IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	)	No. 20 cv 2094
v.	)	
ROBERT JEFFREYS,	)	
Respondent.	)	

PETITIONERS' REPLY IN SUPPORT OF THEIR
PETITION FOR WRITS OF HABEAS CORPUS

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I. Introduction

While over 36,000 people sit trapped in concrete cells, completely at the mercy of a deadly and contagious virus that medical science is powerless to stop, Respondent obfuscates, deflects, and otherwise dodges his constitutional responsibility to address the unprecedented threat posed by COVID-19 to incarcerated peoples. While states around the country and countries around the globe empty their prisons to help reduce the pace and severity of the COVID-19 outbreak, Respondent attempts to block every possible avenue available or Illinois' prisoners to challenge their continued incarceration as creating an undue risk of harm. But Respondent's arguments are not even internally coherent: Respondent argues that Petitioners' Eighth Amendment claim for release under the is "not a cognizable habeas claim," (Doc. 18, Response, at 17), while simultaneously arguing that "habeas is the proper remedy" for prisoners who seek "a quantum change in the level of custody." *Money v. Pritzker,* 20 C 2093, Doc. 26, at 19. Respondent cannot have it both ways—habeas is either a proper vehicle for release claims or it is not.

More fundamentally, Petitioners' legal claims are not an either-or proposition; the Supreme Court has repeatedly recognized that in limited circumstances, claims for relief can be cognizable in both habeas *and* in Section 1983. *Nelson v. Campbell, 5*41 U.S. 637, 638 (2004) (observing that some "civil rights damages actions . . . fall at the margins of habeas," so some civil rights actions and writs of habeas corpus may be coextensive)); *see also Robinson v. Sherrod*, 631 F.3d 839, 840 (7th Cir. 2011) ("We noted in *Glaus* that the Supreme Court had 'left the door open a crack' for prisoners to use habeas corpus to challenge a condition of confinement.'"); *see also Moran v. Sondalle*, 218 F.3d 647, 651 (7th Cir. 2000) (observing of the

distinction between Section 1983 and habeas claims, that "[l]egal rules cause diffraction at the edges."). As discussed at greater length in Section V, Respondent's converse arguments—that AEDPA and the PLRA effectively preclude this Court from reaching the merits of Petitioner's claims in either a habeas or civil action—would amount to an unconstitutional suspension of the writ.

This Court must act expeditiously. Congress has explicitly given federal judges jurisdiction: the habeas statute authorizes federal courts to "summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. Federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). In addition to this statutory authority, federal judicial power is predicated on the constitutional protection of the writ and on the common law. Never before has there been such an urgent need for this Court to exercise its equitable powers; COVID-19 poses a threat utterly unparalleled in the modern era. It has shut down entire countries, has brought the greatest economies in the world to their knees, and spreads rapidly and silently.

I. Medically Vulnerable Petitioners in Subclasses 1 and 2 Require Urgent Relief.

Respondent argues that it has taken steps to both release and protect prisoners in Illinois's Department of Corrections, including prisoners who are especially vulnerable to COVID-19 due to underlying medical condition or age. Respondent's efforts have done nothing whatsoever to protect thousands of people within Subclasses 1 and 2, underscoring the need for relief from this Court.

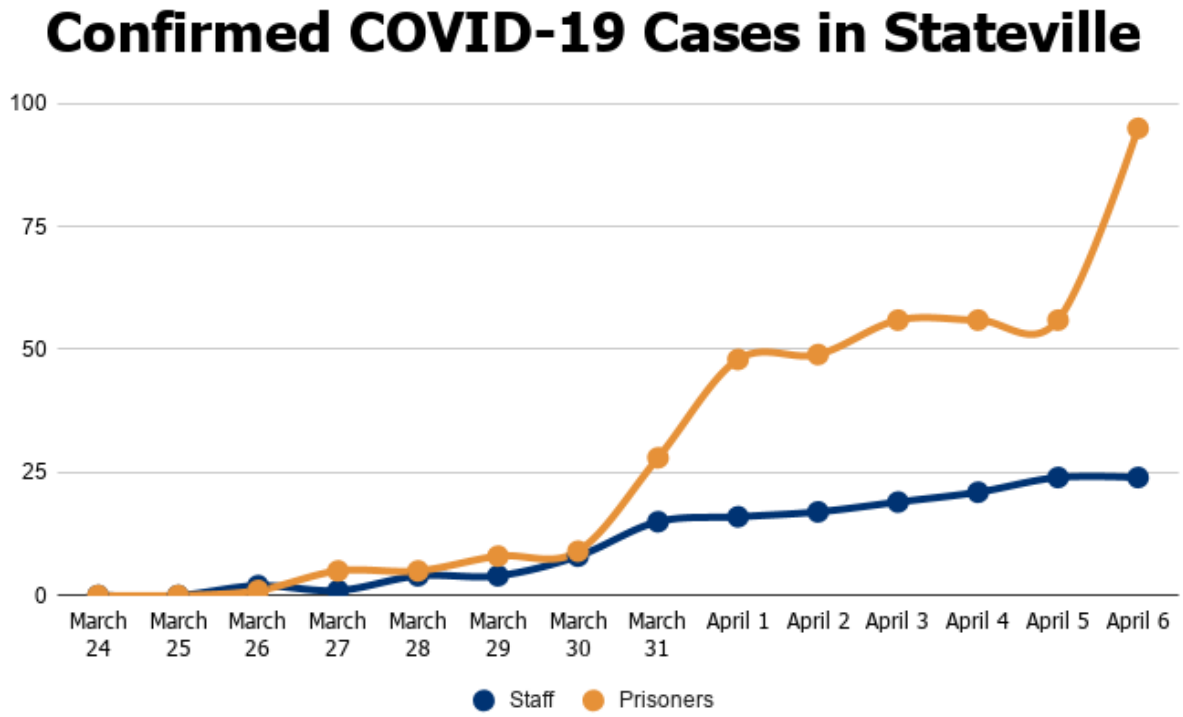
A. Respondent's List of Steps He Is Taking In Response to COVID-19 Demonstrates Why Petitioners Need Relief From This Court.

Respondent asks the Court to take judicial notice of a long series of bullet points which he claims demonstrate that IDOC is acting "quickly and aggressively to combat COVID-19." Doc. 18, Response, at 6-9. While Petitioners acknowledge that Respondent is taking many of the actions listed, Respondents are simply not moving quickly or broadly enough to protect Petitioners from the high risk of serious (and possibly fatal) harm they face as COVID-19 spreads through the prison system. The fact is that—by his own admission— Respondent has only transferred a grand total of 515 prisoners[1] using all of the tools he has available. This represents less than 2% of the prison population.

In the meantime, the number of confirmed COVID-19 cases among IDOC prisoners has mushroomed from zero cases on March 25 to 101 cases on April 6, 2020, and the rate of increase continues to climb; the very day Respondents filed their brief, the number of confirmed cases among prisoners skyrocketed from 62 to 101, by far the largest increase to date. None of this is surprising, as defendants themselves have acknowledged. At this rate, by next week, the number of new confirmed COVID-19 cases will outpace the number of releases. What the Respondent's list of "actions" demonstrates is not that he is acting expeditiously to protect Petitioners, but rather that the intervention of this Court is necessary to prod Respondent to act more quickly, to prevent a looming humanitarian disaster in our prisons of unprecedented proportions. The graph

[1] Respondent also suggests that IDOC has released ,075 people as a result of COVID-19, but that is misleading. Respondent bases this figure on the drop in the total prison population from March 2 through April 6 (Doc. 18 at 7). But most of this drop reflects the natural fluctuation in prison population as new prisoners arrive and old prisoners are released in the ordinary course. This natural fluctuation has resulted in a steady drop in the prison population from 37,563 in early January to 36,384 in early April. This drop had nothing to do with Respondent's actions. Rather, it reflects fewer arrests by police, prosecutions by States Attorneys, and sentences imposed by judges statewide.

below reflects IDOC's reported cases from Stateville alone over the past several days, portending a bleak future.



