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 (ER)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, New York 10018
Tel: (212) 841-1000

Attorneys for Petitioners

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INTRODUCTION

A month after the initiation of this litigation, the MCC's response to the ongoing COVID-19 pandemic remains grossly deficient. The intolerable conditions that gave rise to an initial outbreak that sickened an estimated 75 to 150 inmates persist, posing a clear and present danger to inmates and staff alike.[1] The Court granted Respondent an opportunity to demonstrate through discovery that the MCC had put its inexcusable failure to tackle COVID-19 behind it. The voluminous record compiled since then reveals the opposite—the MCC continues to fall short of the minimum fundamental health standards our Constitution requires.

The discovery also demonstrates something equally disturbing: many of the claims made by the MCC in its May 1, 2020 letter aiming to stave off this Court's intervention were false or misleading.[2] The MCC claimed that "[a]ll inmates" who were "suspected of being infected" with COVID-19 were "placed in a separate isolation ward."[3] That was false. Sworn statements from 33 inmates[4] submitted with this application establish that scores of clearly symptomatic inmates were left untreated in their cells and open dorms, their requests for testing and treatment simply ignored. The MCC insisted that sick inmates were *not* housed in "the Special Housing Unit used to house certain-high security detainees" but in "an ordinary housing unit with 1–2 inmates per cell that has been set aside for this purpose."[5] But the MCC's own records reflect that five sick inmates were sent to the punitive Special Housing Unit ("SHU"),[6] with the Warden testifying in

[1] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶¶ 56–57, 66).
[2] *See* ECF No. 23 (May 1 Letter to Court).
[3] *Id.* at 3.
[4] Given his release and withdrawal from the action, Petitioners do not rely on the Declaration of Jonathan Medina, previously filed as ECF No. 13.
[5] *Id.*
[6] *See* Kala Decl. Ex. 32 (Quarantine Isolation Flowchart, MCC0197).

her deposition that using the SHU to house the sick was "easiest."[7] The MCC claimed that inmates "will be removed from isolation" only after not one but *two* negative test results.[8] But there is no evidence that the MCC has *ever* tested sick inmates prior to releasing them from isolation. The MCC asserted that inmates receive daily "symptom screening" and that "[w]henever a staff member tests positive for coronavirus, contact tracing is done."[9] Eleven inmates deny the former; the MCC's own Medical Director denies the latter.[10]

The reality that the MCC tried to obscure from this Court is ugly. MCC staff admitted in depositions that no preparations whatsoever were made for COVID-19 until the latter part of March,[11] just as COVID-19 was ripping through the 11 South unit, where the MCC had—inexplicably—decided to house its most vulnerable inmates in jam-packed, filthy, vermin-infested, 26-person dormitories, with inmates sharing a single bathroom and sleeping within spitting distance of each other. Some of the sick inmates were sent to the SHU, where they shivered through their fevers on concrete beds, while their pleas for blankets and clean drinking water were ignored.[12] Most were left on 11 South to suffer and spread the virus, their repeated calls for medical help left unanswered. Many inmates were severely sickened. Some were hospitalized. It is a small miracle no one died.

The most disturbing thing about the initial COVID-19 outbreak is what the MCC has learned from it: precious little. Overcrowding was a major cause of the spread of the outbreak.

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[7] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 63:16–21).
[8] ECF No. 23, at 4 (May 1 Letter to Court).
[9] ECF No. 23, at 4–5 (May 1 Letter to Court).
[10] *See* Summary of Inmate Declarant Evidence, Appendix A; Kala Decl. Ex. 1 (Beaudouin Dep. Tr. at 117:14–25).
[11] Kala Decl. Ex. 2 (Edge Dep. Tr., at 22:8–21); *see also* Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 19:15–18; 22:8–13).
[12] *See* Summary of Inmate Declarant Evidence, Appendix A; Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 10) ("I lost my taste and smell for several days and I was shivering and convulsing with fever.").

Yet in April, Warden Licon-Vitale ordered MCC unit staff—in particular, those responsible for executing the Attorney General's emergency directive to "immediately maximize appropriate transfers to home confinement"[13]—to instead drop their assignments and stand duty as guards, bringing the release evaluation process to a halt.[14] The MCC also failed to fix its shockingly defective sick call system, which included an electronic mailbox that inmates were instructed to use to report COVID-19 symptoms—reports that the MCC's Chief Medical Officer admitted did not receive responses for weeks or even months, when they were read at all.[15] And while the MCC still inexplicably struggles to test inmates (its latest excuse involves the need to buy a printer),[16] it has *decreased* screening for COVID-19 symptoms, which even at its peak consisted of little more than a temperature check, even though many with COVID-19 never have a fever.[17] Even the exceedingly simple task of getting the inmates soap seems to be beyond the institution's wherewithal; 21 inmates have submitted sworn declarations that there is not enough.[18]

No doubt the MCC will respond to this application, as it did to the initial TRO filing, with vague assurances that things are not so bad and sure to get better. But the lie has been put to the MCC's May 1 letter, and whatever leeway Respondent may think the MCC is entitled to is clearly not deserved. The reality is that the limited and tenuous steps the MCC has taken to improve conditions have come only after the filing of this lawsuit, with the MCC resisting transparency and oversight along the way.

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[13] Kala Decl. Ex. 22 (April 3 A.G. Barr Memo).
[14] Kala Decl. Ex. 2 (Edge Dep. Tr., at 153:11–154:25, 155:2–5).
[15] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 259:5–262:4). In fact, the earliest response to sick call requests made starting March 1 was on May 5. Kala Decl. Ex. 36 (Sick Call Requests).
[16] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 188:19–189:5, ___).
[17] Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 13); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 9); Kala Decl. Ex. 5 (Hatcher Dep. Tr., at 25: 13–21; 28: 1–4; 39:10–15).
[18] *See* Summary of Inmate Declarant Evidence, Appendix A.

The health and safety of the MCC's inmate population—and the staff working in the institution every day—can only be assured if the Court directs the MCC to comply with the measured but vital steps sought by Petitioners, which in many cases amount to no more than a directive that the MCC comply with BOP's own policies. Accordingly, the Court should grant preliminary injunctive relief, as described in Appendix A of the accompanying Notice of Motion.

FACTUAL BACKGROUND

In recent weeks, discovery has included the production of roughly 6,000 pages of documents, nine depositions, over 30 declarations, and an on-site inspection of the MCC by an experienced correctional epidemiologist, Dr. Homer Venters. This evidence reveals overwhelmingly that the MCC's response to COVID-19 is, if anything, even more deficient than what was previously known.

I. The MCC's Admitted Failure to Prepare for the COVID-19 Pandemic

The MCC knew of the potential risks posed by the COVID-19 pandemic nearly two months before its first inmate became sick, yet did virtually nothing to prepare for it. As early as January 31, 2020, when the virus spread beyond China, the BOP provided guidance to all field clinical personnel on how to respond and issued additional guidance a month later, on February 29.[19] The February guidance included specific recommendations that prisons prepare for the impending pandemic by "screening all new inmate admissions" for COVID-19, having a "readily available" supply of masks and other personal protective equipment ("PPE"), and meeting with staff to determine isolation and quarantine procedures.[20]

[19] Kala Decl. Ex. 24 (Feb. 29 BOP Memo).
[20] Kala Decl. Ex. 24 (Feb. 29 BOP Memo).

