To be argued by
Corey Stoughton (15 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
EX REL. COREY STOUGHTON,
ON BEHALF OF
VENUS WILLIAMS, ET AL.

Petitioner-Appellants,

vs

CYNTHIA BRANN, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION; ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Appellees.

Index No. 451609-2020

REPLY BRIEF FOR PETITIONERS-APPELLANTS

JANET E. SABEL
The Legal Aid Society
COREY STOUGHTON, Of Counsel
199 Water Street
New York, NY 10038
Attorney for Petitioners-Appellants
(646) 527-0095, cstoughton@legal-aid.org

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INTRODUCTION

Respondent Annucci, supported by intervenors the District Attorney's Office of New York ("DANY") and the Office of the Special Narcotics Prosecutor (collectively, "Intervenor Prosecutors"), oppose the release from New York City jail of ten medically vulnerable people deemed by the City's own Correctional Health Service ("CHS") to be at "highest risk" of life-threatening consequences from a COVID-19 infection, primarily on the grounds that the steps the City's Department of Correction ("DOC") has taken in response to COVID-19 have successfully controlled the risk of infection in City jails.

This is a remarkable claim given undisputed facts that is the virus has been spreading in the jails for more than two months; 537 incarcerated people have tested positive in the jail, even in the absence of comprehensive testing;[1] and three incarcerated people have died, along with more than a dozen staff. Also undisputed is that COVID-19 is a virus of unprecedented infectiousness that cannot be

[1] The number of cumulative infections was disclosed for the first time anywhere on May 19, 2020, in written testimony of Dr. Patricia Yang to the New York City Council's Justice Committee. Respondent-Appellees submitted this testimony to the Court in their Joint Appendix ("JA") at 93-95. Unfortunately, to date, no city agency has released updated statistics. Dr. Yang further stated that this statistic emerged from a total of 1,270 total tests (clarified in her oral testimony to have been conducted on 1,054 people, with some individuals being testing more than once). This represents – at most – a testing rate of less than 27%, based on a total reported population on May 19 of 3,940, a denominator that understates the total number of people in the jail during the period those tests, because of the frequency of people cycling in and out of the City's jails.

controlled by a symptom-centered strategy, particularly in congregate settings like jails, because viral spread mainly comes from asymptomatic carriers who may even test negative for the virus. (Pet. Br. at 6-10). One can quibble about how the rate of infection in the jails compares to the rest of the world, or about the consistency or fidelity of DOC's implementation of its mitigation strategy, but, in the words of the Director of the City Board of Correction at a City Council hearing held only last week, "the pandemic is not over and the risk of getting sick in the jails is still significant." Joint Appendix for Respondents (May 22, 2020) (hereinafter "JA") at 102.

Respondent-Appellees also do not dispute that each of Petitioner-Appellants falls into the category of people whose age and underlying health problems (often, compound health problems, including cardiovascular disease, severe asthma, uncontrolled diabetes, and other complications) place them, by the City's own metric, in the "highest risk" for death and long-term adverse health outcomes should they contract COVID-19. Nor do they dispute that the fatality rate for such people is as high as 15 percent and that, if death does not result, severe and permanent medical complications are likely. (Pet. Br. at 8-9, 14-17).

These undisputed facts establish that the lower court erred in refusing to find of deliberate indifference. Indeed, Respondent Brann has withdrawn her opposition to Petitioner-Appellants' release (the City takes "no position" on the matter, while

still resisting a finding of constitutional violations) and makes clear in her submission that the release of people the City identifies as medically vulnerable is a critical part of the City's strategy for addressing COVID-19 in the City's jails – the very strategy Respondent-Appellees hold up as evidence of a lack of deliberate indifference. Petitioner-Appellants are among those the City has identified as in the "highest risk" of medical vulnerability, definitively establishing how the ongoing refusal to release them is deliberate indifference.

Beyond the question of deliberate indifference, Respondent Annucci and the Intervenor Prosecutors urge the Court to adopt a novel theory procedurally foreclosing habeas relief for conditions of confinement cases, despite the Court of Appeals' longstanding, broad interpretation of the scope of the state habeas provision and its prior acknowledgment of the potential viability of such claims, and continue to press a spurious claim, fully answered in Petitioner-Appellants opening brief, that the court below was right to dismiss their petitions because they were brought collectively instead of one at a time. None of these arguments has merit.

ARGUMENT

I. BECAUSE THE CITY'S COVID-19 STRATEGY DOES NOT PROTECT PETITIONER-APPELLANTS, FAILURE TO RELEASE THEM IS DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS.

