UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Sources

Respondent Marti Licon-Vitale ("Respondent"), in her official capacity as Warden of the Metropolitan Correctional Center ("MCC"), by her attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to petitioners' motion for a preliminary injunction, ECF No. 53 ("PI Mot.").[1] For the reasons explained herein, this Court should deny petitioners' motion for preliminary injunctive relief.

PRELIMINARY STATEMENT

Since the beginning of the COVID-19 epidemic, MCC has engaged in a herculean effort: preparing the prison facility for, and operating it through, the onslaught of a serious, potentially deadly infectious disease. This effort, though not without its challenges, has been a success. Despite being located in the city that is the worldwide epicenter of the disease, and despite having one fifth of its staff become infected with the virus—including the Warden—MCC has been able to operate effectively and maintain the health and safety of its inmates and staff.

An early wave of infections passed through MCC in late March and early April; however, it was quickly contained. No inmates became seriously ill—only a handful were ever hospitalized and they were all quickly returned to the prison—and all have recovered. Prison records and inmate statements alike confirm that there are currently no active infections at MCC. Similarly, while approximately 45 members of MCC staff contracted the virus, many have

[1] Attached to this memorandum are declarations from MCC Associate Warden Charisma Edge ("Edge Decl."), MCC Acting Chief Medical Officer Robert Beaudouin, M.D. ("Beaudouin Decl."), MCC Case Management Coordinator Schnahider Demosthenes ("Demosthenes Decl."), MCC Human Resources Manager Neal Sandy ("Sandy Decl."), Bureau of Prisons ("BOP") Residential Reentry Manager Patrick McFarland ("McFarland Decl."), Assistant United States Attorney Allison Rovner ("Rovner Decl.")—which attaches various deposition transcripts, cited as "___ Dep.," the initial and rebuttal expert reports of Rebecca Lubelczyk, M.D. ("Lubelczyk Rep." and "Lubelczyk Rebuttal Rep."), and certain other records—and Assistant United States Attorney Jean-David Barnea, which attaches a letter and a memorandum from Respondent MCC Warden Marti Licon-Vitale ("Licon-Vitale Ltr." and "Licon-Vitale Memo").

returned to work, and there have been no new infections among staff in several weeks. Detailed policies and protocols, consistent with guidance from the Centers for Disease Control and Prevention ("CDC"), regarding cohorting, isolating, and quarantining of inmates, screening and testing of inmates for the virus, screening staff for the virus, cleaning and sanitizing common areas and high-touch surfaces, and providing personal protective equipment to staff and inmates, among other policies, have been implemented at MCC and have been refined to account for advances in the understanding of the disease as well as the prison's ability to obtain certain resources and equipment.

That is not to say that MCC's response has been perfect in every respect. In coping with chaotic outside conditions, absent and reassigned staff, and rapidly evolving guidelines, certain lapses did occur. However, directives from MCC management consistently reinforced precisely what BOP guidelines required. Moreover, the critical functions of MCC remained operational, including those necessary to protect staff and inmates against COVID-19. And perhaps most importantly, Respondent has addressed these lapses and taken appropriate, direct action to correct them.

Respondent disagrees with petitioners' hyperbolic characterization of these deficiencies. As discussed below, Respondent has identified a handful of areas in which proper protocols were not always being followed, including with respect to contact tracing for infected staff, inmate symptom checks, responses to inmate email and handwritten sick leave requests, and review of inmate applications for compassionate release, home confinement, and furlough. These areas have been addressed by Respondent through clarification and reinforcement of existing guidelines and the allocation of additional staff to perform certain of these duties. Contrary to petitioners' suggestion, this is precisely what prison officials are required to do—and what

separates responsible prison officials from those who evidence the "deliberate indifference" required to establish a constitutional violation requiring injunctive relief.

Further, the Warden has recently issued a memorandum to all staff setting forth her expectations and reminding and directing them to follow existing guidelines, policies, and protocols. Moreover, to ensure visibility and accountability going forward, the Warden has agreed to voluntarily provide biweekly reports to the Court for the duration of the epidemic regarding the health status of MCC inmates and staff, as well as MCC's continued compliance with these important measures.

In sum, petitioners cannot show a basis or need for preliminary injunctive relief. Respondent recognizes the seriousness of the issues in this litigation, and has taken appropriate measures to ensure the safety and health of the inmates in her custody, as well as her staff. This Court should permit her to do so and should reject petitioners' invitation for the Court to become involved in the day-to-day management of the prison. The Court should thus deny petitioners' motion for a preliminary injunction.

BACKGROUND

I. MCC

MCC is a federal correctional institution located in lower Manhattan. Edge Decl. ¶ 6. As of May 11, MCC housed 688 inmates, of which 387 were pre-trial inmates, and 65 were inmates designated to serve their sentences at the MCC. Demosthenes Decl. ¶ 6. The remaining 237 inmates are at the MCC in an administrative hold status, a group primarily composed of inmates awaiting sentencing, inmates brought to the MCC to cooperate with law enforcement, inmates brought to the MCC pursuant to a writ, and inmates brought to the MCC for violating the terms of their supervision. *Id.* As of May 28, MCC housed 677 inmates. Edge Decl. ¶ 6.

MCC is a high-rise building and houses inmates on six floors (designated as Units 2, 3, 5, 7, 9, and 11); each unit is divided into North and South, and each such subunit is further divided into six tiers. *Id.* ¶ 7. Unit 2 is the women's unit, which has double cells. *Id.* Unit 11 South is the dormitory unit, and contains six dormitories that can hold up to 26 people each in bunk beds. *Id.* The Special Housing Unit ("SHU") houses inmates mostly in two-person cells, although it has 7 one-person cells; all other units house two inmates per cell. *Id.* Overall, there is space at MCC for 96 inmates in two-person cells in each tier (for a total of 728 inmates—except 71 beds or 35 cells that are currently unavailable because they are being repaired), and 156 inmates in dormitories. *Id.* Excluding those cells/beds that are under repair, MCC currently has 113 available beds for male inmates and 23 available beds for female inmates institution-wide. *Id.* Unit 11 South currently holds approximately 120 inmates; since February 20, it has been used to house older inmates and inmates with certain preexisting medical issues, *e.g.*, diabetes, for ease of delivering medical care. *Id.* The placement of inmates in Unit 11 South in February was unrelated to COVID-19. *Id.*

II. History of COVID-19 at MCC

On or about February 27, 2020, a corrections officer improperly brought a loaded gun into the MCC. *Id.* ¶ 17. On this same date, MCC inmates were placed in lockdown so that staff could attempt to locate and remove the gun. *Id.* On March 4, 155 inmates were sent to the Federal Correctional Institute – Otisville, in Otisville, New York, to facilitate the search. *Id.* The lockdown ended on March 13. *Id.* On March 9, 52 inmates returned to MCC from Otisville, and on March 12, 96 additional inmates returned. *Id.*

The first cases of COVID-19 infection among MCC inmates were identified on or about March 23. Beaudouin Decl. Ex. 9. Within the following few weeks, through April 11, a total of 34 inmates were confirmed or suspected of being infected—though only five were tested—and

isolated separately from the other inmates. *Id.* ¶ 11 & Ex. 9. Of these 34 inmates, two required brief hospitalizations for their symptoms, and three more were sent to the hospital just to be tested. *Id.* ¶ 13 & Ex. 9. The isolated inmates were given Tylenol for their fevers and antibiotics if they had pneumonia. *Id.* ¶ 11. None of the inmates required intubation, ventilation, or intensive care, and none have died. *Id.* ¶ 13 & Ex. 9. No inmates have been identified as symptomatic since April 11—although one inmate presented with possible COVID symptoms on April 24, but tested negative twice. *Id.* Ex. 9. There are currently no MCC inmates remaining in isolation, and the only inmates on quarantine are new arrivals and other inmates who have left and returned to the institution, who are quarantined per BOP policy for 14 days before being released to their housing units. *Id.* ¶ 8 & Ex. 9.

Also beginning in late March, MCC staff started testing positive for COVID-19, and by mid to late March, some 45 members of the staff had tested positive and gone on leave for some period of time, including MCC's warden, the Respondent, who was out for nearly three weeks in April. *Id.* ¶ 25 & Ex. 21; Sandy Decl. ¶ 3; Licon-Vitale Ltr. at 2. The last MCC staff member to go on leave due to a confirmed COVID-19 infection left on April 23. Beaudouin Decl. Ex. 21; Sandy Decl. Ex. 2. The staff absences were alleviated somewhat by temporary staff reassigned from other BOP facilities. *E.g.*, Beaudouin Decl. ¶¶ 4, 24, 27; Licon-Vitale Ltr. at 2. Some forty MCC staff members, out of a total of approximately 200, have been out of work on sick leave and other types of absence. Licon-Vitale Ltr. at 2.

III. BOP and MCC Policies to Address COVID-19

A. BOP Policies re COVID-19

BOP has instituted a number of policies and procedures in order to reduce the risk that inmates in its custody will be infected with the novel coronavirus, COVID-19. These policies, incorporated in a COVID-19 Action Plan, span a number of different areas in prison

administration, the provision of healthcare, and hygiene and protection, and also include efforts to reduce the prison population. The plan has been updated several times and is currently in its seventh phase. Edge Decl. ¶¶ 9-16; Lubelczyk Rep. at 3-5.

