IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

JEANNE VOLTZ-LOOMIS; GARY ZACHARIAH THOMAS; DENISE EDGAR; BRANDON MOORE; ALLEN SLAUGHTER; GAY OPEL STANLEY; BRISON AKEEM ALLISON; PROTECTION & ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.; JOHN DOES 1 through 10; JANE ROES 1 through 10; on their own and on behalf of a class of similarly situated persons,

Petitioners,

v.

HENRY McMASTER, in his official capacity as Governor of the State of South Carolina; BRYAN STIRLING, in his official capacity as Director of the South Carolina Department of Corrections; the SOUTH CAROLINA BOARD OF PARDONS AND PAROLES; and CHRISTOPHER F. GIBBS, MOLLIE DUPRIEST TAYLOR, DAN BATSON, HENRY S. ELDRIDGE, LONNIE RANDOLPH, and KIM FREDERICK, in their official capacities as members of the South Carolina Board of Pardons and Paroles,

Respondents.

Civil Action No.: 5:20-cv-1533-DCC-KDW

RESPONDENT GOVERNOR MCMASTER'S MOTION TO DISMISS EMERGENCY PETITION FOR WRITS OF HABEAS CORPUS AND COMPLAINT WITH PREJUDICE

Respondent Henry McMaster, in his official capacity as Governor of the State of South Carolina (Governor McMaster), by and through the undersigned attorneys, submits this motion to dismiss Petitioners' emergency petition for writs of habeas corpus and complaint, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] See ECF No. 1. For the reasons that follow, the Court should dismiss this action because Petitioners failed as a matter of law to state any

[1] Pursuant to Local Civil Rule 7.04, DSC, a memorandum is not submitted because a full explanation of the argument is contained in this filing and a memorandum would serve no useful purpose.

plausible claims that would entitle them to the extraordinary classwide relief sought in the petition and complaint.

BACKGROUND

This putative class action—one of many filed around the country[2] by the American Civil Liberties Union (ACLU) and others—arises out of an emergency petition filed by inmates committed to the custody of the South Carolina Department of Corrections (SCDC) who seek writs of habeas corpus to "reduce the prison population" and, more to the point, to secure their early release due to the 2019 Novel Coronavirus (COVID-19).

On March 13, 2020, Governor McMaster first declared a State of Emergency in South Carolina due to the public health threat posed by COVID-19. S.C. Governor, Exec. Order No. 2020-08 (Mar. 13, 2020). In his Executive Order, Governor McMaster, among other things, "direct[ed] state correctional institutions to suspend visitation processes and procedures, as necessary, during this State of Emergency." Id. Since then, Governor McMaster has continued to confer with state and federal agencies, officials, and experts to address the evolving public health threat posed by COVID-19. He has also issued various Executive Orders initiating and directing further extraordinary measures to address the significant public health, economic, and other impacts associated with COVID-19.[3] See S.C. OFFICE OF THE GOVERNOR, EXEC. BRANCH,

[2] See, e.g., Chris Dickerson, Justices Dismiss ACLU Petition Seeking to Release Prisoners Amid Pandemic, W. VA. RECORD (Apr. 24, 2020), https://wvrecord.com/stories/533183744-justices-dismiss-aclu-petition-seeking-to-release-prisoners-amid-pandemic; Ed Treleven, State Supreme Court Won't Hear ACLU Lawsuit on COVID-19 in Prisons, WISC. STATE JOURNAL (Apr. 25, 2020), https://madison.com/wsj/news/local/crime-and-courts/state-supreme-court-wont-hear-aclu-lawsuit-on-covid-19-in-prisons/article_c5c16e5c-8376-5684-a0be-2e9c9d799681.html

[3] The Court can take judicial notice of the Governor's Executive Orders. See Fed. R. Evid. 201(b)(1)–(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

EXECUTIVE ORDERS (2020) (including links to Executive Order Nos. 2020-07 through -19, 2020-22 through -23, 2020-25, and 2020-28 through -31, all of which address the State of South Carolina's response to COVID-19), https://governor.sc.gov/executive-branch/executive-orders.

For his part, SCDC Director Bryan Stirling oversaw the implementation of a two-phase COVID-19 Action Plan in the "statewide correctional system involving 21 prisons located throughout the state, which are of various security levels and specialized missions," to help mitigate the spread of COVID-19. S.C. DEP'T CORR., SCDC COVID-19 ACTION PLAN (2020), http://www.doc.sc.gov/scdc_covid-19_action_plan_031620.pdf. This plan was a product of an SCDC agency task force that worked in coordination with experts from, inter alia, the South Carolina Department of Health and Environmental Control and the South Carolina Emergency Management Division. Id.

SCDC adopted a number of measures "to ensure the safety of our inmates and the continued effective operations of the state prison system and to ensure that staff remain healthy and available for duty." Id. Under the plan, all newly arriving inmates are being screened for COVID-19 risk factors and symptoms. Id. As for current inmates, SCDC adopted the following practices: all asymptomatic inmates with risk factors are quarantined, and any symptomatic inmates "with exposure risk factors are isolated and tested for COVID-19 per SCDC health authority protocols." Id. SCDC has continued to update the plan, addressing issues such as masks and testing, and has clarified that the action plan will be reevaluated as needed. Additionally, SCDC has held numerous conference calls to keep prison wardens and SCDC staff up-to-date on the agency's COVID-19 response and any new measures being implemented across the prison system.

Unhappy that they must remain in prison for the duration of their sentences, on April 21,

2020, Petitioners Jeanne Voltz-Loomis; Gary Zacharia Thomas; Denise Edgar; Brandon Moore[4]; Allen Slaughter; Gay Opel Stanley; Brison Akeem Allison; Protection & Advocacy for People with Disabilities, Inc.; John Does 1 through 10; and Janes Roes 1 through 10, on their own and on behalf of a class of similarly situated persons (collectively "Petitioners"), filed a petition for writs of habeas corpus and complaint for injunctive and declaratory relief in this Court.[5] See ECF No. 1. In their complaint, Petitioners named Governor McMaster, Director Stirling, the South Carolina Board Pardons and Paroles, and each of its members in their official capacities as Respondents. See id. Although no Respondents had yet been served or made appearances, Petitioners' counsel then filed a motion to expedite. See ECF No. 9. The Court suspended further briefing and granted the motion to expedite on April 28, 2020, directing Respondents to file a responsive pleading and respond to the Court's interrogatories on May 6, 2020. See ECF No. 14. Respondents moved for a brief two-day extension of the deadline, without objection, and the Court granted their joint request on May 5, 2020. See ECF Nos. 24 & 25.

