SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

THE PEOPLE OF THE STATE OF NEW YORK Ex Rel. Philip Desgranges, Esq., on behalf of JOHN PACE, EARL COLEMAN, TONI DILAURO, JOSHUA WHIDBEE, AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

MICHAEL SCHIFF, Sullivan County Sheriff; and ANTHONY ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondents.

Supreme Court Docket No.
Index # E2020-671

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Petitioners move for class certification in this habeas proceeding challenging the respondents' deliberate indifference to their serious medical needs and seeking their immediate release to avoid serious harm to their health. In the midst of a pandemic that has taken the lives of nearly 30,000 New Yorkers, dozens of people who face a high risk of serious illness or death from COVID-19 are trapped in the Sullivan County Jail where nearly half the jail population is infected with the virus. Both those suffering from the virus and those who have not yet contracted it are condemned to a jail so deplorable that state officials call it a "dungeon." The Sullivan County Jail is filled with black mold, ceilings that leak toilet water into people's cells, and housing units are unbearably hot because of poor ventilation. These conditions make the jail "unsafe" in normal times, according to county officials. But during a deadly pandemic that jail officials have permitted to flourish and from which they have failed to protect the most vulnerable in their custody, these conditions make the Sullivan County Jail a deathtrap. Indeed, the jail is so immitigably dangerous for those most vulnerable to the coronavirus — people of advanced age or with certain underlying medical conditions — that Dr. Homer Venters, one of the Nation's leading experts on correctional health, believes they "face a serious risk of life-threatening medical complications or death from COVID-19 for as long as they remain detained at Sullivan County Jail."

The proposed medically vulnerable class is a class all people who are or will be detained at the Sullivan County Jail during the COVID-19 pandemic and who are at least 50 years of age or have any condition that has been identified by the Centers for Disease Control and Prevention or the New York State Department of Health as posing an elevated risk for severe illness from COVID-19. Class certification under Article 9 of the Civil Practice Law and Rules is appropriate

here because the class action provisions apply to special proceedings such as habeas and every member of the proposed class suffers the same injury – serious risk of severe illness or death from COVID-19. The petitioners seek the immediate release of themselves and the proposed class members to end the defendants' deliberate indifference to their serious medical needs.

BACKGROUND

The Sullivan County Jail is currently facing the uncontrollable spread of COVID-19. The first person incarcerated at the jail to test positive for COVID-19 did so on May 11.[1] As of last week, 33 people have tested positive for the virus,[2] accounting for nearly half of the 73-person jail population.[3] Over the last two weeks, Sullivan County has had the highest rate of positive tests for COVID-19 and the most new cases per capita in New York State.[4] But the jail's infection rate of 45% is even worse than the infection rate in the County—and worse still than at the Rikers jail complex in New York City.[5] There is no vaccine for COVID-19 and no known cure.[6] Preventive measures to curb the spread of COVID-19 are especially important for people of advanced age or with certain underlying medical conditions, which can place them at an elevated risk of serious illness or death from COVID-19 infection.[7] Among the only measures known to prevent the

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[1] *Inmate at Sullivan County Jail Test Positive for COVID-19*, MidHudson News, *available at* https://midhudsonnews.com/2020/05/18/inmates-at-sullivan-county-jail-test-positive-for-covid-19/?fbclid=IwAR0aapcTjVH_crj_F1KvCFhES7izPDrJx-bp0zi81VsDq96wksiGsU8xuWM
[2] *See id.*
[3] *See* Sullivan County Jail Roster, attached as Ex. 1 of Verified Petition.
[4] *10 Weeks Into New York Area's Lockdown, Who Is Still Getting Sick?,* The New York Times, *available at* https://www.nytimes.com/2020/05/28/nyregion/ny-coronavirus-new-cases.html.
[5] *See* Verified Petition, Table at page 14.
[6] *How to Protect Yourself & Others*, CENTERS FOR DISEASE CONTROL & PREVENTION (last reviewed April 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.
[7] N.Y. STATE DEP'T OF HEALTH, Memorandum to the Dep't of Health Housing Providers (Mar. 27, 2020), https://health.ny.gov/health_care/medicaid/covid19/docs/2020-03-27_supp_house_guide.pdf; *Coronavirus Disease 2019: People Who are at Higher Risk*, CTRS.

spread of COVID-19 transmission effectively are maintaining stringent hygiene, such as frequent handwashing with soap and hot water, and observing "social distancing" (maintaining physical distance of at least six feet from others).[8] But despite the importance of these preventive measures — particularly for vulnerable populations — officials at the Sullivan County Jail have failed to ensure that either one is effectively implemented. Instead, the jail is filthy and rarely cleaned; and incarcerated people are frequently housed in cramped conditions where social distancing is impossible. As a result, the respondents have failed to protect the medically vulnerable people, who are at a substantial risk of serious harm from COVID-19.