In Phase 1, starting in January 2020, BOP began strategic planning for COVID-19 building on the BOP's existing procedures for pandemics. Edge Decl. ¶ 9; Lubelczyk Rep. at 4. In Phase 2, starting on March 13, and updated on March 18, BOP suspended non-essential visits, and required screening of inmates and staff, quarantining of new intakes who had risk factors for the virus, isolation procedures for symptomatic inmates, and implementation of modified operations (including staggered meals and recreation times to limit large gatherings). Edge Decl. ¶ 10 & Ex. 1 at MCC 1398-1403; Lubelczyk Rep. at 4. In an update to phase 2 on March 18, BOP recommended that prisons inventory their cleaning and sanitation supplies. Edge Decl. ¶ 2 & Ex. 1 at MCC 1390-94; Lubelczyk Rep. at 4.[2]

In Phase 4, starting on March 26, BOP updated its quarantine and isolation procedures to include symptom screening and quarantining of new inmates and isolation of symptomatic inmates. Edge Decl. ¶ 12 & Ex. 1 at MCC 0123-25, 1625-28; Lubelczyk Rep. at 4. Phase 5, starting on March 31, restricted inmate movement within prisons to decrease the spread of the virus, extended quarantine protocols to close contacts of confirmed and suspected cases and to transfer inmates, and called for good hygiene, heightened cleaning of high-touch surfaces (including ensuring that cleaning supplies were available to all inmates), and maximizing social distancing. Edge Decl. ¶ 13 & Ex. 1 at MCC 0130-31; Lubelczyk Rep. at 5.

[2] Phase 3, starting on March 18, contained guidance regarding teleworking at non-prison locations, and is not relevant here. Edge Decl. ¶ 11; Lubelczyk Rep. at 4.

Phase 6, announced on April 13, extended these protocols until May 18, and further encouraged inmates and staff to wear appropriate face coverings when in public areas when social distancing could not be achieved. Edge Decl. ¶ 14 & Ex. 1 at MCC 0149-54; Lubelczyk Rep. at 5. And Phase 7, announced on May 18, further extended these protocols until June 30. Edge Decl. ¶ 15 & Ex. 1 at MCC 2590-91; Lubelczyk Rep. at 5.

B. Inmate Cohorting, Quarantine, and Isolation

The principal methods by which MCC has controlled the spread of COVID-19 among inmates are its practices of cohorting, quarantining, and isolating inmates. *See* Beaudouin Decl. ¶¶ 9-10. These three practices, taken together, prevent most inmate-to-inmate transmission of the virus, especially in a compact correctional institution where social distancing is not always possible. First, starting when cases of COVID-19 were initially identified among MCC inmates in late March, units in which an infected inmate was diagnosed were placed under quarantine. *Id.* ¶ 14. That means that inmates in those units were largely confined to their cells except for short periods a few times a week for showering, phone calls, and computer use. Edge Decl. ¶ 25. During the course of the quarantines, units were visited daily by MCC medical staff who took the inmates' temperatures and inquired as to whether they had any symptoms consistent with the disease. Beaudouin Decl. ¶ 14. Most MCC inmates are housed in two-person cells, Edge Decl. ¶ 7, and thus their ability to transmit any infection to other inmates while under quarantine is limited, Beaudouin Decl. ¶¶ 9, 14. Certain MCC units, however, are dormitory rooms housing up to 26 inmates, and for those inmates, quarantining limited transmission to other inmates within the same room. *Id.* ¶ 9. Beginning gradually in late March, all MCC units ultimately went under quarantine. *Id.* ¶ 15.

By mid to late April, the quarantines were all lifted, as no new symptomatic inmates were identified. *Id.* MCC remains under what is known as "modified operations," meaning that

inmates are allowed out of their cells only in small groups, by cohort, and do not interact with any inmates outside their cohorts. Edge Decl. ¶ 26. Cohorts generally consist of ten inmates. Beaudouin Decl. ¶ 9. As discussed below, MCC medical staff continue to conduct regular symptom and temperature checks in each unit to identify any potential COVID-19 infections. *Id.* ¶ 16.

MCC inmates who were confirmed or suspected as having been infected with COVID-19 were placed in isolation. *Id.* ¶ 10. In the first few days of the epidemic, from March 23 until March 30, a few inmates were isolated in a separate part of the SHU, comprised of four cells, which contained private showers. *Id.* Shortly thereafter, MCC cleared out Unit 3, which contains individual cells, and converted it to be used for isolating and quarantining inmates beginning on March 30. *Id.* Since that time, all inmates isolated with potential COVID-19 symptoms (whether tested or not) have been housed in that unit until their symptoms subside and they are healthy enough to return to their units. *Id.* While they were isolated, these inmates were seen by MCC medical staff once or twice a day, had their temperatures and symptoms checked, and were provided medical care as appropriate. *Id.* ¶ 12.

Unit 3 has also been used to quarantine all newly admitted inmates as well as those who have had to leave the MCC and return (for example to go to the hospital for non-COVID-related treatment). At times when the cells in Unit 3 were full, some of these quarantined inmates have been housed in designated quarantine tiers in Unit 5-South. *Id.* ¶ 17.[3] Quarantined inmates are seen by MCC medical staff daily for a temperature and symptoms check. *Id.*

[3] Since May 14, quarantined inmates have been housed in Unit 5-South due to a recent fire in Unit 3; on May 22, four of the inmates were able to return to Unit 3. Edge Decl. ¶ 24.

C. Inmate Screening and Testing for COVID-19 Infection

Since symptomatic inmates were first detected, inmates in all MCC housing units have undergone regular screening for COVID-19 symptoms, including temperature checks. *Id.* ¶¶ 14, 16. In units under quarantine because an inmate from that unit was isolated with COVID-19 symptoms, these checks were conducted daily. *Id.* ¶ 14. Now that the quarantines are no longer in force, these checks are conducted weekly, except in Unit 11-South, where they are done twice weekly. *Id.* ¶ 16.[4] Inmates in quarantine as new arrivals or returnees are also screened for COVID-19 symptoms daily. *Id.* ¶ 17.[5]

These checks generally include determining whether an inmate has a fever of 100.4º F or higher as well as asking inmates questions about their symptoms. *Id.* ¶ 14. Initially, staff members performing the screening asked each inmate every day whether he or she was experiencing any of the recognized COVID-19 symptoms. *Id.* ¶ 14 & n.5. But over time, some MCC medical staff started simply asking how inmates were feeling or whether their condition had changed since the previous day. *Id.* Because the same medical staff were generally assigned to the same units, these staff members essentially established "continuity of care" with the

[4] Unit 11-South has been used to house older inmates and inmates with chronic medical conditions since February. Edge Decl. ¶ 7; Beaudouin Decl. ¶ 16 n.6. While BOP has recently (in early May) suggested that cohorting high-risk inmates is not recommended for COVID-prevention purposes, there are relatively few options available given restrictions on transfer or movement of inmates since the beginning of the epidemic. Beaudouin Decl. ¶ 16 n.7. Nonetheless, the MCC Warden is consulting with BOP and the U.S. Marshals Service to see whether there are any options available for inmates in this housing unit. Licon-Vitale Ltr. at 6.

[5] In addition to the proactive COVID-19 symptom screening of all MCC inmates, inmates experiencing COVID symptoms or other medical issues are able to inform MCC medical staff when such staff is in their units daily to distribute medication (known as "pill line"). Beaudouin Decl. ¶ 23. In addition, if an MCC inmate has an acute medical need, he can inform any member of the prison staff, who in turn will contact the medical department by telephone or radio. *Id.*; Licon-Vitale Ltr. at 3 & n.1. For less urgent medical issues, inmates can submit written requests via email or handwritten note. Beaudouin Decl. ¶ 24. Those requests are now reviewed daily, although there were delays in reviewing and responding to requests in March and April. *Id.*; Licon-Vitale Ltr. at 3.

inmates in these units, and were able, through questioning and observation, to detect any changes in the inmates' appearance that could suggest illness. *Id.* However, the MCC medical director has instructed all staff to return to the original model whereby each inmate is asked at each screening about every potential COVID-19 symptom. *Id.*[6]

With respect to testing inmates for COVID-19 infection, MCC—like most non-hospital facilities in New York City—initially did not have access to test kits and sent the first few inmates with suspected infections to the hospital to be tested. Beaudouin Decl. ¶ 18. However, given the limited testing capacity even in hospitals in late March and the risk of infection by going to the hospital, MCC medical staff was told not to send inmates to the hospital unless they required medical care beyond that available in the prison. *Id.* MCC thus began isolating symptomatic inmates based on a diagnosis of probable COVID-19 infection. *Id.* MCC was able to start acquiring COVID-19 test kits in early April, though only in limited quantities because its vendors restricted purchase volumes. *Id.* ¶ 19. This coincided, however, with a drop in symptomatic inmates, so MCC has had to test only a handful of inmates since that time—a few of whom were tested not because they were symptomatic but rather because they were scheduled for an outside medical procedure and the hospital requested advance testing. *Id.* ¶ 18. Only one of those inmates tested positive, on April 8. *Id.*

Recently, BOP published a new testing protocol which MCC has implemented, providing that prisons will test all incoming inmates, all symptomatic inmates, and all inmates who are cohorted with symptomatic inmates. *Id.* ¶ 20. Inmates being released from isolation are also

[6] Several inmates admitted during the inspection of MCC on May 13, however, that they had not shared possible symptoms of COVID-19 with MCC medical staff because they did not want to be isolated. Lubelczyk Rep. at 18-19. Some such inmates stated that their reluctance in that regard had to with MCC's initial placement of isolation inmates in a section of the SHU, which could have been viewed as punitive, though this practice ended on March 30. *See id.*

tested twice. *Id.* MCC has also received a rapid testing machine, which provides results within 15 minutes and is now fully operational. *Id.* However, due to the machine's high false-negative rate, BOP has instructed that it be used to test only symptomatic inmates; asymptomatic inmates will continue to be tested through outside laboratories. *Id.* MCC has an adequate supply of testing kits on hand and has ordered more. *Id.* ¶ 21.

