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 VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

On behalf of themselves and a class of other medically vulnerable detainees, petitioners bring this habeas proceeding challenging the respondents' deliberate indifference to their serious medical needs and seeking their immediate release from the Sullivan County Jail to avoid serious harm to their health. Petitioners John Pace, Earl Coleman, Toni Dilauro, and Joshua Whidbee are four individuals detained at the Sullivan County Jail who all face an imminent risk of serious illness or death from COVID-19. In the midst of a pandemic that has taken the lives of nearly 30,000 New Yorkers, petitioners and other medically vulnerable people 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." 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.

The outbreak of a highly infectious, deadly virus in a closed detention setting is a disaster, calling for urgent and decisive action to protect the health of those confined in the jail, those who work there, and the medical professionals who will treat those who become infected. Unfortunately, the Sullivan County Sheriff's Office, which current detains 73 people, has failed to respond to the urgent and serious threat to the health of people confined at the Sullivan County Jail. Although many medically vulnerable people are confined at the jail, Sullivan County officials have created an environment where COVID-19 flourishes virtually unabated. At the time of filing, 45% of the jail's population had tested positive for COVID-19. As evidenced by the woefully inadequate measures that Sheriff Schiff has implemented in the several months since the COVID-19 crisis reached New York, the Sullivan County Jail is grossly ill-equipped to protect and care for medically vulnerable people during the COVID-19 pandemic.

Because respondents have not adopted *any* specific measures to protect the medically vulnerable population, this Court should find respondents deliberately indifferent to the serious medical needs of the petitioners and the medically vulnerable class. In the extraordinary circumstances and unprecedented public health crisis presented by the pandemic, release via habeas is the only effective remedy to the respondents' deliberate indifference.

STATEMENT OF FACTS

The Sullivan County Jail has become a cesspool for 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. Among the only measures known to prevent the spread of COVID-19 transmission effectively are maintaining stringent hygiene, such

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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 the Verified Petition for Habeas Corpus.

[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.

as frequent handwashing with soap and hot water, and observing "social distancing" (maintaining physical distance of at least six feet from others).[7] 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.

I. COVID-19 POSES A SUBSTANTIAL RISK OF SERIOUS HARM FOR MEDICALLY VULNERABLE PEOPLE INCARCERATED AT THE SULLIVAN COUNTY JAIL.

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.[8] In a February 29, 2020 WHO-China Joint Mission Report, the preliminary mortality rate analyses showed that individuals age 50-59 had a 1.3%

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[7] *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.

[8] 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.

mortality rate, three times as high as for individuals age 40–49, and individuals aged 60-69 had a mortality rate of 3.6%.[9] Named petitioners Pace and Coleman, both age 61, are in this latter category.[10]

People of any age with certain underlying medical conditions also are 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.[11] 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.[12] 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.[13] COVID-19 can also severely damage lung tissue, causing permanent loss

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[9] *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).
[10] Pace Affidavit ¶ 1, Coleman Affidavit ¶ 1.
[11] 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.
[12] *See* Pace Affidavit ¶ 6, Dilauro Affidavit ¶ 6, Whidbee Affidavit ¶ 5.
[13] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19- final-report.pdf (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: "13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer").

of respiratory capacity; can lead to long-term heart failure, which limits exercise tolerance and the ability to work; and can trigger an over-response of the immune system, leading to widespread injury to organs like the kidneys.[14]

Most people in higher risk categories will need advanced supportive care for coronavirus complications, requiring highly specialized equipment that is in limited supply in New York, and an entire team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and intensive care physicians.[15] For people in the Sullivan County Jail, the jail itself is not equipped to provide this advanced supportive care.[16] Even at the local hospitals, the level of support can quickly exceed local health care resources. Without the appropriate level of care and equipment, medically vulnerable people are at serious risk of death. For those in the highest risk populations, the fatality rate of COVID-19 infection is about fifteen percent.[17]

Patients in these high-risk categories who have already contracted COVID-19, such as Petitioners Dilauro and Whidbee, should expect a prolonged recovery, including the need for extensive rehabilitation, including for the loss of respiratory capacity.[18] WHO has reported that physical recovery from COVID-19 can extend well beyond the period of active infection, taking six weeks or longer.[19] Indeed, NYC Health + Hospitals has reported that it is admitting people

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[14] *Id.*
[15] Expert Declaration of Dr. Carlos Franco-Paredes: https://creeclaw.org/wp-content/uploads/2020/03/Declaration-of-Dr.-Carlos-Franco-Paredes.pdf.
[16] *See* Whidbee Affidavit ¶ 37.
[17] Expert Declaration of Dr. Carlos Franco-Paredes: https://creeclaw.org/wp-content/uploads/2020/03/Declaration-of-Dr.-Carlos-Franco-Paredes.pdf.
[18] *Id.*
[19] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, WORLD HEALTH ORG. (Feb. 16–24, 2020), https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf; Amanda D'Ambrosio, *COVID-19 Sequelae Can Linger for Weeks*, MEDPAGE TODAY, (May 13, 2020), https://www.medpagetoday.com/infectiousdisease/covid19/86482.

