positive after being transferred to the hospital. *Id.* ¶ 24.

The MCC’s abject failure to implement effective COVID-19 testing has made it difficult to determine the total number of infected inmates at the facility. Six of the seven MCC inmates tested since the outbreak began received tests only after becoming so ill that they had to be transferred to the hospital. *Id.* ¶ 51. The single test the MCC itself administered to an inmate took place only after a court order. *Id.* In sum, only one percent of the MCC’s total inmate population has been tested for COVID-19. The fact that five of these seven tests were positive for

COVID-19 suggests that the disease has been spreading widely, and largely undetected, through the facility. A further signal: at least 33 MCC staff, who (unlike inmates) are not reliant on the MCC for testing, have tested positive for COVID-19, a number that has increased 371 percent in just four weeks. *Id.* ¶ 26.

II. The MCC Has Not Implemented Essential Measures to Protect Inmates and Mitigate the Spread of COVID-19.

Correctional facilities are incubators and amplifiers for infectious diseases like COVID-19. The virus is extremely contagious; it spreads from person to person through respiratory droplets emitted when coughing and sneezing, close personal contact, and contact with contaminated surfaces and objects.¹ Giftos Decl. ¶ 5. This poses particular risks to incarcerated individuals, who experience their daily activities in very close quarters. *Id.* ¶¶ 8, 10–11.

The federal government has provided guidance to correctional institutions on how to address these challenges. On March 23, 2020, the CDC issued “Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities” (“Interim Guidance”), which detailed necessary measures for correctional facilities to prevent the spread of COVID-19.² These include (i) creating and implementing plans to evaluate, test, and trace potential COVID-19 cases, (ii) isolating and treating inmates who test positive or are suspected positive cases, (iii) developing stricter sanitation policies that include cleaning and disinfecting shared areas and equipment several times daily with soap and hot water, (iv) providing free hygiene

¹ The World Health Organization (“WHO”) suggests the COVID-19 virus can survive “for up to 72 hours on plastic and stainless steel,” up to “4 hours on copper,” and “up to 24 hours on cardboard.” *Q&A on Coronaviruses (COVID-19)*, World Health Org. (Apr. 17, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

² See *Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities*, CDC (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

products such as soap and tissues, and (v) constant use of personal protective equipment by staff and inmates.³

The federal government also has determined that prisons must release inmates to protect those most vulnerable to the virus and reduce overcrowding. The Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) grants the Director of the BOP the power to increase the amount of time an inmate can serve a prison sentence in home confinement under certain conditions.⁴ On March 26, 2020, Attorney General Barr instructed the BOP to use its “various statutory authorities” to allow home confinement for inmates seeking transfer in connection with the COVID-19 outbreak.⁵ On April 3, 2020, Attorney General Barr further directed the BOP to “immediately review” for home confinement “all inmates who have COVID-19 risk factors, as established by the CDC.”⁶ And on April 23, 2020, the BOP announced the need for expanded testing to include asymptomatic inmates, as well as those exhibiting symptoms, to control the spread of COVID-19.⁷

Despite this abundant guidance, authority, and direction, the MCC has egregiously failed to act to mitigate the spread of COVID-19 and protect its inmates.

³ *See id.*

⁴ Memorandum For Director of Bureau of Prisons re Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, Office of the Attorney General, Washington, D.C. (Apr. 3, 2020), available at <https://www.justice.gov/file/1266661/download>.

⁵ Memorandum For Director of Prisons re Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic, Office of the Attorney General, Washington, D.C. (Mar. 26, 2020), available at <https://www.justice.gov/file/1262731/download>.

⁶ *See supra* note 4.

⁷ Kevin Johnson, *Federal Prison System Expands Virus Testing to Find Hidden Asymptomatic Infections*, USA TODAY (Apr. 23, 2020), <https://www.usatoday.com/story/news/politics/2020/04/23/coronavirus-federal-prisons-expand-testing-asymptomatic-inmates/3015287001/>.

First, the MCC has not released a single inmate pursuant to the directives issued by the Attorney General. von Dornum Decl. ¶ 64. As of April 24, 2020, the Federal Defenders have submitted the names of 16 individuals who are particularly vulnerable to COVID-19 and who thus are eligible for home confinement under those directives. *Id.* ¶ 62. This follows weeks of efforts to bring about the release of inmates being held there. *Id.* ¶ 59–62. The MCC has yet to reply or take any action in response. *Id.* ¶ 62. In addition to release to home confinement, the MCC could transfer inmates serving longer sentences to less crowded facilities that have the capability to provide better, necessary medical care. *See id.* ¶ 10. It has not done so. *Id.* ¶ 64.

