UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR FERNANDEZ-RODRIGUEZ, ROBER GALVEZ-CHIMBO, SHARON HATCHER, JONATHAN MEDINA, and JAMES WOODSON, individually and on behalf of all others similarly situated, Petitioners, -v.- MARTI LICON-VITALE, in her official capacity as Warden of the Metropolitan Correctional Center, Respondent.	No. 20 Civ. 3315 (ER)

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

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INTRODUCTION

Respondent seeks to turn the page on the MCC's demonstrably inadequate response to the initial outbreak of COVID-19 in March and April through a letter filed the same day as her opposition brief, promising that the MCC's many failings have been or will be corrected. The Court should not move on so quickly. Whatever progress the MCC has made in its response to COVID-19 was for the most part made only after this lawsuit was filed, and after the MCC's initial response on May 1 denying there were problems at all. The Court's continued supervision is needed to ensure that the MCC's policies to combat COVID-19 are actually implemented and remain in place for as long as necessary.

No fewer than six federal courts have ordered preliminary relief to remedy prison officials' constitutionally deficient responses to the COVID-19 pandemic. The prison officials in these cases, like Respondent here, pointed to various policies and steps in the right direction, but these were deemed insufficient or incomplete. So too in this case: without judicial oversight, prison officials who have already failed to mitigate the grave risk of harm posed by the virus may yet do so again. In light of the MCC's months'-long mishandling of this crisis, the vulnerable status of the inmates in its charge, and the important interests at stake, the targeted preliminary injunctive relief sought here is necessary and appropriate to protect the health and well-being of Petitioners and the proposed class.

ARGUMENT

I. PETITIONERS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

The MCC's argument that Petitioners have failed to demonstrate a "likelihood of success on the merits" boils down to two points: (1) BOP policies for handling the COVID-19 pandemic are adequate; and (2) the conditions at the MCC are not as bad as inmates have described, based

on alleged discrepancies in three inmate statements that were filed in this litigation. Resp. Opp. at 24–35. Both of these arguments should be rejected. This case is not about whether BOP policies are adequate on paper, but whether they have been effectively carried out in practice. The overwhelming evidence that the MCC has failed to actually practice what it *now* preaches is hardly refuted by the trivial, alleged "inconsistencies" in the statements of three of the 33 inmates who submitted declarations demonstrating the MCC's mishandling of the COVID-19 pandemic.

A. The Mere Existence of BOP Policies Does Not Establish Adequate Conditions, Nor Negate Deliberate Indifference.

The MCC seeks to reframe the question before the Court as "whether the existing policies are so inadequate as to fall below the constitutional minimum." Resp. Opp. at 25. However, whether the BOP and MCC have policies in place is beside the point, in light of the MCC's clear failure to *implement* these policies. As one district court recently explained when granting preliminary injunctive relief in a similar context, a constitutional violation may be found based on a prison's "failing to implement policies that will effectively protect inmates from a potentially lethal virus." *Cameron v. Bouchard*, No. 20-cv-10949, 2020 WL 2569868, at *27 (E.D. Mich. May 21, 2020); *see also, e.g.*, *Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 2405350, at *23 (D. Conn. May 12, 2020) ("[B]y failing to make meaningful use of her home confinement authority, the Warden has failed to implement what appears to be the sole measure capable of adequately protecting vulnerable inmates[.]"); *Mays v. Dart*, No. 20-cv-2134, 2020 WL 1812381, at *11 (N.D. Ill. Apr. 9, 2020) (issuing TRO where Sheriff "point[ed] to policies that call[ed] for sanitation and cleaning supplies to be made available to detainees, but . . . offer[ed] no

evidence that this [was] actually happening on the ground, and . . . the plaintiffs . . . offered significant evidence reflecting that it [was] *not* happening").[1]

So too here. The MCC's systemic failures in responding to the virus go well beyond the mere "imperfect execution" the MCC euphemistically describes. Resp. Opp. at 30. A March 26 BOP policy, for example, mandated that "[i]f an inmate is symptomatic . . . they must be placed in isolation until they test negative for COVID-19."[2] Yet 28 inmates have given declarations that the MCC failed to isolate inmates who were demonstrably sick,[3] thereby contributing to the spread of COVID-19 in 11 South and then throughout the jail, as well as leaving the inmates to suffer.[4] And the MCC itself has admitted that it released all but a few of the 34 inmates it did isolate back into the general jail population *without* testing to establish if they were negative for COVID-19, notwithstanding this policy.[5]

Likewise, on March 31, the BOP called for "daily screening" of inmates' symptoms and temperatures "at institutions affected by COVID-19,"[6] which by then included the MCC, after several inmates already tested positive. The MCC also failed to implement this policy: no fewer than 11 inmates report that the MCC engaged in only sporadic symptom and temperature checks, a failure the MCC now at least partially concedes.[7] The MCC also substantially failed to

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[1] Indeed, a prison official can violate the Eighth Amendment even when *following* a generally acceptable policy. *See Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005); *Martinez-Brooks*, 2020 WL 2405350, at *23 n.25.

[2] ECF No. 66-1, Mar. 26, 2020 Matevousian Mem., at 13.

[3] *See* ECF No. 53, Mem. of Law In Support of Mot. for Prelim. Inj. ("P.I. Mot."), App'x A.

[4] Even earlier, on March 13, 2020, BOP directed its prisons to test and isolate symptomatic inmates with "exposure risk factors," which would appear to encompass medically vulnerable inmates such as those packed together on 11 South. ECF No. 66-1, Mar. 13 Matevousian Mem., at 9. The MCC failed to do so.

[5] ECF No. 54-32, Quarantine Isolation Flowsheet (reflecting 6 of 34 isolated inmates tested before release).

[6] ECF No. 66 Ex. 1 at 20.

[7] *See* ECF No. 53, P.I. Mot., App'x A; Resp. Opp. at 9-10 (admitting that staff did not always ask inmates whether they were suffering COVID-19 symptoms); Ex. 72-1 Rebuttal Decl. of Dr. Homer S. Venters, ¶¶ 13-16.

implement BOP policies on contact tracing, investigating only a handful of the more than 40 staff positive cases.[8]

The list goes on: the MCC also failed out carry out its own policies on PPE,[9] hygiene,[10] and sanitation,[11] despite being fully aware of these policies and even though such failures exacerbated the substantial risk of serious harm to inmates. The fact that the MCC's management now claims to have been unaware of the widespread policy violations happening right in front of them merely underscores the deliberately indifferent manner in which they handled the crisis.[12]

The MCC's deliberately indifferent failure to implement COVID-19 polices is no more stark than in the context of release, where the MCC affirmatively flouted the Attorney General's mandates to "immediately" evaluate inmates for release by reassigning the staff responsible for such evaluations. In fact, Associate Warden Edge testified that reassigning the staff to guard duty was unnecessary, contradicting the "staffing constraints" excuse in Respondent's opposition.[13] *See* Resp. Opp. at 15–16. Such disregard of Attorney General Barr's release directives has already been found by another court to constitute deliberate indifference. *See Martinez-Brooks*, No. 2020 WL 2405350, at *26 (warden's failure to implement the Attorney General's directives violated the Eighth Amendment).