According to the *New York Times*, the Cook County Jail stands out as the number one largest known cluster of COVID-19 cases in the entire United States, with Stateville Correctional Center coming in at number 12 on the list. *See* Ex. A (Coronavirus in the US: Latest Map and Case Count, New York Times, *visited* April 8, 2020).

Many of Respondent's assertions about the efforts being taken to address the risk posed by COVID-19 are vague, misleading, or overstated, and certainly not susceptible to being judicially noticed. The most glaring example is Respondent's assertion that the Prisoner Review Board continues to hold hearings on alleged parole violations (Doc. 18 at 15). In fact, the PRB canceled its parole revocation hearings at Stateville last week and has provided no information about whether those hearings will be rescheduled. *See* Ex. B (Adam Kaney declaration). Stateville is where the vast majority of parolees are held pending their hearings. This

cancellation meant that scores of parolees are confined to IDOC based solely on allegations, without any determination of whether those allegations are true, and even if true, whether the violations are sufficiently serious to warrant revocation of parole. These individuals now face a serious risk of harm solely because the IDOC chose not to provide them with a hearing. This is exactly what deliberate indifference looks like.

More generally, Respondent fails to provide the Court with adequate details regarding his alleged efforts to protect the Petitioners stuck inside IDOC's prisons. Respondent provides no detail as to how many people have been released using each of the mechanisms he discusses, what criteria he is applying, how many people are reviewing prisoners, how many prisoners are in the pool of people they are reviewing, how that pool was selected, or how long they expect the process to take and whether there is any prospect that the rate of release will increase over the next few days. He also provides no explanation for why people like named Petitioner William Richard are still in IDOC custody—an extremely medically vulnerable person, very near the end of his sentence, with a safe home waiting for him in the community. Without these details, Respondent's list amounts to a collection of the mechanisms he ***could*** use to protect members of the putative class from harm, rather than evidence that he actually ***is*** protecting them.

Respondent has legal tools at his disposal to protect Petitioners from serious risk of harm. But his laundry list of tools, coupled with the paucity of results, demonstrates a desperate need for the Court to intervene here and require the Respondent to actually use these tools to protect as many Petitioners as possible—and particularly the members of Subclasses 1 and 2—before it is too late.

B. This Court Can and Should Order Enlargement of Custody for Subclasses 1 and 2.

Petitioners need emergency relief now, not after full briefing and argument on the merits. The rapid spread of COVID-19 within Illinois prisons means that medically vulnerable prisoners in all IDOC facilities are facing imminent risk of death or serious injury. The COVID-19 crisis is incompatible with generous briefing deadlines or the reasoned and deliberate consideration that Petitioners' claims would traditionally warrant. Given the emergency nature of Petitioners' request, and the deadly and imminent threat posed by COVID-19, it is appropriate for this Court to use "enlargement" to extend the custody of these Subclasses 1 and 2 to home confinement while this Court considers the merits of Petitioners' claims.

Analogous to a preliminary injunction, enlargement allows this Court to provide appropriate interim relief while the case progresses. Enlargement is a provisional remedy, akin to bail, that judges may order in the context of a pending habeas petition. Ex. C, Declaration of Prof. Judith Resnik. at ¶ 31. Federal Rule of Appellate Procedure 23 provides that, "[w]hile a decision not to release a prisoner is under review," the district court judge rendering the decision (or the appellate court) may order that the prisoner be "detained in other appropriate custody" or "released on personal recognizance, with or without surety." FRAP 23. The habeas statute also authorizes such a use of power by permitting judges to decide "as law and justice requires." 28 U.S.C. § 2243. Enlargement allows for the release or transfer of prisoners to lesser forms of custody during the pendency of their petitions, but it does not require the district court to issue a release order that is subject to the strictures of the PLRA. Resnik Decl. at ¶¶ 31-33.

Where, as here, Petitioners have a high likelihood of success on the merits, enlargement of custody is appropriate where "necessary to make the habeas remedy effective." *See Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (quoting *Calley v. Callaway*, 496 F.2d 701, 702

(5th Cir. 1974)). The Seventh Circuit has explicitly condoned the use of enlargement. *See Cherek v. United States,* 767 F.2d 335, 337 (7th Cir. 1985) (noting that there "there is abundant authority that federal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases").

Petitioners seeking enlargement of custody must show "extraordinary circumstances" and that the underlying claim raises "substantial claims." *See, e.g.*, *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). Here, there can be no doubt that COVID-19 presents an "extraordinary circumstance"—never before have Illinois prisons faced such a pandemic, or the possibility of such serious and widespread illness and death within their walls. Likewise, Petitioners' Eighth Amendment claim based on this serious risk of harm is substantial. And for medically vulnerable Petitioners in Subclasses 1 and 2, temporary transfer to home or other location outside of the prison walls is the only remedy sufficient to protect them from potential death from COVID-19.

Given the nature of this pandemic, every minute, hour, and day of inaction can have profound consequences. *See, e.g.*, J. David Goodman, *How Delays and Unheeded Warnings Hindered New York's Virus Flight*, N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html (indicating that by delaying public health responses by a week or two, New York officials may have increased the COVID-19 death toll by "50 to 80%"). Given the complexity of the legal issues raised in the hundreds of pages of briefing already filed in these actions, Petitioners urge this court to consider provisional remedies, including enlargement of custody for medically vulnerable Petitioners, to assure the safety of these individuals as soon as possible. Even if this Court is not prepared to immediately reach the merits of their claims, Petitioners ask the court to

allow medically vulnerable prisoners to safely quarantine at home or in another setting outside of Illinois prisons until the threat of COVID-19 has passed.

II. Petitioners' Eighth Amendment Claims Are Cognizable and Meritorious.

Based on an incorrect interpretation of Seventh Circuit and Supreme Court law, the Respondent argues that Petitioners' urgent Eighth Amendment claims are neither cognizable nor meritorious. Both arguments are without merit and should be rejected.

A. Petitioners' Eighth Amendment Claims Are Cognizable.

Petitioners' Eighth Amendment claims are cognizable habeas claims. Respondent's disingenuous arguments to the contrary notwithstanding, the Supreme Court has recognized that, in limited circumstances, writs of habeas corpus may be used to challenge conditions of confinement that violate the Eighth Amendment. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (noting that cognizability under Section 1983 does not preclude habeas corpus relief). In *Preiser*, the Supreme Court made a distinction between claims that challenge the fact of confinement (or duration of confinement) and those that do not, noting that claims that "seek[] immediate release or a speedier release from that confinement [are] the heart of habeas corpus." *Id*. at 498. The *Preiser* court recognized that although challenges to the conditions of confinement are generally actionable under a civil rights lawsuit, they may *also* give rise to a habeas claim "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody." *Id.* at 499.

Here, Petitioners do not seek damages or an interim remedy to unconstitutional conditions; rather, they challenge the fact and duration of their confinement—only immediate

placement out of the correctional setting is sufficient to keep them safe and satisfy the Eighth Amendment's prohibition on cruel and unusual punishment. Federal courts have repeatedly read *Preiser* as allowing such challenges to sound in habeas. *See Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014) (petitioners could challenge conditions of confinement in habeas, noting that "[h]abeas is not a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.") (quotations omitted); *see also Adams v. Bradshaw*, 644 F.3d 481, 482–83 (6th Cir. 2011) (holding that a state prisoner's Eighth Amendment challenge to the state of Ohio's lethal injection procedures could be brought in habeas); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d. Cir. 2008) ("This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence, including such matters as the ... type of detention and prison conditions.") (internal quotation marks omitted); *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 242 & n. 5 (3d Cir. 2005) (holding that prisoner's challenge to regulations limiting opportunity for placement in community confinement could proceed by way of habeas corpus "even if what is at issue…is 'conditions of confinement'"); *Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978) ("At most [petitioner's] claims rise to a possible habeas attack on the conditions of confinement, cognizable in a federal habeas action only in extreme cases."); *Kahane v. Carlson*, 527 F.2d 492, 498 (2d Cir. 1975) (Friendly, J., concurring) (contending that section 2241 would furnish "a wholly adequate remedy" for a federal prisoner who sought orders requiring prison officials to accommodate his First Amendment right to free exercise of religion); *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (citing *In Re Bonner*, 151 U.S. 242 (1894)) ("Any unlawful restraint of personal liberty may be inquired into on habeas corpus.").

