UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TRE MCPHERSON, ET AL., *Petitioner*,	:	CIVIL NO. 3:20-CV-0534 (JBA)
v.	:	
NED LAMONT, ET AL., *Respondent.*	:	MAY 18, 2020

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PEITITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

This case is a proposed class action with mixed claims for relief under the federal habeas statutes and civil rights claims under 42 U.S.C. § 1983. Four of the named Petitioners are lawfully incarcerated inmates held by the Connecticut Department of Correction (DOC). One proposed class is comprised of inmates currently serving sentences imposed by judges of the Connecticut Superior Court. The other class is comprised of pre-trial detainees held on bonds set by Superior Court judges. Within each of the two putative classes, Petitioners propose subclasses of "medically vulnerable" inmates who have a greater risk should they contract the COVID-19 virus. Respondents are the Governor of Connecticut, Ned Lamont, and Commissioner of Correction Rollin Cook.

Respondents respectfully submit that the Court should deny the Petitioners' Motion for Preliminary Injunction. As set forth herein, and maintaining Respondents' challenges to this Court's jurisdiction, Petitioners have failed to meet the high burden of a mandatory injunction. Petitioners have failed to establish a "clear" or "substantial" showing of likelihood of success on the merits in that they cannot establish either Respondent has violated the Eighth or Fourteenth Amendment rights of any putative class members. Even if Petitioners could meet this heavy burden, their reckless request to release thousands of inmates *en masse* with no method of

monitoring them, no plan for their housing or medical care, and no plan for when, if, or how they would be returned to custody, is so inimical to the public interest as to warrant denial on these grounds alone.

I. FACTUAL BACKGROUND

A. Petitioners seek the mass release of inmates in both their Petition and their Motion for Preliminary Injunction.

On April 20, 2020, Petitioners filed the current action against Respondents. In their Petition (Doc. #1) the individually named Petitioners identify themselves as inmates held in various DOC facilities, and some allege that they have pre-existing health conditions or are otherwise in an age group that places them at "significantly higher risk of severe disease and death if they contract [COVID-19]." (Doc. #1 at 2, ¶1.) They seek the "immediate release" of numerous, indeed potentially thousands, of inmates who are "50 and older and those with medical conditions that place them at heightened risk of severe illness or death from COVID-19." (Id.) Critically, the Petition and the motion papers lack any allegations or requests for relief that would suggest how any putative class[1] members would be managed or cared for if released to the community.[2] They also make no allegation or requests explaining how, when or even *if*, these released inmates would be returned to custody.

[1] There is no motion pending for class certification, and Respondents will oppose class certification as the individual public safety risk issues that pertain to each offender, and the unique health concerns would necessarily require that the individual issues would predominate over the common issues to the putative class. Further, it is impossible to determine who is medically "vulnerable" and thus it would be impossible to determine who would be in the class and who would be excluded.

[2] Although unclear, it appears that Petitioners envision a state court process for reviewing individuals subject to release so that the State can hold in custody those individuals for whom there are "judicially-recorded findings by clear and convincing evidence that the individual poses such a serious risk of flight or danger to others that no other conditions can mitigate." (Doc. #1 at 34.) Nowhere in their Petition or motion papers do they cite authority for the proposition that the State, its courts or any of its criminal justice agencies bear such a burden of proof anywhere and in any context. Nor do they explain how a state court would have jurisdiction to decide whether previously sentenced inmates "pose such a serious risk of flight or danger to others that no other conditions can mitigate." The state courts have already made such determinations in the first instance.

On May 10, 2020, Petitioners filed a motion for preliminary injunction. (Doc. #43.) Petitioners seek a mandatory, permanent injunction compelling Respondents to release state inmates from custody and to submit for court review certain plans for mitigating risk of infection. (Doc. #43 at 46, ¶¶1-3.) Petitioners make no effort to accommodate the significant and obvious public safety risks of releasing inmates into the community. In particular, their demand that certain class members be released "within twenty-four hours" is so cavalier as to be dangerous to the community at large.

B. The DOC has taken extraordinary steps to combat COVID-19 by implementing CDC recommendations for incarcerated individuals.

The DOC operates fourteen separate correctional facilities around the state, serving different inmate populations and providing housing options that vary greatly from facility to facility. Each facility is assigned a security level score ranging from 2 to 5, with a level 2 facility housing minimum security inmates and the level 5 facility designed to house maximum security inmates.[3] These facilities, their inmate counts, and their respective housing accommodations appear in the following chart:

FACILITY	INMATE COUNT AS OF 3/1/20	INMATE COUNT AS OF 5/18/20	NUMBER OF CELL BEDS	NUMBER OF DORMITORY BEDS
Brooklyn CI	426	355	0	456
Carl Robinson CI	1314	907	32 beds/16 cells	1480
Corrigan-Radgowski CC	1189	985	839	456
MacDougall-Walker CI	1938	1898	2218	0
New Haven CC	679	636	419	328

[3] As discussed *infra*, the DOC chose the level 5 facility, Northern Correctional Institution, to house inmates placed in medical isolation due to Covid-19 infection. DOC made this decision for a number of reasons unrelated to the high security level of the facility. (Declaration of Robert Richeson (Ex. A) at 1-2, ¶¶4-10; Declaration of Dr. Byron Kennedy (Ex. B) at 2-3, ¶¶10, 12.)

Northern CI	78	182	577 (564 minus RHU and infirmary beds)	0
Cheshire CI	1151	1125	1520	128
Willard-Cybulski CI	1079	613	0	1148
Bridgeport CC	690	597	301 which includes restrictive housing (22 beds). Number does not include medical beds which is a maximum of 26.	470
Garner CI	548	540	745	0
Manson YI	283	232	706	0
Osborn CI	1253	1058	448 regular units, 64 mental health unit	235
Hartford CC	876	799	555	480
York CI	883	627	140	1202

Every facility in the system is operating well below capacity and well below the inmate count of just two months ago. This is especially true of Brooklyn, Carl Robinson, Willard-Cybulski, Osborn and York, the facilities with significant population of inmates held in dormitory housing. (Declaration of Warden Faucher (Ex. C) at 1-2, ¶¶5-6; Declaration of Warden Caron (Ex. D) at 1-2, ¶5; Declaration of Warden Garcia (Ex. E) at 2, ¶¶5-6; Declaration of Warden Rodriguez (Ex. F) at 1, ¶5; Declaration of Warden Dougherty (Ex. G) at 1-2, ¶¶4, 6.) These significant population decreases have allowed custody staff to quarantine new admits and separate sick inmates from the remainder of the prison population while undergoing further evaluation for COVID-19. (Ex. B at 3-4, ¶¶18, 20.)

The following chart shows the number of COVID-19 positive inmates, by facility:

Total DOC COVID-19 Positives/Recovered by Facility

Total Offenders Positive 526 Total Offenders Recovered 419
Total Offender Deaths 6

Inmates from Facility to NCI	Total	Inmates Returned to Facility	Total
Bridgeport CC	62	Bridgeport CC	59
Brooklyn CI	0	Brooklyn CI	12
Cheshire CI	17	Cheshire CI	10
Corrigan-Radgowski	102	Corrigan-Radgowski	74
Gamer CI	0	Garner CI	0
Hartford CC	35	Hartford CC	31
MacDougall-Walker	3	MacDougall-Walker	5
Manson	0	Manson	0
New Haven CC	52	New Haven CC	47
Northern CI	0	**Northern CI**	**73**
Osborn CI	123	Osborn CI	75
Carl Robinson CI	72	Carl Robinson CI	55
Willard-Cybulski	60	Willard-Cybulski	53
York CI	0	York CI	0
		Hospital	11
		Discharged	15
		Parole	0

DOC's three specialized facilities, York (females), MYI (21 and younger) and Garner (mental health) have had no reported inmate infections. Moreover, while Northern Correctional Institution ("NCI") houses individuals who have tested positive for the COVID-19 virus and are under quarantine or medical isolation, DOC officials have successfully managed their quarantine units to prevent the spread to other inmates at NCI .

On March 23, 2020 the Center for Disease Control (CDC) provided guidance to correctional and detention facilities. (Ex. B at 7-33.) In response, DOC cancelled social visits, quarantined new admissions, limited inmate transfers, cancelled volunteers, and limited contractor access. (Ex. B at 3-4, ¶18.) All staff members have their temperatures checked prior to entry. (Id.) If any staff member has a temperature greater than 100.4 or exhibits any symptoms, they are denied entry. (Id. at 4, ¶19.) If a staff member is exhibiting symptoms during their shift, they are immediately isolated and sent home, a review of who they have come into contact with is conducted, and those individuals are monitored for symptoms. (Ex. B at 5, ¶25.) These areas are then cleaned and disinfected. (Id.) Soap and cleaning supplies are widely distributed, common areas and frequently touched surfaces are cleaned and disinfected, and recreation was modified to increase social distancing measures. (Id. at 4, ¶20.) Where feasible,

inmates have been provided their meals in their cells to increase social distancing. (Id.) Inmates have been provided hygiene education via posters and/or memos handed to them. (Id. at 5, ¶26.)

