

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

THE STATE OF NEW YORK

Ex Rel: ERIC A. FELLEMAN ESQ.,
On behalf of: CATHY CITRO, DIN 19A3397

Petitioner,

– against –

WILLIAM LEE, Superintendent, Eastern
Correctional Facility, ANTHONY ANNUCCI,
Acting Commissioner, New York State Department
of Corrections and Community Supervision, or any
other person having custody of Ms. Citro,

Respondents.

**VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

Index No.

TO: SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Petitioner, by her attorney Eric A. Felleman Esq., respectfully states:

1. Petitioner Cathy Citro,¹ a 63 year-old transgender woman incarcerated at Eastern Correctional Facility (“Eastern”), suffers from a number of serious medical conditions, including diabetes, asthma, and various heart ailments including high blood pressure. These conditions put her at severe risk of complications from COVID-19—including potentially lethal blood clots. But for the fact that her parole eligibility date is not until this December, Ms. Citro would likely already be released. That is because on April 14, 2020, in response to the COVID-19 pandemic, Governor Cuomo’s office announced a plan to release prisoners who are 55 years of age or older,

¹ Ms. Citro is known to the New York State Department of Corrections and Community Supervision as Albert Citro (DIN 19A3397). Ms. Citro is a transgender woman, and her name is Cathy. She uses the pronouns she/her/hers. Ms. Citro currently resides at Eastern, where, as of May 8, 17 incarcerated individuals have already tested positive for the virus. *NYS DOCCS Incarcerated Individuals COVID-19 Report by Housing Facility as of May 8, 2020 at 3:00 PM*, DOCCS, May 8, 2020, available at https://doccs.ny.gov/system/files/documents/2020/05/inmatedailycovid_table_forpoi-2020.05.08.pdf (last accessed May 10, 2020).

whose underlying crime was not a sex offense or a violent felony, and have 90 days or less before the earliest release date. Ms. Citro is just several months short of that time period. Yet any further confinement would put her at an unacceptably high risk of death. Such punishment would be grossly unjust and excessive relative to the low-level, non-violent and non-sex-based offense she committed. As a result, her continued confinement would be in violation of her rights under the Eighth Amendment of the United States Constitution and Article I, Section 5 of the New York State Constitution. Accordingly, she submits this Verified Petition for a writ of habeas corpus to secure her immediate release from confinement.

PRELIMINARY STATEMENT

2. I, Eric A. Felleman, am an attorney at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul, Weiss”), which is counsel for Ms. Citro in this action along with The Legal Aid Society (“LAS”). I make this Verified Petition on Ms. Citro’s behalf, pursuant to CPLR 7002(a), 7002(b)(1), and 7002(b)(3), because Ms. Citro is confined outside the county in which my office is located, because further delay will cause her material injury, and because the pertinent factual allegations are within my knowledge or information and belief.

3. Ms. Citro is 63 years old, and, on information and belief, suffers from diabetes, asthma, and an irregular heart beat and high blood pressure, and is prone to blood clots. These are serious health conditions that, according to the Centers for Disease Control (“CDC”), put her at a higher risk of contracting COVID-19 and thereafter dying from its effects.² Indeed, doctors and scientists are increasingly observing potentially lethal blood clotting in COVID-19 patients,

² *People Who Are At Higher Risk for Severe Illness*, CDC, Apr. 15, 2020 available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed May 10, 2020); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, CDC, Apr. 6, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (last accessed May 10, 2020).

even those who are young and otherwise healthy.³ This risk is of great concern for people like Ms. Citro, and these risks are heightened by Ms. Citro's age.⁴

4. On information and belief, Ms. Citro, like many transgender people, also has other health issues requiring specialized care. As a result of the societal hurdles that Ms. Citro has had to overcome during her transition, she has been diagnosed with—and is medicated for—depression and anxiety. Ms. Citro's depression and anxiety physically manifest themselves by suppressing her immune system—making her more at risk for contracting viruses such as COVID-19.⁵ Ms. Citro's diabetes, asthma, and heart conditions only contribute to this immunosuppressive state—a serious health condition in and of itself as defined by the CDC.⁶ Respondents have acknowledged Ms. Citro's meager health by designating her as “medically unassigned,” preventing her from participating in various recreational and work programs for fear of further damage to her health. It is well established across jurisdictions that “medically

³ See Jon Hamilton, *Doctors Link COVID-19 To Potentially Deadly Blood Clots and Strokes*, NPR, Apr. 29, 2020, available at <https://www.npr.org/sections/health-shots/2020/04/29/847917017/doctors-link-covid-19-to-potentially-deadly-blood-clots-and-strokes> (last accessed May 10, 2020); Sasha Pezenik & Dr. L. Nedda Dastmalchi, *Why Are So Many COVID-19 Patients Also Seeing Blood Clots?*, ABC News, Apr. 20, 2020, available at <https://abcnews.go.com/Health/covid-19-patients-blood-clots/story?id=70131612> (describing how COVID-19 patients with no underlying heart conditions are at risk for potentially deadly blood clots) (last accessed May 10, 2020); Dr. Sanjay Gupta, *COVID-19 Patient Survives Life-Threatening Blood Clot*, CNN, available at <https://www.cnn.com/videos/health/2020/04/30/warnell-vega-coronavirus-blood-clot-sanjay-gupta-pkg-vpx.cnn> (last accessed May 10, 2020).

⁴ See, e.g., Judith Graham, *Over 60? Know The Odds, Exercise Caution and Consider Your Health In Assessing COVID-19 Risks*, ABC News, Mar. 25, 2020, available at <https://abcnews.go.com/Health/60-odds-exercise-caution-health-assessing-covid-19/story?id=69789335> (last accessed May 10, 2020).

⁵ See Exhibit 1, Letter from Lynly Egyes, J.D., Apr. 3, 2020; Exhibit 2, Letter from Doctor Nick Gorton, Apr. 1, 2020; Exhibit 3, Letter from Doctor Peter Meacher, Mar. 29, 2020; Exhibit 4, Letter from Doctor Ruth Hai, Mar. 22, 2020. See also Brandi Neal, *Can Stress Cause Physical Illness? This Is How Anxiety Affects Your Immune System*, Bustle, Dec. 9, 2017, available at <https://www.bustle.com/p/can-stress-cause-physical-illness-this-is-how-anxiety-affects-your-immune-system-7524590> (“In addition to making you feel sick, hormones released when you experience anxiety can weaken your immune system, which means you are more likely to get a cold or the flu. According to Harvard's Women Health Watch from Harvard Medical School, ‘Evidence suggests that people with anxiety disorders are at greater risk for developing a number of chronic medical conditions.’”) (last accessed May 10, 2020).

⁶ *People Who Are At Higher Risk for Severe Illness*, CDC, Apr. 15, 2020 available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed May 10, 2020).

unassigned” is tantamount to a designation that an incarcerated individual is in poor health or at risk for serious medical complications. *See, e.g.*, 28 CFR 545.21.

5. In 2019, Ms. Citro was convicted of Criminal Possession of Stolen Property in the Fourth Degree, which is a non-violent and non-sex-based Class E felony. Ms. Citro’s parole eligibility date is December 16, 2020. On information and belief, Ms. Citro, because of her medical needs, must visit the prison clinic multiple times every day. These visits put her in frequent contact with sick individuals, greatly increasing her risk of contracting COVID-19. (*See* Affirmation of Robert B. Greifinger, M.D., ¶ 39 [hereinafter “Greifinger Aff.”].) Moreover, before COVID-19 arrived at Eastern, on information and belief doctors advised Ms. Citro to not interact with anyone who may be ill due to her immunosuppressive state.

6. Even apart from these necessary and frequent medical visits, continued confinement at Eastern would create a high risk of contracting COVID-19 that is unacceptable for someone with Ms. Citro’s medical history. Eastern’s design and operations make it impossible for Ms. Citro to socially distance from others. Ms. Citro also cannot undertake the hygiene and cleaning measures that political leaders and medical experts around the world have advised, and in many cases required, to mitigate the risk of COVID-19 transmission. As described below, no matter the extent of Respondents’ efforts, it is impossible to adequately protect Ms. Citro while she is incarcerated given that, on information and belief, she does not have regular access to clean and hot tap water for hydrating and washing her hands, and is forced to constantly intermingle with other staff and inmates at Eastern. If it were possible to adequately protect individuals such as Ms. Citro, Respondents would surely have already enacted such measures. Therefore, it is not surprising that communal settings like Eastern—where, at the

very least, social distancing is impossible—have outpaced all other locations in the rate of COVID-19 spread, especially for those most vulnerable.⁷

7. While some of New York’s political leaders have implored prisons such as Eastern to examine ways to release those—like Ms. Citro—who are particularly vulnerable to COVID-19, Respondents have failed to do enough. For instance, on March 19, 2020, New York State Assemblymember David Weprin and Senator Luis Sepulveda called for the early release of incarcerated individuals “over 50,” with “chronic medical conditions like heart disease . . . diabetes, asthma, [or] compromised immunity,”⁸ and the day before, Dr. Ross MacDonald, Chief Medical Officer for the New York City Jails, Correctional Health Services, called for the release of anyone that can be released.⁹

8. Judicial bodies throughout the world, including courts across the United States and in New York State, have slowed the spread of COVID-19 in prisons by releasing thousands of incarcerated individuals who, like Ms. Citro, are particularly susceptible to contracting the disease and succumbing to its deadly risks.¹⁰

⁷ See, e.g., *COVID-19 Infection Tracking in NYC Jails*, The Legal Aid Society, May 2, 2020, available at <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last accessed May 10, 2020).

