

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON 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

Case No. 5:20-CV-1533-DCC-KDW

Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief

Class Action

IMMEDIATE RELIEF SOUGHT

EMERGENCY PETITION FOR WRITS OF HABEAS CORPUS

Petitioners on behalf of themselves and others similarly situated, allege as follows:

INTRODUCTION

Petitioners are incarcerated in a number of different South Carolina state correctional facilities and bring this Petition seeking emergency relief from this Court because Respondents’

refusal to adequately address the imminent deadly threat posed by the coronavirus violates Petitioners' constitutional rights.

Respondents have failed to address the undeniable fact that the COVID-19 pandemic presents a particularly deadly risk to prisoners who live in close proximity under less than sanitary conditions. In particular, Respondents have refused to take any meaningful action to reduce the prison population, to allow for any meaningful social distance, to implement a rational testing protocol, to isolate and provide appropriate care for those who may already be ill, or to continue necessary treatment for those with other serious medical issues.

In commencing this Proceeding, Petitioners ask that this Court direct Respondents to use their existing authority to take immediate action to provide the protection to which the Petitioners and others are entitled.

COVID-19, which is a highly contagious and deadly respiratory virus, has created an unprecedented public health crisis. Because it is easily transmissible, including by asymptomatic carriers, the only ways to slow its spread are through physical distancing, frequent hand washing with soap, disinfecting living spaces, and wearing masks, but Respondents have been deliberately indifferent to these life preserving needs.¹ COVID-19 has already spread into South Carolina's state prisons and without immediate relief, it will spread like wildfire and unnecessarily sicken and kill countless correctional staff and prisoners.

COVID-19 poses particularly stark and stunning risks to people confined in prisons.² The close quarters and often unhygienic conditions in correctional facilities are in effect petri dishes for disease transmission. Incarcerated individuals must often live together in dormitory-style

¹ See, e.g., Declaration of Dr. Jonathan Louis Golob ("Golob Dec.") (April 3, 2020) at ¶ 10 (Exhibit 1).

² COVID-19 Action Plan, Federal Bureau of Prisons, (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp

housing or in double and triple-bunked cells.³ Living in such close proximity to one another, they must share toilets, sinks, showers, and even soap (when they have access to it).⁴ For reasons beyond their control, and without the relief sought by this petition, people confined to and working in correctional facilities cannot practice social distancing, control their exposure to large groups, practice increased hygiene, wear protective clothing, obtain specific products for cleaning or laundry, or sanitize their own environment in accordance with the guidelines of the Centers for Disease Control and Prevention (“CDC”).⁵ Because physical distancing and vigilant hygiene are impossible under current conditions, highly transmissible diseases like COVID-19 can, and have, spread at a dramatically accelerated rate in jails and prisons.⁶

It is not only the facilities’ physical conditions that make the problem particularly acute. Many people in prisons are more vulnerable and susceptible to the risks of coronavirus because of the high incidence in that population of chronic underlying health conditions, such as diabetes, heart disease, chronic lung and liver diseases, asthma, and compromised immune systems from HIV or chemotherapy cancer treatment.⁷

In addition, even under normal circumstances, incarcerated individuals have limited access to medical care.⁸ As staff become sick, including medical personnel, even fewer people are available to care for those who remain confined.

³ Declaration of Dr. Jaimie Meyer (“Meyer Dec.”) (April 18, 2020) at ¶ 35 (Exhibit 2).

⁴ *Id.*; Laura Brook Eisen, *How Coronavirus Could Affect U.S. Jails and Prison*, Brennan Center for Justice, (Mar. 13, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons>

⁵ Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Patience with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, <https://cutt.ly/ztRAo0X>.

⁶ Brie Williams *A Public Health Doctor and Head of Corrections Agree: We Must Immediately Release People from Jails and Prisons*, *The Appeal*, (Mar. 27, 2020), <https://theappeal.org/a-public-health-doctor-and-head-of-corrections-agree-we-must-immediately-release-people-from-jails-and-prisons/>

⁷ *See, e.g.*, Golob Dec., *supra* note 1 at ¶ 3; Meyer Dec., *supra* note at 3 at ¶ 14.

⁸ Meyer Dec., *supra* note at 3 at ¶ 17.

All of these factors -- the living conditions, a particularly vulnerable population, and limited medical care -- make the outbreak of a highly infectious, deadly virus in a closed detention setting nothing short of a disaster, calling for urgent and decisive action to protect the health of not only the 17,828 people incarcerated in South Carolina's prisons,⁹ but also those who work there, including the medical professionals who will treat those who become infected.

It is no surprise, then, that leading public health officials have warned that once COVID-19 gets into a detention facility it will spread like wildfire, and that unless courts act now, the epicenters of the pandemic will become jails and prisons.¹⁰ In fact, a state prison in Ohio is now reported to be the largest source of virus infections in the United States, and according to one source tracking such data as of April 20, 2020, four of the ten largest-known sources of infection in the United States were correctional facilities.¹¹ Once the virus enters a detention center, the regular movement of staff in and out of the facility means the virus will spread back to the community. The outbreak of COVID-19 that has already begun will likely rapidly overwhelm South Carolina's chronically understaffed correctional facilities and then overwhelm hospitals in communities where they are located.¹² As of April 20, 2020, South Carolina reported 4,439 confirmed COVID-19 cases, 124 deaths, and five times as many estimated cases, 54,536.¹³ Even

⁹ Noah Feit, *More Inmates at SC Jail Test Positive for Coronavirus, Cops Say*, The State, (Apr. 9, 2020), <https://www.thestate.com/news/coronavirus/article241882241.html>

¹⁰ Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons*, N.Y. Times, (Mar. 13, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>

¹¹ *Live Coronavirus News & Updates*, N.Y. Times, https://www.nytimes.com/2020/04/20/us/coronavirus-live-news.html?action=click&pgtype=Article&state=default&module=styln-coronavirus&variant=show®ion=TOP_BANNER&context=storyline_menu#link-52cdb996, (last visited Apr. 20, 2020)

¹² Stephen Hobbs, *SC Prisons Seek Emergency Help to Hire Officers Amid Coronavirus, High Unemployment*, The Post and Courier, (Apr. 2, 2020), https://www.postandcourier.com/health/covid19/sc-prisons-seek-emergency-help-to-hire-officers-amid-coronavirus-high-unemployment/article_e42f0448-743a-11ea-9280-236d83050c4d.html

¹³ South Carolina Dept. of Health and Environmental Control, *South Carolina Announces Latest COVID-19 Update*, <https://www.scdhec.gov/news-releases/south-carolina-announces-latest-covid-19-update-april-19-2020> (last visited Apr. 20, 2020).

so, South Carolina has failed to act in a coordinated or legally sufficient way to prevent COVID-19 from spreading rapidly through state operated correctional facilities and overwhelming medical resources in nearby communities.

And time is of the essence as the pandemic is not just at the door of South Carolina's prisons -- it is already through it. As of April 19, 2020, the South Carolina Department of Corrections ("SCDC") has reported that 35 SCDC employees have tested positive for COVID-19 and one of those employees has died.¹⁴ On April 19, 2020, SCDC reported the first positive test result for COVID-19 in an inmate, and that the inmate has been hospitalized for treatment.¹⁵ That inmate is incarcerated at Kirkland Reception and Evaluation Center in Columbia, the same facility where SCDC had previously reported that three employees had tested positive for COVID-19.¹⁶ Because COVID-19 is so highly contagious, Respondents must take immediate, aggressive action to curtail the further spread of the virus and to protect those inmates most likely to develop serious complications.

Moreover, Respondents' failure to act cannot be reconciled with the decisions of the federal government and many other states that have protected the constitutional rights of incarcerated people by taking steps to reduce prison populations without jeopardizing public safety, including granting early release of vulnerable incarcerated people.¹⁷ Consistent with this approach, the South

¹⁴ COVID-19 Information, South Carolina Dept. of Correction, <http://www.doc.sc.gov/covid.html>, (last visited Apr. 20, 2020); Andy Shain, *How SC's Biggest Coronavirus Hot Spots are Spread Across the State*, The Post and Courier, (Apr. 14, 2020), https://www.postandcourier.com/health/covid19/sc-records-3-553-total-cases-of-coronavirus-10-new-deaths/article_2f7ded12-7e7f-11ea-b8ea-ef51cc02a163.html

¹⁵ COVID-19 Update, South Carolina Department of Corrections, (updated Apr. 19, 2020).