D. Staff Screening for COVID-19 Infection

Since March, pursuant to BOP directives, all MCC staff have been screened upon entry to the building for a fever and COVID-19 symptoms using a form that is periodically updated. *Id.* ¶ 25. Staff who display symptoms are denied entry and asked to see their personal physicians. *Id.* MCC staff have been instructed to report to the prison if they feel ill or have tested positive for COVID-19. *Id.* They can return to work only after their symptoms have been resolved to the satisfaction of their physicians and prison officials. *Id.*[7] MCC conducts "contact tracing" investigations when staff members test positive: this investigation involves identifying other staff members who worked closely with the infected staff member and checking those staff members for fever or other symptoms. *Id.* ¶ 27. Now that inmates are no longer under quarantine and thus are not screened daily for symptoms, the contact tracing for infected staff also includes identifying inmates with whom the staff member interacted closely. *Id.* Because of staff departures and shortages in March and April, not all contact tracing investigations were completed, but that deficiency has been corrected. *Id.*

[7] A chart produced in discovery summarizing the dates on which MCC staff tested positive and went out on leave contained a few errors and unclear information, which erroneously suggested that staff were permitted to work after they began displaying symptoms of possible COVID-19 infection. A declaration from MCC's human resources manager, who created the chart, is being submitted herewith and explains that all symptomatic MCC staff were removed from the premises as soon as they displayed symptoms. Sandy Decl. ¶¶ 3-4 & Ex. 2.

E. Hygiene, Cleaning, and Personal Protective Equipment

BOP and MCC have taken measures with respect to COVID-19 to address hygiene, cleaning, and personal protective equipment ("PPE"). As to hygiene and cleaning, on March 18, BOP recommended that prisons inventory their cleaning and sanitation supplies, and MCC did so. Edge Decl. ¶ 10 & Ex. 1 at MCC 1390; Lubelczyk Rep. at 4. On March 31, BOP recommended implementing good hygiene and heightened cleaning of high-touch surfaces (including ensuring that cleaning supplies were available to all inmates), and MCC followed the recommendations. Edge Decl. ¶ 13 & Ex. 1 at MCC 0130-31; Lubelczyk Rep. at 5.

By March 25, MCC had put up posters containing information about COVID-19, proper hygiene, and cleaning in all inmate common areas. Edge Decl. ¶¶ 22 & Ex.6 at MCC 003-06, MCC 0018, Ex. 7 at Inspection Photographs #35-37. MCC also reinforced the importance of proper hygiene and cleaning during inmate "town hall" meetings in March, April, and May. *Id.* ¶¶ 20, 28. On March 27, MCC conducted an inventory of its cleaning and sanitation supplies and ordered additional supplies. *Id.* ¶ 27.

MCC inmates are provided one roll of free toilet tissue each week. *Id.* ¶ 30. Unit team members are provided soap on a weekly basis, which is available to inmates for free upon request. *Id.* ¶ 30. If inmates need more soap or toilet tissue, they can ask their counselor for additional supplies. *Id.* Inmates are also provided with other hygiene items that include an all-purpose cleaning gel that can be used for their hands, body, or hair. *Id.*; Hazlewood Dep. at 80-81; Licon-Vitale Dep. at 72-73. Recently the prison has prominently posted signs in the common areas of each unit stating that additional soap and toilet paper can be requested from unit teams. Edge Decl. ¶ 31, Ex. 11 at MCC 0001 & Ex. 7 at Inspection Photograph #32; Hazlewood Dep. at 81-82; Licon-Vitale Dep. at 73. Inmates may also purchase soap and other hygiene items from the commissary, which carries a larger variety of products. Edge Decl. ¶ 30;

Hazlewood Dep. at 81. Inmates are able to wash their hands and shower; institutional laundry is done weekly. Edge Decl. ¶¶ 13, 45.[8]

MCC requires inmates to clean their cells before they exit them. Edge Decl. ¶ 34. Bottles of cleaning spray and cloth rags have long been available to inmates for cleaning their cells; these supplies now include HDQC2 cleaning solution, which is approved by the Environmental Protection Agency for use against COVID-19. *Id.* Inmates can check these cleaning supplies out from the officer's station in each unit's common area. *Id.* ¶ 35; Licon-Vitale Dep. at 79-82; Hazlewood Dep. at 82-83; Edge Dep. at 168-69. Recently, MCC prominently posted signs in the window of the officer's station of each unit reminding inmates of the availability of these cleaning supplies. Edge Decl. ¶ 35, Ex. 11 at MCC 0001 & Ex. 7 at Inspection Photograph #32.

Inmates designated as orderlies, as well as all other inmates, share the responsibility for cleaning high-contact areas, such as telephones, computer keyboards, and showers. Edge Decl. ¶ 36; Edge Dep. at 167-68. By March 20, MCC had assigned orderlies to conduct COVID-related sanitation on a daily basis. Edge Decl. ¶ 36 & Ex. 12 at MCC 1961, MCC 3380-81; *see also id.* Ex. 13 at MCC 0010, MCC 0012, MCC 0049-50, MCC 0061, MCC 0113-14 (additional emails and memoranda regarding the importance of orderlies cleaning high-contact surfaces). Orderlies are given gloves for cleaning and are instructed to clean high-contact areas whenever inmates are out of their cells. *Id.* ¶ 36 & Ex. 13 at MCC 0010, MCC 0012, MCC 0049-50, MCC 0061, and MCC 0113-14. Each inmate is also responsible for cleaning high-contact areas after

[8] During the May 13 inspection of MCC, Respondent's expert, Dr. Rebecca Lubelczyk, observed that there was sufficient soap on hand. Lubelczyk Rep. at 13. Some of the inmates whose depositions were taken similarly testified that they had received soap and cleaning gel, had not asked for more, and further indicated that they preferred to purchase hygiene items from the commissary. Fernandez-Rodriguez Dep. at 65-67; Woodson Dep. at 35.

each use, by using the cleaning solution and rags available at the officer's station. *Id.* ¶ 37. Recently, MCC posted signs near the computers and phones to remind inmates to clean these surfaces before and after each use. *Id.* ¶ 37 & Ex. 14, Ex. 7, Inspection Photograph #33.

Respondent's expert, Dr. Rebecca Lubelczyk, observed during the facility inspection that cleaning supplies were located in numerous areas around each unit that was visited. Lubelczyk Rep. at 13; Lubelczyk Rebuttal Rep. at 4. Nearly every inmate interviewed reported that cleaning supplies were readily available upon request and that this had been the case since COVID started, although some said there had recently been an increase in supplies. Lubelczyk Rep. at 13; Lubelczyk Rebuttal Rep. at 4-5. In addition, some inmates who were deposed admitted they had supplies to clean their cells and/or common areas. Fernandez-Rodriguez Dep. at 67; Galvez-Chimbo Dep. at 27-29; Hatcher Dep. at 37-39; Woodson Dep. at 35-37, 40-42; Sucich Dep. at 30-34.[9]

On April 13, BOP encouraged inmates and staff to wear appropriate face coverings in public areas when social distancing could not be achieved. Edge Decl. ¶ 14 & Ex. 1 at MCC 0152. BOP distributed face coverings to its institutions. *Id.* ¶ 42 & Ex. 16 at MCC 1446-47, MCC 1630, MCC 1666, MCC 1686; Edge Dep. at 171; *see also* Luis Ferré-Sadurní & Maria

[9] MCC has also looked into non-COVID-related sanitation-related complaints petitioners raise for the first time in their motion. MCC is not aware of any complete absence of water for up to six days as some petitioners allege (though there had been occasional hot water interruptions that were fixed within no more than a few days). Edge Decl. ¶ 32. MCC has been addressing any issues with vermin by having an exterminator come to the facility on numerous occasions, including on January 15 and 29, February 12, March 13 and 18, April 1 and 30, and May 12. *Id.* ¶ 40. Further, aside from two cockroaches in one dormitory cell on Unit 11 South (one of which was dead on a sticky trap), Dr. Lubelczyk did not observe any evidence of other pests. Lubelczyk Rebuttal Rep. at 3-4. Finally, the only leaking sewage this year of which MCC is aware occurred on Unit 5 South, on a few occasions in February 2020 and one occasion on March 14, 2020. Edge Decl. ¶ 41. On each of these occasions, the leaking sewage affected only one tier and was remedied within a few days; affected inmates were relocated as necessary. *Id.*

Cramer, *New York Orders Residents to Wear Masks in Public*, N.Y. Times, Apr. 15, 2020, https://www.nytimes.com/2020/04/15/nyregion/coronavirus-face-masks-andrew-cuomo.html.

Once MCC received these face coverings, it promptly distributed them. Edge Decl. ¶ 42; Edge Dep. at 171-72. Accordingly, on or about April 16, MCC issued surgical masks to all inmates, giving them one new mask per week. Edge Decl. ¶ 43. On April 16, MCC also issued an inmate bulletin stating it was mandatory for inmates to wear face coverings. *Id.* ¶ 44 & Ex. 17 at MCC 0168. And on May 2, MCC distributed two cloth face masks to each inmate; inmates were instructed that they could wash their masks in their cells with detergent or send them to be washed in the weekly laundry. *Id.* ¶ 45 & Ex. 18 at MCC 0072, MCC 0104. MCC has frequently reminded inmates of the importance of wearing face coverings, and more recently, advised that they could suffer disciplinary action for failing to do so; staff have also been instructed to monitor that inmates are wearing masks. *Id.* ¶¶ 46-48 & Ex. 19 at MCC 0104 & MCC 0169, Ex. 20 at MCC 0053, Ex. 21 at MCC 0163-64.