While COVID-19 can be deadly for people of any age or health condition, people of advanced age or with certain underlying medical conditions are particularly at risk. People over the age of 50 years old face an elevated risk of serious illness or death from COVID-19 infection. According to the New York State Department of Health, those who are 50 or over may become very ill and require emergency hospitalization.[9] In a February 29, 2020 WHO-China Joint Mission

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FOR DISEASE CONTROL & PREVENTION (last reviewed May 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

[8] *Id.* Medical information in this and the following paragraphs draws on the expert testimony of medical professionals filed in recent state and federal actions in California, and Washington. *See* Expert Declaration of Dr. Marc Stern: https://www.aclu.org/sites/default/files/field_document/6_declaration_of_dr._marc_stern.pdf; Expert Declaration of Dr. Robert Greifinger: https://www.aclu.org/sites/default/files/field_document/4_declaration_of_robert_b._greifinger_1.pdf; Expert Declaration of Dr. Jonathan Golob; Expert Declaration of Dr. Homer Venters: https://creeclaw.org/wp-content/uploads/2020/03/Declaration-of-Dr.-Homer-Venters.pdf; Expert Declaration of Dr. Jaimie Meyers: https://creeclaw.org/wp-content/uploads/2020/03/Declaration-of-Jaimie-Meyer.pdf.

[9] N.Y.STATE DEP'T OF HEALTH, Memorandum to the Dep't of Health Housing Providers (Mar. 27, 2020), https://health.ny.gov/health_care/medicaid/covid19/docs/2020-03-27_supp_house_guide.pdf; Coronavirus Disease 2019: People Who are at Higher Risk, CTRS.FOR DISEASE CONTROL &PREVENTION (last reviewed May 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

Report, the preliminary mortality rate analyses showed that individuals age 50-59 had a 1.3% mortality rate, three times as high as for individuals age 40–49, and individuals aged 60-69 had a mortality rate of 3.6%.[10] Named petitioners Pace and Coleman, both age 61, are in this latter category.[11]

People of any age with certain underlying medical conditions are also at an elevated risk from COVID-19. These high-risk conditions include lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, asthma, and pregnancy.[12] Named petitioners suffer from these conditions: Mr. Pace has chronic obstructive pulmonary disease and a heart condition, Ms. Dilauro has severe asthma, and Mr. Whidbee has hypertension.[13] A Joint Mission Report published by the World Health Organization ("WHO") and China provides that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.

Sullivan County Jail

Correctional settings are generally susceptible to the rapid outbreak of infectious diseases. But there is no worse jail in the state, and possibly the country, for medically vulnerable people than the Sullivan County Jail. The infection rate among the incarcerated population is the worst

[10] *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths*, WORLDOMETER (last updated May 13, 2020, 6:00 PM), https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/ (data analysis based on WHO- China Joint Mission Report).
[11] Pace Affidavit ¶ 1, Coleman Affidavit ¶ 1.
[12] *See supra* n. 9.
[13] *See* Pace Affidavit ¶ 6, Dilauro Affidavit ¶ 6, Whidbee Affidavit ¶ 5.

reported rate for any jail in state. That COVID-19 is spreading through the incarcerated population at a record rate makes clear the life-threatening risk it poses for medically vulnerable detainees. Every time a detainee interacts with a correction officer, touches a frequently touched surface area, or simply breathes in the air in the poorly ventilated jail, they risk contracting the virus.

The risks in the Sullivan County Jail are multiplied by the jail's deplorable condition and the respondents' failure to take reasonable measures to mitigate the risk for the medically vulnerable population. The Sullivan County Jail hasn't been fit to serve as a jail for over a decade. Ten years ago, the head of the state watchdog group that monitors county jail conditions called the jail a "dungeon" and said the conditions are "completely unacceptable."[14] The jail has consistently failed to satisfy the state's minimum standards requirements.[15] As the oldest jail in the state, more than 110 years old, the jail conditions simply reflect its age.[16] There are holes in the ceiling and floors, and toilet water leaks through the ceiling into some people's cells. The jail's walls and ceilings are peppered with black mold, the bathrooms and showers are caked with rust and dirt, and the housing units turn into saunas in the summer because of the lack of proper ventilation. The Sheriff and other county officials have called the jail "deplorable" and "unsafe,"[17] yet it continues to house people in conditions not fit for any human being.

The conditions of the Sullivan County Jail facilitate the transmission of the coronavirus. Nearly a quarter of the jail's population is housed in a dorm in which beds are spaced just three feet apart from each other — well within the six feet required to observe proper social distancing.