⁸ *Letter from Assemblymember David Weprin and Senator Luis Sepulveda to Governor Andrew M. Cuomo*, Twitter, Mar. 19, 2020, available at <https://twitter.com/DavidWeprin/status/1241076143626883075/photo/1> (“By releasing persons from custody, especially older, sicker individuals, the prisons will become safer for everyone . . . [whereas] if the current prison population is maintained, it is likely that the correctional health services will be overwhelmed.”) (last accessed May 10, 2020); see also *New York City Board of Corrections Calls for City to Begin Releasing People From Jail As Part of Public Health Response to COVID-19*, Board of Corrections, Mar. 17, 2020, available at <https://www.nysenate.gov/newsroom/in-the-news/julia-salazar/nyc-board-correction-calls-city-begin-releasing-people-jail> (last accessed May 10, 2020).

⁹ Craig McCarthy & Natalie Musemeci, *Top Rikers Doctor: Coronavirus ‘Storm is Coming’*, N.Y. Post, Mar. 19, 2020 available at <https://nypost.com/2020/03/19/top-rikers-doctor-coronavirus-storm-is-coming/> (last accessed May 10, 2020).

¹⁰ See, e.g., Adela Suliman et al., *Coronavirus Prompts Prisoner Releases Around the World*, NBC News, Mar. 26, 2020, available at <https://www.nbcnews.com/news/world/coronavirus-prompts-prisoner-releases-around-world-n1169426> (last accessed May 10, 2020).

9. In contrast, however, Ms. Citro remains incarcerated and cannot, in prison, engage in the risk mitigation necessary to protect herself. As noted earlier, Governor Cuomo has begun to take some steps to protect a limited number of older prisoners from the threat posed by COVID-19. But, by pure technicality, this measure does not extend to Ms. Citro's case. If her parole eligibility date were in July, merely a few months earlier, she would likely already have been released—considering she is older than 55 years old and was convicted for a non-violent, non-sex based offense. Because that date is in December, however, she is not eligible for release under the Governor's announcement.

10. Further action is necessary to protect New York inmates like Ms. Citro who are at a high risk of complications and death from COVID-19. Every day that the New York State Department of Corrections and Community Supervision ("DOCCS") fails to act, the risk for Ms. Citro mounts.

11. On May 7, 2020, Ms. Citro wrote to DOCCS to ask for release as a result of the risk posed by COVID-19,¹¹ but received no response. As Ms. Citro noted in her letter to DOCCS, she has a sound reentry plan upon release. Ms. Citro, a longtime resident of New York City, plans to return to the City. COVID Bail Out NYC, a grass roots organization that works with medically vulnerable people released from jails and prisons, has provided reasonable assurances that it will place Ms. Citro in safe housing for a 14 day period upon release. (*See* Affirmation of Brittany Williams ¶ 8 [hereinafter "Williams Aff."].) Importantly, Ms. Citro will be able to social distance and maintain adequate hygiene and cleanliness in this housing.

12. Ms. Citro also has numerous supports available to her upon release. A social worker from LAS will assist Ms. Citro in connecting with long-term medical, housing and other

¹¹ *See* Exhibit 10, Letter from Paul, Weiss to DOCCS, May 7, 2020.

support services, including a cellphone, food, and cleaning supplies. Additionally, Ms. Citro will be provided with a post-release plan by the Parole Preparation Project (“PPP”),¹² and she plans to return to interning or volunteering in some capacity at the Sylvia Rivera Law Project (“SRLP”). (See Affirmation of Hannah Walker, Esq., ¶¶ 1–6 [hereinafter “Walker Aff.”].) Ms. Citro yearns for the opportunity to be a productive member of society, an opportunity she fears that she may never see if not immediately released from confinement.

13. Respondents are well aware that Ms. Citro is particularly vulnerable to the dangers of COVID-19 and they nevertheless continue to expose her to unsanitary living conditions. For Ms. Citro, these conditions may well amount to a death sentence. Just weeks ago, on March 24, 2020, there were only three confirmed cases of COVID-19 among incarcerated individuals across *all* New York State prisons. As of May 9, 2020, DOCCS reports that this number is now in the hundreds,¹³ with 17 incarcerated individuals testing positive at Eastern alone.¹⁴

14. Respondents’ continued incarceration of Ms. Citro under these conditions constitutes a deliberate indifference to her risk of serious harm, and an imposition of a cruelly excessive punishment, in violation of the Eighth Amendment of the United States Constitution and Article I, Section 5 of the New York State Constitution.

15. Accordingly, Ms. Citro respectfully seeks habeas corpus relief in the form of immediate release from confinement. New York courts have recognized that immediate release from confinement is the *only* remedy for the constitutional violations at issue here during this

¹² See Exhibit 11, Letter from Parole Preparation Project to Commissioners of the Board of Parole, May 7, 2020.

¹³ *Daily Update*, DOCCS, May 9, 2020, available at <https://doccs.ny.gov/doccs-covid-19-report> (last accessed May 10, 2020).

¹⁴ *NYS DOCCS Incarcerated Individuals COVID-19 Report by Housing Facility as of May 8, 2020 at 3:00 PM*, DOCCS, May 8, 2020, available at https://doccs.ny.gov/system/files/documents/2020/05/inmatedailycovid_table_forpoi-2020.05.08.pdf (last accessed May 10, 2020).

ongoing, unprecedented pandemic. For these reasons, and the reasons below, this Court should grant Ms. Citro's requested relief.

PARTIES

16. The Petitioner is Ms. Citro, DIN 19A3397. Ms. Citro is incarcerated at Eastern and by virtue of her age, underlying medical conditions, and living conditions, is particularly vulnerable to serious illness or death if infected by COVID-19.

17. Respondent William Lee is the superintendent of Eastern. Respondent Anthony Annucci is the Acting Commissioner of DOCCS. Respondents Lee and Annucci are collectively referenced as the "Respondents."

18. Subject to the direction of the Commissioner, each Superintendent is the chief administrative officer of a correctional facility and is legally responsible under the laws of the State of New York for the management and supervision of Eastern and for directing the work and defining the responsibilities of all of the employees of Eastern.

19. As the Superintendent of Eastern, Respondent Lee is the legal custodian of, and responsible for the well-being of, Ms. Citro.

JURISDICTION AND VENUE

20. This court has subject matter jurisdiction pursuant to CPLR 7001.

21. On information and belief, Ms. Citro has not made a prior application, individually or as a part of a collective, for the relief requested herein.

22. A copy of Ms. Citro's mandate is not attached hereto due to the emergency nature of this proceeding.

STATEMENT OF FACTS

A. Ms. Citro's Incarceration and Health Status

23. Ms. Citro is 63 years-old and was convicted of Criminal Possession of Stolen Property in the Fourth Degree, a Class E felony. Her crime was nonviolent and had no sexual component. On information and belief, after being convicted, Ms. Citro was sentenced to 18–36 months of incarceration; she has a near-term parole eligibility date of December 16, 2020.

24. On information and belief, as described in greater detail below, Ms. Citro has many longstanding health issues that have continued during her incarceration. These include diabetes, asthma, and various heart ailments, as well as gender dysphoria, depression, and anxiety. She also suffers from immunosuppression: a generalized reduction in immune activity that, in her case, has likely resulted from the combined effect of the foregoing. To manage these conditions, Ms. Citro is prescribed medication.

25. ***Diabetes.*** On information and belief, Ms. Citro was diagnosed with type 2 diabetes over 20 years ago. She visits Eastern's medical clinic for insulin three times a day—in the morning, afternoon, and evening. Because of congestion at the clinic, Ms. Citro often has to wait alongside many other individuals at these visits. Since COVID-19 arrived at Eastern, Ms. Citro has experienced further disruptions in her insulin intake. Ms. Citro also takes 1000mg of Metformin, another diabetes treatment, twice daily.

26. ***Asthma.*** On information and belief, Ms. Citro has suffered from serious asthma for 15 years. Ms. Citro is prescribed a Proventil HFA Inhaler, and takes 10mg of Loratadine accompanied with an oral steroid daily. These medications help alleviate her trouble breathing. Heat can trigger Ms. Citro's asthma, which tends to be worse in the warmer months; general nervousness and stress are also triggers. The upcoming warmer weather and the stresses of the

COVID-19 pandemic mean Ms. Citro will likely face additional asthma attacks in the near future. Ms. Citro had previously been prescribed a nebulizer—a medical device that turns liquid medicine into a very fine mist that an asthma patient can inhale through a face mask or mouthpiece.

27. ***Heart Conditions.*** On information and belief, Ms. Citro has battled with heart conditions for roughly 34 years. Specifically, she has been diagnosed with an irregular heartbeat, high blood pressure, and high cholesterol. She is also prone to blood clots. Ms. Citro has a stent in her heart to increase blood flow. She takes several medications for these conditions. During two of her daily clinic visits—in the morning and evening— and she receives 5mg of blood thinners. Ms. Citro also takes 50mg of Metoprolol (twice daily), 25mg of Enalapril (twice daily), Diltiazem XR (twice daily), 40mg of Atorvastatin (daily), and 0.4mg of Nitrostat (daily).

28. ***Psychological Issues.*** On information and belief, Ms. Citro is a transgender woman diagnosed with gender dysphoria. Ms. Citro suffers from anxiety and depression due in part to the difficulties that she has experienced related to her transition. Ms. Citro takes various prescription medications for her anxiety and depression, including 40mg of Paxil (daily), 15mg of Remeron (daily), and 30mg of Buspar (daily).

29. ***Immunosuppression.*** On information and belief, Ms. Citro also suffers from immunosuppression—a general term for reduced immune-system activity that renders people at greater risk for diseases caused by bacteria and viruses. Anxiety and depression are known to cause a weakened immune system.¹⁵

¹⁵ See, e.g., Ann Pietrangelo and Kristeen Cherney, *The Effects of Depression in Your Body*, Healthline, Sept. 11, 2017, available at <https://www.healthline.com/health/depression/effects-on-body#1> (last accessed May 10, 2020). This article was medically reviewed by Dr. Timothy J. Legg.