Despite two rounds of official guidance, by March 1, the MCC had done nothing to plan for the virus.[21] On March 4, Chief Judge Colleen McMahon convened a meeting with Respondent and representatives of the U.S. Attorney's Office and the Federal Defenders to discuss the MCC's COVID-19 response.[22] Respondent admitted that neither she nor her executive team—consisting of Respondent herself, the Associate Wardens, Executive Assistant, Captain, Psychologist, and at times members of the medical staff[23]—had begun planning for COVID-19.[24]

As the number of confirmed COVID-19 cases in New York City began accelerating rapidly on a daily basis, Respondent's inaction continued. On March 12, at a special meeting with the SDNY Criminal Justice Advisory Board, Respondent again admitted that the MCC had taken no real steps to prepare for the virus. Among its failings: the MCC had (1) no testing protocol and didn't plan to create one; (2) no test kits and no plans to obtain any; (3) no plan in place for isolating COVID-19-positive inmates; and (4) no immediate plans to create one.[25] In fact, by Associate Warden Edge's own admission, the MCC did not begin "any type of planning to address a potential outbreak of COVID-19" until the "latter part of March."[26] On March 20, the MCC again reported

[21] *See* Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 15:11–14) (Q: "[H]ad anything been done as of March 1st to plan for COVID-19?" A: "Not that I'm aware of.").
[22] *See* ECF No. 7 (von Dornum Decl. ¶ 6).
[23] *See* Kala Decl. Ex. 2 (Edge Dep. Tr., at 92:11–20).
[24] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 15:11–14).
[25] *See* ECF No. 7 (von Dornum Decl. ¶ 10); *see also* Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 19:15–18) (Q: "As of the middle of March, was there any testing protocol in place at that time?" A: "There was no testing protocol in place at the institution."); Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 19: 21–25) (Q: "As of the middle of March, did the MCC have any testing equipment within the facility?" A: "I don't believe we had any tests available."); Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 22:8–13) (Q: "As of the middle of March, did the MCC know where it was going to place inmates who were symptomatic for COVID-19 but had not yet tested positive?" A: "I can't say that we knew at that date where we were going to place them."); Kala Decl. Ex. 2 (Edge Dep. Tr., at 38:18–21) (Q: "Did you have any protocol in place for how, if at all, you would test inmates prior March 15th?" A: "Not that I'm aware of.").
[26] Kala Decl. Ex. 2 (Edge Dep. Tr., at 22:8–21).

to the Court on the pitiful state of its preparation: for nearly 800 inmates and 200 staff, it had only 30 N-95 masks and 100 surgical masks.[27]

Three days later, an inmate who had been suffering COVID-19 symptoms for days became so ill he was taken to a hospital, where he tested positive for the virus.[28] The pandemic had hit a jail that had done almost nothing whatsoever to prepare for it, despite the fact that its arrival was known to be well-nigh inevitable for almost two months.

II. The MCC's Inhumane Handling of the Initial Outbreak

The MCC's response to this late-March outbreak was as ill-conceived as it was inhumane. The MCC decided to "treat" those suffering from the disease by locking them in cold cells on bare concrete beds built to contain 9/11 terrorists. The first inmate who tested positive for COVID-19 on March 23 was placed in a cell on Tier G of the Special Housing Unit ("SHU"),[29] depicted in photographs taken during the Court-ordered inspection.[30] In the coming days, he was joined by 4 other inmates.[31] The accounts of those sent to suffer the virus there are truly harrowing.[32] Vinicius Andrade, for example, was placed in the SHU with a high fever, and left "on the concrete shaking" with "no sheets or blanket or pillow."[33] He coughed constantly for 5 days, but "no one ever checked [his] chest or lungs."[34] Another COVID-19 sufferer, Antonio Smith, was left in the SHU while his "eyes were swollen and tearing," with a nose that "would not stop running," a cough that produced a "clear sticky substance," no "sense of taste" or appetite, and constant sweating.[35] By

[27] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 24:9–25:2); ECF No. 7 (von Dornum Decl. ¶ 15).
[28] ECF No. 7 (von Dornum Decl. ¶¶ 17–18); Kala Decl. Ex. 26 (Mar. 25 Memo to Staff re First Positive).
[29] *See* Kala Decl. Ex. 26 (Mar. 25 Memo to MCC Staff on Positive Case).
[30] *See* Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 18); Kala Decl. Ex. 15 (photo of SHU bed).
[31] *See* Kala Decl. Ex. 32 (Quarantine Isolation Flowchart, MCC0197).
[32] *See* Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶¶ 49–53).
[33] Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 6).
[34] Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 8).
[35] Devlin-Brown Decl. Ex. 29 (Smith Decl. ¶ 8).

the time Mr. Smith's illness ran its course—with no intervention from the MCC for weeks—he "lost approximately 36 pounds."[36]

Warden Licon-Vitale's explanation that the SHU was "the easiest place to make . . . available" for isolating the ill demonstrates a startling disregard for the inmates sent there.[37] Associate Warden Edge asserts she was not aware of any discussion among the executive staff as to whether the SHU units were "medically appropriate" for those suffering from COVID-19.[38] This is stunning, as there can be no question that inmates suffering high fevers and other severe symptoms of the disease do not belong on cold, concrete slabs. As Dr. Venters writes, "[t]hese [SHU] housing units, including concrete beds . . ., are grossly inappropriate for the treatment of any ill inmates, and particularly those suffering from COVID-19."[39]

Before going to the hospital and then the SHU, the first inmate who tested positive for COVID-19 was housed on 11 South, an open dormitory unit where five groups of around 26 inmates apiece sleep on bunk beds separated by three feet, share a single toilet and two sinks, and eat at common tables.[40] In defiance of all sound medical judgment (including that of Dr. Venters),[41] the MCC decided to house those patients most vulnerable to the disease together in a

[36] Devlin-Brown Decl. Ex. 29 (Smith Decl. ¶ 8).
[37] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 63: 18–21).
[38] Kala Decl. Ex. 2 (Edge Dep. Tr., at 49:7–20)
[39] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 49).
[40] *See* Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 17); Kala Decl. Exs. 10–11 (Photos of 11 South); Kala Decl. Ex. 25 (Rog Response Number 5); Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr. at 69:20–70:2); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 3); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 6).
[41] *See* Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 68) ("[T]he benefits of cohorting are poorly served by quarantining vulnerable persons in close quarters, particularly when inmates and staff that are not regularly tested for COVID-19 are introduced to the unit.").

large group in 11 South's cramped quarters, a setting where it would almost surely spread among them.[42]

Once COVID-19 broke out in a 26-person tier on 11 South, the standard of care was (and certainly should have been) clear: inmates in close contact to the positive case (presumably the 25 remaining inmates in the tier, at a minimum) should have been separately quarantined in single cells and monitored for symptoms, limiting the further spread of the virus.[43] That did not happen. The MCC simply left the other approximately 120 inmates on 11 South in open dormitories,[44] without any additional protections. No additional hygiene supplies were provided, leaving inmates short of soap.[45] Common areas were not disinfected.[46] And masks that could have slowed transmission were not available to inmates until weeks after the outbreak.[47] On top of that, the MCC did not provide inmates on 11 South with any laundry service from the end of February through the beginning of May; instead, they were forced to reuse the same dirty bed sheets and clothing for over two months.[48]

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[42] Kala Decl. Ex. 2 (Edge Dep. Tr., at 164:4–165:23); Kala Decl. Ex. 6 (Hazelwood Dep. Tr., at 57:7–11); Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 84–85; 181:6–12); Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 69:4–19).
[43] *See* Kala Decl. Ex. 20 (March 23 CDC Guidance for Correctional Facilities).
[44] Kala Decl. Exs. 2 (Edge Dep. Tr., at 53:22–54:12); 7 (Licon-Vitale Tr., at 69:4–70:2; 71:14–16); 1 (Beaudoin Dep. Tr., at 207:15–22); 6 (Hazelwood Dep. Tr., at 41:19–42:9); 25 (Rog Response Number 5).
[45] Devlin-Brown Decl. Ex. 5 (Woodson Decl. ¶ 9); Devlin-Brown Decl. Ex. 12 (Crosby Decl. ¶ 19); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 9); Devlin-Brown Decl. Ex. 28 (Schiliro Decl. ¶ 11).
[46] Kala Decl. Ex. 28 (emails to Executive Assistant mailbox, MCC 1149); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 13); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 9); Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 8).
[47] Devlin-Brown Decl. Ex. 12 (Crosby Decl. ¶ 5); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 13; Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 13).
[48] Devlin-Brown Decl. Ex. 20 (Griffin Decl. ¶ 14); *see also* Kala Decl. Ex. 27 (emails to Associate Warden Operations mailbox, MCC 1131); Kala Decl. Ex. 28 (emails to Executive Assistant mailbox, MCC 1149).

