To be argued by:
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Supreme Court of the State of New York
Appellate Division – First Department

Index No. 451069-2020

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
COREY STOUGHTON on behalf of VENUS WILLIAMS, et al.,

Petitioners-Appellants,

v.

CYNTHIA BRANN, Commissioner, New York City Department of Correction, and ANTHONY ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondents-Respondents.

BRIEF FOR STATE RESPONDENT

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PRELIMINARY STATEMENT

In this proceeding, several parole violators who are being detained pending final revocation hearings sought release through a writ of habeas corpus due to concerns about the risks posed by COVID-19. These petitioners are under the jurisdiction of the New York State Department of Corrections and Community Supervision (DOCCS), but are being held in facilities operated by the New York City Department of Correction (City DOC). Supreme Court, New York County (Statsinger, J.) concluded that petitioners' detention is not unlawful and denied the writ.

This Court should affirm. The sole basis for petitioners' claim for release is that respondents here (both DOCCS and City DOC) have been deliberately indifferent to their medical needs during the COVID-19 crisis. But Supreme Court correctly found no such deliberate indifference on the part of DOCCS.[1] To the contrary, DOCCS has already specifically responded to the COVID-19 crisis by identifying and voluntarily releasing detained parole violators who can be released consistent with public safety. The parole violators who remain in detention—including the

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[1] This brief is filed solely on behalf of DOCCS.

parolee petitioners in this case, who have extensive histories of violent crime—are among those whom DOCCS has determined cannot be released safely. Moreover, DOCCS has not been deliberately indifferent in relying on City DOC's separate efforts to maintain the safety of its facilities in light of the COVID-19 crisis—efforts that City DOC explained below and will be defending in a separate brief in this appeal. Considering the efforts by both DOCCS and City DOC, numerous lower courts have rejected claims that respondents here have been deliberately indifferent to the medical needs of parole violators held in City DOC facilities.

Even if petitioners had shown deliberate indifference—and they have not—release would not be a proper remedy for their claims, and habeas would accordingly not lie. The remedy for deliberate indifference is appropriate treatment, not release.

QUESTIONS PRESENTED

1. Did petitioners fail to establish that DOCCS was deliberately indifferent to their medical needs, given respondents' extensive efforts to combat COVID-19?

Supreme Court answered this question in the affirmative.

2. Is release pursuant to a writ of habeas corpus in any event an improper remedy for petitioners' claims?

Supreme Court answered this question in the affirmative.

STATEMENT OF THE CASE

A. Factual Background

DOCCS and its Board of Parole administer the State's parole system. (Joint Appendix for Resp'ts (J.A.) 236 (¶¶ 1-3).) Ordinarily, when a hearing officer finds probable cause to believe a parolee "violated one or more of the conditions of parole in an important respect," the officer "shall direct that the alleged violator be held for further action." 9 N.Y.C.R.R. § 8005.7(a)(5). That further action includes a final revocation hearing, typically within 90 days, that will determine whether a violation has occurred and, if so, whether the violator should be reincarcerated or released back to parole. *See* Executive Law § 259-i(3)(f).

These hearings are now proceeding telephonically in light of COVID-19.

Although New York law thus authorizes the detention of all parole violators pending the disposition of a final revocation hearing, DOCCS has reasonably revisited that policy in light of the COVID-19 crisis. In response to a directive from Governor Cuomo following the outbreak of COVID-19, DOCCS undertook a comprehensive review of parole violators held in jails statewide to determine whether they could be released safely, thus reducing the population in local jails. (J.A. 236-237 (¶ 4).)[2]

Given the population at issue, DOCCS's review focused not just on public health but also on the need to ensure safety to parolees, DOCCS employees, and the public at large. Taking all of these considerations into account, DOCCS developed eligibility criteria for releasing qualifying parole violators. Parolees detained on technical parole-violation or absconding charges were eligible for release if they (1) had a relatively low risk score using the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) assessment; (2) were not convicted of a

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[2] The cited declaration of DOCCS's acting director, respondent Anthony Annucci, was not included in the record before Supreme Court because it was prepared only after DOCCS's initial review process—and the briefing in Supreme Court in this case—was complete.

sex offense; (3) did not suffer from relevant mental illness; (4) did not have a history of domestic violence; (5) did not commit a parole violation involving weapons or violent conduct; and (6) had an existing residence or placement in a housing facility. (J.A. 237 (¶ 5).)