Second, the MCC has failed to identify, quarantine, and treat individuals who have been exposed to COVID-19. Most fundamentally, the MCC had not tested inmates for the virus. Incredibly, the MCC has no COVID-19 tests, unlike numerous other facilities.⁸ von Dornum Decl. ¶ 51. Inmates have been screened for COVID-19 symptoms only if they self-report to facility staff. *See id.* ¶ 42; *see also* Fernandez-Rodriguez Decl. ¶ 5. Those who do have often been placed in solitary confinement in cells on the third floor or in the punitive Special Housing Unit (“SHU”), thus discouraging essential self-reporting. *See* von Dornum Decl. ¶¶ 22, 24 & 42.

Other symptomatic inmates inexplicably have been left in open dormitories or cells in close proximity to others. *See id.* ¶¶ 18–19. For example, one inmate who shared a dorm with Petitioner Woodson had a high fever and was vomiting. Woodson Decl. ¶ 13. Though the inmates in the

⁸ *See, e.g.,* Cary Aspinwall & Joseph Neff, *These Prisons Are Doing Mass Testing for COVID-19—and Finding Mass Infections*, Marshall Project (Apr. 24, 2020, 5:32 PM EDT), <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections> (highlighting numerous prisons employing aggressive COVID-19 testing regimes, including California, North Carolina, and Ohio); Katie Park et al., *Tracking the Spread of Coronavirus in Prisons*, Marshall Project (Apr. 24, 2020, 3:05 PM EDT), <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons> (“Ohio, Tennessee, Arkansas, Michigan, North Carolina ... have begun aggressively testing nearly everyone at prisons where people have become sick.”).

unit yelled and banged on the walls of the cell to get the attention of correctional staff, the sick inmate was not removed until the next day. *Id.* That inmate tested positive for COVID-19. *Id.* Similarly, Petitioner Medina shared a dormitory with a number of people who were coughing, had fevers, chills, and achy bones, and had lost their sense of taste and smell. Medina Decl. ¶ 7. And Petitioner Galvez-Chimbo, who developed severe COVID-19 symptoms, including fever, loss of sense of smell and taste, severe coughing, loss of appetite, body aches, and nighttime chills, was kept in his cell with his cellmate for about two weeks, despite repeated requests for medical attention. Galvez-Chimbo Decl. ¶ 4.

For those inmates who are symptomatic, the MCC has provided inadequate medical care. There are only two doctors available at the MCC to care for the 700 inmates there. von Dornum Decl. ¶ 53. There is no in-house medical treatment center for sick patients. And the MCC lacks the life-saving care and treatment needed should any person develop complications from a COVID-19 infection. *Id.* ¶¶ 54–60.

Third, the MCC has failed to follow CDC guidelines necessary to improve conditions within the institution that contribute to the spread of COVID-19. Approximately 150 inmates have been confined in cramped, dormitory-style settings, with as many as 26 inmates sharing a single toilet. *Id.* ¶ 33. Many of those not in dormitory-style rooms share cells originally designed for one person. *Id.* ¶ 32. Inmates have not had regular access to sufficient soap, tissues have not been readily available, and there has been no access to hand sanitizer. *Id.* ¶¶ 37–39. Even when additional soap and other supplies have been available, inmates have been charged for the items through their commissary accounts, in direct violation of the CDC's Interim Guidelines. *See* von Dornum Decl. ¶ 30; Hatcher Decl. ¶¶ 9–10; Medina Decl. ¶ 13; Fernandez-Rodriguez Decl. ¶ 7. Toilets, sinks, showers, phones, and computer terminals are all shared by inmates but have not

been sanitized between uses, and inmates lack the supplies to maintain proper sanitation on their own. von Dornum Decl. ¶¶ 35–39.