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[8] ECF No. 54-1, Dr. Beaudouin Dep. Tr., at 119:13–19; *see also id.* at 117:12–118:12 (noting that "there are many more staff that needed some contact investigation who tested positive").

[9] *Compare* ECF 54-24 (Feb. 29, 2020 BOP Memo, at 3 (directing BOP facilities to "[e]stablish baseline PPE supplies for gloves, surgical masks, N-95 respirator masks, face shields and gowns" and "move to purchase additional supplies, as necessary")) *with* ECF No. 53, P.I. Mot., at 17, 33 & sources cited therein.

[10] *See id.*

[11] *See* ECF No. 72-1, Rebuttal Decl. of Dr. Homer S. Venters at ¶¶ 27-29; *compare* ECF No. 66-1, Mar. 31, 2020 Matevousian Mem., at 20–21 (policy requiring cleaning supplies to be available to all inmates) *with* ECF No. 53, P.I. Mot., at 33 (listing declarants attesting to insufficient cleaning supplies).

[12] *See* ECF 60-1, May 29, 2020 Letter from Warden Licon-Vitale, at 3 ("During the course of this litigation, I have learned that certain aspects of MCC operations have not proceeded as well as I had expected, and certain protocols have not always been followed.").

[13] ECF No. 54-2, Edge Dep. Tr., at 162:16–18; *see also* ECF No. 68-10, Hazlewood Dep. Tr., at 68:17–69:21 (stating that the MCC received over thirty additional temporary staff in April).

The overwhelming evidence of these widespread policy failures distinguishes this case from those cited in Respondent's opposition. *See* Resp. Opp. at 32–34. In *Baez v. Moniez*, for example, the Court noted that the "*only* . . . evidence the petitioners ha[d] offered" to rebut evidence of certain policies' effectiveness was "several . . . attorneys' affidavits that detainees ha[d] observed many employees not wearing masks" and that such affidavits also merely "dispute[d] the particulars" of other policies. No. 20-cv-10753-LTS, 2020 WL 2527865, at *7 n.9, *8 (D. Mass. May 18, 2020) (emphasis added). By contrast, Petitioners have offered more than 30 declarations from inmates (including deposition testimony from several), which are corroborated by Dr. Venters' report, documentary evidence, and in many instances MCC management's own statements, demonstrating that critical policies were repeatedly not followed. Likewise, *Swain v. Junior* (a split decision) involved policies that were merely "not uniformly enforced," a far cry from the serious policy violations here. 958 F.3d 1081, 1089 (11th Cir. 2020).

The MCC also argues that Petitioners cannot show that measures they seek are mandated by the Constitution. Resp. Opp. at 26. But this argument confuses the issue of what constitutes a constitutional violation (including the MCC's failure to carry out its policies) with what an appropriate remedy may be. Petitioners do not argue that the MCC's failure to adopt measures proposed by Petitioners is itself a constitutional violation; rather, Petitioners argue that the remedies they propose are properly tailored to the constitutional violation, and that this Court can and should adopt them in fashioning relief. *See, e.g.*, *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) (upholding relief requiring prison to provide showers and recreation time; "[t]he fact that these elements of the relief package may go beyond the constitutional minimum does not mean that the court lacks the authority to order them to remedy a constitutional violation").

B. Evidence of Unconstitutional Conditions of Confinement Is Overwhelming.

The MCC takes a passing shot at supposed inconsistencies in evidence submitted by three of the 33 inmate declarants. These credibility challenges fall short, particularly against the backdrop of the overwhelming evidence—much of it conceded by the MCC—that its response to the initial outbreak of COVID-19 in late March and April was horrendous.

The scope of the MCC's concessions are significant. While claiming in her May 1 submission to the Court that inmates reporting COVID-19 symptoms received prompt attention,[14] she now admits that "inmate email requests for medical attention did not receive timely responses for several weeks." Resp. Opp. at 31. In fact, the MCC's mishandling of sick call requests—which included delays of over a month in some cases—came at a critical time, when the virus spread through 11 South due to the packed conditions and failure to isolate sick inmates.[15] *See, e.g.*, *Seth v. McDonough*, No. 8:20-cv-01028 (PX), 2020 WL 2571168, at *7 (D. Md. May 21, 2020) (finding likelihood of Eighth Amendment violation in case where, "[d]uring [an] outbreak, sick call requests went ignored"). Likewise, Respondent now admits that, contrary to the May 1 submission, the MCC *did* isolate sick inmates on the concrete beds of the punitive Special Housing Unit (Resp. Opp. at 8), thus discouraging other inmates from reporting their symptoms. *See Banks v. Booth*, No. CV 20-849 (CKK), 2020 WL 1914896, at *10 (D.D.C. Apr. 19, 2020) (concluding that prison officials acted with deliberate indifference in COVID-19-related case, noting that "punitive conditions for those in isolation are not acceptable" and "make it more likely that inmates will hide their symptoms to avoid the potential for isolation and continue to infect others in the general population").

[14] ECF 23, May 1, 2020 Resp. Letter to Court, at 4.
[15] ECF No. 72-1, Rebuttal Decl. of Dr. Homer S. Venters at ¶¶ 7–10.

Other gross deficiencies, whether admitted or not, are established by the large number of inmates submitting declarations attesting to them, in great detail. 28 inmates report that sick inmates were left in their cells rather than isolated.[16] 21 inmates confirm the inadequate supply of soap, which is no trivial matter in the midst of a pandemic.[17] *See, e.g.*, *Mays*, 2020 WL 1812381, at *11 (issuing TRO where defendant failed to "ensure the provision of sufficient soap to detainees (let alone that it is being provided free of charge . . .)"). And over 30 inmate declarations, in addition to Dr. Venters' report, reveal widespread deficiencies in sanitation practices, including the failure to disinfect common high-touch surfaces.[18]

Against this backdrop, Respondent's quibbles with three of the declarants' statements would hardly move the needle, even if the criticisms were valid. And they are not.