30. On information and belief, Respondents are well aware of Ms. Citro's medical conditions. Indeed, they have designated Ms. Citro as "medically unassigned" due to her poor health, making her unable to participate in a variety of prison programs.¹⁶

B. The COVID-19 Pandemic Presents a Grave Risk of Harm to Incarcerated Individuals in New York State Prisons, Including Serious Illness and Death

31. COVID-19 is a coronavirus that has reached pandemic status.¹⁷ As of May 10 2020, over 4 million people worldwide have confirmed diagnoses, including over 1.3 million people in the United States and 338,500 in New York State, making New York State the global epicenter of the crisis.¹⁸ Over 279,00 people have died from COVID-19 worldwide, including almost 79,000 people in the United States and almost 27,00 in New York.¹⁹ On March 7, 2020, the governor of the State of New York issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.²⁰ The President of the United States has also

¹⁶ Despite these challenges, Ms. Citro has been a model citizen while incarcerated at Eastern. On information and belief, Ms. Citro has not been seriously disciplined since incarceration.

¹⁷ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, Wall St. J., Mar. 11, 2020, available at <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794> (last accessed May 10, 2020).

¹⁸ *Coronavirus Map: Tracking the Global Outbreak*, N.Y. Times, Mar. 23, 2020, available at <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> (updating live; numbers expected to rise) (last accessed May 10, 2020); Mitch Smith et al., *Coronavirus Map: U.S. Cases Surpass 10,000*, N.Y. Times, Mar. 23, 2020, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updating live; numbers expected to rise) (last accessed May 10, 2020); William Feuer, *New York State Just Surpassed China's Hubei Province for Reported Coronavirus Cases*, CNBC, Mar. 31, 2020, available at <https://www.cnbc.com/2020/03/31/new-york-state-just-surpassed-chinas-hubei-province-for-reported-coronavirus-cases.html> (last accessed May 10, 2020).

¹⁹ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, Apr. 10, 2020, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updating live; numbers expected to rise) (last accessed May 10, 2020).

²⁰ Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. Times, Mar. 10, 2020, available at <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html> (last accessed May 10, 2020).

declared a national emergency regarding the pandemic.²¹ Regretfully, the world's fight with COVID-19 is far from over.

32. COVID-19 has rapidly spread within New York State prisons. On March 24, 2020, there were only three confirmed cases of COVID-19 among people incarcerated in New York State prisons. As of May 9, 2020, DOCCS reports that 1,170 staff members, 433 incarcerated people, and 54 parolees have the virus. Four staff members, 15 incarcerated people, and four parolees have succumbed to the virus.²² At Eastern alone, 17 incarcerated individuals have tested positive for the virus.²³

33. These statistics almost certainly drastically underestimate the number of incarcerated individuals who have contracted the virus. DOCCS tests incarcerated individuals only after they exhibit symptoms and a medical evaluation is conducted,²⁴ meaning DOCCS does not detect any asymptomatic cases. There is also growing concern among medical professionals and experts that COVID-19 tests may have false negative rates of 30 percent or higher.²⁵ And, there is a nationwide shortage of tests for COVID-19 such that New York State correctional facilities do not have sufficient access to these tests. (Greifinger Aff. ¶ 22.)

²¹ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, Wash. Post, Mar. 13, 2020, available at <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/> (last accessed May 10, 2020).

²² *Daily Update*, DOCCS, May 9, 2020, available at <https://doccs.ny.gov/doccs-covid-19-report> (last accessed May 10, 2020).

²³ *NYS DOCCS Incarcerated Individuals COVID-19 Report by Housing Facility as of May 8, 2020 at 3:00 PM*, DOCCS, May 8, 2020, available at https://doccs.ny.gov/system/files/documents/2020/05/inmatedailycovid_table_forpoi-2020.05.08.pdf (last accessed May 10, 2020).

²⁴ Reuven Blau & Rosa Goldensohn, *Call for Cuomo to Free Ailing Prisoners as Virus Spreads*, The City, Apr. 1, 2020, available at <https://thecity.nyc/2020/04/call-for-cuomo-to-free-ailing-prisoners-as-virus-spreads.html> (last accessed May 10, 2020); *Daily Update*, DOCCS, May 9, 2020, available at <https://doccs.ny.gov/doccs-covid-19-report> (last accessed May 10, 2020).

²⁵ Harlan M. Krumholz, M.D., *If You Have Coronavirus Symptoms, Assume You Have the Illness, Even if You Test Negative*, N.Y. Times, Apr. 1, 2020, available at <https://www.nytimes.com/2020/04/01/well/live/coronavirus-symptoms-tests-false-negative.html> (last visited May 10, 2020).

34. It is unfortunate, but unsurprising, that COVID-19 has affected Eastern, which has a collective capacity of over 1,110 people. The virus is highly contagious and spread by proximity to an infected person who may not even show symptoms, through the most minor physical contact, or even by breathing the air in their presence or touching surfaces they have touched. (Greifinger Aff. ¶ 8.) The closed nature of the prison fosters a uniquely intimate form of human contact. Incarcerated people and staff members occupy the same tight quarters where they breathe the same poorly ventilated air. (Greifinger Aff. ¶¶ 8, 33.) Housing blocks and communal spaces are often filthy, with cleaning supplies and hygiene products frequently unavailable. (Greifinger Aff. ¶¶ 19–20.) Incarcerated people receive medical treatment, share meals, play sports, and congregate in housing blocks and dormitories together. (Greifinger Aff. ¶¶ 21, 23–24.) Staff members provide medical treatment, gather during shift changes, share breaks, and clock out together. (Greifinger Aff. ¶ 25.) Due to uniquely restrictive rules and institutional norms, incarcerated people often lack the freedom or means to clean their cells or maintain their hygiene. (Greifinger Aff. ¶¶ 14, 29, 33.)

35. A recent study showed that COVID-19 can survive for up to three hours in the air, four hours on copper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless steel.²⁶ Studies also show that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—meaning transmission by people who are contagious but exhibit limited or no symptoms—rendering ineffective any screening tools dependent on identifying symptomatic behavior.²⁷ These studies show that

²⁶ *Study Reveals How Long COVID-19 Remains Infectious On Cardboard, Metal and Plastic*, Science Daily, Mar. 20, 2020, available at <https://www.sciencedaily.com/releases/2020/03/200320192755.htm> (last accessed May 10, 2020).

²⁷ Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times, Mar. 31, 2020, available at <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html> (last accessed May 10, 2020).

people infected with COVID-19 are most contagious about one to three days before they begin to show symptoms.²⁸ As a result, COVID-19 spreads exponentially if not controlled. For example, on March 7, there were 89 cases in New York State; by March 21, there were over 10,000; and by April 4, over 110,000.²⁹

C. The COVID-19 Pandemic Is Especially Dangerous to Those of Advanced Age or with Serious Medical Conditions, and Members of the LGBTQ+ Community

36. Ms. Citro and other vulnerable individuals are among the members of society most in need of protection from COVID-19. For an older adult like Ms. Citro, COVID-19 is uniquely dangerous because immune function declines with age and the elderly are more likely to have undiagnosed chronic diseases that can complicate recovery.³⁰ (Greifinger Aff. ¶ 28.)

37. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver.³¹ COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.³² In addition, scientists and doctors have recently reported severe

²⁸ *Id.*

²⁹ See *COVID-19 Data*, N.Y. Times, available at <https://github.com/nytimes/covid-19-data/blob/master/us-states.csv> (last accessed May 10, 2020).

³⁰ See, e.g., Umair Irfan & Julia Belluz, *Why COVID-19 Is So Dangerous For Older Adults*, Vox, Mar. 13, 2020, available at <https://www.vox.com/2020/3/12/21173783/coronavirus-death-age-covid-19-elderly-seniors> (last accessed May 10, 2020).

³¹ *Q&A on Coronaviruses (COVID-19)*, WHO, Apr. 17, 2020, available at <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last accessed May 10, 2020).

³² See, e.g., Gina Kolata, *A Heart Attack? No, It Was The Coronavirus*, N.Y. Times, Mar. 27, 2020, available at <https://www.nytimes.com/2020/03/27/health/coronavirus-cardiac-heart-attacks.html> (last accessed May 10, 2020).

blood clotting in COVID-19 patients—including instances in which young, otherwise healthy people have suffered major strokes.³³

38. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. On information and belief, Eastern has only one ventilator in its possession, putting Ms. Citro at great risk of death should she contract COVID-19.

39. Patients who do not die from COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological and lung damage. According to recent estimates, the fatality rate from COVID-19 is about 10 times higher than the rate from severe seasonal influenza, even in advanced countries with highly effective health care systems.³⁴ As such, not only is the virus more likely to spread within Eastern, but the outcomes are also more likely to be severe, or even deadly, than in the general population. (Greifinger Aff. ¶ 28.)

40. Individuals with certain serious medical conditions are also at increased risk if they contract COVID-19. These conditions include lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune system, blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.³⁵ Older adults who suffer

³³ See Jon Hamilton, *Doctors Link COVID-19 To Potentially Deadly Blood Clots and Strokes*, NPR, Apr. 29, 2020, available at <https://www.npr.org/sections/health-shots/2020/04/29/847917017/doctors-link-covid-19-to-potentially-deadly-blood-clots-and-strokes> (last accessed May 10, 2020); Sasha Pezenik & Dr. L. Nedda Dastmalchi, *Why Are So Many COVID-19 Patients Also Seeing Blood Clots?*, ABC News, Apr. 20, 2020, available at <https://abcnews.go.com/Health/covid-19-patients-blood-clots/story?id=70131612> (describing how COVID-19 patients with no underlying heart conditions are at risk for potentially deadly blood-clots) (last accessed May 10, 2020); Dr. Sanjay Gupta, *COVID-19 Patient Survives Life-Threatening Blood Clot*, CNN, available at <https://www.cnn.com/videos/health/2020/04/30/warnell-vega-coronavirus-blood-clot-sanjay-gupta-pkg-vpx.cnn> (last accessed May 10, 2020).