Even the Seventh Circuit's reading of *Preiser,* which is narrower than that of other circuits, recognizes that an Eighth Amendment claim can be cognizable in habeas. Here, uniquely, Petitioners' Eighth Amendment claims can *only* be remedied through release from confinement. As the Respondent acknowledges in their response to Petitioners' related Section 1983 action, "[t]here is no question that COVID-19 poses unprecedented risks to the health of all citizens, including prisoners," Deft. Opp. 1983, at 8, and that socially distancing is the only known mechanism for reducing infection. In *Glaus v. Anderson*, 408 F.3d 382 (7th Cir. 2005), the Seventh Circuit has explicitly recognized that the Eighth Amendment can give rise to a habeas claim when the only way to remedy a constitutional isolation is release, such as when a public health catastrophe makes social distancing the only mechanism to protect life. *Id*. at 387 (recognizing that the *Presier* Court "left open the possibility that litigants could use writs of habeas corpus" to challenge unconstitutional prison conditions) (citing *Preiser*, 411 U.S. at 499). Although the *Glaus* court found that no such circumstance had yet occured to warrant release as a remedy for an Eighth Amendment violation, "because COVID19 can end people's lives unexpectedly and abruptly, COVID-19 claims turn the condition of being incarcerated into a practice that affects the fact or duration of confinement." *See* Resnik Decl. at ¶26. For that reason, "COVID-19 claims collapse the utility and purpose of drawing distinctions between what once could more coherently be distinguished. Therefore COVID-19 claims ought to be cognizable under both provisions." Resnik Decl. at ¶26.

Rather than precluding habeas relief for Eighth Amendment claims outright, the Seventh Circuit's *Preiser* jurisprudence merely recognizes the narrowness of that relief; habeas relief is only available when petitioners "challeng[e] the fact or duration of his physical confinement itself, and…seek[] immediate release or a speedier release from that confinement—the heart of

habeas corpus." *Preiser*, 411 U.S. at 498. If a petitioner is "put under additional and unconstitutional restraints during his lawful custody," such as irremediable threat of exposure to a deadly and highly contagious pathogen, "habeas corpus will lie to remove the restraints making the custody illegal." *Id*. at 499. Petitioners' narrow challenges to conditions of confinement, which explicitly seek release from the correctional setting, is precisely the exceptional case envisioned by *Glaus*. All parties agree that the threat posed by COVID-19 in the congregate prison setting is unique, unlike any threat faced by correctional officials in the modern era, and that release is the only way to meaningfully protect medically vulnerable Petitioners from the substantial risk of deadly infection through other means. Petitioners' request for relief—-release as the only mechanism to redress an ongoing and unfixable constitutional violation—-is not only cognizable, but it goes to the heart of habeas corpus.

B. Petitioners' Eighth Amendment Claims Are Meritorious.

Respondent argues that Petitioners' Eighth Amendment claims are neither cognizable nor meritorious. Respondent's arguments are without merit and should be rejected.

1. Deliberate Indifference Does Not Require Petitioners to Prove Respondent Subjectively Intends to Harm Them.

Petitioners' confinement violates the Eighth Amendment when it creates an objectively serious risk of harm and prison officials act with deliberate indifference to that risk. *Greeno v. Daley*, 414 F. 3d 645, 653 (7th Cir. 2005); *see also Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016). There is no dispute in this case about the objectively serious risks posed by COVID-19 to those in custody—particularly Subclasses 1 and 2 who are medically vulnerable due to age or medical condition. Likewise, there is no dispute as to Respondent's awareness of that risk.

Respondent instead contends that Petitioners claim amounts to a "mere disagreement" about the appropriate response. Doc. 18, Response, at 36. But there is virtually no disagreement about the appropriate action here: those who are medically vulnerable must be transferred to a place where they can self-isolate. The Governor's April 6 Executive Order demonstrates his awareness of—and agreement with—this fact. Ex. D, Executive Order 2020-19. Leaving prisoners locked in small cells, often with cellmates, in congregate settings where they cannot engage in social distancing and must rely on staff for all aspects of daily life is, in the era of COVID-19, akin to leaving them in a cell with a cobra. As the Seventh Circuit has stated, if prison officials place a prisoner in a cell when "they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference." *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995).

Notably, deliberate indifference in the § 1983 context does *not* require plaintiffs to prove that Respondent intends them harm, or even know that harm is a certain result. *Dixon v. County of Cook*, 819 F.3d 343, 350 (7th Cir. 2016); *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996) . The test instead requires a showing that the Respondent is actually aware of and disregarded an obvious risk to the Petitioner's health or safety. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016).

2. The Continued Placement of Medically Vulnerable Petitioners in Highly Dangerous Settings Where Safety and Health Standards Cannot Be Achieved Meets the Deliberate Indifference Standard

Respondent argues that he cannot possibly be deliberately indifferent to Petitioners' risk of harm from COVID-19—the subjective component of the deliberate indifference analysis—because the Department has begun to review and furlough or transfer a very small number of prisoners. Doc. 18, Def's Response, at 6, 34 (citing release of less than 2% of prison population).

But Respondent's contention that IDOC is taking *some* small action does not defeat Petitioners' claims of deliberate indifference when, by IDOC's own admission, such action has not meaningfully reduced the number of prisoners who in Subclasses 1 and 2 who remain incarcerated, at great risk to their lives and safety, because of the IDOC's inability to implement CDC Guidance. *See Gray v. Hardy*, 826 F.3d 1000, 1009 (7th Cir. 2016) ("[k]nowingly persisting in an approach that does not make a dent in the problem is evidence from which a jury could infer deliberate indifference").

Indeed, the Director of the Illinois Department of Public Health admitted that congregate settings, including Illinois prisons, "pose unique challenges in stopping the spread of disease and protecting the health of individuals who live and work there. Those who are incarcerated obviously live and work and eat and study and recreate all within that same environment, heightening the potential for COVID-19 to spread really quickly once it's introduced." Dr. Ngozi Ezike, IDPH, *COVID-19 Press Update*, (Mar. 30, 2020), *available at* http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/media-publications/daily-press-briefings. Not only that, but Illinois prisons do not have the celling capability to quarantine sick individuals or isolate vulnerable ones. *Id*. The Governor's own order expanding the use of Medical Furlough demonstrates his understanding that reducing the prison population is the only reasonable action to reduce the risk of harm to Petitioners. And, yet, Respondent has re-located only a small percentage of class members, leaving thousands more in need of an urgent response.

Petitioners are essentially "sitting ducks," with terms of incarcerations that risk becoming unlawful death sentences if Respondent does not change course to expedite and substantially increase the relocation processes. By doing so, Respondent is "persist[ing] in a course of

treatment known to be ineffective." *Petties,* 836 F.3d at 730. *See also Gray*, 826 F.3d at 1009; *Sellers v. Henman*, 41 F.3d 1100, 1103 (7th Cir. 1994) ("The more negligent acts they commit in a circumscribed interval, the likelier it is that they know they are creating *some* risk, and if the negligence is sufficiently widespread relative to the prison population the cumulative risk to an individual prisoner may be excessive").

The fact that Respondent is handing out more soap than before and has released a small number of people—but not the Petitioners here (or the many more who are similarly in high risk groups)—does not absolve the Department. These actions are simply insufficient to quell the threat of substantial harm and are akin to continuing ineffective course of medical treatment. *Petties,* 836 F.3d at 729-30. Continuation of these inadequate efforts is analogous to giving aspirin to the patient at risk of appendicitis and returning him to his cell, *Sherrod v. Lingle*, 223 F.3d 605, 612 (7th Cir. 2000), or continuing to treat severe vomiting with antacids over three years, *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005). *Petties*, 836 F.3d at 730.