In their petition and complaint, Petitioners are asking this Court to certify a class, split up into six subclasses,[6] and enter an order reducing the prison population in all SCDC facilities. To

[4] Petitioners filed a notice of voluntary dismissal as to Moore on May 5, 2020, asserting he apparently was not the inmate with whom counsel spoke on the phone about this case prior to filing suit. See ECF No. 26.

[5] As the Court noted in its Order, however, while the document's title mentions injunctive relief, the complaint does not include a cause of action or request for injunctive relief. See ECF No. 14, at 1 n.1. Nor have Petitioners raised any claims arising under 42 U.S.C § 1983. At this juncture, they are requesting emergency writs of habeas corpus and a declaratory judgment that Respondents' conduct amounts to deliberate indifference in violation of the Eighth Amendment to the U.S. Constitution. Irrespective of the manner in which these claims are styled, Petitioners are not entitled to relief of any kind from this Court.

[6] Generally, the proposed subclasses would be composed as follows: (1) inmates over the age of 50 who pose no threat to the community; (2) inmates who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including inmates eligible for medical furlough or medical parole under subsections 24-13-210(A)–(B) of the South Carolina Code of Laws; (3) inmates with serious developmental disabilities or mental conditions coupled with the inability to maintain good hygiene habits or take medications as directed; (4) inmates within six months of their anticipated release date who qualify for home detention under section 24-13-1530 of the South Carolina Code of Laws; (5)

get there, Petitioners have raised a deliberate indifference claim against Respondents under the Eighth Amendment to the U.S. Constitution, arguing SCDC must release, furlough, and detain at home subclass members and provide adequate testing, quarantine, and hygiene measures in accordance with CDC guidance for inmates housed in its facilities. Petitioners also raise a habeas corpus claim, asking the Court to release all or some of the class members under appropriate conditions of release pursuant to 28 U.S.C. § 2254 based upon their contention that this is the only remedy sufficient to cure the alleged constitutional violation.

By asking the Court to issue a sweeping ruling, Petitioners whistle past the fact that these matters necessarily require an individualized, fact-intensive inquiry. Indeed, whether an inmate—who stands duly convicted of violating the laws of South Carolina and was committed to the custody of SCDC by a state judge—is ready to be released from prison is a critical matter that cannot be adjudicated in bulk with the broad stroke of a pen. Petitioners' failure to overcome several important procedural hurdles is fatal to their case. What is more, Petitioners improperly named Governor McMaster as a respondent in this habeas petition because he has no legal authority to effect any of the relief sought. Even on the merits, though, Petitioners failed to state a plausible claim for relief under any theory of the case. Accordingly, this matter comes before the Court on Governor McMaster's motion to dismiss the petition and complaint with prejudice.

STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss for "failure to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion to

inmates who are eligible for parole and have been disciplinary free for the last year; and (6) inmates in custody for technical violations of parole or probation. Pet. & Compl. ¶¶ 61–66. Petitioners seek varying relief as to each proposed subclass, ranging from immediate release on parole to medical furlough to home detention. Id. ¶ 86(a)–(f). Further, they blithely purport to shift the burden to Respondents to show why the public health and safety of the community require otherwise. Id.

dismiss, the court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. See E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 440 (4th Cir. 2011). But "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). On a motion to dismiss, the Court's task is limited to determining whether the complaint states a "plausible claim for relief." Id. at 679. The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Facts pled that are merely consistent with liability are not sufficient." A Soc'y Without a Name v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011) (quoting Iqbal, 556 U.S. at 678).

ARGUMENT

As explained in greater detail below, the Court should not wade into the thicket of SCDC's prison management in the age of COVID-19. Instead, the Court should dismiss Petitioners' petition and complaint, with prejudice, because they failed as a matter of law to allege any plausible claims for relief. Governor McMaster is not even a proper Respondent, and neither are the other named Respondents. On the merits, Petitioners are not entitled to the extraordinary relief sought because (1) they failed to meet the prerequisites for certification of a class, (2) the requested relief contravenes principles of federalism and separation of powers, (3) Petitioners' claims are barred by the Prison Litigation Reform Act[7] (the PLRA), (4) they failed to show Respondents acted with deliberate indifference, and (5) Petitioners failed to exhaust their state administrative remedies prior to filing the present writs for habeas corpus.

[7] 42 U.S.C. § 1997e et seq. While the PLRA is codified there, "it encompasses the provisions of 18 U.S.C. § 3626, which is titled 'appropriate remedies with respect to prison conditions.'" Money v. Pritzker, No. 20-cv-2093, 2020 WL 1820660, at *10 (N.D. Ill. Apr. 10, 2020).

I. Governor McMaster is not a proper party to this action.

At the outset, the Court should dismiss Petitioners' petition and complaint, with prejudice, as to Governor McMaster because he is not a proper party to this action.

In their petition and complaint, Petitioners' allegations with respect to Governor McMaster consist of merely conclusory, unsupported statements coupled with incorrect legal conclusions. Petitioners allege "Governor McMaster has failed to take action to reduce the prison population, despite formal requests to do so." Pet. & Compl. at 8. Petitioners note the ACLU sent Governor McMaster a letter on April 9, 2020,[8] "requesting that he utilize his executive power to implement a comprehensive prison reduction plan, including implementation of CDC guidelines for maintaining at least six-feet between individuals, release of vulnerable incarcerated individuals and expedited parole hearings." Id. Although the ACLU's letter cited no such "executive power," in the ACLU's view, "to protect the vulnerable individuals in custody, as well as the staff who work there," the Governor should order "the immediate release for incarcerated people age 50 or older and those with serious underlying medical issues whose release would not jeopardize public safety, and expedite[] parole hearings for eligible individuals and those with indeterminate sentences." Id. at 23–24 ¶ 46.