DOC has created a COVID-19 Tracker and placed it online.[4] The tracker is updated daily. As of May 15, 2020, there have been 598 total inmates who have contracted SARS-CoV-2 with 444 of them being medically cleared and returned to their original facility. 369 staff members have contracted the virus with 299 being medically cleared to return to work. 66 inmates are currently being medically isolated at NCI.

DOC implemented protocols for the quarantine of possible infections and the medical isolation of those testing positive or exhibiting symptoms. (Ex. B at 4-5, ¶¶22-23.) As of April 7, 2020, NCI was designated as the medical isolation unit. (Id. at 2, ¶10.) NCI was chosen because it has single cells with individual bathroom facilities, solid walls and doors, and separate airflow from other parts of the facility, all in accordance with CDC Guidelines. (Ex. A at 1-2, ¶¶4-10; Ex. B at 2-3, ¶¶10, 12.) Prior to returning any inmate who had COVID-19 from NCI to their original housing facility, they must be fever free for at least 72 hours, their symptoms must have improved, and at least 14 days must have passed since the beginning of symptoms, which is longer than what CDC suggests. (Ex. B at 3, ¶15; *see* CDC Guidelines at 17.)

Wardens across DOC have implemented measures to comply with the CDC guidelines. For example, Warden Butricks at Cheshire has increased the opportunities for social distancing by modifying outdoor recreation to 50 inmates at a time, not allowing certain sports such as basketball due to the chance of contact between players, and cancelling congregate programming in lieu of individualized instruction. (Declaration of Warden Butricks (Ex. H) at 2, ¶7.) Cheshire has placed posters around the facility educating inmates about proper hygiene practices.

[4] https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories

(Id. at 2, ¶8) This information is reinforced by constant oral reminders by staff. (Id.) At Brooklyn CI, which has dorm style units, Warden Faucher has increased social distancing by allowing only one dorm at a time to go to outside recreation. (Ex. C at 2, ¶6.) Only five inmates may attend addiction programming at one time and all of them must be from the same housing unit. (Id.) Sanitation has been ramped up, phones are cleaned daily, and cleaning supplies are available for inmates to clean the phones between each use. (Id. at 3, ¶11.) At Corrigan-Radgowski, which has a mix of dorm style housing and cells, common areas are cleaned after every group of inmates is released to use the showers with frequently touched areas such as railings, doors, and handles cleaned constantly. (Declaration of Warden Martin (Ex. I) at 3, ¶8.) And inmates are provided supplies to clean the phones after each use. (Id.)

C. DOC, along with the State Judicial Branch and the Board of Pardons and Paroles, has significantly reduced the inmate population in response to the COVID-19 pandemic.

The most recent monthly report of data collected by the Criminal Justice Policy and Planning Division of the State of Connecticut Office of Policy and Management demonstrates that the prison population has been reduced significantly. As of April 1, 2020, the state prison population stood at 11,854, the lowest since 1993.[5] Since Governor Lamont declared a state of emergency on March 10, 2020, the daily prison count has declined from 12,366 to 10,556, a total reduction of 1,810 or 14.6% in a period of just over 2 months.[6]

This reduction stems from a number of factors. First, arrests have declined and the courts are setting lower bonds.[7] Second, there has recently been a significant increase of inmates

[5] See OPM Criminal Justice Policy & Planning Division, Monthly Indicators Report April 2020 at p. 1, https://portal.ct.gov/OPM/CJ-About/CJ-SAC/SAC-Sites/SAC-Homepage (last accessed on 5/17/20)
[6] See OPM, Daily Population Count, https://portal.ct.gov/OPM/CJ-About/CJ-SAC/SAC-Sites/SAC-Homepage (last accessed on 5/18/20)
[7] Id.

discharging from custody on discretionary release prior to completing their sentences. In March, 522 inmates were discharged from custody early—an increase of more than 70% from February—which was the second highest month on record in terms of early releases.[8] Of the 759 inmates released from DOC custody in March, 522, or 68%, left prison early under some form of discretionary release.[9] The April 2020 OPM Monthly Indicators Report further demonstrates that the Superior Courts remains open to handle criminal matters. Specifically, the monthly report shows that, during March 2020, 1,749 arraignments took place.[10]

D. DOC has made concerted efforts to evaluate inmates eligible and suitable for early release by utilizing a multi-factored, individualized, risk-assessment process, including consideration of likelihood of recidivism, the availability of an appropriate residence, and the safety and rights of victims.

DOC's current discretionary release process considers a number of factors which ensure that offenders released early have a stable home plan and supervision if necessary, to reduce recidivism and give offenders the best chance of success when released. (Declaration of Gavin Galligan (Ex. J) at 4-8, 14, ¶¶ 21-36, 65.) This risk assessment process is critical because a stable release plan results in a lower risk of recidivism and is particularly important at this time, when many community social services are unavailable. (Id. at 14-15, ¶¶65-66.)

In response to COVID-19, DOC has taken extensive steps to increase discretionary releases. Specifically, DOC has expedited the application process by conducting sponsor interviews remotely. (Id. at 8, ¶ 36.) DOC has identified inmates who were previously denied release for various reasons and assisted them in either completing facility programming, locating a sponsor, or re-reviewing release plans. (Id. at 9-10, ¶¶ 42-45.) For example, DOC identified inmates who had previously been approved for release but were not due to lack of a stable home

[8] Id. at 1-2.
[9] Id. at 2.
[10] Id. at 2.

plan, and assisted them in locating a sponsor or residence, allowing approximately 20% of the cases without a sponsor to identify one. (Id. at 10, ¶ 44.) DOC also identified inmates who may not have been eligible due to a restrictive status, disciplinary issues, or temporary ineligibility for review, to be reviewed for release. (Id. at 9, ¶ 41.)

DOC has also identified "high risk" inmates according to CDC Guidelines, reviewed all for eligibility, and prioritized their applications for release. (Id. at 9, ¶ 40.) DOC has also been working closely with the Board of Pardons and Paroles (BOPP) to identify these inmates and the most appropriate release mechanism for them. (Id.) The Commissioner expanded furloughs for offenders for Transitional Supervision, which the Community Release Unit (CRU) has utilized to release an additional 119 offenders prior to their release date. (Id. at 10, ¶ 46.) These redoubled efforts have resulted in the discretionary release of nearly 1,500 inmates since March 1, 2020, with 326 inmates scheduled for release in the next 60 days. (Id. at 17, ¶¶ 84-85.)

The current discretionary release process also involves victims and evaluates victim impact prior to making release decisions. (Id. at 15, ¶¶71-72.) There are currently 1,883 inmates age 50 and older. (Id. at 16, ¶74.) Within this group, 69 are serving life sentences for murder. (Id. at 13, ¶60.) As of April 2020, there are approximately 2,800 inmates with a Victim Notification flag, meaning that there is a registered victim who would require notification upon application for community release. (Declaration of Kristan Mangiafico (Ex. K) at 1, ¶4.) Out of the 1,883 offenders, the DOC has on file with its Victim Services Unit at least 515 confidential registered victims. (Ex. J at 16, ¶77.)

The number of victims contacting VSU has greatly risen during the COVID-19 crisis. (Id. at 16, ¶79.) These victims have expressed great concern about whether the DOC was going to release their assailants without their opposition being heard. (Id.) The DOC's Victim

Services Administrator reports that victims have "begged" her not to release her rapist or the man who killed their father." (Ex. K at 2, ¶10.)

DOC is particularly concerned about the victims of domestic violence. (Ex. J at 15, ¶71.) The Office of Policy Management Criminal Justice Policy & Planning Division reports that "between March and April, domestic related calls for service to the Hartford Police Department increased by 23%, comprising almost one-quarter of all calls." (Id. at 16, ¶72.)

Despite DOC's significant efforts to properly evaluate and release those inmates who are most suitable, there is concern that inmates who have been released are not abiding by the terms of that release, let alone recommended social distancing practices. (Id. at 15, ¶68.) Approximately 281 offenders have violated release terms since March 1, 2020. (Id. at 15, ¶69.) These include technical violations, criminal offenses, escapes, and absconding from supervision. (Id.) Some of these offenders have been returned, while others remain at large. (Id.)

