SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK
EX REL. Corey Stoughton, Esq.,
on behalf of

HOGAN JEFFREY, REGINALD JONES, MICHAEL COUCHON, SEKOU KANE, NELSON CORPORAN, JOSEPH BRYANT, CLAYTON BARRY, DOMINICK WILLIAMS, UCEFF WADE, CECILIA HOWARD, BRANDI FELCI, MARJORIE CHAMBERS, ALUDIEN MARKS, BRIGHTON MONTGOMERY, NICHOLAS KILGORE, JONATHAN PEREZ, EVA DOUBLERG, KEITH JOHNSON, JASON BORRERO, PEDRO VINCENT BARCIA, ABDULLAH SPENCEREL, SERGIO BRUNO, DARLY BRITT, MALCOLM DAWSON, BRIAN KING, ALLEN NANCE, CHRISTOPHER ANDRETTA, HERBERT BARRON, JOHN PIVETZ, GLEN SNYDER, SAMUEL SAEZ, and TOLIB AKILOV,

Petitioners,

v.

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

Respondents.

Index No. _____

SCID No. _____

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

Corey Stoughton, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

INTRODUCTION

1. Petitioners are 32 people who, by virtue of their age and/or underlying medical condition, are particularly vulnerable to serious illness or death if infected by COVID-19. This petition seeks their immediate release from jails in New York City on the grounds that continuing

to hold them on bail or parole holds constitutes deliberate indifference to the risk of serious medical harm in violation of the Fourteenth Amendment and state constitutional right to due process.

2. In only a few months, over 360,000 people worldwide have been diagnosed with COVID-19 and more than 13,000 of those people have died. As of the date of this filing, there are more than 15,000 confirmed cases of coronavirus within the New York City area, up from just 923 on March 18, 2020, less than one week ago. There are now at least 125 COVID-19 related deaths in the New York City area alone.[1]

3. The situation in New York City's jails is rapidly deteriorating. As of March 23, 2020, there are 39 reported cases of COVID-19 in our jails,[2] compared to only *one* known case as of Friday, March 20, 2020.[3] These numbers are growing rapidly every day. Even at current rates of infection, the virus's "attack rate" on Rikers Island – that is, the rate at which the population is being infected – is roughly *five times higher* than anywhere else in the United States of America.

4. There is no vaccine or cure for COVID-19. No one is immune.

5. COVID-19 is most likely to cause serious illness and death for older adults and those with certain underlying medical conditions. Petitioners all fall into this category of heightened vulnerability.

6. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19 and risk mitigation is effectively impossible in jails, including those in New York

[1] COVID-19 Daily Case Data Summary, NYC Health, Coronavirus Disease 2019 (Mar. 23, 2020) *available at* https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary.pdf (last visited Mar. 23, 2020).
[2] Robin McDowell & Michael Balsamo, *38 positive for coronavirus in NYC jails, including Rikers*, Associated Press, *available at* https://apnews.com/54dbc9d47f62cf0c0240314310cfe909 (last visited Mar. 22, 2020); *see also* Chelsia Rose Marcius, *Coronavirus prompts reopening of shuttered jail on Rikers Island*, N.Y. DAILY NEWS (Mar. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-correction-department-reopen-jail-20200323-dq2bn3hap5g5bkjagjzsmkdxie-story.html.
[3] Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html.

City, correctional public health experts—including the New York City Board of Correction, the lead doctor of New York's own correctional health system and several experts around the country—have recommended the release from custody of people most vulnerable to COVID-19. As these experts have explained, release is the only effective means to protect the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people who remain held or working on Rikers Island and other New York City jails.

7. On March 21, 2020, the Board of Correction ("BOC") issued its second advisory letter, urging judges and prosecutors to act quickly to release people, like Petitioners, who are over fifty years old and who have health conditions that make them high-risk for COVID-19.[4] The BOC also recommended immediate release of individuals who are incarcerated for technical violations of parole and those serving city sentences.[5] As the BOC reported – using statistics that are already out of date and thus significantly understate the numbers of diagnosed illnesses and deaths:

> Over the past six days, we have learned that at least twelve DOC employees, five CHS employees, and ***twenty-one people in custody have tested positive for the virus***. There are more than 58 individuals currently being monitored in the contagious disease and quarantine units (up from 26 people on March 17). It is likely these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff. ***Given the nature of jails (e.g. dense housing areas and structural barriers to social distancing, hygiene, and sanitation), the number of patients diagnosed with COVID-19 is certain to rise exponentially.*** The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.[6]

[4] Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf (last visited Mar. 22, 2020).