Pursuant to these criteria, DOCCS voluntarily released approximately half of all parolees held statewide on technical parole violations or absconding charges—some 760 parolees as of April 10, 2020. (J.A. 237-238 (¶¶ 6, 8).) DOCCS also implemented new criteria for issuing parole warrants. (J.A. 238 (¶ 8), 260.) Several of the original petitioners in this case were released pursuant to DOCCS's review process and are thus no longer parties to this appeal. (J.A. 212, 214-215, 226-227, 230.)

The remaining parolee petitioners here—Anthony Brown, Freddie Johnson, Anibal Quinones, and Joseph Torres—are parole violators who were arrested for new crimes and determined not to qualify for release. *See* Br. for Pet'r-Appellants (Br.) at 1 n.1, 14-17. Their individual circumstances are described below.

Anthony Brown is on parole for a violent robbery conviction for which he was sentenced to fifteen years' incarceration. In that offense, Brown attempted to steal merchandise from a store and then assaulted

a female store employee. After his release on parole, Brown was recently rearrested for menacing a store employee with a knife, testing positive for marijuana, and violating parole program and curfew requirements. Brown also has an extensive history of felony and other convictions largely involving theft or drugs, and a history of prior parole violations. (J.A. 217-218.) Brown is 55 years old and states that he has asthma, high blood pressure, and cardiovascular disease. Br. at 14.

Freddie Johnson was sentenced to a maximum term of life imprisonment after his most recent conviction for persistent sexual abuse. In that offense, Johnson rubbed his erect penis on a woman's buttocks on a subway. After his release on parole, Johnson was rearrested on new persistent sexual abuse charges. Johnson is a level 3 sex offender—the highest sex-offender risk level. He has a decades-long history of over 30 convictions for sexual abuse as well as other convictions for offenses including assault, robbery, larceny, public lewdness, and trespass. (J.A. 49-50, 211.) Johnson is 61 years old and states that he has been diagnosed with asthma, hypertension, and cardiovascular and respiratory issues. Br. at 15-16.

Anibal Quinones was convicted of second-degree burglary and, after

his release on parole, was recently rearrested on additional burglary and assault charges. The conduct resulting in Quinones's most recent arrest—his second parole violation in less than two months since his release—involved opening packages that did not belong to him in a residential building and then biting the two civilians who detained him while awaiting police. Quinones has an extensive history of felony robbery and grand larceny and misdemeanor theft, drug, and other convictions. Quinones repeatedly has violated the terms of parole and probation, including in changing his address without informing his parole officer and failing to make his office report. (J.A. 65-66, 230-31.) Quinones is 55 years old and states that he has health problems including being pre-diabetic and suffering from high blood pressure. Br. at 16-17.

Joseph Torres was convicted of two burglary offenses. In those offenses, Torres entered a victim's apartment and stole property including a computer, and entered a bar and stole property. After his release on parole, Torres was recently rearrested for assault, absconding by changing his residence without informing his parole officer and failing to make his office report, and failing to attend his treatment program. Torres also has an extensive criminal history dating back to his youth,

largely involving burglary, larceny, drug, and trespass offenses. (J.A. 221-22.) Torres is 55 years old and states that he has been diagnosed with hepatitis C and a heart murmur. Br. at 15.