³⁴ See, e.g., Denise Grady, *How Does the Coronavirus Compare With the Flu?*, N.Y. Times, Mar. 27, 2020, available at <https://www.nytimes.com/article/coronavirus-vs-flu.html> (last accessed May 10, 2020).

³⁵ *People Who Are At Higher Risk for Severe Illness*, CDC, Apr. 15, 2020 available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed May 10, 2020).

from these medical conditions are at an even higher risk of suffering serious illness or death from COVID-19.³⁶ According to preliminary data from the CDC, over 20% of people with underlying serious health conditions such as diabetes who contract COVID-19 end up in the ICU.³⁷ Even more chilling, preliminary data from China indicates that 20% of people in these same high-risk categories who contract COVID-19 have died. (Greifinger Aff. ¶ 10.)

41. On information and belief, Ms. Citro suffers from several of these serious health conditions. First, Ms. Citro suffers from diabetes and, unfortunately, is not able to manage the disease well while incarcerated. In particular, Ms. Citro does not have access to clean (and hot) tap water for hydrating or for washing her hands. Diabetics need clean drinking water to rehydrate their blood, because their bodies regularly remove excess glucose through urine.³⁸ Moreover, on information and belief Ms. Citro was recently diagnosed with a urinary tract infection resulting from her lack of access to clean drinking water. Ms. Citro also reports delays in her receipt of insulin because COVID-19 has led to overcrowding at Eastern's medical clinic.

42. Diabetes patients like Ms. Citro who are not able to manage the disease well face additional complications from COVID-19. First, the high blood-sugar levels common in diabetics can interfere with the functioning of white blood cells and thus suppress the body's

³⁶ *Older Adults*, CDC, available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last accessed May 10, 2020).

³⁷ *Underlying Health Disparities Could Mean Coronavirus Hits Some Communities Harder*, NPR, Apr. 1, 2020, available at <https://www.npr.org/sections/health-shots/2020/04/01/824874977/underlying-health-disparities-could-mean-coronavirus-hits-some-communities-harder> (last accessed May 10, 2020).

³⁸ *Water and Diabetes*, Diabetes.co.uk, Jan. 15, 2019, available at <https://www.diabetes.co.uk/food/water-and-diabetes.html> ("The bodies of people with diabetes require more fluid when blood glucose levels are high. This can lead to the kidneys attempting to excrete excess sugar through urine. Water will not raise blood glucose levels, which is why it is so beneficial to drink when people with diabetes have high blood sugar, as it enables more glucose to be flushed out of the blood.") (last accessed May 10, 2020).

ability to fight infection. Second, diabetics with viral infections like COVID-19 often suffer increased inflammation or internal swelling, which can further suppress the immune system.³⁹

43. On information and belief, Ms. Citro also suffers from asthma and, as discussed above, cannot easily manage this ailment because she resides in unsanitary conditions. Consequently, Ms. Citro is at an increased risk for respiratory attacks due to a combination of triggers such as warmer weather, stress, and anxiety.

44. Asthma patients such as Ms. Citro may also be more likely to transmit COVID-19. This is because asthma may induce more respiratory symptoms, including coughing, creating a heightened risk for transmission. Therefore, it is important for asthma patients like Ms. Citro to stay isolated during this pandemic.⁴⁰

45. On information and belief, Ms. Citro has also been diagnosed with an irregular heartbeat, high blood pressure, and high cholesterol, and is at risk for blood clots—all serious health conditions that increase the risks accompanying COVID-19 according to the CDC. Ms. Citro has been prescribed various medicines—including blood thinners—to treat these problems. The American Heart Association has outlined that elderly people with heart disease are more likely to develop more severe symptoms should they contract COVID-19.⁴¹ Terrifyingly, doctors have linked COVID-19 to deadly blood clots, and while blood thinners like what Ms.

³⁹ *How COVID-19 Impacts People with Diabetes*, American Diabetes Association, available at <https://www.diabetes.org/coronavirus-covid-19/how-coronavirus-impacts-people-with-diabetes> (last accessed May 10, 2020); Dr. Robert Gabbay, *What You Need To Know About COVID-19 If You Have Diabetes*, Harvard Medical School Health Blog, Apr. 17, 2020, available at <https://www.health.harvard.edu/blog/what-you-need-to-know-about-covid-19-if-you-have-diabetes-2020041719558> (last accessed May 10, 2020).

⁴⁰ Dr. Peter Gulick, *MSU Faculty Member Talks About COVID-19 and Asthma*, MSU, Apr. 14, 2020, available at <https://msutoday.msu.edu/news/2020/msu-faculty-member-talks-about-covid-19-and-asthma/> (last accessed May 10, 2020).

⁴¹ *Coronavirus (COVID-19) Resources*, American Heart Association, Apr. 24, 2020, available at <https://www.heart.org/en/coronavirus/coronavirus-covid-19-resources> (last accessed May 10, 2020).

Citro is prescribed may reduce the risk of clotting, these same drugs can also cause “uncontrolled bleeding” as a side effect.⁴²

46. On information and belief, Respondents have recognized the severity of Ms. Citro’s heart ailments, designating Ms. Citro as “medically unassigned,” which means she is unable to partake in certain activities due to her medical vulnerabilities. One reason they have done so is to prevent Ms. Citro from being infected by viruses. Put differently, Respondents have acknowledged that Ms. Citro’s poor health places her in increased danger from viruses such as COVID-19.

47. Furthermore, Ms. Citro, a transgender woman diagnosed with depression and anxiety, is especially susceptible to the dangers associated with COVID-19 because these conditions have contributed to her immunosuppressive state.⁴³

48. Given her age and medical conditions, Ms. Citro faces a high risk of complications should she contract COVID-19, which would likely require advanced supportive care, specialized equipment that is in limited supply, and an entire team of care providers, nurses, respiratory therapists, and intensive care physicians. To effectively care for COVID-19 patients, hospital units require a nurse-to-patient ratio of 1:1 or 1:2. This level of support is impossible at Eastern, especially since the facility has only one ventilator.

⁴² See Jon Hamilton, *Doctors Link COVID-19 To Potentially Deadly Blood Clots and Strokes*, NPR, Apr. 29, 2020, available at <https://www.npr.org/sections/health-shots/2020/04/29/847917017/doctors-link-covid-19-to-potentially-deadly-blood-clots-and-strokes> (last accessed May 10, 2020); Sasha Pezenik & Dr. L. Nedda Dastmalchi, *Why Are So Many COVID-19 Patients Also Seeing Blood Clots?*, ABC News, Apr. 20, 2020, available at <https://abcnews.go.com/Health/covid-19-patients-blood-clots/story?id=70131612> (describing how COVID-19 patients with no underlying heart conditions are at risk for potentially deadly blood clots) (last accessed May 10, 2020); Dr. Sanjay Gupta, *COVID-19 Patient Survives Life-Threatening Blood Clot*, CNN, available at <https://www.cnn.com/videos/health/2020/04/30/warnell-vega-coronavirus-blood-clot-sanjay-gupta-pkg-vpx.cnn> (last accessed May 10, 2020).

⁴³ See, e.g., Ji Mi Choi et al., *Association Between Anxiety and Depression and Gastroesophageal Reflux Disease: Results From a Large Cross-sectional Study*, J. of Neurogastroenterology, Oct., 2018, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6175551/> (last accessed May 10, 2020).

49. As of May 11, 2020, no vaccine or cure for COVID-19 has proven effective or been approved by the United States and New York State governments. Medical experts emphasize that patients with serious health conditions can only better protect themselves from COVID-19 should they wash their hands regularly using soap and clean water, wear a cloth mask in public, and practice social distancing.⁴⁴ These measures are effectively impossible to follow while incarcerated at Eastern due to its communal nature and unsanitary living conditions. Making matters worse, on information and belief, Ms. Citro commonly interacts with doctors, nurses, and sick patients at Eastern because she needs to visit the clinic several times each day for her medication. This further increases her risk of contracting COVID-19.

D. Due to New York State Prison Conditions, Ms. Citro Cannot Implement the Hygiene, Cleaning, and Social Distancing Protocols Recommended by Public Health Experts for COVID-19 Prevention

50. Unsurprisingly, COVID-19 spreads much faster in communal settings than in other locations.⁴⁵ (Greifinger Aff. ¶¶ 13, 20.) As described, at New York State prisons such as Eastern, for example, prison design and operations make it impossible for individuals like Ms. Citro to follow the hygiene, cleaning, and social-distancing measures that global leaders and medical experts demand all of us take to mitigate the risk of COVID-19 transmission.⁴⁶ (Greifinger Aff. ¶ 24.)

⁴⁴ See, e.g., *Preventing The Spread Of The Coronavirus*, Harvard Medical School, Apr. 17, 2020, available at <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus> (last accessed May 10, 2020).

⁴⁵ See, e.g., Noel King, *At A New York Prison, Social Distancing Is Impossible, Inmate Says*, NPR, Apr. 9, 2020, available at <https://www.npr.org/2020/04/09/830474543/an-inmate-in-new-yorks-sing-sing-prison-shares-his-view-on-covid-19> (last accessed May 10, 2020); *Analysis of COVID-19 Infection Rate in NYC Jails*, LAS, Apr. 3, 2020, available at <https://legalaidnyc.org/wp-content/uploads/2020/04/43Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails-1.pdf> (last accessed May 10, 2020).

⁴⁶ Severe outbreaks of contagious illness regularly occur in prisons like Eastern. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases. H1N1 is far less contagious than COVID-19. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility.” Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge, Mar. 7,

51. On information and belief, DOCCS and Eastern have not provided Ms. Citro with the hygiene and cleaning supplies she needs to prevent the spread of COVID-19. Ms. Citro is not alone in this regard. New York State prisons are in short supply of soap, disinfectant, and other basic cleaning supplies.⁴⁷ Even where those supplies are available, they are rationed pursuant to prison rules and norms. Such conditions are particularly hazardous for asthma patients and those with heart disease, furthering the risk of complications.