II. ARGUMENT

A. Mandatory injunctive relief is an extreme and disfavored remedy, requiring litigants to meet an especially heavy burden, particularly when sought against state government officials and even more so against prison officials.

"Interim injunctive relief 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Reiske v. Bruno*, No. 13CV1089 JBA, 2014 WL 496686, at *1 (D. Conn. Feb. 6, 2014) (quoting *Grand River Enterprise Six Nations Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir.2007)). "In addition, a federal court should grant injunctive relief against a state or municipal official 'only in situations of most compelling necessity.'" *Cerilli v. Rell*, No. 3:08CV242(SRU), 2010 WL 1330998, at *1 (D. Conn. Mar. 31, 2010) (quoting *Vorbeck v. McNeal*, 407 F.Supp. 733, 739 (E.D.Mo.), *aff'd*, 426 U.S. 943 (1976)). "[M]ovants have a heavier burden when attempting to obtain a

preliminary injunction against the government than they do against any other party, reflecting the courts' sensitivity to the need to avoid interfering with government administration of its own programs, a concern that is *particularly acute* in the context of the State's management of prison affairs." *Hodge v. Sidorowicz*, No. 10 CIV. 428 PAC MHD, 2011 WL 6778524, at *7, n.6 (S.D.N.Y. Dec. 20, 2011), *report and recommendation adopted sub nom. Hodge v. Wladyslaw*, No. 10 CIV. 428 PAC MHD, 2012 WL 701150 (S.D.N.Y. Mar. 6, 2012) (citing *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007)).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015). "Obviously the state has a strong interest in ensuring the safety and well-being of its citizens." *Stevenson v. State & Local Police Agencies*, 42 F. Supp. 2d 229, 233 (W.D.N.Y. 1999).

"In the prison context, a request for injunctive relief must always be viewed with great caution so as not to immerse the federal judiciary in the management of state prisons." *Fisher v. Goord*, 981 F. Supp. 140, 167 (W.D.N.Y. 1997) (citing *Farmer v. Brennan*, 511 U.S. 825, 846–47 (1994)) (other citations omitted). "'[J]udicial restraint is especially called for in dealing with the complex and intractable problems of prison administration.'" *Burroughs v. Cty. of Nassau*, No. 13-CV-6784 JS WDW, 2014 WL 2587580, at *7 (E.D.N.Y. June 9, 2014) (quoting *Goff v. Harper*, 60 F.3d 518, 520–21 (8th Cir.1995)); *see also Milhouse v. Fasciana*, 721 F. App'x 109, 111 (3d Cir. 2018) ("a prisoner's request for injunctive relief must be viewed with great caution

because of the intractable problems of prison administration.") (quotation omitted). "This conforms with the Supreme Court's teaching that 'federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment ... especially ... in the fine-tuning of the ordinary incidents of prison life.'" *Burroughs*, 2014 WL 2587580, at *7 (E.D.N.Y. June 9, 2014) (quoting *Sandin v. Conner*, 515 U.S. 472, 482–83 (1995)).

"Courts in this Circuit refer to injunctions as either 'prohibitory,' if they maintain the status quo, or 'mandatory,' if they change the status quo." *Madej v. Yale Univ.*, No. 3:20-CV-133 (JCH), 2020 WL 1614230, at *5 (D. Conn. Mar. 31, 2020) (quoting *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 36–37 (2d Cir. 2018)). "The relevant status quo is the status quo ante—that is, 'the last actual, peaceable uncontested status which preceded the pending controversy.'" *Id.* (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam) (internal quotation omitted)). "Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits,' *as opposed to* a 'likelihood of success on the merits' or 'serious questions on the merits and a balance of hardships decidedly favoring the moving party.'" *Id.* (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (emphasis added).

The plaintiff is required to "carry the burden of persuasion by a clear showing for each factor." *Bergamaschi v. Cuomo*, No. 20 CIV. 2817 (CM), 2020 WL 1910754, at *6 (S.D.N.Y. Apr. 20, 2020) (quoting *Abbott Labs. v. Adelphia Supply USA*, No. 15 CV 5826, 2015 WL 10906060, at *5 (E.D.N.Y. Nov. 6, 2015), *aff'd sub nom. Abbott Labs. v. H&H Wholesale Servs., Inc.*, 670 Fed. Appx. 6 (2d Cir. 2016)).

"[M]andatory injunctive relief is disfavored at a preliminary stage of the litigation." *Mitchell v. Perales*, No. 88-CV-382, 1988 WL 44768, at *2 (N.D.N.Y. May 6, 1988) (*Harris v. Wilters*, 596 F.2d 678 (5th Cir.1979)). "A mandatory injunction, like a mandamus, is an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one." *Morrison v. Work*, 266 U.S. 481, 490 (1925).

Petitioner's recognize that they seek a mandatory injunction in that they concede their requested relief would be "altering the status quo. . ." (Doc. #43 at 25.) However, Petitioners misstate and minimize their burden by suggesting they only "must show (1) irreparable harm in the absence of immediate relief, (2) that relief is in the public interest, and (3) *either* a substantial likelihood of success on the merits, or, that there are sufficiently serious questions on the merits rendering them fair for litigation and a balance of hardships decidedly pointing toward relief." (*Id*) (emphasis added). This is incorrect. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008) ("A difficult question is . . . of course, no reason to grant a preliminary injunction."); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 19 (2008) (vacating preliminary injunction entered on the basis of lower court finding "serious question" regarding interpretation of environmental regulations).

To support this novel test, Petitioners cite two cases: *Trump v. Vance*, 941 F.3d 631, 639 (2d Cir. 2019) *cert. granted*, 140 S. Ct. 659 (2019) and *N. Am. Soccer League, LLC*, 883 F.3d at 36–37. But *Trump* is a case where "the President sought injunctive relief in federal court to restrain enforcement of [a] subpoena [seeking his personal tax returns]." 941 F.3d at 634. The injunction would not have changed the status quo and the Court did not treat it as such. In *N. Am. Soccer League*, the plaintiff sought a preliminary injunction ordering the defendant to

designate it as the "Division II league" of men's professional soccer. 883 F.3d at 34. That case turned entirely on whether to apply the "heightened standard" of "a clear or substantial likelihood of success on the merits." *Id*. at 37. The Court held the heightened standard did apply because the plaintiff was seeking to alter the status quo and affirmed the district court's denial because they had not shown a "clear likelihood of success on the merits." *Id*. at 45.

There is no support for Petitioner's formulation of the standard here. This Court cannot overrule the Second Circuit and adopt Petitioner's test. Petitioners cannot meet their heavy burden here and their efforts to manipulate the law to avoid it should be rejected by this Court.

B. Petitioners cannot meet their burden because their alleged harm is speculative, their likelihood of success is minute, and the public interest is not served by recklessly releasing inmates with no plan or mechanism for their care, housing, monitoring, or return to confinement.

1. Petitioners cannot show irreparable harm because they merely speculate that their likelihood of contracting SARS-CoV-2 is higher while confined than in the community and the mortality rate based on the best available data is magnitudes lower than in the community.

"Although a showing that irreparable injury will be suffered before a decision on the merits may be reached is insufficient by itself to require the granting of a preliminary injunction, it is nevertheless the most significant condition that must be demonstrated." *Cerilli*, 2010 WL 1330998, at *1 (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir.1985)). "To demonstrate irreparable harm, plaintiff must show an 'injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.'" *Id*. (quoting *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999)). District courts across the country have held that fear of COVID-19 is not enough to warrant the release of prisoners.[11]

[11] *See e.g. Riggs v. Louisiana*, No. CV 3:20-0495, 2020 WL 1939168, at *2 (W.D. La, April 22, 2020) ("[E]ven if [plaintiff's] claims are properly asserted, whether under § 1983 or habeas, several federal courts have considered

Although Petitioners go to great lengths describing the grave nature of the current COVID-19 pandemic, the question of speculative versus imminent is still relevant. Respondents have never taken the position, and do not now, that the pandemic is anything less than a significant medical crisis. However, Petitioners assume that inmates are inherently at greater risk of both infection and worse health consequences as a result of infection than the community at large. (Doc. #43 at 10.) This is a speculative conclusion.