diagnosed with COVID-19 weeks ago but who have "lingering symptoms and now are getting worse."[20]

II. RESPONDENTS HAVE FAILED TO TAKE REASONABLE MEASURES TO PROTECT MEDICALLY VULNERABLE PEOPLE FROM COVID-19.

Respondents have failed doubly to protect medically vulnerable people both from COVID-19: They have failed not only to implement baseline measures to curb the virus's transmission to individuals to whom infection poses a deadly threat but also to ensure that minimally adequate treatment can be provided in the inevitable event that such people do become infected. Though adequate measures to mitigate the risk of COVID-19 transmission are *impossible* at the Sullivan County Jail, the respondents have failed to implement even those baseline protections that they reasonably could to promote social distancing and increased hygiene practices in the jail environment.

After the pandemic began, the Sheriff's Office provided masks to those incarcerated, prohibited in-person visits, screened and quarantined newly incarcerated people, and regularly took the temperature of those incarcerated.[21] But the Sheriff's Office failed to require that staff and those incarcerated consistently wear their masks.[22] It required incarcerated workers to work on the quarantined blocks.[23] And has failed to check for symptoms other than fever.[24]

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 Sheriff's Office refuses to make hand sanitizer available to those incarcerated.[25] But the unsanitary

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[20] *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.
[21] *See, e.g.*, Whidbee Affidavit ¶¶ 47-48, Dunn Affidavit ¶17, 21.
[22] *See e.g.,* Pace Affidavit ¶ 23, Coleman Affidavit ¶ 15.
[23] *See, e.g.*, Dunn Affidavit ¶ 18.
[24] *See, e.g.*, Whidbee Affidavit ¶ 41.
[25] Dunn Affidavit ¶ 29.

conditions maintained at the Sullivan County Jail do not end there. Showers, which have poor drainage, are caked in mold and seldom cleaned.[26] Common surfaces are not cleaned regularly.[27] People in the jail are unable to keep their quarters clean, because cleaning supplies that are provided are inadequate and shared among many individuals.[28] Cells are not being cleaned between inhabitants, even when the previous inhabitant had COVID-19.[29]

Nor has the Sheriff's Office effectively implemented social distancing in the jail, despite the obvious need. Those measures that the respondents implemented after the COVID-19 outbreak, such as separating people into housing blocks depending on their infection status,[30] 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 and in fact effectively *requires* incarcerated people *not* to observe social distancing. For example, putative class members Dunn and Mackawgy live in an open dorm housing unit with 16 others with beds an arm's length apart; people in Mr. Dunn and Mr. Mackawgy's housing unit are required to line up closely together to receive daily medications; and Petitioner Whidbee was previously housed in the same unit as, and direct proximity to, the first incarcerated man who tested positive for COVID-19.[31] The Sheriff's Office have housed women who have not yet tested positive for COVID-19 in a housing unit directly next to a unit for individuals who have been infected. The units are in such

[26] Whidbee Affidavit ¶ 25, 29.
[27] Dunn Affidavit ¶ 13.
[28] Whidbee Affidavit ¶ 22, Dilauro ¶ 12, Pace Affidavit ¶ 10, Coleman Affidavit ¶ 21, Dunn Affidavit ¶¶ 13, 29.
[29] Dilauro Affidavit ¶ 17, Whidbee Affidavit ¶ 14.
[30] *See* Dilauro Affidavit ¶ 17.
[31] *See* Pace Affidavit ¶ 24, Dunn Affidavit ¶ 24-25, Mackawgy Affidavit ¶ 11, Whidbee ¶ 18.

close proximity to one another that women in the two units can talk through the windows.[32] Open cells allow for transmission of droplets in the air.[33]

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 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.[34] This is true even for A block, the medical housing unit, where baseline best practices would require that the unit maintain consistent correctional staffing by officers who do not rotate through the jail.[35]

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.[36] Temperature checks that are a baseline practice for COVID-19 screening appear to be conducted with inaccurate results.[37] Sick call responses are spotty at best.[38] Medical staff routinely respond to individuals who present known COVID-19 symptoms by administering nothing more than Tylenol.[39] Medical staff are available only during their twice daily medical rounds.[40] 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

