IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES MONEY, WILLIAM RICHARD, GERALD REED, AMBER WATTERS, TEWKUNZI GREEN, DANNY LABOSETTE, CARL REED, CARL "TAY TAY" TATE, PATRICE DANIELS, and ANTHONY RODESKY, on behalf of themselves and all similarly situated individuals,	)	
Petitioners,	)	
v.	)	No. 20 C 2094 (also filed in 20 C 1792)
ROB JEFFREYS, Director, Illinois Department of Corrections,	)	The Honorable John F. Kness, Judge Presiding.
Respondent.	)	

RESPONSE TO EMERGENCY PETITION FOR WRITS OF HABEAS CORPUS

TABLE OF CONTENTS

I. Background 3

II. IDOC Has Responded and Continues to Respond Quickly and Expeditiously to Protect Prisoners from the Spread of COVID-19 6

III. Petitioners Are Not Entitled to Relief Under 28 U.S.C. § 2254 9

A. Habeas is not the appropriate vehicle for petitioners' claims ... 9

1. Eighth Amendment "deliberate indifference" claims may not be litigated in habeas proceedings 9

2. Petitioners' claim that IDOC has failed to provide procedures for seeking home detention does not state a claim for habeas relief 11

B. Even if habeas is the proper vehicle, relief is unwarranted 13

1. Petitioners cannot proceed by way of a class action 14

a. The restrictions imposed by § 2254 preclude the use of class action procedures 14

b. Petitioners' proposed classes do not satisfy the criteria for class treatment 17

2. Petitioners have not attempted to exhaust their administrative and state court remedies, and there is no basis to excuse exhaustion where remedies are available 20

a. Petitioners must exhaust available state court remedies before seeking § 2254 relief 20

b. Petitioners fail to establish that they may excuse exhaustion 22

3. Exhaustion aside, petitioners' claims are meritless 26

a. Petitioners' Eighth Amendment claim fails because they cannot establish that IDOC is recklessly disregarding the risk to petitioners' health posed by COVID-19 26

b. Petitioners' procedural due process claim fails because they have no liberty or property interest in home detention and even if they did, IDOC is in the process of releasing prisoners to home detention 30

4. Petitioners are not entitled to the remedy they request even if this Court finds a constitutional violation 33

a. If petitioners' claims were both cognizable in habeas and meritorious, they are subject to the requirements for relief in 18 U.S.C. § 3626, which precludes immediate release of tens of thousands of prisoners, as petitioners request 35

b. Petitioners' request for immediate changes in their custody status disregards mandatory state statutory and administrative procedures to determine eligibility on an individualized basis consistent with public safety 37

c. IDOC is already reviewing prisoners for release and transfer to the identified custodial programs 43

CONCLUSION 45

TABLE OF CASES

Bell v. Robert, 402 F. Supp. 2d 938 (N.D. Ill. 2005) 26

Blair-Bey v. Quick, 151 F.3d 1036 (D.C. Cir. 1998) 36

Bd. of Educ. of Nippersink Sch. Dist. 2 v. Koch, 976 N.E.2d 1150 (Ill. App. Ct. 2012) 24

Bd. of Pardons v. Allen, 482 U.S. 369 (1987) 13

Brown v. Plata, 563 U.S. 493 (2011) 35

Burrell v. Powers, 431 F.3d 282 (7th Cir. 2005) 22

Bush v. Pitzer, 133 F.3d 455 (7th Cir. 1997) 12

Calderon v. Ashmus, 523 U.S. 740 (1998) 14

Castille v. Peoples, 489 U.S. 346 (1989) 23

Cavalieri v. Shepard, 321 F.3d 616 (7th Cir. 2003) 28

Crites v. Madison Cnty. Jail, No. 18-CV-611-DRH, 2018 WL 1832919 (S.D. Ill. Apr. 17, 2018) 11

Crown, Cork & Seal, Co. v. Parker, 462 U.S. 345 (1983) 14-15

Dozie v. Cady, 430 F.2d 637 (7th Cir. 1970) 25

Duckworth v. Serrano, 454 U.S. 1 (1981) 21

Estelle v. Gamble, 429 U.S. 97 (1976) 10, 23, 25, 27, 29

Evans v. Chavis, 546 U.S. 189 (2006) 17

Farmer v. Brennan, 511 U.S. 825 (1994) 10, 27, 28

Felce v. Fiedler, 974 F.2d 1484 (7th Cir. 1992) 13

Fontana v. Elrod, 826 F.2d 729 (7th Cir. 1987) 16

French v. Owens, 777 F.2d 1250 (7th Cir. 1985) 10

Fryer v. Cross, No. 14-cv-79-DRH, 2014 WL 1632104 (S.D. Ill. Apr. 23, 2014) 12

Glaus v. Anderson, 408 F.3d 382 (7th Cir. 2005) 9, 10, 11

Graham v. Broglin, 922 F.2d 379 (7th Cir. 1991) 12

Greenholtz v. Inmates of Neb., 442 U.S. 1 (1979) 13

Grennier v. Frank, 453 F.3d 442 (7th Cir. 2006) 30, 31

Hadley v. Holmes, 341 F.3d 661 (7th Cir. 2003) 12, 29, 33, 34

Hankins v. Fulcomer, 941 F.2d 246 (3d Cir. 1991) 25

Helling v. McKinney, 509 U.S. 25 (1993) 10

Jabbar v. Fischer, 683 F.3d 54 (2d Cir. 2012) 10

Jenkins v. Gramley, 8 F.3d 505 (7th Cir. 1993) 25

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) 10

Jones v. Cross, 637 F.3d 841 (7th Cir. 2011) 13

Ky. Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) 13, 30, 31

Lambert v. Davis, 449 F.3d 774 (7th Cir. 2006) 16

Lee v. Young, 533 F.3d 505 (7th Cir. 2008) 27

Lindh v. Murphy, 521 U.S. 320 (1997) 36

Lowe v. Duckworth, 663 F.2d 42 (7th Cir. 1981) 25

McAtee v. Cowan, 250 F.3d 506 (7th Cir. 2010) 23

McCaster v. Darden Restaurants, Inc., 845 F.3d 794 (7th Cir. 2017) 17

McKune v. Lile, 536 U.S. 24 (2002) 42

Messner v. Northshore Univ. Health Sys., 669 F.3d 802 (7th Cir. 2012) 17

Montgomery v. Anderson, 262 F.3d 641 (7th Cir. 2001) 13, 31

Moore v. Olson, 368 F.3d 757 (7th Cir. 2004) 15

Murphy v. Raoul, 380 F. Supp. 3d 731 (N.D. Ill. 2019) 12, 39

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 21, 23

Oden v. True, No. 19-cv-10009-SMY, 2019 WL 6117740 (S.D. Ill. Nov. 18, 2019) 12

Olim v. Wakinekona, 461 U.S. 238, 250 (1983) 31

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 18

Peate v. McCann, 294 F.3d 879 (7th Cir. 2002) 28

Peterson v. Diaz, No. 2:19-cv-01480, 2020 WL 1640008 (E.D. Cal. Apr. 2, 2020) 11, 42

Petry-Blanchard v. Louis, et al., No. 4:20-CV-P49-JHM, 2020 WL 1609493 (W.D. Ky. Apr. 3, 2020) 24

Petties v. Carter, 836 F.3d 722 (7th Cir. 2016) 27

Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002) 10

Preiser v. Rodriguez, 411 U.S. 411 (1973) 11, 21, 23

Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996) 36

Rosario v. Brawn, 670 F.3d 816 (7th Cir. 2012) 28

Rose v. Lundy, 455 U.S. 509 (1982) 21

Rumsfeld v. Padilla, 542 U.S. 426 (2004) 15

Salcido ex rel. Gilliland v. Woodbury Cnty., Iowa, 119 F. Supp. 2d 900 (N.D. Iowa 2000) 13

Sandin v. Conner, 515 U.S. 472 (1995) 13

Santana v. United States, 98 F.3d 752 (3d Cir. 1996) 35

Sceifers v. Trigg, 46 F.3d 701 (7th Cir. 1995) 26

Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982) 18

Sung Park v. Indiana Univ. Sch. of Dentistry, 692 F.3d 828 (7th Cir. 2012) 31

Swarthout v. Cooke, 562 U.S. 216 (2011) 13

Taylor v. Edgar, 52 F. App'x 825 (7th Cir. 2002) 13, 29, 30, 31, 32

U.S. ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974) 14

United States v. Clark, Crim. No. 17-85-SDD-RLB, 2020 WL 1557397 (M.D. La. Apr. 1, 2020) 38

United States v. Clark, No 19-40068-01-HLT, 2020 WL 1446895 (D. Kan. Mar. 25, 2020) 38

United States v. Credidio, No. 19 Cr. 111, 2020 WL 1644010 (S.D.N.Y. Apr. 2, 2020) 29, 44

United States v. Eberhart, No 13-cr-003130PJH-1, 2020 WL 1450745 (N.D. Cal. Mar. 25, 2020) 38

United States v. Garza, No. 18-CR-1745-BAS, 2020 WL 1485782 (S.D. Cal. Mar. 27, 2020) 42

United States v. Gordon, 130 F. App'x 24 (7th Cir. 2005) 15

United States v. Raia, __ F.3d __, 2020 WL 1647922 (3d Cir. Apr. 3, 2020) . 22, 38, 44

United States v. Zywotko, No. 2:19-cr-113-FtM-60NPM, 2020 WL 1492900 (M.D. Fla. Mar. 27, 2020) 38

Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) 35

Whiting v. Wexford Health Sources, Inc., 839 F.3d 658 (7th Cir. 2016) 27

Wilborn v. Ealey, 881 F.3d 998 (7th Cir. 2018) 22

Williams v. Lane, 851 F.2d 867 (7th Cir. 1988) 13

Wolff v. McDonnell, 418 U.S. 539 (1974) 13

Pursuant to this Court's April 2, 2020, order, Doc. 12, respondent Rob Jeffreys, Director of the Illinois Department of Corrections (IDOC), responds to petitioners' emergency petition for writs of habeas corpus and class certification and requests that they be denied.