52. On information and belief, Ms. Citro also does not have access to clean tap water. This is especially dangerous for her because, as a diabetic, she requires regular hydration. Ms. Citro also does not have access to hot, clean tap water for washing her hands. Even as Eastern recommends incarcerated individuals avoid contracting COVID-19 by frequently washing their hands with soap and hot water, it does not provide Ms. Citro with the ability to do so.

53. On information and belief, food preparation presents similar problems for Ms. Citro. At Eastern, most food service is communal. Ms. Citro must line up for food in the mess hall with other ungloved individuals, who come within six feet of her food tray. The food is served by other incarcerated workers drawn from different housing areas within the prison. The eating surfaces in the mess hall are not disinfected after every meal.

2020, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis) (last accessed May 10, 2020).

⁴⁷ See, e.g., Samantha Michaels, *New York State Has Prisoners Making Hand Sanitizer. It's Unclear if Prisoners Can Use it*, Mother Jones, Mar. 9, 2020, available at <https://www.motherjones.com/crime-justice/2020/03/new-york-state-has-prisoners-making-hand-sanitizer-its-unclear-if-prisoners-can-use-it/> (last accessed May 10, 2020); Josiah Bates, *Campaigns, Fundraisers Work To Bail New York City Inmates Amid COVID-19 Outbreaks in Jails and Detention Centers*, TIME, Apr. 17, 2020, available at <https://time.com/5821512/bail-campaigns-new-york-inmates-coronavirus/> (last accessed May 10, 2020); Christina Carrega, *Shampoo, Watery Soap to Disinfect: Conditions on Rikers Island During COVID-19 Unsafe, Some Inmates Say*, ABC News, Mar. 29, 2020, available at <https://abcnews.go.com/Health/shampoo-watery-soap-disinfect-conditions-rikers-island-covid/story?id=69767859> (last accessed May 10, 2020).

54. Even if Eastern did provide Ms. Citro with the necessary hygiene and cleaning arrangements, which it does not, she still could not maintain necessary levels of preventive hygiene and cleaning because, on information and belief, she is required to constantly share or touch objects used by dozens of others. Toilets, sinks, showers, and common areas are often shared, without disinfection between each use. Moreover, because incarcerated individuals are only required to clean their cells once a week, Ms. Citro is constantly exposed to people who live in unsanitary conditions and therefore more likely to transmit COVID-19. As referenced above, the virus can live on surfaces for several days.

55. Relatedly, on information and belief, Ms. Citro is not afforded adequate protective gear to cover her face. She has only been provided with one very thin handkerchief, which she must wear for several days between washing it because she has limited access to antibacterial soap. The CDC and leading medical experts recommend machine-laundering a handkerchief-mask with bleach because antibacterial soap alone is insufficient, but Ms. Citro is not able to do so.⁴⁸

56. Personal protective equipment (“PPE”) helps prevent the wearer from both contracting the virus and transmitting it to others. The White House and the CDC unequivocally recommend that, when in proximity to others, everyone wear PPE in the form of face coverings

⁴⁸ *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19*, CDC, Apr. 13, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html> (last accessed May 10, 2020); *Handkerchief Or Tissues? That is the Question!*, Water Quality & Health Council, Dec. 9, 2016, available at <https://waterandhealth.org/disinfect/handkerchief-tissues-question/> (last accessed May 10, 2020).

whether or not they have displayed symptoms of coronavirus.⁴⁹ Taking an even stronger stance, Governor Cuomo recently ordered all New Yorkers to wear such PPE in public.⁵⁰

57. DOCCS's reports make clear that its PPE policy does not comply with these or the CDC's recommendations. PPE, in the form of surgical-type masks, is given to staff members. But incarcerated individuals receive surgical-type masks only if they are in isolation or quarantine. Other incarcerated individuals are "allowed"—but not required—to use state-issued handkerchiefs as masks.⁵¹ Perplexingly, other incarcerated individuals are also not required to wear masks *even when interacting with individuals who are quarantined*. Even incarcerated individuals at high risk for complications from COVID-19 are given handkerchiefs instead of surgical-type masks.

58. New York State prisons like Eastern also lack the adequate infrastructure to implement the social-distancing measures required to reduce the spread of infectious disease and protect people most vulnerable to illness. (Greifinger Aff. ¶¶ 29–31.)

59. On information and belief, Ms. Citro is unable to engage in social distancing at Eastern. Social distancing is virtually impossible because close gatherings persist in several settings, including in the mess hall, in "rank" (where incarcerated individuals are required to line up in formation and be escorted by an officer to move through the hallways, which does not allow them to remain six feet apart from each other), and in the yard (where Ms. Citro congregates

⁴⁹ Chelsea Ritschel, *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent, Mar. 15, 2020, available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last accessed May 10, 2020).

⁵⁰ Luis Ferre-Sadurni & Maria Cramer, *New York Orders Residents to Wear Masks in Public*, N.Y. Times, Apr. 15, 2020, available at <https://www.nytimes.com/2020/04/15/nyregion/coronavirus-face-masks-andrew-cuomo.html> (last accessed May 10, 2020).

⁵¹ *Daily Update*, DOCCS, May 9, 2020, available at <https://doccs.ny.gov/doccs-covid-19-report> (last accessed May 10, 2020).

with other incarcerated individuals). To make matters worse, Ms. Citro has been advised by doctors to limit her exposure to warm weather and sunlight, environments that contribute to her immunosuppressive state. Yet, she is still forced to congregate in the yard during the spring and summer months. Eastern's medical clinic, which Ms. Citro has to visit regularly, also typically contains 40 to 50 incarcerated individuals waiting to receive medical attention in a cramped waiting area far too small to permit proper social distancing.

60. Therefore, it is impossible for Ms. Citro to maintain social distancing in the spaces in which she is required to congregate on a daily basis. Even if Ms. Citro were allowed to socially distance from other inmates, she would still be required to constantly interact with Eastern's staff members, for example, when being escorted to the medical clinic. These are the same staff members who come and go from Eastern every day to their families and communities and who regularly escort other inmates and search through their belongings.

61. Even if all of these problems could be resolved, they would not sufficiently address the risk of serious harm to Ms. Citro, who is especially vulnerable to the potential ravages of COVID-19. As Dr. Robert Greifinger, former Deputy Commissioner and Chief Medical Officer for DOCCS recently stressed, "[i]f not released, those who are most medically vulnerable to severe effects of COVID-19 will have a poor prognosis if infected while in prison. Moreover, care for those who become sick with COVID-19 will overburden the limited health care resources of the prison." (Greifinger Aff. ¶ 37.)

E. Nationwide, Political Leaders and Courts Alike Have Recognized the Risks Posed to High-Risk Individuals Like Ms. Citro

62. Elected officials, public health experts, medical experts, and community advocates have called for "decarceration"—that is, reducing the prison population by releasing the most vulnerable incarcerated individuals (such as Ms. Citro) so that prisons can implement

proper (or at least improve) social-distancing, hygiene, and medical care for the remaining incarcerated individuals.⁵² For example, California released 3,500 incarcerated individuals⁵³ and Illinois released nearly 4,000 incarcerated individuals⁵⁴ to reduce the incarcerated population and stop the spread of COVID-19. In New York, Governor Cuomo has explained that elderly inmates incarcerated for non-violent and non-sexual offenses—a group that includes Ms. Citro—deserve special leniency.⁵⁵

63. New York Courts have likewise recognized that release is the only adequate remedy that can protect especially vulnerable incarcerated individuals from the risks attendant to COVID-19. *See, e.g., People of the State of New York ex rel. Gregor et al. v. Reynolds*, No. CV20-0150, 2020 WL 1910116, at *1, 3 (N.Y. Sup. Ct. Apr. 17, 2020) (granting habeas petition where due to “the risk to [Petitioner] in [Essex County Jail] because of his own medical conditions,” including “cardiac problems,” and the “lack of the full complement of preventive measures employed,” Petitioner was at risk of “serious, if not fatal, complications should he contract COVID-19”); *People of the State of New York ex rel. Stoughton v. Brann*, 2020 WL 1679209, at *1 (N.Y. Sup. Ct. Apr. 6, 2020) (granting habeas corpus relief in the form of immediate release for over a dozen incarcerated individuals especially vulnerable to the dangers

⁵² *See, e.g., Mary Bassett et al., Andrew Cuomo, Stop a Coronavirus Disaster: Release People From Prison*, N.Y. Times, Mar. 30, 2020, available at <https://www.nytimes.com/2020/03/30/opinion/nyc-prison-release-covid.html> (recommending the release, through executive action, of broad swaths of individuals from prison including elderly and otherwise vulnerable individuals, those held on noncriminal technical parole violations, those approaching the end of their sentences, and “low-risk inmates”) (last visited May 10, 2020). Dr. Bassett was the New York City Health Commissioner.

⁵³ Paige St. John, *California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons*, L.A. Times, Mar. 31, 2020, available at <https://www.latimes.com/california/story/2020-03-31/coronaviruscalifornia-release-3500-inmates-prisons> (last accessed Apr. 10, 2020).

⁵⁴ *Illinois Has Released Almost 4,000 Prisoners, Including 64 Murderers*, Nexstar Media Wire, May 4, 2020, available at <https://www.centralillinoisproud.com/news/state-news/illinois-has-released-almost-4000-prisoners-including-64-murderers/> (last accessed May 10, 2020).

⁵⁵ Ryan Tarinelli, *Certain NY Prisoners Will see Release Amid Pandemic, Top Cuomo Aide Says*, N.Y. Law Journal, Apr. 15, 2020, available at <https://www.law.com/newyorklawjournal/2020/04/15/certain-ny-prisoners-will-see-release-amid-pandemic-top-cuomo-aide-says/> (last accessed May 10, 2020).

of COVID-19). As the *Brann* Court stated, the law does not excuse prison officials “who mean well, but have no effective way to protect inmates” from potentially fatal pandemics. *Id.* at *2, 4 (“The current [pandemic] poses a deadly threat to inmates Given such circumstances and the absence of a viable alternative, a court has no choice but to order release.”).