[32] Dilauro Affidavit ¶ 12.
[33] Venters Affidavit ¶ 18iv.
[34] *See* Coleman Affidavit ¶ 13.
[35] Centers Affidavit ¶
[36] Whidbee Affidavit ¶¶ 46, 52, Mackawgy ¶¶ 15-16.
[37] Dunn Affidavit ¶ 22.
[38] Dunn Affidavit ¶¶ 17-18, Dilauro ¶ 25.
[39] *See* Mackawgy Affidavit ¶ 5, Whidbee Affidavit ¶ 46, Dunn Affidavit ¶ 6.
[40] *See* Dilauro Affidavit ¶ 9.

medical care.[41] 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.[42] Individuals who request medical attention — sometimes for obviously serious medical problems — routinely receive delayed medical attention or no medical attention at all.[43] Correctional staff, who are the conduits for sick call requests by people detained at the facility, sometimes refuse to process requests or edit them.[44]

Finally, respondents have taken no specific action for people who are medically vulnerable.[45] 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 to other units.[46] 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.[47]

ARGUMENT

By continuing to incarcerate people highly susceptible to serious illness or death from COVID-19 under conditions that make contracting the virus likely, the respondents have acted with deliberate indifference to the serious medical needs of medically vulnerable people in the Sullivan County Jail. Respondents' deliberate indifference violates the prohibitions against cruel and unusual punishment and the due process clauses in the United States and the New York Constitutions. Petitioners seek immediate release for themselves and other members of the putative

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[41] Whidbee Affidavit ¶¶ 34-36, 41, Pace Affidavit ¶ 13.
[42] Dilauro Affidavit ¶ 8, Pace Affidavit ¶ 13.
[43] *See id.*
[44] Dunn Affidavit ¶ 22, Mackawgy Affidavit ¶ 17, Dilauro Affidavit ¶ 9.
[45] *See* Pace Affidavit ¶ 22, Coleman Affidavit ¶ 20, Dilauro Affidavit ¶ 11, Whidbee Affidavit ¶ 10, Dunn Affidavit ¶ 8, Mackawgy Affidavit ¶ 7.
[46] Pace Affidavit ¶ 14.
[47] *See* Dunn Affidavit ¶ 18.

class of medically vulnerable individuals because, in these extraordinary circumstances, release is the only remedy to stem the risk of serious harm presented by the coronavirus pandemic.

I. RESPONDENTS HAVE ACTED WITH DELIBERATE INDIFFERENCE TO THE SERIOUS MEDICAL NEEDS OF THE PETITIONERS AND THE MEDICALLY VULNERABLE CLASS.

Corrections officials violate the U.S. Constitution when they act with deliberate indifference to the serious medical needs of those in their custody (*see Estelle v Gamble*, 429 U.S. 97, 104 [1976] [explaining that the Eighth Amendment proscribes more than "physically barbarous punishment"]). Under the Eighth Amendment, corrections officials "must provide humane conditions of confinement [including] . . . adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates" (*Farmer v Brennan*, 511 U.S. 825, 832 [1994]). As part of their obligation to ensure humane conditions, correction officials must protect incarcerated people from exposure to communicable diseases (*see Helling v McKinney*, 509 U.S. 25, 33–34 [1993]; *see also Jolly v Coughlin*, 76 F3d 468, 477 [2d Cir 1996] [stating that correction officials have an "affirmative obligation to protect inmates from infectious disease"]).

Medical care in correctional settings is a condition of confinement, thus "[w]hether one characterizes the treatment received by the [prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the deliberate indifference standard" (*Wilson v Selter*, 501 U.S. 294, 303 [1991] [internal quotation marks and citations omitted]). Deliberate indifference is akin to recklessness, and can be defined "subjectively (what a person actually knew and disregarded), or objectively (what a reasonable person knew, or should have known)" (*Darnell v Pineiro*, 849 F3d 17, 29 [2d Cir 2017], citing *Farmer*, 511 U.S. at 836–837).

A detainee in post-conviction custody must establish that jail officials acted with *subjective* deliberate indifference to their serious medical needs (*see Wilson v Seiter*, 501 U.S. 294 [1991]; *see also Estelle*, 429 U.S. at 104.). To do that, they first need to prove that the condition of confinement poses a "substantial risk of serious harm" (*Farmer*, 511 U.S. at 834,), by establishing that they have a "serious medical need" (*Charles v Orange Cty.*, 925 F3d 73, 86–87 [2d Cir 2019]). The "serious medical needs" standard "contemplates a condition of urgency such as one that may produce death, degeneration, or extreme pain" (*Id.* at 86, citing *Hathaway v Coughlin*, 99 F3d 550, 553 [2d Cir. 1996]). Next, post-conviction detainees have to prove that the jail official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837.