Even before COVID-19 was declared a pandemic, Illinois officials, including respondent, recognized the risks it posed to prisoners and took steps to implement social distancing and otherwise reduce the risk of infection within IDOC facilities. At the same time, IDOC also began expeditious reviews to determine whether eligible prisoners could be released on home detention or upon an award of discretionary sentencing credit. And to further facilitate social distancing and the release of additional prisoners, the Governor has issued an Executive Order (effective 5:00 p.m. on April 6, 2020) that permits discretionary furloughs for medical, psychiatric or psychological services for the duration of the Gubernatorial Disaster Proclamation (which currently extends through April 30, 2020). In sum, IDOC is expeditiously considering prisoners for status changes in light of COVID-19. *See infra*, Part II.

In this 28 U.S.C. § 2254 habeas petition, petitioners propose to proceed as a class and ask that individuals in six subclasses be released on medical furlough, home detention, or following a discretionary award of good conduct credit (GCC). But as explained below, the petition should be denied for several independent reasons. At the threshold, petitioners' deliberate indifference and due process

claims are not cognizable in habeas corpus. *See infra*, Part III.A. But even if habeas corpus were an appropriate vehicle for petitioners' claims, they may not proceed by way of class action here. *See infra*, Part III.B.1. Further, petitioners' conceded failure to exhaust available administrative and state-court remedies bars relief. *See infra*, Part III.B.2.

Even setting aside these procedural bars, petitioners' claims would fail on the merits: the deliberate indifference claim fails because petitioners cannot establish that IDOC is disregarding the risk to petitioners' health posed by COVID-19, and the due process claim fails because, as matter of law, petitioners have no liberty or property interest in the remedy they seek. *See infra*, Part III.B.3. Moreover, even if petitioners' claims were cognizable in habeas and meritorious, their request for immediate changes in the custody status of tens of thousands of prisoners is precluded by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1987e; 18 U.S.C. § 3626. *See infra*, Part III.B.4. And their desired remedies both disregard the state statutory and administrative procedures that IDOC must and should apply to determine eligibility on an individualized basis and consistent with public safety, and overlook that courts considering similar claims in response to the COVID-19 pandemic have held that such release decisions are better left to correctional authorities and their institutional expertise. *See id.*

Accordingly, this Court should deny petitioners' petition for writs of habeas corpus.

I. Background

Ten prisoners in the custody of the Illinois Department of Corrections (IDOC) have filed this "emergency petition for writs of habeas corpus" pursuant to 28 U.S.C. § 2254. Doc. 1. Petitioners simultaneously filed a complaint alleging violations of their civil rights under 42 U.S.C. § 1983 and an accompanying motion for temporary restraining order (TRO). *See* Dist. Ct. No. 20 C 2093, Docs. 1 & 9. Both lawsuits note the danger posed by COVID-19 and assert that IDOC officials have done too little to expedite the release of incarcerated prisoners to reduce the dangers posed by the virus. This Court docketed petitioners' TRO for consideration on the emergency docket and granted petitioners' request to expedite briefing of the habeas petition. Doc. 12.

The ten petitioners are housed at various IDOC facilities and are serving sentences for convictions ranging from drug crimes to first degree murder:

> 1. James Money (S11097), age 28, is housed at Illinois River Correctional Center, serving 12- and three-year sentences for Adams County residential burglary and theft convictions.
>
> 2. William Richard (M52774), age 66, is housed at Dixon Correctional Center, serving a five-year-sentence for a Cook County armed habitual criminal conviction.
>
> 3. Gerald Reed (N23920), age 57, is currently being processed at the Northern Reception Center of Stateville Correctional Center, serving a life sentence for a Cook County murder conviction.
>
> 4. Amber Watters (Y39454), age 39, is housed at Logan Correctional Center, serving a three-year sentence for Livingston County drug convictions.

5. Tewkunzi Green (R84568), age 38, is housed at the Logan Correctional Center serving a 34-year sentence for a Peoria County murder conviction.

6. Danny Labosette (B23629), age 56, is housed at the Robinson Correctional Center, serving a 50-year sentence for a Morgan County murder conviction.

7. Carl Reed (R48993), age 59, is housed at Graham Correctional Center, serving a 27-year sentence for a Cook County murder conviction.

8. Carl Tate (R12529), age 40, is housed at Danville Correctional Center, serving a 40-year sentence for a Cook County murder conviction.

9. Patrice Daniels (B70662), age 45, is presently at the Joliet Treatment Center, serving a life sentence for a Cook County murder conviction.

10. Anthony Rodesky (R47057), age 49, is housed at Pontiac Correctional Center, serving a 30-year sentence for a New Jersey murder conviction.

See Doc. 1 at 3-5; *see also* Resp. Exh. A, Illinois Department of Corrections Inmate Status Sheets for named petitioners; Resp. Exh. B, Data sheet as to Anthony Rodesky.

Excepting Daniels and Rodesky, petitioners claim an entitlement to release from IDOC custody in the form of medical furloughs, release on home detention, or early release based on the award of discretionary GCC. Money claims that he qualifies for all three remedies. Richard, Watters, and Labosette claim that they are entitled to be released on home detention. Gerald Reed, Carl Reed, and Green claim that they qualify for medical furloughs.

Petitioners allege that they are entitled to habeas relief for violations of the Eighth and Fourteenth Amendments. Doc. 1 at 49-55. First, petitioners claim that IDOC officials are acting with deliberate indifference to the risk of harm posed by COVID-19 and imprisoning them under conditions that insufficiently mitigate the risk of transmission of infectious disease. *Id.* at 49-52. Second, petitioners claim that IDOC officials have violated due process by failing to implement procedures for transferring prisoners to home detention. *Id.* at 52-55. These claims are repeated in petitioners' § 1983 complaint. *See* Dist. Ct. No. 20 C 2093, Doc. 1 at 43-45.

Petitioners seek to certify "classes" of habeas petitioners. They propose an overall class "consisting of all people who are currently or will in the future be housed in an IDOC prison during the duration of the COVID-19 pandemic." Doc. 1 at 44-45. Within that class, they propose defining and "releas[ing] from physical custody" six subclasses, based on members' eligibility for various forms of relief. *Id.* at 45. The first two subclasses consist of people "eligible for medical furlough under 730 ILCS 5/3-11-1": subclass one consists of eligible people with "serious underlying medical conditions" and subclass two consists of eligible people who "are 55 years of age or older." *Id.* Three of the proposed subclasses consist of people "eligible for home detention" pursuant to provisions in 730 ILCS 5/5-8A-3. *Id.* at 45-46. The three groups are defined, respectively, as "[p]eople who are 55 years of age or older with less than one year remaining on their sentence"; people who are "currently in custody for Class 2, 3, or 4 offenses"; and people who are "currently in custody for

Class 1 or Class X offenses with less than 90 days remaining on their sentence." *Id.* And the final proposed subclass consists of people "scheduled to be released within 180 days and eligible to receive sentencing credit pursuant to 20 Ill. Admin. Code 107.210." *Id.* at 46.

For reasons that follow, petitioners' requests for class certification and for habeas relief should be denied.

II. IDOC Has Responded and Continues to Respond as Quickly as Possible to Protect Prisoners from the Spread of COVID-19.

The threat posed by COVID-19 and its potential to spread throughout Illinois correctional facilities is a serious concern. Respondent and the IDOC understand the importance of social distancing to slow its spread, yet face unique challenges in implementing social distancing protocols, given its prisoner population and limited housing capacity. Accordingly, respondent and IDOC have been working tirelessly toward their goal of drastically reducing the prison population. To that end, and over the past several weeks, IDOC has taken unprecedented and extraordinary measures to mitigate the risk of exposure in their facilities. For example, Illinois has:

- Released approximately 500 inmates through various forms of sentence credit, restoration of credit, and electronic detention.
- Provided an additional 65 furloughs since the creation of the population management task force.