It cannot be gainsaid that COVID-19 is a novel health crisis and the facts of this pandemic, including infection and mortality rates, are constantly fluctuating. *See Ramirez v. Culley*, No. 220CV00609JADVCF, 2020 WL 1821305, at *4 (D. Nev. Apr. 9, 2020) ("[t]he COVID-19 global pandemic is undisputedly a grave and dynamic situation. . ."); *United States v. Eberhart*, No. 13-CR-00313-PJH-1, 2020 WL 1450745, at *1 (N.D. Cal. Mar. 25, 2020) (noting "the dynamic nature of the COVID-19 pandemic").[12]

Petitioners hinge their argument in large part on the premise that "DOC system's infection rate continues to vastly outpace that of every single locality in Connecticut." (Doc. #43 at 8; Doc. #1 at 18, ¶43.) But there is simply no way to know the true infection or mortality rate

arguments like those of Riggs and have universally found that prisoners are not entitled to release or transfer based solely on generalized COVID-19 fears and speculation."); *United States v. Clark*, No. 19-40068-01-HLT, 2020 WL 1446895 at *3 (D. Kan. March 25, 2020) (Denial of release pursuant to 18 U.S.C. § 3142(i)); *United States v. Eberhart*, No. 13-CR-00313-PJH-1, 2020 WL 1450745 at *2 (N.D. Cal. March 25, 2020) (Denial of modification of his sentence under the compassionate release provision of 18 U.S.C. § 3582(c)(1)(A)(i)); *Carter v. Santa Fe Adult Det. Ctr.*, No. CV 20-00271 RB/GJF, 2020 WL 1550888 (D.N.M. Apr. 1, 2020). (denial of Emergency Injunction); *United States v. Santana*, No. 1:19-CR-251, 2020 WL 1692010 (M.D. Pa. Apr. 7, 2020) (asthmatic prisoner with sleep apnea denied temporary release); *United States v. Williams*, Crim. No. PWG-19-8, 2020 WL 1643662, at *2 (D. Md. Apr. 2, 2020) (denying defendant's motion for release from facility where five detainees tested positive for COVID-19 and defendant suffered from allergies and asthma); *United States v. Teon Jefferson*, No. CCB-19-487, 2020 WL 1332011 (D. Md. Mar. 23, 2020) (denying asthmatic defendant's motion for release due to COVID-19 outbreak).

[12] https://www.cdc.gov/nchs/nvss/vsrr/covid19/tech_notes.htm. ("the data shown on this page may be incomplete, and will likely not include all deaths that occurred during a given time period, especially for the more recent time periods."); https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm. (CDC notes that data on "excess dates" related to COVID-19 are "incomplete," "should be treated with caution," and that "Connecticut" has "historically low levels of completeness.").

among the non-inmate population of Connecticut, particularly where Petitioners themselves allege "that around 60% of COVID-19 cases are asymptomatic." (Doc. #1 at 23, ¶55.) Indeed, Petitioners' own recently disclosed expert Dr. Goldenson estimates that "80% of [COVID-19] cases are selflimited and generally mild" and points out that "95% of those who tested positive [at an Ohio prison] were asymptomatic and would otherwise not have been tested." (Declaration of Dr. Goldenson (Ex. L) at 1, 7; ¶¶7, 32.)

Thus, Petitioners cannot simply posit that releasing inmates into the community makes them less likely to contract SARS-CoV-2, especially here where Petitioners make no allowances for where or how Petitioners will live when they are released. Providing inmates—some of whom have been serving life sentences—a piece of paper instructing them "that they should self-isolate" for 14 days (Doc. #43 at 46, ¶6) would be comically naïve if it were not so dangerous. As James Madison presciently observed, "if men were angels, no government would be necessary." *Federalist No. 51*, p. 349. But people, including and especially Petitioners, are not angels and their proposed injunction will most likely increase, rather than decrease, the risk to both them and the public at large. (Ex. J at 15-16, ¶¶67-73.) They cannot show irreparable harm based on such speculation and unavoidably murky facts and they certainly cannot meet their heavy burden in the context of a mandatory injunction.

Even if all of the numbers here were as accurate as a study conducted after this crisis had passed, there are still insufficient facts to show that the DOC is unable to properly manage the current health crisis. Per the US Census, Connecticut has approximately 3,565,000 residents.[13] As of May 15, 2020, Connecticut has 37,419 people who have tested positive for the COVID-19

[13] https://www.census.gov/quickfacts/CT

virus, with 3,408 COVID-19 associated deaths.[14] That translates to a 1% positive infection rate with a mortality rate of 9.1% of those infected.

As of May 15, 2020, the total population of DOC facilities stands at 10,556[15], with 598 total inmates testing positive for the COVID-19 virus with 6 COVID-19 related deaths.[16] That translates to a 5.6% infection rate, but just a 1% mortality rate. So comparing the DOC to the general community, while there is a greater infection rate, there is a significantly lower mortality rate. Additionally, 444 inmates who had COVID-19 and were thus quarantined at NCI, have been medically cleared in accordance with CDC guidelines and returned to their original facilities.[17] That is a recovery rate of 74% and the numbers of inmates who have recovered is increasing significantly by the day, as evidenced by the dramatic drop of inmates housed at NCI, which currently stands at 66.

Based on the available data, a DOC inmate who does unfortunately contract SARS-CoV-2, has a 99% chance of survival and the vast majority of inmates have *already* recovered pursuant to CDC guidelines. Given these circumstances, Petitioners cannot show a substantial risk of serious harm in the form of death or serious illness. Put simply, if one has a 1% risk of death, one cannot argue he faces a "substantial" risk, particularly when juxtaposed against the 9.1% mortality rate in the general community where he seeks to be released. Nor can one argue that he faces a "substantial" risk of serious illness, where inmates are making full recoveries—as determined by following CDC guidelines—at a rapid pace.

Respondents are not minimizing this crisis. Even Petitioners' designated expert avers that this virus has a "mild" impact on the vast majority of those infected and Petitioners

[14] https://portal.ct.gov/coronavirus
[15] https://cjis-dashboard.ct.gov/CJPPD_Reports/rdPage.aspx?rdReport=Extracted_Data
[16] https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories
[17] https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories.

themselves allege that 60% of these cases are asymptomatic. (Ex. L at 1, ¶7; Doc. #1 at 23, ¶55.) The harm itself must be "serious" and the risk "substantial." Based on the available data, it is at least arguable that neither is true. And since it is arguable, it cannot be said that Petitioners' have met their heavy burden to show irreparable harm, a burden that applies to *all* factors of the mandatory injunction test. *Bergamaschi*, 2020 WL 1910754, at *6 (required to "carry the burden of persuasion by a clear showing for each factor.").

2. Petitioners cannot show that they are far more likely to succeed than not.

Petitioners "must show 'a clear and substantial likelihood of success on the merits.'" *Bergamaschi*, 2020 WL 1910754, at *5 (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)). "This requires proof 'that their cause is considerably more likely to succeed than fail.'" *Id*. (quoting *Abdul Wall v. Coughlin*, 754 F.3d 1015, 1026 (2d Cir. 1985), *overruled on other grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)); *see also Eng v. Smith*, 849 F.2d 80, 81 (2d Cir.1988). "It is not enough for a plaintiff seeking a mandatory injunction to demonstrate just a 'likelihood of success on the merits;' and it is certainly not a enough for him to demonstrate the existence of a 'serious questions on the merits and a balance of hardships decidedly favoring the moving party,' which has traditionally been an alternative to a likelihood of success on the merits in this Circuit." *Id*. (citing *N. Am. Soccer League, LLC*, 883 F.3d at 37).

"When courts refer to 'a probability of success,' they are presumably using the word 'probability' (or its cognate 'probable') in the sense of a substantial degree of likelihood, rather than in the sense of some ratio of the likelihood of a particular outcome to a number of possible outcomes." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). A party seeking a prohibitory injunction "need only make a showing that the probability of his prevailing is better than fifty

percent." *Eng*, 849 F.2d at 82 (quoting *Abdul Wall*, 754 F.3d at 1025). Therefore, in practical terms, Petitioners must meet a burden greater than a mere preponderance of the evidence. *See C Tennant, Sons & Co of New York v. Dill*, 158 F. Supp. 63, 69 (S.D.N.Y. 1957) (noting that the plaintiff had failed to meet the "clear and convincing" standard "which would seem to be necessary to warrant a grant of a mandatory injunction"); *see also Bristol Tech., Inc. v. Microsoft Corp.*, 42 F. Supp. 2d 153, 175 (D. Conn. 1998) (Judge Hall denying mandatory injunction because "[a]lthough the record currently supports the conclusion that [the plaintiff] is more likely than not to succeed . . . it cannot be said that a clear showing has been made. . .").