A. The COVID-19 Pandemic is Not Under Control in the City's Jails.

Respondent- Appellees primarily rest on the argument that "the virus has been fairly well controlled in DOC facilities." Brief of Respondent Cynthia Brann (May 22, 2020) (hereinafter "DOC Br.") at 2. Whatever one thinks of the term "fairly well," there is really no seriously claiming that the virus is under control. As of the 19th of May (the last day for which such data was disclosed), 537 incarcerated people have tested positive in the jail. (JA 94).[2] Many hundreds more – 610 people as of May 25 – remain "under observation" as "likely exposed" to the disease in the jails.[3]

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[2] As noted in Petitioner-Appellants' opening brief, this number likely understates the true scale of COVID-19 infections in the jails, because of the lack of comprehensive testing. (Pet. Br. at 10-13). Respondent-Appellees counter that the rate of testing is much higher in the jails than in the City has a whole but, even if that is true, the fact remains that no more than 27% of the jail population (and likely much less than that) has been tested. *See* JA 94 and *supra* note 1.

[3] Petitioner-Appellants join Respondent Brann in urging the Court to accept into the record updated official statistics tracked daily by the City Board of Correction. *See* DOC Br. at 4. The May 25 daily report is available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_5_25_2020.pdf (last visited May 26, 2020).

Much ink is spilled in the parties' opening briefs disputing exactly how fast COVID-19 is spreading in the jails, a debate that reflects how rapidly the relevant facts on the ground are changing. Respondent-Appellees claim that the rate of increase in infections is slower now than it was at the first peak of the virus's spread, sometime in April, while Petitioner-Appellants have explained why incomplete testing and a failure to account for cumulative infections renders such a firm conclusion dubious, and why there is still reason to believe the virus is spreading faster than in the City has a whole, and indeed most places in the world. Brief for Petitioner-Appellants (May 8, 2020) (hereinafter, "Pet. Br.") at 10-13.

But the Court need not dwell on such disputes. While the rate of increase in infections may have slowed since its explosion in the jails at the end of March, the disease is still spreading. Over approximately the last month – from April 22 to May 22 – the official daily snapshot of the number of incarcerated people with a positive diagnosis ranged between 357 and 369 people[4] – hardly a dramatic rate of improvement. Under these circumstances, there is no plausible claim that the threat of COVID-19 in the City jails has receded. *Cf. United States v. Kelly*, No. 3:13-CR-59, 2020 WL 2104241, at *6-7 (S.D. Miss. May 1, 2020) (finding corrections

[4] Complete sets of the Board of Correction's daily COVID-19 report are available at https://www1.nyc.gov/site/boc/covid-19-updates.page (last visited May 26, 2020).

officials failed to control COVID-19 where only "33 prisoners and 17 staff" had tested positive).

The Board of Correction ("BOC") recently warned against complacency, stating in written testimony to the City Council on May 19 that "the pandemic is not over and the risk of getting sick in the jails is still significant." (JA 102). Under questioning from the City Council, Dr. Yang of the City's Correctional Health Service ("CHS") was asked whether she believed there remained people in the City jails that she believed "should not be in a jail setting at this moment." She answered "yes" and went on to note that "the jail is not a healthy environment and particularly in the face of a pandemic such as what we are facing" and noted their ongoing efforts to press for the release of people, like Petitioner-Appellants, who CHS have identified as medically vulnerable.[5]

Indeed, Dr. Yang testified that CHS is already beginning to "prepare for the resurgence" of COVID-19 in the jails, (JA 102), and BOC's leadership described a second surge as inevitable[6] – meaning that even if Respondent-Appellees' claim of

[5] Oral Testimony of Dr. Patricia Yang to the New York City Council Justice Committee, Hearing on COVID-19 in City Jails (May 19, 2020) available at https://councilnyc.viebit.com/player.php?hash=ISWBm3U0udx7 (question and answer session beginning at 00:45:20 mark).

[6] Oral Testimony of Meg Egan to the New York City Council Justice Committee, Hearing on COVID-19 in City Jails (May 19, 2020) available at https://councilnyc.viebit.com/player.php?hash=ISWBm3U0udx7 (last visited May 26, 2020) (question and answer beginning at 02:37:10).

a reduction in the rate of increase in infections is true, it cannot be counted on to continue. The disease persists in the City jails, as does the danger to Petitioner-Appellants and the corresponding need for their release.[7]

B. The Refusal to Release Petitioner-Appellants Amidst the Ongoing Spread of COVID-19 Establishes *Per Se* Deliberate Indifference.