- Between March 2 and April 4, 2020, reduced its inmate population by roughly 1,075.

- Suspended admissions from all Illinois county jails, with limited exceptions at the sole discretion of the Director. Executive Order 2020-13 (Mar. 26, 2020); *see also* Executive Order 2020-18 (Apr. 1, 2020) (extending Executive Order 2020-13 through April 30, 2020).

- Suspended the required 14-day notification to the State's Attorney for inmates released early as a result of earned sentence credit for good conduct. Executive Order 2020-11 (Mar. 23, 2020); *see also* Executive Order 2020-18 (Apr. 1, 2020) (extending Executive Order 2020-11 through April 30, 2020).

- Awarded up to 180 days of Earned Discretionary Sentencing Credit for eligible offenders pursuant to 730 ILCS 5/3-6-3(a)(3). Such sentencing credit is within the sole discretion of the Director, but must be based on the results of a risk or needs assessment, circumstances of the crime, any history of conviction for a forcible felony, the offender's behavior and disciplinary history, and the prisoner's commitment to rehabilitation, including participation in programing. *Id*. The Director may not award discretionary sentencing credit unless the inmate has served a minimum of 60 days. *Id*.

- Identified offenders within nine months of their release date and conducted individualized reviews to determine whether they are eligible for early release. The review requires staff to examine an offender's disciplinary history, commitment to rehabilitation, and criminal history. Offenders with forcible felonies, violent criminal histories, significant disciplinary issues, or outstanding warrants are not approved for the sentencing credit. Each week, IDOC generates a list of potentially eligible offenders, and staff conduct daily reviews of their files.

- Reviewed prior revocations of GCC and restored sentence credit where appropriate.

- Placed offenders on electronic monitoring or home detention pursuant to 730 ILCS 5/5-8A-3. IDOC has placed many pregnant and postpartum offenders on home detention, and is now concentrating its efforts on those who are 55 years or older, have served 25% of the sentence, and are within 12 months of release. For qualifying offenders, IDOC must conduct

individual assessments to ensure that placement outside of a secure facility is appropriate.

- Illinois's Prisoner Review Board (PRB) continues to conduct daily hearings by telephone and video conference to set the conditions of mandatory supervised release for all individuals pending release.

- The PRB has notified persons affected by the cancellation of the April 2020 clemency docket, and new dates are being secured. The PRB has also notified affected parties that they can request a non-public hearing, which may be heard based upon the paper submissions, if all affected parties agree. In addition, the PRB continues its customary practice of conducting informational interviews of incarcerated petitioners by videoconference, and the July docket is scheduled to proceed as planned at this time.

- The PRB continues to conduct release revocation hearings. As always, cases are reviewed on an individual basis, with consideration of the facts and circumstances of each alleged violation or set of violations. The PRB is also taking into account the extraordinary circumstances presented by COVID-19, while recognizing that each decision must be made with the goals of protecting public safety and restoring releasees to productive lives.

In tandem with its efforts to reduce the prison population, IDOC has taken measures to reduce the risk of exposure and infection within its facilities. For example,

- Effective March 14, 2020, all correctional facilities, impact incarceration programs, and work camps are under administrative quarantine with no visitors permitted (phone and video visit privileges continue as normal).

- Facilities with confirmed COVID-19 cases are placed on lockdown, which means there is no movement around the facility except for medical care.

- Staff who work with individuals in isolation and quarantine, as well as in healthcare units, are wearing full personal protective equipment (PPE)

and all staff are wearing some PPE. Staff temperatures are checked daily as they enter the facility.

- IDOC has also (1) educated staff on infection control, (2) promoted good health habits that interrupt transmission, (3) conducted frequent environmental cleaning of high touch surfaces and high volume locations, (4) made efforts to separate the sick from the well and employ social distancing, ongoing infection control education to prisoners. and (5) provided ongoing infection control education to prisoners.

IDOC's website provides additional detail about its evolving "Covid-19 Response," including a list of confirmed cases (in employees and prisoners) and the affiliated correctional facility. *See* https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx. That chart presently reflects that inmates have tested positive in only two IDOC facilities, with the lion's share of confirmed prisoner cases — 56 out of 60 — occurring at the Stateville Correctional Center.

In sum, Illinois officials have quickly taken aggressive action to protect the health and safety of incarcerated individuals, IDOC employees, and the public. They continue to monitor these efforts and make necessary changes to IDOC's pandemic plan as the rapidly-changing situation evolves, and are continually reviewing eligible offenders for early release.

III. Petitioners Are Not Entitled to Relief Under 28 U.S.C. § 2254.

A. Habeas is not the appropriate vehicle for petitioners' claims.

1. Eighth Amendment "deliberate indifference" claims may not be litigated in habeas proceedings.

Ground 1 — alleging that "all or some of the class members" should be "release[ed]" from prison because respondent has violated the Eighth Amendment by acting with "deliberate indifference" to the risks posed by COVID-19, Doc. 1 at 49-52 — is not a cognizable habeas claim. *See, e.g.*, *Glaus v. Anderson*, 408 F.3d 382, 387-88 (7th Cir. 2005) (cited at Doc. 1 at 49). In *Glaus*, the petitioner alleged that prison officials were "deliberately indifferent" to his potentially fatal medical problems and sought either release or transfer to another facility. *Id*. at 384. The Seventh Circuit affirmed the denial of his habeas petition, explaining that

> Glaus's habeas corpus petition would be proper if release were among the possible remedies for an Eighth Amendment deliberate indifference claim. Unfortunately for Glaus, it is not. If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option. . . .
>
> [Glaus's claim] must be brought as either a civil rights claim or possibly a Federal Tort Claims Act claim against the United States or an Administrative Procedures Act challenge[.]

Id. at 387 (collecting cases).

Notably, petitioners fail to cite any authority either holding that a deliberate indifference claim may be brought in a habeas petition or considering such a claim

in the context of a § 2254 petition. *See* Doc. 1 at 48-52. Instead, petitioners cite only cases that address deliberate indifference claims raised in other civil actions.[1] Moreover, petitioners' observation that the Supreme Court has left open "the possibility" that § 2254 could be used to challenge the conditions of confinement does not save Ground 1. *See id.* at 48-49 (citing *Preiser v. Rodriguez*, 411 U.S. 411, 499 (1973)). As *Glaus* held,

> While the Supreme Court [in *Preiser*] left the door open a crack for habeas corpus claims challenging prison conditions, it has never found anything that qualified. . . . Since release is unavailable to Glaus [because release is not an available remedy for deliberate indifference claims], his challenge can only concern the conditions of his confinement or the administrative rules the [Bureau of Prisons (BOP)] is using, not the fact of his confinement. As such, he may not proceed with a habeas corpus petition.

Glaus, 408 F.3d at 387-88; *see also Crites v. Madison Cnty. Jail*, No. 18-CV-611-DRH, 2018 WL 1832919, at *2 (S.D. Ill. Apr. 17, 2018) (dismissing habeas petition on preliminary review because deliberate indifference claim was non-cognizable); *Peterson v. Diaz*, No. 2:19-cv-01480, 2020 WL 1640008, *1 (E.D. Cal. Apr. 2, 2020) (holding that habeas proceedings are not appropriate vehicle to raise Eighth

[1] Citing *Brown v. Plata*, 563 U.S. 493 (2011); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Jabbar v. Fischer*, 683 F.3d 54 (2d Cir. 2012); *Phelps v. Kapnolas*, 308 F.3d 180 (2d Cir. 2002); *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985).

Amendment claim seeking release due to COVID-19 pandemic). Accordingly, this Court should deny habeas relief on Ground 1.

2. Petitioners' claim that IDOC has failed to provide procedures for seeking home detention does not state a claim for habeas relief.

Ground 2 — alleging that subclasses 3, 4, and 5 are entitled to "immediate transfer to home detention" under the Due Process Clause because respondent purportedly failed to create a "mechanism" to allow prisoners to request home detention as required by state law, Doc. 1 at 52-55 — also fails to allege a cognizable habeas claim. Petitioners cite no authority — nor is respondent aware of any — holding that a prison's alleged failure to enact a "mechanism" required by state statute, permits a federal habeas court to order the transfer of prisoners to home detention. Rather, a habeas petitioner "must demonstrate that the custody is unlawful, and not just that an administrative official made a mistake in the implementation of a statute or regulation." *Bush v. Pitzer*, 133 F.3d 455, 456-57 (7th Cir. 1997); *see Hadley v. Holmes*, 341 F.3d 661, 665 (7th Cir. 2003) (claim challenging procedures for awarding discretionary GCC has potential to affect duration of confinement, but is not a § 2254 claim).