¹⁶ *Id.*

¹⁷ Walter Pavlo, *AG William Barr's Memo to Bureau Of Prisons: 'Time Is Of The Essence'*, Forbes, (Apr. 4, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/04/ag-william-barrs-new-memo-to-bureau-of-prisons-time-is-of-the-essence/#e943a3868058>; Prison Policy Initiative, *Responses to COVID-19 pandemic - Releasing people from jail and prisons*, (Apr. 8, 2020), <https://www.prisonpolicy.org/virus/virusresponse.html>, Joshua Sharpe, *Georgia to Release Some Inmates due to COVID-19 Fears*, The Atlanta Journal, (Mar. 31, 2020), <https://www.ajc.com/news/local/breaking-georgia-release-some-inmates-due-covid->

Carolina Supreme Court issued emergency directives restricting access to the courts and urging the state’s judicial districts to avoid issuing bench warrants and to start releasing people charged with non-violent offenses.¹⁸ The highest courts in many other states—including California, Ohio, Pennsylvania, Michigan, New Jersey, Massachusetts, Washington, Kentucky, Maine, Maryland, and Wyoming—have also taken similar measures to significantly reduce the populations in their correctional facilities, recognizing that the coronavirus pandemic compels the release of those who pose little threat to public safety and will be endangered by continued imprisonment.¹⁹ Likewise, the governors of Pennsylvania and New Jersey authorized the early release of thousands of nonviolent state prison inmates, placing them under house arrest or on parole.²⁰

By contrast, South Carolina has no adequate plan to address the exigent health emergency. While the SCDC has promulgated a “COVID-19 Action Plan” (“SCDC Action Plan”),²¹ that plan utterly fails to protect correctional staff and prisoners. Not only has the State failed to implement the SCDC Action Plan, but the plan is inherently inadequate because it fails to call for any reduction in prison population, which is necessary to allow for sufficient physical distancing. In addition, the SCDC Action Plan does not require testing of current employees or inmates, but

[fears/np6zhBrIP1oe2jOkUmWVoL](https://www.iowacapitaldispatch.com/2020/04/12/iowa-prison-inmates-make-their-own-face-masks-to-mitigate-spread-of-covid-19/); Linh Ta, *Iowa’s Prisons Will Accelerate Release of Approved Inmates to Mitigate COVID-19*, Times-Republican, (Mar. 23, 2020), <https://www.iowacapitaldispatch.com/2020/04/12/iowa-prison-inmates-make-their-own-face-masks-to-mitigate-spread-of-covid-19/>

¹⁸ Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020);

<https://sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>. This action resulted in the release of 85 people from the Greenville County Detention Center, 42 people from Anderson County Detention Center, and 24 people from Spartanburg County Detention Center. Daniel Gross, *Dozens of Inmates Released from Greenville Jail Amid Growing COVID-19 Concerns*, Greenville News, (Mar. 20, 2020).

<https://www.greenvilleonline.com/story/news/local/south-carolina/2020/03/20/dozens-released-greenville-south-carolina-jail-due-covid-19-fears/2883854001>

¹⁹ Prison Policy Initiative, *Responses to the COVID-19 Pandemic*, “<https://www.prisonpolicy.org/virus/virusresponse.html#releases>.” (last updated Apr. 20, 2020).

²⁰ Jeremy Roebuck, *Thousands of State Prison Inmates in Pa. and N.J. are Now Eligible for Temporary Release*, The Philadelphia Inquirer, (Apr. 10, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-prisoners-pennsylvania-new-jersey-governor-wolf-murphy-20200410.html>

²¹ COVID-19 Action Plan, South Carolina Department of Corrections, http://www.doc.sc.gov/scdc_covid-19_action_plan_031620.pdf, (last updated Mar. 14, 2020).

rather recommends monitoring only newly arrived prisoners for “COVID-19 exposure risk factors and symptoms.”²² The impact of that failure is obvious: While the SCDC currently reports that 35 prison employees have already tested positive, there is only a single inmate with a positive test.²³ Statistically, the only conceivable explanation for that lopsided result is the absence of testing of inmates. Without the ability to perform widespread testing -- of prison employees *and inmates* -- there is a high risk that asymptomatic carriers will expose dozens of people in a short period of time. The risk of widespread infection in South Carolina’s prisons is further compounded by SCDC’s well-publicized 900-person staffing shortage, which further constrains the ability of SCDC to implement quarantining measures necessary to isolate symptomatic inmates and protect inmates and staff with underlying medical conditions.²⁴ Finally, the SCDC Action Plan also endangers the lives of those in custody by restricting their transportation to medical facilities for necessary medical treatment, including life-sustaining medical attention.²⁵ For example, there are prisoners suffering from Stage 4 cancer who are not receiving their chemotherapy treatments.

Unless this Court intervenes to compel Respondents to implement a plan for the reduction of South Carolina’s prison populations, Respondents and the SCDC will clearly continue in their steadfast refusal to take the necessary steps to prevent a COVID-19 outbreak. Respondent Director Stirling has said he lacks authority to release prisoners.²⁶ For its part, Respondent Board of Pardons and Paroles does have the power to release prisoners. But that Board has ceased meeting

²² *Id.*

²³ COVID-19 Information, *supra* note 14; COVID-19 Update, *supra* note 15

²⁴ Meyer Dec. *supra* note 3 at ¶ 30; Hobbs, *supra* note 12.

²⁵ Meyer Dec., *supra* note 3 at ¶¶ 17-18.

²⁶ Gregory Yee, *How SC Authorities are Working to Protect Inmates from Coronavirus*, The Post & Courier, (Apr. 10, 2020), https://www.postandcourier.com/health/covid19/how-sc-authorities-are-working-to-protect-inmates-from-coronavirus/article_1897548e-7b65-11ea-a6cf-dbc336a2a7e.html

during the COVID-19 emergency,²⁷ and has failed to take any action to mitigate the health emergency.²⁸ Respondent Governor McMaster has failed to take action to reduce the prison population, despite formal requests to do so.²⁹

In particular, on March 27, 2020, the ACLU of South Carolina sent an inquiry to the SCDC regarding the availability of testing kits, the number of inmates in quarantine and the number of confirmed cases of COVID-19 in its facilities.³⁰ The SCDC's only response was to post on their website the number of staff infected and until the first such case was reported on April 19, 2020, that there have been no cases of COVID-19 among those incarcerated in its facilities, but without any indication whether any of its incarcerated population has ever been tested for the virus.³¹ Without a satisfactory response from the SCDC, on April 9, 2020, the South Carolina ACLU sent a letter to Respondent Governor McMaster 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.³² As of the date of this filing, Respondent Governor McMaster

²⁷ Emily Bohatch, *Parole Hearings Postposed Due to the Coronavirus*, The State, (Apr. 3, 2020), <https://www.thestate.com/news/coronavirus/article241711431.html>.

²⁸ Although the South Carolina Department of Probation, Parole and Pardon Services has announced that since April 1, 2020 it has released 202 inmates to its various supervision programs, it appears that those inmates had been granted parole before the South Carolina Board of Pardons and Paroles ceased holding hearings as a result of the COVID-19 emergency. In that announcement the only action reported to have been taken by the Board of Pardons and Paroles has been to modify parole conditions for approximately 30 inmates who were originally ordered to attend addiction treatment before release solely due to staffing limitations within the prison. See South Carolina Dept. of Probation, Parole, and Pardon Services (Apr. 17, 2020), Retrieved from Facebook, [https://www.facebook.com/South-Carolina-Department-of-Probation-Parole-and-Pardon-Services-791711507516145/?_cft__\[0\]=AZXZQLvOPGN_7LwQGrvFEDU-nxourtq5RXj3joWnAlbh4TN92MAsx1V-N7VsT07w4WomQu5DIou2eiVnyTaU6MS8G8dyVUvdX6o-8ybBSXgHV5N0ExwEZELf7xzOIYFz3LTGSndu2IGrAYYQIbxWwsaoGCRr2wbkAfhmJKHThUWg&_tn=-UC%2CP-R](https://www.facebook.com/South-Carolina-Department-of-Probation-Parole-and-Pardon-Services-791711507516145/?_cft__[0]=AZXZQLvOPGN_7LwQGrvFEDU-nxourtq5RXj3joWnAlbh4TN92MAsx1V-N7VsT07w4WomQu5DIou2eiVnyTaU6MS8G8dyVUvdX6o-8ybBSXgHV5N0ExwEZELf7xzOIYFz3LTGSndu2IGrAYYQIbxWwsaoGCRr2wbkAfhmJKHThUWg&_tn=-UC%2CP-R)

²⁹ Letter to Governor Henry McMaster from ACLU-SC (Apr. 9, 2020),

https://www.aclusc.org/sites/default/files/field_documents/04.09.20_prison_release_demand_letter_0.pdf

³⁰ Letter to SCDC Director Stirling from ACLU-SC (Mar. 27, 2020),

https://www.aclusc.org/sites/default/files/field_documents/03.27.20_aclu_sc_letter_to_director_stirling.pdf

³¹ COVID-19 Information, *supra* note 14; COVID-19 Update, *supra* note 15.

³² Letter to Governor Henry McMaster, *supra* note 29.

has provided no response of any kind, and Respondent SCDC Director Stirling responded to press inquiries about that letter by stating that the SCDC has no authority to release prisoners even under a medical emergency.³³

Respondents' collective failure to act, and their extreme indifference to the health and safety of those they are required to protect, necessitates the intervention of this Court. To be sure, Petitioners do not request the unregulated release of the state's prisoners or that the Court disregard the institutional structure of state government. Rather, for the reasons set forth below, Petitioners respectfully request that this Court exercise its jurisdiction to direct Respondents to use their existing authority to expeditiously reduce the SCDC prison population by releasing certain Petitioners and those individuals falling within the categories defined below with appropriate protections for themselves and the community at large. Petitioners also request that the Court direct Respondents to take additional necessary measures to prevent the spread of COVID-19 within SCDC facilities, and for any other relief that this Court deems just and proper.

If this Court does not grant immediate release with appropriate safeguards on the basis of this Petition-Complaint, given the exigency of the issues raised here and the potential for immediate and irreversible harm, including death, Petitioners request a hearing as soon as possible.

I. JURISDICTION AND VENUE

1. Petitioners bring this action pursuant to 22 U.S.C. § 2254 for relief from detention that violates their Eighth and Fourteenth Amendment rights under the U.S. Constitution.

2. This Court has subject matter jurisdiction over this Petition pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause), 28 U.S.C. § 2254 (habeas corpus), 28 U.S.C. § 1651 (All Writs Act), and 28 U.S.C. § 1331 (federal question jurisdiction).

³³ Yee, *supra* note 26.