Respondent-Appellees' robust defense of the City's COVID-19 strategy overlooks the fact that, according to that very strategy, Petitioner-Appellants should be released. Respondent Brann's submissions to this Court, as well as the testimony offered by the City's witnesses to the City Council last week and offered to the Court as part of Respondent-Appellees' submissions, repeatedly emphasize the importance of releasing medically vulnerable people from jail in order to effectively respond to the COVID-19 pandemic. *See, e.g.*, DOC Br. at 8 (leading the description of its

[7] Respondent-Appellees suggest that the fact that three people are reported to have died in custody is evidence of a lack of deliberate indifference. Putting aside that the loss of three lives is hardly something to be proud of even in the worst of circumstances, this argument overlooks the fact that the risk to medically vulnerable people like Petitioner-Appellants is not merely death but serious and permanent bodily harm. "Recent clinical evidence indicates that in persons who suffer severe symptoms, the virus may also cause damage to organs such as the heart, the liver, and the kidneys, as well as to organ systems such as the blood and immune systems. This damage is so extensive and severe that it may be enduring. Among other things, patients who suffer severe symptoms from COVID-19 end up having damage to the walls and air sacs of their lungs, leaving debris in the lungs and causing the walls of lung capillaries to thicken so that they are less able to transfer oxygen going forward. Indeed, studies of some recovered patients in China and Hong Kong indicate a declined lung function of 20% to 30% after recovery." *Favi v. Kolitwenzew*, No. 20-CV-2087, 2020 WL 2114566, at *2 (C.D. Ill. May 4, 2020).

COVID-19 response with its "efforts toward depopulation," in particular that "the City has worked with state and local officials to identify those most vulnerable to COVID-19's effects and put them forward" for release). In her oral testimony to the City Council, Respondent-Appellees' witness Dr. Yang described releasing medically vulnerable people as the "key strategy" and "cornerstone" of the City's approach to managing COVID-19.[8] Petitioner-Appellants are among the vulnerable people the City put forward for release. Petitioner's Appendix (May 8, 2020) (hereinafter "A.") at 484-86, 494, 499, 501-03, 507, 527, 530.

Against that backdrop, it is notable that, on appeal, the City "takes no position on the ultimate question of whether appellants should or should not be released" by the Court. DOC Br. at 1. This concession reflects the dilemma for the City created by Respondent Annucci's and the Intervenor Prosecutors' opposition to Petitioner-Appellants release: on the one hand, the City does not want to admit liability to a claim of constitutional deliberate indifference but, on the other hand, the release of these Petitioner-Appellants is a cornerstone of the very strategy the City offers up in its defense to that claim.

[8] Oral Testimony of Dr. Patricia Yang to the New York City Council Justice Committee, Hearing on COVID-19 in City Jails (May 19, 2020) available at https://councilnyc.viebit.com/player.php?hash=ISWBm3U0udx7 (testimony of Dr. Yang beginning at the 00:30 minute mark).

The City's COVID-19 strategy does not even purport to protect Petitioner-Appellants from infection while they remain incarcerated. By DOC's own account, its strategy is one of "flattening the curve of infection" in the jails. DOC Br. at 4. The notion of "flattening the curve" embodies an acknowledgement of the inevitability of the spread of this disease, and a recognition that the best we can do is mitigate the rate of infection so that our capacity for medical intervention is not overwhelmed. "Flattening the curve" is reassurance, of a sort, for reasonably healthy people who, with such medical intervention, have a fair chance at emerging from a COVID-19 infection with their health intact. For Petitioner-Appellants, "flattening the curve" provides no solace, because their odds of emerging from an infection alive, without long-term health consequences, are dire. Respondent-Appellees have never disputed this fact, nor do they provide the Court with any public health or evidence-based rationale for how DOC's strategy for "flattening the curve" will protect these particular individuals. On the contrary, the City's own public health experts repeatedly emphasize that release is a vital component of their COVID-19 strategy because it is the only adequate means of protecting them.