3. The Court Need Not, and Cannot, Wait for the Named Plaintiffs to Test Positive for COVID-19 to Act.

The named Petitioners do not need to wait until one of them contracts COVID-19 to state a claim under the Eighth Amendment. Petitioners' age and pre-existing medical conditions put them at risk of death or serious injury if they contract COVID-19. Petitioner William Richard is 66 years old and has COPD, emphysema, and heart disease. Amber Watters has neurological impairments from a back injury. Gerald Reed is 57, has heart failure and hypertension, and is pre-diabetic. Tewkunzi Green has asthma and severe hypertension. Danny Labosette is 56 years old, a double amputee, and has untreated Hepatitis C. Carl "Tay Tay" Tate has hypertension and severe anxiety that is exacerbated by the current pandemic. Indeed, waiting until these Petitioners already are infected would be too late to avoid death or serious injury to them. *See*

Thakker v. Doll, 20 C 0480, Doc. 47 at *5-6 (M.D.P.A. Mar. 31, 2020) (rejecting argument that medically vulnerable prisoners lacked standing because they had not yet contracted COVID-19).

It is well established that an Eight Amendment claim can be founded upon risk of future harm, especially where the harm is certain and imminent. In *Helling*, a plaintiff alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes per day. *Helling v. McKinney*, 509 U.S. 25, 28 (1993). At issue was whether this exposure to environmental tobacco smoke (ETS) could constitute a valid claim under the Eighth Amendment, even though the plaintiff had not yet suffered harm. *Id.* at 30. The Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff stated "a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health." *Id.* at 35.

It is widely understood that COVID-19 is a highly contagious disease that spreads rapidly in congregate settings—indeed it is the entire basis for the Governor's currently-pending shelter-in-place order. The fact that the individual named plaintiffs do not yet have COVID-19 does mean they are not at imminent risk of serious harm, and therefore does not defeat their Eighth Amendment claim.

III. Petitioners' Due Process Claims are Cognizable and Meritorious.

Next, Respondent argues that Petitioners' due process claims are neither cognizable nor meritorious. Respondent's arguments are without merit, and should be rejected.

A. Petitioners' Due Process Claims are Cognizable in Habeas.

Petitioners' due process claim goes to the duration of their confinement, an issue that is at the core of habeas corpus. *Preiser*, 411 U.S. at 487-88 (challenge to the procedures for awarding good time credit went to the duration of confinement, at the core of habeas proceedings).

First, Respondent argues that Petitioners' claims are not cognizable because home detention does not amount to release for purposes of habeas. Their argument—that home detention does not amount to a significant enough change in confinement to give rise to a habeas claims—flies in the face of arguments Respondents make throughout their Opposition to the TRO in Petitioners' related § 1983 suit. *See Money v. Pritzker,* 20 C 2093, Doc. 26, at 7, 8, 22 (arguing that "[b]y seeking immediate release from prison, plaintiffs are seeking the kind of quantum change that is not allowed [in a § 1983 action]"; arguing that "the Court's order would qualify as a prisoner release order" and is therefore barred by the PLRA; and arguing that by seeking "immediate release from prison, whether through medical furlough, home detention, or a shortening of their sentences", "[p]laintiffs are therefore challenging *the fact of their confinement*, rather than any conditions that have been imposed, and such claims are not cognizable under § 1983." (emphasis added)).

There is no question that home detention represents a "quantum change in the level of custody" making habeas corpus a proper vehicle for pursuing this relief. See *Graham v. Broglin*, 922 F.2d 379, at 381 (7th Cir. 1995). In *Graham*, the Seventh Circuit ruled that an action is cognizable in habeas if the prisoner seeks a "quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation." *Id.* By contrast, claims in which the prisoner is merely "seeking a different program or location or environment," such as work release, did not represent a quantum change

in custody because "[t]he prisoner remains confined, but instead of spending the daytime hours working in a prison factory, he works in a factory outside the prison." *Id; see e.g., Oden v. True*, No. 19-cv-10009-SMY, 2019 WL 6117740, at *5-6 (S.D. Ill. Nov. 18, 2019). *Graham* does not control here, where Petitioners seek an order removing them from the correctional setting entirely.

B. Petitioners Have a Liberty Interest in Home Detention and Respondent has failed to Protect Petitioners' Liberty Interests

Next, Respondent incorrectly argues that Petitioners do not have a liberty interest in Illinois' Home Detention Law. The courts have long recognized that "a cognizable liberty interest may arise from the Constitution, statutes, or regulations." *See., e.g.*, *Murphy v. Raoul,* 380 F.Supp.3d 731, 760 (N.D. Ill. 2019) (citing *Felce v. Fielder*, 974 F.2d 1464, 1488 (7th Cir. 1992) (citations omitted); *Williams v. Lane*, 851 F.2d 867, 879-80 (7th Cir. 1988) (collecting cases)). If the language and structure of the statutes in question create an expectancy of release, they create a liberty interest. *See Montgomery v. Anderson*, 262 F.3d 641, 644 (7th Cir. 2001); *Taylor v. Edgar*, 52 F. App'x 825, 826–27 (7th Cir. 2002). Moreover, here, Illinois created a protected liberty interest by placing substantive limitations on official discretion. *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983). To demonstrate a protected liberty interest, Petitioners must show "that particularized standards or criteria guide the State's decisionmakers." *Id.* (quoting C*onnecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring). No liberty interest is created if the State "can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Connecticut Board of Pardons*, 452 U.S. at 466–467. But Petitioners do have a liberty interest if the State is "required to base its decisions on objective and defined criteria." *Id.*; *see also Vitek v. Jones*, 445 U.S. 480, at 488–491 (1980) (summarizing cases).

Here, there is no question that the Home Detention Law creates a constitutionally protected liberty interest, one that sets forth particularized standards or criteria to guide the State's decision-makers. The Home Detention Law orders the Department of Corrections to issue administrative directives. 730 ILCS 5/5-8A-3(e) ("A person serving a sentence for conviction of a Class 2, 3, or 4 felony offense which is not an excluded offense may be placed in an electronic monitoring or home detention program pursuant to Department administrative directives."). It requires that those directives reward specific criteria, including good behavior and program participation. *Id*. ("These directives *shall* encourage inmates to apply for electronic detention to incentivize positive behavior and program participation prior to and following their return to the community." (emphasis added)). The law prohibits Respondents from denying application for home detention based solely on specific factors like prior criminal history. *Id*. These directives *shall* not prohibit application solely for prior mandatory supervised release violation history, outstanding municipal warrants, current security classification, and prior criminal history" (emphasis added)).

Illinois's Home Detention Law stands in stark contrast to the law at issue in *Olim*, where no liberty interest did attach to Hawaii's rules—or lack thereof—governing transfers between facilities. There, unlike here, "the prison administrator's discretion to transfer an inmate is completely unfettered. No standards govern or restrict the administrator's determination." *Olim*, 261 U.S. at 249. The other cases cited by Respondent are inapposite. *See e.g., Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006) (recognizing liberty interest in prisoner's "presumptive" entitlement to parole after two-thirds of their sentences). Here, because the legislature created a mandatory statutory scheme, the question before this Court is whether Respondent has implemented a constitutionally sufficient process to protect that liberty interest

has been created. *See Murphy*, 380 F.Supp.3d at 760 ("The procedural due process inquiry typically entails two steps: (1) whether the person has a protected life, liberty, or property interest; and (2) if so, what process is then due.").

There is no question that Respondents have not taken steps to protect Petitioners' liberty interest. Respondent has deprived Petitioners of home detention arbitrarily, having articulated none of the administrative directives required by statute. Respondent does not identify a single step he has taken to protect Petitioners' liberty interest in this case. Respondent argues that Petitioners' due process argument must fail because Respondent "has released approximately 500 prisoners through various forms of sentencing credit, restoration of civil credit and electronic home detention." Doc. 18, Response, at 34. That Respondent has released some people via unrelated mechanisms does nothing to satisfy Petitioners' Due Process rights here. Pursuant to 730 ILCS 5/5-8A-3, eligible petitioners are entitled to release on home detention.