Petitioners complain that Governor McMaster "provided no response of any kind" in the brief period that elapsed between the ACLU emailing the Governor and filing this lawsuit and, thus, has failed to act "with the urgency or decisiveness required to quell this oncoming crisis." Id. at 8–9, 23 ¶ 44. Respectfully, that much does not follow. Governor McMaster's lack of response to a letter from the ACLU making lofty—and legally unsupported—demands within

[8] Despite having previously communicated with counsel for the Office of the Governor about other matters, it appears that the ACLU, via Petitioners' counsel of record, instead attempted to email Governor McMaster directly regarding their concerns and, shortly thereafter, this lawsuit.

some arbitrary timeframe hardly amounts to deliberate indifference. Governor McMaster is keenly aware of the challenges posed by COVID-19, and he and his office have been working around the clock to ensure the health and safety of the people of the State of South Carolina—both free and incarcerated—by shepherding the State through the ongoing emergency. And SCDC Director Stirling, a member of the Governor's Cabinet, has taken swift and appropriate action to address this ever-evolving issue in our State's correctional facilities and institutions.

More to the point, though, Governor McMaster does not possess the authority to take the ACLU's demanded action. If the ACLU had spent its time looking at the law instead of trying to turn a letter into a lawsuit, it would have recognized as much. After all, under the South Carolina Constitution, the Governor's clemency power is limited to granting petitions for reprieves and to commuting sentences of death to life imprisonment. See S.C. CONST. art. IV, § 14 ("With respect to clemency, the Governor shall have the power only to grant reprieves and to commute a sentence of death to that of life imprisonment. The granting of all other clemency shall be regulated and provided for by law."). In all other instances, the pardon power and other clemency authority is vested solely in the Department of Probation, Parole and Pardon Services (PPP). See S.C. Code Ann. § 24-21-920. Specifically, any pardon applications or clemency-related requests must be directed to PPP's Board of Paroles and Pardons (the Board). See id. Just as this Court's jurisdiction is limited to "resolv[ing] cases and controversies, not crusades," Timpson ex rel. Timpson v. McMaster, ___ F. Supp. 3d ___, No. 6:16-cv-1174-DCC, 2020 WL 548920, at *1 (D.S.C. Feb. 4, 2020), the Governor's clemency authority is similarly confined by the South Carolina Constitution.

Thus, contrary to Petitioners' assertions, the Governor has no authority to "substantially reduce the population or expand the SCDC's ability to release, furlough, or transfer to home

detention those who are medically vulnerable." Pet. & Compl. at 23 ¶ 45. And given the lengths to which Petitioners went to plead around 42 U.S.C. § 1983, they cannot tag Governor McMaster with supervisory liability either. See Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (stating the "three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices'; and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff"). Even if this were a Section 1983 action, they could not meet that high burden.

Petitioners rightly begin their Eighth Amendment argument citing case law about the "constitutional obligations" of "[c]orrections officials." Id. at 35 ¶ 73. But Petitioners then seek to lump all Respondents together as if the Governor could be deemed a corrections official under the law. He, of course, is not. And thus, Governor McMaster is not a proper respondent to a habeas petition. Indeed,"there is generally only one proper respondent to a given prisoner's habeas petition. This custodian, moreover, is 'the person' with the ability to produce the prisoner's body before the habeas court." Rumsfeld v. Padilla, 542 U.S. 426, 434–35 (2004). The rules governing relief under Section 2254 require a petitioner "currently in custody under a state-court judgment" to "name as respondent the state officer who has custody" in the petition. Rule 2, 28 U.S.C. § 2254. As the D.C. Circuit held, "the custodian is the person having a day-to-day control over the prisoner. That person is the only one who can directly produce 'the body' of the petitioner." Guerra v. Meese, 786 F.2d 414, 416 (D.C. Cir. 1986) (per curiam).

To be sure, courts have repeatedly recognized that, in a habeas corpus proceeding, "[t]he

proper respondent" is "the warden or superintendent of the state institution in which petitioner [is] confined at the time of the commencement of the action." Copeland v. State of Miss., 415 F. Supp. 1271, 1272 (N.D. Miss. 1976); Rumsfeld, 542 U.S. 426, 435 (observing "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official"). "Ascertaining the proper respondent is critical because '[t]he 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.'" Plaskett v. Cruz, 282 F. Supp. 3d 912, 914 (D.S.C. 2017) (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973)). After all, "[t]he whole force of the writ is spent upon the respondent." Id. (quoting Braden, 410 U.S. at 495).

Other courts have reiterated the immediate custodian requirement, finding as follows:

> [I]t would stretch the meaning of the term beyond the limits thus far established by the Supreme Court to characterize the Parole Board as the "custodian" of a prisoner who is under the control of a warden and confined in a prison, and who is seeking, in a habeas corpus action, to be released from precisely that form of confinement. At that point the prisoner's relationship with the Parole Board is based solely on the fact that it is the decisionmaking body which may, in its discretion, authorize a prisoner's release on parole.

Guerra, 786 F.2d at 416 (D.C. Cir. 1986) (quoting Billiteri v. U.S. Bd. of Parole, 541 F.2d 938, 948 (2d Cir. 1976)).

So too here. Instead of naming the wardens of their respective facilities, Petitioners have named the Board of Paroles and Pardons and its members, SCDC Director Stirling, and Governor McMaster as Respondents. None of these officials have immediate custody over Petitioners—or any other potential member of the proposed class for that matter—for habeas purposes. If the Board of Paroles and Pardons cannot be named as a Respondent, then Petitioners surely cannot go farther upstream to reach the Governor, who has no power to release them. Cf. Guerra, 786 F.2d

at 416 (noting that, under appellees' theory, "the Attorney General of the United States could be considered the custodian of every prisoner in federal custody because he supervises the Federal Bureau of Prisons," and so could "the President of the United States," but squarely rejecting this interpretation of the federal custody habeas statute that would "extend[] to any person or entity possessing some sort of power to release them").