Petitioners are not merely seeking a preliminary injunction. They are not even just seeking a mandatory injunction. Petitioners are seeking a mandatory injunction compelling state *prison* officials, to not only correct supposedly deficient conditions of confinement, but to *release* potentially thousands of inmates, including six dozen murderers. Petitioners are asking this Court to ignore federalism, separation of powers, the Prison Litigation Reform Act, Second Circuit and Supreme Court precedent, the rights of crime victims under the Connecticut Constitution, common sense, and the safety of Connecticut's law-abiding citizens, to do something that no court has ever done in American history: order the Governor to release numerous inmates with no plan for monitoring, housing or return, *prior* to trial, and despite the fact that they have not even attempted to exhaust their state court or administrative remedies, and despite the fact that there has been no violation of any interim court order to address unconstitutional conditions. It is no exaggeration to submit that Petitioners face the highest possible burden a litigant could face when requesting preliminary injunctive relief. They cannot meet this properly onerous burden.

a. Petitioners cannot meet the deliberate indifference standard.

i. Petitioners do not describe in what way Respondents are failing to "provide appropriate medical care."

"To state a claim for deliberate indifference to safety or failure to protect him from harm, [an inmate] must show that the conditions of his confinement posed a substantial risk of serious harm and that the defendants were deliberately indifferent to his safety." *Llewellyn v. Aldi*, No. 3:19-CV-1030 (KAD), 2019 WL 4139484, at *7 (D. Conn. Aug. 30, 2019) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "Deliberate indifference exists when the defendant knows of and disregards an excessive risk to an inmate's safety." *Id.*; *see also Bridgewater v. Taylor*, 698 F. Supp. 2d 351, 357 (S.D.N.Y. 2010) (explaining that defendants must be aware of facts supporting an inference that the harm would occur and must actually draw that inference). There are both objective and subjective components to the deliberate indifference standard. *Deegan v. Doe #1*, No. 3:19CV1356(MPS), 2019 WL 5964816, at *3–4 (D. Conn. Nov. 13, 2019).

"There are two elements to a claim of deliberate indifference to a serious medical condition: The plaintiff must show that she or he had a serious medical condition and that it was met with deliberate indifference." *Reddick v. Lantz*, No. CIV307CV1793JBA, 2010 WL 1286992, at *4–5 (D. Conn. Mar. 29, 2010) (quoting *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir.2009)).

"[The Second Circuit applies] a two-part inquiry to determine whether an alleged deprivation is objectively serious." *Benjamin v. Pillai*, 794 F. App'x 8, 11 (2d Cir. 2019) (quoting *Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d Cir. 2006)). "[A] prisoner must demonstrate that (1) he 'was actually deprived of adequate medical care,' and (2) the 'inadequacy in medical care [wa]s sufficiently serious.'" *Id.* (quoting *Salahuddin*, 467 F.3d at 280).

"Deliberate medical indifference claims can generally arise in two kinds of cases." *Id.* "First, in cases where the prisoner is deprived of all medical care, 'courts examine whether the inmate's medical condition is sufficiently serious.'" *Id.* (quoting *Salahuddin*, 467 F.3d at 280). "Second, in cases where a prisoner alleges 'a temporary delay or interruption in the provision of otherwise adequate medical treatment, it is appropriate to focus on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone.'" *Id.* (quoting *Smith*, 316 F.3d at 185).

"As the Second Circuit has made clear, there is an important distinction between cases involving a denial of treatment and cases involving a delay in treatment." *Benjamin v. Pillai*, No. 3:16-CV-01721 (JAM), 2018 WL 704998, at *3 (D. Conn. Feb. 5, 2018), *aff'd*, 794 F. App'x 8, 11 (2d Cir. 2019) (citing *Salahuddin*, 467 F.3d at 280). "For cases involving a claimed delay in treatment, 'the seriousness inquiry is narrower' . . ." *Id.* (quoting *Salahuddin*, 467 F.3d at 280). Thus, to determine whether any delay in receiving appropriate treatment was an unreasonable delay, the court must evaluate whether the delay exacerbated the injury or condition. *Washington v. Artus*, 708 F. App'x 705, 709 (2d Cir. 2017) (citing *Smith*, 316 F.3d at 185). "In considering whether a delay caused a risk of harm, a court may consider the absence of adverse medical effects or demonstrable physical injury." *Valdiviezo v. Boyer*, 752 F. App'x 29, 32 (2d Cir. 2018).

Courts have found that a plaintiff's allegations fail to meet the objective prong where the alleged "delay in providing medical attention is neither the underlying cause of a plaintiff's condition nor contributed to a worsening in the condition. . ." *Cuffee v. City of New York*, No. 15CV8916 (PGG) (DF), 2017 WL 1232737, at *9 (S.D.N.Y. Mar. 3, 2017), *report and recommendation adopted*, No. 15CIV8916PGGDF, 2017 WL 1134768 (S.D.N.Y. Mar. 27,

2017) (citing cases); *see also McCoy v. Goord*, 255 F.Supp.2d 233, 260 (S .D.N.Y.2003) (granting motion to dismiss on pro se plaintiff's deliberate indifference claim, since plaintiff did not allege "for what serious medical condition he sought and was denied treatment, [or] what harm, if any, resulted from the delay in treatment").

Thus, even "a delay in treatment of a life-threatening condition may not violate the Eighth Amendment if the delay does not cause additional harm beyond that which would have occurred even with earlier medical attention." *Guerrero v. White-Evans*, No. 06CIV5368SCRGAY, 2009 WL 6315307, at *3 (S.D.N.Y. Sept. 17, 2009), *report and recommendation adopted*, No. 06CIV.5368(SCR), 2010 WL 1257537 (S.D.N.Y. Mar. 30, 2010); *see also Smith*, 316 F.3d at 186 (finding no constitutional violation because of two alleged episodes of missed HIV medication where plaintiff failed to present evidence of permanent or on-going harm or an unreasonable risk of future harm stemming from missed doses).

Petitioners' assert that Respondents "Do Not Provide Appropriate Medical Care." (Doc. #43 at 15.) Setting aside whether an allegation of providing "inappropriate" medical care even states a deliberate indifference claim, Petitioners make no allegations about any inmates who sought specific care and were denied or provided alternative care. (Doc. #43 at 15-18.) Petitioners instead allege that there is an "utter lack of medical staffing at DOC facilities." (*Id.* at 17.) But Petitioners make no argument as to how the supposed lack of staffing has actually impacted any of them and the numbers they rely on for their contentions of inadequate staffing are all based on unsworn hearsay.[18]

[18] Litigants are permitted to submit hearsay in preliminary injunction motions. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) ("The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage."). However, in the preliminary injunction context, "there is a preference for live testimony regarding disputed issues of fact." *Flores v. Town of Islip*, No. 218CV3549ADSGRB, 2019 WL 1515291, at *2 (E.D.N.Y. Apr. 8, 2019). Petitioners make liberal use of unsworn and unverified newspaper articles throughout their papers. "It is well-established that 'newspaper articles offered for the truth of the matters asserted therein are inadmissible hearsay. . .'" *Outerbridge v. City of New York*, No. 13 CIV. 5459

The closest Petitioners come are allegations of delay: "[p]eople are kept in their congregate housing units for days or even weeks after reporting COVID-19 symptoms and requesting medical care. Some are refused medical care altogether. The first prisoner to die from COVID-19 in custody had reportedly had a fever of 101 degrees and been begging to be seen before he finally was transferred to a hospital." (Doc. #43 at 22-23.) But to support these allegations, Petitioners rely on hearsay.

For example, the support for the allegation that "some are refused medical care altogether" comes from the affidavit of Marcus Champagne. But he simply says "I've seen 3 or 4 people sick with coronavirus symptoms, and only 2 have gone to medical. One of those people had been asking repeatedly for the entire day. Both of the people who have been to medical didn't come back to the dorm." (Doc. #43-7 at 3, ¶10.) He does not name these inmates or the DOC officials they spoke with, what kind of symptoms they had, whether the "3 or 4" all had even asked to go to medical, whether they submitted a grievance or written request, and what kind of treatment they received once these phantom people were seen by medical. This illustrates the problem with relying on this kind of hearsay when trying to meet the heavy burden of a mandatory injunction.

Petitioners can submit hearsay, but this Court is not required to accept it without question. Indeed, even properly sworn affidavits are insufficient to settle a disputed issue of fact. *See Davis v. N.Y.C. Hous. Auth.*, 166 F.3d 432, 437-48 (2d Cir. 1999) ("We note for purposes of remand that while affidavits may be considered on a preliminary injunction motion, motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed

(AT/DCF), 2015 WL 5813387, at *4 (S.D.N.Y. Sept. 30, 2015) (quoting *Odom v. Matteo*, 772 F.Supp.2d 377, 404 (D. Conn. 2011)) Given this fact, Respondents submit that Petitioners' overreliance on inadmissible media reports, often containing hearsay within hearsay, be discounted or "be afforded little or no weight." *Flores*, 2019 WL 1515291, at *3.

issues of fact. When a factual issue is disputed, oral testimony is preferable to affidavits.") (citation omitted). Petitioners cannot make vague allegations based on unverifiable and unconfronted claims to satisfy their heavy burden for a preliminary injunction. Based on their submissions, there is no likelihood of success on the merits, let alone a substantial one.