These conditions ensured that the virus would spread through 11 South, which it quickly did. Shortly after 11 South was "quarantined,"[49] many inmates experienced severe symptoms characteristic of COVID-19, including high fevers and coughs, while only a handful were removed to isolation.[50] For instance, Anthony Luna "could barely breathe, had severe body aches and heavy sweating" and reported that [s]ome inmates couldn't even get out of bed for 2 or 3 days at a time."[51] Rodney Griffin "experienced coughing, achiness in [his] body, chills and sweating. [He] was unable to get out of bed and had no appetite."[52] Chris Karimbux "was shaking," his "whole body was in pain," he had a 105 degree fever, and he "lost [his] sense of smell."[53] Joseph Schiliro had a cough, chills, and fainted twice in one night.[54] Indeed, a total of 14 inmates from 11 South have submitted sworn declarations describing the suffering they or their dorm-mates endured from the symptoms of COVID-19.

The inmates on 11 South became increasingly fearful as the virus spread. As one inmate recalled, "the level of anxiety was palpable and ever increasing," with more and more inmates developing coughs and other symptoms.[55] Nevertheless, some inmates were also reluctant to report their symptoms for fear of being sent to the SHU, and perhaps dying alone there.[56] Those

[49] Even this "quarantine" was hardly air-tight. New inmates were introduced to 11 South even while disease was spreading in the unit. *See e.g.*, Devlin-Brown Decl. Ex. 29 (Smith Decl. ¶ 8); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶¶ 6–8).
[50] Kala Decl. Ex. 32 (Quarantine Isolation Flowsheet, MCC 0197).
[51] Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 7).
[52] Devlin-Brown Decl. Ex. 20 (Griffin Decl. ¶ 11); *see also* Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 16) ("I am very afraid that I will get sick and die in this facility.").
[53] Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 4).
[54] Devlin-Brown Decl. Ex. 28 (Schiliro Decl. ¶ 11).
[55] Devlin-Brown Decl. Ex. 34 (Zegarra-Martinez Decl. ¶ 18).
[56] Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 12); *see also* Kala Decl. Ex. 8 (Sucich Dep. Tr., at 23:19–24:8) (After attempting to report his own symptoms, Mr. Sucich was told by staff that "we were worthless, and that we were left there to die.").

who did report their symptoms were ignored.[57] As Franklyn Dansowah put it: "When the medical staff started coming around taking temperatures, they did not care if people had other symptoms—cough, chills, diarrhea. They just left them in bed unless they had a fever."[58] Another inmate similarly said that "[w]hen someone is sick [at the MCC] nothing happens."[59] Yet another inmate was "constantly coughing and . . . [had] a pain in [his] chest like someone was sticking [him] with needles," but "never saw a doctor or a nurse during that time and didn't get any treatment or medicine."[60] Inmates who were "extremely weak, could barely eat or get out of bed," and "coughed through the night and complained of difficulty breathing" were simply told to lie down.[61] These are not isolated reports: 15 inmates housed on 11 South have stated in sworn declarations and/or in statements to Dr. Venters that sick call requests and other pleas for medical care during the outbreak were simply ignored.[62]

The virus inevitably spread to every other unit of the facility, as the MCC's Medical Director, Dr. Beaudouin, himself acknowledged.[63] Michael Falu, for example, reported that on 7 South, he, his cellmate, and "many other people in [his] unit were sick."[64] Armando Beniquez on 11 North stated that "[his] whole tier caught the virus."[65] The virus also spread to the women's unit on 2. Tiffany Days reported that, after she became sick herself at the end of March, "at least

[57] *See, e.g.*, Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 7).
[58] Devlin-Brown Decl. Ex. 13 (Dansowah Decl. ¶ 9).
[59] Devlin-Brown Decl. Ex. 27 (Roberts Decl. ¶ 18); *see also* Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 9).
[60] Devlin-Brown Decl. Ex. 19 (Garcia Decl. ¶ 12).
[61] Devlin-Brown Decl. Ex. 20 (Griffin Decl. ¶ 12); *see also* Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 7) ("The only way to get seen by a doctor at the MCC is when something dramatic happens, like someone passing out.").
[62] *See, e.g.*, Summary of Inmate Declarant Evidence, Appendix A (listing declarants who identify failure to provide medical call after a sick call or other request, including declarants from 11 South); *see generally* Devlin-Brown Decl. Ex. 1 (Venters Decl.)
[63] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 186:21–187:3).
[64] Devlin-Brown Decl. Ex. 17 (Falu Decl. ¶¶ 5–6).
[65] Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 6).

ten other women in [her] unit" were not feeling well; upon taking her elevated temperature the nurse called the doctor and said, "[w]e have another one."[66] All told, counsel's review of inmate declarations, depositions, sick call requests, housing charts, and the quarantine flowsheet indicates that between 75 and 150 inmates have been symptomatic for COVID-19. While 46 staff have tested positive,[67] the true number of positive inmates will never be known because of the MCC's failure to administer tests.[68] Nevertheless, it cannot be any clearer that the MCC's complete mismanagement of the outbreak on 11 South allowed the virus to spread throughout the entire facility, risking the lives of staff and inmates alike, including 205 inmates the MCC itself designated as highly vulnerable to COVID-19.

III. The MCC's Failure to Reduce Overcrowding Through Home Confinement and Other Methods

On March 26, as the COVID-19 virus was spreading through the packed conditions on 11 South and into the rest of the overcrowded jail,[69] Attorney General Barr directed the BOP to prioritize efforts to reduce prison populations.[70] The explicit goal of this directive was to "decrease the risks" to inmate health by removing medically vulnerable prisoners and increasing social distancing—in other words, to remedy the exact sort of conditions that led to the outbreak at the

[66] Devlin-Brown Decl. Ex. 15 (Days Decl. ¶ 5).
[67] Kala Decl. Ex. 23 (May 26, 2020 Letter from MDC and MCC Wardens to Chief Judge Roslynn Mauskopf).
[68] *See, e.g.*, Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 8); Devlin-Brown Decl. Ex. 19 (Garcia Decl. ¶ 15); *see also* Devlin-Brown Decl. Ex. 19 (Garcia Decl. ¶ 8); *see also* Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 171:8–16) (citing lack of inmate testing to explain the discrepancy between the percentage of confirmed staff and inmate COVID-19 positives).
[69] The MCC currently houses approximately 700 inmates, a number far in excess of its capacity of 474. *See* ECF No. 7 (von Dornum Decl. ¶ 31); Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 71:14–18); Kala Decl. Ex. 2 (Edge Dep. Tr., at 52:13–23).
[70] Kala Decl. Ex. 21 (Mar. 26 A.G. Barr Memo).

MCC.[71] While the Attorney General's message came at a time when the need for the MCC to follow it could not be any more urgent or apparent, the MCC proceeded to do the opposite.