3. Venue is proper in the District of South Carolina pursuant to 28 U.S.C. § 2254 because the Petitioners and all other class members are in custody in this judicial district and therefore, venue is proper pursuant to 28 U.S.C. § 1391(b)(2). Assignment to the Charleston Division of this Court is appropriate because this an action raising prisoner issues and because a substantial part of the events or omissions giving rise to Petitioners' claims have occurred and continue to occur in this division.

II. PARTIES

4. The Petitioners specifically named herein are only a small fraction of those eligible for the relief requested. It is expected that additional individual and representative incarcerated people, represented by John Does 1 through 10 and Jane Roes 1 through 10 in the caption of this proceeding, will be added as Petitioners as this proceeding progresses.

5. Petitioner Jeanne Voltz-Loomis (00382904) is 68 years old and housed at Leath Correctional Institution in Greenwood.³⁴ Ms. Voltz-Loomis suffers from hypertension, extremely high blood pressure (stroke-level), and diet deficiencies exacerbating her hypertension.³⁵ She is serving a five year sentence for fraud and tax evasion.³⁶ Her projected parole eligibility date is October 20, 2021.³⁷

6. Petitioner Gary Zachariah Thomas (00310751) is 45 years old and is housed at Trenton Correctional Institution in Trenton.³⁸ Mr. Thomas suffers from sciatica.³⁹ He is serving

³⁴ SCDC Inmate Search Detail Report, Jeanne Voltz-Loomis ("Voltz-Loomis Search Report") (Exhibit 3).

³⁵ Declaration of Patrick Brooks ("Brooks Dec.") (Apr. 19, 2020) at ¶ 9, 11 (Exhibit 4).

³⁶ Voltz-Loomis Search Report, *supra* note 34.

³⁷ *Id.*

³⁸ SCDC Inmate Search Detail Report, Gary Thomas ("Thomas Search Report") (Exhibit 5).

³⁹ Brooks Dec., *supra* note 35 at ¶ 36.

a two year sentence for domestic violence and drug possession.⁴⁰ Mr. Thomas' projected release date is October 4, 2020.⁴¹ Mr. Thomas has less than six months remaining on his sentence.⁴²

7. Petitioner Denise Edgar (00189102) is 60 years old and is housed at Leath Correctional Institution in Greenwood.⁴³ Ms. Edgar suffers from asthma and high blood pressure, and recently had surgery.⁴⁴ She has received no medical care for her pre-existing medical conditions.⁴⁵ Ms. Edgar is serving a 30 year sentence for drug trafficking, and her projected release date is September 1, 2029.⁴⁶

8. Petitioner Brandon Moore (00349976) is 30 years old and is housed at Turbeville Correctional Institution in Turbeville Correctional Institution.⁴⁷ Mr. Moore suffers from high blood pressure and seizures.⁴⁸ Mr. Moore was eligible for parole in December 2019, and his projected release date is August 14, 2020.⁴⁹

9. Petitioner Allen Slaughter, Jr. (00380922) is 48 years old and is housed at Allendale Correctional Institution in Fairfax.⁵⁰ Mr. Slaughter suffers from chronic severe asthma.⁵¹ He has had to go to the emergency room multiple times and been repeatedly hospitalized for asthma prior to incarceration.⁵² Mr. Slaughter is serving a 10 year sentence for manufacturing,

⁴⁰ Thomas Search Report, *supra* note 38.

⁴¹ *Id.*

⁴² *Id.*

⁴³ SCDC Inmate Search Detail Report, Denise Edgar ("Edgar Search Report") (Exhibit 6).

⁴⁴ Brooks Dec., *supra* note 35 at ¶ 17.

⁴⁵ *Id.*

⁴⁶ Edgar Search Report, *supra* note 43.

⁴⁷ SCDC Inmate Search Detail Report, Brandon Moore ("Moore Search Report") (Exhibit 7).

⁴⁸ Declaration of Shirene Hansotia ("Hansotia Dec.") (Apr. 19, 2020) at ¶ 23-28 (Exhibit 8).

⁴⁹ Moore Search Report, *supra* note 47.

⁵⁰ SCDC Inmate Search Detail Report, Allen Slaughter, Jr. ("Slaughter Search Report") (Exhibit 9).

⁵¹ Hansotia Dec., *supra* note 48 at ¶¶ 33, 35.

⁵² *Id.*

distribution, and possession of narcotics and his projected parole eligibility date is October 18, 2020.⁵³

10. Petitioner Gay Opel Stanley (00382015) is 47 years old and is housed at Camille Griffin Graham Correctional Center in Columbia.⁵⁴ Ms. Stanley suffers from many health problems, including chronic lung disease (COPD), cirrhosis, liver cancer, and Hepatitis C.⁵⁵ She is currently serving a 16 month sentence for shoplifting.⁵⁶ Her projected release date is June 22, 2020.⁵⁷ She became eligible for parole on January 21, 2020.⁵⁸ Ms. Stanley has less than four months remaining on her sentence.⁵⁹

11. Petitioner Brison Akeem Allison (00381992) is in SCDC custody at the Goodman Correctional Institution in Columbia.⁶⁰ Mr. Allison is a lifelong asthmatic and is serving a one year sentence for financial transaction fraud.⁶¹ His projected parole eligibility date was on March 31, 2020, and his projected release date is July 22, 2020.⁶²

12. Petitioner Protection & Advocacy for the People with Disabilities, Inc. (P&A) is a non-profit corporation. It is the protection and advocacy system for the state under federal and South Carolina law, and is charged with the duty to “protect and advance the legal rights of people with disabilities.”⁶³ The organization’s offices are located at 3710 Landmark Drive, Suite 208,

⁵³ Slaughter Search Report, *supra* note 50.

⁵⁴ SCDC Inmate Search Detail Report, Gay Opel Stanley (“Stanley Search Report”) (Exhibit 10).

⁵⁵ Brooks Dec., *supra* note 35 at ¶ 47

⁵⁶ Stanley Search Report, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ SCDC Inmate Search Detail Report, Brison Akeem Allison (“Allison Search Report”) (Exhibit 11).

⁶¹ Brooks Dec., *supra* note 35 at ¶ 26.

⁶² Allison Search Report, *supra* note 60.

⁶³ Petitioner Protection & Advocacy for the People with Disabilities, Inc., <https://www.pandasc.org/>, (last visited Apr. 16, 2020).

Columbia, SC 29204.⁶⁴ P&A's interest is specifically in regard to individuals with disabilities as identified in paragraphs ¶¶ 62-63 (*infra*).

13. Respondent Governor Henry McMaster is the Governor of South Carolina. This Petition is brought against Governor McMaster solely in his official capacity.

14. Respondent Bryan Stirling is the Director of the South Carolina Department of Corrections. This Petition is brought against Director Stirling solely in his official capacity.

15. Respondent South Carolina Board of Pardons and Paroles is appointed by the Governor of South Carolina, to, among other things, grant or modify paroles and pardons and assist the Governor with respect to petitions for reprieves and commutations. Respondents Christopher F. Gibbs, Mollie DuPriest Taylor, Dan Batson, Henry S. Eldridge, Lonnie Randolph and Kim Frederick are members of the South Carolina Board of Pardons and Paroles. This Petition is brought against the individual members of the Board of Pardons and Paroles solely in their official capacities.

III. FACTUAL ALLEGATIONS

A. COVID-19 Poses a Rapidly Spreading Public Health Crisis and Risk of Illness, Injury, or Death

16. The novel coronavirus causes the disease known as COVID-19. The number of known COVID-19 infections is increasing daily. On March 11, 2020, when the World Health Organization labeled the outbreak a global pandemic, the organization had identified 118,000

⁶⁴ *Id.*

cases in 110 countries.⁶⁵ A month later, the WHO reported approximately 2,000,000 COVID-19 cases throughout the world and over 130,000 reported deaths.⁶⁶

17. On March 13, 2020, President Trump declared a national emergency,⁶⁷ yet in the United States, as of April 16, 2020 there are 632,548 confirmed cases nationwide and over 31,071 deaths.⁶⁸

18. Despite the recent reports of the leveling of the number of newly reported COVID-19 cases in the United States in areas where the CDC guidelines have been followed rigidly, that has not been the case where compliance with the guidelines has been compromised such as in jails and prisons and in other workplaces with large numbers of employees working within close proximity of each other. The Institute for Health Metrics and Evaluation at the University of Washington projects that 68,841 Americans will die of COVID-19 by August, even accounting for existing interventions and restrictions on public interaction.⁶⁹

19. On March 13, 2020, Respondent Governor Henry McMaster issued an executive order declaring a state of emergency in the State of South Carolina.⁷⁰ On April 6, 2020, the Governor enacted a statewide shelter-in-place order that requires all persons to stay at home or to

⁶⁵ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://cutt.ly/UtEuSLC>.

⁶⁶ Coronavirus Disease 2019 (COVID-19) Situation Report – 87, World Health Organization, (Apr. 16, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200416-sitrep-87-covid-19.pdf?sfvrsn=9523115a_2

⁶⁷ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

⁶⁸ Coronavirus Disease 2019 (COVID-19): Cases in U.S., Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Apr. 16, 2020).

⁶⁹ COVID-19 Projections, Institute for Health Metrics and Evaluation, <https://covid19.healthdata.org/united-states-of-america> (last visited Apr. 16, 2020).