Because Governor McMaster does not have immediate custody over or the power to release Petitioners, he was improperly named as a respondent in Petitioners' emergency petition for writs of habeas corpus. The same is true of the other Respondents. The Court should therefore dismiss the petition and complaint with prejudice.

II. Petitioners failed to meet the necessary elements for preliminary certification of a class.

Federal Rule of Civil Procedure 23 contains an implicit threshold requirement that the proposed members of a class be "readily identifiable." EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (quoting Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972)). Thus, the court must be able to "readily identify the class members in reference to objective criteria." Id. "The plaintiffs need not be able to identify every class member at the time of certification. But if class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class is inappropriate." Id. (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 593 (3rd Cir. 2012) (internal quotations omitted).

After passing the threshold "readily identifiable" requirement, "class certification is a two-step process." Robinson v. Carolina First Bank NA, No. 7:18-cv-02927-JDA, 2019 WL 719031, at *4 (D.S.C. Feb. 14, 2019). The plaintiff bears the burden of establishing that the prerequisites in the Federal Rules of Civil Procedure 23(a) and (b) are met. Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1267 (4th Cir. 1981). Additionally, the Supreme

Court has said district courts must conduct a "rigorous analysis" to ensure compliance with the class action rule. Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 318 (4th Cir. 2006) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)).

Rule 23(a) establishes the prerequisites to maintain a class action, and failure to satisfy one of the four requirements in Rule 23(a) is sufficient grounds for a court to deny class certification. Rule 23(a) states that one or more members of a class may sue as representative parties on behalf of all of the members only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(1)–(4). Along with meeting the preconditions in Rule 23(a), Petitioners must meet one of the three prerequisites in Rule 23(b). In their petition, Petitioners have relied upon Rule 23(b)(1)(A) or (b)(2). Thus, Petitioners must prove one of the following:

> (1) prosecuting separate actions by . . . individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or . . .
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . .

Fed. R. Civ. P. 23(b)(1)–(2).

For the reasons set forth below, class certification is inappropriate in a habeas setting in

general—and particularly in this instance—because, "[b]y its very nature, the process [for which Petitioners advocate] would entail a highly individualized inquiry that is ill-suited to class treatment. Simply put, there is no way to decide which inmates should stay, and which inmates should go, without diving into an inmate-specific inquiry." Money, 2020 WL 1820660, at *15.

A. The proposed class members are not readily identifiable.

Petitioners have failed to identify a proposed class in which all members are readily ascertainable "without extensive and individualized fact-finding or mini-trials." Adair, 764 F.3d at 358. Petitioners' proposed class members include "all people who are currently or will be in the future housed in a SCDC prison during the duration of the COVID-19 pandemic." Pet. & Compl. at ¶ 60. These class members would not be readily identifiable without extensive fact-finding into issues of each individual SCDC facility, both currently and potentially in the future, for an indeterminate period simply defined as "the duration of the COVID-19 pandemic." Not only would identifying these future inmates be impossible, but dividing them and current inmates into Petitioners' six proposed subclasses would also necessarily require performing the exact sort of intensive and individualized fact-finding inquiries, or mini-trials, that the Adair court described as inappropriate. Because Petitioners failed to allege the existence of a class that is readily identifiable, the Court should deny class certification.

B. Petitioners have not established numerosity.

To satisfy Rule 23(a)'s numerosity requirement, Petitioners must demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity "depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." George v. Duke Energy Ret. Cash Balance Plan, 259

F.R.D. 225, 231 (D.S.C. 2009) (quoting Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986); Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980)). Petitioners' proposed subclasses have significantly muddied the water in this case.[9] Potential class members could qualify for multiple subclasses, and it is quite burdensome to require SCDC to sift through the medical records of all inmates to see in which subclasses they would best fit. Moreover, an individual's physical condition is hardly a static measure, particularly for those with "serious underlying medical conditions." Given that the SCDC inmate population changes daily, this number will necessarily remain fluid. Nevertheless, Petitioners certainly have proposed what appears to be a large class.

C. The lack of commonality is fatal to Petitioners' request for class certification.

"Commonality requires . . . questions of law or fact common to the class." Thorn, 445 F.3d at 319 (4th Cir. 2006) (quoting Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001)). "A common question is one that can be resolved for each class member in a single hearing, such as the question of whether an employer engaged in a pattern and practice of unlawful discrimination against a class of its employees." Id. at 319.

A question is not common, however, "if its resolution 'turns on a consideration of the individual circumstances of each class member.'" Id. Further, the answer to the question must be "apt to drive the resolution of the litigation." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). The proposed class members must have suffered the same injury that arises from the same "common contention." Ealy v. Pinkerton Gov't Servs., Inc., 514 F. App'x 299, 304 (4th Cir. 2013) (quoting Dukes, 564 U.S. at 350). "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id.

[9] Governor McMaster would respectfully rely upon the data provided by SCDC regarding Petitioners' unworkable proposed subclasses.

(quoting Dukes, 564 U.S. at 350).

Here, the need for individualized determinations for each of Petitioners' alleged 17,000+ proposed class members shows that class certification is improper for a lack of commonality. See Pet. & Compl. at ¶ 68. As the Northern District of Illinois cogently recognized in a similar context, each proposed "class member comes with a unique situation—different crimes, sentences, outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community." Money, 2020 WL 1820660, at *15. Solving one question common to them all would not be "apt to drive the resolution of the litigation." Dukes, 564 U.S. at 350.

Instead, this Court would have to undertake a thorough examination of each of the proposed 17,000 class members and determine whether their unique circumstances call for a highly individualized form of relief. Not only would this examination be burdensome on the Court, but it also would be impossible to conduct in time for relief in the face of this "imminent deadly threat posed by the coronavirus" as requested by Petitioners. Due to the Petitioners' incarcerated status, resolution of any questions in this case necessarily turns on considerations of individual circumstances of each class member and, thus, commonality is lacking.