[5] *Id.*

[6] *Id.* (emphasis added).

8. In other parts of the country, government officials have recognized this reality and begun releasing medically vulnerable pre-trial detainees. The Supreme Court of New Jersey mediated a process between the N.J. Office of the Public Defender, the ACLU of New Jersey, the N.J. Office of the Attorney General, and the County Prosecutors Association that resulted in a court order creating a presumption of release for *all* inmates serving a county jail sentence or a sentence as a condition of probation, resulting in the release of over 1,000 people. *See* Consent Order, Supreme Court of New Jersey, Docket No. 084320 (Mar. 22, 2020). Other courts have begun granting specific applications for release of pretrial detainees, with many more such applications pending around the country.[7]

9. In New York, however, as of the date of this writing, the Mayor of New York reports that only 75 people *from all across the City's jails* have been released.[8] There are more than 5,000 people on Rikers Island alone. Only a few handfuls of people have been released in a negotiated process that remains ongoing between the District Attorney's Office of New York and the Legal Aid Society. To date, the District Attorney's office has declined to consent to the release of Petitioners despite a request to do so.

10. All across New York City, extraordinary and unprecedented measures affecting every aspect of life are being taken in the name of protecting people from this pandemic. New York cannot leave people in jails behind to suffer and die.

PARTIES

11. I am the Attorney in Charge of the Special Litigation Unit of the Legal Aid Society's Criminal Defense Practice, which is counsel to Petitioners in this matter. I make this application on behalf of the below-named Petitioners.

[7] *See infra* paragraph 91.
[8] The Mayor announced this statistic on a press conference on March 23, 2020.

12. Petitioner Hogan Jeffrey (B&C No. 3492000874, NYSID 03669288Q), is detained in a jail controlled by the New York City Department of Corrections, solely because of a parole hold. He has just $1 bail set on a pending misdemeanor charge. Mr. Jeffrey is sixty-one years old and is diagnosed with hypertension and other medical conditions which require him to be housed in the North Infirmary Command (NIC). As a result of his age and medical condition, he is at high risk for severe illness or death if he contracts COVID-19.

13. Petitioner Reginald Jones, (B&C No. 3492000233, NYSID 04979573R) is detained in a jail controlled by the New York City Department of Correction due to an alleged technical parole violation, for purportedly failing to report to parole. He has a pending, non-violent criminal charge, on which a judge ordered him to be released on his own recognizance. Medical records confirm that he is 55 years old and is diagnosed with hypertension. He also reports respiratory issues and a history of hospitalization for pneumonia. As a result, Mr. Jones is at high risk for severe illness or death if he contracts COVID-19.

14. Petitioner Michael Couchon (B&C No. 3491905913, NYSID 03923245P), is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail set on a misdemeanor matter pending in Manhattan criminal court. He is sixty-four years old and medical records demonstrate that he is diagnosed with diabetes, cardiovascular disease, and kidney disease. Dr. Rachel Bedard, Director of Geriatrics and Complex Care Services in Rikers Island has signed a letter recommending Mr. Couchon's release because he is at high risk for severe illness or death if he contracts COVID-19.

15. Petitioner Sekou Kane (B&C No. 8951900661, NYSID 01476895H) is detained in a jail controlled by the New York City Department of Corrections, solely because he cannot afford his current bail of $50,000 cash or bond. Medical records confirm that Mr. Kane is 42 years old

and is diagnosed with asthma, for which he is prescribed an inhaler. Medical records establish that Mr. Kane's asthma has required treatment at Bellevue Hospital in the recent past. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

16. Petitioner Nelson Corporan (B&C No. 3492000695, NYSID 08917919R), is detained in a jail controlled by the New York City Department of Corrections, due solely to an alleged parole violation. He has $1 bail set on a pending misdemeanor matter. Mr. Corporan suffers from cardiovascular issues and survived a heart attack mere months ago. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

17. Petitioner Joseph Bryant (B&C No. 3492000936, NYSID 04061925L) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail set on a non-violent felony matter pending in Manhattan Criminal Court. He is 59 years old. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