Specifically, the March 26 Memo directed the BOP to reduce prison populations by transferring inmates to home confinement after considering "the totality of circumstances," including factors such as the "age and vulnerability of the inmate to COVID-19."[72] A week later, the Attorney General sent a second memorandum that further expanded the number of inmates eligible for home confinement and directed the BOP to "give priority in implementing these new standards to the most vulnerable inmates."[73] Importantly, the BOP was directed to "*immediately* review all inmates who have COVID-19 risk factors" and to "include all at-risk inmates—not only those who were previously eligible for transfer."[74] For all inmates deemed suitable for home confinement, the BOP was to "*immediately* process . . . and then *immediately* transfer them."[75] Lest there by any doubt, the Attorney General punctuated his directive by emphasizing that "time is of the essence."[76]

The MCC was fully aware of these directives[77] and, from the outbreak on 11 South, the human costs of not following them. And yet, rather than respond with urgency, the MCC

[71] Kala Decl. Ex. 21 (Mar. 26 A.G. Barr Memo).
[72] Kala Decl. Ex. 21 (Mar. 26 A.G. Barr Memo).
[73] Kala Decl. Ex. 22 (April 3 A.G. Barr Memo).
[74] Kala Decl. Ex. 22 (April 3 A.G. Barr Memo) (emphasis added).
[75] Kala Decl. Ex. 22 (April 3 A.G. Barr Memo) (emphasis added). In addition, the BOP central office sent further guidance on potential avenues of release to the facilities under its jurisdiction on no fewer than four occasions, again emphasizing that "it ha[d] become imperative to review at-risk inmates for placement on home confinement" and that "[t]he current pandemic is considered an urgent situation that may warrant an emergency furlough." Kala Decl. Ex. 33 (April 22 BOP Memo re Home Confinement); Kala Decl. Ex. 34 (April 15 BOP Memo re Furlough and Home Confinement Additional Guidance); Kala Decl. Ex. 38 (April 3 BOP Memo re Home Confinement); Kala Decl. Ex. 39 (May 8 BOP Memo re Home Confinement).
[76] Kala Decl. Ex. 22 (April 3 A.G. Barr Memo).
[77] *See* Kala Decl. Exs. 7 (Licon-Vitale Dep. Tr., at 96:20–98:21); 2 (Edge Dep. Tr., at 143: 15–23); 6 (Hazelwood Dep. Tr., at 57:23–25; 58:1–19).

responded with indifference. Instead of prioritizing the review requests for home confinement, compassionate release, or furlough, the MCC reassigned all of the case managers who would normally review such requests away from those responsibilities, effective April 5.[78] As a result, Associate Warden Edge—responsible for reviewing and approving home confinement recommendations made by the case managers—could not comply with the Attorney General's directives.[79] Edge specifically raised her concerns with Respondent, and later Acting Warden Hazelwood, urging that the case managers did not need to be reassigned to cover custody duty.[80] Yet the full case management team was not moved back to their regular work until April 26, three weeks later.[81] From April 9 to April 24, while acting as warden of the facility, Mr. Hazelwood did not recommend a single inmate for home confinement and only vaguely recalls even receiving any home confinement reviews for his approval.[82]

The reassignment of critical personnel also created a backlog with respect to compassionate release applications.[83] Since the onset of the COVID-19 pandemic, the MCC has received almost 70 of these applications.[84] Yet during his time at the helm when Respondent was herself out of work due to COVID-19, Acting Warden Hazelwood could not recall receiving a single compassionate release application.[85] Ultimately, the MCC did not finish reviewing these

[78] Kala Decl. Ex. 2 (Edge Dep. Tr., at 153:11–154:25, 155:2–5).
[79] Kala Decl. Ex. 2 (Edge Dep. Tr., at 160:2–14).
[80] Kala Decl. Ex. 2 (Edge Dep. Tr., at 153:9–19, 156:17–159:25).
[81] Kala Decl. Ex. 2 (Edge Dep. Tr., at 162: 22–25); Kala Decl. Ex. 6 (Hazelwood Dep. Tr., at 67:17–68:2); Kala Decl. Ex. 35 (email from Associate Warden Edge re Return to Unit Team).
[82] Kala Decl. Ex. 6 (Hazelwood Dep. Tr., at 71:12–25; 72:1–13).
[83] Kala Decl. Ex. 2 (Edge Dep. Tr., at 138:20–139:14).
[84] Kala Decl. Ex. 40 (Compassionate Release, MCC1923); *see* ECF No. 23, at 7 (May 1 Letter to Court).
[85] Kala Decl. Ex. 6 (Hazelwood Dep. Tr., at 77:5–8).

applications until around May 14, and only upon Court order.[86] The MCC did not support a single one of these requests.[87]

The MCC has similarly ignored furloughs as a tool to address COVID-19. Neither Respondent nor Acting Warden Hazelwood has considered even a single furlough request since the onset of the crisis, despite the fact that BOP's central office made clear that the COVID-19 pandemic was an "urgent situation" justifying the MCC's use of its "emergency furlough" authority in response.[88]

IV. The MCC's Continuing Indifference to the COVID-19 Threat

Even today, two months after the initial outbreak of COVID-19 at the MCC, the facility still is not implementing basic, common-sense measures necessary to protect inmates' health and safety.

First, at a time when the ability to respond to inmate sick calls is paramount, the MCC still lacks a functioning sick-call system.[89] Numerous sick calls are simply going unanswered, even when inmates report serious symptoms.[90] In one case, an inmate submitted a sick call on April 16 describing shortness of breath and chest pains, yet did not receive a response until May 5, three weeks later.[91] In another example, the MCC waited *six weeks* to respond to an inmate who complained of fever and coughing on March 15.[92] Another inmate described having a high fever, "shaking[,]" feeling like his "whole body was in pain" and losing his sense of smell; he "sent

[86] *See* Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 146:8–147:1).
[87] Kala Decl. Exs. 7 (Licon-Vitale Dep. Tr., at 142:13–18; 146:8–147:1); 2 (Edge Dep. Tr., at 134: 5–17).
[88] Kala Decl. Exs. 7 (Licon-Vitale Dep. Tr., at 147: 15–19); 6 (Hazelwood Dep. Tr., at 77:5–8).
[89] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶¶ 34–47).
[90] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 41).
[91] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 243:21–244:17).
[92] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 250:15–251:13).

requests over the computer to be seen by medical, but no one came."[93] Of approximately 25 inmates who submitted electronic sick call requests, the medical activities report produced by the MCC in this action indicates that only 4 received any sort of medical care within one day, and only 5 inmates received medical care within one week. 6 of these inmates had to wait over 15 days to even be seen, and, as of May 15, 7 of these inmates still had not been seen by a medical staff member at all.[94]

Dr. Beaudouin acknowledged that monitoring of sick calls was not "regular" (a gross understatement), but said that it's "something that [they] are working to fix."[95] Yet there is no credible evidence of a fix on the horizon. As of May 13, the MCC was still receiving complaints that sick calls were not being answered.[96] As of May 15, 2020 (the last date for which records pertaining to this evidence were produced), an inmate who reported coughing up blood ten days earlier had still not received any medical care, had not been placed in isolation, and his tier had not been quarantined.[97] The response to sick calls remains so slow that inmates who are currently locked in their cells 23 hours a day refer to them as "a waste of time."[98]

With a broken sick call system, other measures such as testing, screening and contact tracing becomes even more important. But the MCC continues to neglect these measures as well. While the MCC obtained, on May 14, an Abbott ID Now test machine capable of processing 64

[93] Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 4).
[94] *See* Kala Decl. Ex. 36 (Sick Call Log); Kala Decl. Ex. 37 (Bureau of Prisons Health Services Activity Report); *see also* Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 41).
[95] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 257:16–258:7).
[96] *See* Kala Decl. Ex. 29 (email to Unit Team 9/11 mailbox, MCC 1173); Devlin-Brown Decl. Ex. 27 (Roberts Decl. ¶ 19); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 9) ("They never answer Corrlinks sick calls.").
[97] Kala Decl. Ex. 36 (Sick Call Requests); Kala Decl. Ex. 37 (Bureau of Prisons Health Services Activity Report); Kala Decl. Ex. 32 (Quarantine Isolation Flowsheet); Kala Decl. Ex. 25 (Rog Response Number 5).
[98] Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 10).