64. New York federal courts have also acted to protect highly vulnerable incarcerated individuals from the dangers of COVID-19.⁵⁶ Just recently, the court in *Barbecho* granted immediate release to several ICE detainees especially vulnerable to the dangers of COVID-19 in a habeas action. 2020 WL 1876328, at *1, 8 (“Petitioners are being subjected to unconstitutional conditions of confinement, and . . . the risks posed by COVID-19 are imminent.”). The court emphasized that immediate release was the only proper remedy because detaining those individuals—“whose medical conditions place them at a higher risk of severe illness, or death,

⁵⁶ See, e.g., *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328, at *8 (S.D.N.Y. Apr. 15, 2020); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *1–2, 7 (S.D.N.Y. Mar. 26, 2020) (ordering the “Hudson, Bergen, and Essex County Correctional Facilities . . . to immediately release . . . the particularly vulnerable . . . Petitioners today on their own recognizance without fail” to protect them from COVID-19); *U.S. v. Stephens*, 15-cr-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (ordering release of federal pretrial detainee in part due to “unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place inmates, in particular, at “heightened risk”); *U.S. v. Perez* 19 Cr.-297 (PAE), Dkt. No. 62 at 1 (S.D.N.Y. Mar. 19, 2020) (ordering the release of a detainee held on sex crime charges with “serious progressive lung diseases” after finding “compelling reasons exist for temporary release of the defendant from custody during the current public health crisis”); *U.S. v. Raihan*, No. 20- cr-68, Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (ordering the continued release of a pre- trial detainee on the grounds that “[t]he more people we crowd into [the Manhattan Detention Center], the more we’re increasing the risk to the community”); see also *U.S. v. Zukerman*, No. 16-cr-194, 2020 WL 1659880, at *5 (S.D.N.Y. Apr. 3, 2020) (noting that “the great risk(s) that COVID-19 pose[] to an elderly person with underlying health problems” such as the defendant constitute “extraordinary and compelling reasons” to modify his sentence under 18 U.S.C. § 3582(c)(1)(A)(i)); *U.S. v. Hernandez*, No. 18 Cr. 834-04, 2020 WL 1445851, at *1 (S.D.N.Y. Apr. 2, 2020) (granting compassionate release under 18 U.S.C. § 3582(c) to asthmatic detainee because of the heightened medical risk posed by the COVID-19 pandemic); *U.S. v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422, at *1,4 (S.D.N.Y. Apr. 1, 2020) (holding that defendant’s medical condition combined with the limited time remaining on his sentence and the risks posed by the virus in his detention facility “clear[] the high bar set by” the extraordinary and compelling reasons requirement of the federal compassionate release statute); *U.S. v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020) (“Defendant’s compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and compelling reason to modify [] Defendant’s sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the [prison] environment.”).

from COVID-19”—would cause them to “face a significant risk that they would contract COVID-19—the very outcome they seek to avoid.” *Id.* at *8.

65. Federal courts in other jurisdictions are undertaking similar efforts to release vulnerable inmates.⁵⁷ For example, the federal District Court in *U.S. v. Gonzales* found that an individual—who was “the most susceptible to the devastating effects of COVID-19” due to her “age category (over 60 years of age)” and “chronic medical conditions”—evinced “extraordinary and compelling reasons” sufficient to reduce her sentence and warrant immediate release from confinement. 2020 WL 1536155, at *1–2.

66. Finally, international bodies have also recommended “decarceration,” especially for particularly vulnerable inmates. The United Nations High Commissioner for Human Rights

⁵⁷ See, e.g., *Malam v. Adducci*, No. 20-10829, 2020 WL 1899570, at *8 (E.D. Mich. Apr. 17, 2020) (finding that Petitioner was “at unreasonable risk of contracting COVID-19 should she remain in the Calhoun County Correctional Facility, regardless of precautions taken[.]” and that “continued release is both appropriate and necessary”); *U.S. v. Gonzales*, No. 2:18-cr-0232, 2020 WL 1536155, at *1 (E.D. Wash. Mar. 31, 2020); *U.S. v. Doshi*, No. 13-cr-20349, 2020 WL 1527186, at *3 (E.D. Mich., Mar. 31, 2020) (granting motion for home confinement for diabetic and hypertensive defendant, noting that “[t]hough the Court does not doubt that the BOP is doing everything in its power to slow the spread of SARS-COV-2 within its facilities, the high density of prison populations makes federal prisons ideal transmission grounds for the virus”); *U.S. v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, (D. Nev. Mar. 17, 2020) (“With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large.”); see also *U.S. v. Colvin*, No. 19-cr-179 (JBA), 2020 WL 1613943, at *4 (D. Conn. Apr. 2, 2020) (granting compassionate release in finding that diabetic defendant’s continued exposure to jail population would impose “additional, unnecessary health risks which can be minimized by her early release”); *U.S. v. Rodriguez*, No. 2:03-cr-00271-AB-1, 2020 WL 1627331, at *1–2 (E.D. Pa. Apr. 1, 2020) (granting compassionate release due to the fact that “[p]risons are tinderboxes for infectious disease” and that for diabetics such as the Petitioner’s “nothing could be more extraordinary and compelling than this pandemic”); *U.S. v. Meekins*, No. 18-cr-00222 (APM), Dkt. No. 75 at 1 (D.D.C. Mar. 31, 2020) (finding that COVID-19’s spread throughout the jurisdiction’s correctional facilities constituted prerequisite “exceptional reasons” for hypertensive and diabetic defendant’s release pending sentence under 8 U.S.C. § 1345(c), where defendant had been a convicted felon in possession of a weapon and was still facing three separate assault charges); *U.S. v. Muniz*, 4:09-CR-0199-1, 2020 WL 1540325, at *1–2 (S.D. Tex. Mar. 30, 2020) (“Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release.”); *In re Manrique*, 19-mj-71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering pre-trial detainee’s release on bond despite finding defendant was a flight risk and that COVID-19 had not yet reached the San Mateo County jail, because by the time COVID-19 reached the jail “it may be too late”). Professor Margo Schlanger, curator of the Civil Rights Clearinghouse, has generated a list of dozens (and counting) of federal court cases in which the emerging COVID-19 pandemic has been addressed. See *COVID-19 (Novel Coronavirus)*, *Special Collection*, University of Michigan Law School Civil Rights Clearinghouse, available at <https://clearinghouse.net/results.php?searchSpecialCollection=62> (last accessed May 10, 2020).

has implored governments to take immediate action to reduce the number of people in prison and examine ways to release those particularly vulnerable to COVID-19, noting that “physical distancing and self-isolation” in crowded prisons is “practically impossible,” and the “potentially catastrophic” consequences of neglecting those in confinement.⁵⁸

67. To date, DOCCS has not taken, and likely cannot take, the steps necessary to limit the spread of this disease and the potentially deadly risks associated with it for vulnerable incarcerated individuals. To the contrary, instead of invoking its statutory authority to release people, DOCCS has remained silent.⁵⁹

F. Ms. Citro's Plans upon Release

68. Ms. Citro has a sound reentry plan that will permit her to be safe, supported, and productive upon release. Ms. Citro will return to Manhattan, where COVID Bail Out NYC has confirmed that it will place Ms. Citro in safe (and quarantined) housing for a two-week period. (Williams Aff. ¶ 8.) On information and belief, Ms. Citro will also be in constant communication with volunteers who will provide her with a cellphone, a post-release plan, access to therapeutic resources, and food and essentials deliveries. Significantly, Ms. Citro will be able to socially distance and maintain adequate hygiene and cleanliness upon release.

69. Upon release, Ms. Citro will be connected with a social worker from LAS who will also assist her in connecting with long-term medical, housing, and other

⁵⁸ *Urgent Action Needed to Prevent COVID-19 "Rampaging Through Places of Detention"*, OHCHR, Mar. 25, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E> (last accessed May 10, 2020). The crisis of COVID-19 in prisons and corresponding calls for release have been echoed by special proceedings of the Human Rights Council. *See, e.g., Eritrea Must Free Political Prisoners and Low-Risk Offenders to Reduce COVID-19 Threat In Crowded Jails, Says UN Expert*, OHCHR, Apr. 2, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25764&LangID=E> (urging Eritrea to immediately release low-risk offenders and those particularly vulnerable to COVID-19 complications due to age or health) (last accessed May 10, 2020).

⁵⁹ Ms. Citro has separately written to DOCCS to ask for release as a result of the risk posed by COVID-19, but has received no response. *See* Exhibit 10, Letter from Paul, Weiss to DOCCS, May 7, 2020.

support services. Anthony Dixon, Director of Community Engagement at the PPP, will also mentor Ms. Citro and make “all the appropriate referrals” to ensure that she remains on a productive path.⁶⁰ The PPP has indicated that Ms. Citro could “play a key role in [its] organization” in mentoring and training incoming volunteers, conducting regular speaking engagements, reviewing and contributing to its written training materials, as well as other leadership-oriented work.⁶¹ For some of these engagements, the PPP may be able to offer Ms. Citro a stipend.⁶²

70. Ms. Citro also has strong ties to the SRLP, an organization providing services to the transgender community in New York City, and where she previously interned for \$18 an hour and plans to return upon release. (Walker Aff. ¶ 7.) At the SRLP, Ms. Citro has previously developed materials for the Shelter Organization Team, which educates and organizes TGNCI people in New York City shelters about their rights, and has helped respond to correspondence that the SRLP receives from people seeking information about TGNCI issues. (Walker Aff. ¶ 5.) Hannah Walker, Director of the Survival and Self-Determination Project and staff attorney at the SRLP noted that, “[she] always enjoyed when Ms. Citro was in the office because of her kind demeanor and insistence on helping with whatever the staff needed that day.” (Walker Aff. ¶ 6.) On information and belief, Ms. Citro has ties to many other transgender-specific organizations located in the City, including the Samuels Clinic At Mount Sinai West, a clinic devoted to supporting the City’s transgender community. Finally, Dr. Valerio Bacak, an Assistant Professor at the School of Criminal Justice at Rutgers University in Newark, and her team have also

⁶⁰ See Exhibit 11, Letter from Parole Preparation Project to Commissioners of the Board of Parole, May 7, 2020.