Since April 9, staff have been given one surgical mask daily, and those assigned to high-risk units were given additional PPE, including masks, suits, goggles, and face shields. *Id.* ¶ 50 & Ex. 22 at MCC 0039. By April 11, staff were given one N95 mask per week, in addition to surgical masks. *Id.* ¶ 50 & Ex. 22 at MCC 0046. Staff coming into contact with inmates in the isolation and quarantine units are given daily N95 masks, suits, googles, and face shields. *Id.* ¶ 50. MCC has an adequate supply of this PPE. *Id.* Signs are posted at the entrance to the building that remind staff to wear PPE, and email reminders have also been sent. *Id.*

F. Release of Inmates from MCC

Staffing constraints in late March and April impeded MCC's ability to utilize inmate release as part of its initial response to the COVID-19 pandemic. Demosthenes Decl. ¶ 38. Despite this initial setback, since April 26, review of inmates for home confinement, residential

reentry centers ("RRC"), or furlough has become an integral aspect of MCC operations. *Id.* ¶¶ 41, 56. Consistent with BOP policy, MCC has relied on pre-pandemic guidance in responding to requests for compassionate release. *Id.* ¶¶ 26-37, 43. MCC has nonetheless prioritized providing timely responses to the influx of requests for compassionate release relating to the pandemic. *Id.* ¶ 43.

On March 26, Attorney General Barr issued a memorandum entitled "Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic" directing BOP to use referrals to home confinement as part of its strategy to combat the disease in federal prisons. Demosthenes Decl. Ex. 3. A subsequent memorandum, dated April 3, entitled "Increasing Use of Home Confinement at Institutions Most Affected by COVID-19," directed BOP to expand the cohort of inmates considered for release to home confinement. *Id*. Ex. 4.

On April 5, two days later, the MCC unit staff who assisted in processing requests for compassionate release and referrals to home confinement were redeployed to served correctional and custody functions as part of an emergency schedule due to staffing shortages. As a result, they were temporarily unavailable to review requests for compassionate release and referrals to home confinement, until their regular schedules were restored on April 26. Demosthenes Decl. ¶ 38. During this time, MCC received an unprecedented number of requests for compassionate release. *Id.* ¶ 40. Compounding matters, on April 9, MCC's Case Management Coordinator, who reviewed these requests, fell ill, and was out on sick leave until April 29. *Id.* ¶ 39.

On April 26, MCC case management staff resumed their normal duties and responsibilities, including assisting in the processing of requests for compassionate release and reviewing inmates for referral to home confinement or RRC. *Id.* ¶ 41. Since then and moving forward, MCC leadership has committed to maintaining current case management staffing levels

so that future requests can be addressed in a timely manner. *Id.* ¶ 60; Licon-Vitale Ltr. at 5. Since April 26, MCC has worked through its backlog of requests for compassionate release and prioritized referrals to home confinement and RRCs. Demosthenes Decl. ¶¶ 42, 44.[10]

Specifically, as of May 28, MCC has reviewed 239 inmates to determine whether they are appropriate for release to either home confinement or an RRC. *Id.* ¶ 44. That includes 165 inmates who have been deemed at greater risk of developing serious health effects from COVID-19, 47 additional inmates designated to serve their sentences at the MCC, and 27 other inmates who requested compassionate release. *Id.* Of these inmates, only 117 have been sentenced, and MCC has referred 24 to the BOP office responsible for final decisions regarding placement in home confinement or RRCs. *Id.* ¶¶ 45-46. With respect to the 24 referred inmates: 9 have been released as of May 28; 8 have been approved for placement and have a scheduled release date; and 7 are still being reviewed, *id*. ¶ 47.[11]

To date, MCC has determined that 61 of the sentenced inmates it has reviewed are ineligible for referral to home confinement or RRC. *Id.* ¶ 50. In making eligibility determinations, MCC has relied on BOP guidance, although this guidance has evolved, sometimes substantially, over the past few months. *Id.* ¶¶ 51-52. To the extent MCC's earlier

[10] As of May 14, 2020, MCC had responded to 67 outstanding requests for compassionate release. Demosthenes Decl. ¶ 42. As of May 28, there are 5 requests for compassionate release to which MCC has yet to respond; MCC anticipates it will be able to respond to these requests within 30 days. *Id.* ¶ 61.

[11] In addition, 22 sentenced inmates who MCC considered for referral to home confinement or an RRC have been released pursuant to court order or at the conclusion of the inmate's sentence. *Id.* ¶ 48. MCC initially prioritized review of inmates for referral to home confinement and RRC. *Id.* ¶ 54. It has now begun reviewing the remaining inmates whose sentences will soon be expiring to determine if any of them could be furloughed for some or all of the remainder of their sentences. *Id.* ¶ 56.

home confinement determinations relied on eligibility criteria that have since been rescinded or updated, it will re-review them using the current criteria. *Id.* ¶ 53.

G. The Warden's Corrective Actions

As discussed above, certain aspects of MCC's policies were not being consistently followed for certain periods in March and April when many prison staff—including the Warden—were absent and when work schedules and conditions became irregular. Licon-Vitale Ltr. at 2-3. These issues have all been addressed: requests for medical care are now being reviewed daily; medical staff are required to ask inmates about all possible COVID-19 symptoms during screenings; staff contact tracing investigations are being performed; adequate soap, toilet tissue, and cleaning products are being made available to inmates regularly; and requests for compassionate release and home confinement are being processed. *Id.* at 3; Licon-Vitale Memo. To ensure that these improvements are not merely temporary, and that all MCC staff understand the importance of continuing to adhere to them, the Warden has issued a memorandum to all staff dated May 29, which reiterates existing policies relating to many aspects of COVID-19 protection, and makes clear that compliance with these measures is mandatory. Licon-Vitale Ltr. at 3; Licon-Vitale Memo.

Moreover, in a letter addressed to this Court, the Warden acknowledges where there have been certain deficiencies in MCC operations, and makes clear that she has, and will continue to, direct the necessary efforts to ensure compliance with the relevant protocols. Licon-Vitale Ltr. at 1-2. In order to address any concern regarding MCC's commitment to abide by these undertakings, the Warden has committed to voluntarily provide biweekly reports setting forth MCC's performance with respect to these measures, as well as information regarding inmates or staff who may have tested positive for the virus. *Id.* at 5.

ARGUMENT

I. Petitioners Are Not Entitled to Preliminary Injunctive Relief

A. Applicable Legal Standards

1. Standard for a Preliminary Injunction Against a Government Agency

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (citation omitted). Where the proposed preliminary injunction stays "government action taken in the public interest pursuant to a statutory or regulatory scheme," the moving party must demonstrate "that he will suffer irreparable injury, and there is a likelihood that he will succeed on the merits of his claim." *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 101 (2d Cir. 2008) (internal quotation marks omitted),

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). To establish irreparable harm, plaintiffs must demonstrate that, in the absence of a preliminary injunction, "they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* (internal quotation marks omitted). A plaintiff must additionally "demonstrate a 'substantial' likelihood of success on the merits," where, as here, it "seeks a preliminary injunction that will alter the status quo." *N.Y. Progress*, 733 F.3d at 486 (citation omitted).

Further, "[w]henever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief." *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 929 (2d Cir. 1997). Under this standard, "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010). Thus, an injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted. *Mazurek*, 520 U.S. at 972. Put otherwise, petitioners have the burden of proving the need for injunctive relief; respondent bears no burden to defeat the motion. *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442-43 (1974).

Finally, although a defendant's "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, it is nonetheless an important factor bearing on the question whether a court should exercise its power to entertain a request for injunctive relief or declare it moot." *Holland v. Goord*, 758 F.3d 215, 223-24 (2d Cir. 2014) (internal quotation marks omitted). Put otherwise, "in order to obtain an injunction . . . the moving party must satisfy the court that relief is needed—there must be some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Vargas v. Viacom Int'l, Inc.*, 366 F. Supp. 3d 578, 583 (S.D.N.Y. 2019) (in context of analyzing irreparable harm); *accord, e.g., Int'l Gemmological Inst., Inc. v. Indep. Gemological Labs, Inc.*, No. 00 Civ. 4897, 2000 WL 1278179 (LAK), at *1 (S.D.N.Y. Sept. 7, 2000); *RQ Innovasion, Inc. v. Carson Optical, Inc.*, No. 19 Civ. 3886 (CBA) (RER), 2019 WL 4359456, at

*8 (E.D.N.Y. Aug. 21, 2019), *report and recommendation adopted by* 2019 WL 4346264 (E.D.N.Y. Sept. 12, 2019).

Courts therefore have declined to issue preliminary injunctions where defendants took corrective action and indicated that they would not again commit the challenged conduct. *See, e.g.*, *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 109-10 (2d Cir. 2016) (in context of addressing mootness due to voluntary cessation, stating that corrective actions taken by defendant and defendant's representation in its brief and at oral argument that it would not again commit the challenged conduct, coupled with the lack of ongoing or lingering harm to plaintiff, supported vacating the preliminary injunction); *Vargas*, 366 F. Supp. 3d at 583-84 (similar, in context of analyzing irreparable harm). A plaintiff's speculative assertion that there is a future possibility of a recurrent violation if a court does not issue a preliminary injunction is insufficient to defeat the resulting lack of harm that flows from a defendant's corrective action and representation that harm will not reoccur. *See, e.g.*, *Vargas*, 366 F. Supp. 3d at 584; *RQ Innovasion*, 2019 WL 4359456, at *8.