tests per day, only one test had been conducted using that test machine as of May 21.[99] The MCC's inmate screening procedure falls well short of CDC recommendations (and even Dr. Beaudouin's understanding of what a proper screening should entail),[100] because inmates are screened only for fever, not other known symptoms of COVID-19, as confirmed by the declarations of 15 inmates.[101] Further, the MCC has rolled back its already barebones screening procedure by reducing the frequency of inmate screening.[102] One inmate recently reported that there had been no "temperature checks in the last two weeks,"[103] which is consistent with Mr. Woodson's deposition testimony that his temperature had not been checked in about two weeks.[104] Other inmates describe similar experiences,[105] and it does not appear that there is "any regular screening of high-risk patients" held on 11 South.[106]

Nor does the MCC have any protocol for contact tracing investigations. As the staff positive number continues to rise steadily, the MCC has conducted only a handful of contact tracing investigations for staff who have tested positive for COVID-19. Dr. Beaudouin admits that "there are many more staff [that tested positive] that needed some contact investigation."[107] As for inmates, "there is no indication that any contact tracing is undertaken for those who test

[99] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 28:2–12).
[100] Venters Report ¶¶ 24–27; Kala Decl. Ex. 1 (Beaudouin Dep. Tr. at 146:9–14).
[101] *See e.g.*, Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 13) (when the MCC was performing temperature checks, they "never asked us about any other symptoms"); Devlin-Brown Decl. Ex. 13 (Devlin-Brown Decl. Ex. 13 (Dansowah Decl. ¶ 9.) ("When the medical staff started coming around taking temperatures, they did not care if people had other symptoms – cough, chills, diarrhea. They just left them in bed unless they had a fever.").
[102] Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 13); Devlin-Brown Decl. Ex. 31 (Sucich Decl. ¶ 9); Kala Decl. Ex. 6 (Hatcher Dep. Tr., at 25: 13–21; 28: 1–4; 39:10–15).
[103] Devlin-Brown Decl. Ex. 17 (Falu Decl. ¶ 13).
[104] Kala Decl. Ex. 9 (Woodson Dep. Tr. at 32:2–4).
[105] Kala Decl. Ex. 5 (Hatcher Dep. Tr. at 28:1–7); Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 13).
[106] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 16).
[107] Kala Decl. Ex. 1 (Beaudouin Dep. Tr. at 117:14–25).

positive."[108] Associate Warden Edge conceded that while such investigations were recommended, she did not know whether contact investigations were actually conducted for positive inmates.[109]

With respect to PPE, although inmates finally have some masks, they are too small for many, and are washed infrequently and at times without any detergent (which inmates have not received).[110] Replacement masks are limited; some inmates continue to wear the disposable masks they were given in April.[111] To make matters worse, the MCC is not consistently requiring inmates to wear masks.[112] Indeed, some inmates report that they were only explicitly told to wear masks immediately before the inspection of the facility ordered by this Court.[113] In total, 26 inmates have reported either not receiving any masks or receiving masks of poor quality. And the MCC's dangerously lax approach to hygiene extends to its staff, who wear masks and gloves infrequently or ineffectively. As one inmate described, "[t]he only time I have seen staff members wearing gloves are when they are wearing the white suits, which is infrequent."[114] Other inmates report that staff only started regularly wearing masks at the start of May, and that many staff members continue to leave their masks around their necks or not wear them at all.

Finally, the MCC's poor hygiene and sanitation practices remain two needless obstacles to preventing the spread of disease. For example, on May 5, multiple inmates (including a cadre inmate) complained that they had no running water for six days and could not wash their hands

[108] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 31).
[109] Kala Dec. Ex. 2 (Edge Dep. Tr. 52:5–12)
[110] Devlin-Brown Decl. Ex. 28 (Schiliro Decl. ¶ 10); Devlin-Brown Decl. Ex. 29 (Smith Decl. ¶ 11); Devlin-Brown Decl. Ex. 27 (Roberts Decl. ¶ 11); Devlin-Brown Decl. Ex. 16 (Dones Decl. ¶ 9); Devlin-Brown Decl. Ex. 23 (Matute Decl. ¶ 9); Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 20).
[111] *See* Kala Decl. Ex. 4 (Galvez-Chimbo Dep. Tr., at 23:11–24:11); Devlin-Brown Decl. Ex. 26 (Richardson Decl. ¶ 10); Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 11).
[112] Devlin-Brown Decl. Ex. 7 (Barnes Decl. ¶ 8); Devlin-Brown Decl. Ex. 27 (Roberts Decl. ¶ 11).
[113] Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 12); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 9).
[114] Devlin-Brown Decl. Ex. 29 (Smith Decl. ¶ 22).

during that time.[115] Two days later, another inmate complained that he had not received soap for more than three weeks.[116] At least 21 inmates reported not getting enough soap, if any.[117] And as the Court-ordered inspection revealed, the MCC is "widely infested with mice and roaches."[118] Inmates reported deteriorating conditions: toilets are leaking water, urine, and feces into their units; air vents are "filthy"; and common areas and objects (including computers and phones) are rarely cleaned, if at all.[119] Clean clothes are not being regularly supplied; approximately 15 inmates say they do not have regular access to clean clothes.[120] Some report that the only cleaning implements available to them are "a broom, dustpan, and dirty mop," and "[t]he mop is so dirty that it is worse than nothing."[121] Approximately 31 inmates have made statements that the MCC is not being cleaned properly.[122] Inmates still lack even the most basic hygiene supplies, like adequate soap, and have to purchase it from the commissary.[123]

ARGUMENT

I. The Court Should Grant Preliminary Injunctive Relief Remedying the COVID-19 Crisis at the MCC.

Preliminary injunctive relief should be granted where movants make a clear showing that (1) they are likely to succeed on the merits; (2) they face a prospect of irreparable harm; (3) the balance of equities tips in their favor; and (4) the public interest is served by an injunction. *Winter*

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[115] Kala Decl. Ex. 31 (emails to Warden mailbox, MCC 1185, 1186).
[116] Kala Decl. Ex. 31 (emails to Warden mailbox, MCC 1178).
[117] *See* Summary of Inmate Declarant Evidence, Appendix A.
[118] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶ 20).
[119] Devlin-Brown Decl. Ex. 26 (Richardson Decl. ¶ 6); Devlin-Brown Decl. Ex. 23 (Matute Decl. ¶ 10); Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 12); Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 8); Devlin-Brown Decl. Ex. 20 (Griffin Decl. ¶ 14); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 10); Devlin-Brown Decl. Ex. 7 (Barnes Decl. ¶ 6).
[120] *See, e.g.*, Devlin-Brown Decl. Ex. 5 (Woodson Decl. ¶ 7); Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 13); Devlin-Brown Decl. Ex. 19 (Garcia Decl. ¶ 37); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 11).
[121] Devlin-Brown Decl. Ex. 16 (Dones Decl. ¶ 7).
[122] Summary of Inmate Declarant Evidence.
[123] Devlin-Brown Decl. Ex. 19 (Garcia Decl. ¶ 33).

v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 392 (S.D.N.Y. 2011). Each element of this test is readily satisfied here.

A. Petitioners Are Likely to Succeed on the Merits

"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). Thus, both the Eighth Amendment (for sentenced inmates) and Fifth Amendment (for pretrial inmates) prohibit prison officials from acting with "deliberate indifference" to a "substantial risk of serious harm" to inmate health. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Darnell v. Pineiro*, 849 F.3d 17, 21 n.3, 29 (2d Cir. 2017).

As an initial matter, there can be no serious dispute that a "substantial risk of serious harm"—namely, the risk of contracting COVID-19, a highly contagious and deadly virus, in crowded prison conditions—is present in this case. "[C]orrectional officials have an affirmative obligation to protect inmates from infectious disease." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). And numerous courts have already held that exposure to COVID-19 constitutes a substantial risk of serious harm. *See, e.g.*, *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *8 (N.D. Ohio Apr. 22, 2020); *Basank v. Decker*, No. 20 Civ. 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)).