Actual knowledge is required because medical conditions only rise to the level of a "punishment" when officials are aware of the risk of harm and fail to take "reasonable measures" to mitigate it (*See Farmer*, 511 U.S. at 832, 836–37.837). Once they have actual knowledge, corrections officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" (*Helling v McKinney*, 509 U.S. 25, 33 [1993)] [finding Eighth Amendment violation based on incarcerated individual's exposure to environmental tobacco smoke.]). Nor can they "await a tragic event" before their actions constitute deliberately indifference because "[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" (*id.* at 33.).

An un-convicted detainee, on the other hand, need only establish that corrections officials acted with *objective* deliberate indifference to their serious medical needs (*see Darnell*, 849 F3d at 29.). Because detainees who have not been convicted cannot be punished, the Second Circuit has recognized that they need not prove that corrections officials were actually aware of the risk

of harm (*id.*). As a result, pre-trial detainees and people accused of parole violations need prove only that corrections officials "recklessly failed to act with reasonable care to mitigate the risk that the condition posed . . . even though the defendant-official knew, or *should have known*, that the condition posed an excessive risk to health or safety" (*id.* at 35 [emphasis added]).[48]

Here, for the putative class members who are pre-trial detainees and people accused of parole violations, the Fourteenth Amendment to the U.S. Constitution and the Due Process Clause of New York Constitution protects them against any form of punishment and thus provides broader protections than the Eighth Amendment provides to post-conviction detainees (*see Darnell*, 849 F3d at 29; *Cooper v Morin*, 49 NY2d 69, 79 [1969]).[49] Regardless of whether this Court applies the deliberate indifference test for convicted or un-convicted detainees, both standards are satisfied here because the respondents had actual knowledge of the substantial risk of serious harm that COVID-19 poses to medically vulnerable detainees. As a result, petitioners focus on the deliberate indifference standard for convicted detainees because, by establishing an Eighth Amendment

[48] The conditions of petitioners held on parole warrants, like those of other pretrial detainees, are to be evaluated under the Fourteenth Amendment (*see Benjamin v Malcolm*, 646 F Supp 1550, 1556 [SDNY 1986]; *Hamilton v Lyons*, 74 F3d 99, 106 [5th Cir 1996]).

[49] The clause in the New York State Constitution prohibiting "cruel and unusual punishments" is the same as the Eighth Amendment. N.Y. Const. Art. 1, § 5. Thus, by establishing an Eighth Amendment violation, petitioners necessarily establish a violation of the state's Constitution (*see, e.g.*, *People v Harris*, 77 NY2d 434, 437-38 [1991] ["Because the language of the Fourth Amendment of the United States Constitution and section 12 of article I of the New York State Constitution prohibiting unreasonable searches and seizures is identical, it may be assumed, as a general proposition, that the two provisions confer similar rights."]). The New York Court of Appeals has interpreted the state's due process clause to confer more protections than the federal counterpart (*Cooper v Morin*, 49 NY2d 69, 79 [1979] [rejecting the Supreme Court's due process test for determining whether prison regulations constitute unlawful punishment, and instead and it employs State Constitution's due process clause requiring "a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement"]; *see also People v Pavone*, 26 NY3d 629, 639 [2015] ["This Court has previously, and repeatedly, 'applied the State Constitution ... to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties'"] [citing cases]).

violation, as petitioners do here, they establish a constitutional violation for both pre-trial and post-conviction medically vulnerable individuals.

A. COVID-19 Poses a Substantial Risk of Serious Harm to the Petitioners and the Medically Vulnerable Class.

The first component of the subjective deliberate indifference standard is satisfied with proof that a detainee faces a "substantial risk of serious harm" (*Farmer*, 511 U.S. at 834 [describing the objective harm test set forth in *Helling*]). To demonstrate such a risk, petitioners must show they have "serious medical needs," which involves "a condition of urgency such as one that may produce death, degeneration, or extreme pain" (*Charles*, 925 F3d at 86 [citation omitted]; *see also Hathaway v Coughlin*, 37 F3d 63, 67 [2d Cir 1994] ["Hathaway had serious medical needs [because of his] . . . degenerative hip conditions"]).

Here, petitioners and the medically vulnerable class satisfy the serious medical needs standard. It cannot be disputed that COVID-19 is a highly dangerous disease that poses a high risk of severe illness and death, especially for the petitioners and the medically vulnerable class by virtue of their age or underlying medical conditions (*see supra* at p 4-5). The medical conditions of those who have already contracted the virus can deteriorate rapidly at any moment, requiring immediate, emergency hospitalization (*see* Venters aff at ¶ 26).). The virus can damage heart, kidney, and lung function and cause blood clots throughout the body, creating a risk of serious complications during the weeks after and individual first tests positive (Venters aff ¶ 10). And the fact that COVID-19, a highly transmissible virus, is already present within the jail creates a substantial risk that other class members will contract the virus (*id.* at ¶ 33). Because of the "unsafe, life-threatening condition" in the jail (*see Helling*, 509 U.S. at 33), petitioners clearly satisfy the objective prong of the deliberate indifference standard.