2. Deliberate Indifference Under the Fifth and Eighth Amendments

While claims of convicted inmates relating to conditions of confinement and deprivations of medical care are properly brought under the Eighth Amendment's prohibition against cruel and unusual punishment, such claims brought by federal pretrial detainees are properly brought under the Fifth Amendment's Due Process Clause. *See Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994)*; Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *Darnell v. Pineiro*, 849 F.3d 17, 21 n.3, 29, 33 n.9 (2d Cir. 2017). The standards under both Amendments are similar.

"The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832. Prison officials must ensure that an inmate receives adequate food, clothing, shelter, and medical care. *Id.* However, "only those deprivations

denying 'the minimal civilized measure of life's necessities' . . . are sufficiently grave to form the basis" for a constitutional violation. *Wilson v. Seiter*, 501 U.S. 294, 299 (1991). A petitioner can prevail only by showing that the government's conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Charles v. Orange County*, 925 F.3d 73, 85 (2d Cir. 2019) (quotation marks omitted). In the context of exposing prisoners to risk of communicable disease, a claim must be dismissed if it does not reach the law's threshold of a threat that is so severe that it would be "contrary to current standards of decency for anyone to be so exposed." *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

A prison official violates the Eighth or Fifth Amendments when his actions violate the relevant objective and subjective standards. *See Farmer*, 511 U.S. at 834 *Darnell*, 849 F.3d at 29. To establish an objective deprivation under either Amendment, the inmate must show that the deprivation is "sufficiently serious" such that it results in the denial of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834; *see also Darnell*, 849 F.3d at 30. The inmate must show "that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. "[T]he alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (internal quotation marks and citation omitted). "Each . . . condition[] must be measured by its severity and duration, not the resulting injury, and none of the[] conditions is subject to a bright-line durational or severity threshold." *Darnell*, 849 F.3d at 32. In the case of alleged deprivation of medical care, the inmate must show a "serious medical need," *i.e.*, "a condition of urgency such as one that may produce death, degeneration, or extreme pain." *Charles*, 925 F.3d at 86 (citing *Hathaway*, 99 F.3d at 553).

The subjective component of a claim based on an inmate's conditions of confinement or deprivation of medical care under requires the plaintiff to show the defendant's "deliberate indifference" to an objectively serious condition of confinement. *See Farmer*, 511 U.S. at 836-37; *Darnell*, 849 F.3d at 32. This requires a *mens rea* of recklessness. *See Farmer*, 511 U.S. at 836; *Darnell*, 849 F.3d at 32. The Second Circuit has recently held that the Eighth Amendment adopts the criminal definition of *mens rea*, while the Fifth Amendment adopts the civil definition. *See Darnell*, 849 F.3d at 35.

Therefore, under the Eighth Amendment, a prison official can be found liable for deliberate indifference when the official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Farmer*, 511 U.S. at 836-37. This standard requires actual knowledge on the part of the prison official. *Id.* Under the Fifth Amendment, to establish deliberate indifference, a pretrial detainee must prove "that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Darnell*, 849 F.3d at 35; *see also Charles*, 925 F.3d at 87. "In other words, the 'subjective prong' (or '*mens rea* prong') of a deliberate indifference claim is defined objectively" under the Fifth Amendment. *Darnell*, 849 F.3d at 35. However, even under the Fifth Amendment, prison officials cannot be liable for negligent conduct. *Darnell*, 849 F.3d at 35.

B. Petitioners Are Unlikely to Succeed on the Merits of Their Claims

1. MCC Policies and Practices Regarding Medical Care, Operations, and Hygiene Accord with BOP Guidance and Constitutional Standards

MCC's policies are largely set by its parent agency, BOP. Specifically with regard to the response to COVID-19, BOP has issued a series of phased guidelines beginning earlier this year that dictate how federal prisons are to address the risks associated with the epidemic. Edge Decl. ¶¶ 8-15. MCC policies and practices are almost entirely based on these guidelines, which have evolved over time. *Id.* ¶¶ 20-39, 42-53. These guidelines require such things as screening inmates and staff for symptoms of infection, cohorting inmates in small groups, isolating inmates who are symptomatic, and quarantining new inmates and those who have been exposed to symptomatic inmates. *Id.*; Beaudouin Decl. ¶¶ 9-17. BOP has also recently issued protocols regarding testing inmates for COVID-19 infection. Beaudouin Decl. ¶ 20. Furthermore, there is BOP guidance on PPE, sanitation and hygiene, and social distancing. Edge Decl. ¶¶ 42-53. The BOP's standards are quite similar to the CDC guidelines for correctional institutions. *E.g.*, Lubelczyk Rep. at 17, 22. As described above, MCC's policies have mirrored—and in some instances anticipated—BOP's guidelines. *See id.* at 6-7, 10-12, 15-19, 21, 23, 25-26. For example, BOP did not require quarantining of inmates who had left a prison and returned (such as to go to a local hospital) until May 7, but MCC implemented such a measure back on March 29. *See id.* at 16 & Exs. 35, 37.

Petitioners' papers strangely ignore the applicable BOP policies (or MCC's adoption of them) almost entirely. Instead, they propose a series of measures—some of which are already required under BOP and MCC rules, some of which Respondent has chosen to adopt, as discussed in Respondent's letter, and some of which are in conflict with BOP policies—that they ask the Court to impose on MCC. ECF No. 50, App. A ("Proposed Order"). In doing so, they

misapprehend the relevant legal standard for injunctive relief and deliberate indifference. The question is not what measures the petitioners would like to see MCC enact—or even, for that matter, what they or others might consider to be best practices. Rather, the relevant question is whether the existing policies are so inadequate as to fall below the constitutional minimum.

Thus, for example, the Fifth Circuit recently overturned a district court order enjoining a Texas state prison in such a manner. *See Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020), *stay application denied*, __ S. Ct.. __, 2020 WL 2497541 (U.S. May 14, 2020). The district court had "acknowledged the numerous protections [the state] provided, but it wanted to see extra measures, such as providing alcohol-based sanitizer and additional paper products," which "go beyond [applicable] policies." *Id.* at 802 (internal quotation marks and brackets omitted). But, as the Fifth Circuit held, there is "no precedent holding that the CDC's recommendations are insufficient to satisfy the Eighth Amendment." *Id.* (internal quotation marks omitted). The same can be said for the constitutional sufficiency of BOP's COVID-19 protocols.

Indeed, in a case involving a Massachusetts federal prison, prison officials outlined the steps they have been taking to prevent COVID-19 transmission within the facility—which are nearly identical to those at MCC as both are based on BOP guidelines. *Grinis v. Spaulding*, No. CV 20-10738-GAO, 2020 WL 2300313, at *3 (D. Mass. May 8, 2020). The district court denied preliminary injunctive relief, explaining that "[t]hese affirmative steps may or may not be the best possible response to the threat of COVID-19 within the institution, but they undermine an argument that the respondents have been actionably deliberately indifferent to the health risks of inmates." *Id.* Similarly, a New Jersey district court very recently denied a request by inmates at a federal prison for a preliminary injunction based on their expert's disagreement with the measures BOP and prison staff had put into place, explaining that any such disagreements do not

rise to the level of deliberate indifference. *See Wragg v. Ortiz*, __ F. Supp. 3d __, 2020 WL 2745247, at *22 (D.N.J. May 27, 2020); *see also Plata v. Newsom*, No. 01-CV-01351-JST, 2020 WL 1908776, at *9 (N.D. Cal. Apr. 17, 2020) (in California state prison case, "Plaintiffs identify other steps Defendants might take to provide for greater physical distancing, but they cite no authority for the proposition that Defendants' failure to consider or adopt these potential alternatives constitutes deliberate indifference within the meaning of the Eighth Amendment.").

The same analysis should control here. The criticisms of MCC policies offered by petitioners and their expert are relevant only to the extent they demonstrate that BOP and MCC's existing policies are unconstitutionally inadequate. Petitioners have made no such showing. For example, petitioners ask this Court to direct MCC to conduct COVID-19 testing on "[a]ll inmates vulnerable to COVID-19, as determined by the CDC," and on certain symptomatic and asymptomatic members of the MCC staff. Proposed Order ¶ 1(F)-(H). Tellingly, they do not and cannot show that such a testing regime is constitutionally required and that BOP's current testing protocols, which do not include these aspects, are unconstitutional as a result. Indeed, the CDC does not recommend testing asymptomatic individuals in prisons. *See* Lubelczyk Rep. at 24. And in any event, the MCC has explained why such testing is not required under current BOP or MCC testing protocols. *See* Licon-Vitale Ltr. at 5; Beaudouin Decl. Ex. 18 at MCC 1365 (explaining that testing large numbers of asymptomatic inmates requires special approval within BOP as it may be difficult to implement); *id.* ¶ 26 & Ex. 22 (BOP medical staff is not permitted to test prison staff for COVID-19); Sandy Decl. ¶ 2 (BOP cannot require staff to provide medical information).