For this reason, refusing to release Petitioner-Appellants – a refusal that, as established above, is in conflict with to the City's COVID-19 public health strategy – violates the affirmative obligation state actors have to protect the health and lives

of people in their custody and amounts to deliberate indifference.[9] A line of cases long pre-dating the COVID-19 pandemic and first arising in the context of sexual assault establishes that deliberate indifference exists where there remains "a substantial risk of serious harm to inmates in spite of efforts reasonably calculated to reduce the risk," where an official "intentionally refuses other reasonable alternatives and the dangerous conditions persist." *Tafoya v. Salazar*, 516 F.3d 912, 918 (10th Cir. 2008) (reversing a grant of summary judgment to jail officials based on evidence sufficient to conclude that the jail's range of responses to ongoing sexual assaults was not working); *Cash v. Cty. of Erie*, 654 F.3d 324, 337 (2d Cir. 2011) (upholding a jury verdict on similar grounds, and finding that "in the context of such an absolute proscription and a duty to protect [incarcerated people], knowledge that an established practice has proved insufficient" is enough to establish deliberate indifference).

In the context of infectious disease, a refusal to take medically necessary steps amid the continued spread of the disease within a correctional institution has been

[9] On appeal, Respondent-Appellees wisely do not defend the lower court's misapplication of the legal standard applicable to federal claims of deliberate indifference. In his brief, however, Respondent Annucci wrongly suggests that people held on parole detainers are not subject to the same legal standard for establishing deliberate indifference as pre-trial detainees, *see* DOCCS Br. at 12 n. 5, without citing any authority for the proposition or acknowledging the existence of on-point authority to the contrary. (Pet. Br. at 19 n.16). Based on that authority, and the lack of any legal support whatsoever for DOCCS's novel theory, the Court should reject this argument out of hand.

found to be deliberate indifference both before and during COVID-19. The Second Circuit has held that "correctional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). As with the tuberculosis outbreak at the center of *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990), the question is not whether some steps have been taken, but whether those steps are reasonable likely to protect the petitioner from the risk of serious medical harm.[10] None of the Respondent-Appellees submitted a single piece of public health evidence suggesting that DOC's actions can actually prevent Petitioner-Appellants from contracting COVID-19 and from the serious, permanent consequences vulnerable people like them face. On the contrary, the City's own public health experts have advocated for Petitioner-Appellants' release. In refusing to follow that advice, Respondent-Appellees have very much neglected the health and lives of Petitioner-Appellants, and their actions are far beyond simple negligence.

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[10] Respondent Annucci attempts to distinguish *DeGidio* on the grounds that the corrections institution there engaged in a "continuing pattern" of failing to protect people from tuberculosis, DOCCS Br. at 17, but that distinction fails. Months into this crisis, the ongoing failure to release Petitioner-Appellants amounts to a "continuing pattern." This is not a case of a doctor on a single occasion withholding medication or making an inappropriate treatment decision; it is a sustained course of action. The critical point establishing liability here, as in *DeGidio*, is Respondent-Appellees' understanding of the special risks to medically vulnerable people – and, in this case, their admission that release is a critical component of an effective disease response strategy – and the failure to take reasonable available steps to accomplish that goal.

Indeed, as argued in the opening brief, several courts have recognized exactly that proposition in finding deliberate indifference in the failure to release similarly medically vulnerable people from other detention centers in light of the COVID-19 pandemic. *See* Pet. Br. at 32-36. Decisions subsequent to the filing of Petitioner's opening brief further support this claim. For example, in *Malam v. Adducci*, No. 20-10829, 2020 WL 2468481 (E.D. Mich. May 12, 2020), the court extended a previously issued temporary restraining order requiring the release of four medically vulnerable people from detention, finding particularly significant the fact that ICE's release of other medically vulnerable detainees demonstrated it was aware of the necessity of release to adequately protect such people but refused to extent that precaution to the instant petitioners and, despite opportunities to do so, provided no "medical professional or public health expert who can reconcile these two conflicting positions." *Id.* at *16. The same is true here.[11]

[11]Respondent Annucci attempts to distinguish these cases on grounds that petitioners in those cases are civil immigration detainees rather than people with criminal histories, DOCCS Br. at 18, but fails to acknowledge controlling precedent applying the same legal standard to both groups, *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019). Moreover, as a plain reading of those cases indicate, many of those detainees are subject to deportation precisely because of their criminal history. Respondent Annucci also points out that the Eleventh Circuit stayed the preliminary injunction in *Swain v. Junior*, 2020 WL 2078580 (S.D. Fla. Apr. 29, 2020), *see* DOCCS Br. at 17 n. 10, but it did so citing doubts as to whether the lower court had the basis to find a "liable state of mind" – precisely the subjective element of deliberate indifference that federal courts require for people post-conviction under the Eighth Amendment and which is not required of the pre-trial detainees here.