Contrary to the MCC's argument that Mr. Fernandez-Rodriguez falsely claimed he did not have access to an inhaler in the aftermath of a pepper-spray induced asthma attack, the deposition testimony makes clear that Mr. Fernandez-Rodriguez admitted he had access to an inhaler at other times—just not in the aftermath of the incident, when he was handcuffed and left lying on his stomach.[19] Mr. Fernandez-Rodriguez's inability to give precise dates for his symptoms is completely understandable; as he explained: "[W]e're in a cell. We're locked down. Days go by, and we don't even know what day it is. We only come out 50 minutes of a day."[20] And, contrary to Respondent's claim, he *denied* that he was experiencing symptoms "right now."[21]

The MCC's suggestion that Mr. Woodson had no serious medical issues other than asthma is flatly contradicted by the MCC's own records, which indicate that Mr. Woodson received

[16] *See* ECF No. 53, P.I. Mot., App'x A.
[17] *See* ECF No. 53, P.I. Mot., App'x A.
[18] *See* ECF No. 53, P.I. Mot., at 17–18, App'x A & sources cited therein.
[19] ECF No. 68-12, Fernandez-Rodriguez Dep. Tr., at 39:11–40:3.
[20] ECF No. 68-12, Fernandez-Rodriguez Dep. Tr., at 59:23–25.
[21] ECF No. 68-12, Fernandez-Rodriguez Dep. Tr., at 60:1–2, 61:1–7.

medication for HIV and hyperthyroidism as well. The MCC's claim that Mr. Woodson is not credible because no sick call records reflect that he reported symptoms in March is entirely uncompelling, given its admission that it *destroyed* records of paper sick call requests and didn't keep records of oral sick call requests at all.[22] In any event, MCC records confirm he reported his symptoms in April.

Finally, the MCC's arguments concerning Mr. Sucich are puzzling, as they attempt to challenge his credibility on one issue (whether he reported symptoms) while relying on other parts of his testimony as proof that conditions at the jail have improved since early April. Regardless, Mr. Sucich conceded that he did not know why the nurse's notes stated that he did not report his symptoms, and testified consistently and credibly both that he was sick and that he did report his symptoms.[23]

In any event, the supposedly inconsistent statements of three of the 33 declarants is hardly compelling proof of anything.[24] The MCC does not even attempt to rebut the declarations or deposition testimony of Petitioners Mr. Galvez-Chimbo or Ms. Hatcher, let alone the declarations from 28 other inmates, who collectively provide a consistent and compelling account of the MCC's failed response to the outbreak of COVID-19 in March and April—an account in large part corroborated by documentary evidence and MCC employees' own deposition testimony and concessions. And the MCC's excuse that it "lacked the time" to seek to rebut other inmate declarations rings hollow. Resp. Opp. at 28. The MCC knew of Petitioners' identities from the start; Petitioners' counsel identified additional inmate witnesses on a daily basis; and the MCC has

[22] ECF No. 54-1, Dr. Beaudouin Dep. Tr., at 218–220:17.
[23] ECF No. 68-15, Sucich Dep. Tr., at 27:20–29:6.
[24] Respondent also suggests that 33 inmate declarations ought be discounted because they were "crafted by attorneys." Resp. Opp. at 28. To be clear, the declarations of these inmates (who were in lockdown status) were drafted based on the detailed accounts they provided to counsel. We presume the declarations offered by Respondent were drafted in like fashion.

had access to each inmate's medical records. Moreover, Respondent's counsel decided to cancel three inmate depositions and did not depose any non-party inmates other than Mr. Sucich, despite receiving an additional week from the Court to do so. In these circumstances, the MCC's failure to rebut Petitioners' overwhelming evidence only reinforces its reliability and force.

II. PRELIMINARY INJUNCTIVE RELIEF IS NECESSARY TO REMEDY THE CONSTITUTIONAL VIOLATIONS.

Respondent's principal argument against the imposition of remedial measures is that the MCC has now committed to corrective action to address what she refers to as "lapses" and "deficiencies" in the MCC's COVID-19 response. Resp. Opp. at 18, 30. Many of these promised changes track the targeted relief Petitioners seek. The Court's oversight will ensure that these largely agreed-upon reforms are actually carried out.

A. Post-Litigation Remedial Measures Do Not Reduce the Need for Injunctive Relief.

It is well settled that corrective actions undertaken only after litigation has commenced do not negate the need for injunctive relief. As this Court itself recently observed, "a court's power to grant injunctive relief survives discontinuance of the illegal conduct" where there remains a "cognizable danger of recurrent violation." *United States v. Hakim*, No. 18 Civ. 5726 (ER), 2020 WL 2751020, at *9–10 (S.D.N.Y. May 26, 2020) (citing *States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

In determining whether injunctive relief is warranted, a court can look to "all the circumstances" of the case including, but not limited to the "bona fides of the expressed intent to comply," "the effectiveness of discontinuance," and "the character of the past violations." *Id.* (citing *E.E.O.C. v. KarenKim, Inc.*, 698 F.3d 92, 100 (2d Cir. 2012) (per curiam)). The

circumstances here establish a pronounced risk that the MCC will fail to effectively manage the ongoing pandemic absent ongoing judicial supervision.

The timing of Respondent's expressed intention to cure admitted deficiencies bears particular emphasis. When this lawsuit was filed, Respondent resisted any form of judicial scrutiny, even an inspection, insisting in her May 1 letter that deficiencies the MCC now promises to correct did not exist. Now that discovery has disproved many of those assertions, Respondent promises in a new letter, filed on the eve of the preliminary injunction hearing (the "May 29 Letter"), that the MCC is "implementing" the necessary "corrective action" and that a court order is not needed as a result.[25] But the changes Respondent highlights in the May 29 Letter have largely been implemented "over the past several weeks," *i.e.*, subsequent to the initiation of this lawsuit.[26] Indeed, Respondent's memorandum to MCC staff "setting forth [her] expectations with regard to . . . COVID-19 related issues"[27] was also issued only on Friday, May 29, 2020,[28] the same date Respondent's opposition was filed.

Courts should be skeptical of corrective action taken in "an attempt to avoid judicial resolution of the controversy." *Yassky v. Kings Cty. Democratic Cty. Comm.*, 259 F. Supp. 2d 210, 215 (E.D.N.Y. 2003). As this Court recently emphasized, it is important to be "particularly cautious when faced with corrective measures that appear to take place in anticipation of or in reaction to legal action." *Hakim*, 2020 WL 2751020, at *9–10. Indeed, making remedial efforts just "before the court was scheduled to hold a preliminary injunction hearing" can be "an attempt to avoid judicial resolution of the controversy and not the type of voluntary cessation of challenged activity that calls for the court to stay its hand." *Yassky*, 259 F. Supp. 2d at 215.

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[25] ECF No. 60-1, May 29, 2020 Letter, at 3, 5.
[26] ECF No. 60-1, May 29, 2020 Letter, at 3.
[27] ECF No. 60-1, May 29, 2020 Letter, at 4.
[28] ECF No. 60-2, May 29, 2020 Mem. from Warden Licon-Vitale.