Similarly, petitioners' assertion that MCC should be required to automatically notify an inmate's family and counsel when the inmate tests positive for COVID-19, *see* Proposed Order

¶ 14, is both not constitutionally required, and inconsistent with the inmate's medical privacy. Furthermore, petitioners' demand that MCC be required to "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," Proposed Order ¶ 26, directly contradicts applicable BOP guidance and is in no way a remedy for a purported constitutional violation, Beaudouin Decl. Ex. 5 at MCC 1633 (BOP Quarantine Guidance of May 7, 2020: "The following inmates should be placed in quarantine: . . . . Inmates being released back into the community (residential reentry center, home confinement, or full-term release), prior to their release.").

Finally, petitioners' demand that MCC be ordered "reduce[]" the population of Unit 11-South by half, Proposed Order ¶ 20, is not based on a constitutional violation. Many prisons include dormitory housing for inmates. In a recent case, a Florida district court granted a preliminary injunction because inmates in a dormitory claimed they could not practice social distancing, but the Eleventh Circuit has stayed the injunction on appeal, finding plaintiffs' unlikely to succeed on the merits even though it was "perhaps impossible . . . to implement social distancing measures effectively in all situations at [the prison's] current population level." *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020), *staying injunction issued by* __ F. Supp. 3d __, 2020 WL 2078580, at *5 (S.D. Fla. Apr. 29, 2020). Petitioners have cited no authority for the proposition that merely housing inmates in a dormitory setting, including high-risk inmates, violates the Constitution. Furthermore, as a factual matter, petitioners cannot dispute that there are currently no known COVID-positive inmates in Unit 11 South, nor any inmates who are experiencing COVID symptoms. Likewise, as discussed above, MCC has implemented strong policies to protect the health of the inmates in that unit, including through cohorting, the

distribution of masks and hygiene supplies, extra cleaning and sanitation, regular medical screening, restricted movement, and the screening of staff. Accordingly, petitioners cannot show that these inmates are facing a "substantial risk of harm" or that MCC is being deliberately indifferent with respect to the conditions of their confinement. *Farmer*, 511 U.S. at 834; *see also Hathaway*, 99 F.3d at 553.[12]

Many of the remaining items demanded by petitioners either reflect existing BOP or MCC policy and procedure or are very similar to existing policy—such as screening inmates for COVID-19 symptoms, provision of PPE and hygiene supplies (although MCC does not provide inmates with facial tissue or paper towels), and the provision of medical treatment to isolated inmates—and petitioners offer no reason why the Constitution requires this Court to impose their favored formulation of these policies rather than leaving in place existing protocols.[13]

2. Inmate Allegations Regarding Conditions of Confinement and Medical Care Lack Credibility

The numerous inmate declarations crafted by attorneys that petitioners have submitted do not require a contrary result. As a threshold matter, the claims made by these inmates are not unassailable. Under the compressed discovery schedule in this matter, Respondent has lacked the time and resources to depose and cross-examine more than a small fraction of these inmates. However, the inmate depositions that did occur revealed inconsistencies between the inmates'

[12] While the CDC recognizes that social distancing can be difficult to maintain consistently in such a setting, it does not recommend that such housing units be abandoned or dramatically thinned. Lubelczyk Rep. at 11. Moreover, Respondent has committed to exploring other housing options with regard to the inmates of 11 South, subject to existing limitations on what may be possible in that regard. Licon-Vitale Ltr. at 6.

[13] Petitioners' proposal that inmates be given two new washable cloth face masks *per week* is difficult to understand. Proposed Order ¶ 15(b). Obviously, the whole point of providing inmates with washable cloth face masks—each inmate received two earlier this month—is so that they can be used for an extended period and need to be replaced only when damaged. *See* Licon-Vitale Memo.

allegations and the factual record. *See* Lubelczyk Rebuttal Rep. at 9-10, 14-16 (reviewing several such inconsistencies in detail).

For example, the lead named petitioner, Cesar Fernandez-Rodriguez, claims in his declaration that he was not given any medical care for an asthma attack on March 12 after a pepper spray attack and that MCC did not allow him access to his inhaler. Fernandez-Rodriguez Decl., ECF No. 51-2, ¶ 1; Fernandez-Rodriguez Dep. at 11, 35-40. However, at his deposition Fernandez-Rodriguez admitted that he actually saw an MCC nurse that day; medical records reflect that he told the provider that did not get hit by the pepper spray and that he had "used [his] inhaler and that helped." Fernandez-Rodriguez Dep. at 42; Lubelczyk Rebuttal Rep. Ex. 4 at MCC 721. Fernandez-Rodriguez similarly gave inconsistent testimony concerning when his alleged COVID-19 symptoms began and ended; he testified variously that they had begun in mid-March or only in the latter part of April, and that they had either ended in April or that he still had them on the date of his deposition (May 19). Fernandez-Rodriguez Decl. ¶ 4; Fernandez-Rodriguez Dep. at 56-61.

Similarly, petitioner James Woodson claimed in his declaration that he had numerous serious medical issues, but admitted at his deposition that he had sought treatment at MCC only for asthma. Woodson Decl., ECF No. 51-5, ¶ 2; Woodson Dep. at 15-17, 25; *see* Lubelczyk Rebuttal Rep. at 16. Although Woodson faults MCC for not responding to his sick call requests in March, Woodson Decl. ¶ 3, Woodson Dep. at 17-22, no such records from March exist in MCC's system, Declaration of Ishita Kala, Ex. 36, ECF No. 54-36. Medical records from March also reflect that Woodson denied numerous asthma-related symptoms such as coughing and shortness of breath, and stated that that he "rarely uses his albuterol" and has had "no recent

asthma flares." Lubelczyk Rebuttal Rep., Ex. 6 at MCC 1026. By April 29, he had received a steroid inhaler. Rovner Decl. Ex. 12 at MCC 1017.

Likewise, Nicolas Sucich claimed in his declaration that he thought he was infected with COVID-19, "but they never took me to the hospital or anything." Sucich Decl., ECF No. 51-31, ¶ 10; Sucich Dep. at 23-25. However, while he asserts that he reported this to MCC medical staff on April 3 who ignored his concerns, Mr. Sucich's medical records indicate that during a medical encounter that day, he denied fever, chills, chest pain, shortness of breath, cough, sore throat, nausea or vomiting, or respiratory distress. Sucich Dep. at 26-28; MCC 470. Mr. Sucich also admitted that he sees the MCC doctor "all the time" and that the medical staff are "very good" and "very attentive" to him. Lubelczyk Rebuttal Rep. at 9; Sucich Dep. at 12-14. Further, both Mr. Sucich and Mr. Woodson admitted that nobody in their tiers on Unit 11 South currently appeared to have COVID-19 symptoms, and Mr. Sucich testified that he had not seen any symptomatic inmates for a few weeks. Sucich Dep. at 17-18; Woodson Dep. at 32.

More broadly, as described in Dr. Lubelczyk's rebuttal report, during the inspection the inmates painted a less dire picture than do petitioners and the other declarants in their declarations—such as with respect to sanitation, screening, responses to requests for medical care, and isolation and quarantine. *See* Lubelczyk Rebuttal Rep. at 3-13. And, as discussed above, Respondent has taken action to address any prior lapses with respect to requests for medical care and other issues such that there is no basis to grant the relief requested.

3. Imperfect Execution of Appropriate Policies Due to Extraordinary Circumstances Does Not Establish Deliberate Indifference

The crux of petitioners' argument—and one Respondent is acutely sensitive to, *see* Licon-Vitale Ltr. at 1-3—is that MCC staff have not always followed the governing policies. This is indeed a matter of concern at the highest levels of MCC management. *Id.* Contact

tracing for infected staff, inmate symptom screening, timely responses to requests for medical intervention, and the provision of hygiene and cleaning supplies to inmates are critical elements of MCC's response to COVID-19, and this response is undermined when these required steps are not followed, *id.* at 2-3. Many of these instances of noncompliance and alleged noncompliance occurred when MCC was experiencing acute staff shortages due to COVID-19 in March and April. *E.g.*, Beaudouin Decl. ¶¶ 24, 27; Licon-Vitale Ltr. at 2-3.

Respondent, however, has already taken appropriate action, and is now reinforcing those steps, to address the past deficiencies. For example, as Dr. Beaudouin explains, there were gaps in contact tracing caused by the departure and retirement of staff, but these have now been addressed, and such tracing is now happening whenever a staff member tests positive (which is not often at this point). Beaudouin Decl. ¶ 27; Licon-Vitale Memo. Similarly, inmate email requests for medical attention did not receive timely responses for several weeks, but such requests are now being reviewed every morning. Beaudouin Decl. ¶ 24; Licon-Vitale Memo.[14] With respect to inmate screening for potential COVID-19 symptoms, MCC policy required medical staff members to ask each inmate about every possible symptom each time they took their temperature, but it appears some staff members shortened their questioning to a variation on "how are you feeling today" after several days of asking the same inmates the same longer list of questions. Beaudouin Decl. ¶ 14 & n.5. Dr. Beaudouin consequently has instructed his staff to return to asking all questions of each inmate. *Id.*; Licon-Vitale Memo.

[14] Significantly, a number of inmates acknowledged during the MCC inspection that they understood such email requests are to be used for non-emergency medical issues only and acute requests for medical attention should be made in person to staff members or to MCC medical staff, who are present in the inmates' units every day. Lubelczyk Rep. at 9; Lubelczyk Rebuttal Rep. at 9-10.