Cadre inmates (inmates who work throughout the building) have continued to perform responsibilities, including cleaning the facility and preparing and serving food, yet they lack the protective supplies to do so safely. *See* Dornum Decl. ¶¶ 36 & 40; Medina Decl. ¶ 12. They are forced to reuse a limited supply of paper or thin cloth face masks, and have no access to gloves. von Dornum Decl. ¶ 45. Mr. Medina, who has experienced COVID-19 symptoms, has performed cadre duties, including serving breakfast, cleaning his unit (where at least two inmates tested positive for COVID-19), and cleaning the kitchen. Medina Decl. ¶ 12. He has not received a clean mask to perform these duties. The MCC has failed to act on repeated recommendations to employ an outside cleaning facility to improve the sanitation within the building. von Dornum Decl. ¶ 10.

III. The MCC’s Inaction Jeopardizes the Health and Safety of All Inmates, Especially Those Identified as Particularly Vulnerable to COVID-19.

The coronavirus can lead to dangerous—and sometimes fatal—consequences for those infected by it. Giftos Decl. ¶ 5. While the risks for severe or deadly symptoms are elevated for people over the age of 60 and people of any age who suffer from certain underlying medical conditions (including asthma, obesity, diabetes, lung disease, heart disease, chronic liver or kidney disease, and compromised immune systems), even individuals outside of these categories are at risk of contracting this potentially deadly disease. *Id.* ¶ 9–10. For example, 22 percent of individuals requiring admission to a hospital intensive care unit do not have any underlying health conditions.⁹ *Id.* ¶ 10.

⁹ *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12-March 28, 2020*, CDC (Apr. 3, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm>.

The MCC has identified 205 inmates facing a particularly high risk of complications from COVID-19, including each of the five Petitioners. Mr. Fernandez-Rodriguez and Mr. Medina suffer from chronic asthma (and both lack access to the medications they need to manage the condition). Fernandez-Rodriguez Decl. ¶ 2; Medina Decl. ¶ 3. Ms. Hatcher is HIV positive and clinically obese. Hatcher Decl. ¶ 3. She also suffers from Chronic Obstructive Pulmonary Disease (“COPD”) as well as hypertension. *Id.* Mr. Woodson is HIV positive and suffers from several serious conditions, including hypertension, hepatitis, asthma, chronic lung disease, and hypothyroidism. Woodson Decl. ¶ 2. Mr. Galvez-Chimbo very likely already has COVID-19 (the MCC has refused to test him), and has been experiencing severe symptoms, including fever, loss of the sense of smell and taste, severe coughing, and chills. Galvez-Chimbo Decl. ¶ 4. Mr. Medina, housed in a unit where two inmates tested positive for COVID-19, and Mr. Fernandez-Rodriguez, who continues to share a cell with another inmate, have suffered symptoms but have not been tested. Medina Decl. ¶ 10; Fernandez-Rodriguez ¶ 4. In response, the MCC has done next to nothing to ensure the health and safety not only of these Petitioners but also of the many inmates and staff with whom they interact.

ARGUMENT

Applications for preliminary injunctions and temporary restraining orders under Rule 65 are governed by the same standards. *See, e.g., Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). Movants must demonstrate that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “The party seeking the injunction carries the burden of persuasion to demonstrate, ‘by a clear showing,’ that the necessary elements are satisfied.” *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 392 (S.D.N.Y. 2011); *see also N.Y. Civil Liberties*

Union v. N.Y. City Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012) (“For mandatory injunctions, which alter rather than maintain the status quo, such as the one at issue here, the movant must show a clear or substantial likelihood of success on the merits.” (internal quotation marks omitted)).

Each element of this test is satisfied here. Petitioners have identified substantial and compelling evidence that the MCC has recklessly failed to act to control the spread of COVID-19 through its facility, creating grievous risks to the health and lives of its inmate population. Immediate action is needed to decrease the number of persons held at the MCC, to begin testing, quarantining, and contact tracing, and to improve hygiene conditions.¹⁰

I. Petitioners and Proposed Class Members Are Likely to Succeed on the Merits of Their Claims.

“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). The Eighth Amendment, which applies to inmates who have been convicted of an offense, protects the incarcerated from prison conditions that pose “an unreasonable risk of serious damage” to a prisoner’s health. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). The Fifth Amendment guarantees due process protections to presumptively innocent persons detained before trial. *See Darnell v. Pineiro*, 849 F.3d 17, 21 n.3, 29 (2d Cir. 2017).