IV. Representative Action is Both Permissible and Appropriate.

Next, Respondent argues that a representative petition is not an appropriate vehicle for a habeas claim, and that such a vehicle raises timeliness and jurisdictional concerns. Respondent's arguments are without merit.

A. Representative Action is Appropriate in Light of the Emergent Threat Posed by COVID-19.

Representative habeas claims are well established and have been the vehicle for some of the most important cases in modern habeas doctrine. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (federal habeas class action on behalf of Guantanamo detainees); *Rasul v. Bush*, 542 U.S. 466 (2004) (same). More recently, representative habeas petitions have been brought successfully on behalf of classes of incarcerated petitioners to challenge similar circumstances

created by the COVID-19 pandemic. *See Thakker v. Doll,* 20 C 0480, Doc. 47 (M.D.P.A. Mar. 31, 2020) at 5-6 (finding that habeas corpus petition was the proper vehicle for class of detainees to challenge risk of harm posed by COVID-19 on behalf of themselves and other detainees similarly situated); *Basank v. Decker,* 20 C 2518, Doc. 11 (S.D.N.Y. Mar. 26, 2020) at 11-12 (finding that medically vulnerable immigration detainees were likely to succeed on the merits of their class petition for habeas corpus requesting immediate release from ICE custody due to COVID-19 threat under Section 2241).

Even before the COVID-19 pandemic, class action habeas petitions have been authorized where principles of judicial economy favored resolution of the legal claims in one legal action rather than hundreds or thousands of individual petitions. *See Bijeol v. Benson*, 513 F.2d 965, 967 (7th Cir. 1975); *see also Reno v. Flores*, 507 U.S. 292 (1993) (class action seeking relief pursuant to 28 U.S.C. § 2241); *U.S. ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221 (7th Cir. 1976); *Ali v. Ashcroft*, 346 F.3d 873, 889-91 (9th Cir 2003) (holding that the district court did not exceed its habeas jurisdiction in certifying a nationwide habeas class), withdrawn and amended on other grounds on reh'g; *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). *See also Geraghty v. U.S. Parole Commission*, 429 F. Supp. 737, 740 (M.D. Pa. 1977) (noting that "procedures analogous to a class action have been fashioned in habeas corpus actions where necessary and appropriate"); *U.S. ex rel. Green v. Peters*, 153 F.R.D. 615, 617 (N.D. Ill. 1994) (granting class certification in habeas context, noting that "the obvious undesirability of a large number of individual petitioners clamoring for preference in the allocation of scarce resources... counsels strongly in favor of certification"); *Adderly v. Wainwright*, 58 F.R.D. 389, 400 (M.D. Fla. 1972) (finding that class certification in state prisoners' habeas action was appropriate to

ensure that the writ was "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected") (internal citations omitted).

Although Petitioners right to bring a representative habeas claim is well established, it bears emphasizing the efficiencies of such a measure. Here, the sheer urgency of the COVID-19 pandemic makes it impossible for each individual petitioner to file their own habeas corpus petition to vindicate their federal and constitutional rights and protect their own lives.

B. Petitioners' Proposed Classes Satisfy Criteria for Class Treatment.

While Rule 23 does not strictly apply to class habeas petitions, courts look to Rule 23 requirements as common sense guidelines to determine whether a representative class is appropriate. *U.S. ex rel. Green*, 153 F.R.D. at 618. That said, a petition "need not comply precisely with Rule 23 prerequisites in order to be found appropriate for such certification." *Id.* For the reasons already articulated in Petitioners' opening brief, the proposed Petitioner subclasses easily satisfy Rule 23's guidelines requiring numerosity, common questions of law or fact, typicality of claims or defenses, and adequacy of representation.

1. Petitioners Have Proffered Sufficient Evidence To Satisfy the Spirit of Rule 23.

Subclass 1 is defined as "people who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including but not limited to people with respiratory conditions including chronic lung disease or moderate to severe asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or any other condition or related to treatment for a medical condition; people with chronic liver or kidney disease or renal failure (including hepatitis and

dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders (including sickle cell disease), inherited metabolic disorders; people who have had or are at risk of stroke; and people with any other condition specifically identified by CDC either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19, and who are eligible for medical furlough pursuant to 75 ILCS 5/3-11-1." Subclass 2 is comprised of people who are medically vulnerable to COVID-19 because they are 55 years of age and older and who are eligible for medical furlough pursuant to 75 ILCS 5/3-11-1.

In support of their request to proceed through a representative action, Petitioners request that the Court take judicial notice of a number of well-established facts, specifically: (1) World Health Organization data demonstrating people in these subclasses have a significantly increased chance of dying if they contract COVID-19; (2) United States Department of Justice data regarding the increased prevalence of medical vulnerabilities among people in prison; and (3) the IDOC's own data establishing that there are 4,807 people in its custody who are 55 or older. See Fed. R. Evid. 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

Declarations from families of putative class members are attached to this filing describing the the health conditions of named class members, including cancer, diabetes, Hepatitis C, asthma, and hypertension and a host of other conditions that make them vulnerable to serious medical complications and death from COVID-19; the frightening prevalence of people in prison exhibiting symptoms of COVID 19; and the inability to socially distance in prison. Each family member declarant affirms that they have a space in their homes for their currently incarcerated

loved one to safely quarantine upon release and that they will support their loved one in complying with IDOC supervision requirements and obtaining medical care. *See* Ex. D.

2. Petitioners Meet the Commonality and Typicality Requirements of Rule 23.

Respondent argues that factual variances between members of the subclasses undermine the Petitioners' assertion that their claims share a common question. These arguments hinge on Respondent's mischaracterization of Petitioners' position. As noted repeatedly, Petitioners do not seek a blanket release order. Rather, Petitioners seek varying forms of release based on their individual needs.

In an attempt to defeat commonality, Respondent describes a list of individualized factors that IDOC should consider prior to making a decision about a class member's eligibility for medical furlough. Doc. 18, Response, at 18-19. Petitioners agree that some evaluation regarding individuals' health and safety balanced with public safety concerns must occur prior to any determination regarding medical furlough. However, the fact that, after an evaluation, some class members may be suitable for furlough while others may have to remain in IDOC's physical custody does not destroy commonality. The commonality requirement does not require perfect uniformity. *See e.g.*, *Robert L. Meinders D.C., Ltd v. Emery Wilson Corp*., 2016 WL 3402621, at *4 (S.D. Ill. June 21, 2016) ("'Rule 23(a)(2) does not demand that every member of the class have an identical claim,' and some degree of factual variation will not defeat commonality") (quoting *Spano v. The Boeing Co.*, 633 F.3d 574, 585 (7th Cir. 2011)); *Rench v. TD Bank, N.A.*, 2018 WL 264121, at *3 (S.D. Ill. Jan. 2, 2018) (same); *Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016). Further, the individualized nature of the relief Petitioners seek is entirely consistent with Rule 23. *See, e.g., DL v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) (quoting *Wal-*

Mart Stores, Inc. v. Dukes, 564 US. 338, 3360 (2011) (certifying a subclass of special education students under Rule 23(b)(2) when they sued for individualized assessments and educational programming to meet their specific needs because a single injunction was suitable to "provide relief to each member of the class"); *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (approving certification for a class of individuals detained without bond hearings and seeking injunctive relief in the form of individual bond hearings even though some members of the class may not have been entitled to this relief and may not have suffered an actually cognizable injury); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (approving class certification in race discrimination case where plaintiffs sought individualized relief in the form of back pay); *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997) (approving the certification of a Title VII class action for plaintiffs seeking individualized monetary relief in the form of back pay and front pay); *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 601 (N.D. Cal. 2015) (finding certification of an injunctive and declaratory relief class under Rule 23(b)(2) proper even though relief "might differ from individual to individual" because the class sought a "uniform relief from a common policy that… applies to all class members"); *Franco-Gonzales v. Napolitano*, No. CV 10-02211, 2011 WL 11705815, at *14-15 (C.D. Cal. Nov. 21, 2011) (certifying a class of individuals in Department of Homeland Security custody alleging inadequate procedures in place to assess the mental competence of aliens in custody and provide them with safeguards even though relief would "vary based on the circumstances" of each case); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 388 (D. Colo. 1993) (certifying a "medical monitoring class" seeking relief for damages from radioactive and nonradioactive substances when relief would be based on "the individualized nature of each individual's claim").