Further, as noted above, Petitioners have tried to shift the burden to Respondents to prove whether members of any given subclass would pose any threat to the health and safety of the community. On its face, such an inquiry is unavoidably inmate-specific and would require consideration of a host of factors. An examination of a fifty-year-old who is serving time for a voluntary manslaughter conviction, for example, will not yield the same results as a fifty-year-old inmate serving a brief sentence for check fraud. Putting aside the inherent dissimilarities in these

respective crimes, the decisionmaker would also need to take into account the inmates' disciplinary history, work credits, and other factors to make an informed decision as to the appropriate alternative, if any, for another means of confinement. This is simply impossible in a class setting.

Therefore, class treatment—especially in this urgent timeframe—is inappropriate, and the Court should reject Petitioners' request for class certification.

D. Petitioners' claims lack typicality.

The typicality condition of Rule 23(a) "goes to the heart of a representative parties' [sic] ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements." Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006). "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Lienhart, 255 F.3d at 146 (quoting Falcon, 457 U.S. at 156). "The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." Deiter, 436 F.3d at 466.

A "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." Id. at 466–67. While typicality does not require "the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned[,] . . . when the variation in claims strikes at the heart of the respective causes of actions," the Fourth Circuit has "readily denied class certification." Id. at 467. Specifically, courts have denied class certification when the potential harm was dependent on considerations of each class member's unique circumstances. See Boley v. Brown, 10 F.3d 218, 223 (4th Cir. 1993).

As noted above, the need for individualized determinations for each of Petitioners' alleged 17,000 proposed class members shows that class certification is improper for lack of typicality.

The factual scenario of each proposed class member is unique to each inmate. And the variation of factual scenarios results in a slightly different claim for each proposed class member and, thus, the representative plaintiffs cannot be typical of each and every proposed member of the class. Proof of the representative plaintiffs' claims may not advance those claims of unnamed class members, especially considering that relief for each of them would be different. Therefore, because typicality is lacking, class treatment—especially in this urgent timeframe—is improper and class certification should be denied.

E. Petitioners fail to meet the adequacy requirement because they do not necessarily share the same interests of the whole class.

"Rule 23's adequacy requirements provide critical safeguards against the due process concerns inherent in all class actions." Bell v. Brockett, 922 F.3d 502, 511 (4th Cir. 2019), cert. denied sub nom., Brockett v. Orso for REX Venture Grp., LLC, 140 S. Ct. 469 (2019). The representative plaintiffs must "fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). Representational adequacy "involves two inquiries: 1) whether the plaintiff has any interest antagonistic to the rest of the class; and 2) whether plaintiff's counsel is qualified, experienced and generally able to conduct the proposed litigation." George, 259 F.R.D. at 232. The purpose of the first inquiry is to "uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625 (1997). In the absence of proof to the contrary, "the adequacy of plaintiffs' counsel . . . is presumed." S.C. Nat'l Bank v. Stone, 139 F.R.D. 325, 330 (D.S.C. 1991).

In the present case, a conflict exists between the named and unnamed Petitioners. Even if the Court determines they have all suffered some sort of harm by incarceration during this pandemic, the named plaintiffs' relief could be completely different than that of the unnamed plaintiffs because of the different circumstances unique to each inmate. A separate inmate-by-

inmate inquiry for each proposed class member will be required to determine whether the particular person is a threat to the community and, if not, which option for relief is appropriate under the circumstances. The named Petitioners' circumstances could be so different—whether better or worse—from many unnamed plaintiffs that relief for one would conflict with any relief that may be available to the other named or unnamed plaintiffs. Further, if any of the named plaintiffs were to be afforded the extraordinary relief requested—namely, release from prison—they do not have an ongoing interest in continuing the litigation for or on behalf of the other named plaintiffs, or unnamed plaintiffs, until the requested relief is or is not awarded. After all, that is all this case is about. Petitioners want the Court to do what the Governor cannot—grant them an early release from their court-imposed term of incarceration.

Because conflicting interests between the named and unnamed plaintiffs are present, the representative Petitioners cannot fairly and adequately protect the interests of the whole class. Class certification, especially in this urgent timeframe, is therefore improper.

F. Petitioners cannot meet the requirement of Rule 23(b)(2).

Rule 23(b)(2), as stated above, allows for class certification where "the party opposing the class acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Claims for individualized relief, even if not monetary in nature, do not satisfy this rule because the remedy must be of an "indivisible nature." See Dukes, 564 U.S. at 360. Therefore, Rule 23(b)(2) "applies only when a single injunctive or declaratory judgment would provide relief to each member of the class." Id. It is not satisfied, however, "when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." Id. (emphasis in original).

As a preliminary matter, as the Court noted, Petitioners failed to plead or pray for injunctive relief in their emergency petition and complaint. Although Petitioners contend classwide declaratory and habeas relief would be an appropriate remedy in this case, they fail to recognize the different circumstances surrounding each putative class member's claim. Indeed, to grant any relief, the Court would have to undergo a painstaking evaluation of each class member's respective crimes, sentences, medical history, place of incarceration, disciplinary record, danger to the community, and other facts and circumstances. Because the relief sought by Petitioners necessitates an inmate-specific inquiry, no declaratory relief would be applicable to every unique circumstance of each claimant, and the Court would not be able to issue a judgment with a blanket effect as required by Rule 23(b)(2). Consequently, this Court should deny class certification for Petitioners' failure to satisfy the prerequisite in Rule 23(b)(2).

G. Petitioners likewise cannot meet the requirement of Rule 23(b)(1)(A).

Rule 23(b)(1)(A) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Windsor, 521 U.S. at 614 (quoting Kaplan, Continuing Work 288 (footnotes omitted)). The rule, however, is meant to protect the class opposing the class and should be used "if individual adjudication of the controversy would prejudice . . . the party opposing the class." Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986) (citing Fed. R. Civ. P. 23(b)(1)(A)).

"Certification is not appropriate simply because 'some plaintiffs may be successful in their

suits against a defendant while others may not.'" Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 633 (6th Cir. 2011) (quoting In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984)). Lastly, some district courts have, at least in part, relied on defendants' opposition to class certification under Rule 23(b)(1)(A) in denying certification under that subsection. See, e.g., In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 354 (D.N.J. 1997); Pettco Enters. v. White, 162 F.R.D. 151, 155 (M.D. Ala. 1995); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972).