⁷⁰ South Carolina Office of the Governor, Executive Order. No. 2020-08, (Mar. 13, 2020), [https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-13%20FILED%20Executive%20Order%20No.%202020-08%20-%20State%20of%20Emergency%20Due%20to%20Coronavirus%20\(COVID-19\).pdf](https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-13%20FILED%20Executive%20Order%20No.%202020-08%20-%20State%20of%20Emergency%20Due%20to%20Coronavirus%20(COVID-19).pdf)

go to work only if participating in essential business or activities.⁷¹ As of April 20, 2020, South Carolina reported 4,439 confirmed COVID-19 cases, 124 deaths, and five times as many estimated cases, 54,536.⁷²

20. The virus is known to spread from person to person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.⁷³ There is no vaccine against COVID-19, and there is no medication that has been scientifically shown to prevent or treat infection.⁷⁴ Social distancing—deliberately keeping at least six feet of space between persons to avoid spreading illness⁷⁵—and a vigilant hygiene regimen, including washing hands frequently and thoroughly with soap and water, are the only known effective measures for protecting against transmission of COVID-19.⁷⁶ Because the coronavirus spreads among people who do not show symptoms, staying away from people is the best way to prevent contraction.

21. Once contracted, COVID-19 can cause severe damage to lung tissue, including a permanent loss of respiratory capacity, and it can damage tissues in other vital organs, such as the heart and liver.⁷⁷

22. For certain categories of people, particularly those with certain medical conditions, the risk of serious COVID-19 infection is greater and more likely to lead to serious injury or death.⁷⁸

⁷¹ South Carolina Office of the Governor, Executive Order, No. 2020-21 (Apr. 6, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-04-06%20eFILED%20Executive%20Order%20No.%202020-21%20-%20Stay%20at%20Home%20or%20Work%20Order.pdf>

⁷² SDEC COVID-19 Update, *supra* note 13

⁷³ CDC Guidelines, *supra* note 5.

⁷⁴ World Health Organization, *Coronavirus*, <https://cutt.ly/ztWYf7e> (“At this time, there are no specific vaccines or treatments for COVID-19.”)

⁷⁵ Johns Hopkins University, *Coronavirus, Social Distancing and Self-Quarantine*, <https://cutt.ly/VtYYiDG>.

⁷⁶ Golob Dec., *supra* note 1 at ¶ 10.

⁷⁷ Golob Dec., *supra* note 1 at ¶ 9; *see also* Centers for Disease Control, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, <https://cutt.ly/etRPVRI>

⁷⁸ Golob Dec., *supra* note 1 at ¶ 3; Declaration of Dr. Mark Stern (“Stern Dec.”) (April 16, 2020) at ¶ 7 (Exhibit 12).

23. People over the age of 50 also face a greater risk of serious illness or death from COVID-19.⁷⁹ In a February 29, 2020 preliminary report, individuals age 50-59 had an overall 1.3% mortality rate; 60-69-year-olds had an overall 3.6% mortality rate, and those 70-79 years old had an 8% mortality rate.⁸⁰

24. People of any age who suffer from certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and asthma, also have an elevated risk.⁸¹ Early reports estimate that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.⁸²

25. In many people, COVID-19 causes fever, cough, and shortness of breath. However, for people over age fifty or with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe.⁸³ Most people in higher risk categories who develop serious illness will need advanced support. This requires highly specialized equipment like ventilators, and the medications needed to enable intubation for ventilator support, all of which are

⁷⁹ Stern Dec., *supra* note 78 at ¶ 7; *see also* Xianxian Zhao, et al., Incidence, clinical characteristics and prognostic factor of patients with COVID-19: a systematic review and meta-analysis (March 20, 2020), <https://cutt.ly/etRAkmt>.

⁸⁰ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths* Chart, <https://cutt.ly/ytEimUQ> (data analysis based on WHO China Joint Mission Report).

⁸¹ *Coronavirus disease (COVID-19) advice for the public: Myth busters*, World Health Organization, <https://cutt.ly/dtEiCyc> (“Older people, and people with pre-existing medical conditions (such as asthma, diabetes, heart disease) appear to be more vulnerable to becoming severely ill with the virus.”).

⁸² *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://cutt.ly/xtEokCt> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”).

⁸³ Golob Dec., *supra* note 1 at ¶ 3; Zhao, *supra* note 79.

in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians.⁸⁴

26. In serious cases, COVID-19 causes acute respiratory disease syndrome (“ARDS”), which is life-threatening: Those who receive ideal medical care with ARDS have a 30% mortality rate.⁸⁵ Even in non-ARDS cases, COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, cause permanent loss of breathing capacity.⁸⁶ COVID-19 may also target the heart, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can reduce the heart’s ability to pump.⁸⁷ This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work. COVID-19 can also trigger an over-response of the immune system and result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.⁸⁸

27. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.⁸⁹

28. Even some younger and healthier people who contract COVID-19 may require supportive care, which includes supplemental oxygen, and in extreme cases, intubation and placement on a ventilator for extended periods.⁹⁰

⁸⁴ Golob Dec., *supra* note 1 at ¶ 8.

⁸⁵ Letter from Faculty at Johns Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon. Larry Hogan, Gov. of Maryland, (Mar. 25, 2020), <https://cutt.ly/stERiXk>.

⁸⁶ Golob Dec., *supra* note 1 at ¶ 9.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ CDC, *Interim Clinical Guidance*, *supra* note 77.

⁹⁰ Golob Dec., *supra* note 1 at ¶ 5.

29. For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent.⁹¹

B. Prevention of COVID-19 Spread and the Grave and Immediate Danger to People Who Live and Work in Detention Centers

30. With high fatality rates and no cure, the only way to reduce injury from COVID-19 is to prevent spread of the virus. And the only assured way to limit the risk of contraction and thereby curb the pandemic is through dramatically reducing contact for all.

31. However, this is extremely challenging in prisons where it is difficult to implement the social distancing or sanitation measures necessary to mitigate transmission of the virus. The best way to achieve physical distancing to reduce the prisoner population, thereby reducing the degree of proximate personal interaction among prisoners and prison staff. Inmates live, eat, and sleep in close proximity, with minimal levels of sanitation and limited access to medical care.⁹² Inmates further risk contracting COVID-19 due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, the presence of many high-contact surfaces, and no possibility of staying at a distance from others.⁹³

32. Dr. Jaimie Meyer (Yale School of Medicine),⁹⁴ Dr. Marc Stern (University of Washington School of Public Health)⁹⁵ (both of whom have submitted declarations along with this

⁹¹ Golob Dec., *supra* note 1 at ¶ 4.

⁹² Letter from John Hopkins Faculty, *supra* note 85

⁹³ Letter from Johns Hopkins Faculty, *supra* note 85; Meyer Dec., *supra* note 3 at ¶ 14 (“People incarcerated in prisons are more susceptible to acquiring and experiencing complications from infectious diseases than the population in the community. This is because people in prisons are more likely than people in the community to have chronic underlying health conditions, including diabetes, heart disease, chronic lung disease, chronic liver disease, and lower immune systems from HIV.”)

⁹⁴ Meyer Dec., *supra* note 3.

⁹⁵ Stern Dec., *supra* note 78

Petition), as well as Dr. Gregg Gonsalves (Yale School of Public Health),⁹⁶ Ross MacDonald (chief medical officer for Correctional Health Services),⁹⁷ Dr. Oluwa Damilola T. Oladeru (physician at Massachusetts General Hospital),⁹⁸ Dr. Anne Spaulding (Emory School of Public Health),⁹⁹ Homer Venters (former chief medical officer for NYC’s jail system),¹⁰⁰ and Josiah Rich (Brown University)¹⁰¹ have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19.

33. The inability of correctional facilities to contain spread is demonstrated by dramatic outbreaks at Blackwater River Correctional Facility in Pensacola, Florida,¹⁰² Parchman State Penitentiary in Mississippi where an inmate recently died from COVID-19,¹⁰³ and at Oakdale Federal Correctional Facility in Louisiana, where six prisoners have died. As he has directed generally across all federal detention facilities, Attorney General Barr has directed the Oakdale Correctional Facility to move forward with home confinement for vulnerable prisoners.¹⁰⁴

⁹⁶ Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, Connecticut Mirror (March 11, 2020), <https://cutt.ly/BtRSxCF>.

⁹⁷ Craig McCarthy and Natalie Musumeci, *Top Rikers Doctor: Coronavirus ‘Storm is Coming,’* New York Post (March 19, 2020), <https://cutt.ly/ptRSnVo>.

⁹⁸ Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America’s Incarcerated Population – and How to Ensure It’s Not Left Behind*, (March 10, 2020), <https://cutt.ly/QtRSYNA>.

⁹⁹ Anne C. Spaulding, MD MPH, *Coronavirus COVID-19 and the Correctional Jail*, Emory Center for the Health of Incarcerated Persons (March 9, 2020).

¹⁰⁰ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (March 12, 2020), <https://cutt.ly/jtRSPnk>.

¹⁰¹ Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, The Guardian (March 13, 2020 3:00 p.m.), <https://cutt.ly/itRSDNH>.

¹⁰² Samantha Gross, *First Widespread Coronavirus Outbreak at Florida Prison Stirs Dread*, Miami Herald (Apr. 10, 2020), <https://www.miamiherald.com/news/coronavirus/article241906466.html>

¹⁰³ Jimmie Gates, *Mississippi Inmate Who Died Tested Positive for COVID-19*, Mississippi Clarion Ledger (Apr. 13, 2020), <https://www.clarionledger.com/story/news/2020/04/13/first-confirmed-case-covid-19-state-inmate/2986782001/>

¹⁰⁴ Memorandum from Attorney General William Barr to Director of Bureau of Prisons, *The Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (Apr. 3, 2020), *available at* <https://politi.co/2UV3JBi>.