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[14] *Inside the Sullivan County Jail,* THE CATSKILL CHRONICLE, *available at* https://thecatskillchronicle.com/2010/01/28/inside-the-sullivan-county-jail/
[15] *Inside the Sullivan County Jail,* THE CATSKILL CHRONICLE, *available at* https://thecatskillchronicle.com/2010/01/28/inside-the-sullivan-county-jail/
[16] *Sullivan's New Jail Decades In the Making*, RECORD ONLINE, available at https://www.recordonline.com/news/20191017/sullivans-new-jail-decades-in-making
[17] *Id.*

They all share the same bathrooms, showers, dining tables, recreation yard, and telephones. The two phones in this dorm are right next to each other, and they are both often in use at the same time. The commonly used areas are rarely cleaned. The first incarcerated person to contract COVID-19 was in this dorm, and subsequent testing of the dorm's population found that 17 out of 20 people tested also contracted the virus.[18]

Even weeks after discovering the COVID-19 outbreak at the facility, the Sheriff's Office continues to ensure that incarcerated individuals cannot observe basic hygiene practices. The respondents refuse to make hand sanitizer available to those incarcerated,[19] and even prevent adequate handwashing by providing no access to hot water.[20] People in the jail are unable to keep their quarters clean, because those supplies that are provided are inadequate and shared among many individuals.[21]

Nor has the Sheriff's Office effectively implemented social distancing in the jail, despite the obvious need. The measures that the respondents implemented after the COVID-19 outbreak, such as separating people into housing blocks depending on their infection status,[22] are wholly ineffective because of other glaring deficiencies. The Sheriff's Office does not enforce social distancing in any meaningful way among incarcerated people and staff. Furthermore, the Sheriff's Office continues to implement staffing practices that enable COVID-19 to flourish at the jail. Correctional staff rotate continually between housing units, ensuring that units housing people

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[18] *Inmate at Sullivan County Jail Test Positive for COVID-19*, MIDHUDSON NEWS, *available at* https://midhudsonnews.com/2020/05/18/inmates-at-sullivan-county-jail-test-positive-for-covid-19/?fbclid=IwAR0aapcTjVH_crj_F1KvCFhES7izPDrJx-bp0zi81VsDq96wksiGsU8xuWM
[19] Dunn Affidavit ¶ 29.
[20] Dunn Affidavit ¶ 28, Pace Affidavit ¶ 9.
[21] Whidbee Affidavit ¶ 22, Dilauro ¶ 12, Pace Affidavit ¶ 10, Coleman Affidavit ¶ 21, Dunn Affidavit ¶¶ 13, 29.
[22] *See* Dilauro Affidavit ¶ 17.

without COVID-19 diagnoses are staffed every day by many correctional officers, some of whom will have spent extensive time in units housing people infected with COVID-19. [23]

Medical care at the Sullivan County Jail is also systemically deficient in a manner that would place incarcerated people in harm's way even under normal circumstances but that creates a profound risk of harm during a deadly pandemic. Medical staff routinely fail to check COVID-19 symptoms other than fever.[24] Temperature checks that are a baseline practice for COVID-19 screening appear to be conducted inconsistently and with inaccurate results.[25] Sick call responses are spotty at best.[26] Medical staff routinely respond to individuals who present known COVID-19 symptoms by administering nothing more than Tylenol.[27] They are available only during their twice daily medical rounds.[28] They are *entirely* absent from the facility between the hours of 10 p.m. and 8 a.m., meaning that any person who requires medical attention overnight has *no* access to onsite medical care. [29] As a result, people who report potentially serious medical conditions overnight are routinely told that they must wait to receive medical care until the morning.[30] Individuals who request medical attention — sometimes for obviously serious medical problems — routinely receive delayed medical attention or no medical attention at all.[31] Correctional staff, who are the conduits for sick call requests by people detained at the facility, often refuse to process requests or edit them.[32]

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[23] *See* Coleman Affidavit ¶ 13.
[24] Whidbee Affidavit ¶¶ 46, 52, Mackawgy ¶¶ 15-16.
[25] Dunn Affidavit ¶ 22.
[26] Dunn Affidavit ¶¶ 17-18, Dilauro ¶ 25.
[27] *See* Mackawgy Affidavit ¶ 5, Whidbee Affidavit ¶ 46, Dunn Affidavit ¶ 6.
[28] *See* Dilauro Affidavit ¶ 9.
[29] Whidbee Affidavit ¶¶ 34-36, 41, Pace Affidavit ¶ 13.
[30] Dilauro Affidavit ¶ 8, Pace Affidavit ¶ 13.
[31] *See id.*
[32] Dunn Affidavit ¶ 22, Mackawgy Affidavit ¶ 17, Dilauro Affidavit ¶ 9.

Finally, Respondents have taken no specific action for people who are medically vulnerable to serious complications or death from COVID-19.[33] Named petitioners are housed together with others in the jail who do not have medical vulnerabilities to COVID-19, and though Mr. Pace is in a "medical unit," the medical unit does not provide heightened care or prevention efforts compared with other units.[34] In fact, some medically vulnerable people were put in more risk of contracting COVID-19 by being forced to work on "quarantine" units with people who had newly arrived at the jail.[35]

Putative Class Representatives

Petitioners John Pace, Earl Coleman, Toni Dilauro, and Joshua Whidbee are four individuals detained at the Sullivan County Jail. All face an imminent risk of serious illness or death from COVID-19. And that risk is particularly acute as to Petitioners Dilauro and Whidbee, who have already been infected by COVID-19 and whose conditions could drastically deteriorate at any moment.