Petitioners contend that prosecuting separate actions would lead to the risk stated in Rule 23(b)(1)(A). But nothing indicates an adjudication of separate actions would impair Respondents' ability to pursue a uniform course of action or require them to use incompatible standards. Due to the significant risks associated with Petitioners' request for relief and the individual circumstances surrounding their cases, it is actually appropriate to treat every plaintiff individually, rather than alike. Individual actions would not create incompatible judgments from court to court. Because Petitioners failed to shoulder their burden of demonstrating individual adjudication of the inherently claimant-specific controversy would prejudice Respondents, this Court should deny class certification.

III. Petitioners' requested relief raises serious federalism and separation of powers concerns.

Turning to the merits of the petition, at first blush, the extraordinary relief sought by Petitioners raises serious federalism and separation of powers concerns.

As the U.S. Supreme Court has acknowledged, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of prisons." Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973); see also Meacham v. Fano, 427 U.S. 215, 229 (1976) ("Federal courts do not

sit to supervise state prisons, the administration of which is of acute interest to the States."). To be sure, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Turner v. Safley, 482 U.S. 78, 84 (1987).

The Northern District of Illinois, which recently addressed a strikingly similar challenge, perhaps said it best:

> It is no accident that the federal judiciary only rarely intrudes into the management of state prisons, and only once in history has actually ordered the release of prisoners on a scale anywhere near what Plaintiffs hope to accomplish through this litigation. And in that instance, inmates were released only after a painstakingly long process, informed by voluminous expert testimony and a weeks-long trial.

Money, 2020 WL 1820660, at *16. Indeed, the Supreme Court has likewise commented on how "ill equipped" federal courts are to handle the "complex and intractable" problems associated with prison management, observing that "[j]judicial recognition of that fact reflects no more than a healthy sense of realism." Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981). For that reason, the Court has said federal courts "must proceed cautiously in making an Eighth Amendment judgment." Id. at 351.

Here, Petitioners are asking this Court to interfere with matters that, by their very nature, are governed by specific processes and procedures outlined under South Carolina law. As noted above, the Governor possesses no authority in this arena at all. The Board, however, does in certain situations. Respectfully, it is up to the Board—not this Court—to exercise its limited discretion in determining, from both a factual and legal standpoint, whether inmates are eligible for parole, medical furlough, early release, home detention, or any other less restrictive alternative than confinement in an SCDC facility. While the Court certainly has a duty to scrutinize claims of cruel

and unusual conditions of confinement, "[i]n discharging this oversight responsibility," the Court "cannot assume that . . . prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens." Rhodes, 452 U.S. at 352.

Prison management is complex even in the best of times. COVID-19 has only further complicated the matter. Respondents, however, have been consulting with experts to ensure appropriate measures are in place that protect inmates and SCDC employees. SCDC has developed and implemented a two-stage action plan, and it frequently holds systemwide conference calls with wardens to discuss efforts to combat the evolving spread of COVID-19. Petitioners nevertheless want the entire SCDC to operate under the supervision of this Court. But even if Petitioners were entitled to relief, "any effort for the Court to insert itself into this process likely would be ineffectual in dealing with the actual situation at hand." Money, 2020 WL 1820660, at *16.

Indeed, given the current landscape, Governor McMaster has begun carefully lifting restrictions in a measured approach to reopen our economy and get South Carolinians back to work. Certainly, "the prison environment presents special challenges and may not bend to the same curve as the rest of the [S]tate collectively." Id. But SCDC "has in place measures to deal with suspected and confirmed cases within its facilities and to limit the chance of the virus being brought into the facility by outsiders." Id. In other words, "[b]y the time the Court could develop even a partially-informed plan for dealing with an infectious disease in the prison system, the current wave likely will have passed." Id. The point, however, is that these are complex matters

that require subject matter expertise that, respectfully, is beyond the ken of the federal judiciary. That Petitioners are seeking the release of thousands of prisoners only further counsels against this Court imposing upon the powers of another level and branch of government, particularly where the General Assembly has prescribed and circumscribed the manner in which to balance the appropriate policy considerations attendant to releasing prisoners in faithfully executing the duty to protect the safety and welfare of the public.

Against this backdrop, the Court should proceed with caution—mindful of the federalism, separation of powers, and comity concerns attendant to entertaining Petitioners' drastic request for relief—particularly given the significant substantive and procedural hurdles standing in their way as outlined in greater detail below.

IV. Petitioners' claims are barred by the PLRA.

In recognition of the fact that prisoner litigation drains the dockets of federal district courts around the country, "Congress enacted a variety of reforms [in the PLRA] designed to filter out the bad claims and facilitate consideration of the good. Key among these was the requirement that inmates complaining about prison conditions exhaust prison grievance remedies before initiating a lawsuit." Jones v. Bock, 549 U.S. 199 204 (2007). To that end, the PLRA's exhaustion requirement provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

As for remedies, the PLRA further states that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1). In fashioning an

appropriate remedy, courts are to "give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief." Id. And the PLRA defines "civil action with respect to prison conditions" broadly to include "any civil proceeding arising under Federal law with respect to the conditions of confinement and the effects of actions by government officials on the lives of persons confined in prisons." 18 U.S.C. § 3626(g)(2). Admittedly, the PLRA excludes from its reach "habeas corpus proceedings challenging the fact or duration of confinement in prison." Id.

Although Petitioners seek to skirt the PLRA hurdle by styling this action as a petition for writs of habeas corpus, they are challenging the conditions of their confinement in the face of COVID-19. See 18 U.S.C. § 3626(g)(2). In any event, that is not the full extent of the relief sought in this case. To their credit, Petitioners tried to plead around this procedural quagmire by asking the Court to issue a declaratory judgment as opposed to bringing a Section 1983 claim challenging the constitutionality of SCDC's conditions of confinement. But that did not solve all their problems. It is beyond dispute that "the ultimate aim of these lawsuits" is "to reduce the prison population. Reducing the prison population is not just a side effect of the case—it is the whole point." Money, 2020 WL 1820660, at *13. Accordingly, the PLRA's special procedures for a "prisoner release order" are triggered. 18 U.S.C. § 3626(a)(3). Under the PLRA, any order "that has the purpose or effect of reducing or limiting a prison population, or that directs the release from or nonadmission of prisoners to a prison" is exclusively within the province of a three-judge panel. 18 U.S.C. § 3626(g)(4).