Pursuant to Executive Law § 259-i(3), the parolee petitioners are all detained in City DOC facilities. The State does not control those facilities and thus lacks first-hand knowledge of conditions there. However, City DOC submitted affirmations and other evidence attesting to numerous actions it has taken in response to the COVID-19 outbreak to ensure the health and safety of detainees such as petitioners. (*See, e.g.*, J.A. 33-34, 36-39, 46-47, 177-207.) According to that evidence, City DOC's actions have included identifying medically vulnerable detainees, separating them from the general population, and monitoring them; providing masks to all City DOC staff and detainees; requiring staff to wear masks at all times and detainees to wear masks at all times in common areas; imposing new sanitizing, cleaning, and training protocols; ensuring availability of adequate sanitization and cleaning supplies; and substantially reducing the detainee population to support social distancing. (*See id.*) Recent data suggest that these efforts flattened the curve of infection at City DOC facilities by mid-April, and that the

number of infections in those facilities has since begun to decrease.[3]

B. Procedural Background

On March 19, 2020, 116 petitioners detained in City DOC facilities filed this mass petition for a writ of habeas corpus against both DOCCS and City DOC. Petitioners claimed that City DOC's and, in the case of detained parole violators, DOCCS's, failure to release them in light of the health risk posed by COVID-19 constitutes deliberate indifference in violation of the federal and state constitutions. (Pet'r-Appellants' Appendix (A.) 61-100.)[4] Petitioners ranged in age from 19 to 76, and in some cases stated that they had one or more of a wide range of health conditions. (A. 64-81.)

On March 20, Supreme Court, New York County (Statsinger, J.), heard extensive argument on the petition, and subsequently denied the

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[3] *See* New York City Board of Correction, *COVID-19 Update*, at 8 (May 11, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/BOC%20Board%20Update%20-%20COVID-19_5.11.2020.pdf.

[4] The non-parolee petitioners, who were detained exclusively on new criminal charges, have not been detained by DOCCS; they are detained only by City DOC. (A. 81 (¶¶ 124-125).)

petition, finding that respondents have not been deliberately indifferent to petitioners' medical needs. (A. 4-60.)

On April 1, petitioners filed a motion for leave to renew, claiming that a significant increase in cases of COVID-19 since the court denied the petition justified renewal of the petition. (A. 327-358.) By that time, only 79 petitioners joined the motion, because many others had been voluntarily released in the two weeks since the petition was filed. (A. 329, 469, 481.)

On April 13, the court granted the motion to renew but again denied the petition. (A. 469-483.) In a thorough written opinion, the court concluded that the "extensive record" of respondents' remedial efforts in response to COVID-19 is "well documented both in connection with this motion and elsewhere," and demonstrates that respondents have not been deliberately indifferent to petitioners' medical needs. (A. 474.) Indeed, the court found that respondents' efforts are "probably far greater" than what the federal and state constitutions require. (A. 476.) Supreme Court also noted that petitioners had failed to present sufficient evidence regarding individual petitioners to permit an individualized review of their claims. (A. 480-483.) Finally, Supreme Court concluded that it did

not have authority to grant release through a writ of habeas corpus when petitioners are not illegally detained. (A. 480.)

Ten petitioners who remain in City DOC facilities are pursuing this appeal. Br. at 1. Only four petitioners—parolees Brown, Johnson, Quinones, and Torres—are under the jurisdiction of DOCCS. Br. at 14-17.

ARGUMENT

POINT I

SUPREME COURT CORRECTLY FOUND NO CONSTITUTIONAL VIOLATION WARRANTING HABEAS RELEASE

A. DOCCS Has Not Been Deliberately Indifferent to Petitioners' Medical Needs During the COVID-19 Crisis.

Petitioners' sole claim for release here is that respondents have been deliberately indifferent to their medical needs during the COVID-19 crisis, in violation of the U.S. and New York State Constitutions. To establish deliberate indifference, petitioners must prove, at a minimum, that respondents "acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed" "even though the [respondents] knew, or should have

known, that the condition posed an excessive risk to health or safety." *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *accord* Br. at 22.[5]