Petitioner John Pace is in pretrial detention at the Sullivan County Jail for a burglary charge.[36] He is 61 years old and diagnosed with chronic obstructive pulmonary disease ("COPD"), a progressive lung disease, and a heart condition caused by bundle blockage.[37] Mr. Pace's advanced age, COPD, and heart condition place him at an elevated risk of serious illness or death from COVID-19. Mr. Pace has not yet tested positive for COVID-19.[38] Mr. Pace's medical

[33] *See* Pace Affidavit ¶ 22, Coleman Affidavit ¶ 20, Dilauro Affidavit ¶ 11, Whidbee Affidavit ¶ 10, Dunn Affidavit ¶ 8, Mackawgy Affidavit ¶ 7.
[34] Pace Affidavit ¶ 14.
[35] *See* Dunn Affidavit ¶ 18.
[36] Pace Affidavit ¶¶ 1, 3.
[37] *Id.* at ¶ 6.
[38] *Id.* at ¶ 1.

conditions are so severe that he has been on A Block in a "medical unit" ever since he was incarcerated last fall.[39] However, no one has taken special precautions to protect Mr. Pace from serious illness or death in light of his medical vulnerabilities.[40] Social distancing is virtually impossible for Mr. Pace. In his housing unit, the tier is less than six-feet wide outside the cells, which are open-faced with bars.[41] When Mr. Pace uses the telephone, he is directly next to the cell of another man, who would only be able to observe social distancing by standing inside the toilet in his cell.[42] His cellblock, like others, is covered in insects, mold, rust, and filth.[43] The cleaning supplies he uses are shared with people in other units.[44]

Petitioner Earl Coleman is detained at the Sullivan County jail on a parole warrant for alleged parole violations, a technical violation and a violation based on a charge of possession of a controlled substance.[45] He is 61 years old: his advanced age places him at an elevated risk for serious illness or death from COVID-19.[46] Mr. Coleman has not yet tested positive or COVID-19.[47] Mr. Coleman is housed in C Block and there is no way to social distance on the block, where tables are close to the cells and men on the block play cards at the table together.[48] During the lock down, people still have to walk past his cell to shower, use the phone, or retrieve food.[49] On Mr. Coleman's block, the men are not required to wear masks within the housing unit.[50]

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[39] *Id.* at ¶ ¶ 12, 14.
[40] *Id.* at ¶ 22.
[41] Pace Affidavit at ¶ 24.
[42] *Id.*
[43] *Id.* at ¶ 9.
[44] *Id.* at ¶ 10.
[45] Coleman Affidavit ¶¶ 1, 3.
[46] *Id.* at ¶ 1.
[47] *Id.*
[48] *Id.* at ¶ 10.
[49] *Id.* at ¶ 9.
[50] Coleman Affidavit ¶ 15.

Petitioner Toni Dilauro is serving a sentence at the Sullivan County Jail until August 24, 2020 based on a conviction for a technical parole violation.[51] She has severe asthma, which places her at an elevated risk of serious illness or death from COVID-19.[52] Ms. Dilauro tested positive for COVID-19 on or around May 16, 2020.[53] Ms. Dilauro has already suffered from inadequate medical care at the jail. She recently had an asthma attack overnight and was ignored by corrections staff.[54] When someone in a neighboring cell screamed for help, the corrections officer replied that nothing can be done because the nurses had left for the night.[55] The corrections officer later said she would try to reach her supervisor, but no one ever followed up that night.[56] Luckily for Ms. Dilauro, she was able to recover after multiple uses of her inhaler.[57]

Petitioner Joshua Whidbee is detained at the Sullivan County Jail on a parole warrant for alleged technical parole violations.[58] He is diagnosed with hypertension, which places him at an elevated risk for serious illness or death from COVID-19.[59] Mr. Whidbee tested positive for COVID-19 on or around May 16, 2020. Mr. Whidbee already has suffered serious symptoms of coronavirus, including dizziness, loss of appetite, chronic fatigue, extremely swollen lips, difficulty falling and staying asleep, tightness in his throat, constant migraine headaches, difficulty thinking and focusing, a "barking" cough, muscle aches and back pain, and tightness in his chest particularly when speaking.[60] Mr. Whidbee is currently housed in a cramped cell in a unit where

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[51] Dilauro Affidavit ¶ 3.
[52] *Id.* at ¶ 6-7.
[53] *Id.* at ¶ 4.
[54] *Id.* at ¶ 8.
[55] *Id.*
[56] Dilauro Affidavit ¶ .8
[57] *Id.*
[58] Whidbee Affidavit ¶ 3.
[59] Whidbee Affidavit ¶ 5.
[60] *Id.* at ¶ 9.

social distancing is impossible.[61] His housing unit is filthy and coated in black mold, which Mr. Whidbee breathes in daily.[62]

ARGUMENT

Petitioners move for certification of the following class: all people who are or will be detained at the Sullivan County jail during the COVID-19 pandemic and who are at least 50 years of age or have any condition that has been identified by the Centers for Disease Control and Prevention or the New York State Department of Health as posing an elevated risk for severe illness or death from COVID-19. As a threshold matter, the class action provisions of CPLR Article 9 apply to special proceedings like habeas corpus. The text of the CPLR, state case law, and federal jurisprudence supports the application of Article 9 (governing class actions) to habeas corpus proceedings. *See infra* Section I.