18. Petitioner Clayton Barry (B&C No. 3491907294, NYSID 00085592J), is detained in a jail controlled by the New York City Department of Corrections, solely because he cannot afford to pay his bail of $10,000 cash, or $15,000 bond. Mr. Barry has a medical diagnosis that makes him immunocompromised. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

19. Petitioner Dominick Williams (B&C No. 3491902946, NYSID 00896876Z), is detained in a jail controlled by the New York City Department of Corrections, due to a parole hold and because she cannot afford to pay her bail of $20,000 cash or bond on a matter pending in Manhattan Supreme Court, Criminal Term. Medical records confirm that she has an asthma diagnosis which is treated with an inhaler. Dr. Ruth Hai, a physician on Rikers Island, has

specifically recommended that Ms. Wiliams be released because she is at high risk for severe illness or death if she contracts COVID-19.

20. Petitioner Uceff Wade (B&C No. 3491906067, NYSID 07153052Y), is detained in a jail controlled by the New York City Department of Corrections, because he cannot afford to pay his bail of $50,000 cash or $100,000 bond on a pending matter in Manhattan Supreme Court, Criminal Term. Medical records establish that Mr. Wade suffers from lung issues with "recent exacerbations." Dr. Rachel Bedard, a physician on Rikers Island, wrote a letter recommending consideration of his release because, due to his lung issues, Mr. Wade is in the "highest risk group" for severe illness or death if he contracts COVID-19.

21. Petitioner Cecilia Howard (B&C No. 3602000057, NYSID 04603097Y), is detained in a jail controlled by the New York City Department of Corrections because of a remand order pending resolution of her case in the "Judicial Diversion" part—a drug-treatment court. Records reveal that she is fifty-five years old. She has been specifically recommended for release by Dr. Rachel Bedard of Correctional Health Services because, as a result of her age, she is at high risk for severe illness or death if she contracts COVID-19.

22. Petitioner Brandi Felci (B&C No. 3472000069, NYSID 11871477H), is detained in a jail controlled by the New York City Department of Corrections, solely because she cannot afford to pay her bail of $6,000 cash or $12,000 bond on matters pending in Manhattan Criminal Court. Medical records establish that Ms. Felci is twenty-six years old and is diagnosed with a medical condition that compromises her immune system. As a result, she is at high risk for severe illness or death if she contracts COVID-19.

23. Petitioner Marjorie Chambers (B&C No. 6001900274, NYSID 08089378L), is detained in a jail controlled by the New York City Department of Corrections, because she cannot

afford her bail of $100,000 cash or $150,000 bond. Medical records reveal that she is fifty-five years old and is diagnosed with diabetes and cardiovascular disease. She has been specifically recommended for release by Dr. Rachel Bedard of Correctional Health Services because, as a result of her age and medical diagnoses, she is at high risk for severe illness or death if she contracts COVID-19.

24. Petitioner Aludein Marks (B&C No. 3472000027, NYSID 12381876Q), is detained in a jail controlled by the New York City Department of Corrections because she cannot afford to pay her bail of $100,000 cash or $300,000 bond. Ms. Marks is immunocompromised and, as a result, is at high risk for severe illness or death if they contract COVID-19.

25. Petitioner Brighton Montgomery, (B&C No. 3491900264, NYSID 12975930Q), is detained in a jail controlled by the New York City Department of Corrections due to a pretrial remand order. Medical records confirm that he is nineteen years old and suffers from asthma. Records also verify that, on several occasions, he has been hospitalized because of asthma attacks. As a result of his severe asthma, he is at high risk for severe illness or death if he contracts COVID-19.

26. Petitioner Nikki (Nicholas) Kilgore, (B&C No. 6002000050, NYSID 13542338M) is detained in a jail controlled by the New York City Department of Corrections because she cannot afford her bail of $30,000 cash or $90,000 bond. Medical records confirm that she has health issues that place her at high risk for COVID-19. She has been specifically recommended for release by Dr. Rachel Bedard of Correctional Health Services because, as a result of her underlying health issues, she is at high risk for severe illness or death if she contracts COVID-19.

27. Petitioner Jonathan Perez (B&C No. 3491806917, NYSID 09406763M) is detained in a jail controlled by the New York City Department of Corrections because he cannot afford his

bail of $50,000 cash or bond. He suffers from Graves' disease, which compromises his immunity. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

28. Petitioner Eva Doublerg (B&C No. 3471900256, NYSID 09920942P) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. She has $1 bail set on a non-violent charge pending in Manhattan Supreme Court, Criminal Term. Medical records confirm that she is immunocompromised. As a result, she is at high risk for severe illness or death if she contracts COVID-19.