⁶¹ *Id.*

⁶² *Id.*

offered support to Ms. Citro upon release in utilizing their “many re-entry resources” and would invite her to participate in any future work they conduct through the University.⁶³

71. Accordingly, Ms. Citro seeks her release from confinement because, as experts have noted, the only medically accepted strategy to protect her from COVID-19 is impossible in her current living conditions. Ms. Citro, who has only months left before parole eligibility and has been a model citizen since incarceration, has no other options to protect herself. This Court should take comfort that Ms. Citro will immediately become a contributing member to society upon release, with ambitions to help those less fortunate than her.

ARGUMENT

72. The continued confinement of Ms. Citro constitutes a deliberate indifference to a serious risk of harm and a cruelly excessive punishment in violation of both the United States and New York State Constitutions. This Court should grant her immediate release through habeas corpus because it is the only relief that would cure the violations at issue. CPLR. 7002(a).

73. New York courts have recognized that, in the context of this pandemic, immediate release from confinement is the *only* remedy for the constitutional violations from which Ms. Citro continues to suffer while incarcerated.

74. The Eighth Amendment of the United States Constitution and Article I, Section 5 of the New York State Constitution require that (1) prison officials take reasonable measures to guarantee the safety of the incarcerated individuals, *see Estelle v. Gamble*, 429 U.S. 97, 103

⁶³ See Exhibit 12, Letter from Dr. Valerio Bacak et al. to Your Honor, May 8, 2020. Dr. Bacak first met Ms. Citro in March 2019. *Id.* As Dr. Bacak noted, Ms. Citro was “eager to support our efforts and provide critical contribution to our work. Ms. Citro understood – both personally and in a more global sense – how important her voice could be in our creating a better future for those who come after her. She saw the potential impact and used her influence as a community member to attract equally dedicated individuals to our team. Any minority population can be wary of those who do not share their experiences, so Ms. Citro’s validation of the intent and impact of our work was crucial. She served as an important bridge building trust between our team and other community members.” *Id.*

(1976), and imposes a duty upon prison officials to ensure that incarcerated individuals receive “adequate” medical care, *see Estelle*, 429 U.S. at 105, and (2) prohibits prison officials from inflicting cruelly excessive punishments. *Id.*; *see also People v. P. J. Video*, 68 N.Y.2d 296, 303 (1986) (citations omitted) (emphasizing that the New York State Constitution is at least as broad as the Eighth Amendment).

A. Respondents’ Refusal to Release Ms. Citro Constitutes a Deliberate Indifference to a Serious Risk of Harm in Violation of the Eighth Amendment of the United States Constitution and Article I, Section 5 of the New York State Constitution

75. A prison official’s “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain” proscribed by the Eighth Amendment and Article I, Section 5. *Estelle*, 429 U.S. at 104 (internal quotation marks and citation omitted). In order to establish a violation in this context, an incarcerated individual must prove an objective and subjective component. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837–840 (1994); *Smolen v. Fischer*, No. 12 Civ. 1856 (PAC) (AJP), 2012 WL 3609089, at *7 (S.D.N.Y. Aug. 23, 2012). Ms. Citro’s continued detention easily satisfies both components.⁶⁴

76. The “objective” component is clearly satisfied because that only requires that Ms. Citro’s medical condition be “serious,” that is, “a condition of urgency, one that may produce death, degeneration, or extreme pain.” *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994); *Fischer*, 2012 WL 3609089, at *4. The heightened risk of contracting a communicable disease

⁶⁴ Ms. Citro’s continued confinement under current conditions also constitutes a “cruelly excessive punishment” in violation of Article I, Section 5 of the New York State Constitution considering that she is being exposed to a deadly environment. Article I, Section 5 employs a very broad understanding of punishment. *People v. Broadie*, 37 N.Y. 2d 100 (1978); *People v. Rodriguez*, 66 Misc. 3d 189, 196 (N.Y. City Ct., 2019). Specifically, collateral consequences of a conviction—not merely the carceral sentence imposed by the sentencing court—are considered as part of an incarcerated individual’s “punishment.” *See Rodriguez*, 66 Misc. 3d at 197 (vacating 15-year old misdemeanor conviction as cruel and unusual where it would result in deportation, a “de facto punishment,” reasoning that in 2002 when the conviction occurred, deportation for the offense was “unforeseeable” in light of federal immigration practices at the time). For this reason, Ms. Citro’s continued confinement for her low-level felony is “cruelly excessive” and therefore unconstitutional.

such as COVID-19 and thereafter dying from its effects constitutes an “unsafe, life-threatening condition” that threatens “reasonable safety,” and thus is “serious.” *Brann*, 2020 WL 1679209, at *2 (“The current [pandemic] poses a deadly threat to inmates, and its presence at the prison equates to an ‘unsafe, life-threatening condition’ endangering ‘reasonable safety.’”) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)); *Narvaez v. City of New York*, No. 16-cv-1980, 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying Defendant’s motion to dismiss Plaintiff’s claim that the City of New York violated Plaintiff’s constitutional rights by repeatedly deciding to house him with inmates infected with active tuberculosis).

77. Ms. Citro also meets the “subjective” component, which only requires that Respondents knew of a “substantial risk” of harm to Ms. Citro’s health and disregarded that risk, regardless of whether the Respondents intended or desired the harm to occur. *See Munger v. Cahill*, 792 F. App’x 110, 112 (2d Cir. 2020) (“To satisfy the subjective component, a plaintiff must establish the equivalent of criminal recklessness, i.e., that the charged official acted or failed to act while actually aware of a substantial risk that serious inmate harm will result.”) (internal quotation marks and citation omitted); *see also Farmer*, 511 U.S. at 837, 840–42, n.8 (holding that an inmate must show that the prison officials were at the very least aware of “obvious dangers” from which “the inference *could* be drawn” that a substantial risk of serious medical harm existed) (emphasis added).

78. Respondents, like virtually all Americans today, are subjectively aware of the extraordinarily high risk that COVID-19 poses to people at high risk, such Ms. Citro, and have disregarded these risks by failing to authorize her release from custody. Respondents have been repeatedly alerted to these conditions and these risks, and have proven unwilling or unable to help her with any measures short of release. The law does not “excuse prison officials who . . .

have no effective way to protect inmates from potentially fatal [pandemics].” *Brann*, 2020 WL 1679209, at *4 (holding that the Eighth Amendment of the federal constitution and Article 1, Section 5 of the New York State constitution, and the Due Process protections of the federal and New York State constitutions, provide “comparable protection” for pretrial detainees and post-conviction detainees in this context).

79. In *Brann*, the court concluded that Rikers Island officials—including Respondent *Annucci*—were deliberately indifferent to the medical needs of incarcerated individuals vulnerable to the dangers of COVID-19 because proper hygiene, cleaning, and social distancing was effectively impossible. *Id.* at *3–5. The court noted that “communicable diseases” such as COVID-19 “could not ask for a better breeding ground than a crowded prison,” and reasoned that, with no other viable alternative, it had “no choice but to order release.” *Id.* at *2. And in *Gregor*, the court recognized that while the conditions in the Essex County Jail at issue “[c]ertainly . . . do not approach those of Rikers Island” as described in *Brann*, immediate release was nonetheless warranted because of the unique risks that the petitioner faced due to his underlying serious medical conditions and the “lack of the full complement of preventive measures employed at the jail.” 2020 WL 1910116, at *3, 5.

80. Respondent *Annucci* (as the *Brann* court held) and Respondent Lee are well aware of federal and state health guidelines, which explain that incarcerated individuals with serious underlying medical conditions such as diabetes, asthma, and heart conditions—like Ms. Citro—are especially susceptible to contracting, and dying from, COVID-19. Respondent *Annucci* (as the *Brann* court held) and Respondent Lee are likewise well aware of federal and state guidelines providing that all incarcerated individuals—but especially those most vulnerable like Ms. Citro—need to follow proper hygiene, cleaning, and social-distancing measures to

mitigate the risk of COVID-19 transmission. Nonetheless, the COVID-19 prevention policies that Respondent Annucci and Respondent Lee have put in place at Eastern fall far short of these goals. Regardless of the extent of Eastern's efforts to implement adequate safety measures, "policies that are 'generally justifiable' may still 'amount to deliberate indifference to' the specific and unique medical needs of particular individuals." *Gregor*, 2020 WL 1910116, at *3, 5 (quoting *Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005)).

81. To put it bluntly, Respondents know that they continue to expose Ms. Citro to deadly conditions every day that she remains in confinement. For example, Respondents are aware that Ms. Citro is "medically unassigned"; cannot properly wash her handkerchief-mask; that she cannot properly hydrate herself with clean water; and that, in order to receive insulin and other medications, she must visit the prison clinic several times per day and wait in crowded conditions where social distancing is not an option. The fact is that no matter the extent to which Respondents act during this pandemic, it will continue to be impossible for Ms. Citro to socially distance from the other inmates and staff at Eastern while incarcerated due to prison policies and norms.