COVID-19 likely is a "serious medical condition" to the 20% of people Petitioners allege "will have more severe disease requiring medical intervention and support." (Ex. L at 1, ¶7.) But as to the remaining 80% of cases that Petitioners assert are "mild," this cannot be a serious medical condition. *See Salaam v. Adams,* No. 03-cv-517, 2006 WL 2827687, at *10 (N.D.N.Y. Sept. 29, 2006) (medical condition was not serious where, among other things, the plaintiff's complaints "to medical staff were sporadic and moderate or mild in nature (i.e., not characterized by [the p]laintiff as 'severe,' 'extreme,' 'agonizing,' 'excruciating,' etc.)").

Petitioners also cannot meet their burden to demonstrate deliberate indifference to medical needs simply by saying a condition generally exists in DOC facilities. If they are claiming a lack of treatment, they must explain how, why, and to whom that has happened. If they are claiming delay in treatment, Petitioners must explain the length of the delay and what, if any, negative health consequences resulted therefrom. Petitioners have the burden here and it is not incumbent on Respondents to prove that they are providing "appropriate" medical care, especially where Petitioners offer only vague allegations to the contrary.

ii. Petitioners cannot demonstrate that Respondents have the requisite mental state for deliberate indifference under either the Eighth or Fourteenth Amendments.

"To satisfy the subjective prong of the deliberate indifference standard, 'the official must have acted with the requisite state of mind, the equivalent of criminal recklessness.'" *James v. Suffolk Cty. Corr. Facility*, No. 13CV2344JFBSIL, 2018 WL 3966688, at *12 (E.D.N.Y. June

26, 2018), *report and recommendation adopted*, No. 13CV2344JFBSIL, 2018 WL 3966241 (E.D.N.Y. Aug. 17, 2018) (quoting *Collazo v. Pagano*, 656 F.3d 131, 135 (2d Cir. 2011)). Thus, an allegation of "mere negligen[t]" conduct is insufficient. *See Farmer*, 511 U.S. at 835.

"In the case of pretrial detainees, 'the subjective prong (or *mens rea* prong) ... is defined objectively.'" *Harris v. Viau*, No. 17-CV-9746 (KMK), 2019 WL 1331632, at *4 (S.D.N.Y. Mar. 25, 2019) (quoting *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017)). "After *Darnell*, pretrial detainees asserting conditions of confinement claims under the Fourteenth Amendment must allege 'that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.'" *Id*. (quoting *Darnell*, 849 F.3d at 35). Despite the application of an objective standard, deliberate indifference still requires more than mere negligence. *See Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (holding that "something more than mere negligence" or "mere medical malpractice," is necessary to establish deliberate indifference in the Fourteenth Amendment context).

"Because mere negligence will not support a Section 1983 claim, not all lapses in prison medical care constitute a constitutional violation." *Reddick v. Lantz*, 2010 WL 1286992, at *4–5 (quoting *Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir.2003)). "In addition, inmates are not entitled to the medical treatment of their choice." *Id*. (citing *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir.1986)). "Mere disagreement with prison officials about what constitutes appropriate care does not state a claim cognizable under the Eighth Amendment." *Id*. "So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation." *Id*. (quoting *Chance v. Armstrong*, 143 F.3d 698,

703 (2d Cir.1998)). "The conduct complained of must 'shock the conscience' or constitute a 'barbarous act.'" *Id*. (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir.1996)).

"Medical judgment usually is not sufficient to support an Eighth Amendment violation." *Id*. (citing *Hernandez v. Keane*, 341 F.3d 137, 146–47 (2d Cir.2003) (deliberate indifference claim rejected where relying on delay in providing risky treatment), *cert. denied*, 543 U.S. 1093 (2005); *see also Revels v. Corr. Med. Care, Inc.*, 2018 WL 1578157, at *4 (N.D.N.Y. Mar. 28, 2018) ("A mere disagreement with a prescribed course of treatment is not sufficient to establish a violation of the Eighth or Fourteenth Amendment."). "The judgment of prison doctors is presumed valid unless the prisoner provides evidence that the decision was 'such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.'" *Reddick*, 2010 WL 1286992, at *4–5 (quoting *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir.1990)).

"In addition, physicians can and do differ in their diagnoses and their determinations of the appropriate treatment for a particular patient. That difference of opinion does not establish a claim of deliberate indifference." *Id*. (citing *Estelle*, 429 U.S. at 107 (holding that questions of diagnosis and treatment implicating medical judgment are at most medical malpractice, not deliberate indifference to serious medical needs)). "Thus, the mere fact that treating physicians considered two possible diagnoses does not establish deliberate indifference to serious medical needs." *Id*.; *see also Brown v. Beard*, 445 F. App'x 453, 455 (3d Cir. 2011) ("A professional disagreement between doctors as to the best course of treatment does not establish an Eighth Amendment violation."). "A difference of opinion between a prisoner and prison officials regarding medical treatment does not, as a matter of law, constitute deliberate indifference."

Reddick, 2010 WL 1286992, at *4–5 (citing *Chance*, 143 F.3d at 703 ("It is well-established that mere disagreement over the proper treatment does not create a constitutional claim.")).

Petitioners fail the subjective prong. Petitioners acknowledge that Respondents have been taking steps to combat COVID-19, but they simply characterize these steps as "inadequate" or "insufficient." (Doc. #43 at 1, 9, 12, 22.) Allegations of inadequate treatment sound in negligence and are therefore insufficient to state a deliberate indifference claim, whether under the Fourteenth or Eighth Amendments. *See Pettus v. Lemmott-Taylor*, 219 F. App'x 81, 82 (2d Cir. 2007) (State prisoner's allegations that medical personnel rendered inadequate medical care, at most, claimed mere negligence, which was insufficient to state a claim of deliberate indifference).

As has been the case since this litigation began in the state court, Petitioners' issue with Respondents is not that they have taken no actions or that they have ignored this pandemic. It is that Respondents have not taken the actions Petitioners prefer, namely mass release of inmates. But allegations that Respondents have not done enough to combat COVID-19 is insufficient to satisfy the subjective prong of the deliberate indifference test, under either the Eighth or Fourteenth Amendments.

The CDC Guidelines do not anticipate or recommend the release of *any* number of inmates from prison as a method of addressing COVID-19. (Ex. B, CDC Guidelines.) Indeed, the only mentions of releasing any inmates in the Guidelines have to do with the *limitations* prison officials should place on inmates leaving prisons. (*See* Id. at 12 ("Consider suspending work release programs and other programs that involve movement of incarcerated/detained individuals in and out of the facility"), Id. at 14 ("Screen all releasing individuals for COVID-19 symptoms and perform a temperature check . . . If an individual does not clear the screening

process, follow the protocol for a suspected COVID-19 case-including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing), Id. at 17 ("If an incarcerated/detained individual who is a COVID-19 case is released from custody during their medical isolation period, contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning.") Petitioners do not simply disagree with DOC's plan. They disagree with the CDC as well. Either way, this is not enough to prove deliberate indifference.

The best example of this mere disagreement is Petitioners' complaints about NCI. (Doc. #43 at 18-21.) Petitioners must acknowledge that Respondents have been using NCI for medical isolation cases. However, Petitioners object to the use of NCI as a medical isolation site, mainly because they contend that its "inherently punitive nature" make inmates less likely to report their symptoms. (Id. at 21.) There are naturally significant factual disputes between the parties as to the conditions at NCI, disputes that can only be settled at a hearing. But these disputes ultimately do not matter because at best Petitioners submit opinions from their experts disagreeing with the use of NCI as a medical isolation facility.

Respondents did not choose NCI on a whim or in an effort to "punish" people for contracting SARS-CoV-2. They did so based on the considered advice of medical professionals, considering such factors as space, ventilation, availability of medical staff, and most importantly, the guidance of the CDC for managing incarcerated individuals. (Ex. A at 1-2, ¶¶4-10; Ex. B at 2-3, ¶¶10, 12.) Per the CDC Guidelines, facilities should place suspected confirmed cases under medical isolation individually. (Ex. A at 2, ¶5; CDC Guidelines at 15.) The Guidelines also suggest single cells should have solid walls and doors and a private bathroom. (Id.; CDC Guidelines at 16.) NCI also has a ventilation system which helps minimize the risk of airborne

spread of the virus. (Id. at 2, ¶7; Ex. B at 2-3, ¶12.) NCI is the best fit to accomplish all goals for medical isolation during this pandemic. Respondents made their choices based on the guidance of their medical experts, upon whom they are entitled to rely. *See Terbush v. Mitchell*, No. 3:15CV01339(SALM), 2017 WL 663198, at *6 (D. Conn. Feb. 17, 2017) (holding that a supervisory official is "generally entitled to delegate medical responsibility to medical staffs and [is] entitled to rely on the opinion of medical staff concerning the proper course of treatment."); *see also Graham v. Wright*, No. 01-CV-9613, 2003 WL 22126764, at *1 (S.D.N.Y. Sept. 12, 2003) ("supervisory officials are generally entitled to delegate medical responsibility to facility medical staffs and are entitled to rely on the opinion of medical staff concerning the proper course of treatment.").