The ongoing risk that COVID-19 poses to Petitioners, while inherently "substantial," is exacerbated by the woefully inadequate conditions that continue to plague the MCC in particular. The prison remains overcrowded by over 200 inmates,[124] and continues to pack groups of 26 into

[124] *See* ECF No. 7 (von Dornum Decl. ¶ 31).

cramped dormitories where it is impossible to socially distance. The sick call system is basically non-existent. Inmates with severe COVID-19 symptoms, such as high fever, chest pains, coughing up blood, and difficulty breathing, are going many days or even weeks without treatment. *See supra* pp. 13–15. Dr. Beaudouin's vague aspiration, unsupported by any evidence, that the MCC is "working to fix" its sick call system, cannot give any confidence to inmates who have no idea when, if ever, they will be treated.[125]

The continuing lack of hygiene and sanitation at the MCC further increases the risk of contracting the virus. A week into May, one inmate complained that he did not receive any soap while another inmate reported that he had no access to running water.[126] Common areas are still left uncleaned; toilets still leak sewage into units; and mice, rats and roaches still proliferate.[127]

In short, the MCC's crowded, unclean conditions, in combination with a dysfunctional sick-call system, all perpetuate a risk of serious harm that was already substantial to begin with.

As to the "deliberate indifference" prong, Petitioners can satisfy the Fifth Amendment standard by showing that Respondent "recklessly failed to act with reasonable care to mitigate the risk that the [challenged] condition posed … even though [Respondent] knew, *or should have known*, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35 (emphasis added). Under the Eighth Amendment, inmates may establish a violation by showing that Respondent (i) was "aware of [the] facts from which the inference could be drawn that a substantial risk of serious harm exists," and (ii) actually "dr[ew] the inference"—a subjective standard. *Farmer*, 511 U.S. at 837.

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[125] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 258:4–7).
[126] Kala Decl. Ex. 31 (emails to Warden mailbox, MCC 1185, 1186).
[127] Devlin-Brown Decl. Ex. 26 (Richardson Decl. ¶ 6); Devlin-Brown Decl. Ex. 23 (Matute Decl. ¶ 10); Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 12); Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 8); Devlin-Brown Decl. Ex. 20 (Griffin Decl. ¶ 14); Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 10); Devlin-Brown Decl. Ex. 7 (Barnes Decl. ¶ 6); Devlin-Brown Ex. 12 (Crosby Decl. ¶ 14).

Both the Eighth and Fifth Amendment standards are met in this case. As the discovery record reveals, Respondent has, for months, been actually aware of the serious risks posed by COVID-19, but nevertheless failed to undertake the necessary steps to effectively address them. *See Farmer*, 511 U.S. at 837; *Darnell*, 849 F.3d at 35. Respondent was aware of the risks posed by COVID-19 no later than January, when the BOP issued a memorandum with guidance to all correctional facilities on how to prepare for this public health emergency. Yet the MCC admits it had not even begun planning its response to the pandemic until the "latter half of March,"[128] when COVID-19 was already rampaging through the facility.

The results of the MCC's inaction were severe. Because the MCC obtained no tests—and made no plans to test—the first inmate who was confirmed to have the virus was left in his dormitory unit for days, symptomatic and surrounded by other inmates, before the MCC finally sent the inmate to the hospital, where he tested positive. Because the MCC had not developed an isolation area for COVID-19 inmates, this inmate and many like him were sent to the SHU, perhaps the worst place in the institution for housing seriously ill inmates. Exposed inmates on 11 South were left "quarantined" in their open dormitories, where they slept alongside 25 other men with bunk beds just a few feet apart. The MCC failed to sanitize the unit after the inmate tested positive, and instead required the other inmates to attempt to clean the dormitory cell on their own without masks or other PPE.[129] The MCC's actions did not mitigate the spread of COVID-19, but instead only ensured that the virus spread within this group and beyond it—which it did.

The MCC's indifference to the threat of COVID-19 and its repudiation of BOP guidance were also reflected in the decision to reassign all case managers from their duties overseeing

[128] Kala Decl. Ex. 2 (Edge Dep. Tr., at 22:8–21).
[129] *See, e.g.*, Devlin-Brown Decl. Ex. 33 (Turner Decl. ¶ 6); Devlin-Brown Decl. Ex. 12 (Crosby Decl. ¶10); *see also* Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶¶ 12–14).

applications for home confinement and other release requests. Although Respondent's own Associate Warden expressed concern about this move, Respondent emptied the case manager offices for several weeks, forcing those staff members into different roles, and ensuring that no release requests could be reviewed. This decision flew in the face of a clear order from the Attorney General directing correctional facilities to *immediately* prioritize release to home confinement. Such wanton action by Respondent and the MCC undermined the very efforts to mitigate the spread of COVID-19 required by the Department of Justice and the BOP.

It took this lawsuit, and this Court's intervention, to nudge the MCC into any action at all, but the MCC has still not started regular testing, despite having obtained a rapid testing machine and numerous test kits, nor is it yet screening inmates regularly or thoroughly for COVID-19 symptoms. Its sick call request system remains broken, leaving inmates to wait days or weeks before their requests for medical attention are addressed. Inmates continue to reside in damp, unsanitary conditions, and fall asleep to the sounds of rodents running throughout the building. Neither Respondent nor Associate Warden Edge appear to understand the full scope of their release-related authority, despite receiving memo after memo expanding home confinement authority and urging its immediate use.[130]

The need for continued oversight from this Court is underscored by how the MCC approached the Court-ordered inspection that its Warden personally opposed.[131] Multiple inmates witnessed the MCC's attempt to make temporary and often superficial changes in preparation for

[130] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr. at 98:22–99:24; 116:8–135:24) (Q: "So tell me as best as you know, what exactly did the MCC do in response to Attorney General Barr's and the Bureau of Prisons' directive . . . ?" A: "We did not immediately start referring inmates to home confinement . . . ."); 2 (Edge Dep. Tr. at 148:21–25; 149:2) (Q: "To be clear, are you saying that . . . the only inmates who would be eligible for release after [the Attorney General's April 3, 2020] memo would be the same inmates who were eligible for release before?" A: "Yes . . . .").

[131] Kala Decl. Ex. 7 (Licon-Vitale Dep. Tr., at 89:8–13).

the inspection.[132] MCC staff "ordered the orderlies to scrub the unit, and they put up signs about COVID, and they made us all wear our masks."[133] MCC staff sprayed sanitizer in the housing units in advance of and during the inspection, which was never done before or since.[134] The MCC also put up posters advising inmates how to practice good hygiene and stating that they were free to ask for additional soap and cleaning supplies,[135] even when such supplies were not in fact available.[136]

In short, the MCC has done little more than pay lip service to necessary mitigation steps such as screening, contact tracing, hygiene, and sanitation, while continuing to exhibit unacceptable and widespread deficiencies on each of these fronts. *See supra* pp. 13–17; *see also, e.g.*, *Hernandez v. Cty. 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"); *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 Civ. 3144 (DC), 1996 WL 15688, at *1 (S.D.N.Y.

[132] Devlin-Brown Decl. Ex. 1 (Venters Decl. ¶¶ 62–63); Devlin-Brown Decl. Ex. 7 (Barnes Decl. ¶ 5); Devlin-Brown Decl. Ex. 12 (Crosby Decl. ¶ 6); Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 12); Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 17); Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 15); Devlin-Brown Decl. Ex. 22 (Luna Decl. ¶ 17).
[133] Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 12); *see* Devlin-Brown Decl. Ex. 9 (Bourgoin Decl. ¶ 9).
[134] *See, e.g.*, Devlin-Brown Decl. Ex. 8 (Beniquez Decl. ¶ 12); Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 17); Devlin-Brown Decl. Ex. 21 (Karimbux Decl. ¶ 12).
[135] Kala Decl. Ex. 6 (Hatcher Dep. Tr., at 39:16–25); Devlin-Brown Decl. Ex. 10 (Bradley Decl. ¶ 15); Devlin-Brown Decl. Ex. 6 (Andrade Decl. ¶ 17).
[136] *See, e.g.*, Kala Decl. Ex. 31 (email to Warden mailbox, MCC 1178).

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).