Both Petitioner-Appellants and Respondent-Appellees cite multiple lower court cases from across New York reaching conflicting decisions writs of habeas corpus seeking release based on medical vulnerability to COVID-19. Needless to say, none of those cases bind this court. The decisions cited by Respondent-Appellees lack persuasive authority because they suffer from the same flaws as the decision of the court below: several of them turn on crediting DOC's subjective good faith when subjective intent plays no part in the analysis of a pre-trial detainee's Fourteenth Amendment rights, and all of them fail to grasp that the City's strategy for addressing the risk of COVID-19 actually turns on the release of medically vulnerable people like Petitioner-Appellants, and how its remaining efforts can only hope to "flatten the curve" as to those who remain in detention.

Respondent Brann argues that the City's willingness to cooperate in Petitioner-Appellants' release precludes a finding of their deliberate indifference against that particular party. DOC Br. at 1-2, 18-19. But the City's reliance on its broad decarceration efforts as evidence of its lack of deliberate indifference – including not only its release of City-sentenced people but also how it has "worked with state and local officials to identify those most vulnerable to COVID-19's effects and put them forward for early release review" by the other Respondent-Appellees, DOC Br. at 8 – directly contradicts the City's attempt to absolve itself of

responsibility by claiming that "release is not in the Commissioner's power to bestow." *Id.* at 1. It cannot use its decarceration initiatives as both a sword and a shield.

Moreover, to the extent that the City seeks to avoid liability by promising to present no obstacle to Petitioner-Appellants' release, that promise supports granting these writs of habeas corpus based on a finding of deliberate indifference on the part of Respondent DOCCS and – having requested and been granted intervention in this matter by the court below, and asserted their stake in the maintenance of the orders that keep certain of Petitioner-Appellants' incarcerated and violate their constitutional rights – the Intervenor Prosecutors. DOC's claim that it has no stake in the continued incarceration of Petitioner-Appellants clears the path to a grant of relief, and underscores the degree to which the other parties' obstruction of that relief undermines not only Petitioner-Appellants' constitutional rights but also the City's own decarceration-focused strategy for responding to COVID-19.

It is ironic, then, that Respondent Annucci accuses Petitioner-Appellants of second-guessing corrections officials' "discretion in formulating policies" in response to this pandemic. Brief for State Respondent (May 22, 2020) (hereinafter "DOCCS Br.") at 14. To the contrary, Petitioner-Appellants seek to support DOC in achieving its stated goal of releasing people its own system has identified as

especially medically vulnerable. DOCCS and the Intervenor Prosecutors are the parties interfering with that correctional policy goal.[12]

C. In the Alternative, the Court Must Remand to Supreme Court and Order an Evidentiary Hearing.

For the reasons stated above, a finding of deliberate indifference does not turn on resolving disputed facts about whether and to what extent DOC has actually implemented the range of steps Respondent-Appellees claim it has implemented. But, to the extent the Court finds such facts material to its determination, the lower court's failure to engage with any of the myriad disputes surrounding these facts requires vacating the judgment below and remanding to Supreme Court with instructions to conduct a full evidentiary hearing. Pet. Br. at 44 n.24.

The need for an evidentiary hearing as a prerequisite to accepting Respondent-Appellees' factual submissions is rendered even more stark by the new evidence Respondent-Appellees have put into the record on appeal. Petitioner-Appellants do not object to the introduction of this evidence; to the contrary, they urge the Court

[12] Respondent Annucci makes a spurious claim that the Governor's decision to release *other* people held on parole warrants establishes a lack of deliberate indifference toward *these* Petitioner-Appellants. DOCCS Br. at 2. Even if DOCCS' actions to protect others could be construed as excusing them from protecting these medically vulnerable people, which it cannot, it is false to characterize DOCCS has having considered Petitioner-Appellants release and rejected it based on a nuanced assessment of public safety. On the contrary, it is undisputed that none of the Petitioner-Appellees were even considered for this release by DOCCS because they did not meet the narrow eligibility criteria for review, which focused solely on people accused of technical parole violations.

to exercise its original jurisdiction over petitions for habeas corpus pursuant to CPLR § 7000 *et seq.*, in light of the urgent nature of Petitioner-Appellants' request for release, and the speed with which the facts relevant to this petition are changing on the ground.[13]

As detailed at pages 40-44 of Petitioner-Appellants' opening brief, the record regarding the steps the City has allegedly taken to respond to COVID-19 is heavily disputed. On appeal, Respondent-Appellees have supplemented the record with updated information not presented to the court below, including the results of a May 11, 2020 audit by the Board of Correction, information presented for the first time in testimony offered to the New York City Council on May 19, 2020, and information from recent news stories pertaining to COVID-19 in the jails.