29. Petitioner Keith Johnson (B&C No. 3492000931, NYSID 04893440H) is detained in a jail controlled by the New York City Department of Corrections solely because he cannot afford to pay his bail, which is set in the amount of $10,000 cash bail or $30,000 bond. Mr. Johnson is 53 years old and suffers from glaucoma. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

30. Petitioner Jason Borrero (B&C No. 3491906542, NYSID 08585167Z) is detained in a jail controlled by the New York City Department of Corrections due to a remand order pending resolution of a matter in "Judicial Diversion," a drug-treatment court. A physician inside Rikers Island, Dr. Ruth Hai, has recommended their release due to underlying medical conditions. Dr. Hai has indicated that Jason Borrero is at high risk for severe illness or death if they contract COVID-19.

31. Petitioner Pedro Vinent Barcia is detained in a jail controlled by the New York City Department of Correction due to a pretrial remand order. Mr. Vinent Barcia is currently housed at North Infirmary Command and has been for the majority of his current incarceration on Rikers Island. He is 63 years old and deemed high risk by the Correctional Health Services ("CHS") because of several severe medical diagnoses. Dr. Rachel Bedard has indicated that Mr. Vinent

Barcia has been diagnosed with the following: cardiovascular disease (congestive heart failure, he has a cardiac defibrillator, and has an aortocoronary bypass graft having undergone heart bypass surgery); pulmonary disease (he suffers from chronic obstructive pulmonary disease and has asthma); and Type II diabetes mellitus. These diagnoses have been confirmed by medical records received from CHS. As a result of his medical conditions and age, Mr. Vincent Barcia is at high risk for severe illness or death if they contract COVID-19.

32. Petitioner Abdullah Spencerel, (B&C No. 3491605137, NYSID 06737285K) is detained in a jail controlled by the New York City Department of Correction due to a pretrial remand order. He has been housed at the North Infirmary Command for approximately four years, requiring a wheelchair, hospital bed, and Assisted Daily Living assistance. CHS records demonstrate that his complicated medical issues require an immense amount of services and oversight, placing him at high risk for severe illness or death if he contracts COVID-19.

33. Petitioner Sergio Bruno (B&C No. 3492000955, NYSID 01078664Z) is detained in a jail controlled by the New York City Department of Corrections because he is unable to afford his bail of $100,000. Medical records demonstrate that Mr. Bruno is forty-five years old and is diagnosed with diabetes mellitus. Further, when seen by his assigned attorney earlier this month, he had a persistent, hacking cough. Mr. Bruno reports being a long-time cigarette smoker, smoking approximately half a pack per day. Medical records reveal that in early March, he was observed by medical staff to have a productive cough, wheezing, and rhonchi—symptoms associated with chronic respiratory issues. As a result of his diagnoses and recent respiratory issues, he is at high risk for severe illness or death if he contracts COVID-19.

34. Petitioner Daryl Britt (B&C No. 3002000093, NYSID 05269003Z), is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation.

He has $1 bail set on a misdemeanor matter pending in Manhattan Criminal Court. He is fifty-two years old. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

35. Petitioner Malcolm Dawson (B&C No. 3492000499, NYSID 07705018P), is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail set on a pending non-violent matter in Manhattan Supreme Court, Criminal Term. He suffers from asthma and high blood pressure. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

36. Petitioner Brian King (B&C No. 3492000021, NYSID 04883621H) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail on a pending charge in Manhattan Criminal Court. He is fifty-four years old and has a history of respiratory infections. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

37. Petitioner Allen Nance (B&C No. 3492000836, NYSID 06783025J) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has just $1 bail set on a pending non-violent charge pending in Manhattan Criminal Court. His family reports that he suffers from severe asthma. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

38. Petitioner Christopher Andretta (B&C No. 3491902974, NYSID 05659401J) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail set on a pending matter in Manhattan Supreme Court, Criminal Term. He is fifty-two years old. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

39. Petitioner Herbert Barron (B&C No. 3491907270, NYSID 01073657) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation and bail in the amount of $5,000 cash or $10,000 bond on a pending matter in Manhattan Supreme Court, Criminal Term. Medical records demonstrate that he is fifty-four years old and is diagnosed with diabetes, asthma, and Parkinson's Disease. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