This Court should certify the proposed class because it meets the requirements of CPLR § 901 (a). Specifically, CPLR § 901 (a) is satisfied here because: (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the class predominate of over any individual questions, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) class action is superior to all other available methods for the fair and efficient adjudication of the controversy. Along with these requirements, the class satisfies the considerations of practicality and fairness found in CPLR § 902 because they "are implicit in CPLR 901" (*Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc 2d 941, 948 [Sup Ct, New York County 1978]).

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[61] *Id.* at ¶ 23.
[62] *Id.* at ¶¶ 22-24.

I. CLASS HABEAS IS PERMISSIBLE UNDER THE CPLR.

A class action habeas proceeding is permissible under the CPLR because the text of the CPLR, state case law, and federal jurisprudence supports the application of the CPLR's class actions provisions to habeas corpus proceedings. Beginning with the text, the CPLR governs the procedure in civil actions and special proceedings, "except where the procedure is regulated by inconsistent statute" (CPLR §§ 101, 103 [b]). Habeas corpus proceedings are special proceedings under the CPLR (*see* CPLR § 7001). The distinction between actions and special proceedings is largely irrelevant because the CPLR's provisions that apply to actions "shall be applicable to special proceedings" except where the law prohibits its application (CPLR § 103 [b]). The CPLR does not prohibit the application of the class action provisions in Article 9 to special proceedings (Article 4), including habeas proceedings (Article 70). And no statute inconsistent with the CPLR regulates habeas corpus proceedings. Thus, Article 9's class action provisions, which are applicable to actions, are also applicable to special proceedings like habeas.[63] (*See* CPLR § 103 [b].)

Next, state case law supports the application of Article 9's class action provisions to special proceedings like habeas corpus. In 1975, the legislature adopted Article 9 to replace the prior class action provision, CPLR § 1005, which had been "judicially restricted over the years" (*City of New York v Maul*, 14 NY3d 499, 508 [2010] [citation omitted]). Since then, the few cases that have addressed whether Article 9 applies to special proceedings have determined that it does. For

[63] The legislative history of CPLR Article 9 supports the broad application of its class action provisions. The New York Court of Appeals has explained that the CPLR's class action criteria "should be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it." (*City of New York v Maul*, 14 NY3d 499, 509 [2010], quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980].)

example, the Fourth Department rejected the argument that class status is unavailable for special proceedings (*Turner v Reed*, 52 AD2d 739, 741 [4th Dept 1976] [holding that "[a]though this is a special proceeding and not an action, we think that such fact alone does not, as respondents contend, bar class action relief"] [citing CPLR § 103(b), which states that provisions of the CPLR that are "applicable to actions shall be applicable to special proceedings"]; *see also Boulevard Gardens Tenants Action Comm., Inc. v Boulevard Hous. Corp.*, 388 NYS2d 215, 218 [Sup Ct, Queens County 1976] [citing CPLR § 103 (b) and holding that "The fact that this is a special proceeding does not bar class action treatment"]). Indeed, the Fourth Department affirmed the certification of a class in an Article 78 special proceeding where the petitioners satisfied Article 9's certification requirements (*Brown v Wing*, 241 AD2d 956 [4th Dept 1997] [affirming the certification of a class of recently arrived New York residents challenging the constitutionality of statute restricting Home Relief benefits in the first six months of residency]).

In the one case that has directly addressed whether Article 9's class action provisions apply to habeas proceedings, the court recognized that they do apply. In *People ex rel. Kaufmann v Goldman*, a 15-year-old filed a habeas petition seeking his release from the state's custody in a drug treatment center because he was not drug dependent (86 Misc 2d 776, 777 [Sup Ct, New York County 1976]). The teenager applied for class action status for the habeas (*see id.*), presumably for a class of teens similarly held in drug treatment centers without a finding that they were drug dependent. The court held that the class action application was "premature" and it "denied the application without prejudice to renewal" (*Id.* at 777–778 [referencing CPLR § 902]).[64] By

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[64] Relying on CPLR § 902, the court found the class action application was premature because it was made before the service of the respondent's answer (*Id.* at 777–778). But the Appellate Division has since held that courts can disregard the "irregularity" of an early application for class certification and afford the adverse party "the opportunity to oppose [the motion for class certification] on its merits" (*David B. Lee & Co. v Ryan*, 266 AD2d 811, 812 [4th Dept 1999];

permitting the renewal of the application, the court recognized that Article 9's class action provisions apply in habeas proceedings.