Therefore, Petitioners' complaints at best boil down to a dispute between doctors as to the best way to manage this entirely novel and dynamic crisis. Petitioners and their experts disagree with the conclusions of Dr. Kennedy, Robert Richeson and the Respondents, and contend that the efforts of DOC have been "insufficient," while at the same time ignoring the impressive recovery and mortality rates of COVID-19 within DOC. They are entitled to this disagreement, but Petitioners are not entitled to the extraordinary relief of a mandatory injunction based on this disagreement. *See Gumns et. al. v. Edwards, et. al.*, No. 20-231-SDD-RLB, 2020 WL 2510248, at *15 (M.D. La. May 15, 2020) (denying inmates' request for TRO prohibiting their transfer from jails to a state prison, holding "the existence of an alternative plan–even a better plan–is not evidence that the challenged plan is unconstitutional or illustrative of deliberate indifference.").

Prison officials, particularly medical personnel, are given breathing room and discretion under ordinary circumstances. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972) (stating that prison

officials must be afforded latitude in administering prison affairs); *Vega v. Lantz*, No. 3:04CV1215(DFM), 2005 WL 8166179, at *1 (D. Conn. July 27, 2005); *Gonzalez v. Narcato*, 363 F. Supp. 2d 486, 493 (E.D.N.Y. 2005) ("it is not the job of the federal courts to engage in detailed supervision of the prisons"). It would be a distortion of this well-held principle to rob prison officials of their due deference in the midst of a crisis, where the medical facts and evidence are changing daily, and there is no settled knowledge regarding this disease, its spread, or its treatment.

It is also important to keep in mind the nature of the relief sought. Petitioners are seeking release of inmates. However, there is nothing in the CDC Guidelines for incarcerated individuals that anticipates the mass release of inmates as a method of combating COVID-19. On the contrary, the Guidelines make it clear that they are flexible and recognize the need for prisons and the need to incarcerate individuals, even in the midst of COVID-19. Furthermore, even if Petitioners could demonstrate that Respondents are somehow failing to meet the CDC Guidelines by refusing to simply fling open the prison doors, they cannot demonstrate how mere failure to meet professional guidelines, despite best efforts, could constitute anything other than negligence. The mere fact that the CDC Guidelines do not anticipate, nor recommend releasing inmates proves that the Respondent's refusal to do so cannot be "'such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment.'" *Reddick*, 2010 WL 1286992, at *4–5 (quoting *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir.1990)).

As the Fifth Circuit recently observed in an almost identical context, it is error to treat "inadequate measures as dispositive of the Defendants' mental state." *Valentine v. Collier*, 956 F.3d 797, 802–03 (5th Cir. 2020). "Such an approach resembles the standard for civil

negligence, which *Farmer* explicitly rejected." *Id*. "Though the district court cited the Defendants' general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate. To the contrary, the evidence shows that TDCJ has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus." *Id*. So too here.

Petitioners may disagree with Respondents. They may object to Respondents' policy decision made based on medical advice, a balancing of risks, and due consideration for the safety of all of Connecticut's people. They are free to do so in a republic. But they cannot invoke the federal courts to force Respondents to reverse their policy decisions, especially when the best they can do is demonstrate a disagreement amongst doctors as to the proper course of action.

b. Petitioners cannot show a substantial likelihood of success on their Substantive Due Process claim, because there is clearly no intent to punish and the presence of COVID-19 does not render confinement in and of itself as "excessive."

"[S]ubstantive due process is violated if the pretrial conditions are punitive." *Caves v. Payne*, No. 3:20-CV-15 (KAD), 2020 WL 1676916, at *6 (D. Conn. Apr. 6, 2020) (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). "In considering such a claim, the 'court must decide whether the [condition] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'" *Id*. (quoting *Bell*, 441 U.S. at 538). Absent evidence of an "expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.'" *Id*. (quoting *Bell*, 441 U.S. at 538). "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court

permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Id*. (quoting *Bell*, 441 U.S. at 539).

"Conversely, 'if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id*. (quoting *Bell*, 441 U.S. at 539). "Legitimate government objectives include 'maintain[ing] security and order at the institution and mak[ing] certain no weapons or illicit drugs reach detainees,' 'ensuring the detainees' presence at trial,' and managing the facility where the detainee is held." *Id*. (quoting *Bell*, 441 U.S. at 539). It is well-held that "public safety" is a legitimate government objective. *See, e.g., Marcavage v. City of N.Y.*, 689 F.3d 98, 104 (2d Cir. 2012) (recognizing City's "significant interest in keeping its public spaces safe"); *United for Peace and Justice v. City of N.Y.*, 243 F.Supp.2d 19, 29 (S.D.N.Y. 2003) (describing the "significant government interest of public safety"). In the current context, ensuring the healthcare infrastructure of Connecticut not be overwhelmed, preventing a second wave of infections, preventing recidivism, and protecting the rights of victims in accordance with the Connecticut Constitution are all "legitimate governmental objectives" as well.

Petitioners give lip service to this argument, essentially repeating their points about deliberate indifference. (Doc. #43 at 32.) The only law they cite to support this is from District Court decisions dealing with civil immigration detainees. But all of these cases are inapposite for the same reason Petitioners' argument ultimately fails. They do not involve people accused of crimes and who have consequently been ordered incarcerated on bond, and therefore do not consider the public safety risk associated with releasing numerous *criminal* detainees *en masse*.

Petitioners also make no mention of how any of the detainees they seek to release will be monitored, whether they have housing, whether they have access to medical care, and whether

they would ever return to confinement. Thus, Petitioners do not grapple with the very real risk that releasing people that they specifically allege may be asymptomatic carriers of SARS-CoV-2 might not abide by the "instructions" to self-quarantine. They do not consider that these inmates may not have the ability to self-quarantine. Perhaps they have no place to live or perhaps the only place they can go would require them to live with many other people. Petitioners' facile plan demonstrates the many legitimate government interests in keeping detainees confined, while either reconsidering their status on a case-by-case basis, or allowing the state courts to do the same, as they have been since the beginning of this crisis. Indeed, Petitioner Void-Williams had a hearing for a bond reduction and was denied 2 weeks before bringing this case. (Transcript of Apr. 3, 2020 bond reduction hearing in State v. Williams-Void (Ex. M.); Void-Williams' Motion for Bond Reduction dtd Mar. 24, 2020 (Ex. N.)) Petitioner McPherson also had such a hearing and was actually released.

Finally, Petitioners do not consider that the Connecticut Constitution has robust protections for victims and therefore Respondents have a legitimate interest in upholding those laws. This will be discussed in further detail *infra*. There is no good faith argument that refusing to massively release thousands of inmates in an effort to ensure public safety is "arbitrary or purposeless." Petitioners cannot meet their heavy burden on their Substantive Due Process claim and the injunction should therefore not issue.

c. The PLRA bars this Court from ordering the relief sought by Petitioners.

"Running 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, 84-85 (1987).

Federal courts may order prospective relief "in any civil action with respect to prison conditions," provided the relief "extend[s] 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)(A). Should this court deem such relief necessary it must be narrowly tailored or proportional to the scope of the violation and extending no further than necessary to remedy the violation. *Brown v. Plata*, 563 U.S. 493, 530 (2011). A court should not issue "remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution." *Id.*

Petitioners request habeas relief and the release of thousands of inmates. However, the PLRA, 18 U.S.C. § 3626, titled "Appropriate remedies with respect to prison conditions," places strict limits on Courts' ability to order the release of inmates "in any civil action with respect to prison conditions," and precludes a single district judge from doing so. *Id.* § 3626(a)(3)(A)-(B). That law applies to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2).

In such a suit, the Court "may enter a temporary restraining order or an order for preliminary injunctive relief," but such injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). Under Section 3626, a "prisoner release order"—which "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison," 18

U.S.C. § 3626(g)(4)—may "be entered only by a three-judge court," *id.* § 3626(a)(3)(B), and then only if certain conditions have been met.