¹⁰ As a threshold matter, the Prisoner Litigation Reform Act’s 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. As the Second Circuit has explained, “the requirements of the [PLRA] do not apply to habeas proceedings.” *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001); *see, e.g., Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882, at *10 (N.D. Ohio Apr. 22, 2020) (recognizing that the PLRA does not apply to habeas petitions and thus § 3626 did not limit the court’s authority to grant habeas relief based on claims relating to COVID-19); *see also Harris v. Garner*, 216 F.3d 970, 979 n.7 (11th Cir. 2000) (“28 U.S.C. § 2241, 2254, and 2255 filings . . . are not covered by the PLRA.”); *Colton v. Ashcroft*, 299 F. Supp. 2d 681, 689 (E.D. Ky. 2004) (similar).

Because pretrial detainees are entitled to protections “at least as great as the Eighth Amendment protections available to a convicted prisoner,” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983), conditions that would violate the Eighth Amendment are more than enough to also violate the Fifth Amendment rights of pre-trial detainees, *Hardy v. District of Columbia*, 601 F. Supp. 2d 182, 189 (D.D.C. 2009).

A. The Conditions at the MCC, Combined with the Risks Posed by COVID-19, Pose a Substantial Risk of Serious Harm to Inmates’ Health.

Petitioners’ Fifth and Eighth Amendment claims both require proof that the conditions of confinement pose a risk of serious harm to the health of those detained at the MCC. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (“For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.”). But “a remedy for unsafe conditions need not await a tragic event.... [I]nmates [are] entitled to relief under the Eighth Amendment when they prove[] threats to personal safety from ... the mingling of inmates with serious contagious diseases with other prison inmates.” *Helling*, 509 U.S. at 34. The Supreme Court has held that, in determining whether there is a substantial risk of serious harm, courts must “assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.” *Id.* at 36. To demonstrate a “substantial risk of serious harm,” Petitioners must show that “the risk of which [they] complain[] is not one that today’s society chooses to tolerate.” *Id.*

The risks of serious harm due to the COVID-19 outbreak are undeniable. The disease is highly contagious and spreads rapidly in close settings—it has already killed over 53,000 people

in the United States.¹¹ The MCC is vastly over-crowded: as a facility with 700 inmates but designed to house 474, it is nearly 50 percent over its intended capacity. von Dornum Decl. ¶ 31. Inmates at the MCC spend all their time in close proximity with each other, many sleeping in rooms with 26 bunk beds, sharing sinks and toilets, eating at common tables, and sharing devices like telephones and computers. *See id.* ¶¶ 18, 30–33. Some inmates, including at least one who tested positive for COVID-19 in March, are members of the “cadre,” people who work in and regularly move throughout the building. *Id.* ¶ 21. And, even as these crowded conditions persist, the MCC continues to accept still more inmates. *Id.* ¶ 23.

The MCC also is not taking even rudimentary—but essential—steps to identify infected inmates, as directed by both the CDC and the BOP. von Dornum Decl. ¶ 29–45. The MCC has no COVID-19 tests. *Id.* ¶ 46. All inmates who have tested positive, except one, have done so only because their symptoms became so egregious that they were transferred to local hospitals where they were finally tested for the coronavirus. *Id.* When inmates or staff do present as symptomatic or test positive for COVID-19, the MCC has failed to conduct even minimal contact tracing to identify and isolate other potentially infected persons. von Dornum Decl. ¶¶ 4 & 43. Inmates with symptoms of COVID-19 are often held with cellmates, or in small dorm-like settings shared by more than two dozen other people. *Id.* ¶¶ 18–19.

Basic sanitation measures that might prevent the spread of illness are also sorely lacking. The MCC has not provided inmates with gloves or medically-appropriate face masks, or even basic necessities such as adequate hand soap and regular access to warm water. von Dornum Decl. ¶¶ 4, 35–38. The MCC has relegated inmates to the re-use of paper or thin cloth masks for up to two

¹¹ As of April 26, 2020, the CDC estimates that 53,922 have died due to COVID-19. *See Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, CDC (last visited Apr. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

weeks, has yet to require its correctional officers to wear gloves, and has not allowed any alcohol-based hand sanitizer. *Id.* ¶¶ 37 & 45.