The claims of the named Petitioners are also typical of the subclasses they seek to represent. Named Petitioners and the members of the putative class meet the typicality requirement because they have all suffered from the same violations of their constitutional rights. See Rule 23(a)(3). Each named Petitioner here has a heighted chance of becoming critically ill or dying if they contract COVID-19 and each is currently subjected to a substantial risk of harm because of the IDOC's failure to act with urgency regarding the medical furlough and home transfer related evaluations and determinations. This is sufficient to satisfy typicality. *See Oshana v. Coca-Cola, Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (internal quotes omitted) (typicality is "meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large"). Certain factual distinctions between named Petitioners and the class members do not defeat typicality. *See Young v. Cnty of Cook*, No. 06 C 552, 2007 WL 1238920, at *6 (N.D. Ill. Apr. 25, 2007) ("The likelihood of some range of variations in how different groups of new detainees were treated does not undermine the fact that the claims of each class share common factual basis and legal theories."); *Phipps v. Sheriff of Cook Ctny.*, 249 FRD 298, 301 (N.D. Ill. 2008) ("That the particular conditions may differ slightly from one cell block to the next, or that there are factual distinctions between the actual injuries suffered by the [the named plaintiff] and the class members, does not defeat typicality under Rule 23(a)(3).").

Petitioners have demonstrated that their representative claims present common questions susceptible to class-wide resolution, that those common questions predominate over individualized ones, and that the experience of the named Petitioners is typical of the class.

C. No Other Procedural Barrier Bars Relief for Class.

Respondents argue that a host of other procedural barriers prevent this Court from reaching the merits here. These arguments should be rejected.

1. Petitioners' Claims Are Not Successive Within the Meaning of § 2244, nor Do They Count as "First" Petitions.

Respondent incorrectly argues that a representative action is inappropriate here because Petitioners' claims could either be construed as a successive habeas petition, requiring authorization from the Seventh Circuit, or could be treated as a first petition under 28 U.S.C. § 2254, thereby prohibiting a later constitutional challenge to an individual prisoner's conviction or sentence. Respondent's argument evinces a fundamental misunderstanding of Petitioners' claims and federal habeas law.

Section 2244's limitations on the filing of "second or successive" habeas petitions do not apply to Petitioners' application for relief. As the Supreme Court has held, "second or successive" is a term of art—it "does not simply refer to all § 2254 applications filed second or successively in time." *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). Rather, the term "second or successive" applies only to consecutive applications that challenge the same state court judgment as a prior application. *Id.*, at 331; *see also Valona v. U.S.*, 138 F.3d 693, 694 (7th Cir. 1998) ("Not all multiple collateral attacks are 'second or successive.'"). Here, Petitioners do not challenge their state court convictions, nor do they raise claims that could have been brought in any previous petitions. *See Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (holding that "a habeas petition raising a claim that had not arisen at the time of a previous petition is not barred by § 2244(b) [as a second or successive petition] or as an abuse of the writ"); *In re Cain,* 137 F.3d 234, 236–37 (5th Cir.1998) (same).

Rather, Petitioners in this case challenge their continued confinement as unconstitutional given the unprecedented risk to their lives posed by COVID-19. As advocates in Louisiana recently analogized, incarceration during this pandemic is as if "someone sick with COVID-19 came into your home and sealed the doors and windows behind them. … [the] outbreak is rampant, social distancing is impossible, and no one detained can leave." *Livas v. Meyers*, 1:20-cv-00422, DE 1 at 1 (Apr. 6, 2020).

Here although Petitioners' claims are filed pursuant to 28 U.S.C. § 2254, they bring challenges traditionally contemplated by 28 U.S.C. § 2241. State prisoners may bring claims under § 2254 that focus "on the fact of custody," and "not necessarily on the flaws in the underlying judgment or sentence that brought the person there." *Walker v. O'Brien*, 216 F.3d 626, 632-33 (7th Cir. 2000). While § 2254 is the habeas remedy for a state prisoner, that statute "in effect implements the general grant of habeas corpus authority found in § 2241, as long as the person is in custody pursuant to the *judgment* of a state court." *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2006); *see also Singleton*, 319 F.3d at 1023 ("The focus of § 2254 is on the petitioner's custody, not, as in § 2255, on the flaws in the underlying judgment or sentence.").

Indeed, if Section § 2244's limitations applied universally to any subsequent habeas application by a state prisoner, state prisoners would rarely, if ever, be permitted to bring habeas petitions other than those challenging the validity of their conviction. But the plain text of § 2254 is not so narrow, and this court's authority extends to habeas claims that go to the fact or duration of confinement as distinct from the sentence or conviction itself. To wit, the Seventh Circuit has explicitly held that the "prior-appellate-approval" mechanism in § 2244 does not apply to habeas petitions based on "the execution of but not the validity of the conviction and sentence." *Valona,* 138 F.3d at 694; *see also Gray-Bey v. United States,* 209 F.3d 986, 990 (7th

Cir. 2000) (petitioner does not need appellate court approval to file as petition under 28 U.S.C. § 2241, even if he has filed a prior claim for relief under 28 U.S.C. § 2255).

Here, Petitioners do not seek to invalidate their underlying state-court convictions, nor do they challenge their sentence as initially imposed. Rather, Petitioners'' claims—-the sort traditionally addressed through § 2241—-challenge the constitutionality of their continued confinement during the COVID-19 pandemic. *See Valona,* 138 F.3d at 694 (recognizing a distinction between habeas claims that attack the validity of the conviction or sentence, and those concerning the execution of the sentence). As such, Petitioners' claims do not challenge their underlying convictions or sentences, making application of 2244's "second or successive" petition absurd. Furthermore, treating Petitioners' claims as successive would render habeas relief entirely unavailable to them, amounting to an unconstitutional suspension of the writ of habeas corpus.

2. Petitioners' Request for Habeas Corpus is Timely.

Petitioners' challenge to the unconstitutional risk of harm posed to Petitioners by COVID-19 while incarcerated by the IDOC is timely. Under 28 U.S.C. § 2244(d)(1), the one-year statute of limitations period for petitions under § 2254 runs from the latest of four different dates, only one of which is applicable here: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The "factual predicate" of Petitioners' claim is the introduction of the rapidly spreading COVID-19 virus into the Illinois Department of Corrections, which began only weeks ago. Even assuming that the limitation period of § 2244 applies, Petitioners are well within the one-year statute of limitations.

3. This Court has Jurisdiction over Petitioners' Claims.

Next, Respondent argues that this Court does not have jurisdiction to consider Petitioners' claims. In representative habeas claims, as is the case in their civil analogs, the court issuing the writ need only have jurisdiction over the custodian and at least one representative petitioner.. In *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 494–95 (1973), the Supreme Court emphasized that "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 484 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). This flexible interpretation is consistent with what the Court has described as a "classic" statement about the writ:

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.'

Braden, 410 U.S. at 495 (quoting I*n the Matter of Jackso*n, 15 Mich. 417, 439—440 (1867); *see also Ahrens v. Clark*, 335 U.S. 188, 196-197 (1948). (Rutledge, J., dissenting). The *Braden* Court went on to reason that:

> Read literally, the language of s 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495. For this reason, courts have jurisdiction in national representative actions in habeas proceedings, as that in civil proceedings, provided that the court has personal jurisdiction over the custodian. *See id*. at 494–95 (stating that the writ of habeas corpus acts not

upon "the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody"); *Ali v. Ashcroft*, 46 F.3d 873, 889 (9th Cir. 2003), reversed on other grounds by 421 F.3d 795 (9th Cir. 2005), as amended on rehearing (Oct 20, 2005); *Roman*, 162 F.Supp. 2d at 761 (reasoning that "[o]nce a court takes the step of approving the Attorney General as a proper respondent [to a habeas petition], there would appear to be no jurisdictional reason why the petition could not be heard in any district in which the Attorney General was subject to service of process").