In each deposition, the MCC staff acknowledged the federal directives, guidelines, and policies disseminated since January. The MCC's awareness of the threat of COVID-19 and the actions it needed to take are without question. The MCC's continued failure to take these actions is the very hallmark of indifference, thereby exposing Petitioners to an intolerable risk of harm and violating their Eighth and Fifth Amendment rights.

B. Petitioners Face Irreparable Harm if Relief Is Not Granted

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 Transp.t Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009)). Harm is 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). Violations of constitutional rights establish irreparable harm as a matter of law. *See, e.g.*, *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 230–31 (2d Cir. 2004); *Jolly*, 76 F.3d at 482.

The likelihood of irreparable harm for Petitioners and proposed class members could not be clearer. Petitioners and dozens of other MCC inmates have contracted the virus, and face further bouts of severe illness, pain, and possible death should the status quo be allowed to continue. Since March, COVID-19 has been winding its way, unstopped, through the MCC. Though we know of only five inmates who tested positive, the evidence shows that the actual number of inmates infected with the disease is approximately 15 to 30 times higher. *See supra* pp. 10. The only reason the number of positive cases is not higher is because the MCC did not test more inmates. By comparison, 46 MCC staff (nearly a quarter of all employees) have tested positive for COVID-19, many of whom continued to show up to work and move around the MCC while infected, with

no clear policy directing otherwise.[137] If these conditions persist, MCC staff and inmates will continue to spread the virus back and forth among themselves—a reality that is made all the more dangerous not only by the MCC's abysmal sanitary conditions, health protections, housing practices, and overpopulation, but also (for many inmates) because of their respective ages and/or underlying medical conditions.

The risk of exposure to serious health effects alone is sufficient to establish irreparable harm. As the Supreme Court observed, "[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.[138] Several courts have determined that the grave risks from COVID-19 constitute irreparable harm. *See, e.g.*, *Wilson*, 2020 WL 1940882, at *9 ("[I]t is more than mere speculation that [COVID-19] will continue to spread and pose a danger to inmates if BOP does not increase its efforts to stop the spread."); *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."). This Court should make the same finding here.

C. The Equities and Public Interest Weigh in Favor of Relief

Where an injunction is sought against the Government, the balance-of-equities and public interest factors in the standard for relief merge. *Coronel*, 2020 WL 1487274, at *7. These factors, too, overwhelmingly support preliminary relief.

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[137] Kala Decl. Ex. 1 (Beaudouin Dep. Tr., at 120:1–121:12).

[138] *See also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) (burden of showing irreparable injury satisfied where evidence was presented that closing a treatment program would lead to plaintiffs' continued abuse of alcohol and drugs, "resulting in death, illness, or disability").

The public interest is "best served by ensuring the constitutional rights of persons within the United States are upheld." *Id.* (internal quotation marks omitted). The government can claim no interest in maintaining an unconstitutional practice of the kind at issue here. *See Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017). It is also in the public interest to ensure public health and safety. *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 will not just help protect both the medically vulnerable and other inmates at the MCC; it will also protect MCC staff members and the community at large. Staff who interact with each other and with inmates who carry the virus may unwittingly spread the disease to their families and communities.[139] In addition, sick inmates and staff require medical services that are already stretched thin. It is undoubtedly in the public interest to ease the burdens on local hospitals and healthcare systems.

The relief requested here would not impose an unreasonable burden on the MCC. Directing the MCC to follow existing guidance and evaluate releasing inmates to home confinement or on furlough, timely processing their motions for compassionate release, or transferring them to other facilities, cannot be considered an unreasonable burden, as such authority and procedures existed even prior to the COVID-19 outbreak and have only expanded since. Nor is it an unreasonable burden to ask the MCC to fully and promptly put its new testing machine to use, actually implement basic levels of sanitation within the facility, or undertake legitimate contact tracing investigations to identify potentially infected inmates. Further, it is entirely reasonable to require the MCC to provide basic levels of healthcare and treatment. Petitioners previously highlighted the numerous courts across the country that have begun to order the emergency release of inmates

[139] 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/.

whose conditions of confinement in the COVID-19 pandemic violate the U.S. Constitution. *See* Mot. for TRO, at 21. Even in the month since, courts have continued to order such release or measures facilitating it. In fact, one court has already issued a second order directing the Elkton Correctional Facility to comply with the standards of its preliminary injunction, and provided specific guidelines for what the facility was required to consider in determining which of its inmates to release. *See Wilson*, 2020 WL 2542131, at *4.

Indeed, the only progress the MCC has made to date in combatting the disease has come following the filing of this lawsuit and at the Court's intervention. Upon order of this Court, the MCC has finally managed to clear its backlog of roughly 67 compassionate release applications, though none were approved.[140] Some of these requests had previously been languishing for over two months.[141] *See supra* pp. 12–13. Similarly, at the Court's direction, the MCC seems to finally be making modest progress with respect to review for home confinement. After effectively failing to act at all for weeks, even in the face of clear guidance from the BOP central office and the Attorney General, the MCC managed to assess dozens of inmates' eligibility once the Court ordered it to do so. One might hope these limited improvements would continue without the Court's guiding hand. But the reality is different; with respect to release, as elsewhere, the MCC has demonstrated that it cannot be trusted to take necessary action on its own.[142]

In light of the Petitioners' vulnerable status, the wide-reaching effects of COVID-19, and the modest burdens asked of the MCC (which are consistent with official guidance) to care for its charges, the balance of equities and public interest weigh decidedly in Petitioners' favor.

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[140] ECF No. 40 (May 13 Letter to Judge Ramos).
[141] ECF No. 25 (Supplemental von Dornum Decl. ¶ 11).
[142] For this reason, Petitioners request that the Court appoint an independent monitor to ensure compliance with the proposed preliminary injunction order (Notice of Motion, App. A). *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 24 (2d Cir. 1971); *C.D.S., Inc. v. Bradley Zetler, CDS, LLC*, No. 16 Civ. 3199 (VM), 2016 WL 3522197, *1 (S.D.N.Y. June 15, 2016).

II. The Court Should Conditionally Certify the Proposed Class

Formal class certification is not necessary for the Court to grant the relief sought here. "It is well established that certain circumstances give rise to the need for prompt injunctive relief for a named plaintiff or on behalf of a class and that the court may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers.'" *Ligon v. City of New York*, 925 F. Supp. 2d 478, 539 (S.D.N.Y. 2013) (alteration omitted) (internal quotation marks omitted).[143]

Some courts granting preliminary relief against detention facilities in COVID-19 cases have done so without even finding it necessary to reach class certification. *See, e.g.*, *Cameron v. Bouchard*, 20 Civ. 10949, 2020 WL 1929876 at *2–*3 (E.D. Mich. Apr. 17, 2020); *Swain v. Junior*, 2020 WL 1692668 at *2 (S.D. Fla. Apr. 7, 2020). Other courts have conditionally certified classes as part of orders with class-wide preliminary relief. *See, e.g.*, *Wilson*, 2020 WL 1940882 at *6; *Rivas v. Jennings*, 20 Civ. 02731 (VC), 2020 WL 2059848, at *1, *4 (N.D. Cal. Apr. 29, 2020). If the Court exercises its discretion to follow the latter approach, the proposed class of MCC inmates here easily satisfies the prerequisites for class certification under Rule 23(a) and the requirements for an injunctive relief class under Rule 23(b)(2). *See, e.g., Consol. Rail Corp. v. Town of Hyde Park* 47 F.3d 473, 482 (2d Cir. 1995) (no abuse of discretion in certifying class at preliminary injunction stage); *A.T. v. Harder*, 298 F.Supp.3d 391, 411 (N.D.N.Y. 2018) (certifying class as part of preliminary injunction addressing juvenile detention policies).