Courts routinely find that exposure to disease or health issues constitute a “serious harm.” *See, e.g., Helling*, 509 U.S. at 33 (finding that the reach of the Fifth and Eighth Amendments includes “exposure of inmates to a serious, communicable disease”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease.”); *Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (agreeing that “tuberculosis is a serious contagious disease, which presents a serious risk to inmate health”). This principle has been affirmed by several courts in recent rulings addressing the ongoing COVID-19 crisis. *See, e.g., Basank v. Decker*, No. 20-cv-2518 (AT), 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020) (citing *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) and *United States v. Garlock*, No. 18-cr-418 (VC), 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020)). There can be no reasonable dispute that such harm is present here.

B. The MCC Has Acted With Deliberate Indifference Under Both Fifth And Eighth Amendment Standards.

The Fifth and Eighth Amendment claims both require proof that the MCC acted with deliberate indifference, though the requirement is not identical. Under the Fifth Amendment, which applies to pretrial inmates, a petitioner need only show that the respondent “knew, or *should have known*, that the [challenged] condition posed an excessive risk to health or safety.” *Darnell*, 849 F.3d at 35 (emphasis added). In other words, when pre-trial detainees challenge prison conditions, “the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.” *Id.* Sentenced inmates bringing claims under the Eighth Amendment can show

deliberate indifference through evidence that the respondent was “aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,” and that the Respondent actually “dr[ew] the inference.” *Farmer*, 511 U.S. at 837.

Petitioners have demonstrated deliberate indifference under either standard. As early as January 2020, both the Southern and Eastern Districts of New York began planning for COVID-19 by, among other things, establishing protocols for remote proceedings, arranging for improved sanitation, and discussing how best to follow CDC protocols. von Dornum Decl. ¶ 6. Yet in early March, Respondent acknowledged that the MCC had not yet put forth *any* plan for the facility’s response to COVID-19. *Id.* ¶¶ 6–7. On March 12, 2020, the MCC reported, in a meeting convened by Chief Judge McMahon, that it had conducted no tests and had no plans for testing, did not have enough protective gear, and had no plan for isolating symptomatic or COVID-19 positive inmates. *Id.* ¶ 10.

When COVID-19 did, as expected, reach the jail, the MCC still failed to act. On March 23, 2020, the MCC reported its first COVID-19 positive case. von Dornum Decl. ¶ 17. Though symptomatic, the inmate in question was neither tested nor quarantined for several days. *See id.* ¶ 18. Once he tested positive, the other inmates in his unit, 11 South, were left “quarantined” in their open dormitories, where they slept alongside 25 other men with cots packed just a few feet apart. *Id.* ¶ 19. The MCC failed to sanitize the unit after the inmate tested positive, and instead forced the other inmates to attempt to clean the dormitory cell on their own without masks or other personal protective equipment. *Id.* The MCC’s actions did not mitigate the spread of COVID-19, but instead only ensured that the virus spread within this the group—which it then did. *Id.* ¶ 24.

In short, the MCC flouted—and continues to flout—the guidance provided by the CDC on the key steps correctional facilities must take to address COVID-19. More than one month after

the CDC guidance was issued, the MCC has still failed to follow it. It has failed to test inmates, failed to quarantine those likely infected, and failed to provide the basic sanitation needed to stop the virus's spread. These were issues first identified as problems by the MCC in the first half of March. The fact that, more than six weeks later, the MCC cannot provide a COVID-19 test available at pharmacies across New York State is the very hallmark of indifference.

Respondent's failures to follow accepted medical protocol, particularly in the face of positive cases, amount to deliberate indifference under well-settled law. *See, e.g., Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (stating that "known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm"). Indeed, a failure by a prison to implement safety and hygiene procedures in the face of an infectious disease outbreak is a classic example of deliberate indifference violating the Fifth and Eighth Amendments. *See, e.g., Feliciano v. Gonzales*, 13 F. Supp. 2d 151, 208–09 (D.P.R. 1998) (finding that the defendant's "inability ... to properly isolate cases of active tuberculosis," the "insufficient medical dormitory beds," the failure to "fully screen incoming inmates," and the failure to "provide for a sick call system that ensures access to care and that is capable of effectively handling emergencies" constituted deliberate indifference); *Shimon v. Dep't of Corr. Servs. for N.Y.*, No. 93-cv-3144 (DC), 1996 WL 15688, at *1 (S.D.N.Y. Jan. 17, 1996) (holding that the defendant's inability to "adequately quarantine or remove inmates and support staff known to have active tuberculosis" constituted deliberate indifference).