34. Correctional facilities house large groups of people together, and move people in groups to eat, recreate, shower and participate in prison programs.¹⁰⁵ They frequently have insufficient medical care for the incarcerated population even outside times of crisis.¹⁰⁶ Hot water, soap, and paper towels are often in limited supply. Incarcerated people, rather than professional cleaners, are responsible for cleaning the facilities¹⁰⁷ and there are questions as to whether they are in fact given appropriate supplies.¹⁰⁸

35. Because of the severity of the threat posed by COVID-19, and its potential to spread rapidly throughout a correctional setting, public health experts recommend the rapid release from custody of people most vulnerable to COVID-19.¹⁰⁹ Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus, and also allows for greater risk mitigation for people held or working in a prison and the broader community.¹¹⁰ Release of the most vulnerable people from custody also reduces the burden on the State's health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

36. Dr. Stern, a correctional health expert, has concluded that downsizing will reduce the density of congregation, which allows people in prison to maintain social distancing and eases the burden on prison authorities to implement infection prevention measures such as provision of

¹⁰⁵ See, e.g., Nathalie Baptiste, *Correctional Facilities are the Perfect Incubators for the Coronavirus*, (March 6, 2020), <https://cutt.ly/GtRSi3e>.

¹⁰⁶ See, e.g., Steve Coll, *the Jail Health-Care Crisis*, *The New Yorker* (Feb. 25, 2019), <https://cutt.ly/ftERHNg>.

¹⁰⁷ See, e.g., Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative, (April 10, 2017); <https://cutt.ly/qtER2bh> (noting that “custodial, maintenance, laundry” and “grounds keeping” are among the most common jobs for incarcerated people); North Carolina Dept. of Corrections, *North Carolina Prison Inmates at Work*, <https://cutt.ly/jtERCbb> (noting that cleaning the grounds and facilities is one of the jobs of incarcerated persons in North Carolina).

¹⁰⁸ See: http://www.doc.sc.gov/scdc_covid_news_update_041920.pdf

¹⁰⁹ See Meyer Dec., *supra* note 3 at ¶ 14 (“As such, from a public health perspective, it is my strong opinion that individuals in SCDC institutions should be evaluated for release.”); Stern Dec., *supra* note 78 at ¶ 13-15.

¹¹⁰ Stern Dec., *supra* note 78 at ¶ 13-15.

cleaning supplies.¹¹¹ According to Dr. Stern, reduction in population can prevent overloading the work of prison staff such that they can continue to ensure the safety of incarcerated people. For those people housed in dormitories, reducing density will enable people to live in group settings with sufficient space to maintain six feet of distance from others.

37. Controlling the spread of the virus by limiting person-to-person contact is critical to saving lives. This is very challenging in prisons, because they are congregate environments, i.e. places where people live and sleep in close proximity, and when individuals are housed in close quarters less than six feet apart and share or touch objects or surfaces used by others, infectious diseases transmitted via the air or by touch, like COVID-19, are even more likely to spread.¹¹² When people must share dining halls, bathrooms, showers, and other common areas, the opportunities for transmission are even greater.¹¹³

38. In the United States, the need to address the COVID-19 problem in prisons has been recognized on a national level. The COVID-19 stimulus package passed by Congress specifically includes funding for federal prisons to purchase personal protective equipment and test kits for COVID-19 because of “the density of the inmate population, the high traffic, the high volume of inmates, [and] the high rate of turnover of inmates and personnel.”¹¹⁴ The bill authorizes the U.S. Attorney General to lengthen the maximum amount of time that a federal prisoner can be placed in home confinement during the pandemic.¹¹⁵

39. On March 30, 2020, the United States House of Representatives Committee on the Judiciary recommended a similar plan of action, calling on the federal Bureau of Prisons to

¹¹¹ Stern Dec., *supra* note 78 at ¶ 14-15.

¹¹² Stern Dec., *supra* note 78 at ¶ 9.

¹¹³ Meyer Dec., *supra* note 3 at ¶ 10.

¹¹⁴ Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) H.R. 748, at 633 (2020), available at <https://assets.documentcloud.org/documents/6819239/FINAL-FINAL-CARES-ACT.pdf>

¹¹⁵ *Id.* at 634.

dramatically increase its population reduction efforts, including through release where viable and increased use of home detention.¹¹⁶ On April 4, Attorney General William Barr directed the Federal Bureau of Prisons to prioritize the use of home confinement as a tool for combatting the dangers that COVID-19.¹¹⁷

40. Echoing the calls of advocates and medical professionals, a group of 35 elected prosecutors has called on leaders within the criminal legal system to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks.¹¹⁸

41. The non-profit, non-partisan Prison Policy Initiative has been tracking actions on the part of state and local agencies that are taking meaningful steps to slow the spread of COVID-19 in jails and prisons, and provides examples of those efforts on its website at “<https://www.prisonpolicy.org/virus/virusresponse.html#releases>.”

C. Existing Procedures and Protocols in South Carolina Are Not Sufficient to Ensure the Safety of Class Members or the General Public

42. The SCDC manages a statewide correctional system involving 21 prisons located throughout the state.¹¹⁹

43. Over the past three weeks since the first case of COVID-19 was detected in South Carolina’s prison system on March 29, the reported number of positive cases has risen daily, and as of April 19, 2020, totals 35 cases spread among 11 different correctional facilities.¹²⁰ SCDC reported that it had *no* confirmed cases of COVID-19 among its inmate population until April 19,

¹¹⁶ March 30, 2020 letter, https://judiciary.house.gov/uploadedfiles/3.30.20_letter_to_ag_barr_re_covid19.pdf

¹¹⁷ Barr Memorandum, *supra* note 104.

¹¹⁸ Fair and Just Prosecution, Joint Statement from Elected Prosecutors on COVID19 and Addressing the Rights and Needs of Those in Custody (Mar. 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>

¹¹⁹ SCDC Action Plan, *supra* note 21.

¹²⁰ COVID-19 Information, SCDC, *supra* note 14.

2020, when it reported its first case involving an inmate, and indicating that only 24 inmates have been tested at all. Given the likely lack of adequate and sufficient testing in these facilities, the fact that cases of COVID-19 among prison staff is self-reported, and the rapid spread of the virus, there is no doubt that the number of people infected who are working or incarcerated in SCDC correctional facilities is actually higher.¹²¹

44. Although the SCDC claims to have been preparing for the COVID-19 crisis since February 2020 and adopted a COVID-19 “Action Plan” purportedly to “ensure the safety of our inmates, the continued effective operations of the state prison and system and to ensure that staff remain health and available for duty,” neither Governor McMaster, the Board of Pardons and Paroles nor the SCDC have acted with the urgency or decisiveness required to quell this oncoming crisis.¹²²

45. The Governor has not taken any steps to substantially reduce the population or expand the SCDC’s ability to release, furlough, or transfer to home detention those who are medically vulnerable. The Board of Pardons and Paroles ceased conducting hearings as a result of the COVID-19 emergency.

46. Even before COVID-19 was introduced into SCDC facilities, activists and civil rights lawyers began advocating for social distancing and de-population efforts to curb the spread, including ACLU of South Carolina which sent the March 27, 2020 letter to the SCDC discussed above.¹²³ Receiving no response to that letter to SCDC, ACLU of South Carolina next sent a letter to Governor McMaster on April 9 requesting that he implement a rigorous safety protocol for SCDC and release individuals who can be released from custody in a way that is consistent with

¹²¹ Meyer Dec., *supra* note 3 at ¶ 28; Stern Dec., *supra* note 78 at ¶ 4.

¹²² SCDC Action Plan, *supra* note 21.

¹²³ Letter from ACLU SC to Director Bryan Stirling, *supra* note 30.

public safety.¹²⁴ The letter outlined a number of specific actions Governor McMaster should take to protect the vulnerable individuals in custody, as well as the staff who work there, which included, among others, 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 expedited parole hearings for eligible individuals and those with indeterminate sentences.¹²⁵

47. Despite these pleas to take action in the face of this medical emergency that endangers the lives not only of the state prison inmate population, but also those of prison employees and their families and the communities surrounding the state prisons, neither Governor McMaster nor the SCDC have even responded, and instead, they have continued their failure to act with the urgency or decisiveness required to quell this burgeoning crisis. The Governor has not taken any action directed at substantially reducing the population or expand the SCDC's ability to release, furlough, or transfer to home detention those who are medically vulnerable. The SCDC has yet to improve its testing and distancing protocols. Dr. Meyer has reviewed the SCDC's Action Plan and determined that it is not comprehensive and fails to conform with CDC guidance in at least three respects.¹²⁶

48. First, SCDC's interim guidance for staff to stay home if ill for 24 hours after symptoms resolve is entirely inconsistent with CDC guidance that home isolation should only be discontinued once (1) at least 7 days have passed from symptoms onset, (2) once at least 3 days have passed without fever and without the need for fever-reducing medications and (3) respiratory symptoms are resolving. In some correctional settings other than those operated by SCDC, repeat testing dictates when employees are permitted to return to work and employees are only allowed

¹²⁴ Letter to Governor Henry McMaster, *supra* note at 29.