Numerosity - Rule 23(a)(1). The proposed Class satisfies the numerosity requirement because there are nearly 700 people housed at the MCC, and it would be impractical to join them

[143] *See also N.Y. State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y. 1988) ("[L]eaving the question of class certification" for another day); Newberg on Class Actions § 24:83 (4th ed. 2002) ("The absence of formal certification is no barrier to classwide preliminary injunctive relief.").

all as parties. *See, e.g., Consol. Rail Corp.*, 47 F.3d at 483 (numerosity generally requires least 40 class members); *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (discussing impracticality of joinder of all inmates in case addressing prison conditions).

Commonality – Rule 23(a)(2). The questions of law and fact raised here are common because their "resolution will affect all or a significant number of the putative class members." *Johnson v. Nextel Commc'ns Inc*., 780 F.3d 128, 137 (2d Cir. 2015). Courts routinely find commonality when inmates "have a common interest in preventing the recurrence of the objectionable conduct" in prisons. *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 24 (2d Cir. 1971); *see also Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001) (commonality presumed where class seeks injunctive relief under Rule 23(b)(2) to remedy constitutional wrongs). Here, the principal question to be resolved is whether Respondent's failure to mitigate the risks posed by COVID-19 constitutes deliberate indifference in violation of inmates' Fifth and Eighth Amendment rights. There is thus at least "a single common question" that is shared by all class members. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

Typicality – Rule 23(a)(3). Petitioners' claims are typical of the claims of the other inmates in the proposed class. Because the claims are based on conditions and policies endured by both Petitioners and class members, the typicality requirement is satisfied even if there may be "minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993); *see Butler v. Suffolk Cty*., 289 F.R.D. 80, 99 (E.D.N.Y. 2013) (typicality satisfied in prison conditions case even if the "exact nature of [inmates'] injuries" may differ).

Adequacy – Rule 23(a)(4). Petitioners are adequate class representatives because they "have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253,

268 (2d Cir. 2006). All inmates generally have been subjected to the same unconstitutional conduct, and Petitioners have brought this suit to remedy Respondent's inadequate response to the COVID-19 pandemic. In addition, class counsel here are "qualified, experienced and able to conduct the litigation," *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000), and also meet the requirements of Rule 23(g).[144]

Requirements for Injunctive Release Class – Rule 23(b)(2). Finally, the proposed class meets the Rule 23(b)(2) requirement that "the party opposing the class has acted or refused to act on grounds that apply generally to the class" so that injunctive relief as to the entire class is appropriate. Fed. R. Civ. P. 23(b)(2). "[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what [Rule 23] (b)(2) is meant to capture." *Dukes,* 564 U.S. at 361. Courts have already certified or conditionally certified Rule 23(b)(2) classes of inmates seeking injunctive relief to remedy failures to properly manage the COVID-19 pandemic. *See, e.g., Wilson*, 2020 WL 1940882, at *8. Here, the Warden's action—and inaction—came in response to the risks of COVID-19 at the MCC, a ground that applies to all members of the purported Class. Respondent's deliberate indifference to the health and safety of MCC inmates can be remedied only by declaring such conduct to be a violation of Petitioners' constitutional rights and granting injunctive relief to alleviate those risks.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant Petitioners' Motion for a Preliminary Injunction and order the relief set forth in Appendix A to their Notice of Motion, as well as any other relief that the Court deems just and proper.

[144] See the accompanying Declaration of Andrew A. Ruffino.

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New York, New York

COVINGTON & BURLING LLP

By: s/ Arlo Devlin-Brown
Arlo Devlin-Brown
Andrew A. Ruffino
Alan Vinegrad
Timothy C. Sprague
The New York Times Building
620 Eighth Avenue
New York, New York 10018
T: (212) 841-1000
E: adevlin-brown@cov.com
aruffino@cov.com
avinegrad@cov.com
tsprague@cov.com

Attorneys for Petitioners

Appendix A: Summary of Inmate Sworn Statements

All citations below are to inmate declarations (with paragraph citations) or transcripts of inmate depositions (with page citations), attached as exhibits to the accompanying Declarations of Arlo Devlin-Brown and Ishita Kala.

Deficiencies	Inmate Declarations and Testimony
Failure to provide medical care to sick inmates.	**28** declarants Fernandez-Rodriguez 4; Galvez-Chimbo 4-5; Hatcher Dep. Tr. 10:1-4, 25:12-22, 40:14-20 (Kala Decl. Ex. 5); Woodson 13, 16; Andrade Decl. 4, 6, 8; Beniquez 8, 16; Bourgoin 6, 7; Bradley 12; Crosby Decl. 8, 11; Dansowah 8, 15; Davis 6; Days 4-5, 10; Dones 14; Falu 5; Flynn 10; Garcia 8-16, 19-20; Griffin 11-13; Karimbux 4, 6, 8; Luna 7, 9-10; Matute 7-8; Naqvi 17; Richardson 8; Roberts 15, 18; Schiliro 7; Sucich 10; Toro 30; Turner 7-8; Zegarra-Martinez 8-10, 15.
Failure to isolate sick inmates.	**28** declarants Fernandez-Rodriguez 4; Galvez-Chimbo 4-5; Woodson 13, 15; Andrade 4; Beniquez 5, 10; Bourgoin 4, 6; Bradley 12; Brown 10-12, 30; Crosby 8, 11; Dansowah 8; Davis 6; Days 4-5; Dones 14; Falu 5-6; Flynn 10; Garcia 8-16; Griffin 11-13; Karimbux 3-4, 6; Luna 7, 10; Matute 5; Naqvi 17; Richardson 8; Roberts 13; Schiliro 7, 8; Sucich 10; Toro 30; Turner 7-8; Zegarra-Martinez 8-10, 13.
Failure to adequately screen for COVID-19 symptoms.	**11** declarants Hatcher Dep. Tr. 25:13-21, 39:10-15, 28:1-4 (Kala Decl. Ex. 5); Woodson 17; Beniquez 7; Bourgoin 7; Dansowah 9; Falu 13; Schiliro 9; Sucich 9; Toro 16; Turner 13; Zegarra-Martinez 16.
Lack of soap.	**21** declarants Fernandez-Rodriguez 7; Hatcher 9; Woodson 9; Barnes 5; Beniquez 18; Bourgoin 9; Bradley 6; Brown 19-20; Crosby 19; Days 19; Dones 6; Flynn 5; Garcia 33; Griffin 5; Luna 15; Naqvi 18; Richardson 11; Schiliro 11; Soto 7; Toro 27; Zegarra-Martinez 25.

Deficiencies	Inmate Declarations and Testimony
Lack of adequate masks or other PPE.	**26** declarants Hatcher 8; Woodson 11-12; Barnes 8; Beniquez 19; Bourgoin 13; Bradley 9; Brown 19; Crosby 5; Dansowah 16; Davis 8; Days 6, 21; Dones 9-10; Falu 7; Flynn 7, 12; Garcia 15, 30, 36; Griffin 8; Luna 11, 14; Matute 9; Michel 7; Naqvi 20; Roberts 11; Schiliro 10, 14; Sucich 14; Toro 22, 24; Turner 18-19; Zegarra-Martinez 19-21.
Insufficient cleaning of cells or common areas.	**31** declarants Fernandez-Rodriguez Dep. Tr. 67:12-68:23 (Kala Decl. Ex. 3); Galvez-Chimbo Dep. Tr. 27:1-19, 27:24-29:2 (Kala Decl. Ex. 4); Woodson 18; Hatcher 6-7; Andrade 11; Barnes 5-7; Beniquez 9, 14; Bourgoin 10; Bradley 8; Brown 19, 22; Crosby 10, 18; Dansowah 12; Davis 8-9; Days 17, 22; Dones 7; Falu 10-11; Garcia 32, 35; Griffin 7, 10, 14; Karimbux 9, 12; Luna 12-13; Matute 10, 16; Michel 11; Naqvi 18; Richardson 12; Schiliro 5, 12-13; Smith 12; Sucich 13; Soto 15; Toro 26-27; Turner 5-6, 16; Zegarra-Martinez 25.