Indeed, as petitioners' authority shows, the proper vehicle to pursue Ground 2 is a suit under 42 U.S.C. § 1983 or another statute authorizing damages or injunctions, not a habeas petition. *See Murphy v. Raoul*, 380 F. Supp. 3d 731, 750-51 (N.D. Ill. 2019) (civil rights action, not habeas petition, is appropriate vehicle to

--

raise claim of "entitlement to a constitutional process in determining whether [prisoners] will be released on [mandatory supervised release]") (cited at Doc. 1 at 52); *see also Oden v. True*, No. 19-cv-10009-SMY, 2019 WL 6117740, at *3 (S.D. Ill. Nov. 18, 2019) (claim that inmate was entitled to spend "his remaining custody time in [a residential reentry center] rather than in prison" and that prison officials did not properly review his request "fall[] outside the realm of available habeas relief"); *Fryer v. Cross*, No. 14-cv-79-DRH, 2014 WL 1632104, at *2 (S.D. Ill. Apr. 23, 2014) (habeas not appropriate vehicle for claim seeking review of procedures used to deny request for home detention); *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (habeas not proper vehicle to seek work release because "if [an prisoner] is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law"). And, in fact, petitioners are pursuing this procedural due process claim in their pending § 1983 action, *see* Petr. § 1983 Action, Doc. 1 at 44-45.

Tellingly, all but three of the remaining twelve cases that petitioners cite in support of Ground 2 involve civil lawsuits or administrative actions, not habeas petitions. Doc. 1 at 52-55.[2] And the habeas cases petitioners cite are inapposite and

[2] Citing *Sandin v. Conner*, 515 U.S. 472 (1995); *Ky. Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989); *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Inmates of Neb.*, 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Taylor v. Edgar*, 52 F. App'x 825 (7th Cir. 2002); *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *Salcido ex rel. Gilliland v. Woodbury Cnty., Iowa*, 119 F. Supp. 2d 900 (N.D. Iowa 2000).

do not otherwise show that habeas relief is available on Ground 2. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (affirming denial of habeas petition challenging denial of parole); *Jones v. Cross*, 637 F.3d 841, 846 (7th Cir. 2011) (affirming denial of habeas petition challenging loss of GCC); *Montgomery v. Anderson*, 262 F.3d 641, 644 (7th Cir. 2001) (affirming denial of habeas petition challenging reduction of ability to earn GCC). In sum, Ground 2 fails to state a claim for relief under § 2254.

B. Even if habeas is the proper vehicle, relief is unwarranted.

1. Petitioners cannot proceed by way of a class action.

Petitioners ask this Court to certify various subclasses of "similarly situated" prisoners to collectively pursue their requested habeas relief. Doc. 1 at 3. But habeas petitioners seeking relief under 28 U.S.C. § 2254 cannot proceed as a class. Moreover, even if they could do so, these petitioners do not satisfy the criteria for certifying their exceptionally broad classes of prisoners.

a. The restrictions imposed by § 2254 preclude the use of class action procedures.

A habeas petition under § 2254 is not an appropriate vehicle for pursuing a class action. Historically, the class action procedures set forth in Federal Rule of Civil Procedure 23 have not applied to habeas actions. *See U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-27 (2d Cir. 1974). Indeed, petitioners concede that general class action procedures do not apply. Doc. 1 at 46. And habeas cases are ill-

suited to the form of "representative action" that petitioners seek, *see id.*, as the Supreme Court has cautioned, *see Calderon v. Ashmus*, 523 U.S. 740, 742 (1998).

The procedural requirements imposed on habeas petitioners make them ill-suited for class treatment: each class member would need to be screened for compliance with pertinent procedural rules, undermining any efficiency that might otherwise be gained by proceeding as a class. *See generally Crown, Cork & Seal, Co. v. Parker*, 462 U.S. 345, 349 (1983) (noting that "[t]he principal purposes of the class action procedure" are "promotion of efficiency and economy of litigation").

First, the venue (or territorial jurisdiction) requirement precludes class treatment of the named petitioners. "District courts are limited to granting habeas relief 'within their respective jurisdictions.'" *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (quoting 28 U.S.C. § 2241(a)). A state prisoner must file his federal petition in the district court with jurisdiction over the county in which he was convicted or the county in which he resides. 28 U.S.C. § 2241(d). "[T]hese requirements are not jurisdictional, but they are nonetheless grounds for dismissal." *United States v. Gordon*, 130 F. App'x 24, 25 (7th Cir. 2005) (nonprecedential) (citing *Moore v. Olson*, 368 F.3d 757, 759-60 (7th Cir. 2004) (remaining citations omitted)).

Here, for at least three of the named petitioners, the Central District is the only appropriate venue: Money was convicted in Adams County and resides in Fulton County; Watters was convicted in Livingston County and resides in Logan County; and Green was convicted in Peoria County and resides in Logan County.

They may not properly pursue a habeas action in this Court on the theory that "a substantial part of the events and omissions giving rise to these claims" occurred here, Doc. 1 at 6, because 28 U.S.C. § 1391 does not govern a habeas case.

Second, class treatment is inappropriate because a state prisoner may file only one federal habeas petition. 28 U.S.C. § 2244(a). To file a successive petition, a petitioner must obtain preauthorization from the court of appeals upon meeting stringent criteria. *See* 28 U.S.C. §§ 2244(b)(3)(A) &(C). Absent such preauthorization, a district court lacks jurisdiction over a successive petition. *Lambert v. Davis*, 449 F.3d 774, 777 (7th Cir. 2006). The bar on successive petitions complicates class treatment in two ways. Members of the proposed class who have already filed habeas petitions are barred from proceeding. And members of the proposed class who have not yet filed habeas petitions would be barred from filing future habeas petitions.

Indeed, class action procedures could bar members of the class from filing future habeas petitions even if they do not wish to join the present petition. Petitioners propose no method for ascertaining whether prisoners who satisfy the proposed class criteria wish to join this action; in fact, they have suggested no procedure for providing notice and an opportunity to opt out. And under traditional class action procedures seeking injunctive relief (*i.e.*, a 23(b)(2) class), there is no requirement that every class member receive actual notice of a class action before being bound by the judgment. *See Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir.

1987). Thus, permitting petitioners to proceed on behalf of a broad class may prejudice the interests of other class members. The risk of adverse consequences for absent class members is especially acute, given that petitioners seek to define an exceptionally broad class consisting of every prisoner in IDOC custody, as well as broad subclasses based on age, the classification of the crimes of conviction, and/or medical history.

Third, the habeas statute imposes a strict one-year limitations period for filing a federal petition. *See* 28 U.S.C. § 2244(d)(1); *Evans v. Chavis*, 546 U.S. 189 (2006). Theoretically, each potential class member would need to be screened to determine whether the current habeas petition is timely, turning on each person's state court litigation history.

In sum, potential habeas class members would need to satisfy several procedural hurdles before joining the class, showing that (1) this case was filed in an appropriate venue; (2) the class member has not previously filed a federal habeas petition; and (3) the member's petition is not time-barred. These limitations make habeas petitioners ill-suited to proceeding as a class generally, and this Court should deny petitioners' request.

b. Petitioners' proposed classes do not satisfy the criteria for class treatment.

Even setting aside the complications that arise in habeas class actions generally, petitioners' proposed classes do not satisfy the criteria for certification.

Petitioner's proposed classes are defined by class members' entitlement to the requested remedy, which is not a proper basis for defining a class. *See, e.g.*, *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) (class cannot be defined such that "'whether a person qualifies as a member depends on whether the person has a valid claim'") (quoting *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012)). If entitlement to the requested remedy sought had to be litigated to establish class membership, little efficiency would be gained by certifying the classes petitioner has framed.

Petitioners also fail to meet additional criteria for class certification. Under the civil rule governing class actions, a class may be certified on considering whether (1) the class is numerous; (2) "legal or factual questions are common to the class"; (3) "representative plaintiffs' claims are typical of the class"; and (4) "representative plaintiffs will adequately protect the class's interests." Fed. R. Civ. P. 23(a); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 828 n.6 (1999). Petitioners assert that they satisfy the numerosity requirement because their proposed classes each consist of thousands of people. *See* Doc. 1 at 47. But assuming that those numbers satisfy the numerosity requirement, the breadth of the proposed classes fatally dilutes the extent to which proposed members share common "legal and factual questions" that can be adequately litigated by the named class members.

For one thing, petitioners seek to certify classes covering prisoners at every IDOC correctional institution. But those institutions vary in critical respects that

preclude uniform treatment, both with respect to the merits of the petitioners' claims and the availability of the requested remedy. *See Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982) (affirming denial of class certification where conditions at 82 different county jails were challenged, given the facilities' divergent "physical and environmental conditions").

On the merits, the urgency of the risk posed by COVID-19 at each institution varies, turning on such factors as whether a confirmed case has been found within the facility, the extent to which physical conditions permit separation of prisoners, and the efficacy of the many measures already implemented to reduce the risk of transmission. These differences in the circumstances of each facility belie petitioners' claim that their proposed classes present "common questions" as to the substantiality of the risk, the availability of remedial measures, and the extent to which measures have already been implemented. *See* Doc. 1 at 47. Accordingly, this Court should decline to certify the proposed classes covering petitioners at distinctly different institutions.