A number of courts have reached the same conclusion based on similar facts. For example, in *People ex rel. Jeffrey v. Brann*, a New York court found that "[t]here can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition" (2020 WL 1679209, at *1–5 [Sup Ct, NY County Apr. 6, 2020, No. 451078/2020] [noting that "Covid-19 is at large at Rikers Island" and "poses a deadly threat to inmates"]). In *Wilson v Williams*, the court found that detainees in an Ohio jail "obviously satisfy [the objective] component" of the deliberate indifference standard because "a deadly virus is spreading amongst [the facility's] population and staff" which risks pneumonia for some and death for members of the subclass who "have a very serious medical need to be protected from the virus" (2020 WL 1940882, at *8-9 [ND Ohio Apr. 22, 2020, No. 4:20-CV-00794]). In *Cameron v Bouchard*, the court found that the presence of COVID-19 in a Michigan county jail along with the fact that it "poses a significant risk of severe illness and death, particularly for the medically vulnerable, renders the objective component easily satisfied in this case" (2020 WL 2569868, at *21 [ED Mich. May 21, 2020, No. CV 20-10949]). This Court should similarly find that petitioners and the medically vulnerable class have demonstrated a serious medical need and thus satisfied the objective prong of the deliberate indifference standard.

B. Respondents Knew of and Disregarded the Risk of Harm Because They Failed to Take Reasonable Measures to Abate It.

The second component of the deliberate indifference standard is satisfied here because the respondents have known of and disregarded an excessive risk to the health of the medically vulnerable incarcerated population (*See Farmer*, 511 U.S. at 837; *Charles*, 925 F.3d at 87 ["Whether the state knew or should have known of the substantial risk of harm to the detainee is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence."]). For months now, the respondents have known of the serious medical

needs of the medically vulnerable people in the Sullivan County jail and failed to take reasonable measures to mitigate the substantial risk to their health (*Hathaway v. Coughlin*, 37 F3d 63, 67 [2d Cir 1994] ["[A] rational jury could find that [defendant] was deliberately indifferent to Hathaway's serious medical needs in that he knew of and disregarded an excessive risk to Hathaway's health."]).

This Court may conclude that respondents "knew of a substantial risk from the very fact that the risk was obvious" (*Farmer*, 511 U.S. at 842.). During a global pandemic that has cost the lives of at least 100,000 Americans,[50] it could not be more obvious that COVID-19 poses a substantial risk of serious harm to the medical vulnerable population at the Sullivan County Jail. Over 23,000 New Yorkers have died from COVID-19.[51] In Sullivan County, as of today 30 people have died from COVID-19, making its substantial risk obvious to county officials, including the Sheriff's Office.[52] DOCCS is also well aware of the risk given that, as of today, 16 people incarcerated in DOCCS custody, 4 parolees under its supervision, 4 members of its staff have already lost their lives due to COVID-19.[53]

Correspondence sent to the respondents and the respondents' own actions further prove that they knew of the substantial risk of serious harm that COVID-19 poses to the medically vulnerable in the Sullivan County Jail. Beginning in March, the State Commission of Correction

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[50] *An Incalculable Loss*, The New York Times, *available at* https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html
[51] New York State COVID-19 Tracker, *available at* https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last visited on May 29, 2020).
[52] Sullivan County COVID-19 Dashboard, *available at* https://sullivanny.us/departments/publichealth/coronavirus (last accessed on May 29, 2020).
[53] DOCCS Daily Update on COVID-19 Confirmed Deaths, *available at* https://doccs.ny.gov/doccs-covid-19-report (last accessed on May 29, 2020)

sent a series of memoranda to the Sheriff's Office including guidance from the CDC and the DOH identifying people who are at higher risk of severe illness or death from COVID-19. (*See* exhibit 4 of the Petition for Habeas Corpus.) The NYCLU also wrote to the Sheriff's Office in late May detailing the substantial risk of serious harm that COVID-19 poses to the medically vulnerable incarcerated population (*see* exhibit 3 of the Petition for Habeas Corpus; *see also Hernandez v Decker*, 2020 WL 1547459, at *3 [SDNY Mar. 31, 2020, No. 20-CV-1589 (JPO)] [finding that respondent was aware of petitioner's serious medical needs because petitioner submitted a letter detailing his needs and heightened risk of harm from COVID-19]). As for DOCCS, beginning in late March, it released some low-level technical parole violators from the Sullivan County jail and other jails "in response to the growing number of COVID-19 cases in local jails" to protect the "vulnerable population" in those jails.[54] Respondents thus had actual knowledge that COVID-19 "may produce death, degeneration, or extreme pain" for the medically vulnerable people at the Sullivan County (*Charles*, 925 F3d at 86 [citation omitted]).