D. Any Failure by Petitioners to Exhaust their Claims does not Preclude Review.

Next, Respondent argues that Petitioners' claims should be dismissed for failing to exhaust in state court. Federal habeas corpus exhaustion requirements are waived when "(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." 28 U.S.C. §§ 2254(b)(1)(B)(i)-(ii). Petitioners need not exhaust state court remedies that are not available at the time their petition is filed. *See U.S. ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). Even where state remedies are available, failure to exhaust may be excused where there has been undue delay in the process. *See Jenkins v. Gramley*, 8 F.3d 505, 508 (7th Cir. 1993).

1. Exhaustion should be Waived in Light of the Unique Threat Posed by COVID-19

This court should employ its broad equitable powers to excuse any exhaustion idiosyncrasies by Petitioners. The rapidly developing and deadly threat posed by COVID-19 means that any delay—of weeks, of day, or even of hours—could be the difference between life and death for Petitioners, especially the medically vulnerable members of Subclasses 1 and 2. "The concern is that day by day, the risk of illness increases for prisoners and staff, and that their

illnesses endanger others as well as stretch health care resources." *See* Renick Decl. at ¶ 27. To be blunt, exhaustion will be "futile" if additional delay results in Petitioners' infection, or death.[2] Dozens of Petitioners are already sick; many more will become sick, and some will assuredly die. Any delay simply cannot be tolerated by the Constitution. *See Preiser*, 411 U.S. at 497 ("If the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his habeas corpus application immediately, under s 2254(b)'s language relating to 'the existence of circumstances rendering such (state) process ineffective to protect the rights of the prisoner.'").

The devastation wrought by COVID-19 is so enormous that it has suspended the normal functioning of state courts across the state. Simply put, there is no time for the thousands of vulnerable prisoners who make up the putative class to file state court petitions for relief. At any moment, COVID-19 may enter and rapidly spread through Petitioner's respective prisons, rendering *any* delay in relief unjustifiable. *See Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981); *Dozie v. Cady*, 430 F.2d 637 (7th Cir. 1970). Such unjustifiable delay would render state corrective processes ineffective to protect the rights - and the very lives - of Petitioners and the similarly situated prisoners they represent. § 2254(b)(1)(B)(ii).

Federal courts have excused exhaustion requirements when pursuit of state court procedure would be tantamount to a death sentence. In *Puerta v. Overton*, 272 F. Supp. 2d 621

[2] "If [prisoners] are proceeding under either habeas, §1983, or both, courts also need to address how COVID-19 fits with conventional rules on exhaustion of judicial remedies for state court prisoners and the parameters of the PLRA. Again, new problems have emerged. For example, in terms of exhaustion of state judicial remedies, whatever the viability of state courts responding quickly, the concern is that day by day, the risk of illness increases for prisoners and staff. Those illnesses endanger others as well as stretch health care resources. Exhaustion would be "futile," not only if state courts cannot respond, but also if people become sick, risks skyrocket, and deaths occur." Resnik Decl. at ¶ 27.

(E.D. Mich. 2003), a federal district court waived the exhaustion requirement for a 76-year-old prisoner with coronary artery disease and bladder cancer that had recently gone into remission, releasing him on bond pending a decision on his petition for a writ of habeas corpus. *Id.* at 628. In reaching the conclusion to waive the exhaustion requirement, the court found that the petitioner's "age, ill health, and dire need for continued medical treatment" warranted special consideration. *Id.* The court considered a prior prison conditions lawsuit, in which a judge made findings about the Michigan Department of Corrections inability to "provide reliable and timely access to care for prisoners with urgent and emergent symptoms." *Id.* at 629 (quoting *Hadix v. Johnson*, 2002 U.S. Dist. LEXIS 21283, No. 4:92-CV-110 (W.D. Mich. Oct. 29, 2002)). For these reasons, the court determined that "the interests of comity and federalism" would be better served by addressing the merits of the petition rather than allowing the petitioner to risk death in prison while awaiting adjudication in state court. *Id.* at 627-29 (quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)).

Although Respondent and this Court are extremely familiar with the challenges already facing medically vulnerable people in Respondent's custody, they bear repeating here in light of the unprecedented dangers posed by COVID-19. The Illinois Department of Corrections is already subject to a federal consent decree because of Respondent's constitutionally inadequate healthcare system. *See Lippert v. Jeffreys*, 1:10 CV 04603 (N.D. Il). Of particular relevance, the Second Court Appointed Expert in that case noted that:

> There is no active infection control program. Infection control practices lack guidance from a physician with expertise in infection control practices. This is evident in HIV testing, TB screening, and analysis of surveillance practices.

Report of Second Court Appointed Expert, DE 767, at 11, *Lippert v. Jeffreys*, 1:10 CV 04603 (N.D. Il,, Nov. 14, 2018), Moreover, as admitted in Executive Order 2020-21, "the vast majority of [IDOC prisoners], because of their close proximity and contact with each other in housing

units and dining halls, are especially vulnerable to contracting and spreading COVID-19." Report of Second Court Appointed Expert at 15. Clearly, given this reality and the rapid pace at which COVID-19 spreads, it is "in the interests of comity and federalism," *Granberry*, 481 U.S. at 131, to waive the exhaustion requirement for Petitioners before it is too late.

2. State Court Remedies Continue to be Unavailable to Petitioners.

While Petitioners did file a parallel petition before the Supreme Court of Illinois requesting a writ of mandamus, mandamus is an "extraordinary state remedy," *Hankins*, 941 F.2d at 249, that need not be exhausted. The Supreme Court of Illinois has repeatedly acknowledged that mandamus is an "extraordinary remedy." *See, e.g. People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 192-93 (2009); *People ex rel. Senko v. Meersman*, 980 N.E.2d 1115 (Ill. 2012); *People ex rel. Alvarez v. Howard*, 72 N.E.3d 346 (Ill. 2018). Moreover, mandamus relief is discretionary in nature; even if Petitioners have a legally meritorious claim, mandamus guarantees no relief. *Durbin v. Gilmore*, 718 N.E.2d 292, 294 (1999) ("The issuance of a writ of mandamus is an extraordinary remedy, discretionary in nature, and it is appropriate only when there is a clear right to the requested relief, a clear duty of the defendants to act, and clear authority in the defendants to comply with the writ").

The exhaustion requirement does not "bar from federal habeas prisoners in states whose post-conviction procedures are technically inexhaustible." *Castille v. Peoples*, 489 U.S. 346, 350 (1989). This has been interpreted to mean that exhaustion does not require "the pursuit of extraordinary state remedies." *Hankins v. Fulcomer*, 941 F.2d 246, 249 (3d Cir. 1992) ; *accord Sceifers v. Trigg*, 46 F.3d 701, 703 (7th Cir. 1995); *Jenkins v. Gramley*, 8 F.3d 505, 508 (7th Cir. 1993); *Lane v. Richards*, 957 F.2d 363, 365 (7th Cir. 1992). As such, 28 U.S.C. § 2254(c) does not require Petitioners to exhaust the remedy of mandamus. *See Castille*, 489 U.S. at 350.

Respondent also wrongly suggests that, despite state court closures, the remedy of mandamus is actually available to Petitioners. Citing *Preiser v. Rodriguez*, 411 U.S. 475, 494-95 (7th Cir. 1973), Respondent claims "there is no reason to assume that . . . state courts will not act expeditiously." To the contrary, Petitioners have every reason to make that assumption and to contemporaneously pursue remedy in federal court. If Petitioners were to assume that state courts would move rapidly and forego federal remedies, the cost of being incorrect could quite literally amount to the lives of thousands of putative class members. In fact, while the federal courts have responded expeditiously to Petitioners' request for an expedited hearing on this emergency habeas petition—scheduling briefing by the parties to be completed within just days of the Petitioners' initial filing—the Illinois Supreme Court has taken no action on Petitioners' mandamus petition in nearly a week. During that time, at least two IDOC prisoners have died of COVID-19, and the number of confirmed COVID-19 cases among prisoners has more than doubled.