Finally, federal jurisprudence supports the application of the CPLR's class actions provisions to habeas corpus proceedings. The New York Court of Appeals has counseled that "[f]ederal jurisprudence is helpful in analyzing CPLR 901 issues, because CPLR article 9 has much in common with Federal rule 23, the federal class action provision" (*City of New York v Maul*, 14 NY3d 499, 511 [2010] [citations and internal quotation marks omitted]; *see also Vasquez v Nat'l Secs. Corp.*, 48 Misc 3d 597, 600 [Sup Ct, NY County 2015] ["It is well established that our state courts look to Rule 23 of the Federal Rules of Civil Procedure [] to inform New York's class action law"]). Federal courts routinely certify multi-party actions in habeas proceedings based on Rule 23's requirements (*see infra* II.B [citing seven cases in the last two months granting class status in coronavirus-related habeas proceedings based on Rule 23]*; see also Bertrand v Sava*, 684 F2d 204, 219 [2d Cir 1982] [finding no error in the lower court's decision to certify a class based on the requirements of Rule 23]). That Rule 23 is used to certify the equivalent of class habeas proceedings in the federal courts supports the application of Article 9 to state habeas proceedings because Article 9's class action requirements "are virtually identical to those contained in rule 23" (*Colt Indus. S'holder Litig. v Colt Indus. Inc.*, 77 NY2d 185, 193–194 [1991]).

Indeed, the CPLR provides a stronger foundation for applying class action status in habeas proceedings than the federal rules. The federal rules state that they govern all civil suits, with the exception that they apply to habeas corpus proceedings only to the extent that the practice in habeas

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see also Evans v City of Johnstown, 96 Misc 2d 755, 772 [Sup Ct, Fulton County 1978] [rejecting defendants' request to dismiss the class certification motion as premature, stating that the only prejudice the defendants would suffer is if the court decides the motion now without affording defendants an opportunity to contest it, and allowing the defendants the opportunity to contest the motion on its merits to avoid any prejudice]).

proceedings has previously conformed to the practice in civil actions (Fed Rules Civ Pro rule 81). Based on Rule 81's "conformity provision," the Second Circuit in *U. S. ex rel. Sero v Preiser* held that Rule 23 does not directly apply to federal habeas proceedings because class action status did not conform to previous habeas practice (506 F.2d 1115, 1125 [2d Cir 1974]). But the Second Circuit nonetheless allows for a "multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure" (*id.*). As it explained, "our conclusion that an analogous procedure may be employed in this case is bolstered by the Federal Rules' delineation of the circumstances which make multi-party actions appropriate," including that "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue is thereby avoided" (*id.*). Because the CPLR contains no "conformity provision," the CPLR's class action provisions can be directly applied to state habeas proceedings in these circumstances.

II. PETITIONERS MEET THE REQUIREMENTS OF CPLR § 901(a) FOR CLASS CERTIFICATION.

A. The Proposed Class Is Numerous.

Plaintiffs' proposed class satisfies the requirement that the class be "so numerous that joinder of all members, whether otherwise required or permitted, is impracticable" (CPLR § 901 [a] [1]). There is no "set rule for the number of prospective class numbers which must exist before a class is certified" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [1980]). Nonetheless, courts have found that a class with at least 40 members presumptively satisfies numerosity (*Consol. Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995] ["numerosity is presumed at a level of 40 members"]; *Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224 [Sup Ct, NY County 2013] [stating that "the threshold for impracticability of joinder seems to be around forty," and certifying

a class of between 30 and 70 workers] [citation and internal quotations marks omitted], *affd* 50 AD3d 357 [1st Dept 2008]).

As of the date of this filing, there are 73 people detained at the Sullivan County jail, many of whom qualify as class members (Desgranges aff at ¶ 7; *see also* Petition for Habeas Corpus [attaching affidavits from two class members]). Establishing the precise number of class members is not required, especially where such a number is in the exclusive control of the government (*Robidoux v Celani*, 987 F2d 931, 936 [2d Cir 1993] [holding that plaintiffs need not define the exact size or identity of class members to obtain class certification, and instead may "show some evidence of or reasonably estimate the number of class members"]).[65]

The proposed class satisfies the numerosity requirement because joinder of all potential class members is impracticable based on its size and contextual factors. The Court of Appeals has explained that "the legislature contemplated classes involving as few as 18 members where the members would have difficulty communicating with each other, such as where 'barriers of distance, cost, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated'" (*Borden v 400 E. 55th St. Assocs., L.P.,* 24 NY3d 382, 399 [2014] [finding the legislature's reasoning on numerosity applied to a class of tenants where some had moved out of the building] [internal citation omitted]; *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v Morgan Stanley & Co.*, 772 F3d 111, 120 [2d Cir 2014] [considering similar contextual factors when assessing numerosity] [citation omitted]). The