In particular, differences among the medical facilities at the various institutions should preclude class treatment of petitioners seeking medical furloughs. To qualify for a medical furlough, a petitioner must show that he cannot otherwise receive adequate medical services. *See* 730 ILCS 5/3-11-1(a)(2). Although petitioners opine that "many correctional facilities lack an adequate medical care infrastructure," Doc. 1 at 17, the institutions necessarily vary in the medical

facilities that they provide. Thus, prisoners at each facility are differently situated for purposes of evaluating requests for medical furlough.

Differences in the personal characteristics of the petitioners within each proposed subclass also militate against class treatment. For those seeking medical furloughs, class members are defined solely on the basis of age and medical condition. Accordingly, class members vary extensively in their criminal backgrounds. Several of the named petitioners seeking release on medical furlough are serving sentences for murder, and the risks posed by the release of violent offenders must be considered in granting and setting the conditions for medical furloughs. *See also infra*, Part III.B.4 (describing individualized determinations required when granting medical furloughs to prisoners).

The individualized determinations required for the remaining two requested remedies — home detention and the award of good-credit credits — similarly turn on personal characteristics that are unsuitable for class treatment. *See id.* (describing individualized determinations required when granting home detention and awarding discretionary GCC to prisoners).

In sum, because every request for release requires an individualized determination that turns on the characteristics of the offender and the propriety of the remedy under his or her unique circumstances, these issues are not properly litigated as a class action.

2. Petitioners have not attempted to properly exhaust their administrative and state court remedies, and there is no basis to excuse exhaustion where remedies are available.

a. Petitioners must exhaust available state court remedies before seeking § 2254 relief.

Although this Court may deny the petition, *see* 28 U.S.C. § 2254(b)(2), it may not grant habeas relief because petitioners have failed to exhaust available administrative and state court remedies. *See* 28 U.S.C. § 2254(b)(1);[3] *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court.").

The exhaustion requirement both "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam), and, "[e]qually as important," helps to ensure that claims are "accompanied by a complete factual record to aid the federal courts in their review," *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

These concerns are at their zenith in cases involving "internal problems of state prisons." *Preiser*, 411 U.S. at 492. As the Supreme Court emphasized, "[i]t is

[3] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant."

difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Id.* at 491-92. Because most prisoner litigation "is most efficiently and properly handled by the state administrative bodies and state courts," "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492.

Petitioners concede their failure to exhaust to exhaust any available administrative or state court remedy for their claims. That concession alone provides a sufficient basis to dismiss the petition.

b. Petitioners fail to establish that they may excuse exhaustion.

Petitioners provide no explanation for why they could not exhaust available administrative remedies for their claims, *see Wilborn v. Ealey*, 881 F.3d 998, 1004-06 (7th Cir. 2018) (describing in context of civil rights action the Illinois administrative remedies for Eighth Amendment deliberate-indifference claims); *Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005) (same), and there is no merit to their contention that they "are excused from exhausting state court remedies because Illinois courts are functionally unavailable to hear their petition for urgent release," Doc. 1 at 6. *See United States v. Raia*, __ F.3d __, 2020 WL 1647922, at *1-

2 (3d Cir. Apr. 3, 2020) (federal defendant seeking compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), must exhaust administrative remedies before seeking relief in sentencing court).

At the threshold, petitioners cannot invoke section 2254(b)(1)(B)(i) — permitting a court to excuse exhaustion in the "absence of available State corrective process" — because they concede that Illinois provides an available corrective process. Doc. 1 at 7 ("mandamus is the only state process ostensibly available to petitioners to raise their claims"); 28 U.S.C. § 2254(c) (petitioner does not exhaust state remedies if "he has the right under the law of the state to raise, by any available procedure, the question presented").[4] And petitioners cite no support for their generalized contention that this available state corrective process is unavailable, *see* Doc. 1 at 7 (mandamus remedy should be considered unavailable

[4] On April 2, 2020, petitioners filed a motion for leave to file an original mandamus complaint in the Illinois Supreme Court. Doc. 1 at 7. Unless leave is granted and the merits are reviewed, however, the motion is insufficient to exhaust. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (unsuccessful request for discretionary leave to file original action in state supreme court does not properly exhaust claim unless court expressly reviews merits). That is why, following exhaustion of administrative remedies, Illinois prisoners must first seek mandamus relief in an Illinois circuit court and then "invoke one complete round of the normal appellate process, including seeking discretionary review before the state supreme court." *McAtee v. Cowan*, 250 F.3d 506, 508-09 (7th Cir. 2010) (citing *Boerckel*, 526 U.S. at 845-48). Moreover, there is no reason to believe that, like this Court, Illinois circuit courts would not also expedite the state corrective process, if petitioners sought the appropriate relief there. *See Preiser*, 411 U.S. at 494-95 ("there is no reason to assume that state prison administrators or state courts will not act expeditiously").

due to "current circuit court closures"), for despite certain operational changes, like this Court, the state circuit courts are not "closed." *See* COVID-19 Information and Updates, www.illinoiscourts.gov/Administrative/covid-19.asp (compiling information on Illinois judiciary's response to COVID-19, including orders showing that circuit courts have adopted procedures for emergency matters); www.cook countycourt.org/HOME/INFORMATIONREGARDINGCORONAVIRUS.aspx (Circuit Court of Cook County using video conferencing to conduct emergency matters; "any emergency matters heard during this time will be conducted via video systemwide no later than April 16"); *Petry-Blanchard v. Louis, et al.*, No. 4:20-CV-P49-JHM, 2020 WL 1609493, slip op. at 3-4 (W.D. Ky. Apr. 3, 2020) (rejecting petitioner's argument that COVID-19 pandemic rendered state corrective process unavailable).

Similarly, petitioners fail to demonstrate that "circumstances exist that render [the available state corrective] process ineffective to protect the[ir] rights." 28 U.S.C. § 2254(b)(1)(B)(ii). Petitioners' chief contention — that "most civil and criminal matters in Cook County will not be heard until at least May 18, 2020," Doc. 1 at 8 — overlooks that the Cook County Circuit Court has adopted procedures for hearing *emergency* matters and a schedule to hear them "no later than April 16." Moreover, as discussed, Cook County is not the county of incarceration for any of the named petitioners; thus, any alleged delays in that court are immaterial because petitioners likely must exhaust their claims in state circuit courts other

than the Cook County Circuit Court. *See, e.g.*, 735 ILCS 5/2-101, *et seq.* (venue); *Bd. of Educ. of Nippersink Sch. Dist. 2 v. Koch*, 976 N.E.2d 1150, 1154-60 (Ill. App. Ct. 2012) (relevant factors bearing on proper venue in mandamus action include "location of those persons who will particularly be affected by the governmental action sought via *mandamus*," "where the cause of action sprang into existence," and "place where the order or rule [i]s to be put into effect").

Moreover, petitioners' cited cases, Doc. 1 at 8, do not support their claim of inordinate delay. In three of the four cited cases, the petitioners *invoked* the available state corrective process, only to later complain of inordinate delay in those proceedings. *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970) (17-month delay of direct appeal warranted district court investigation into cause of delay); *Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981) (three-and-one-half-year delay in ongoing proceeding inordinate and triggered federal court hearing); *Hankins v. Fulcomer*, 941 F.2d 246, 252 (3d Cir. 1991) (11-year delay in pending state postconviction proceedings not attributable to petitioner excuses exhaustion). And the fourth case, *Jenkins v. Gramley*, 8 F.3d 505 (7th Cir. 1993) (cited Doc. 1 at 8), defeats petitioner's allegation: "Undue delay . . . might show that available state court remedies have been exhausted, permitting the federal court to proceed even while the state appeal was pending. *It does not, however, permit a prisoner to ignore a remedy that, for all we can tell, would have been speedy and effective*." *Id.* at 508

(emphasis added).[5] Petitioners have not even attempted to invoke the appropriate and available state corrective process. Accordingly, even if under the circumstances some lesser period of delay could be considered "inordinate," *see* Doc. 1 at 8; petitioners cannot complain of inordinate delay here. *See generally Bell v. Robert*, 402 F. Supp. 2d 938, 948 (N.D. Ill. 2005) (noting that "seventeen months is shortest period of time that [Seventh Circuit] has . . . deemed potentially "inordinate" such that a hearing was required to see if delay was undue and federal intervention potentially appropriate").

Finally, even if petitioners could establish inordinate delay, they cite no support for their bare contention that delays — actual or anticipated — caused by a global pandemic (rather than, as in their cited cases, some inefficiency in the state court system itself) are unjustified, and therefore should be attributed to the State. *See*, *e.g.*, *Sceifers v. Trigg*, 46 F.3d 701, 703 (7th Cir. 1995) (delay must be both inordinate *and* unjustified).

[5] Indeed, *Jenkins* cautioned, "State courts are not some nuisance clogging access to federal courts; in state criminal prosecutions they are the principal vindicators of both state and federal rights, and a complex of doctrines—including both forfeiture rules and the requirement that a prisoner exhaust all available state remedies—is designed to ensure that state courts retain that role. Problems that can be rectified in state court must be dealt with there." *Id.* at 508.