A "past record of noncompliance is an important indicator of the likelihood of recurrent violation." *Hakim*, 2020 WL 2751020, at *9–10. Left to its own devices, the MCC utterly failed to meet the constitutional obligations owed to those in its charge. Respondent admits the MCC made no preparations for COVID-19 until the latter part of March, despite repeated inquires by the Chief Judge of this district beginning in early March about the MCC's plans.[29] The result was near disaster when the pandemic hit on March 23, sending some of its sufferers to convalesce on cold concrete beds in a Special Housing Unit that the United Nations Special Rapporteur on Torture has criticized as inhumane[30] while the rest, untreated, spread the disease to an estimated 75–150 inmates in the 11 South dorms and across the rest of the institution.[31] And even though this near disaster was caused in part by overcrowding, the Warden's response was to reassign to other posts the personnel responsible for fulfilling the Attorney General's mandate to expedite home confinement consideration.[32] It is this lawsuit, and the judicial attention that followed, that has turned the MCC's full attention to the serious failings it was denying as recently as May 1.

Indeed, improvements that the MCC has implemented to date have in large part been driven by the judicial scrutiny this lawsuit affords. At the April 29, 2020 conference, this Court instructed Respondent's counsel to detail what the MCC was doing with respect to reducing the prison population.[33] In the May 1 Letter that followed, Respondent reported that the MCC had responded to only eight of the "65–70" compassionate release applications received since the onset

[29] ECF No. 54-2, Edge Dep. Tr., at 22:8–21; *see also* ECF 54-7, Licon-Vitale Dep. Tr., at 19:15–18; 22:8–13.
[30] This housing unit was described by the United Nations Special Rapporteur on Torture as a "punitive measure that is unworthy of the United States as a civilized democracy." Sally Eberhardt & Jeanne Theoharis, Five Years Ago, Obama Pledged to End Torture. He Still Hasn't, The Nation (Jan. 22, 2014), https://www.thenation.com/article/archive/five-years-ago-obama-pledged-end-torture-he-still-hasnt/.
[31] ECF No. 53, P.I. Mot. at 17.
[32] ECF No. 54-2, Edge Dep. Tr., at 153:11–154:25, 155:2–5.
[33] Tr. of April 29, 2020 Teleconference, at 35.

of the pandemic, that none of the 20 sentenced inmates deemed at-risk to COVID-19 had been reviewed for home confinement eligibility, and that it would take at least two weeks before this backlog was cleared.[34] After the Court asked at the May 4, 2020 conference why "precious little has happened" with respect to release, Respondent quickly offered an accelerated timeline, some of which was completed in a matters of days.[35] Similar improvements to the sick call system, symptom checks and sanitation likewise came only after this lawsuit was filed, and, as to those, the Court has only Respondent's assurance that they are occurring and will continue to occur.

The Court's continued monitoring is particularly crucial because the pandemic is far from over. While Respondent depicts a crisis mostly in the rearview mirror, Resp. Opp. at 37, the threat posed by COVID-19 remains dire. People throughout New York City continue to be stricken with COVID-19: thousands are still diagnosed with the disease, and hundreds die from it, each week.[36] And, based on scientific consensus, the threat posed by COVID-19 is likely to surge again in the future. As noted by Dr. Venters in his rebuttal report, "[p]revailing epidemiological research . . . establishes that COVID-19 will continue to fall and rise in waves . . . ."[37] The CDC has even raised the possibility that "the assault of the virus on our nation next winter will actually be even more difficult than the one we just went through."[38]

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[34] ECF No. 23, Resp.'s May 1, 2020 Letter at 6-9; ECF 24, Petitioners' May 4, 2020 Letter at 7–11.
[35] Tr. of May 4, 2020 Teleconference, pp. 34-35.
[36] New Reported Cases and New Reported Deaths by Day in New York City, N.Y Times, https://www.nytimes.com/interactive/2020/nyregion/new-york-city-coronavirus-cases.html.
[37] ECF No. 72-1, Rebuttal Decl. of Dr. Homer S. Venters at ¶¶ 4, 32.
[38] *See* Lena Sun, CDC director warns second wave of coronavirus is likely to be even more devastating, The Washington Post (Apr. 21, 2020), https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/; *see also Swain v. Junior*, No. 1:20-CV-21457-KMW, 2020 WL 2078580, at *20 n.24 (S.D. Fla. Apr. 29, 2020). Dr. Marc Lipsitch, epidemiology professor at the Harvard T.H. Chan School of Public Health and director of the Center for Communicable Disease Dynamics, predicts that "the usual pattern of coronaviruses is likely [to] continue with new transmission peaking in November and cases peaking in December." Len Strazewski, Harvard Epidemiologist: Beware COVID-19's Second Wave This

Correctional facilities, such as the MCC, will be particularly vulnerable to further waves of the virus. The MCC cannot close itself off. Staff members, 45 of whom have tested positive to date, Resp. Opp. at 7, come into the facility on a daily basis from the community. The MCC has continued to accept new detainees from the community and transfers from other facilities—including the Queens Detention Facility, where 39 inmates have tested positive.[39] In addition, to the extent visitor restrictions are eased and court appearances resume, inmates and staff will come into greater contact with those from the outside world who might transmit the disease. Once the virus is inside the MCC, the risk of transmission remains intrinsically high, given the crowded conditions and impracticability of social distancing.[40] As Dr. Venters observes, it is "vital that the MCC addresses the systemic failings that gave rise to the initial spread of COVID-19 within the jail and the illness of many inmates . . . if it is to address subsequent outbreaks."[41]

B. The Relief Sought Is Reasonable And Well-Tailored to Remedy the Violation.

Respondent argues that Petitioners are seeking remedies going well beyond BOP policies or established medical guidance. But Petitioners are not. Most of what Petitioners seek is simply that the MCC actually carry out the policies it professes to honor. And to the limited extent Petitioners seek further remedial measures, they are narrowly tailored to address demonstrated deficiencies in the MCC's response to date, and well within the Court's authority to grant.

Fall, AMA (May 8, 2020), https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall.

[39] Letter from William Zerillo, Facility Administrator of the Queens Detention Facility, to Chief Judge Roslynn R. Mauskopf (May 28, 2020), https://www.nyed.uscourts.gov/pub/bop/QDF_20200529_093252.pdf.

[40] ECF No. 72-1, Rebuttal Decl. of Dr. Homer S. Venters at ¶ 4

[41] ECF No. 72-1, Rebuttal Decl. of Dr. Homer S. Venters at ¶4; *see also id.* at ¶ 32.