Despite knowing the substantial risk of serious harm that COVID-19 poses to petitioners and the medically vulnerable class, the Sheriff's Office failed "to take reasonable measures to abate it" (*Farmer*, 511 U.S. at 847; *see also Darnell*, 849 F.3d at 35 [stating that deliberate indifference requires proof that officials "failed to act with reasonable care to mitigate the risk that the condition posed."]). After the pandemic began, the Sheriff's Office provided masks to those incarcerated, prohibited in-person visits, screened and quarantined newly incarcerated people, and regularly took the temperature of those incarcerated (*see, generally* Verified Petition of Habeas

[54] Releases, Effective March 27, 2020, available at https://doccs.ny.gov/doccs-covid-19-report. A number of advocates, including NYCLU, have also written to DOCCS informing them of the substantial risk of serious harm that COVID-19 poses to parolees in local jails. *See, e.g.,* Ex. 2 of the Verified Petition of Habeas Corpus.

Corpus). But the Sheriff's Office failed to require that staff and those incarcerated wear their cloth masks (*id.*). The Sheriff's Office did not attempt to enforce social distancing among those incarcerated and staff (*see id.*), presumably because it recognizes, like the petitioners do, that social distancing is impossible in the facility (*id.*).

Even weeks after discovering the COVID-19 outbreak at the facility, the Sheriff's Office still refuses to make hand sanitizer available to those incarcerated (*id.* at ¶ 79). While the Sheriff's Office locked down the facility after the outbreak and separated people into housing blocks based on whether they tested positive for the virus (*see id.* at ¶ 19), social distancing still doesn't take place (*id.* at ¶ 48). As the CDC explained, masks are not a replacement for social distancing because "a cloth face covering is not intended to protect the wearer, but it may prevent the spread of virus from the wearer to others."[55] Filthy conditions in the jail, too — including the presence of mold, mildew, and flies — ensure that proper cleaning and disinfection are impossible (*see* Venters aff ¶ 18.a.iii.) Making matters worse, the Sheriff's Office continues to rotate its staff between housing blocks risking further transmission of the virus from infected to non-infected housing blocks (*see* Petition of Habeas Corpus at ¶ 79). As for DOCCS, while it released some individuals detained on parole warrants from the Sullivan County jail because of the risk of COVID-19, it has failed to take *any* measures for those high-risk parolees whom it has chosen not to release from jail (*see Barbecho v Decker*, 2020 WL 1876328, at *4–5 [SDNY Apr. 15, 2020, No. 20-CV-2821 (AJN)] [finding that ICE disregarded the serious medical needs of detainees it assessed for release and "determined should *remain* in ICE custody" because it failed to offer any evidence of measures designed to address the needs of those high-risk detainees"]).

[55] Cloth Face Coverings: Questions and Answers, Center for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html

As petitioners' expert contends, none of the measures adopted by the respondents are adequate to prevent the spread of the virus once it has entered the facility or to protect medically vulnerable individuals who contract it (Venters aff. ¶ 12). That nearly half of the incarcerated population is infected with COVID-19 demonstrates the inadequacy of these measures (*see People ex rel. Jeffrey v Brann*, 2020 WL 1679209, at *1–5 [NY Sup Ct, Apr. 6, 2020, No. 451078/2020] ["[T]he escalating numbers of the infected show that what Rikers has done is not remotely effective. Prisoners with dangerous conditions are dramatically at risk."]). Respondents appear to have taken no action for high-risk individuals to assess them daily for signs and symptoms of COVID-19 (*See* Venters aff. ¶ 37.). Those at a high-risk of serious medical complications from COVID-19 may continue to experience physical symptoms for six weeks or longer after infection (*See id.* ¶ 10). But despite the continuing risk to these individuals in the weeks after infection, systemic inadequacies in the provision of medical care at the jail ensure their serious medical needs will go inadequately — and sometimes completely — unaddressed (*See* Venters aff. ¶¶ 27–28). Even if the respondents' measures are "generally justifiable," they still amount to deliberate indifference here because they are not justifiable for the high-risk population at the jail (*see Johnson v Wright*, 412 F3d 398, 404 [2d Cir. 2005] [holding that even if a policy were "generally justifiable ... the application of the policy in [a particular] case could ... amount[ ] to deliberate indifference"]).