Supreme Court correctly found that this rigorous standard has not been satisfied here. Petitioners have not proven that DOCCS acted intentionally or recklessly in imposing or failing to mitigate an excessive risk to their health. To the contrary, petitioners acknowledge that "there is no disputing" that respondents have taken "many" steps to address the COVID-19 outbreak specifically. Br. at 38. These steps include DOCCS's extensive efforts to identify and release those parolees who can be released consistent with public safety. See *supra* at 4-5. Moreover,

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[5] Petitioners note that pretrial detainees, unlike inmates convicted of crimes, need not show that respondents are subjectively aware that the detainees face a substantial risk of harm. Br. at 24. But, unlike pretrial detainees, the parolee petitioners of whom DOCCS is a custodian have been convicted of crimes, and are detained on that basis. *See Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *see also Hamilton v. Lyons*, 74 F.3d 99, 106 (5th Cir. 1996) ("[T]he detention and subsequent reincarceration of a parolee are only *triggered* by the new arrest; detention and reincarceration are *justified* by the prior conviction."). In any event, there is no dispute here as to DOCC's awareness of the COVID-19 risk: DOCCS understands well the serious risk posed by COVID-19. The issue in dispute is the adequacy of respondents' response to that risk. And even a pretrial detainee "must prove that [a respondent] acted intentionally or recklessly, and not merely negligently" in imposing or failing to mitigate the risk in order to show deliberate indifference. *See Darnell*, 849 F.3d at 36.

although DOCCS does not control actions at City DOC facilities, DOCCS reasonably relied on City DOC's own response to the COVID-19 crisis, which the record shows has involved extensive efforts to minimize COVID-19 risks for detainees at its facilities—particularly those with medical conditions. See *supra* at 8-9.

As lower courts have recently found, publicly available data demonstrate that respondents' "dedicated and relentless pursuit" of antivirus efforts is "significantly stop[ping] the spread" of COVID-19 at City DOC facilities. *People ex rel. Moulter v. Brann*, 2020 N.Y. Slip Op. 50436(U), at *3 (Sup. Ct. Bronx County 2020) (quotation marks omitted).[6]

Petitioners offer no evidence to suggest otherwise. Instead, they rely heavily on an inapposite declaration by Jonathan Giftos. *See* Br. at 11, 36-38, 40-41. But that declaration is from a Washington, D.C. case and addresses conditions in a D.C. halfway house—not New York City

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[6] *See also* New York City Board of Correction, *COVID-19 Update*, *supra*, at 8.

jails. Giftos does not claim to have even considered DOCCS or City DOC's responses to COVID-19. (A. 531-542.)[7]

More fundamentally, the constitutional issue here does not ultimately turn on whether detainees continue to face health risks, but rather on whether DOCCS has been deliberately indifferent to petitioners. (A. 476.) And petitioners acknowledge that DOCCS, far from being deliberately indifferent, has engaged in considerable efforts to address the COVID-19 crisis. Br. at 38. Although petitioners may wish that DOCCS made different choices, courts have recognized that corrections officials have discretion in formulating policies, particularly those that affect security. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979); *Swain v. Junior*, No. 20-11622-C, 2020 WL 2161317, at *4 (11th Cir. May 5, 2020) (jail officials must have discretion to balance COVID-19 public-health goals such as social distancing with other jail requirements);

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[7] Moreover, petitioners cite the Giftos declaration as support for a number of purported facts that are nowhere to be found in the declaration. *Compare, e.g.*, Br. 36-37 (quoting statement purportedly from Giftos Decl. ¶ 10)*, with* A. 534 (Giftos Decl. ¶ 10) (including no such statement); Br. at 38 (citing Giftos Decl. ¶ 18 for assertion related to showers, phones, and hallways), *with* A. 537 (Giftos Decl. ¶ 18) (unrelated statement); Br. at 40 (citing Giftos Decl. ¶ 9 for assertion related to testing), *with* A. 534 (Giftos Decl. ¶ 9) (unrelated statement).

Valentine v. Collier, 956 F.3d 797, 802-03 (5th Cir. 2020) (similar for prison officials).