Appendix A to this brief is a color-coded version of Petitioners' request for relief (ECF No. 50, Appendix A), identifying whether and to what extent the relief Petitioners seek is (1) already mandated by BOP or MCC policy, or that the MCC has otherwise agreed to (green) or (2) allegedly unauthorized by BOP policy (red), or for which (3) BOP policy is silent (black). This reveals that the vast majority of Petitioners' requests are already required under BOP or MCC policy, a number of which Respondent has only recently committed to implement. For example, Petitioners request that the MCC test all symptomatic inmates in accordance with BOP guidelines,[42] conduct contact tracing for symptomatic staff and inmates,[43] provide inmates with masks and free sanitation supplies,[44] and promptly address requests for compassionate release.[45] Such relief will create no additional burden; it only will reinforce actions that the MCC should have been taking since day one.

The substantive relief not specifically mandated by BOP policy—reflected in black text in Appendix A—is hardly onerous, and well-tailored to the particulars of the health emergency here. *See Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977) ("Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (internal quotation marks omitted)); *Preston*, 589 F.2d at 303 (upholding prison-conditions injunction and noting that the specific elements of a relief package "may go beyond the constitutional minimum").

For example, while BOP policy may not affirmatively require that vulnerable asymptomatic inmates be tested for COVID-19 (*see* Resp. Opp. at 26), it certainly does not

[42] ECF 61-18, Guidance for Abbott ID Now COVID-19 Point of Care Testing, at 2.
[43] ECF No. 60-2, May 29, 2020 Letter, at 2.
[44] ECF No. 60-2, May 29, 2020 Letter, at 3.
[45] ECF No. 54-21, Mar. 26, 2020 A.G. Barr Memo; and ECF No. 54-22, Apr. 3, 2020 A.G. Barr Memo; ECF No. 54-39, May 8, 2020 Letter from Hugh Hurwitz, at 1.

prohibit such testing, and even proclaims in public statements that testing of asymptomatic inmates "will assist the BOP in slowing transmission"[46] and that "asymptomatic inmates in open housing . . . with a diagnosed case of COVID-19" are a high priority for testing.[47] Similarly, while the BOP does not require that inmates be removed from dormitory units, there is no evidence of BOP policy preventing such a sensible reduction of population density. Surely, if the MCC can, as it represents, hold over 650 individuals in two-person cells (Resp. Opp at 4) and currently has 688 inmates in the facility, reduction in the population of 11 South (with over 100 inmates) is hardly out of reach.[48] Likewise, professional cleaning of the MCC would not interfere with responsibilities of inmate orderlies;[49] rather, such cleaning would only enhance sanitation at a time when it is of the utmost importance in a facility suffering from mold, leaks and a serious vermin infestation.[50]

As for the handful of measures (in red on Appendix A) that Respondent insists cannot be implemented, the Court could easily fashion alternative relief addressing many of the same measures. For example, the MCC states that its medical staff is "unable" to test MCC staff for COVID-19, Resp. Opp. at 26, without explaining why. In any event, the Court could inquire as to the viability of other measures that would accomplish the same goal, such as testing staff who

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[46]Bureau of Prisons, *BOP Expands COVID-19 Testing*, https://www.bop.gov/resources/news/20200424_expanded_testing.jsp.

[47]ECF 61-18, Guidance for Abbot ID Now COVID-19 Point of Care Testing, at 2. 11 South, where most vulnerable inmates are housed in an open dormitory where multiple individuals have tested positive for COVID-19.

[48] The Eleventh Circuit case that Respondent cites regarding dormitory housing is easily distinguishable. In *Swain v. Junior*, the facility implemented numerous protective measures designed specifically to protect inmates in dormitories and the only outstanding issue was inmates' ability to engage in social distancing. 958 F.3d 1081, 1089–90 (11th Cir. 2020). Here, the dormitory unit was the source of the first outbreak of COVID-19 at the MCC and the MCC, by its own admission, conducted deficient symptom screening which led to the dangerous spread of the virus among inmates left in the unit.

[49] ECF No. 60-1, May 29, 2020 Letter, at 6.

[50] ECF No. 68-11, Dep. Tr. Licon-Vitale at 84:24-85:5; 85:16-87:2.

consent to the test. Likewise, the MCC's claim that it cannot report positive test results to an inmate's family member or counsel (Resp. Opp. at 26–27) can easily be overcome if the inmate provides consent.

While Respondent opposes the appointment of a monitor, the necessity of some form of outside supervision has been amply demonstrated. The MCC has repeatedly failed to implement BOP policies. Progress has come largely as a result of this lawsuit. The Court-ordered inspection, together with other discovery, demonstrated that Respondent's initial report to the Court was inaccurate in key respects. None of these events inspires confidence that Respondent's last-minute assurance she "fully appreciate[s] the importance of the issues in this lawsuit"[51] can be accepted at face value, without judicial oversight.

The authority of courts to appoint a monitor in order to ensure compliance with injunctive relief measures is well-established in this Circuit. *C.D.S., Inc. v. Bradley Zetler, CDS, LLC*, 190 F. Supp. 3d 375, 378 (S.D.N.Y. 2016) (appointing a special master to "monitor compliance with the preliminary injunctive relief ordered by the Court"), *aff'd*, 691 F. Appx. 33 (2d Cir. 2017); *see also Benjamin v. Schriro*, 370 Fed.Appx. 168, 171–72 (2d Cir. 2010). Respondent argues that appointment of a monitor "is not permitted under [Section 3626 of the Prison Litigation Reform Act]" but, for the reasons stated in Petitioners' opposition to the partial motion to dismiss, Section 3626 does not apply to this action.[52] Further, the sole Second Circuit case cited by Respondent simply held that a special master's mandate must be "narrowly drawn" to the task at hand. *See Webb v. Gourd*, 340 F.3d 105, 111 (2d Cir. 2003). Likewise, neither of the Eleventh Circuit cases cited by Respondent (Resp. Opp. at 40-41) addresses Fifth or Eighth Amendment violations, nor do they affirmatively rule that a monitor may not be appointed. In any event, the PLRA's

[51] ECF No. 60-1, May 29, 2020 Letter, at 7.
[52] ECF No. 57, Petitioners' Mem. of Law in Opp. to Respondent's Mot. to Dismiss, at 5–8.

requirements apply only to special masters, not an independent monitor. *See Handberry v. Thompson*, 446 F.3d 335, 352 (2d Cir. 2006) (explaining that because monitors' reports merely "aid[] the court in assessing compliance efforts, the [monitor] [does] not exercise 'quasi-judicial power' and [is] therefore not a special master"). Petitioners request only that a monitor be appointed to oversee, verify and report on Respondent's compliance with this Court's order, not sit as a "super-warden" and second-guess day-to-day decision making.