3. No other state corrective process is available to Petitioners.

Respondent does not even identify which state remedies Petitioners purportedly should have sought in state court. State postconviction remedies are not available under these circumstances, and even if they were, courts throughout the state are closed and operating on reduced dockets. As already stated, delays of days or weeks will deprive Petitioners' any meaningful remedy. Indeed, it may cost them their lives. Petitioners were not required to seek remedy through the circuit courts because this remedy was unavailable due to the circuit court closures highlighted in the Petition. *See U.S. ex rel. Morgan v. Sielaff*, 546 F.2d at 222; Doc. 1 at 6. Respondent correctly notes that Petitioners have not cited any cases regarding "delays—actual or anticipated—caused by a global pandemic." Doc. 18, Response, at 26. Rather than prove

Petitioner's point, this absence merely highlights the unprecedented nature of the crisis facing the judicial system.

4. Continued Incarceration is Tantamount to a Death Sentence, and Precluding review would be a Miscarriage of Justice.

Even if this court determines that Petitioners had access to a corrective process that could adequately protect their rights, this Court should still reach the merits of Petitioners' claims, because to do otherwise would be a miscarriage of justice. Here, exposing Petitioners to COVID-19 is tantamount to a death sentence, a fundamental miscarriage of justice beasue Petitieorns are actually innocent of any factor that would make them eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 347, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (petitioner can be actually innocent of being eligible for the death penalty). It is well settled that a sentence imposed despite actual innocence gives rise to a miscarriage of justice.

The Supreme Court has expressly applied the miscarriage of justice exception to overcome various procedural bars, incluidng include "successive " petitions asserting previously rejected claims, *see Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion);"abusive" petitions asserting in a second petition claims that could have been raised in a first petition, *see McCleskey v. Zant*, 499 U.S. 467, 494–495 (1991); failure to develop facts in state court, *see Keeney v. Tamayo–Reyes*, 504 U.S. 1, 11–12 (1992); and failure to observe state procedural rules, including filing deadlines, *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Nothing about AEDPA has restricted the miscarraige of justice exception, which continues to thrive. *See McQuiggins v. Perkins*, 569 U.S. 383 (2013) (applying exception to allow federal court to review petitioner's procedurally defaulted claims); *Calderon v. Thompson,* 523 U.S. 538 (1998) (holding that a federal court may, consistent with AEDPA, recall its mandate in order to revisit

the merits of a decision); *Bousley v. United States*, 523 U.S. 614, 622 (1998) (miscarriage of justice may overcome a prisoner's failure to raise a constitutional objection on direct review): *House*, 547 U.S., at 537–538, 126 S.Ct. 2064. (miscarriage of justice may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error).

Significantly, AEDPA and its procedural bars were designed to streamline, not foreclose habeas review.

> AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law.... When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights."

Holland v. Florida, 560 U.S. 631, 648-39 (2010) (citations omitted). "[E]quitable principles have traditionally governed the substantive law of habeas corpus," before affirming that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Id*. at 646 (internal quotation marks omitted). Nothing within Section 2254's procedural restrictions undermine the federal court's equitable authority to invoke the miscarriage of justice exception to overcome exhaustion requirements. *See McQuiggins*, at 398 (relying on courts' equitable authority to invoke the miscarriage of justice exception to overcome statute of limitations).

V. Respondent's Interpretation of the PLRA and AEDPA to Preclude Federal Review of Petitioners' Claims Would Violate the Constitution.

Respondent urges this Court to avoid the merits of Petitioners' claims in both this action and the related Section 1983, invoking a series of procedural bars purported procedural barriers from Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 106, 110

Stat. 1220, and the Prisoner Litigation Reform Act that they argue foreclose consideration on the merits in either action.

A. PLRA does not apply to habeas proceedings

Respondents argue that even if Petitioners have brought cognizable claims for relief, which they are, they would still not be entitled to release because they would not have satisfied the provisions of the Prisoner Litigation Reform Act. This disingenuous argument has been squarely rejected by the Seventh Circuit, which Respondents acknowledge. Resp.'s Opp. to Writ, at 35 "[T]he PLRA generally does not apply to § 2254 cases." (citing *Walker v. O'Brien*, 216 F.3d 626, 633-34 (7th Cir. 2000)). Respondent's arguments are foreclosed by Seventh Circuit law.

"By its terms, the PLRA only applies when "a prisoner brings a civil action or files an appeal in forma pauperis." *Blair-Bey v. Quick*, 151 F.3d 1036,1040 (D.C. Cir. 1998) (citing 28 U.S.C. § 1915(b)(1)). Although habeas corpus proceedings are often characterized as civil in other contexts, "the label is gross and inexact. Essentially, the proceeding is unique." *Harris v. Nelson*, 394 U.S. 286, 293–94 (1969); *see also O'Neal v. McAninch,* 513 U.S. 432, 440 (1995) (rejecting the application of civil standard for reviewing error because "although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake."). Habeas corpus actions are distinct from "civil actions," and courts have found them to be not civil in nature for the purposes of the PLRA. *Moran v. Sondalle,* 218 F.3d 647, 650 (7th Cir. 2000) (noting Seventh Circuit law that a petition for a writ of habeas corpus is not "civil action" for purposes of § 1915(b)).

B. Foreclosure of Federal Habeas Review Violates the Suspension Clause.

Although Respondent's arguments are wrong on the merits, as discussed *infra*, their argument that there is no avenue for federal review or relief for ongoing constitutional violations would result in an unconstitutional suspension of the writ. *See Boumediene v. Bush,* 553 U.S. 723, 787 (2008) ("We are obligated to construe the statute to avoid [constitutional] problems" if it is " 'fairly possible' " to do so." (quoting *St. Cyr,* 533 U.S., at 299–300, 121 S.Ct. 2271, and *Crowell v. Benson,* 285 U.S. 22, 62 (1932))).

Writs of habeas corpus are such a central tool for the protection of individual liberty that grounds for its suspension are constitutionally limited: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. The Suspension Clause prohibits, except under the most extreme circumstances, measures that preclude judicial review of detention. *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) ("The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."). Deeply rooted in the separations of powers doctrine, legislative measures that create or act in concert to create a complete bar on judicial review of detention violate the Clause. *Luna v. Holder,* 637 F.3d 85, 87 (2d Cir. 2011) (procedural bars that leave petitioners "no forum in which to raise plausible claims of constitutional violations" raise Suspension Clause concerns).

It is "uncontroversial …that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 778 (quoting *St. Cyr,* 533 U.S., at 302). Fundamental to the writ is the habeas court's "power to order the conditional

release of an individual unlawfully detained. *Id.* at 779 (citing *Ex parte Bollman*, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court "can only direct [the prisoner] to be discharged"). Unlike traditional avenues of relief, Habeas corpus is a collateral process that exists, in Justice Holmes' words, to "cu[t] through all forms and g[o] to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Boumediene*, 553 U.S. at 785 (citing *Frank v. Mangum*, 237 U.S. 309, 346 (1915).

Crucially, to avoid suspension of the writ, "the court that conducts the habeas proceeding must have the means to correct errors." *Boumediene*, 553 U.S. at 786. Although Respondent's procedural and substantive arguments are incorrect, they must be rejected, for they leave no avenue for meaningful and expedited review by a federal court review. In this context, where a day's delay in the difference between life and death, a narrow interpretation of this Court's authority violates the Suspension Clause. In effect, Respondents argue that, despite the clearly urgent nature for expeditious action to save hundreds if not thousands of lives among Illinois's incarcerate population and the larger communities in which they sit, Petitioners' claims for release from unconditional custody are not actionable in habeas through a civil suit.

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Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I, Jennifer Soble, an attorney, certify that I served this pleading on all counsel of record by filing it through CMECF system.

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