82. Numerous advocacy groups, media organizations, and defender organizations have also put Respondents on notice about the extent of the risk similarly situated individuals face while incarcerated.⁶⁵

83. For instance, LAS has written several letters to DOCCS and Governor Cuomo alerting the State to the severity and scope of this risk. On March 4, 2020, LAS sent its first

⁶⁵ See, e.g., *Joint Defender Statement Calling for Immediate Release of Vulnerable Incarcerated New Yorkers in Response to Coronavirus*, The Legal Aid Society, Brooklyn Defender Services, The Bronx Defenders, New York County Defender Services, The Neighborhood Defender Service of Harlem, Mar. 12, 2020, available at <http://bds.org/joint-defender-statement-calling-for-immediate-release-of-vulnerable-incarcerated-new-yorkers-in-response-to-coronavirus/> (last accessed May 10, 2020).

letter to DOCCS describing the severity of the risks faced by people confined in DOCCS custody.⁶⁶ On March 30, 2020, LAS reported to DOCCS the alarming reports received from its clients about dangerous conditions in the facilities. This letter noted the lack of available sanitary supplies, including soap, hand sanitizer and cleaning supplies; the lack of information and education provided to incarcerated people on how to clean areas properly; the failure by staff to supervise cleaning and distancing protocols purportedly established to address the pandemic; and inmates' repeated and continuing inability to physically distance from others in dayrooms and common areas.⁶⁷ On April 2, 2020, LAS wrote to DOCCS demanding that, for the pendency of the COVID-19 pandemic, it immediately suspend the enforcement of any rule that prohibits incarcerated persons from covering their faces to protect their health.⁶⁸ On April 6, 2020, LAS further described the life-threatening challenges that many LAS clients—especially those similarly situated to Ms. Citro with serious medical conditions—face as the pathogen spreads in New York State prisons.⁶⁹

84. And, just days ago on April 27, 2020, public defender groups, LGBTQ+ advocacy organizations, and public officials wrote to Governor Cuomo and DOCCS to request the immediate release of all vulnerable populations from jail and prison custody, outlining additional risks that transgender individuals such as Ms. Citro face while incarcerated in the fight to protect themselves from COVID-19.⁷⁰

⁶⁶ See Exhibit 5, Letter from D. Lewis, S. Short, and K. Murtagh to Respondent Annucci and Dr. John Morley, DOCCS Chief Medical Officer, Mar. 4, 2020.

⁶⁷ See Exhibit 6, Letter from S. Short to Adam Silverman, DOCCS General Counsel, and Cal Whiting, Assistant Secretary to Governor Cuomo, Mar. 30, 2020.

⁶⁸ See Exhibit 7, Letter from S. Short to Adam Silverman, DOCCS General Counsel, Apr. 2, 2020.

⁶⁹ See Exhibit 8, Letter from S. Short to Respondent Annucci and Governor Andrew M. Cuomo, Apr. 6, 2020.

⁷⁰ See Exhibit 9, Letter from Legal Aid Society et al., to Respondent Annucci, Governor Andrew M. Cuomo, et al., April 27, 2020.

85. Respondents have been deliberately indifferent to the obvious and unique dangers that COVID-19 imposes on Ms. Citro. As a result, Ms. Citro's continued incarceration violates her fundamental constitutional rights. Every day Respondents fail to act, they expose Ms. Citro to a high risk of sickness and death. This Court is empowered to remedy a prison official's deliberate indifference *before* it results in serious harm. *Helling*, 509 U.S. at 25, 33 (1993); *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."); *Brann*, 2020 WL 1679209, at *1 ("Courts must not shrink from their obligation to enforce the constitutional rights of all, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") (quotations and citations omitted). Accordingly, Ms. Citro's immediate release is warranted.

B. Habeas Corpus Provides the Remedy to Ms. Citro's Continued Unconstitutional Imprisonment

86. Habeas corpus relief in the form of immediate release is warranted for persons "illegally imprisoned or otherwise restrained in [their] liberty." CPLR 7002(a). Whether Ms. Citro is incarcerated unconstitutionally is a question of law properly resolved through habeas corpus. *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (holding that a habeas petition may be used to address "restraint in excess of that permitted by . . . constitutional guarantees"); *Matter of Kaufman v. Henderson*, 64 A.D.2d 849, 850 (4th Dept 1978) ("[W]hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment."). Respondents' refusal to release Ms. Citro under the above-described circumstances violates Ms. Citro's fundamental constitutional rights.

87. New York law recognizes that habeas relief is appropriate where—like here—Ms. Citro’s immediate release from custody is the only viable remedy to cure the constitutional violations at issue. *See, e.g., Gregor*, 2020 WL 1910116, at *1, 3, 5 (granting habeas corpus relief in the form of immediate release for Petitioner where Petitioner was especially vulnerable to contracting COVID-19 and dying from its effects and it was not sufficient that *some*—yet ineffective—risk reduction measures had been put in place); *Brann*, 2020 WL 1679209, at *1 (granting habeas corpus relief in the form of immediate release for over a dozen of New York State inmates especially vulnerable to the dangers of COVID-19 where DOCCS violated these individuals constitutional rights through continued incarceration in unsafe conditions and no other adequate remedy existed to cure the violations); *People ex rel. Kalikow v. Scully*, 198 A.D.2d 250, 250–51 (2d Dep’t 1993) (emphasizing that in some circumstances, “habeas corpus is available to challenge the conditions of confinement”) (citation omitted).

88. Only Ms. Citro’s immediate release from confinement can remedy the above-described constitutional violations because the sole medically accepted strategy to protect a vulnerable individual like herself from COVID-19 is strict social distancing, which is impossible while Ms. Citro remains confined. Because Ms. Citro has no other options to adequately protect herself, her release via this writ is the necessary and practical result. *See Gordon v. Heath*, 113 A.D.3d 706 (2014) (The remedy of habeas corpus should be reserved for cases dictated by “practicality and necessity”) (quoting *People ex rel. Keitt v. McMann* 18 N.Y.2d 257, 262, 273 (1966)). Indeed, it is more than practical; the Court should take comfort that Ms. Citro has a sound reentry plan in which she will not just protect herself and others through proper social distancing, but will also engage in productive activity.

89. An Article 78 proceeding would be inadequate because an incarcerated individual cannot request immediate and total release from custody. CPLR 7801(2). And Article 78 relief in the form of “short-term temporary release” would be inappropriate considering Ms. Citro does not seek medical treatment as defined by New York law. N.Y. Comp. Codes R. & Regs. tit. 7, § 1901.1(a) (2019) (a temporary leave of absence would only be appropriate to receive surgery or to receive medical treatment not available at the facility, and only if it is absolutely necessary to the inmate’s health and well-being); *see also* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.2(e) (a prison’s decision about a temporary release request is “non-grievable”).

90. While Ms. Citro could conceivably bring an Article 78 proceeding to seek relief in the form of hygiene and cleaning supplies, she would nevertheless not be able to maintain the necessary levels of social distancing from the other inmates and staff at Eastern. *See* CPLR 7803(1) (writ of mandamus may be brought as to “whether the body or officer failed to perform a duty enjoined upon it by law”). This is in addition to the fact that Ms. Citro would also inevitably still be required to constantly share and touch objects used by dozens of other people.

91. Similarly, Ms. Citro may not bring a Section 1983 claim seeking immediate and total release from custody. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (finding that Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking validity of fact or length of their confinement, and is the exclusive remedy where clearly applicable).

92. Finally, in this case, as in unconstitutional overcrowding cases,⁷¹ transfer will not remedy the danger to health and life of Ms. Citro. The danger is inherent in the circumstances of

⁷¹ Outright release of prisoners has been required in cases where courts have found unconstitutional levels of crowding that could not be remedied in any other way. *See, e.g., Duran v. Elrod*, 713 F.2d 292, 298 (7th Cir. 1983); *Palmigiano v. DiPrete*, 737 F. Supp. 1257, 1262–63 (D. Ri. 1990); *Fambro v. Fulton Cty., Ga.*, 713 F. Supp. 1426, 1432–33 (N.D. Ga. 1989); *Benjamin v. Malcolm*, 564 F. Supp. 668, 688 (S.D.N.Y. 1983); *Inmates of Allegheny Cty. Jail v. Wecht*, 573 F. Supp. 454, 456 (W.D. Pa. 1983).

incarceration, with large numbers of prisoners held in close quarters, often in large open dormitory units, and thus unable to observe the public health measures directed by the state and federal government.

93. “These are not normal times.” *Brann*, 2020 WL 1679209, at *5. Habeas corpus relief in the form of Ms. Citro’s immediate release is warranted to prevent a potentially deadly—and avoidable—fate. Indeed, the circumstances here present an unconstitutionally high risk that Ms. Citro’s sentence could become a death sentence.

CONCLUSION

94. For all the foregoing reasons, Ms. Citro’s continued incarceration is unconstitutional, particularly due to her susceptibility to contracting COVID-19 and succumbing to its associated risks of serious injury and death. Respondents therefore lack constitutional authority to continue to incarcerate Ms. Citro, and Ms. Citro is entitled to immediate release from confinement.

95. No court or judge of the United States has exclusive jurisdiction to order Ms. Citro’s release.

96. No appeal has been taken of any order by virtue of which Ms. Citro is incarcerated. No prior application for the relief sought herein has been brought by Ms. Citro.

RELIEF REQUESTED

WHEREFORE, Ms. Citro respectfully prays that this Court:

- (a) issue a writ of habeas corpus without delay, directed to the Respondents, for the purpose of inquiring into the constitutionality of their continued confinement;
- (b) grant a hearing on the facts and issues presented at which Ms. Citro can call witnesses, should Respondents contest the facts and issues alleged;
- (c) direct Ms. Citro's immediate release from incarceration; and
- (d) grant Ms. Citro's such other and further relief as is just and proper.

Dated: New York, New York
May 11, 2020

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VERIFICATION

I, Eric A. Felleman, an attorney duly admitted to practice before the courts of this state, does hereby affirm under penalty of perjury that the following statements are true:

1. I am one of the attorneys of record herein.
2. I have written the foregoing Verified Petition and know its contents.
3. The contents of the foregoing Verified Petition are true to my knowledge, except as to matters alleged to be upon information and belief, and as to those matters, I believe them to be true.
4. The sources of the aforesaid information and beliefs are conversations I and other attorneys at my firm and at The Legal Aid had with Petitioner.
5. I make this verification on Petitioner's behalf because she is presently incarcerated outside the county in which my office is located.

Dated: New York, New York
May 11, 2020

/s/ Eric. A. Felleman
Eric. A Felleman