Respondents' failures are particularly outrageous because these dangers could be readily addressed. The MCC's omissions contrast starkly with common-sense measures other correctional facilities have implemented to protect the health of their inmates. For example, the Minnesota

Department of Corrections established a pandemic response team and began taking a number of recommended measures as of March 13, 2020, including identifying alternate housing locations for inmates who need to be isolated, identifying vulnerable inmates for prevention considerations, and providing extra handwashing and sanitizing stations for people entering and exiting facilities.¹² Similarly, the Michigan Department of Corrections has actively taken steps to quarantine inmates who test positive for COVID-19 in separate facilities, creating a setting where there is little to no contact between healthy and sick inmates.¹³ When the Elkton Federal Prison in Ohio determined it lacked medical personnel to treat a severe outbreak within its facility, it partnered with the Ohio National Guard and the Army Corps of Engineers to send 26 medically trained national guard members, medical equipment, and ambulances to the facility.¹⁴ The MCC's response to COVID-19 pales in comparison.

The MCC's failure to reduce its inmate population, despite clear directives from Attorney General Barr, likewise demonstrates a gross indifference to the health and well-being of those in its charge. On April 3, 2020, Attorney General Barr directed BOP facilities to review all inmates with COVID-19 risk factors and authorize the release of those particularly medically vulnerable

¹² See Clairissa Baker, *Minnesota Prison System Organizes Fight Against COVID-19*, St. Cloud Times (Mar. 13, 2020, 4:50 PM CDT), <https://www.sctimes.com/story/news/local/2020/03/13/doc-sets-up-command-post-covid-19-minnesota-st-cloud-coronavirus-prison/5043758002/>.

¹³ See Ashley Graham, *How Michigan's Prisons Are Handling the COVID-19 Pandemic*, WLNS (Apr. 13, 2020, 6:20 PM EDT), <https://www.wlns.com/news/michigan/how-michigans-prisons-are-handling-the-covid-19-pandemic/>.

¹⁴ See Cory Shaffer, *Ohio Governor Deploys National Guard to Help Federal Prison with COVID-19*, Corrections One (Apr. 7, 2020), <https://www.correctionsone.com/coronavirus-covid-19/articles/D.C.-governor-deploys-national-guard-to-help-federal-prison-with-covid-19-Z6luUGyFV5BoD9RQ/>.

who pose low risk to the public.¹⁵ Attorney General Barr also directed the BOP to “prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic.”¹⁶ Yet the MCC has released no one in response to the Attorney General’s directives, even though there are many suitable candidates. *See* von Dornum Decl. ¶¶ 58–59. Petitioners Medina and Woodson are prime examples. Both men are scheduled to be released later this year, are incarcerated for non-violent offenses, and suffer from health conditions that make them vulnerable to COVID-19.¹⁷ The MCC has declined to release to home confinement either man, or numerous other inmates at MCC nearing the end of their sentences.

Notably, other New York and similarly-situated correctional facilities have been able to reduce inmate populations to protect against the spread of COVID-19, making the MCC’s failure to act that much more inexplicable. For instance, on March 17, 2020, the New York City Board of Corrections called on New York City to release people from criminal custody, prioritizing people over 50 with underlying health conditions, detained for administrative reasons, and/or with sentences of one year or less.¹⁸ New York has since released over 1,500 inmates.¹⁹ In addition,

¹⁵ *See supra* note 4.

¹⁶ *See supra* note 5.

¹⁷ Attached hereto as Appendix A is a chart providing pertinent details concerning each Petitioner, including (where applicable) the length of their sentences, currently projected release dates, and the offenses with which they have been charged and/or convicted.

¹⁸ *See New York City Board of Correction Calls for the City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19*, (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

¹⁹ *See Board of Correction Daily Covid-19 Update*, N.Y. DOC (Apr. 21, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_4_21_2020.pdf.

according to the BOP, since Attorney General Barr’s March 26, 2020 directive approximately 1,500 BOP inmates have been placed in home confinement.²⁰ Once again, the MCC has failed to mitigate the imminent and irreparable harm to its inmate population by taking similar measures.