Importantly, a court is not permitted to enter a prisoner release order unless it "has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied" and "the defendant has had a reasonable amount of time to

comply with the previous court orders." 18 U.S.C. § 3626(a)(1)–(2). Only after this process is followed may a three-judge court properly consider "a prisoner release order—and even then only if it finds by clear and convincing evidence that 'crowding is the primary cause of the violation of a Federal right' and 'no other relief will remedy the violation.'" Money, 2020 WL 1820660, at *10 (quoting 18 U.S.C. § 3626(a)(3)(E)(i)–(ii)).

Here, Petitioners can call it whatever they please, but they are asking the Court to issue a prisoner release order. Like the plaintiffs in Money, Petitioners

> devote pages to describing the congregate conditions in [SCDC] facilities in support of the proposition that crowded conditions inherent in living arrangements in a prison setting are unsafe during a pandemic. They then offer the opinions of numerous affiants who universally advance one message: the only solution is the immediate release of inmates in large numbers. A fair summary of the bulk of the complaint . . . is that the crowded conditions in [SCDC] facilities require the Court to issue an order immediately reducing the prison population . . . .

2020 WL 1820660, at *12. In an attempt to get around this legal hurdle, Petitioners—like the plaintiffs in Money—propose a process for making subclass determinations, including the appointment of a special master. Respectfully, the process versus direct-release debate is a ruse and presents a distinction without a difference. Irrespective of the manner in which the remedy is couched, Petitioners are asking the Court to reduce the inmate population in SCDC facilities.

Because Petitioners failed to follow the strictures of the PLRA prior to seeking such extraordinary relief from this Court, their claims are barred as a matter of law. The Court should therefore dismiss the petition and complaint.

V. Petitioners failed to state a plausible claim for deliberate indifference.

Petitioners' deliberate indifference claim comes to the Court in an unusual posture. Indeed, Petitioners have tied this case into procedural knots. As noted above, Petitioners have not asked

the Court to issue injunctive relief. Nor have they alleged a cause of action under 42 U.S.C. § 1983.[10] Indeed, Section 1983—the traditional vehicle through which plaintiffs vindicate alleged deprivations of constitutional rights—does not appear once in their emergency petition and complaint. Apparently, Petitioners want the Court to issue a declaratory judgment finding that Respondents' prior, current, and future implementation of measures to combat COVID-19 amount to deliberate indifference in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Given that the only pleaded mechanism through which Petitioners could obtain relief for this alleged violation is the petition for writs of habeas corpus, Respondents will address their Eighth Amendment claim within that rubric.

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. "Eighth Amendment liability requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" Farmer v. Brennan, 511 U.S. 825, 835 (1994) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). In Farmer, the Supreme Court set forth a two-prong test inmates must satisfy to state a claim for unconstitutional conditions of confinement. "First, Farmer's 'objective' prong requires plaintiffs to demonstrate that 'the deprivation alleged [was], objectively, sufficiently serious.'" Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016) (quoting Farmer, 511 U.S. at 834). "In medical needs cases, like the case at bar, the Farmer test requires plaintiffs to demonstrate officials' deliberate indifference to a 'serious' medical need that has either 'been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" Id. (quoting Iko v. Shreve, 535

[10] Unfortunately for Petitioners, that renders their request for attorneys' fees, see Pet. & Compl. ¶ 86(k), invalid under Section 1988, irrespective of whether they prevail. See 42 U.S.C. § 1988(b) (limiting the availability of attorney's fees to the prevailing party in "any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX . . . , the Religious Freedom Restoration Act of 1993 . . . , the Religious Land Use and Institutionalized Persons Act of 2000 . . . , title VI of the Civil Rights Act of 1964 . . . , or section 12361 of title 34").

F.3d 225, 241 (4th Cir. 2008)).

"Second, under Farmer's 'subjective' prong, plaintiffs must show that prison officials acted with a 'sufficiently culpable state of mind.'" Id. (quoting Farmer, 511 U.S. at 834). "In conditions of confinement cases, the requisite state of mind is deliberate indifference." Id. "An official is deliberately indifferent to an inmate's serious medical needs only when he or she subjectively 'knows of and disregards an excessive risk to inmate health or safety.'" Jackson v. Lightsey, 775 F.3d 170, 178 (4th Cir. 2014) (quoting Farmer, 511 U.S. at 837). As the Fourth Circuit has recognized, "[t]hat is a higher standard for culpability than mere negligence or even civil recklessness, and as a consequence, many acts or omissions that would constitute medical malpractice will not rise to the level of deliberate indifference." Id.

Respondents, of course, are aware of the serious effects of COVID-19. See Farmer, 511 U.S. at 834 (stating the objective prong requires a showing that the medical need was "objectively, sufficiently serious"). As for Governor McMaster, in the first Executive Order declaring a State of Emergency due to the spread of COVID-19, he authorized and directed both state correctional institutions and local detention facilities to suspend visitation processes and procedures. No one contests the serious risk COVID-19 poses to inmates and SCDC staff. Thus, "deliberate indifference is the whole ball game" as it relates to Petitioners' "Eighth Amendment claim." Money, 2020 WL 1820660, at *18. In light of the significant efforts Respondents have undertaken to confront and try to contain a constantly evolving global pandemic, Petitioners cannot make this showing.

Although Petitioners insinuate SCDC is turning a blind eye to the problem, that is simply not true. SCDC is working tirelessly to implement the proper measures to combat COVID-19 in

SCDC's facilities.[11] As to Governor McMaster, Petitioners' deliberate indifference claim fails right out the gate because he lacks the authority to provide the relief they demand. Again, the allegations against Governor McMaster center on his lack of an immediate response to the ACLU's letter. Thus, Petitioners failed to allege a claim that is plausible on its face. Even when digging into the contents of the ACLU's letter, though, Governor McMaster's authority is constrained by the South Carolina Constitution. See S.C. CONST. art. IV, § 14. As a matter of law, Governor McMaster's unwillingness to accept the ACLU's invitation to take action beyond the state constitutional limitations on his power cannot amount to deliberate indifference for purposes of the Eighth Amendment. In any event, Petitioners' underling "objections about the speed or scope of action" and unsolicited "suggestions for altering it through a 'prod' [from the Court] do not support either half the phrase 'deliberate indifference.'" Money, 2020 WL 1820660, at *18.