In sum, because petitioners have failed to exhaust their available administrative and state court remedies and provide no basis for excusing that failure, this Court may not grant habeas corpus relief. 28 U.S.C. § 2254(b)(1).

3. Exhaustion aside, petitioners' claims are meritless.

a. Petitioners' Eighth Amendment claim fails because they cannot establish that IDOC is recklessly disregarding the risk to petitioners' health posed by COVID-19.

Ground 1 fails because petitioners fail to show that respondent is acting with "deliberate indifference" to a recognized risk that petitioners face substantial harm. As discussed *supra*, Part II, respondent recognizes the risk of harm to prisoners from COVID-19, and petitioners fail to allege the kind of subjective indifference — amounting to criminal recklessness — necessary to sustain a claim under the Eighth Amendment.

The Eighth Amendment prohibits the "unnecessary and wanton" infliction of suffering caused by an official's deliberate indifference to a prisoner's serious medical needs. *Estelle*, 429 U.S. at 103-04. To establish deliberate indifference, prisoners must prove that the prison official both knew of and disregarded an excessive risk to their health or safety. *Farmer*, 511 U.S. at 837. Courts therefore perform a two-step analysis: "first examining whether a plaintiff suffered from an objectively serious medical condition, and then determining whether the individual

defendant was deliberately indifferent to that condition." *Petties v. Carter*, 836 F.3d 722, 727-28 (7th Cir. 2016) (en banc).

Deliberate indifference "describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835; *accord Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016) ("evidence of medical negligence is not enough to prove deliberate indifference"). To establish a constitutional violation, the prisoner must show that the response was so deficient that it constituted criminal recklessness. *Farmer*, 511 U.S. at 839-40; *see Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008) ("negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense"). The deliberate indifference standard imposes a "high hurdle" and requires a showing "approaching a total unconcern for the prisoner's welfare." *Rosario v. Brawn*, 670 F.3d 816, 821 (7th Cir. 2012) (internal quotations and citation omitted).

An official's response to a risk of harm can defeat an allegation of deliberate indifference even if the risk is not ultimately averted. *Farmer*, 511 U.S. at 844. Accordingly, a defendant is "not required to take perfect action or even reasonable action." *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003). This standard ensures that "the mere failure . . . to choose the best course of action does not amount to a constitutional violation." *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002).

Respondent does not dispute his awareness that COVID-19 poses serious risks to prisoners and prison staff, but petitioners have not plausibly alleged that respondent has been deliberately indifferent to that risk generally, let alone to any specific risk to any named petitioner. Indeed, petitioners do not allege that any of them has COVID-19 or has been deprived of any necessary care based on his or her particular medical conditions.

To the contrary, petitioners disregard the applicable authority and predicate their claim on a mere disagreement as to what they believe to be the preferred course of action to protect them and other prisoners from possible exposure to COVID-19. Petitioners acknowledge that IDOC had released at least 300 prisoners at the time they filed their petition, Doc. 1 at 36, but complain that respondent has not acted with more "urgency or decisiveness" to release "substantially" more, *id.* at 33, and has "failed to take reasonable measures" to secure more early releases through various means, *id.* at 3. But in grounding their claim on their view of what constitutes a *reasonable* course of conduct, petitioners improperly equate their deliberate indifference claim with malpractice, contrary to *Estelle*. *See* 429 U.S. at 106 ("malpractice does not become a constitutional violation merely because the victim is a prisoner").

In short, petitioners' focus on the reasonableness of respondent's actions is insufficient to show that respondent has been, or continues to be, subjectively and recklessly indifferent to the risks posed by COVID-19. And although the Court can

and should deny the petition based solely on defects in its allegations, the Court should also take judicial notice of the public actions taken by the Governor and IDOC to combat COVID-19 within the State of Illinois generally, and within IDOC specifically. Those actions, summarized above in Part II, refute petitioners' allegation that respondent's responses to COVID-19 could be fairly or plausibly characterized as being so deficient to constitute criminal recklessness. *See United States v. Credidio*, No. 19 Cr. 111, 2020 WL 1644010, at *2 (S.D.N.Y. Apr. 2, 2020) (BOP not deliberately indifferent to "high risk" 72-year-old prisoner's "needs, in light of the numerous and significant plans and protocols recently implemented by BOP to protect prisoners").

b. Petitioners' procedural due process claim fails because they have no liberty or property interest in home detention and even if they did, IDOC is in the process of releasing prisoners to home detention.

Ground 2 — alleging that respondent has violated procedural due process by failing to create a constitutionally sufficient "mechanism" for prisoners to request home detention — is meritless as a matter of law because petitioners lack any liberty or property interest in home detention. *See* Doc. 1 at 52-55. As petitioners correctly note, to succeed on a procedural due process claim they must prove, among other things, that they have a "liberty or property interest" in home detention. *Id.* at 52 (citing *Thompson*, 490 U.S. at 460).

But courts have consistently held that a statute providing for release from prison to a less restrictive form of custody (such as parole or, here, home detention) does not create a liberty or property interest unless the statute contains "'*explicitly mandatory language*,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Thompson*, 490 U.S. at 463 (emphasis added); *see also Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006) ("It takes mandatory language (and thus an entitlement contingent on facts that could be established at a hearing) to create a liberty or property interest in an opportunity to be released on parole."). For example, the statute at issue in *Grennier* provided that the parole board "*may* parole an inmate serving a life term when he or she has served 20 years." Wis. Stat. § 304.06(1)(b) (2014) (emphasis added). As the Seventh Circuit observed, prisoners with life sentences were "not even eligible [for parole] until they ha[d] served 20 years, and from that point forward the system [wa]s wholly discretionary." *Grennier*, 453 F.3d at 444. The Court thus concluded that it was "straightforward," given this discretionary scheme, that the plaintiff lacked a liberty or property interest in release on parole. *Id.*

Similarly, the Illinois home detention statute is discretionary, as it provides that a prisoner "may" be placed on home detention at IDOC's discretion. 730 ILCS 5/5-8A-3. Therefore, petitioners have no liberty or property interest in home

detention, and Ground 2 is meritless. *See, e.g., Thompson*, 490 U.S. at 463; *Grennier*, 453 F.3d at 444.

Petitioners' cited authorities defeat their argument that "[i]f the language and structure of the statutes in question create an expectancy of release, they create a liberty interest." *See* Doc. 1 at 52 (citing *Montgomery*, 262 F.3d at 644; *Taylor*, 52 F. App'x at 826-27). *Montgomery* holds that opportunities for release from prison constitute a liberty interest "only if the state has made a promise. Unilateral expectations and hopes for early release" are insufficient and "[g]ood-time credits are statutory liberty interests once they have been awarded, just as parole is a form of statutory liberty once the prisoner has been released." *Montgomery*, 262 F.3d at 644. *Taylor* similarly holds that it "is well established that in the absence of a state rule creating a specific entitlement, prisoners have no liberty interest" in release to less restrictive forms of custody; thus, the petitioner lacked a liberty interest in release to less restrictive custody where state laws "establish[ed] no more than eligibility for such placement." *Taylor*, 52 F. App'x at 826.

Petitioners cite no authority for their remaining argument that the Illinois legislature "created an enforceable liberty interest in the Home Detention Law" by directing the Department to create a mechanism to evaluate requests for home detention. Doc. 1 at 53. And the argument fails as a matter of law, for it is well-settled that "[p]rocess is not an end in itself"; thus, "[t]he State may choose to require procedures for reasons other than protection against deprivation of

substantive rights, . . . but in making that choice the State does not create an independent substantive right." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (that prison was required by state rules to conduct hearing before transferring prisoners out of state did not create protected liberty interest); *see also Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012) ("The Supreme Court has emphasized that the federal Constitution's due process clause does not protect an interest in other process"; plaintiff's claim failed because "she is not asserting an interest in continuing her graduate education. Instead, she asserts an interest in her allegedly contractually-guaranteed rights to university process prior to being dismissed[.]").

In sum, given the discretionary terms of Illinois's home detention statute, petitioners lack any liberty or property interest in home detention and Ground 2 fails as a matter of law. *See, e.g., Thompson*, 490 U.S. at 460 (where plaintiffs lack liberty interest in request relief, procedural due process claim is meritless).[6]

Lastly, as petitioners note, even if they had a protected liberty interest in home detention (they do not), they would still have to prove that respondent

[6] To the extent petitioners' request for discretionary GCC could be construed as alleging a procedural due process claim, it fails for the same reasons: petitioners have no liberty or property interest in discretionary GCC. *See Hadley*, 341 F.3d at 665 (no protected interest in discretionary GCC under 730 ILCS 5/3-6-3(a)(3), and "the [S]tate need not afford [petitioner] due process before declining to award him the credit"); 20 Ill. Admin. Code 107.210 (regulations for awarding discretionary GCC under 730 ILCS 5/3-6-3(a)(3)).

employs constitutionally insufficient procedures when administering the home detention program. Doc. 1 at 54. But petitioners' sole argument about the procedures — *i.e.*, that no procedure exists, *id*. — is contradicted by the record, which shows that IDOC has been working diligently to evaluate offenders who may be eligible for home detention, and has released approximately 500 prisoners through various forms of sentencing credit, restoration of civil credit and electronic home detention, *supra*, Part II. Accordingly, Ground 2 fails for this additional reason.