As for non-medical issues, MCC has performed well overall with respect to sanitation and hygiene during this crisis. *See supra* Background, Sec. E; Lubelczyk Rep. at 11-14; Lubelczyk Rebuttal Rep. at 3-6. However, when MCC management learned that some inmates complained about not being provided with enough soap and other hygiene items despite previous instructions that they be provided, signs were posted throughout the units to remind staff and inmates of their availability. Edge Decl. ¶¶ 30-31, Ex. 11 at MCC 0001 & Ex. 7 at Inspection Photograph #32; Hazlewood Dep. at 80-82; Licon-Vitale Dep. at 72-73. Likewise, despite previously having adequate policies in place regarding the availability of supplies for inmates to clean their cells and high-contact surfaces, such as telephones and computers, Edge Decl. ¶¶ 36-37, similar reminders have been posted regarding the availability of such supplies, *id.* ¶ 37 & Ex. 14, Ex. 7, Inspection Photograph #33; *see also* Licon-Vitale Memo.

Moreover, Respondent has very recently issued a memorandum to all staff reminding them of the importance of these and other measures and of her expectation that such policies be followed rigorously. Licon-Vitale Ltr. at 3, Licon-Vitale Memo. This memorandum reiterates the Warden's—and MCC's—commitment to providing appropriately for the health and safety of MCC's inmates generally and specifically with respect to COVID-19. *Id.* Such measures negate any possible finding that the Warden is deliberately indifferent to inmates' needs.

Courts have concluded that preliminary injunctive relief is not appropriate in such circumstances. Especially, as here, where MCC has taken corrective action to ensure that its policies are more consistently implemented, there is no need for an order from this Court compelling it to do so—even if such measures were reinstituted to some degree only after the litigation commenced. Thus, a Pennsylvania district court that had initially granted a TRO with respect to several state prisons largely reversed itself at the preliminary injunction stage: "[W]e

must acknowledge that the status quo of a mere few weeks ago no longer applies. In granting the TRO, we appropriately erred on the side of great caution given the facts as they then existed, and the clearly virulent nature of COVID-19. But it is clear to the Court that in the nearly one month that has elapsed since we were first presented with this case, the Facilities have significantly and favorably altered their response to the COVID-19 pandemic. To be sure, [one facility] remains free of any infections and [another] has limited its infection to one person, which we consider to be a significant success given the extremely contagious nature of the virus." *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 2025384, at *11 (M.D. Pa. Apr. 27, 2020), *appeal filed*, No. 20-1906 (3d Cir.).

Other courts have denied injunctive relief based on allegations of noncompliance with prison policy, even absent such definitive corrective action from prison officials. For example, the District of Massachusetts recently denied injunctive relief relating to a state prison's response to COVID-19 where it concluded that the prison "has adopted many reasonable policies and practices to protect the individuals working and imprisoned" there, even though it was "[l]ess clear . . . whether and to what extent [the warden] is ensuring that such policies and practices are effectively and consistently implemented by those working for him." *Baez v. Moniz*, Civ. No. 20-10753-LTS, 2020 WL 2527865, at *10 (D. Mass. May 18, 2020).

And the Eleventh Circuit recently overturned a preliminary injunction issued against a Florida state prison because the petitioners there could not establish deliberate indifference with regard to COVID-19. *See Swain*, 958 F.3d at 1089. In that case, prison authorities had "implemented many measures to curb the spread of the virus"—such as "such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures"—though it was

"perhaps impossible . . . to implement social distancing measures effectively in all situations at [the prison's] current population level." *Id.* Despite allegations that the prison's policies "[we]re not uniformly enforced," injunctive relief was not warranted because "the district court made no finding that the defendants are ignoring or approving the alleged lapses in enforcement of social-distancing policies, so these lapses in enforcement do little to establish that the defendants were deliberately indifferent." *Id.* (internal quotation marks omitted).

Similarly, in a case involving a state prison in Illinois, a district court denied the plaintiffs' request for a temporary restraining order despite their allegations "that Defendants are simply not moving quickly or broadly enough, and that the Court's intervention is necessary to prod the defendants to act more quickly." *Money v. Pritzker*, No. 20-CV-2093, 2020 WL 1820660, at *18 (N.D. Ill. Apr. 10, 2020) (internal quotation marks omitted). As the court explained, "objections about the speed or scope of action and suggestions for altering it through a 'prod' do not support either half of the phrase 'deliberate indifference.'" *Id.* Because the "Defendants are trying, very hard, to protect inmates against the virus and to treat those who have contracted it," "[t]he record simply does not support any suggestion that Defendants have turned the kind of blind eye and deaf ear to a known problem that would indicate total unconcern for the inmates' welfare." *Id.* (internal quotation marks omitted).

In any event, Respondent and MCC management have amply demonstrated that they are not deliberately indifferent to inmates' needs, and indeed remain committed to enforcing all current and future BOP and MCC protocols. Licon-Vitale Ltr. at 1-5; Licon-Vitale Memo; Beaudouin Decl. ¶¶ 14, 24, 27; Edge Decl. ¶ 54. And, to allay possible concerns of "slippage" once the judicial spotlight is not focused as brightly on these matters, Respondent has agreed to

provide periodic voluntary updates to the Court documenting its continued efforts in this regard. Licon-Vitale Ltr. at 4-5. In these circumstances, no injunctive relief is warranted.

4. Petitioners Cannot Succeed on the Merits of Their Release-Related Claims

As addressed at length in Respondent's Partial Motion to Dismiss, ECF No. 47, the Petition's claims seeking inmate releases cannot survive as a matter of law. Petitioners effectively acknowledge that they cannot establish a likelihood of success on such claims by seeking no such relief as part of this motion. Their motion does, however, ask this Court to order: (a) a 50% reduction in the inmate population of Unit 11 South; (b) a direction that MCC must decide all requests for compassionate release within 14 days; (c) the issuance of written policies regarding home confinement, RRC placements, and furlough encompassing petitioners' desired content; and (d) a guarantee of staff availability to process such requests. Proposed Order ¶¶ 20-24. Even this narrower relief is precluded by the Prison Litigation Reform Act ("PLRA") and 18 U.S.C. § 3621. Moreover, in light of MCC's resumption of timely consideration of inmate release requests, petitioners cannot establish that MCC acted with deliberate indifference.

First, petitioners' requests cannot be considered because the PLRA precludes this Court from issuing an order "that has the purpose or effect of reducing or limiting the prison population," 18 U.S.C. § 3626(g)(4), and 18 U.S.C. § 3621(b) bars the Court from reviewing BOP's placement decisions. As discussed in Respondent's motion to dismiss, *see* Respondent's Partial Motion to Dismiss ("MTD"), ECF No. 47, at 9-10, Section 3626 does not permit the Court to order prisoner release under the circumstances presented here. Briefly, the intent of Section 3626, and the PLRA as a whole, is "to eliminate unwarranted federal court interference with the administration of prisons." *Ruggiero v. County of Orange*, 467 F.3d 170, 174 (2d Cir. 2006) (internal quotation marks omitted). In addition, BOP's decisions regarding "the place of

the prisoner's imprisonment" are thus "not reviewable by any court." 18 U.S.C. § 3621(b); *see also* MTD at 15-17.

These provisions preclude the release-related relief sought by petitioners. Insofar as the purpose of the requested relief is to reduce the alleged overcrowding at MCC, it clearly has the "purpose or effect of reducing or limiting the prison population," 18 U.S.C. § 3626(g)(4), and is therefore precluded by the PLRA. And to the extent that the proposed relief would compel the BOP to re-house inmates, either in community-based facilities or other BOP correctional institutions, Section 3621 prevents this type of judicial interference.

But even if this Court had the authority to grant the requested relief (which it does not), it should not do so because petitioners cannot establish a likelihood of success on their release claims. Since April 26, MCC has been diligently reviewing inmate applications and has committed to maintain the appropriate staffing levels to keep doing so; therefore there is no need for judicial compulsion. Licon-Vitale Memo; Demosthenes Decl. ¶ 60; *see also Money*, 2020 WL 1820660, at *18 (denying preliminary injunction based on request for court to oversee processing of prison's release operations).

C. Petitioners Have Not Established They Will Suffer Irreparable Harm Absent Injunctive Relief

For the same reasons that petitioners are unlikely to succeed on the merits of their claims, they also cannot establish that they will be subject to irreparable harm in the absence of injunctive relief. The deficiencies petitioners have noted in MCC's compliance with its policies and with timely processing of requests for early release have been resolved or are in the process of being resolved. Licon-Vitale Ltr. at 4; Licon-Vitale Memo; Beaudouin Decl. ¶¶ 14, 24, 27. Moreover, these issues affected only certain aspects of MCC's operations, and did not substantially negatively impact the prison's otherwise compliant and successful response to the

COVID-19 epidemic. Lubelczyk Rebuttal Rep. at 9, 11, 14; Licon-Vitale Ltr. at 2-3. Moreover, the risk of infection with COVID-19 has decreased at MCC as it has in the larger New York City community, and indeed there have been no new inmate or staff infections in several weeks. *See, e.g.*, *Thakker v. Doll*, 2020 WL 2025384, at *8 ("In the last month, however, [the state prisons] have quickly and effectively implemented the guidelines published by the CDC such that they have stymied any potential outbreak within their walls. The fears which we reasonably harbored of a 'tinderbox' scenario have largely failed to appear within those Facilities. This again is a credit to the staffs at those institutions. Indeed, and as aforestated, there are no reported cases at [one facility] and the single reported case at [the other] appears to have been effectively contained. Thus, we find that any allegations of irreparable harm at [the prisons] are largely speculative and cannot satisfy the second element of our Preliminary Injunction analysis." (citation omitted).