C. There is Ample Legal Authority for Injunctive Relief.

While Respondent implies that preliminary injunctive relief in this case would be extraordinary, the reality is that federal courts across the United States have issued preliminary injunctions directing federal correctional facilities to protect detainees from COVID-19. With respect to release-related relief, the court in *Wilson* ordered prison officials at FCI Elkton to evaluate medically vulnerable inmates' eligibility for transfer out of the facility "through any means, including but not limited to, compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two [] weeks." 2020 WL 1940882, at *10. The Sixth Circuit and Supreme Court denied the prison's request to stay this injunction, *see Wilson*, 2020 WL 2644305 (U.S. May 26, 2020); *Wilson*, No. 20-3447 (6th Cir. May 4, 2020), ECF No. 23-2, the district court granted a motion to enforce the injunction by eliminating certain factors in the release-review process, *see Wilson*, 2020 WL 2542131, at *4 (N.D. Ohio May 19, 2020) (ordering prison to make "full use of the home confinement authority beyond the paltry grants of home confinement it has already issued" and to "eliminate" and "disregard" certain factors in that review, including length of sentence served, citizenship, and denials based solely on a low PATTERN risk score), and today the Sixth Circuit denied the warden's motion to stay the enforcement order, *see Wilson*, 20-3447 (6th Cir. June 1, 2020), ECF No. 46-2.

In this Circuit, the Court in *Martinez-Brooks v. Easter* likewise ordered FCI Danbury to "adopt a process for evaluating inmates with COVID-19 risk factors for home confinement and other forms of release that is both far more accelerated and more clearly focused on the critical issues of inmate and public safety than the current process." 2020 WL 2405350, at *1. Similar to Petitioners' request here (ECF No. 50, Mot. App. A) and the order in *Wilson*, the Court specifically ordered the prison to promptly implement a release-review process by relaxing or eliminating unnecessary requirements that impeded the prison's full exercise of its release authority. *See Martinez-Brooks*, 2020 WL 2405350, at *33–34.

Courts also have ordered *non*-release relief of the kind sought here. *See, e.g.*, *Seth v. McDonough*, No. 8:20-cv-01028 (PX) (D. Md. May 21, 2020), ECF No. 85 (ordering prison to promptly adopt and submit plans regarding training, educating, and supervising staff to identify symptoms, as well as proper medical care, sick call responses, and screening, among other relief); *Cameron v. Bouchard*, No. 20-10949 (E.D. Mich. May 1, 2020), ECF No. 94 (ordering prison to provide adequate hygiene and cleaning products and establish a plan for monitoring cleaning of common areas, among other relief), *stay denied*, 20-1469 (6th Cir. May 26, 2020), ECF No. 22-2; *Mays*, 2020 WL 1987007, at *36–37 (ordering measures similar to those in *Cameron*, *supra*); *Banks*, 2020 WL 1914896, at 15*; *Banks*, 20-cv-849 (CKK) (D.D.C. Apr. 19, 2020), ECF No. 50 (similar).[53]

[53] Respondent's cases declining or staying injunctive relief are largely distinguishable and should not be followed. In *Wragg v. Ortiz*, unlike here, the petitioners made a "clear concession" that the prison did not act with subjective deliberate indifference and, without any Eighth Amendment violation, relief was of course not warranted. No. 20-cv-5496 (RMB), 2020 WL 2745247, at *21 (D.N.J. May 27, 2020). Likewise, in *Valentine v. Collier*, the Fifth Circuit reasoned in part that ordering a state prison to comply with its own laws and procedures would violate the Eleventh Amendment, a concern that is not relevant here since Respondent is the warden of a federal jail. *See* 956 F.3d 797, 802 (5th Cir. 2020); *see also supra* pp. 4–5 (distinguishing *Baez v. Moniz* and *Swain v. Junior*).

In short, no fewer than six courts (including a court in this Circuit) have ordered relief similar to the measures requested here. This Court's authority to order relief in *this* case is thus clear: it is well-supported by both the case law and the overwhelming evidence of unconstitutional conditions posing a threat to inmate health and well-being.

III. The Court Should Conditionally Certify the Proposed Class.

Respondent's challenge to conditional class certification does not withstand scrutiny. The suggestion that the proposed class of MCC inmates is not ascertainable (Resp. Opp. at 42) is baffling. Respondent knows the identities of each of the 677 inmates currently housed at the MCC (Edge Decl. ¶ 6) and will know going forward whenever inmates arrive at or leave. *See, e.g.*, *A.T. v. Harder*, 298 F.Supp.3d 391, 411 (N.D.N.Y. 2018) (class of inmates was readily identifiable); *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) ("fluid composition" of prison population makes class treatment more, rather than less, appropriate in civil rights cases).

Nor can there be any serious dispute about common questions or typicality. The thrust of this motion is that the MCC has violated inmates' constitutional rights by subjecting them to systemically dangerous conditions. This is plainly a significant common question that affects all class members and is sufficient to support class certification. *See, e.g., K.A. v. City of New York*, 413 F. Supp. 3d 282, 302 (S.D.N.Y. 2019) (common questions existed in action alleging that prison policies deprived inmates of constitutional rights by subjecting them to dangerous conditions). In addition, although even a single common question suffices, *see id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011), Petitioners are also asserting in their motion that the MCC has failed to exercise its existing authority to evaluate the possibility of home confinement, compassionate release, furlough, and other release measures for eligible inmates. The exercise of that authority is a common question for purposes of this motion, even if particular release determinations for particular inmates—which Petitioners are *not* seeking on this motion—will

depend on individual circumstances. *See Martinez-Brooks*, 2020 WL 2405350, *30 (constitutional issues concerning policies and process for evaluating home confinement and compassionate release were common questions warranting class certification; individualized circumstances of each application were not relevant because court was not being asked to rule on the propriety of the Warden's determinations as to any particular inmate).

The MCC also argues that the severity of inmates' injuries may differ.[54] But this is a red herring, because Petitioners are seeking class-wide injunctive relief under Rule 23(b)(2), focusing on generally applicable prison conditions and policies. There is no claim for damages in this case, and Petitioners are not proposing a class under Rule 23(b)(3) that would require individualized damages determinations. Civil rights cases like this one are "prime examples" of the appropriate use of Rule 23(b)(2), and courts have already certified or conditionally certified similar classes of inmates seeking injunctive relief to remedy failures to properly manage the COVID-19 pandemic.[55]

CONCLUSION

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

[54] *See* Resp. Opp. at 42-43.
[55] *See Dukes*, 564 U.S. at 361; *Wilson*, 2020 WL 1940882, at *8; *Martinez-Brooks*, 2020 WL 2405350, at *29–31; *see also Rivas v. Jennings*, 20 Civ. 02731 (VC), 2020 WL 2059848, at *1, *4 (N.D. Cal. Apr. 29, 2020) (granting conditional class certification and preliminary relief regarding immigration detention conditions during the COVID-19 pandemic).