II. Petitioners and Proposed Class Members Will Suffer Irreparable Harm Absent an Order Granting the Requested Relief.

In the Second Circuit, a “showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Basank*, 2020 WL 1481503, at *2 (quoting *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009)). Harm is considered to be irreparable if it “cannot be redressed through a monetary award.” *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990). A violation of constitutional rights constitutes irreparable harm as a matter of law. *See, e.g., Johnson v. Connolly*, 378 F. App’x 107, 108 (2d Cir. 2010); *Johnson v. Miles*, 355 F. App’x 444, 446 (2d Cir. 2009); *Conn. Dep’t of Env’tl. Prot. v. OSHA*, 356 F.3d 226, 230–31 (2d Cir. 2004); *Jolly*, 76 F.3d at 482.

A likelihood of irreparable harm is clearly present here. Petitioners and other MCC inmates face severe illness, pain, and potentially death if the conditions of their incarceration are not addressed and changed now. COVID-19 has already gained a foothold at the MCC, and its spread is inevitable.²¹ *von Dornum Decl.* ¶¶ 31–45. Once infected, Petitioners and other inmates will be at serious risk of grave or life-threatening complications due not only to the MCC’s woeful sanitary conditions, health protections, and housing practices, as well as its overpopulation, *see id.*, but also

²⁰ *See Frequently Asked Questions Regarding Potential Inmate Home Confinement In Response to the COVID-19 Pandemic* (last visited Apr. 27, 2020), <https://www.bop.gov/coronavirus/faq.jsp>.

²¹ *See CDC Media Telebriefing: Update on COVID-19*, CDC (Feb. 25, 2020), <https://www.cdc.gov/media/releases/2020/a0225-cdc-telebriefing-covid-19.html> (“It’s not a question of if but rather a question of when and how many people in this country will have severe illness.”).

(for many inmates) because of their respective ages and/or underlying medical conditions. Giftos Decl. ¶ 9.

It is well-established that risk of exposure to serious health effects alone is sufficient to establish irreparable harm. The Supreme Court has observed that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Helling*, 509 U.S. at 33; *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) (finding the burden of showing irreparable injury was satisfied where evidence was presented that closing of treatment program would lead to plaintiffs’ continued abuse of alcohol and drugs, “resulting in death, illness, or disability”); *see also Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (finding likelihood of “pain, infection, amputation, medical complications, and death” constituted irreparable harm); *Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 273 (N.D.N.Y. 2015) (“[T]he obvious potential for such issues as developing chronic health issues or spreading contagious diseases underscores the need for equitable relief . . .”).

Several courts have already determined that the grave risks from COVID-19 constitute irreparable harm and injury—the very same risks Petitioners and other inmates now face. *See, e.g., Basank*, 2020 WL 1481503, at *4 (“The risk that Petitioners will face a severe, and quite possibly fatal, [COVID-19] infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.”); *Coronel v. Decker*, No. 20 Civ. 2472, 2020 WL 1487274, at *3 (S.D.N.Y. Mar. 27, 2020) (“Due to their serious underlying medical conditions, all Petitioners face a risk of severe, irreparable harm if they contract COVID-19.”); *Castillo v. Barr*, S.D.N.Y. Case No. 20 Civ. 605, ECF No. 32, at 10 (Mar. 27, 2020) (finding that petitioners should be

released from immigration custody because they established irreparable harm stemming from risk of exposure to COVID-19).

III. The Balance of Equities Tilts in Petitioners' Favor, and the Public Interest Supports an Injunction.

“Where the Government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge.” *Coronel*, 2020 WL 1487274, at *7 (citing *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018)). These factors, too, plainly support immediate injunctive relief here.

First, the public interest is “best served by ensuring the constitutional rights of persons within the United States are upheld.” *Id.* (quoting *Sajous v. Decker*, No. 18 Civ. 2447 (AJN), 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018); *see also L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 620 (S.D.N.Y. 2018)). This is especially true in this case, where the constitutional rights at stake go to the very physical well-being of the aggrieved individuals.

In addition, ensuring public health and safety is also in the public's interest. *See Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”). The relief requested here would also protect MCC staff members, as well as the community at large—as staff members who come into contact with COVID-19-positive inmates may spread the disease to their families and communities.²² Sick inmates or staff members will frequently need to be transported to local hospitals, which are already overwhelmed. Any action to ease the burden on hospitals and healthcare systems—or, at a minimum, to prevent making the situation worse—is undeniably in the public interest.