Supreme Court thus properly rejected petitioners' claims that DOCCS has been deliberately indifferent to detainees' medical needs—and indeed correctly recognized DOCCS's "well documented" and "extensive record of remedial efforts." (A. 474, 476.) Likewise, other courts repeatedly have found that DOCCS and City DOC have acted "with responsible concern, and attentiveness" in response to COVID-19, and that petitioners have "fallen woefully short of establishing that either the City, or the State, is acting with deliberate indifference." *Moulter*, 2020 N.Y. Slip Op. 50436(U), at *3 (quotation marks omitted); *see also, e.g.*, *People ex rel. Ferro v. Brann*, No. 1818/19, 2020 WL 2462237, at *1 (2d Dep't May 12, 2020) (no deliberate indifference toward City DOC inmate who contracted COVID-19); *People ex rel. Coleman v. Brann*, 2020 N.Y. Slip Op. 20090, at *5 (Sup. Ct. Bronx County 2020) ("In finding a lack of deliberate indifference, I join the large majority of courts that have recently examined the issue and reached the same conclusion.").[8]

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[8] Several additional unpublished opinions reaching the same conclusion are included in the respondents' joint appendix. (J.A. 103-76.)

Petitioners cite a single trial-court decision ordering temporary release of some City DOC detainees in light of COVID-19 risks. Br. at 33 (citing *People ex rel. Stoughton v. Brann*, 2020 N.Y. Slip Op. 20081 (Sup. Ct. N.Y. County 2020)). But that court did "not at all question the good faith" of the respondent DOCCS and City DOC officials. *Stoughton*, 2020 N.Y. Slip Op. 20081, at *3. Rather, the court improperly ordered release without finding the intentional or reckless conduct by respondents that is required for a constitutional violation. *See id.* In ordering release, the court also appears to have weighed heavily that infections at City DOC facilities were "spiking" at the time—before respondents' efforts had time to flatten the curve. *Id.* at *2.[9]

None of the other cases on which petitioners rely involve the respondents here—and none are apposite.

First, unlike in this case, the respondents in many of the cases petitioners cite had "not implemented specific measures to identify,

[9] In addition, the court ordered the release only of those petitioners who had proven that their individual circumstances put them at greatest risk. *See Stoughton*, 2020 N.Y. Slip Op. 20081, at *4. The court denied release to many others, including older petitioners and petitioners with serious medical conditions such as HIV, where the condition was effectively controlled. *See id.*

protect, and treat inmates who are at a heightened risk" from COVID-19. *Ferreyra v. Decker*, No. 20-cv-3170, 2020 WL 1989417, at *8 (S.D.N.Y. Apr. 27, 2020); *see, e.g.*, *People ex rel. Gregor v. Reynolds*, No. CV20-0150, 2020 WL 1910116, at *5 (Sup. Ct. Essex County Apr. 17, 2020) (respondents failed to take "the most important, scientifically-based, best practices recommended by the United States Center for Disease Control"). In one case arising outside of New York, the defendants at issue had policies to protect inmates in theory, but evidence from plaintiffs and the defendants' own staff showed that the policies had "not been adequately communicated to DOC staff for operationalization." *Banks v. Booth*, No. 20-849, 2020 WL 1914896, at *8 (D.D.C. Apr. 19, 2020). Unlike those cases, this case does not involve a "continuing pattern of reckless and negligent conduct" by DOCCS that has ignored the risks posed by COVID-19. *DeGidio v. Pung*, 920 F.2d 525, 531, 533 (8th Cir. 1990).[10]

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[10] Petitioners also cite a trial-court decision in another State that faulted the defendant jail officials for failing to stem the "exponential rate of infection since this case commenced." *Swain v. Junior*, No. 1:20-cv-21457, 2020 WL 2078580, at *15-16 (S.D. Fla. Apr. 29, 2020). The Eleventh Circuit has stayed that decision pending appeal, explaining that the district court erred in "treat[ing] the increase in COVID-19 infections" alone "as proof that the defendants deliberately disregarded an intolerable risk," because deliberate indifference requires a "liable state

Second, in most of the cases petitioners cite, the petitioners were civil immigration detainees, rather than parole violators with extensive histories of violent crime and recent evidence of serious misconduct.[11] In the immigration detainee cases where petitioners were released—unlike this one—the petitioners posed no "specific danger to the public or risk of

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of mind." 2020 WL 2161317, at *4 (citing *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)).