With regard to the timely processing of release applications, because MCC is already doing so as expeditiously as possible while still ensuring adequate inmate support and public safety, petitioners cannot establish that they will suffer irreparable harm absent injunctive relief. While conceding that MCC has "ma[de] modest progress with respect to review for home confinement," petitioners incorrectly characterize the prison's efforts as having been undertaken only "upon order of this Court," and "at the Court's direction." Mot. at 27. However, as is clear from the transcript of the May 4 hearing on petitioners' request for a temporary restraining order, that is not an accurate description of what occurred. Rather, MCC proposed a processing schedule that it believed to be reasonable, and the Court adopted it. ECF No. 36, at 54:1-5 ("The Court: I'm prepared to accept the government's representations as to the amount of work that it will take and the level of effort that it will take as reasonable, and so I will adopt the plan or the

deadlines that have been agreed to or proposed by the government."). Given that the MCC's efforts to date have been satisfactory, and that Respondent has committed to maintaining such efforts going forward, petitioners cannot establish irreparable harm in this regard.

In short, while MCC officials shall remain vigilant and do not intend to let their hard-gained success slip between their fingers, Licon-Vitale Ltr. at 4; Licon-Vitale Memo, the virus is now under control, and MCC has implemented and is carrying out procedures to ensure that it will remain so for the foreseeable future.

Ultimately, the potential irreparable injury posited by petitioners—a risk to their health, Mot. at 24-25—is not a sufficiently likely outcome and cannot justify injunctive relief. While of course neither the Respondent nor the Court can guarantee that no additional MCC inmates will be infected with COVID-19, there is no reason to believe that MCC inmates currently face an inordinate risk of infection compared to that faced by others in our community.

D. Granting a Preliminary Injunction Is Not in the Public Interest

Finally, although there is no dispute that promoting inmate health is always in the public interest, the public interest does not weigh in favor of injunctive relief here. In the context of the prison system, the Supreme Court has recognized that "the problems of prisons . . . require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1973). "[C]ourts," by contrast, "are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* at 405. Running a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 85 (1987). The "formidable task of running a prison" falls to those other two branches, and "separation of powers concerns

counsel a policy of judicial restraint" and "deference to the appropriate prison authorities." *Id.* As one Texas district court recently noted, "the Court is ill suited to manage the day-to-day health care of prisoners, especially during a health crisis. . . . [T]he Attorney General and the BOP are implementing plans to control the spread of the CO[VID]-19 virus and are better suited to manage prisoner health care." *Jones v. Bergami*, No. EP-20-CV-132-DB, 2020 WL 2575566, at *2 (W.D. Tex. May 21, 2020).

With respect specifically to petitioners' requests relating to inmate release specifically, the relief sought could harm MCC's ability to effectively manage its operations, create a conflict between MCC and BOP's central office, and potentially endanger public safety. Petitioners seek the release or transfer of certain inmates and changes to MCC's procedures for furlough and placement in home confinement or RRC. If a court were to order MCC to adopt its own release policies and procedures that differed from current or future BOP policies, it could create problems given that the release process is handled jointly with BOP. Demosthenes Decl. ¶ 63; McFarland Decl. ¶ 18.

Moreover, it is not possible for MCC to release inmates without coordination with, and approval from, BOP and its community partner agencies. *Id.* ¶ 19. BOP's regional office arranges for inmates' post-release placement, which is contingent on the agreement of a BOP partner to take on case management responsibilities for the inmate. *Id.* ¶¶ 7-12, 19. It would not be appropriate for MCC to release an inmate before such a community partner could accept oversight. Demosthenes Decl. ¶ 64. Likewise, judicially mandated deadlines for consideration of release applications, especially now that MCC staff is diligently addressing these matters, could have the unintended effect of forcing hasty release decisions that do not include sufficient time for proper diligence and consideration of these sensitive matters. *Id.* ¶ 65.

Accordingly, the public interest weighs strongly against injunctive relief.

II. This Court Lacks Authority to Appoint an Independent Monitor

Petitioners' request that the Court to 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," Proposed Order ¶ 28, should be denied as it is not permitted under the PLRA and would be detrimental to the operations of the prison, which is entrusted to the executive and legislative branches.

The PLRA limits the appointment of special masters (even if styled as "independent monitors") to two specific contexts: to "conduct hearings on the record and prepare proposed findings of fact," and, "during the remedial phase of the action," to assist if the "remedial phase will be sufficiently complex to warrant the appointment." 18 U.S.C. § 3626(f)(1)(A)-(B). As the Second Circuit has recognized, "[t]he PLRA has substantially limited the capacity of federal courts to appoint special masters to oversee prison conditions, specifically in order to ensure compliance with the Eighth Amendment." *Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003).

Petitioners' request presupposes that an independent monitor—rather than the Warden, or BOP—is best situated to make decisions about MCC's operations. As discussed above, Congress and the Supreme Court have explicitly found to the contrary. *See supra* Section I(D). Prison officials, not special masters or independent monitors, are the ones who must "make the difficult judgments concerning institutional operations." *Pesci v. Budz*, 935 F.3d 1159, 1166 (11th Cir. 2019). A special master cannot be permitted to "sit[] as a super-warden to second-guess the decisions of the real wardens." *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018) (explaining the "substantial deference to the decisions of prison administrators because of the complexity of prison management, the fact that responsibility

therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems."), *cert. denied*, 138 S. Ct. 795 (2019).

Petitioners' request for appointment of an Independent Monitor therefore should be denied.

III. Petitioners Are Not Entitled to Provisional Class Certification, and Class-Wide Relief Would Likely Harm Many Inmates

Lastly, regardless of whether petitioners are seeking final or conditional class certification, they must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See Denney v. Deutsche Bank Ag*, 442 F.3d 253, 271 (2d Cir. 2006) ("Before certification is proper for any purpose—settlement, litigation, or otherwise—a court must ensure that the requirements of Rule 23(a) and (b) have been met."). They cannot.

"The Rule 23 requirements must be established by at least a preponderance of the evidence," and "[t]he burden of proving compliance with all of the requirements of Rule 23 rests with the party moving for certification." *Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013). A movant must show that: "(1) 'the class is so numerous that joinder of all members is impracticable'; (2) 'there are questions of law and fact common to the class'; (3) 'the claims or defenses of the representative parties are typical' of those of the class; and (4) 'the representative parties will fairly and adequately protect the interests of the class.'" *Roach v. TL Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (quoting Fed. R. Civ. P. 23(a)). In addition, "Rule 23 contains the additional, implicit requirement that an ascertainable class exists and has been properly defined." *In re Fosamax Prods. Liability Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008). "It must be administratively feasible for a court to determine whether a particular individual is a member of the class." *Id.* at 395-96.

Here, the proposed class cannot be certified because it is not ascertainable, and fails to satisfy Rule 23(a)'s commonality and typicality requirements. First, the Petition proposes to bring an action on "behalf of all current and future detainees in custody at the MCC during the course of the COVID-19 pandemic." ECF No. 1, ¶ 87. Given that the "course of the . . . pandemic" is uncertain, as is the date on which it will end, and that it is impossible to know the identity of inmates who have not yet been brought to the MCC, the proposed class clearly fails to satisfy Rule 23's ascertainability requirement.

Second, "Rule 23(a)(2) requires that there be 'questions of law or fact common to the class.'" *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 700 (S.D.N.Y. 2020) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Commonality requires a plaintiff 'to demonstrate that the class members have suffered the same injury.'" *Id.* (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 349-350). Petitioners cannot demonstrate commonality given the differing circumstances of inmates at the MCC, such as the stages of their criminal proceedings, differences in their housing circumstances, and differences in their health. Each of these differences directly inform the alleged injuries. For example, inmates who have yet to be sentenced are statutorily ineligible for release to home confinement. Furthermore, due to epidemic-related prison procedures, inmates cannot be transferred between housing units—whose type and degree of occupancy vary—absent extraordinary circumstances. Insofar as the proposed class of inmates have each suffered different injuries, petitioners cannot meet their burden of satisfying Rule 23(a)'s commonality requirement.

Petitioners also cannot satisfy Rule 23(a)'s typicality requirement. Although "the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims," *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993), a party

seeking certification must still "show that each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability,'" *In re Flag Telecom Holdings, Ltd. Secs. Litig*. 574 F.3d 29, 35 (2d Cir. 2009). For this reason, "the named plaintiffs in a class action cannot represent a class of whom they are not a part, and can represent a class of whom they are a part only to the extent of the interests they possess in common with members of the class." *Irvin v. Harris*, 944 F.3d 63, 71 (2d Cir. 2019) (internal quotations omitted). The proposed class here includes inmates who, due to the differing stages of their criminal proceedings, will necessarily assert different legal arguments to support their claims. Also, due to the differences in their housing and health circumstances, inmates' potential claims will arise from different courses of events. These key differences distinguish the named plaintiffs from certain members of the class, and they accordingly fail to satisfy Rule 23(a)'s typicality requirement.

For the same reasons that petitioners fail to satisfy the commonality and typicality requirements of Rule 23(a), they also cannot satisfy the requirements of Rule 23(b)(2). Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Here, differences in the inmates' health and legal status are material to BOP's decisions regarding whether they are to be released. Similarly, because inmates' housing assignments differ, so do the effects of those assignments on them. The Court should therefore deny provisional class certification for the additional reason that petitioners cannot satisfy their burden under Rule 23(b)(2).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny petitioners' motion for a preliminary injunction and for provisional class certification.

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Respectfully submitted,

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