²² Sandhya Kajeepeta & Seth J. Prins, *Why Coronavirus in Jails Should Concern All of Us*, THE APPEAL (Mar. 24, 2020), <https://theappeal.org/coronavirus-jails-public-health/>.

Likewise, the relief requested here would not impose an unreasonable burden on the MCC. Releasing inmates to home confinement or transferring them to other facilities cannot be considered an unreasonable burden, as such authority and procedure existed even prior to the COVID-19 outbreak. Nor is asking the MCC to obtain COVID-19 tests, when New York State has been running up to 10,000 tests per day. Nor is establishing a basic level of sanitation within the facility. Indeed, courts around the country have begun to order the emergency release of inmates whose conditions of confinement in the COVID-19 pandemic violate the U.S. Constitution. *See, e.g.:*

- *Banks v. Booth*, 2020 WL 1914896 (D.D.C. Apr. 19, 2020) (issuing a TRO, finding “Plaintiffs have provided evidence that Defendants are aware of the risk that COVID-19 poses to Plaintiffs’ health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus,” and ordering the Washington D.C. Department of Corrections to make immediate improvements to conditions in each of these areas);
- *Wilson v. Williams*, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) (ordering Respondents to immediately evaluate and review medically-vulnerable class members for compassionate release, home release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks);
- *Coronel*, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (granting release from immigration detention of four petitioners with medical conditions that render them particularly vulnerable to severe illness or death if infected by COVID-19);
- *Basank*, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (granting release of ten petitioners who “suffer[] from chronic medical conditions, and face[] an imminent risk of death or serious injury in immigration detention if exposed to COVID-19”);
- *United States v. Stephens*, 15-cr-95 (AJN), 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting motion for reconsideration of defendant’s bail conditions and releasing him from the MCC to home confinement, recognizing inmates may be at heightened risk of contracting COVID-19);
- Mem. Decision & Order, *Jovel v. Decker*, Docket No. 27, 20-cv-308 (GBD) (S.D.N.Y. Mar. 26, 2020) (granting emergency request for release of petitioner from immigration detention in light of the COVID-19 crisis);
- *People ex rel. Stoughton on behalf of Little et al. v. Brann*, Index No. 260154/2020 (Sup. Ct., Bronx Cty. Mar. 25, 2020) (releasing 106 individuals held at Rikers Island jail on

parole violations who are particularly vulnerable to illness or death if infected by COVID-19);

- *People ex rel. Stoughton on behalf of Hogan et al. v. Brann*, Index No. 51078/2020 (Sup. Ct., N.Y. Cty. Mar. 27, 2020) (releasing 16 individuals held at Rikers Island jail on pre-trial detention who were particularly vulnerable to illness or death due to COVID-19);
- *Xochihua-Jaimes v. Barr*, No. 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (unpublished) (ordering, *sua sponte*, that petitioner be immediately released from immigration detention “[i]n light of the rapidly escalating public health crisis” related to COVID-19);
- *Castillo*, No. 20-cv-605 (TJH) (C.D. Cal. Mar. 27, 2020) (ordering that petitioners be released from immigration detention in light of COVID-19 and noting “the risk of infection in immigration detention facilities – and jails – is particularly high”);
- Mem. & Order, *Jimenez v. Wolf*, Docket No. 507, 18-cv-225 (D. Mass. Mar. 26, 2020) (ordering release of petitioner from immigration detention due to COVID-19 concerns);
- *In re Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (N.J. Mar. 22, 2020) (ordering, based on the dangers posed by COVID-19, release of any inmate in New Jersey serving a county jail sentence as a condition of probation or as a result of a municipal court conviction).

The balance of equities thus tilts decidedly in Petitioners’ favor and in support of the emergency relief sought here.

CONCLUSION

More than a month after its first case, the MCC has utterly failed to address the spread of COVID-19 within the jail, risking the health and lives of the more than 700 people under its care. This Court should grant Petitioners’ motion for a temporary restraining order and preliminary injunction directing the MCC to take immediate action to address the uncontrolled spread of the COVID-19 virus in the facility utilizing both release and non-release relief, and thereby ensuring and protecting the health and well-being of its inmate population.

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