This Court need look no further than the fact that the respondents have taken no actions specific to the medically vulnerable population to conclude that the subjective prong of the deliberate indifference standard is met (*see Coronel v Decker*, 2020 WL 1487274, at *5 [SDNY, Mar. 27, 2020, No. 20-CV-2472] [holding that, despite the general measures taken, the government "knew of a serious medical risk to Petitioners, but took no action in response" because there is "no

evidence that [it] took any specific action to prevent the spread of COVID-19 to high-risk individuals" in civil detention];[56] *Barbecho*, 2020 WL 1876328, at *2–6 [same]; *Basank v Decker,* 2020 WL 1481503 [SDNY, Mar. 26, 2020, 20 Civ. 2518 (AT)] ["[C]onfining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health 'pose[s] an unreasonable risk of serious damage to [their] future health'"] [citation and internal quotation marks omitted]; *People ex rel. Gregor v. Reynolds*, No. CV20-0150, 2020 WL 1910116, at *5 [Sup. Ct., Essex County, Apr. 17, 2020] [finding that holding medically vulnerable petitioner in jail with "the lack of the full complement of preventive measures" violates his due process rights]). Indeed, medically vulnerable people who become sick in the jail are kept in the same conditions and receive the same inadequate medical treatment as everyone else in the jail (*see* Petition of Habeas Corpus at ¶ 47). Because respondents have not adopted *any* specific measures to protect the medically vulnerable population, this Court should find respondents deliberately indifferent to the serious medical needs of the petitioners and the medically vulnerable class.[57]

II. HABEAS RELIEF IS THE APPROPRIATE AND NECESSARY REMEDY.

A. Release Via Habeas is an Appropriate Remedy When Necessary to Correct the Unconstitutional Treatment of Incarcerated People.

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[56] As an example of specific actions, the court stated that the government could have identified high-risk detainees and released them "but it has not taken such a course" (*Id.*).

[57] The cases in New York holding that jail administrators were not deliberately indifferent to the risk of COVID-19 focused on the precautions administrators took on behalf of the general jail population (*see, e.g., People ex rel. Coleman v Brann*, 2020 WL 1941972, at *7 [Sup Ct, NY County, Apr. 21, 2020) , No. 260252/20] [finding "petitioners failed to show that DOC has been deliberately indifferent to the health risk posed by the conditions on Rikers Island [because] DOC has made substantial efforts to ameliorate that risk by containing the spread of COVID-19 on Rikers Island.") ."] [citing cases]). But the federal court decisions cited herein demonstrate that those cases focused on the wrong set of precautions. The "increased precautions generally taken at [a] Jail do nothing to alleviate the *specific, serious*, and *unmet* medical needs of the high-risk detainees, who require greater precautions in light of their correspondingly greater risk of *severe* illness if they contract COVID-19" (*Barbecho*, 2020 WL at *5).

The Court of Appeals long has recognized the writ of habeas corpus as a remedy necessary to prevent "encourage[ing] the unrestricted, arbitrary and unlawful treatment of prisoners" (*People ex rel. Brown v Johnston*, 9 NY2d 482, 485 [1961]; [58] *see also Kaufman v Henderson*, 64 AD2d 849, 850 [4th Dept 1978] ["[W]hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment."]). In *People ex rel. Hall v LeFevre*, the Court of Appeals specifically identified that habeas corpus is an appropriate vehicle to remedy a claim that jail officials were deliberately indifferent to a person's medical needs (60 NY2d 579, 580–581 [1983]). The Court of Appeals explained that "the only claim in the petition that could result in release is that because relator suffers from epilepsy imprisonment constitutes cruel and unusual punishment" (*id.* [citation omitted]; *see also People ex rel. Kalikow on Behalf of Rosario v Scully*, 198 AD2d 250, 250–251 [2d Dept 1993], citing *Hall* for the proposition that immediate release is a remedy for prison officials acting with deliberately indifference to a person's medical needs, but finding that the petitioner did not demonstrate deliberate indifference). Here, habeas corpus is an appropriate vehicle to remedy petitioners' claim that respondents are deliberately indifferent to the substantial risk of serious harm that COVID-19 poses to themselves and the medically vulnerable class.[59]

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[58] For similar reasons, the Second Circuit has held that incarcerated people may use federal habeas corpus to challenge "the execution of a federal sentence, including such matters as . . . prison conditions" (*Thompson v Choinski*, 525 F3d 205, 209 [2d Cir. 2008] [internal quotation marks omitted]).

[59] The petitioners seek release rather than medication because neither a vaccine nor even an effective therapeutic treatment exists for COVID-19. (*see supra* Facts section; *cf. People ex rel. Sandson v Duncan*, 306 AD2d 716, 716–17 717 [3d Dept 2003] [finding that habeas was not the appropriate vehicle because, under the circumstances of the case, success would "entitle the petitioner to the medication he seeks" rather than release]). Those who have already contracted COVID-19 remain at a high risk of serious illness or death even many weeks after infection, and systemic deficiencies in the jail's medical care ensure they remain in harm's way (*See* Venters aff. ¶¶ 10, 24–28).