4. Petitioners are not entitled to the remedy they request even if this Court finds a constitutional violation.

Petitioners seek "[i]mmediate" transfer to medical furlough or home detention, or release after an "immediate awar[d]" of 180 days of discretionary GCC against their sentences, arguing that IDOC has taken no steps, or insufficient steps, to reduce the prison population to prevent the spread of COVID-19 within its facilities. Doc. 1 at 33-34, 51, 54-56.[7] If petitioners' claims challenging their conditions of confinement were cognizable in habeas, then the PLRA, 42 U.S.C. § 1997e, applies to preclude petitioners' requested remedy; no prior order for less

[7] By their own admission, petitioners Daniels and Rodesky are ineligible for (and, thus, do not seek) release from prison. Doc. 1 at 43-44. These named petitioners therefore cannot receive habeas relief, even if their claims were cognizable and meritorious. *See Hadley*, 341 F.3d at 665 (habeas not appropriate vehicle to raise claim that did not directly shorten duration of petitioner's custody).

intrusive relief has been entered and petitioners have not requested such relief from a three-judge panel, *see* 18 U.S.C. § 3626(a)(3).

Moreover, petitioners' requested remedy is practically impossible, and particularly inappropriate because less intrusive measures consistent with IDOC's statutory obligations are available to remedy the alleged constitutional violation. IDOC has been reviewing, and will continue to review, on an individualized and prison-by-prison basis, eligibility for transition to home detention and earlier release through award of discretionary GCC credit. Petitioners ignore the individualized determinations necessary for assessing eligibility for all forms of release under state law, rendering their request for "immediate" changes in custodial status impossible. Accordingly, if the Court finds a constitutional violation, then other less intrusive remedies consistent with IDOC's statutory obligations would be warranted.

a. If petitioners' claims were both cognizable in habeas and meritorious, they are subject to the requirements for relief in 18 U.S.C. § 3626, which precludes immediate release of tens of thousands of prisoners, as petitioners request.

As discussed in Part III.A, *supra*, § 2254 is not the proper vehicle for petitioners' claims, which challenge their conditions of confinement. Such claims are typically litigated under the PLRA, 42 U.S.C. § 1997e. But the PLRA generally does not apply to § 2254 cases. *See Walker v. O'Brien*, 216 F.3d 626, 633-34 (7th Cir. 2000).

If, however, § 2254 *is* available for petitioners' claim that they are entitled to various forms of release due to their conditions of confinement, then the PLRA's requirements for prisoner release orders, *see* 18 U.S.C. § 3626(a)(3); *Brown v. Plata*, 563 U.S. 493, 514 (2011), must apply.[8] This is so because petitioners' § 2254 claims are "'analogous to the typical suits brought under 42 U.S.C. § 1983 complaining about prison conditions.'" *Santana v. United States*, 98 F.3d 752, 756 (3d Cir. 1996) ("the PLRA applies to special proceedings like habeas corpus" where claims are analogous to typical suits brought under § 1983) (agreeing with *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997)); *see also Blair-Bey v. Quick*, 151 F.3d 1036, 1040-42 (D.C. Cir. 1998) (where challenges to prison conditions "are permissibly brought in habeas corpus," they would be subject to the PLRA, "as they are precisely the sort of actions that the PLRA sought to address"), *modified on other grounds by reh'g*, 151 F.3d 1036 (D.C. Cir. 1998). Otherwise, petitioners could evade the PLRA's requirements by merely requesting a habeas remedy for alleged prison condition violations, contrary to Congress's clear intent that challenges to prison conditions be litigated

[8] In their supplemental brief, petitioners assert that they are not seeking "prisoner release orders." Doc. 17. But as a three-judge in California recently held in a COVID-19 related case, even orders of release that require supervision fall within the PLRA. *See Coleman & Plata v. Newsom et al.*, Nos. 2:90-cv-0520 KJM DB P & 01-cv-01351-JST, at 1, 5, 9, 12-13 (E.D. Cal. & N.D. Cal. Apr. 4, 2020) (three-judge court pursuant to 28 U.S.C. § 2248) (available at: https://courtlistener.com/recap/gov.uscourts.cand.76/gov.uscourts.cand.76.3261.0.pdf).

and remedied under the PLRA. *See Blair-Bey*, 151 F.3d at 1042 ("'[I]t would defeat the purpose of the PLRA if a prisoner could evade its requirements by simply . . . joining it with a petition for habeas corpus.'").

Under § 3626(a)(3)(A), a federal court may not enter a prisoner release order unless there has been a prior order "for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prison release order," and respondent "has had a reasonable amount of time to comply with the previous court order[]." Moreover, under § 3626(3), a three-judge court may enter a prison release order after a prisoner files an appropriate request, and it may enter such an order "only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(3)(B), (C), & (E). Petitioners have not satisfied any of these requirements. *See, e.g., Coleman & Plata*, Nos. 2:90-cv-0520 KJM DB P & 01-cv-01351-JST, at 1, 12-13 (three-judge court pursuant to 28 U.S.C. § 2248) (denying emergency motion to modify population reduction order due to COVID-19, noting that (1) prisoners must first go to single federal judge who, if finding constitutional violation, "may order [prison authorities] to take steps short of release necessary to remedy that violation; and (2) if lesser remedy "proves inadequate," [petitioners] may return to convened three-judge panel to determine whether release order is appropriate under 18 U.S.C. § 3626(a)(3)) (available at: https://courtlistener.com/recap/gov.

uscourts.cand.76/gov.uscourts.cand.76.3261.0.pdf). Accordingly, the PLRA forecloses petitioners' request for immediate prison release orders.

b. Petitioners' request for immediate changes in their custody status disregards mandatory state statutory and administrative procedures to determine eligibility on an individualized basis consistent with public safety.

Petitioners' requested remedy is practically impossible, and particularly inappropriate because less intrusive measures consistent with IDOC's statutory obligations are available to remedy the alleged constitutional violation. Even upon finding a constitutional violation, federal courts defer to prison authorities to remediate the violation rather than order immediate custodial changes that release a prisoner into the community. Moreover, IDOC cannot "immediately" make such determinations for the tens of thousands of prisoners in petitioners' proposed subclasses given the eligibility determinations that require analysis of each prisoner's individual circumstances, public safety issues, and limitations on supervisory personnel and equipment. Instead, as detailed in Part II, *supra*, IDOC is expeditiously considering prisoners for status changes in light of COVID-19.

Indeed, even in the wake of the COVID-19 pandemic, courts have reiterated that they cannot order prison authorities to change prisoners' custodial status upon short circuiting such eligibility and feasibility analysis, and that prison authorities are better equipped to make such determinations, expeditiously but in due course.

See, e.g., Raia, 2020 WL 1647922, at *2 (COVID-19 risk alone "cannot independently justify" release especially in light of BOP's "statutory role"); Order, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, No. SJC-12926, at 26 (Mass. Apr. 3, 2020) (agreeing that process of jail population reduction "requires individualized determinations" that should focus first on non-violent offenders) (available at: https://www.mass.gov/files/documents/2020/04/03/12926.pdf); *see also United States v. Clark*, Crim. No. 17-85-SDD-RLB, 2020 WL 1557397 (M.D. La. Apr. 1, 2020); *United States v. Zywotko*, No. 2:19-cr-113-FtM-60NPM (M.D. Fla. Mar. 27, 2020); *United States v. Clark*, No 19-40068-01-HLT, 2020 WL 1446895 (D. Kan. Mar. 25, 2020); *United States v. Eberhart*, No 13-cr-003130PJH-1 (N.D. Cal. Mar. 25, 2020).

Moreover, as petitioners appear to recognize, Doc. 1 at 52 (citing *Murphy v. Raoul*), this Court has been careful to hold that it had "no warrant to dictate" to IDOC a particular method for correcting an identified constitutional violation because that was "entirely within [IDOC's] province." 380 F. Supp. 3d at 738, 750, 759. The *Murphy* court explained that "IDOC [wa]s free to develop whatever additional practices it want[ed] to avoid the" constitutional violation, and "caution[ed] that nothing in [its] opinion should be construed to entitle the plaintiffs to release — immediate or otherwise." *Id.* at 759; *see also id.* at 765-66.