[11] *See Favi v. Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566 (C.D. Ill. May 4, 2020); *Kevin M. A. v. Decker*, No. 20-4593, 2020 WL 2092791 (D.N.J. May 1, 2020); *Medeiros v. Martin*, No. 20-178, 2020 WL 2104897, at *1 (D.R.I. May 1, 2020); *Coreas v. Bounds*, No. 20-780, 2020 WL 2201850 (D. Md. Apr. 30, 2020); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020); *Chavez Garcia v. Acuff*, No. 20-cv-357, 2020 WL 1987311 (S.D. Ill. Apr. 27, 2020); *Ferreyra*, 2020 WL 1989417; *Roman v. Wolf*, No. EDCV20-768, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020), *stayed pending appeal*, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020); *Kaur v. DHS*, No. 2:20-cv-3172, 2020 WL 1939386 (C.D. Cal. Apr. 22, 2020); *Fraihat v. ICE*, No. EDCV 19-1546, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020); *Zaya v. Adducci*, No. 20-10921, 2020 WL 1903172 (E.D. Mich. Apr. 18, 2020), *order extended*, 2020 WL 2079121 (E.D. Mich. Apr. 30, 2020); *Cristian A.R. v. Decker*, No. 20-3600, 2020 WL 2092616 (D.N.J. Apr. 12, 2020); *Valenzuela Arias v. Decker*, No. 20-cv-2802, 2020 WL 1847986 (S.D.N.Y. Apr. 10, 2020); *Ortuno v. Jennings*, No. 20-cv-2064, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020), *order extended*, 2020 WL 1899570 (E.D. Mich. Apr. 17, 2020); *Castillo v. Barr*, No. CV 20-605, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020); *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Basank v. Decker*, No. 20 civ. 2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020).

flight that would justify [their] confinement." *Ferreyra*, 2020 WL 1989417, at *11. By contrast, courts have denied release when detained individuals *do* pose a public-safety or flight risk. *See, e.g.*, *Favi*, 2020 WL 2114566, at *9 ("release on this claim would no longer be authorized" if "continued detention is necessary to prevent a risk of flight or a threat to public safety"); *Gayle*, 2020 WL 2086482, at *7 (permitting release only after consideration of factors including "eligibility for bond" and "prior criminal history"); *Chavez Garcia*, 2020 WL 1987311, at *3 ("The Court's order does not prevent Respondents from taking Petitioner back into custody should Petitioner commit any crimes that render him a threat to public safety or otherwise violate the terms of release.").

B. The Absence of Deliberate Indifference Also Precludes Any Relief Under the New York Constitution.

The New York Constitution does not change the constitutional standard applicable here. *Cooper v. Morin*, 49 N.Y.2d 69 (1979), on which petitioners rely for a different standard (Br. at 46-49), "was explicitly limited to pretrial detainees who . . . enjoy the presumption of innocence." *Matter of Victory v. Coughlin*, 165 A.D.2d 402, 404 (3d Dep't 1991). But the petitioners in this case include convicted violent felons who have

engaged in additional serious misconduct in violation of their parole conditions. *Cooper* is inapplicable to these parole violators. *See, e.g.*, *Coleman*, 2020 N.Y. Slip. Op. 20090, at *5. (*See also* A. 478.)

In any event, even if this Court were to apply *Cooper*'s balancing "of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement," as Supreme Court recognized (A. 477-478), the balance would tip strongly in favor of DOCCS. *See Cooper*, 49 N.Y.2d at 79. The interests supported by DOCCS's decision to continue detaining some parole violators, while releasing others—such as protecting the public from the threat posed by violent petitioners and ensuring the petitioners' appearance for future hearings and return to incarceration if ordered—outweigh any potential harm to petitioners.