¹²⁵ *Id.*

¹²⁶ Meyer Dec., *supra* note 3 at ¶ 27-31

to return once repeat COVID-19 testing is negative. It can take as long as 4-6 weeks after symptoms resolve for repeat testing to return a negative result. If staff with COVID-19 infection return to work too early, they will likely transmit the virus to others. This type of inadequate screening, testing, and isolation will contribute to widespread COVID-19 transmission in SCDC facilities.¹²⁷

49. Second, SCDC's stated plan to maximize social distancing and limit group gatherings is a hollow promise because the SCDC can only take those steps "depending on the facility's population and physical layout."¹²⁸ Given that SCDC institutions largely consist of either double and triple occupancy cells or open-air dormitory-style housing, as well as the severe staffing shortage, it is virtually impossible for proper social distancing to be maintained given the physical layout of these facilities.¹²⁹

50. Third, it does not appear that SCDC facilities have adequate capacity of infirmary beds to care for COVID-19 patients. A 2018 report on various SCDC institutions details multiple facilities with infirmaries that were not operational or, if open, were already full of patients with other health conditions. This suggests that health systems within SCDC facilities will quickly become overwhelmed during a widespread facility outbreak with multiple COVID-19 patients, resulting in complications and preventable deaths.¹³⁰

a) South Carolina Detention Facilities Have Not Implemented Sufficient Social Distancing

51. CDC Guidance on correctional and detention facilities demand social distancing ('ideally 6 feet between individuals, regardless of the presence of symptoms') for incarcerated

¹²⁷ Meyer Dec., *supra* note 3 at ¶ 29.

¹²⁸ SCDC Action Plan, *supra* note 21.

¹²⁹ *Id.* at ¶ 36.

¹³⁰ *Id.* at ¶ 31.

persons during all activities, including sleeping, meals, transportation, recreation, and headcounts.¹³¹ South Carolina has failed to implement social distancing within its prisons. As noted above, the SCDC action plan states that the Agency will implement modified operations to maximize social distancing and limit group gatherings “depending on the facility’s population and physical layout.”¹³² As a result, any attempts at social distancing at a facility like Tyger River, which already has a reported case of COVID-19 among its staff, will be essentially useless where over 100 inmates are housed in “dry” cells which do not contain a toilet or wash basin. Inmates in that facility must use a shared common area to access toilets, wash basins and showers. Additionally, several SCDC facilities also utilize dormitory-style housing where inmates sleep in an open-air environment in close proximity to all others in the unit. These housing arrangements make distancing impossible and contribute to widespread infection once a single inmate becomes ill. Based on the capacity of these and other SCDC detention facilities, it will not be possible to achieve CDC’s social distancing standards throughout the SCDC system.¹³³

52. The CDC guidance recommends “medical isolation of confirmed or suspected COVID-19 cases.”¹³⁴ Because of the forced contact between many individuals in crowded facilities, people who are exposed need to be quarantined. Most South Carolina correctional facilities lack the space to isolate individuals with symptoms or provide treatment, particularly in the event of an outbreak.¹³⁵ Facilities at or near capacity simply lack sufficient space to house people consistent with CDC-recommended quarantine protocol, which requires separating people to further the spread of the disease, or to house those who test positive in true isolation units.¹³⁶

¹³¹ CDC, *Interim Clinical Guidance*, *supra* note 77.

¹³² SCDC Action Plan, *supra* note 21.

¹³³ Meyer Dec., *supra* note 3 at ¶ 35.

¹³⁴ CDC, *Interim Clinical Guidance*, *supra* note 77.

¹³⁵ See, e.g., Meyer Dec., *supra* note 3 at ¶ 31.

¹³⁶ CDC, *Interim Clinical Guidance*, *supra* note 77.

Anecdotal reports from South Carolina correctional facilities indicate that the SCDC has not taken the necessary steps to prepare for medical isolation. For example, Mr. Herbert Palmer, an inmate at McCormick prison with underlying medical conditions and symptoms of COVID-19 was not placed in medical isolation and continued to be housed with his cellmate.¹³⁷ Further, while the SCDC has publicly declared that it has plentiful supplies of hand sanitizer, bleach, and cleaning supplies and that each incarcerated person has access to those items, Mr. Palmer reported that there were no cleaning supplies available.¹³⁸ Mr. Palmer's reports show that despite its public statements that it is adhering to CDC guidelines and adjusting protocols to stop transmission of the virus by providing masks to inmates,¹³⁹ SCDC is not taking appropriate action to stop transmission throughout its facilities.

b) South Carolina Department of Corrections Is Not Properly Screening Individuals

53. Prisons in South Carolina cannot implement the screening measures necessary to prevent introduction of the virus into their facilities. The CDC recommends that correctional facilities adopt intensive pre-intake screening of *all* incarcerated individuals, and screen all staff and individuals entering the facilities,¹⁴⁰ yet the SCDC claims to be screening only all *newly arriving* incarcerated people for COVID-19 exposure risk factors and symptoms.¹⁴¹ The SCDC states that it is placing asymptomatic incarcerated people with exposure risk factors into quarantine; and testing and isolating symptomatic incarcerated people with exposure risk factors for COVID-19 “as appropriate.”¹⁴² Inmates at SCDC facilities report, however, that they were

¹³⁷ Hansotia Dec., *supra* note 48 at ¶ 20

¹³⁸ *Id.* at ¶ 17

¹³⁹ Yee, *supra* note 26 .

¹⁴⁰ CDC, *Interim Clinical Guidance*, *supra* note 77.

¹⁴¹ SCDC Action Plan, *supra* note 21.

¹⁴² *Id.*

denied COVID-19 testing after exhibiting symptoms,¹⁴³ And SCDC has to date reported only *one* positive case of COVID-19 among its incarcerated population. The SCDC has not reported whether it is performing widespread COVID-19 testing in its facilities or whether sufficient testing capability is even available to screen its prison staff and prison inmates.

54. Given the number of cases in the state's most populated counties, it would be logical to expect rates of COVID-19 equal to or higher than the surrounding community in prisons with unsanitary conditions and staff routinely entering and exiting.¹⁴⁴ The report that there is only *one* reported case among the prisoner population in light of a growing number of cases among prison employees likely means that the methods for screening incarcerated people have failed and that the SCDC COVID-19 Action Plan does not include an adequate or sufficient protocol for testing incarcerated people.

c) South Carolina Department of Corrections is Not Equipped to Deal with the Pandemic

55. A staffing shortfall of 900 corrections officers means that the SCDC faces challenges in trying to implement necessary measures to prevent the spread of COVID-19, including social distancing, quarantining, and medical isolation, without significant reductions in the number of incarcerated persons.¹⁴⁵ Even before the onset of the pandemic, the SCDC was plagued by chronic staffing shortages, which resulted in widespread disciplinary violations, including a deadly riot at Lee Correctional Institution.¹⁴⁶ As COVID-19 is expected to spread throughout the state, the SCDC is missing about one-third of the agency's frontline security

¹⁴³ Hanisota Dec., *supra* note 48 at ¶ 18.

¹⁴⁴ Shain, *supra* note 14.

¹⁴⁵ Hobbs, *supra* note 12; Meyer Dec. *supra* note 3at ¶ 30.

¹⁴⁶ Emily Bohatch, *Facing Dire Challenges, Can SCDC Get Ambivalent State House to Throw it a Lifeline?*, (Apr. 11, 2019), <https://www.thestate.com/news/special-reports/article227089334.html>; Anne Emerson, *Audit Takes Closer Look at SCDC Training and Staffing Issues*, (Aug. 26, 2019), <https://abcnews4.com/news/local/audit-takes-closer-look-at-sc-department-of-corrections-training-and-staffing-issues>

workforce.¹⁴⁷ Director Bryan Stirling reported that the Agency was “planning for people to possibly be out for significant amounts of time because of this pandemic.”¹⁴⁸

D. The Petitioners are Particularly Vulnerable

56. A significant number of persons housed in facilities without the ability to adequately follow CDC guidelines are the most vulnerable to COVID-19 infection and death. As of the filing of this Petition, there were, upon information and belief, 3,900 people incarcerated in South Carolina state prisons aged 50 or older, a group at higher risk for fatal outcomes from COVID-19. In addition, incarcerated persons are more likely than the general population to have medical conditions which heighten their risk from death from COVID-19.¹⁴⁹

57. Four of the Petitioners are scheduled to be released within six months:

- a) Gary Zachariah Thomas (00310751) is in SCDC custody at Trenton Correctional Institution in Trenton.¹⁵⁰ His expected release date is October 14, 2020 and is a member of Subclass 4 (see paragraph ¶ 64 *infra*).¹⁵¹
- b) Brandon Moore (00349976)¹⁵² is in SCDC custody at Turbeville Correctional Institution in Turbeville, South Carolina.¹⁵³ Mr. Moore became eligible for parole in December 2019 and his expected release date is August 14, 2020.¹⁵⁴ He has had no disciplinary sanctions during his current incarceration.¹⁵⁵ Not

¹⁴⁷ Hobbs, *supra* note 12

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, Meyer Dec. *supra* note 3 at ¶ 30 ¶ 8 (“The risk posed by infectious diseases in prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.”); Stern Dec., *supra* note 78 at ¶ 9 (“To the extent that incarcerated people are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, infectious diseases that are transmitted via the air or touch (like COVID-19) are more likely to spread, placing people at risk.”).

¹⁵⁰ Thomas Search Report, *supra* note 38.

¹⁵¹ *Id.*

¹⁵² Moore Search Report, *supra* note 47.

¹⁵³ Hansotia Dec., *supra* note 48 at ¶¶ 21-22.

¹⁵⁴ *Id.* at ¶ 30.

¹⁵⁵ Moore Search Report, *supra* note 47.

only is he scheduled for release in less than four months, but Mr. Moore also has underlying health issues that place him at higher risk of COVID-19 infection.¹⁵⁶ Mr. Moore suffers from high blood pressure and seizures.¹⁵⁷ SCDC has denied Mr. Moore his seizure medication and has suffered seizures and serious injuries as a result.¹⁵⁸ Mr. Moore is a member of Subclasses 2, 4 and 5 (see paragraphs see paragraphs ¶¶ 62, 64, 65 *infra*).