40. Petitioner John Pivetz (B&C No. 8952000118, NYSID 04557405Q) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation. He has $1 bail set on a pending non-violent matter in Manhattan Supreme Court, Criminal Term. He is fifty-eight years old and is diagnosed with asthma. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

41. Petitioner Glen Snyder (B&C No. 3492000049, NYSID 04304740Y) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation and bail set in the total amount of $450,000 cash or $1,050,000 bond on pending matters in Manhattan Supreme Court, Criminal Term. He is fifty-eight years old and is diagnosed with asthma, diabetes, high blood pressure, and a cardiovascular condition. As a result, he is at high risk for severe illness or death if he contracts COVID-19.

42. Petitioner Samuel Saez (B&C No. 3491901668, NYSID 05691820P) is detained in a jail controlled by the New York City Department of Corrections due to an alleged parole violation and bail in the amount of $40,000 cash or $80,000 bond on a pending matter in Manhattan Supreme Court, Criminal Term. He is fifty years old and, as a result, he is at high risk for severe illness or death if he contracts COVID-19.

43. Petitioner Tolib Akilov is detained in a jail controlled by the New York City Department of Corrections because he cannot afford to pay his current bail of $15,002 on pending non-violent matters in Manhattan Criminal and Supreme Court. Mr. Akilov suffers from pancreatic cancer and, as a result, is at high risk for severe illness or death if he contracts COVID-19.

44. Respondent Cynthia Brann is the Commissioner of the New York City Department of Correction. Respondent is a legal custodian of Petitioners.

45. Respondent Anthony J. Annucci is the Acting Commissioner of the New York State Department of Correction and Community Supervision ("DOCCS"). Respondent is a legal custodian of Petitioners who are detained pursuant to a parole warrant.

JURISDICTION AND VENUE

46. This court has subject matter jurisdiction over this matter under CPLR § 7001.

47. Petitioners have made no prior application for the relief requested herein.

48. Copies of the mandates pertaining to individual Petitioners are not attached hereto due to the emergency nature of this proceeding.

STATEMENT OF FACTS

The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to People Over Age 50 and Those With Certain Medical Conditions

49. COVID-19 is a coronavirus that has reached pandemic status. As of March 23, 2020, over 360,000 people worldwide have confirmed diagnoses, including over 43,000 people in the United States with 20,000 in New York—nearly half of the known cases in the nation.[9] Over 16,000 people have died worldwide, including at least 500 people in the United States and over

[9] *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); 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).

150 in New York.[10] On the single day of March 18 alone, more than 1,000 new cases were announced in New York State. As of the date of this writing, there are more than 9,000 confirmed cases of coronavirus within the New York City area, and there are 125 deaths reported within the five-boroughs of New York City.[11] As noted above, there are now thirty-nine reported cases of detainees with COVID-19 and twenty-one reported cases of DOC staff members with the virus throughout jail facilities in New York City controlled by Respondent Brann.[12]

50. The World Health Organization has declared COVID-19 a pandemic.[13] 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.[14] Subsequently, the Mayor of New York City declared a State of Emergency for the City.[15] The President of the United States has now officially declared a national emergency.[16]

51. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention ("CDC") indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the

[10] *Id.*
[11] COVID-19 Daily Case Data Summary, NYC Health, Coronavirus Disease 2019 (Mar. 23, 2020) *available at* https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary.pdf (last visisted Mar. 23, 2020).
[12] Chelsia Rose Marcius, *Coronavirus prompts reopening of shuttered jail on Rikers Island*, N.Y. DAILY NEWS (Mar. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-correction-department-reopen-jail-20200323-dq2bn3hap5g5bkjagjzsmkdxie-story.html; *see also* Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf (last visited Mar. 22, 2020).
[13] Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794
[14] Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency,* N.Y. TIMES, (Mar. 7, 2020), https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html.
[15] *DeBlasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned.* N.Y. TIMES (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html.
[16] Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020, 10:46 AM), https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/.

pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections. [17]

52. COVID-19 is a particularly contagious disease. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.[18] Indeed, a new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.[19] New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.[20]

53. There is no vaccine for COVID-19. No one is immune.

54. Older adults and those with certain medical conditions face greater chances of serious illness or death from COVID-19.[21]

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[17] Chas Danner, *CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html.