Petitioners err in asserting that public safety is not a relevant consideration. Although "[t]he only legitimate purpose for pretrial detention" "is to assure the presence of the detainee for trial," *Cooper*, 49 N.Y.2d at 81, the parole violator petitioners are not pretrial detainees. "Unlike the typical pretrial detainee, the justification for the detention of a detained parolee is dual." *Hamilton*, 74 F.3d at 106. That dual

justification includes not only securing of the detainee's presence, but also public-safety concerns. *Id.*; *see also Morrissey*, 408 U.S. at 483.

C. Petitioners Failed to Offer Evidence of Their Individual Constitutional Claims.

As Supreme Court correctly recognized, petitioners also failed to establish deliberate indifference for the separate but related reason that they offered no individual circumstances sufficient to warrant a finding of deliberate indifference. (A. 480-483.) On a deliberate-indifference claim, it is the petitioner's burden to prove that each respondent acted intentionally or recklessly to impose or fail to mitigate an excessive risk to the individual petitioner's health. *See Darnell*, 849 F.3d at 35.[12]

Petitioners did not satisfy this standard of proof here. For each of the parolee petitioners at issue in this appeal, the petition included just a single sentence regarding the petitioner's age and, in some cases, health conditions, which varied widely. (A. 65 (¶ 9), 69 (¶ 41), 70 (¶ 49), 79 (¶ 10).)

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[12] Petitioners are thus wrong to claim that DOCCS bears the burden of disproving petitioners' constitutional claims here. Br. at 50. In any event, DOCCS has submitted unrebutted evidence of the petitioners' individual public-safety and flight risks that justify their detention, and evidence of its policies to respond to COVID-19. (J.A. 208-260.)

Even in petitioners' motion for renewal, the petitioners at issue here still included no evidentiary support as to their own circumstances. (A. 359-468.) And neither in the original petition nor the motion for renewal did petitioners explain their specific conditions of confinement. (A. 61-101, 327-58.)

Only for the first time on appeal have petitioners provided any medical related records. But it is improper to introduce such evidence for the first time on appeal when it could have been presented below. *See, e.g.*, *Matter of Beiny v. Wynyard*, 132 A.D.2d 190, 210 (1st Dep't 1987). And, in any event, the records that petitioners have presented are largely one-page form letters repeating the same one-sentence description of petitioners' age and health conditions that was included in the petition, with no detail as to the specific risks these petitioners might face from COVID-19. (A. 484-530.) Nor have petitioners provided any evidence as to their individual conditions of confinement.

Another court recently rejected a COVID-19-based deliberate-indifference claim on the basis of a similar failure of proof. As that court explained, a record that "is devoid of evidence of [a petitioner's] individual

circumstances" cannot support a deliberate-indifference claim. *Verma v. Doll*, No. 4:20-cv-14, 2020 WL 1814149, at *6 (M.D. Pa. Apr. 9, 2020).

POINT II

SUPREME COURT CORRECTLY CONCLUDED THAT RELEASE IS NOT AN APPROPRIATE REMEDY FOR PETITIONERS' CLAIMS

Even if petitioners' constitutional claims did have merit—and they do not (see *supra* Point I)—release would not be a proper remedy. When a court finds that the government acts with deliberate indifference to a detainee's needs, "the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option." *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (citing additional cases); *accord People ex rel. Barnes v. Allard*, 25 A.D.3d 893, 894 (3d Dep't 2006); *People ex rel. Sandson v. Duncan*, 306 A.D.2d 716, 717 (3d Dep't 2003). "Granting any individual's release from custody due to prison conditions would be unprecedented." *Moulter*, 2020 N.Y. Slip Op. 50436(U), at *2.