That new information raises more questions than it answers. First, while Respondent-Appellees repeatedly emphasize the central importance of population

[13]Respondent-Appellees take a schizophrenic approach to this question. They both ask the Court to treat this as a traditional appeal, reviewed solely on the record presented below, and criticizing Petitioner-Appellants for adding to the record, DANY Br. at 22; DOCCS Br. at 22, and produce to the Court a range of new statistics, documents and information not provided to the lower court and designed to support their contentions. They cannot have it both ways. As argued above, Petitioner-Appellants urge the Court to consider the fullest record possible, and grant the writs on that basis. In the alternative, however, and at a minimum, Respondent-Appellants' need to supplement the record in order to defend the decision below illustrates the error of that decision and the need to reverse and remand for a full evidentiary hearing testing the myriad factual disputes presented by the parties' evidence.

reductions, their own new evidence shows that the jail population has steadily begun to rise again since late April, with new admissions rising rapidly.[14] In its written testimony to the City Council dated May 19, 2020, BOC informed the Council that "we have seen in our daily analysis that admissions are beginning to increase again. This is concerning . . . ." (JA 99). Dr. McDonald, of CHS, and Dr. Cohen, of the BOC, raised significant concerns about this at the City Council hearing, noting that while the rate of infection has subsided, that success has been dependent on reductions in admissions, which are now once again rising, putting incarcerated people in further jeopardy.[15]

Second, BOC's testimony to the City Council undermines Respondent-Appellees' claim that it is effectively deploying masks, gloves and other personal protective equipment (PPE). BOC's recent audit, released in advance of their City Council testimony, found that inmates in common areas were seen wearing masks

[14] Daily population data is listed in the BOC's daily reports, *see supra* note 4.
[15] Oral Testimony of Dr. Ross McDonald to the New York City Council Justice Committee, Hearing on COVID-19 in City Jails (May 19, 2020) available at https://councilnyc.viebit.com/player.php?hash=ISWBm3U0udx7 (last visited May 26, 2020) (question and answer beginning at 2:13:00); Oral Testimony of Dr. Robert Cohen to the New York City Council Justice Committee, Hearing on COVID-19 in City Jails (May 19, 2020) available at https://councilnyc.viebit.com/player.php?hash=ISWBm3U0udx7 (last visited May 26, 2020) (oral statement beginning at 2:30:31).

correctly only 17% of the time, and corrections officers were also observed failing to use, or properly wear, PPE.[16]

Third, the BOC's report and testimony undermine Respondent-Appellees' claim that reductions in population have enabled effective social distancing, and reinforce the evidence presented by Petitioner-Appellants that, even with lower populations, social distance is neither practical nor feasible. "Board staff observed people in custody not practicing social distancing, as they were sitting or standing close together in communal spaces such as dayrooms, especially around TV sets, phones, main doors, and during meals."[17] And a CNN.com article cited by Respondent Brann, DOC Br. at 9, 14, reports that "[p]eople in custody tell CNN they still sleep in beds that are a few feet apart, share phones that are not cleaned between uses, have trouble getting new masks and access to soap."[18]

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[16]New York City Board of Correction Monitoring COVID-19 Responses in New York City Jails, April 5 – April 16, 2020 (May 11, 2020) available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/COVID%20Housing%20Public%20Report%204.5-4.16%20DRAFT%205.11.20_FINAL_1.pdf

[17]New York City Board of Correction Monitoring COVID-19 Responses in New York City Jails, April 5 – April 16, 2020 (May 11, 2020) available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/COVID%20Housing%20Public%20Report%204.5-4.16%20DRAFT%205.11.20_FINAL_1.pdf.

[18] Sonia Moghe, *Inside New York's Notorious Rikers Island Jails 'The Epicenter of the Epicenter' of the Coronavirus Pandemic*, CNN.com (May 18,2020) available at https://www.cnn.com/2020/05/16/us/rikers-coronavirus/index.html.

BOC's new evidence further documents over 1,000 COVID-related grievances had been filed as of May 5 relating to issues such as "lack of access to PPE and cleaning supplies" "concerns about COVID-19 exposure safety and access to medical care" and "complaints made by DOC staff members or their families regarding staff working conditions." (JA 100). Even without knowing whether and to what extent such grievances are substantiated, the high volume of them highlights the gap between Respondent-Appellees' policy proclamations and the view from incarcerated people on the ground.