B. Release Via Habeas is the Necessary Remedy in the Extraordinary Circumstances Presented By the COVID-19 Pandemic.

Respondents cannot adequately mitigate the risk of harm that COVID-19 poses to petitioners and the medically vulnerable class in the Sullivan County Jail. For those who have already tested positive for COVID-19, the jail's inhumane conditions, woefully inadequate medical system, and lack of any medical care during late night hours fails to mitigate, and indeed may exacerbate, their risk of serious illness or death (*See* Venters aff ¶¶ 24–28). For those who have not yet contracted the virus, social distancing is among the primary effective preventive measure to protect those who are medically vulnerable to serious illness or death from the transmission of COVID-19 (*see id.* aff. ¶ 9). As petitioners' expert explains, it is impossible to effectively engage in social distancing in a jail setting. Nothing short of release from jail can effectively mitigate the substantial risk of life-threatening harm that COVID-19 poses to each member of the putative class at the Sullivan County jail (*See* Venters aff. ¶¶ 42–44). In the extraordinary circumstances and unprecedented public health crisis presented by the pandemic, release via habeas is the only effective remedy to the respondents' deliberate indifference. A recent New York case illustrates this point.

In *People ex rel. Jeffrey v Brann*, a Bronx Supreme Court addressed the habeas petition brought by multiple medically vulnerable people incarcerated at the Rikers Island jail who claimed that respondents were deliberately indifferent to the danger that COVID-19 poses to their health (2020 WL 1679209, at *1–5 [Sup Ct, NY County, Apr. 6, 2020, No. 451078/2020]). The court explained that respondents' obligation to provide reasonable care is "not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an *effective* ameliorative measure" (*id.* at *4). Because social distancing is "decisively precluded by the nature of prison construction and operation," the court held that it "has no choice but to order release" to effectively mitigate

the deadly threat caused by the pandemic (*Id.* at *2, *4; *see also People ex rel. Gregor v Reynolds*, 2020 WL 1910116, at *4-5 [Sup Ct, Essex County, Apr. 17, 2020, No. CV20-0150] [granting habeas release of a medically vulnerable parolee incarcerated on a parole warrant due to the extraordinary risk COVID-19 poses to his health]).

In another example, *Cameron v Bouchard*, a class habeas on behalf of people with criminal convictions or pending cases incarcerated in a Michigan county jail, the court ordered jail authorities to produce a list of medically vulnerable people to enable the court to release them (Order [ED Mich. May 21, 2020, No. 20-10949]. In doing so, the court explained that "the inherent characteristics of the Jail cannot be altered to any extent that would make it safe enough to protect the members of the Medically-Vulnerable Subclass from the potentially lethal combination of their unique vulnerabilities and COVID-19's health-shattering consequences. Any response other than release or home confinement placement constitutes deliberate indifference" (2020 WL 2569868, at *24 [ED Mich, May 21, 2020, No. 20-10949]).

Several courts have similarly concluded that release via habeas is necessary to resolve the risk of serious harm that COVID-19 poses to medically vulnerable incarcerated people (*see, e.g., Basank*, 2020 WL at *14 [ordering that ICE release a group of medically vulnerable immigrant detainees]; *Barbecho*, 2020 WL at *9 [ordering the immediate release of medically vulnerable immigrant detainees because they were likely to succeed on their deliberate indifference claim and release was necessary under the extraordinary circumstances]; *Hernandez v Decker*, 2020 WL 1547459, at *4 [SDNY, Mar. 31, 2020, No. 20-CV-1589 (JPO)] [ordering the release of a medically vulnerable immigrant detainee because he was likely to succeed on his deliberate indifference claim and release was necessary under the extraordinary circumstances]; *Coronel*,

2020 WL at *10 [same]; *Arias v Decker*, 2020 WL 1847986, at *9 [SDNY Apr. 10, 2020, No. 20 Civ. 2802 (AT)] [same]).

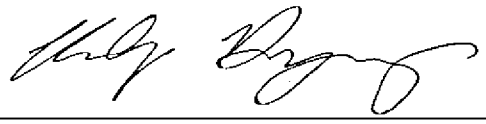
Courts "must not shrink from their obligation to enforce the constitutional rights of all, including prisoners" (*Brown v Plata*, 563 U.S. 493, 511 [2011] [internal quotation marks and citations omitted]). Here, petitioners and the putative class members are people whose age and underlying medical conditions ensure they face a substantial risk of serious illness or death from COVID-19. This Court should "not await a tragic event" (*see Helling,* 509 U.S. at 33.). It should act now, ordering their release to protect them from the life-threatening harm they now face.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that the Court grant the writ of habeas corpus and order the immediate release of the petitioners and the medically vulnerable class with appropriate precautionary public health and public safety measures.

Dated: May 29, 2020
New York, New York

Respectfully submitted,



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