And as detailed here, petitioners' proposed three changes in custodial status that result in their release involve individualized eligibility determinations and

consideration of resources for their implementation. Home detention is governed by the Electronic Monitoring and Home Detention Law, 730 ILCS 5/5-8A-1, *et seq*. Petitioners' request for immediate transfer to home detention for proposed subclasses 3, 4, and 5, Doc. 1 at 56, would implicate over 12,000 IDOC prisoners, *id*. at 47. And each of the three proposed subclasses implicates different eligibility criteria. 730 ILCS 5/5-8A-3(d). Additionally, the statute contemplates that officials will consider whether the individual prisoner's personal, behavioral, or criminal history weighs against transfer to home detention. *See, e.g.,* 730 ILCS 5/5-8A-3(d)(iv) & (e). Relatedly, when IDOC uses electronic monitoring for home detention, triggering additional rules and requirements, including ensuring that (1) the residence has the necessary conditions to facilitate electronic monitoring, (2) an electronic monitoring device is available, and (3) agents are available to verify compliance. 730 ILCS 5/5-8A-4. These individualized considerations attendant to any home detention decision render impossible petitioners' request for immediate change in status for over 12,000 prisoners.

The award of 180 days of discretionary GCC is governed by 20 Ill. Admin. Code 107.210 and 730 ILCS 5/3-6-3(a)(3), and, like the other state law provisions, requires case-by-case eligibility consideration. Petitioners estimate that their request for immediate award of 180 days of discretionary GCC for subclass 6, Doc. 1 at 56, would apply to over 5,000 IDOC inmates, *id*. at 47. Like home detention, the award of such GCC requires officials to apply the statutory eligibility criteria based

on the facts of the underlying offense(s) and sentence(s), and discretionary consideration of the inmate's personal, behavioral, and/or criminal history. *See* 20 Ill. Admin. Code 107.210(a), (b)(1), (d), (e), (f), (g) & 730 ILCS 5/3-6-3(a)(3) (conviction and sentence); 20 Ill. Admin. Code 107.210(b)(2), (c) & 730 ILCS 5/3-6-3(a)(3) (discretionary consideration). It is simply impracticable to require IDOC to make these individualized determinations for 5,000 prisoners "immediately" and in a manner consistent with public safety.

Finally, medical furloughs are governed by 730 ILCS 5/3-11-1.[9] Petitioners estimate that their request for immediate medical furlough for proposed subclasses 1 and 2, Doc. 1 at 55-56, would implicate over 16,000 prisoners, *id.* at 47. Yet by statute, IDOC may assign an agent to accompany the prisoner on furlough (and may impose appropriate charges for related necessary expenses). 730 ILCS 5/3-11-1(a). And by administrative rule, "[c]ontinuous supervision *shall* be required by a correctional facility employee except in cases where the committed person is classified as minimum security without supervision," 20 Ill. Admin. Code 530.40(b)

[9] By statute, medical furloughs are limited to 14 days and must be for the purpose of "obtain[ing] medical, psychiatric or psychological services when adequate services are not otherwise available." 730 ILCS 5/3-11-1(a) & (a)(2). Such limitations are inconsistent with petitioners' request for furloughs indefinite in length and not for the purpose of obtaining medical services. Doc. 1 at 16, 45, 49, 55-56. However, Governor Pritzker's recently adopted Executive Order 2020-21 in response to COVID-19, suspends these limits on medical furloughs and gives the IDOC Director discretion to allow them. That order is effective on April 6, 2020 at 5:00 p.m. and for the remainder of the Gubernatorial Disaster Proclamation, which currently extends through April 30, 2020.

(emphasis added), posing an additional obstacle to mass releases on medical furlough. Indeed, based on the characteristics of the proposed class representatives, it appears that IDOC supervision may be required for some prisoners in subclasses 1 and 2, including Gerald Reed (who is serving a life sentence for first degree murder, aggravated kidnapping, and attempted armed robbery, *see* Resp. Exh. A); similarly, petitioners Tewkunzi Green, Carl Reed, Carl Tate, and Patrice Daniels have also been convicted of first degree murder, *see* Doc. 1 at 4-5; *see also* Resp. Exh. A; and petitioner Anthony Rodesky was also convicted of murder, *see* Resp. Exh. B.

In sum, IDOC cannot, consistent with state law or public safety, simply release or transfer tens of thousands of IDOC prisoners "immediately," as petitioners urge.[10] "It is well settled that the decision where to house inmates is at the core of prison administrators' expertise." *McKune v. Lile*, 536 U.S. 24, 39 (2002); *see also Peterson*, 2020 WL 1640008, at *2 (in § 2254 case, denying emergency request for interim release due to COVID-19 risk; petitioner had not shown prison's response measures were inadequate and observing that "prison and state officials are more likely to know who may be best" candidates for release under state laws); *Coleman & Plata*, Nos. 2:90-cv-0520 KJM DB P & 01-cv-01351-JST, at *13 (recognizing that deference must be given to prison authorities to allow

[10] Petitioners' draft proposed remedial plan suggests that these decisions be made within three or seven days. Doc. 17-1. Petitioners neither identify the source of that time frame nor grapple with their feasibility.

them to determine what steps must be taken to respond to COVID-19); *United States v. Garza*, No. 18-CR-1745-BAS, 2020 WL 1485782 (S.D. Cal. Mar. 27, 2020) ("decisions as to which prisoners should be released because of the COVID-19 pandemic are better left to the Bureau of Prisons and its institutional expertise"). In addition to considering the needs of prisoners, IDOC must adhere to Illinois statutory requirements and ensure public safety; IDOC has the institutional expertise to best determine each prisoner's individual eligibility for a change in custodial status, weigh public safety concerns, and account for resource and personnel limitations in implementing any change. Petitioners have provided neither justification nor authority to short circuit these established procedures and immediately release such a vast number of prisoners.

c. IDOC is already reviewing prisoners for release and transfer to the identified custodial programs.

As discussed *supra*, Part II, IDOC is already expeditiously considering prisoners for discretionary GCC or transfer into custodial programs outside of prison.

Petitioners' unsubstantiated allegations that IDOC is taking no action are insufficient to warrant the far-reaching remedy they seek. Doc. 1 at 51 (citing respondent's "failure to take meaningful and accessible steps to reduce the prison population); *id.* at 54-55 (claiming that respondent "has taken no steps to implement the Home Detention Law" and that "there is simply no procedure in

place"). And no factual development has been made on this point because petitioners have not pursued administrative or state court review of their claims. *See supra* Part III.C (noting petitioners' failure to exhaust).

Ultimately, IDOC is taking steps to mitigate the danger posed by COVID-19 within the prison setting. Additionally, IDOC is already undertaking expeditious reviews of prisoner eligibility for the GCC and release on home detention that petitioners seek, *see supra* Part II, and has just been granted broader discretion to consider granting medical furloughs. Indeed, in the less than five days since petitioners filed their petition, 200 more prisoners have been released in some way. *See supra*, Part II; Doc. 1 at 36.

In sum, if petitioners' challenges to their conditions of confinement were cognizable in habeas and this Court finds a constitutional violation, then the PLRA applies to preclude petitioners' requested remedy for immediate release orders. Other less intrusive remedies consistent with IDOC's statutory obligations would be warranted were this Court to find a constitutional violation. But petitioners' request that these determinations and transfers happen immediately is not feasible on the scale that they request; and the requested relief is already in the process of being implemented. Thus, this Court, at most, should encourage IDOC to continue undertaking such expeditious reviews. *See, e.g., Raia*, 2020 WL 1647922, at *2 (complimenting U.S. Attorney General's directive that BOP prioritize use of its statutory options for transfer to home confinement); *Coleman & Plata*, Nos. 2:90-cv-

0520 KJM DB P & 01-cv-01351-JST, at 13 (urging officials to "leave no stone unturned" in taking "voluntary" steps to mitigate the spread of COVID-19 in California prisons); Order, *Committee for Public Counsel Services*, No. SJC-12926, at 8 (acknowledging COVID-19 risk but noting limited power over those currently incarcerated, "urg[ing] the DOC and the parole board" "to expedite parole hearings" and to identify prisoners who could be released early) (https://www.mass.gov/files/documents/2020/04/03/12926.pdf); *Credidio*, 2020 WL 1644010, at *2-3 (noting lack of authority to modify prisoner's custodial status but directing counsel to serve the order on warden and corrections counsel to "assure that BOP treats this matter with the urgency it deserves").

CONCLUSION

This Court should deny petitioners' emergency petition for writs of habeas corpus.

April 6, 2020

Respectfully submitted,

KWAME RAOUL

Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

LEAH M. BENDIK
MICHAEL L. CEBULA
KATHERINE M. DOERSCH
ERIN M. O'CONNELL
Assistant Attorneys General

s/ Gopi Kashyap
GOPI KASHYAP, BAR NO. 6289886
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
PHONE: (312) 814-4684
FAX: (312) 814-2253
EMAIL: gkashyap@atg.state.il.us

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on April 6, 2020, I electronically filed the foregoing **Response to Emergency Petition for Writs of Habeas Corpus** with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, using the CM/ECF system, which provided notice to petitioners' counsel, who are registered CM/ECF users.

s/ Gopi Kashyap
GOPI KASHYAP, BAR NO. 6289886
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
PHONE: (312) 814-4684
FAX: (312) 814-2253
EMAIL: gkashyap@atg.state.il.us