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APPENDIX A

Policy Support for Preliminary Injunction Relief Requested[56]

TESTING: The following categories of people shall be tested:		
Relief Requested	Support	Notes
All inmates upon admission, with newly admitted inmates who report or are determined to have COVID-19 symptoms (as identified by the CDC) but have a COVID-19 negative test result re-tested, with the second test sent to a commercial laboratory	MCC Memo[57] at 1	
All symptomatic inmates (with two consecutive COVID-19 negative test results required to discharge an inmate from isolation)	MCC Memo at 1	
All inmates who were in close contact with an inmate who has tested positive for COVID-19 or has COVID-19 symptoms ("COVID-19 Inmates")	MCC Memo at 1	
All inmates under quarantine, before their release from quarantine	Beaudouin Decl.[58] ¶ 20	

[56] Appendix A is a color-coded version of Petitioners' request for relief (ECF No. 50, Appendix A), identifying whether and to what extent the relief Petitioners seek is (1) already mandated by BOP or MCC policy, or that the MCC has otherwise agreed to (green) or (2) allegedly unauthorized by BOP policy (red), or (3) where BOP policy is silent (black).

[57] ECF No. 60-2, May 29, 2020 Memorandum from Warden Licon-Vitale.

[58] ECF No. 61, Decl. of Dr. Robert Beaudouin ¶ 20.

All inmates returning from civilian health care system visits or hospitalizations	Guidance for Abbott ID Testing[59]	States that inmates returning from hospitalizations are an intermediate priority for testing; no mention of civilian health care visits
All inmates vulnerable to COVID-19, as determined by the CDC		Warden's Letter at 6[60] states that "MCC cannot conduct COVID-19 testing of asymptomatic inmates who have not had close contact with symptomatic inmates unless it is authorized to do so by BOP policy." The BOP has noted that testing of asymptomatic inmates "will assist the BOP in slowing transmission."[61]
All staff who report or are determined to have COVID-19 symptoms		Warden's Letter at 6, Beaudouin Decl. at ¶ 26 state that providing medical care/testing to BOP staff is not allowed. Beaudouin Decl., Ex. 22[62] at 2, states that the BOP is "unable to offer staff testing at the institution" but does not say it is prohibited.
All asymptomatic staff identified as being exposed to COVID-19 through the contact tracing described in Section II, to extent such staff return to the MCC within two weeks of exposure		See above.

[59] ECF No. 61-18, May 8, 2020 Guidance for Abbott ID Now COVID-19 Point of Care Testing.

[60] ECF No. 60-1, May 29, 2020 Marti Licon-Vitale Letter to the Court.

[61] Bureau of Prisons, BOP Expands COVID-19 Testing, https://www.bop.gov/resources/news/20200424_expanded_testing.jsp.

[62] ECF No. 60-22, May 18, 2020 BOP Coronavirus (COVID-19) Phase Seven Action Plan.

CONTACT TRACING AND QUARANTINE		
Relief Requested	Support	Notes
Contact tracing investigations will be carried out for close contacts of COVID-19 Inmates, or staff who have tested positive for COVID-19 or have COVID-19 symptoms ("COVID-19 Staff"), within two days.	MCC Memo at 2	
The MCC shall promptly quarantine all inmates who have been in close contact with COVID-19 Inmates or COVID-19 Staff, in single cells where space permits.	MCC Memo at 2 Beaudouin Decl. ¶ 27 BOP Quarantine Guidance [63]	
The MCC shall record and preserve the results of each contact tracing investigation.	MCC Memo at 2	

[63] ECF No. 61-5, May 7, 2020 BOP Quarantine Guidance: New Admits, Contacts of COVID-19, and Pending Release.

SYMPTOMS REPORTING, MONITORING, AND RESPONSE		
Relief Requested	Support	Notes
Inmates shall be provided with the opportunity to report COVID-19 symptoms on at least a daily basis.	MCC Memo at 2	
The MCC shall record and preserve each COVID-19-related sick call request and response thereto.	Beaudouin deposition[64] at 220 (3-4)	
Medical personnel shall evaluate all inmates who report or are determined to have COVID19 symptoms within 24 hours of the report or determination being made.	MCC Memo at 2	
All inmates in a quarantine or isolation unit shall be evaluated for COVID-19 symptoms on a twice-daily basis.	MCC Memo at 2 BOP Quarantine Checklist[65]	Warden's Letter at 6 states that she cannot authorize an increase in the monitoring of asymptomatic inmates beyond the current schedule of once a day for quarantined inmates, but the BOP Quarantine Checklist requires all inmates in quarantine to be screened twice daily.
All inmates in the general population shall be evaluated for COVID-19 symptoms on a twice-weekly basis. Should any inmate in the general population test positive, daily symptom screening shall be conducted for all inmates at the facility, until no inmate tests positive for COVID-19 for at least two consecutive weeks.	MCC Memo at 2	MCC Memo at 2 states that all inmates in general population will be screened on a once-a-week basis, with the exception of 11S (twice-weekly screening).

[64] ECF No. 54-1, May 20, 2020 Dr. Robert Beaudouin Dep. Tr., 219:25-220:3-4.

[65] ECF No. 61-4, May 7, 2020 Quarantine Checklist.

ISOLATION AND TREATMENT OF COVID-19 PATIENTS		
Relief Requested	Support	Notes
All COVID-19 Inmates shall be isolated in single cells in a medically appropriate manner as soon as practicable, but in no event later than 12 hours from either a positive test result or awareness by medical personnel that an inmate has COVID-19 symptoms.	MCC Memo at 1	Single cells recommended but not required by COVID-19 Isolation Infirmary Guidance.[66]
Isolation shall not occur in a setting normally used for punishment, such as the Special Housing Unit.		Warden's Letter at 6 states that it is not the MCC's intention to use the SHU for isolation, but that it may have to be used in the future as a "last resort."
Medical monitoring, on a twice-daily basis, shall be conducted of all COVID-19 Inmates for the duration of their time in isolation.	MCC Memo at 2	
All COVID-19 Inmates shall be provided with sufficient blankets and clean drinking water.		
Counsel for, and one family member of, each COVID-19 Inmate shall be notified with 24 hours following an initial positive test result.		Respondent's Opp. Brief[67] at 26-27 states that this is inconsistent with medical privacy.

[66] ECF No. 61-1, Apr. 19, 2020 COVID-19 Isolation Infirmary Guidance.

[67] ECF No. 59, Respondent's Opposition Brief.