Beyond these new disputes, Respondent-Appellees continue to disregard the reasons Petitioner-Appellants presented to doubt the rigorousness of their COVID-19 response, including the expert testimony of former Rikers medical professionals like Dr. Jonathan Giftos[19] and Dr. Robert Griefinger, who explain, among other things, that social distancing is not possible even under perfect conditions; the inherent limitations of a symptoms-based screening strategy; and the inevitable gap between policy aspirations and practice with regard to issues such as sanitation, provision and use of PPE. Pet. Br. 40-44.

[19] In the Appendix submitted to the Court on May 8, 2020, Petitioner-Appellants inadvertently substituted an affidavit prepared by Dr. Giftos in relation to the Washington, D.C. jail, rather than his affidavit relating to the New York City jails. A corrected Appendix is filed alongside this brief. Respondent-Appellees are not prejudiced by this error, as they are well aware of the contents of the correct affidavit from prior litigation on this matter.

For reasons stated in Petitioner-Appellants' opening brief and *supra* Parts I.A and B, the Court need not resolve these factual disputes to find that Petitioner-Appellants have established an entitlement to release based on deliberate indifference, and because of the urgent nature of the relief sought, the Court should immediately grant that relief. In the alternative, however, the Court cannot let stand the clearly erroneous denial of the writ based on Respondent-Appellees' unsupportable factual record.

II. WRITS OF HABEAS CORPUS BASED ON CONDITIONS OF CONFINEMENT ARE NOT PROCEDURALLY FORECLOSED.

Although the court below disagreed, on appeal Respondent Annucci and the Intervenor Prosecutors contest the procedural availability of habeas relief. (Respondent Brann does not make this claim.) But they cite no authority procedurally foreclosing such relief, and the Court of Appeals declined an opportunity to foreclose such relief in *People ex rel. Hall v. Lefevre*, where, while finding the allegations insufficient to state a claim, the Court in dicta acknowledged that a claim of deliberate indifference "could result in release." 60 N.Y.2d 579, 580-81 (1983). Such dicta from the highest court of this state is entitled to deference from this Court. *Cf. United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (discussing why certain dicta of the U.S. Supreme Court should be given "considerable weight"). The Appellate Division, Second Department, has similarly acknowledged the availability of habeas relief stemming from conditions of confinement. *People ex*

rel. Kalikow v. Scully, 198 A.D.2d 250, 251 (2d Dept. 1993) ("[I]n some special circumstances, habeas corpus is available to challenge the conditions of confinement").

More broadly, the Court of Appeals has repeatedly emphasized the breadth and flexibility of the habeas writ, counseling strongly against a novel ruling foreclosing its availability in this context. *See People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966) ("[T]o adhere to the rigidities of traditional practice and procedure would be contrary to the spirit and purposes of the writ… cases may arise where the right to invoke habeas corpus may take precedence over procedural orderliness and conformity"); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) ("[A]n individual, once validly convicted and placed under the jurisdiction of the Department of Correction is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society. If these situations were placed *without* the ambit of the writ's protection, we would thereby encourage the unrestricted, arbitrary and unlawful treatment of prisoners, and eventually discourage prisoners from co-operating in their rehabilitation."). And the fact that conditions of confinement claims may also be brought as an Article 78 or declaratory judgment action does not foreclose the availability of habeas relief, especially when that vehicle is the only mechanism capable of delivering release as a remedy. *Cf. Kaufman v. Henderson*, 64 A.D.2d 849, 850 (4th Dep't 1978) (holding that the

availability of an Article 78 to challenge a parole determination does not foreclose habeas relief for the same subject, when the action challenges the underlying constitutionality of detention, because "when appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment").

The United States Supreme Court long acknowledged the possibility that litigants could use writs of habeas corpus in this fashion. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("This is not to say that habeas corpus may not also be available to challenge such prison conditions. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.") (internal citation omitted). And federal courts considering the analogous federal habeas statute, including those in the Second Circuit, have recognized the viability of petitions premised on the risk of exposure to COVID-19. Indeed, "every court of appeals that has addressed the question has held that a district court judge may order a person released pursuant to" the federal habeas statute. *United States v. Harris*, No. CR 19-356, 2020 WL 1503444, at *4 (D.D.C. Mar. 27, 2020) (citing cases). *See also Basank*, 2020 WL 1481503 ("An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing.") (citing *Roba v.*

United States, 604 F.2d 215, 218–19 (2d Cir. 1979)); *Ferreyra*, 2020 WL 1989417 at *7 ("An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing."); *Ortuño*, 2020 WL 1701724 at *2 (noting that it is "fairly well established that federal habeas corpus actions are now available to deal with questions concerning both the duration and the conditions of confinement") (internal quotations and citation omitted); *Favi*, 2020 WL 2114566 at *7 ("[T]he Court finds that Petitioner's conditions-of-confinement claim directly bears on not just his conditions of confinement, but whether the fact of his confinement is constitutional in light of the conditions caused by the COVID-19 pandemic. Accordingly, the Court finds that his claim can proceed in a habeas corpus petition and the Court proceeds to a determination of the merits.") (emphasis in the original).