- c) Gay Opel Stanley (00382015) is in SCDC custody at Camille Griffin Graham Correctional Center in Columbia.¹⁵⁹ Her projected release date is June 22, 2020.¹⁶⁰ Ms. Stanley also has underlying health conditions that place her at higher risk of COVID-19 infection.¹⁶¹ Ms. Stanley suffers from, among other things, chronic lung disease (COPD), liver cancer, cirrhosis, and Hepatitis C.¹⁶² Ms. Stanley is a member of subclasses 2 and 4 (see paragraphs ¶¶ 62, 64 *infra*).
- d) Brison Akeem Allison (00381992) is in SCDC custody at Goodman Correctional Institution in Columbia serving a one year sentence for financial fraud.¹⁶³ He became eligible for parole on March 31, 2020, and his projected release date is July 22, 2020.¹⁶⁴ In addition to his release date in three months, Mr. Allison is a lifelong asthmatic, which places him at higher risk of serious

¹⁵⁶ Hansotia Dec., *supra* note 48 at ¶¶ 23-27.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Stanley Search Report, *supra* note 54.

¹⁶⁰ *Id.*

¹⁶¹ Stanley Search Report, *supra* note 54.

¹⁶² Brooks Dec., *supra* note 35 at ¶ 47.

¹⁶³ Allison Search Report, *supra* note 60.

¹⁶⁴ *Id.*

illness or death from COVID-19.¹⁶⁵ Mr. Allison is a member of subclasses 2, 4 and 5 (see paragraphs ¶¶ 62, 65 *infra*).

58. The remaining Petitioner is over 50 years of age and has significant medical conditions, which makes him at greater risk of COVID-19 infection, and if he is infected, greater risk of serious adverse health consequences.

a) Jeanne Voltz-Loomis (00382904) is 68 years of age in SCDC custody at Leath Correctional Institution in Greenwood.¹⁶⁶ She is serving a three year sentence for fraud and tax evasion.¹⁶⁷ Her projected parole eligibility date is October 20, 2021, and she has had no disciplinary sanctions during her current incarceration.¹⁶⁸ Ms. Voltz-Loomis suffers from hypertension, dangerously high blood pressure placing her at risk of stroke, and diet deficiencies exacerbating her hypertension.¹⁶⁹ She is concerned about the sanitary conditions at Leath Correctional Institution due to lack of proper cleaning and COVID-19 protocol.¹⁷⁰ Ms. Voltz-Loomis' age and underlying health conditions put her at high risk for COVID-19 infection. Ms. Voltz-Loomis is a member of Subclasses 1 and 2 (see paragraph ¶¶ 61-62 *infra*).

b) Denise Edgar (00189102) is 60 years of age and is in SCDC custody at Leath Correctional Institution in Greenwood serving a 30-year sentence for a non-violent drug offense.¹⁷¹ Ms. Edgar suffers from asthma and high blood

¹⁶⁵ Brooks Dec., *supra* note 35 at ¶ 26.

¹⁶⁶ Voltz-Loomis Search Report, *supra* note 34.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Brooks Dec., *supra* note 35 at ¶ 9, 11.

¹⁷⁰ Brooks Dec., *supra* note 35 at ¶ 7.

¹⁷¹ Edgar Search Report, *supra* note 43.

pressure, and recently had surgery.¹⁷² She has received no medical care for her pre-existing medical conditions.¹⁷³ Because of her age and underlying health conditions, Ms. Edgar is at high risk for COVID-19 infection. She has had no disciplinary sanctions during her current incarceration.¹⁷⁴ Ms. Edgar is a member of Subclasses 1 and 2 (see paragraph ¶¶ 61-62 *infra*).

59. One of the Petitioner is in sub-class 2 because he is especially medically vulnerable to COVID-19 infection, and if infected, to serious adverse health consequences.

a) Allen Slaughter, Jr. (00380922) is a 48-year-old male in SCDC custody at Allendale Correctional Institution in Fairfax.¹⁷⁵ Mr. Slaughter suffers from chronic severe asthma. He has had to go to the emergency room multiple times and was repeatedly hospitalized for asthma prior to incarceration.¹⁷⁶ Mr. Slaughter's projected parole eligibility date is October 18, 2020, and he has had no disciplinary sanctions during his current incarceration.¹⁷⁷ Because of his underlying health condition, Mr. Slaughter is at high risk of COVID-19 infection.¹⁷⁸ Mr. Slaughter is a member of subclasses 2 and 5 (see paragraphs ¶¶ 62, 65 herein). The Court should order that Mr. Slaughter be provided immediate medical attention and follow CDC guidelines to protect Mr. Slaughter from becoming infected. The Court should also order the SCDC to show cause why Mr. Slaughter should not be immediately released.

¹⁷² Brooks Dec., *supra* note 35 at ¶ 17.

¹⁷³ *Id.*

¹⁷⁴ Edgar Search Report, *supra* note 43.

¹⁷⁵ Slaughter Search Report, *supra* note 50.

¹⁷⁶ Hansotia Dec., *supra* note 48 at ¶¶ 33, 35.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

IV. CLASS ACTION ALLEGATIONS

60. Petitioners bring this representative habeas action pursuant to 28 U.S.C. 2554 on their own behalf and on behalf of all persons similarly situated. *See Walker v. O'Brien*, 216 F.3d 626, 633 (7th Cir. 2000). Petitioners seek to represent a class consisting of all people who are currently or will be in the future housed in a SCDC prison during the duration of the COVID-19 pandemic. Petitioners' request for release from physical custody either on parole or through the utilization of furlough or home detention, is limited to the following subclasses:

61. Subclass 1: People in custody who are over the age of 50 as to whom the SCDC has no basis to contend that the release of those older inmates would pose any threat to the community.

62. Subclass 2: People in custody who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19. In addition to people in custody who are eligible for medical furlough or medical parole pursuant to S.C. Code Ann. § 24-210 (A)-(B), this Subclass includes but is not limited to, people with respiratory conditions including chronic lung disease, moderate to severe asthma, people with heart disease or other heart conditions, people who are immunocompromised as the result of cancer, HIV/AIDS, people with chronic liver or kidney disease or renal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders, inherited metabolic disorders, people who have had or are at a risk of stroke, and people with any other condition specifically identified by the CDC either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19 regardless of whether they have received a diagnosis that their underlying medical condition renders them likely to survive for any predetermined length of time.

63. Subclass 3: People in custody with serious developmental disabilities or mental conditions accompanied with an inability to maintain good hygiene habits or an inability to take medications as directed.

64. Subclass 4: People in custody who are within six months of their anticipated release date and qualify for home detention pursuant to S.C. Code Ann. § 24-13-1530.

65. Subclass 5: People in custody who are eligible for parole and who have been disciplinary free for the past year.

66. Subclass 6: People in custody for technical violations of parole or probation.

67. This action has been brought and may properly be maintained as a class action under Federal law. It satisfies the numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Fed. R. Civ. P. 23(a).

68. The class and subclasses are so numerous that joinder of all members is impracticable. The number of people in custody exceeds 17,000, and each subclass contains hundreds of people.

69. Common questions of law and fact exist as to all members of the proposed classes, including (1) does COVID-19 present a substantial risk of harm to people in the custody of the SCDC, (2) do the Respondents have the ability to implement measures that could reduce the number of people living in SCDC prisons, including those especially vulnerable to COVID-19; and (3) have the Respondents, on their own or in concert with each other, failed to act reasonably to mitigate the spread of COVID-19 and protect those in custody who are most vulnerable by not fully utilizing furlough, home detention and other mechanisms to reduce the prison population. All members of the SCDC prison population have a right to receive adequate COVID-19 prevention, testing, and treatment.

70. The claims of the named Petitioners are typical of those of the class as a whole. That typically stems from their claim that Respondents have placed them at significant risk of harm by failing to take the appropriate steps to address the risk of COVID-19 throughout SCDC facilities. Every single person in SCDC custody faces the same risk of contracting COVID-19 if the Respondents fail to take meaningful action to reduce the in-custody population. While members of Sub-classes 1-3 have an increased risk of serious health complications and death as a result of the threat of COVID-19 and Subclasses 4-6 suffer due process violations, the overarching nature of the threat of COVID-19 to every person confined in a SCDC correctional facility is sufficient to satisfy typicality.

71. Respondents have refused to act in a manner that applies generally to the class as a whole, rendering class-wide injunctive and declaratory relief appropriate under FRCP 23(b)(2).

72. In the alternative, the requirements of FRCP 23(b)(1) are satisfied because prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the proposed classes.

V. ARGUMENT

A. SCDC's Failure to Take Steps to Mitigate Transmission of COVID-19 Constitutes Deliberate Indifference to the Serious Risk of Harm to Petitioners

73. Corrections officials have a constitutional obligation to provide for detainees' reasonable safety and to address their serious medical needs. *See DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical

care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”); *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 324 (1982) (the state has an “unquestioned duty to provide adequate . . . medical care” for detained persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*, 563 U.S. 493, 531-32 (2011); *Farmer v. Brennan*, 511 U.S. 825, 834 (remanding for determination whether correctional officer violated Eighth Amendment by failing to prevent “a substantial risk of serious harm”).¹⁷⁹

74. This obligation requires corrections officials to protect detainees from infectious diseases like COVID-19; officials may not wait until someone tests positive for the virus, and an outbreak begins. *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *see also Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”).