[65] Petitioners have requested discovery on the exact number of individuals in the jail who satisfy the characteristics of the proposed class. *See* Order to Show Cause. To the extent that this Court requires the exact number of class members to resolve this motion, it must order that respondents produce such discovery (*see Stewart v Roberts*, 163 AD3d 89, 95-97 [3d Dept 2018] [finding that the lower court erred in denying petitioner's motion for class certification in an Article 78 special proceeding "without first granting her request for discovery on the issue of numerosity" to identify the number of individuals who meet the characteristics of the proposed class]).

proposed class consists of people in jail, which, even in ordinary times, limits one's ability to sue independently (*see V.W. by & through Williams v. Conway*, 236 F Supp 3d 554, 574 [NDNY 2017] ["[T]he ability of any one individual member of the class or the subclass to maintain an individual suit will necessarily be limited by the simple reality that they are being detained."]). Because the jail is currently under lockdown, it is even more difficult than normal for incarcerated class members to communicate with other members on different floors of the jail. Dilauro aff at ¶ 26. Most of the class members have limited finances and are represented by public defenders. Desgranges aff at 8. But as a result of the lockdown, lawyers cannot visit their clients in the jail. Mackawgy aff at 26.

Finally, numerosity is established because the case involves future class members. The jail's lockdown will eventually end, and the class will revolve through the jail during the course of the pandemic, making the joinder of class members impracticable (*See Gerstein v Pugh*, 420 U.S. 103, 110 n 11 [1975] [noting that the transient nature of pretrial detention makes it difficult for "any given individual [to] have his constitutional claim decided"]; *see also V.W.*, 236 F Supp 3d at 574 [noting that plaintiffs' class includes future pre-trial detainees, which is "the sort of revolving population that makes joinder of individual members a difficult proposition."]; *see also Clarkson v Coughlin*, 145 FRD 339, 346 [SDNY 1993] ["[p]risoners . . . come and go from institutions for a variety of reasons . . . [n]evertheless, the underlying claims tend to remain."] [internal quotations and citations omitted]).

B. Common Questions of Law or Fact Predominate for the Proposed Class.

The questions of law and fact raised here are "common to the class" and predominate over questions affecting only individual members (CPLR § 901 [a] [2]) because their "resolution will affect all or a significant number of the putative class members" (*Johnson v Nextel Commc'ns Inc.*,

780 F3d 128, 137 [2d Cir 2015]). The common question of law and fact to be resolved here is: whether respondents have acted with deliberate indifference to the serious medical needs of the proposed class in violation of the cruel and unusual punishment clauses and Due Process clauses of the U.S. and New York Constitutions.

As the Court of Appeals emphasized, "it is 'predominance, not identity or unanimity,' that is the linchpin of commonality" (*Maul*, 14 NY3d at 514, quoting *Friar*, 424 NYS2d at 708). Therefore, "the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*id.).* The key to commonality is that an issue will be resolved "that is central to the validity of each one of the claims in one stroke" (*Wal-Mart Stores, Inc. v Dukes*, 564 U.S. 338, 350 [2011]; *see also Escalera v N.Y.C. Hous. Auth.*, 425 F2d 853, 867 [2d Cir 1970] [finding that "[a]lthough the facts leading to the [housing authority] action in the case of each named plaintiff were different, the procedures used in each type of action were identical. This provides the common question of law and fact for the members of the respective classes."]).

The commonality requirement is perfectly met in prison and jail cases, like this one, when those incarcerated "have a common interest in preventing the recurrence of the objectionable conduct" (*Inmates of Attica Corr. Facility v Rockefeller*, 453 F2d 12, 24 [2d Cir 1971]). Indeed, a number of federal courts have found commonality established in COVID-related habeas class actions raising similar deliberate indifference claims (*Gomes v Acting Secretary, Dept. of Homeland Security*, 2020 WL 2113642, at *2 [D New Hampshire May 4, 2020, No. 20-CV-453-LM] [finding commonality based on petitioner's deliberate indifference claim and certifying a class of all individuals held at an immigration detention center]; *Fraihat v U.S. Immigration and Customs Enforcement*, 2020 WL 1932570, at *18 [CD Cal, Apr. 20, 2020, No. EDCV 19-1546

JGB] [finding commonality to certify civil detainee class based on common deliberate indifference claim]; *Wilson v Williams*, 2020 WL 1940882, at *7 [ND Ohio, Apr. 22, 2020, No. 4:20-cv-00794] [finding common question regarding whether respondent's failure to create safe conditions violated plaintiffs' rights and certifying the class]; *Savino v Souza*, 2020 WL 1703844, at *6 [D Mass, Apr. 08, 2020, No. 20-10617-WGY] [finding common question as to whether the government was deliberately indifferent to risk COVID-19 posed to civil detainees and certifying the class]; *Rivas v Jennings*, 2020 WL 2059848, at *1 [ND Cal Apr. 29, 2020, No. 20-cv-02731-VC]; *Rodriguez Alcantara v. Archambeault*, 2020 WL 2315777, at *4 [SD Cal, May 1, 2020, No. 20CV0756 DMS (AHG)] [rejecting defendant's argument that each member of the putative class has a different risk profile because there is commonality in that everyone is high risk and certifying the class]; *Roman v Wolf*, ECF No. 52 [CD Cal, Apr. 23, 2020, No. 20-cv-00768-TJH-PVC] [finding commonality in that every member of the putative class suffers the same constitutional injury even if their risk levels vary and provisionally certifying the class]).