Simply put, Respondents have taken, and continue to take, COVID-19 very seriously and have not acted with deliberate indifference to the conditions of SCDC facilities. "[G]iven the constantly shifting parameters and guidance regarding how to combat a previously little known virus, it is worth pointing out that 'the mere failure . . . to choose the best course of action does not amount to a constitutional violation.'" Id. (quoting Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002)). Petitioners' Eighth Amendment claim thus fails as a matter of law, and the Court should dismiss the petition and complaint with prejudice.

VI. Petitioners are not entitled to habeas relief because they failed to exhaust their administrative remedies.

"In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must

[11] For the sake of judicial economy, Governor McMaster would respectfully rely upon and direct the Court to SCDC's detailed explanation of these efforts in its filing submitted contemporaneously herewith.

exhaust all available state remedies before he can apply for federal habeas relief." Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). As the Fourth Circuit has held, "[t]o exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court." Id. "Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," the U.S. Supreme Court has "conclude[d] that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). And this includes giving the opportunity for discretionary review as part of the state's ordinary appellate procedure. See id. at 847.

"The exhaustion doctrine existed long before its codification by Congress in 1948." Rose v. Lundy, 455 U.S. 509, 515 (1982); see also 28 U.S.C. § 2254. And it was "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose, 455 U.S. at 518. "State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." O'Sullivan, 526 U.S. at 844. To that end, the Supreme Court has held that a district court must "dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts," even when such "mixed petitions" allege some claims that are exhausted and others that are not. Rose, 455 U.S. at 510.

Here, Petitioners' conclusory assertion that they were not required to exhaust state administrative remedies is without merit. Petitioners' argument rests upon the shaky proposition

that release is the only way to "remove them from the serious health risk they face in correctional facilities." Pet. & Compl. at 40 ¶ 84. Although it is understandable why they would make this argument, that is just not the case. SCDC grievance procedures are at the inmates' disposal. State courts are also available. While physical restrictions are still in place, the Chief Justice of South Carolina has given trial courts some flexibility to hold in-person hearings with appropriate social distancing precautions. See Mem. from Chief Justice Beatty, Court Operations During the Six Week Period, May 4–June 12, 2020 (Apr. 24, 2020), https://www.sccourts.org/whatsnew/display whatsnew.cfm?indexID=2486. Pursuant to this guidance, circuit courts across the State have been scheduling hearings via Web-Ex. So has the entire South Carolina judiciary.

Just last week, the South Carolina Court of Appeals held virtual oral arguments in two criminal appeals. See Press Release, S.C. Court of Appeals, South Carolina Court of Appeals to Hold Webex Oral Argument (May 1, 2020), https://www.sccourts.org/whatsnew/displayWhats New.cfm?indexId=2492. The Supreme Court of South Carolina is not far behind and has indicated its intent to hold oral arguments via Web-Ex when appropriate. See In re Operation of the Appellate Courts During the Coronavirus Emergency, App. Case No. 2020-000447, Order No. 2020-03-20-01 ¶ (b) (S.C. Sup. Ct. filed Mar. 20, 2020), https://www.sccourts.org/whatsnew/ displaywhatsnew.cfm?indexID=2470. Accordingly, Petitioners could have availed themselves of access to state courts. Instead, they went forum shopping and filed this matter in the Charleston Division of the U.S. District Court for the District of South Carolina, going so far as to claim the case was related to one of countless motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A). See ECF No. 3, at 3.[12]

In sum, Petitioners' naked assertion that state administrative remedies are unavailable finds

[12] Notably, the "pro-se motion for compassionate release" cited by Petitioners was denied on April 27, 2020. See United States v. Parish, No. 2:07-cr-00578 (ECF No. 129).

no support in law or fact. And Petitioners' admitted failure to exhaust their state administrative remedies is fatal to their petition for writs of habeas corpus. Accordingly, the Court should enter an Order dismissing the petition.

ANSWERS TO THE COURT'S INTERROGATORIES

1–18. Governor McMaster would respectfully rely upon the responses of the remaining Respondents.

19. No constitutional, statutory, or regulatory provision authorizes Governor McMaster to release an inmate early from his or her term of imprisonment. Under section 24-21-920 of the South Carolina Code of Laws, any pardon applications or clemency-related requests must be directed to PPP's Board of Paroles and Pardons. Likewise, section 24-21-715 provides PPP may grant parole for terminally ill, geriatric, or permanently disabled inmates. Of course, an inmate may also pursue state administrative remedies through the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 through -160. Governor McMaster would respectfully rely upon any other authorities cited by the remaining Respondents.

20. Aside from the instant action, Governor McMaster has not been served with any other lawsuits related to Respondents' handling of COVID-19 in SCDC facilities. Governor McMaster would respectfully rely upon any other cases identified by Respondents.

CONCLUSION

In sum, SCDC is well aware of COVID-19 and has taken appropriate measures to ensure the health and safety of inmates and SCDC personnel. But everyone has a role to play—even this Court. The Fourth Circuit has counseled that, "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such

facilities." Taylor v. Freeman, 34 F.3d 266, 268 (4th Cir. 1994). In other words, "it is not for federal courts to . . . micromanage the Nation's prisons." O'Dell v. Netherland, 112 F.3d 773, 777 (4th Cir. 1997). Respondents have taken, and will continue to take, this "invisible enemy" very seriously. Petitioners failed as a matter of law to demonstrate that Respondents' actions taken to date amount to deliberate indifference and, thus, run afoul of the Eighth Amendment. Because Petitioners failed to state any plausible claim for relief, the Court should dismiss the petition and complaint with prejudice. Simply put, they are not entitled to habeas relief on a wholesale, classwide basis.

Respectfully submitted,

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