75. Government officials violate this affirmative obligation by showing “deliberate indifference” to the substantial risk of serious harm. *Wilson*, 501 U.S. at 303. With respect to a

¹⁷⁹ Petitioners and Class Members are post-conviction detainees. The Eighth Amendment applies to post-conviction detainees in State operated prisons through application of the Fourteenth Amendment’s Due Process Clause. While it is clear that pretrial detainees are presumed innocent and therefore merit greater protection, *see Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), the distinction is irrelevant here: the harms of actual and potential COVID contraction alleged herein clearly satisfy the Eighth Amendment’s more restrictive standard.

highly contagious and rapidly spreading infectious disease like COVID-19 that has already been communicated into and within the SCDC prison system, deliberate indifference is satisfied when officials such as Respondents, who are ultimately responsible for the operation of correctional facilities and the process of release, parole, furlough or home detention, “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33 (holding that a prisoner “states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”) (emphasis added); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Farmer*, 511 U.S. at 842). This Court need not “await a tragic event” to find that Respondents are maintaining unconstitutional conditions of confinement. *Helling*, 509 U.S. at 33. (court “may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious”); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (noting that among the prison conditions for which the Eighth Amendment required a remedy was placement of inmates in punitive isolation under conditions where infectious diseases could spread easily); *Putney v. Likin*, 656 Fed. Appx. 632,*637 (4th Cir. 2016) (holding that courts must consider the risk of harm posed to inmate by deprivation of a mattress for four months in addition to harm actually suffered by inmate). Instead, showing the conditions of confinement “pose an unreasonable risk of serious damage to [Petitioners’] future health” is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35) (alteration omitted); *see also, Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (incarcerated people “may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health”) (citation and internal quotation marks omitted).

76. Here, Petitioners face a substantially increased risk of exposure to COVID-19 -- with the attendant risk of death that follows given their vulnerable conditions and/or age -- because

of the Respondent’s failure to take meaningful and accessible steps to reduce the prison population. As outlined by public health experts, there are no mitigation efforts that the SCDC could undertake here that would better prevent the risk of contraction—and possible later spread to the non-jail community—than immediate release.¹⁸⁰ In addition to the release, furlough and home detention of Subclass members, the SCDC must provide adequate testing, quarantine and hygiene measures in accordance with CDC guidance. Accordingly, Respondents’ failure to adopt and implement such measures constitutes deliberate indifference. *See, e.g., Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996) (“even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.”).¹⁸¹

77. Release of all or some of the class members is the only remedy sufficient to cure this constitutional violation. Without a substantial reduction in prison population, Respondent is unable to prevent or even mitigate the spread of COVID-19 throughout the prison.

B. 28 U.S.C. § 2254 is an Appropriate Vehicle to Remedy these Violations

78. Release of all or some of the class members under appropriate conditions of release is the only remedy sufficient to cure this constitutional violation. Without a substantial reduction in prison population, Respondent is unable to prevent or even mitigate the spread of COVID-19 throughout the prison.

79. Habeas corpus is the appropriate instrument to obtain release when the core grievance is that the petitioner is being unlawfully subjected to physical constraint. *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). Section 2254 allows this Court to grant habeas corpus relief

¹⁸⁰ *See also*, Meyer Dec., *supra* note 3; Stern Dec., *supra* note 78.

¹⁸¹ *See also*, Meyer Dec., *supra* note 3; Stern Dec., *supra* note 78.

when a state prisoner is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The Fourth Circuit has held that Section 2554 governs habeas petitions brought by prisoners in state custody challenging the duration of their sentences. *In re Wright*, 826 F.3d 774, 78-79 (4th Circuit. 2016).

80. Habeas corpus is an appropriate instrument even when prisoners seek something “less than complete freedom.” *Maleng v. Cook*, 490 U.S. 488 (1989); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“It is clear, not only from the language of ss 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.”). Here, while all Petitioners do not necessarily seek total release from SCDC custody, Petitioners do seek urgent release from prison facilities, whether by parole, medical furlough or transfer to home detention.

81. In the alternative, the Petitioners may pursue a habeas claim under Section 2441, which allows this court to release inmates like the Petitioners who are held “in violation of the Constitution.” 28 U.S.C. 2441(c)(3). *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) (Section 2241(c)(3) can afford immediate release for claims other than those challenging the sentence itself).

1. Exhaustion of State Remedies in the Face of COVID-19 Spread is Futile

82. Exhaustion of state remedies is not required “in the absence of state corrective process” or where “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B). There are no state administrative remedies available to petitioners and any state court remedies would be ineffective to protect the petitioner’s constitutional rights.

83. As SCDC Director Stirling already stated in response to the ACLU’s letter to Governor McMaster concerning the danger to inmates from the COVID-19 health emergency, “SCDC does not have the authority to release inmates on its own,..” and the Governor has elected not to respond at all. While South Carolina law authorizes parole for geriatric, terminally ill and permanently incarcerated inmates, only the Board of Probation, Pardons and Paroles can grant that relief and only the SCDC Director can petition the Board for that relief. *See* S.C. Code § 24-21-715(B). Petitioners themselves have no right to initiate that process. Moreover, the statute does not authorize the release of inmates at relatively high risk for serious or fatal medical consequences from COVID-19 who do not satisfy the narrow parameters defined in the statute. Only inmates 70 or older are eligible for geriatric parole, but inmates younger than 70 are in a high-risk category. *See* S.C. Code § 24-21-715(A)(2). And only inmates who have been diagnosed with an incurable illness expected to cause death within two years are eligible for terminally ill parole, but inmates with respiratory, cardiac and other medical conditions that are not imminently terminal are in a high-risk category. *See* S.C. Code § 24-21-715(A)(1).

84. The SCDC’s grievance procedure is equally unavailable to remedy the health emergency to which Petitioners are exposed. That process explicitly does not apply to issues outside the SCDC’s control, including parole decisions in the purview of the Board of Probation, Pardons and Parole. *See* Policy § 8.4.3. Accordingly, there is no administrative remedy available to Petitioners that can remove them from the serious health risk they face in correctional facilities.

85. State court remedies would be ineffective in protecting Petitioner’s federal constitutional rights particularly given reduced court function as a response to the COVID-19 outbreak.¹⁸² *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir. 1977) (“It may further be that even

¹⁸² *See* Mar. 16, 2020 Beatty Memorandum, *supra* note at 18; Bohatch, *supra* note 27,

where the state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process, the federal intrusion may still be warranted.”). Finally, exhaustion is futile for proposed class members because requiring each member to individually petition the court would burden the limited judicial resources during this emergency and cause further delay. The risk of irreparable harm to Petitioners and Class Members is simply too high to require exhaustion in this circumstance. It would be not only futile, but dangerous to force Petitioners and Class Members to exhaust state remedies when their risk of COVID-19 contraction is increasing by the minute.

VI. REQUEST FOR RELIEF

86. Wherefore, Petitioners on behalf of themselves and the putative class they seek to represent, request that this Court enter judgment in their favor and against Respondents and order the following relief:

- a) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate release on parole, furlough or home detention with appropriate precautionary public health measures for members of Subclass 1: People in custody who are over age 50 as to whom Respondents do not demonstrate any threat to the community from their release under their specified release conditions.
- b) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate release on parole, furlough or home detention with appropriate precautionary public health measures for members of Subclass 2: People in custody who are eligible for medical furlough or medical parole pursuant to S.C. Code Ann. 24-210 (A)-(B), or who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including but

not limited to people with respiratory conditions including chronic lung disease or moderate to severe asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or any other condition or related to treatment for a medical condition; people with chronic liver or kidney disease or renal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders (including sickle cell disease), inherited metabolic disorders; people who have had or are at risk of stroke; and people with any other condition specifically identified by CDC either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19 .

- c) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate medical furlough with appropriate precautionary public health measures to members of Subclass 3: People in Custody with serious developmental disabilities or mental conditions accompanied with an ability to maintain good hygiene habits or inability to take medications as directed.
- d) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate transfer to home detention of members of Subclass 4: People in Custody who are within six months of their anticipated release date.
- e) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate transfer to home detention of members of Subclass 5: Parole-eligible individuals who have been disciplinary free for the past year.
- f) Absent a showing by Respondents why the public health and safety of the community requires otherwise, immediate transfer to home detention of members of Subclass 6:

People in Custody for technical violations of parole or probation.

g) Within 10 days of an Order to Show Cause by the Court, the submission of a plan by Respondents, to be overseen by a qualified public health expert pursuant to Fed. R.

Evid. 706, which outlines:

1. Specific mitigation efforts, in line with CDC guidelines, to prevent, to the degree possible, contraction of COVID-19 by all Class Members not immediately released;
 2. A housing and/or public support plan for any released Class or Subclass Members whose testing confirms have been exposed to or infected with COVID-19 and who do not readily have a place to self-isolate for the CDC-recommended period of time (currently 14 days).
 3. Appointing a Special Master on an emergency basis to Chair a Coronavirus Release Committee to evaluate prison inmates vulnerable to contraction of COVID-19 and make recommendations for ameliorative action for other persons who remain in SCDC custody;
- h) If immediate release is not granted on the basis of this Petition alone, then expedited review of the Petition, including oral argument, via telephonic or videoconference if necessary;
- i) A declaration that SCDC's policies violate Petitioners' Eighth and Fourteenth Amendment rights against cruel and unusual punishment;
- j) Certification of this Petition as a Class Action;
- k) An award of Petitioners' attorney fees and costs under 42 U.S.C. sec. 1988 and other applicable law; and

l) Any other and further relief this Court deems appropriate.

Dated: April 21, 2020

Respectfully submitted,

s/ Susan K. Dunn
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