C. The Claims of the Named Petitioners Are Typical of the Proposed Class.

The requirement of CPLR § 901 (a) (3) that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" is satisfied where, as here, the claims "arose out of the same course of conduct and [are] based on the same theories as the other class members" (*Ackerman v Price Waterhouse*, 252 AD2d 179, 201 [1998]). Here, the deliberate indifference claim of the petitioners is the same as the class members because it arises from the same government practice (*Hurrell-Harring v State of New York*, 914 NYS2d 367, 370 [3d Dept 2011] [finding typicality among class of defendants challenging systemic deficiencies of public defense system where "plaintiffs' claims derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory"]).

D. The Named Petitioners Will Fairly and Adequately Represent the Class.

The adequacy requirement of CPLR § 901 (a) (4) is measured by such factors as "whether a conflict of interest exists between the representative and the class members," "the competence, experience, and vigor of the representative's attorneys," and "the financial resources available to prosecute the action" (*Pruitt v Rockefeller Ctr. Props, Inc.*, 574 NYS2d 672, 678 [1st Dept 1991]; *see also Denney v Deutsche Bank AG*, 443 F3d 253, 268 [2d Cir 2006] ["the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members."]). "Courts that have denied class certification based on the inadequate qualifications of plaintiffs have done so only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit" (*In re Frontier Ins. Group, Inc., Sec. Litig.*, 172 FRD 31, 47 [EDNY 1997] [internal quotations marks omitted]). Here, all the representatives of the class have been subjected to the same deliberate indifference of their serious medical needs as the proposed class. The named petitioners brought this habeas to end the unconstitutional punishment inflicted on them and the proposed class, and the named petitioners have no foreseeable conflicts of interest with other class members. *See* Pace aff ¶ 2; Coleman aff ¶ 2; Whidbee aff ¶ 2; Dilauro aff ¶ 2. Proposed class counsel, the New York Civil Liberties Union Foundation (NYCLU), has the requisite competence and experience based on decades of class action litigation experience in representing people in jails and in bringing constitutional challenges. Desgranges aff ¶¶ 3-5. And NYCLU has the financial resources to prosecute the action (*see id.* 6).

E. The Proposed Class Satisfies the Superiority Requirement.

The requirement of CPLR § 901 (a) (4) that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy" is met here. Class certification would promote judicial economy by avoiding multiple suits that would raise the same issues (*see Gen. Tel. Co. of the Sw. v Falcon*, 457 U.S. 147, 155 [1982] [noting how "the class-action device saves the resources of both the courts and the parties"]). The "governmental operations rule," which "cautions against class certification where governmental operations are involved," is inapplicable here because relief granted to one petitioner would not "adequately flow to and protect others similarly situated under principles of stare decisis" (*New York City Coal. to End Lead Poisoning v Giuliani*, 245 AD2d 49 [1st Dept 1997] [citations omitted]). The rule does not apply when "victory for the individual plaintiffs in the absence of class relief will only result in a plethora of actions being brought for identical relief," creating unnecessary delay and expense (*Ammon v Suffolk County*, 413 NYS2d 469, 470 [2d Dept 1979] [explaining why the rule doesn't apply in damages actions]). Because the release of the named petitioners based on deliberate indifference grounds will only spur more habeas proceedings seeking identical relief, class habeas would save unnecessary delay and expense (*see Hurrell-Harring*, 914 NYS2d at 371 [certifying a class of indigent criminal defendants challenging the state's public defense system because failure to grant certification would likely lead to many duplicative lawsuits, the possibility of inconsistent rulings, and significant discovery challenges]).

Other exceptions to the governmental operations rule also justify the superiority of a class action habeas. Where, as here, the ability to commence individual suits is highly compromised due to indigency (*see Tindell v Koch,* 164 AD2d 689, 695 [1st Dept 1991]), and the condition sought to be remedied poses an immediate threat that cannot await individual determinations (*see Lamboy*

v Gross, 513 NYS2d 393, 399 [1st Dept 1987]), the rule doesn't apply. Given that the proposed class consists of indigent, incarcerated people who face a significant risk of serious harm from COVID-19, class action is superior to all other methods.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that this Court grant this application for class certification, certify the proposed class, appoint the named petitioners as representatives of the class, and appoint the undersigned counsel as class counsel.

Dated: May 29, 2020
New York, N.Y.

Respectfully submitted,

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