[18] *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show.* TIME (https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/ (last visited Mar. 19, 2020).

[19] Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. Emerg Infect Dis. 2020 Jun. (https://doi.org/10.3201/eid2606.200412 (last visited Mar. 18, 2020).

[20] *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html (last visited Mar. 18, 2020).

[21] Medical information in this and the petition paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. *See* Expert Declaration of Dr. Marc Stern: https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern;Expert Declaration of Dr. Robert Greifinger: https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger; Expert Declaration of Dr. Jonathan Golob https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center, (last visited Mar. 19, 2020).

55. Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age – including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.

56. For people over the age of 50 or with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing and shortness of breath can be especially severe.[22]

57. 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. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

58. 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.

59. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in

[22] *Id.*

widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

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

61. Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support can quickly exceed local health care resources. Patients in high-risk categories should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

62. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.[23]

[23] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: "13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer"); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, Lancet (March 11, 2020), tb. 1,https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

63. There is no cure for COVID-19 nor is there any known medication to prevent or treat infection.

64. The only known methods to reduce the risk for vulnerable people of serious illness or death from COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hand frequently with soap and water.

People Imprisoned in New York City Jails Face an Elevated Risk of COVID-19 Transmission

65. COVID-19 has now reached Rikers Island and is rapidly spreading. On March 20, 2020, there was only one confirmed case of a detainee with a positive COVID-19 diagnosis.[24] Just one day later, on March 21, 2020, the New York City Board of Correction reported that at least 21 detainees in New York City DOC jails had tested positive for the virus, along with twelve DOC employees, and five Correctional Health Services (CHS) employees.[25] There are now at least 39 inmates diagnosed with the virus, indicating transmission is now passing at an alarming rate and will only continue to spread rapidly.

66. One DOC staff member, a 56-year-old Investigation Division staffer, whose position entailed interviewing detainees in several facilities as part of investigations, died on March 15, 2020.[26] He reportedly had underlying health conditions, just as Petitioners do.[27]

[24] Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html.
[25] Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf (last visited Mar. 22, 2020).
[26] Chelsia Rose Marcius, *Coronavirus kills NYC Correction Department official,* N.Y. DAILY NEWS (Mar. 18, 2020) https://www.nydailynews.com/coronavirus/ny-coronavirus-department-correction-employee-dies-from-coronavirus-20200316-akeai6gop5alledhzhi7u3pivm-story.html.
[27] *Id.*

67. Infectious diseases that are communicated by air or touch are more likely to spread in congregate environments such as jails – places where people live, eat, and sleep in close proximity.

68. The highest known person-to-person transmission rate for COVID-19 to date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California.

69. The conditions of New York City jails pose a higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Jails have a greater risk because of closer quarters, the proportion of vulnerable people detained, and scant medical care resources.

70. Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases.[28] H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei province prisons.[29] The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that "[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]"[30]

[28] Nicole Westman, The Verge, *Prisons and jails are vulnerable to COVID-19 outbreaks*, available at https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap (Mar. 12 2020). *See also* David M. Reutter, Swine Flu Widespread in Prisons and Jails, but Deaths are Few, PRISON LEGAL NEWS, (Feb. 15, 2020) at https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-butdeaths-are-few/.

[29] Evelyn Cheng and Huileng Tan, China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons, CNBC, Feb. 20, 2020, available at https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reportednearly-250-cases.html.

[30] *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

71. Even at current rates of infection, which are rapidly growing, the virus's "attack rate" on Rikers Island – that is, the rate at which the population is being infected – is roughly *five times higher* than anywhere else in the United States of America.

72. In New York City jails, jail design and operations make it impossible for Petitioners to engage in the necessary social distancing required to mitigate the risk of transmission. Many people live in dormitory-like sleeping arrangements. They have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others.

73. Petitioners also cannot maintain adequate levels of preventive hygiene. They are required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use.

74. Food preparation and service is communal, served by other incarcerated workers drawn from many different housing areas within the jail, with little opportunity for surface disinfection.

75. There have been shortages of basic cleaning supplies to disinfect housing areas in New York City jails, including housing areas where people with respiratory illnesses are currently confined.