Because release is not a proper remedy, petitioners cannot succeed on their habeas petition. If "the relief requested by petitioner would not result in his immediate release, the remedy of habeas corpus is not

available." *People ex rel. Knowles v. Scully*, 101 A.D.2d 895, 895 (2d Dep't 1984); *accord People ex rel. Townsend v. New York State Bd. of Parole*, 97 A.D.2d 386, 387 (1st Dep't 1983) (similar).

For these reasons, courts repeatedly have refused to order release in habeas cases raising COVID-19-based deliberate-indifference claims, including at City DOC facilities. *See, e.g.*, *Ferro*, 2020 WL 2462237, at *1; *People ex rel. Harpaz v. Brann*, No.400011/2020, at 8 (Sup. Ct. Bronx County Apr. 22, 2020) (J.A. 171); *Moulter*, 2020 N.Y. Slip Op. 50436(U), at *2-3; *People ex rel. Shoshany v. Brann*, No. 260222/2020, at 7 (Sup. Ct. Bronx County Apr. 11, 2020) (J.A. 109); *People ex rel. Jackson v. Brann*, Nos. CR-5432-20BX, CR-5433-20BX, at 2-3 (Sup. Ct. Bronx County Apr. 8, 2020) (J.A. 121-122).

Petitioners cite no appellate decision ordering release as a remedy for deliberate indifference. S*ee* Br. at 25-27; *cf. Helling v. McKinney*, 509 U.S. 25 (1993); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). Likewise, the trial-court decisions on which petitioners rely that found deliberate indifference toward criminal inmates or pretrial detainees typically did not order release. *See Wilson v. Williams*, No. 4:20-cv-794, 2020 WL 1940882, at *10-11 (N.D. Ohio Apr. 22, 2020) (ordering transfer

to another facility, or compassionate or home release or parole if eligible); *Banks*, 2020 WL 1914896, at *13-*15 (ordering improvements in facilities' COVID-19 response); *see also Narvaez v. City of New York*, No. 16-cv-1980, 2017 WL 1535386 (S.D.N.Y. Apr. 17, 2017) (plaintiff did not seek release); *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (refusing to find deliberate indifference, much less grant release, where plaintiffs could be housed with inmates who tested positive for tuberculosis).

The cases petitioners cite that ordered release of inmates convicted of crimes typically did so not on the basis of constitutional deliberate-indifference findings, but rather on the basis of specialized federal statutory schemes for release of qualified inmates. *See United States v. Pabon*, No. CR-17-165-1, 2020 WL 2112265, at *2, *9 (E.D. Pa. May 4, 2020); *United States v. Kelly*, No. 3:13-cv-59, 2020 WL 2104241, at *2 (S.D. Miss. May 1, 2020); *United States v. Park*, No. 16-cr-473, 2020 WL 1970603, at *6 (S.D.N.Y. Apr. 24, 2020); *United States v. Rodriguez*, No. 2:03-cr-271, 2020 WL 1627331, at *1, *12 (E.D. Pa. Apr. 1, 2020); *United States v. Fellela*, No. 3:19-cr-79, 2020 WL 1457877, at *1 (D. Conn. Mar. 20, 2020); *see also United States v. Kennedy*, No. 18-20315, 2020 WL 1493481, at *1 (E.D. Mich. Mar. 27, 2020) (ordering only temporary

release), *reconsideration denied*, No. 18-20315, 2020 WL 1547878 (E.D. Mich. Apr. 1, 2020). These federal statutory schemes are not applicable to the state detainee petitioners here.

CONCLUSION

For all the reasons set forth above, the Court should affirm Supreme Court's decision and order.

Dated: New York, New York
May 22, 2020

Respectfully submitted,

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AFFIRMATION OF SERVICE

Philip J. Levitz affirms upon penalty of perjury:

I am over eighteen years of age and an Assistant Solicitor General in the office of the Attorney General of the State of New York, attorney for the State Respondent herein. On May 22, 2020, I served, with consent of opposing counsel or the opposing party, the accompanying Brief for State Respondent by sending one portable document format copy by electronic mail as complete and effective personal service upon the following named person(s):

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