Among other requirements, "no court shall enter a prisoner release order unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* §3626(a)(3)(A).

Congress enacted the PLRA "to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997); *see also Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (*en banc*) (Calabresi, J., concurring) ("The *in banc* majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect."). "Congress intended the PLRA to revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns." *Gilmore v. California*, 220 F.3d 987, 991, 997 (9th Cir. 2000). "Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

Section 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Plata*, 563 U.S. at 511 (quoting 18 U.S.C. § 3626(g)). The PLRA's "requirements ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'" *Plata*, 563 U.S. at 514 (quoting

Inmates of Occoquan v. Barry, 844 F.2d 828, 843 (D.C. Cir. 1988)). "The release of prisoners in large numbers . . . is a matter of undoubted, grave concern." *Plata*, 563 U.S. at 501.

Section 3626 prevents this Court from granting Petitioners' requested relief. Under Section 3626, "[t]he authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court." *Plata*, 563 U.S. at 500 (citing 18 U.S.C. § 3626(a)); 18 U.S.C. § 3626(a)(3)(B) ("In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court.").

Moreover, such an order may not be entered unless "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). And even a three-judge court may only order prisoners released to remedy unconstitutional prison conditions "only if the court finds by clear and convincing evidence" that "crowding is the primary cause of the violation" and "no other relief will remedy [it]." *Id.* § 3626(a)(3)(E)(i)-(ii). Here, there can be no dispute that the instant lawsuit is a "civil action with respect to prison conditions" governed by §3626, which defines "civil action with respect to prison conditions" broadly to mean "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but [that term] does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2).

One court recently reached this conclusion in an identical case. In *Money v. Pritzker*, Nos. 20- CV-2093 & 20-CV-2094, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020), inmates from

various Illinois Department of Correction facilities brought purported class action lawsuits seeking release of over 12,000 prisoners in light of the COVID-19 pandemic. The Court held that the PLRA prevented it from entering the relief requested. *Id.* at, *14; *see also Jones v. Smith*, 720 F.3d 142, 145 n. 3 (2d Cir. 2013) (assuming that the PLRA applies to conditions of confinement habeas claims brought under Section 2241).

Clearly, a mass release of all DOC inmates, or a subclass thereof including Petitioners, is one of the least narrowly drawn and most intrusive means imaginable. Thus, Petitioners'' requested relief is barred by statute. *See* 18 U.S.C. § 3626(a)(2); *see also Jones*, 720 F.3d 142, 145 n. 3 (2d Cir. 2013) (assuming that the PLRA applies to conditions of confinement claims brought under Section 2241). Even if Petitioners could somehow show a substantial likelihood of irreparable harm and success on the merits, their requested relief is barred.

3. The balance of equities and public interest weigh strongly in favor of Respondents.

"A balance of hardships tipping decidedly toward the party requesting a preliminary injunction means that, as compared to the hardship suffered by other party if the preliminary injunction is granted, the hardship suffered by the moving party if the preliminary injunction is denied will *be so much greater* that it may be characterized as a 'real hardship.'" *Doe v. Zucker*, No. 117CV1005GTSCFH, 2019 WL 111020, at *6 (N.D.N.Y. Jan. 4, 2019) (emphasis added) (quotation omitted). "'A balance of equities tipping in favor of the party requesting a preliminary injunction' means a balance of the hardships against the benefits." *Id*. (citing *Ligon v. City of New York*, 925 F. Supp. 2d 478, 539 (S.D.N.Y. 2013) (characterizing the balancing "hardship imposed on one party" and "benefit to the other" as a "balanc[ing] [of] the equities");

"[A] preliminary injunction is 'in the public interest' if the preliminary injunction would not 'cause harm to the public interest.'" *Doe*, 2019 WL 111020, at *7 (quoting *SEC v. Citigroup*

Global Mkts. Inc., 673 F.3d 158, 163 n.1 (2d Cir. 2012). "The 'public interest' is defined as '[t]he general welfare of the public that warrants recognition and protection,' and/or '[s]omething in which the public as a whole has a stake[,] esp[ecially], an interest that justifies governmental regulation.'" *Id*. (quoting Black's Law Dictionary at 1350 (9th ed. 2009)).

As argued *supra*, given the uncertainty regarding the actual infection rate in the community and the corresponding uncertainty as to the actual mitigation of any risk of infection in the community, the benefit of the injunction to Petitioners is likewise uncertain. At first glance, an order releasing Petitioners from confinement seems beneficial to Petitioners. But the complete lack of any plan to address their housing and/or their medical care contradicts that. Petitioners cannot simply argue that the Court has "broad" power to fashion a remedy, ask for a mass release and leave all of the practical issues to this Court. They carry a heavy burden. Petitioners are bound by what they are actually requesting, which is mass release.

The harm to Respondents and the public are myriad and also largely overlap. The risks to public safety are obvious. Once released, inmates could re-offend. (Ex. J at 15, ¶69.) A mass release of inmates could overwhelm the healthcare system at a time when the State is just preparing to loosen lockdown procedures. Inmates could refuse to abide by the "instructions" to self-quarantine and thereby further spread COVID-19. This presents even more logistical problems. Who will set conditions of release and monitor releasees for compliance? What happens if an inmate does refuse to self-quarantine? Would he be re-arrested and confined again? If so, by state authorities or federal authorities? Where would be confined this time? Petitioners are completely silent as to all of these very serious logistical and practical issues. Indeed, based on the actual language of their requests for relief, Petitioners are seeking the release of sentenced inmates with no mention of their return to DOC custody. Petitioners are

seeking a *de facto* pardon of a huge number of convicted felons, including six dozen murderers serving life sentences. It would undoubtedly not be in the public interest for a federal court to invalidate well over one thousand convictions and sentences issued by the state courts.

The one thing Petitioners offer is a requirement that Respondents prove via "judicially-recorded findings by clear and convincing evidence that the individual poses such a serious risk of flight or danger to others that no other conditions can mitigate." (Doc. #43 at 40.) Petitioners are silent as to what this means. The state courts would have no jurisdiction to re-evaluate "risk of flight or danger" of already sentenced inmates. Petitioners are also taking contrary positions regarding bond arguments. They asserted in opposition to Respondents' motion to dismiss that the state courts were effectively "closed," despite two of them had already had bond reduction hearings, one of which was successful. Now they suggest Respondents go to these same courts they argue, incorrectly, are "closed" to get a lightning fast evaluation of potentially thousands of inmates, their risk of flight, and the danger they pose to the public. Petitioners inconsistent approach to an essential element of releasing offenders into the community severely undercuts any claim that the balance of hardships weighs in their favor.

Furthermore, there is a large segment of the population that has gone ignored during the course of this litigation: the hundreds of registered victims who have substantial rights under the constitution and laws of the State of Connecticut. Conn. Const. art. I, § 8b; Conn. Gen. Stat. §§ 54-227, 52-230, 54-230a, 54-231. No one has considered their rights to be notified or consulted, to make a statement, or to register their fears or objections that one or more of their attackers is about to be released into the community. The harm in granting the mandatory injunction to this class of individuals is massive, and as is the case with all the other practical realities of what they seek, this goes completely unaddressed by Petitioners. Indeed, the victims are already suffering

intense anxiety simply as a result of this litigation and the confusion Petitioners' broad and illegal requested relief has caused. The Victim Services Administrator attests to this: "when a victim calls me and begs me to not let out the monster who viciously raped and beat her or brutally killed their father because that's what they're 'hearing on the news' I do my best to reassure them, that yes although the Department of Correction is reviewing potential releases; they need not worry." (Ex. K at 2, ¶10.) If the injunction is granted, these reassurances will have proven false. The Petitioners are not the only people that have rights.

Respondents are fulfilling their duties to inmates, including by thoughtfully evaluating who can be released early and implementing a plan designed by the medical director that complies with CDC guidelines. The plan is working. Any death is tragic, but DOC has kept the mortality rate nine times lower than in the community. Almost 75% of those infected have already recovered and returned from NCI to their original facilities.

Respondents also have a duty to every citizen of Connecticut. Petitioners' plan to mass release inmates, without accounting for monitoring, housing, or if they will return, and without even contacting the victims is ill-conceived, reckless, and dangerous. It would thwart Respondents' ability to do right by *all* of Connecticut's citizens. Petitioners have not met their heavy burden to demonstrate the equities weigh in their favor and that the public interest would be best served by granting their Motion. Therefore, this Court must deny Petitioners' request.

III. CONCLUSION

For all the foregoing reasons the Respondents respectfully request this Court deny the Petitioners' motion for Preliminary Injunction.

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CERTIFICATION

I hereby certify that on May 18, 2020 a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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