In support of this proposition, Respondent Annucci cites several cases brought by incarcerated people challenging the discontinuation of treatment for Hepatitis C, but in all of those cases courts found that the relief sought was in fact to continue appropriate treatment, not obtain immediate release. DOCCS Br. at 30 (citing *Glaus v. Anderson*, 408 F.3d 382 (7th Cir. 2005); *People ex rel. Barnes v. Allard*, 25 A.D.3d 893 (3d Dep't 2006); *People ex rel. Sandson v. Duncan*, 306 A.D.2d 716 (3d Dep't 2003)). These cases, as well as the bulk of the lower court cases cited by

Respondent-Appellees, merely hold that the petitioners there *did not* state a claim sufficient to entitle him to release, not that such relief is legally foreclosed. Indeed, far from foreclosing such relief, the Seventh Circuit in *Glaus* acknowledged that "the Supreme Court has left the door open a crack for habeas corpus claims challenging prison conditions." 408 F.3d at 387.

III. TO THE EXTENT THAT INDIVIDUALIZED INQUIRIES INTO WHETHER PETITIONER-APPELLANTS POSE A FLIGHT RISK ARE REQUIRED, THE COURT SHOULD VACATE AND REMAND TO SUPREME COURT TO ORDER AN EVIDENTIARY HEARING.

Respondent-Appellee Annucci and the Intervenor Prosecutors further defend the lower court's conclusion that Petitioner-Appellants failed to present sufficient individualized information to enable the court to engage in the balancing test required by *Cooper v. Morin,* 49 N.Y.2d 69 (1979). On the contrary, as argued fully in Petitioner-Appellants' opening brief, the court below had complete information about Petitioner-Appellants' medical conditions, criminal charges, bail and parole status, and criminal histories. Pet. Br. at 49-50. The court simply refused to weigh this evidence.

DOCCS and the Intervenor Prosecutors claim that the court below was not "privy to" information about Petitioner-Appellants' medical conditions, but this is false. Detailed information about their medical conditions were presented in both the petitions filed with the court below (A 294-327; JA 48-69). Counsel for Petitioner-Appellants was prepared to present the records during the hearing, as has been the

standard practice in the many hundreds of writs filed across the City and the many thousands of bail-related pre-trial release writs that preceded the COVID-19 pandemic, but none of the Respondents disputed the information about Petitioners' medical condition and, in any case, the court's refusal to conduct any individualized inquiry deprived Petitioner-Appellants of the opportunity to make those submissions should the court below have found such documentation necessary to reach its conclusion.

For the reasons stated above, such individualized inquiries are not necessary to grant Petitioner-Appellants writs of habeas corpus. *Ferreyra*, 2020 WL 1989417, at *2 ("[T]he health risks posed by COVID-19 and the constitutional claims presented do not turn on facts unique to each Petitioner beyond their having preexisting conditions that make them vulnerable to the virus."). To the extent that the Court finds the weighing of such evidence necessary, however, the Court should vacate based on the legal errors in the court's decision below and remand with instructions to conduct a full evidentiary hearing.

CONCLUSION

For the forgoing reasons, the Court should grant Petitioner-Appellants' writs of habeas corpus or, in the alternative, vacate the decision of the court below denying those writs and remand with instructions to hold a full evidentiary hearing.

Respectfully Submitted,

JANET E. SABEL
Attorney for Petitioner-Appellants

COREY STOUGHTON
Of Counsel
May 27, 2020

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :
EX REL. Corey Stoughton on behalf of Venus Williams, et al.

Petitioner-Appellants,

v.

: Index no. 451609-2020

CYNTHIA BRANN, COMMISSIONER, NEW YORK CITYDEPARTMENT OF CORRECTION; ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, :

Respondent-Appellees.

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ADDENDUM

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 N.Y.C.R.R. § 1250.8(j), appellant states the following:

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