MASKS AND OTHER PPE		
Relief Requested	Support	Notes
All inmates shall promptly be provided, free of charge, with masks effective for preventing transmission of COVID-19. If non-washable surgical masks are distributed, each inmate shall receive a minimum of five masks per week. If washable cloth masks are distributed, each inmate shall receive a minimum of two properly fitting masks ~~per week~~, and be provided adequate means to launder them or have them laundered.	MCC Memo at 3 COVID-19 Update - Use of Face Masks[68]	MCC Memo at 3 states that inmates have been provided with two cloth masks; the COVID-19 Update - Use of Face Masks states that all inmates are to be issued three cloth face masks and that prior to arrival of cloth face masks inmates are to be issued one surgical mask per week Petitioners no longer seek issuance of two new cloth masks each week, provided adequate laundering is available.
All staff shall be required to wear N95 masks if they will be exposed to isolated or quarantined inmates, and surgical or cloth masks at all other times.	MCC Memo at 2	

[68] ECF 66-16, Apr. 6, 2020 Coronavirus (COVID-19) Update - Use of Face Masks.

SANITATION AND HYGIENE SUPPLIES		
Relief Requested	Support	Notes
All inmates shall be promptly provided, free of charge, with adequate sanitation supplies, including soap, paper towels, toilet paper, facial tissue, and disinfectant products effective against COVID-19, including cleaning spray and/or disinfecting wipes that can be used on the shared telephones, computer terminals, sinks, toilets, and shower handles.	MCC Memo at 2	
Each inmate shall have daily access to showers and weekly access to clean laundry.		Warden's Letter at 6 states, "As for regular access to showers and laundry, such services are currently available to all inmates, but are curtailed to some degree during quarantines. We will continue to follow BOP procedures in that regard."

OVERCROWDING / RELEASE		
Relief Requested	Support	Notes
The inmate population of 11 South, and each tier on 11 South, shall be reduced to 50% of capacity as soon as practicable but in any event within 30 days.		Warden's Letter at 6 states that MCC cannot agree to "arbitrary reduction" but will "discuss this matter with appropriate officials…and attempt to devise a solution to address this housing unit."
All inmate requests for COVID-19-related compassionate release shall be decided within 14 days of receipt of the request. The results shall be reported to the Court and the Petitioners, indicating the inmates for whom the BOP will or will not seek compassionate release and, for those for whom it will not, the basis for not seeking compassionate release.	Warden's Letter at 4	Warden's Letter at 4 states will make "best efforts to review COVID-19-related requests … within 14 days, … and not more than 30 days."
The MCC shall promptly adopt and implement a written policy (which shall be disclosed to Petitioners and the Court) that maximizes and accelerates the use of home confinement and residential re-entry center placements, consistent with the MCC's legal authority, Attorney General Barr's March 26, 2020 and April 3, 2020 directives, and BOP policies and guidance, and that takes into account the following: a. the age and vulnerability of the inmate to COVID-19, in accordance with CDC guidelines; b. the inmate's prior criminal conduct shall not render the inmate ineligible; c. a more than minimum PATTERN score shall not render the inmate ineligible;	Attorney General Barr's March 26, 2020 Memorandum and April 3, 2020 Memorandum[69] BOP Home Confinement Memo[70]	BOP Policy silent as to whether individual facilities can adopt and implement their own policies, consistent with BOP Policy.

d. the percentage of the inmate's sentence served shall not render the inmate ineligible; e. an inmate's gang activity not while in jail or prison shall not render the inmate ineligible; and f. other factors, consistent with the BOP's exercise of home confinement and residential re-entry center release authority to the maximum extent possible under the relevant statutes, regulations and BOP policies and guidance.		
The MCC shall promptly adopt and implement a written policy (which shall be disclosed to Petitioners and the Court) that maximizes and accelerates the use of furlough placements, consistent with the MCC's legal authority and BOP policies and guidance.		Warden's Letter at 6 states MCC will not issue its own guidance; Demosthenes Decl.[71] ¶ 56 states that the "MCC is beginning to review inmates whose sentences will soon be expiring, as well as those approved for release to home confinement, for furlough." "The current pandemic is considered an urgent situation that may warrant an emergency furlough under 570.32(b)(1) and 570.33(b). These regulations authorize a non-transfer emergency furlough if the inmate is otherwise deemed appropriate, even if he/she has been submitted for Home Confinement (HC)."[72]

[69] ECF No. 54-21, Mar. 26, 2020 A.G. Barr Memo; ECF No. 54-22, Apr. 3, 2020 A.G. Barr Memo.

[70] ECF No. 54-39, May 8, 2020 Matevousian Memorandum on Home Confinement.

[71] ECF No. 65, Decl. of Schnahider Demosthenes ⁋ 56.

[72] ECF No. 54-34, Apr. 15, 2020 Brewer Memorandum on Furlough and Home Confinement at 1.

Sufficient staff shall be assigned to review, in an expeditious manner, inmates' eligibility for compassionate release, as well as placements in home confinement, residential re-entry centers, and furlough.		Warden's Letter at 4 states appropriate staffing is in place.
The results of the foregoing policy adoptions and implementations shall be promptly reported to the Court and the Petitioners, indicating which inmates have and have not been released or recommended for release and, for those who have not, the basis for not releasing them or recommending them for release.		Warden's Letter at 4 states that it will report on these items to the Court.
The MCC shall eliminate the 14-day pre-release quarantine requirement for inmates leaving the facility based on compassionate release, home confinement, residential re-entry center placement, or furlough, so long as the inmate has a place in which the inmate can safely quarantine and has tested negative for COVID-19.	Attorney General Barr's April 3, 2020 Memorandum	Respondent's Opp. Brief at 27 cites to the BOP Quarantine Guidance to say that removing the 14-day quarantine requirement would contradict BOP guidance, but Attorney General Barr's April 3, 2020 Memorandum states that such a quarantine can also take place "in appropriate cases subject to your case-by-case discretion, in the residence to which the inmate is being transferred."

REPORTING AND MONITORING		
Relief requested	Support	Notes
Reports shall be submitted to the Court and Petitioners, every 10 days, describing Respondent's compliance with this Order, including but not limited to the following information: a. number of inmates tested for COVID-19 and results of that testing; b. number of staff tested for COVID-19 and results of that testing; c. number of inmates who have reported COVID-19 symptoms or were found to have COVID-19 symptoms;	Warden's Letter at 5	States MCC will report on all nearly all of the points requested in the PI Relief, with exceptions noted in black.

d. number of inmates in quarantine and in isolation and their respective locations within the facility; e. information regarding sick calls, including the times elapsed between calls and subsequent visits by medical personnel; f. information regarding PPE and hygiene supplies provided to inmates; g. information regarding cleaning of the facility; and h. number of inmates considered for release on home confinement, to residential reentry centers, on furlough or based on compassionate release, the results, and the basis for any denials.		
The Court shall appoint an Independent Monitor to oversee implementation of the Court's Order and to make recommendations to the Court regarding actions to be taken at the MCC to mitigate the risk of COVID-19 and to otherwise comply with the Order.		