76. DOC cleaning protocols for common spaces are often not followed. On Monday, March 23, 2020, a Legal Aid lawyer spoke to her client who reported that six people had been removed from his dormitory over the weekend after testing positive for COVID-19, but his dormitory still had not been cleaned. Later that day, the Legal Aid Society informed DOC in a letter of this and other complaints, but to date have not had a response.

77. Petitioners lack ready access to soap and water for washing hands. If a sink in a housing area is broken, they do not have a choice to walk to an area with a working sink. Soap and paper towels are not provided by the jail. Often, the only means to access soap is by purchasing it in commissary—which is not an option for many detainees who lack access to funds. There is no recourse if another person takes a vulnerable person's bar of soap.

78. As recently as the day of this filing, clients of the Legal Aid Society were reporting to their attorneys that they had no access to soap or hand sanitizer.

79. Hand sanitizer capable of killing COVID-19 contains alcohol, which has been treated as contraband in jails. Indeed, on March 20, 2020, a representative for Respondent Brann confirmed in a court proceeding that detainees still do not have access to hand sanitizer because of its purported dangerousness.

80. New York City jails lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.

81. Neither DOC nor Correctional Health Services ("CHS"), the medical services provider in New York City jails, has implemented protocols sufficient to screen, detect or identify incarcerated people or staff who have been infected.

82. On March 10, 2020, DOC officials testified at a Board of Correction meeting that the Communicable Disease Unit ("CDU") has only 88 respiratory isolation beds available for people who become infected. Officials did not identify how many of these beds are already occupied by other ill people or what actions would be taken by the Department in the event that CDU and hospital ward capacity is exhausted.[31]

[31] Testimony of Dept. of Corr. Official, N.Y.C. Bd. of Corr. Mtg., Mar. 10, 2020 at 17:40, https://www1.nyc.gov/site/boc/meetings/mar-10-2020.page.

83. The procedures outlined in the DOC's "COVID19 Preparation & Action Plan" issued on March 5, 2020 are not sufficient to mitigate the risk of serious harm. According to this plan, newly admitted detainees will only be separated from other detainees if they exhibit "flu-like" symptoms upon admission.[32] This initial screening process overlooks the fact that COVID-19 may present with a slower onset of symptoms than the flu — meaning that many who are infected with COVID-19 do not show signs of illness.[33] The dangers of asymptomatic transmission continue within DOC facilities. DOC and CHS have revealed only symptom-reactive policies—that staff will be sent home and incarcerated people will be separated and treated *if they display symptoms*[34]—which are ineffective to stop the rampant asymptomatic transmission of the disease.[35]

84. DOC plans to warehouse all of its "sick" detainees together, in communal living spaces, where they will "sleep head to toe thereby increasing breathable space between inmates,"[36] a measure that will do little to avoid transmission among detainees.

85. Even if all of these problems could be resolved, however, they would not sufficiently address the risk of serious medical harm to Petitioners. As Dr. Homer Venters, former chief medical officer of New York City jails, recently said, "[i]n ordinary times, crowded jails overlook prisoners' medical problems and struggle to separate them based on their security

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[32] *See* N.Y.C. Dept. of Corr., *COVID19 Preparaton & Action Plan*, https://www1.nyc.gov/site/doc/media/coronavirus-news.page (last visited Mar. 19, 2020).
[33] CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Mar. 19, 2020); *see also* Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus (last visited Mar. 19. 2020).
[34] New York City Department of Correction: COVID19 Preparation & Action Plan, *available at* https://www1.nyc.gov/site/doc/media/coronavirus-news.page (last visited Mar. 18, 2020).
[35] *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html.
[36] *Id.*

classification…[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix…they will find managing a COVID-19 outbreak '*simply almost impossible*.'"[37]

86. Likewise, Correctional Health Services ("CHS"), which administers medical care in New York City jails, has acknowledged their limited capacity to manage the risk of the virus and has requested that courts reconsider the necessity of pretrial detention for high risk patients until the current state of emergency is resolved.

Release Is Required to Address the Risk of Serious Medical Harm

87. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, correctional public health experts, including the New York City Board of Correction, have recommended the release from custody of people most vulnerable to COVID-19. On March 17, 2020, they called on New York City to "immediately remove from jail all people at higher risk from COVID-19 infection" and to "drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances."[38] The Board reasons that "[t]he City's jails have particular challenges to preventing disease transmission on a normal day and even more so during a public health crisis."[39] Accordingly, the Board recommends that DOC prioritize the release of "[p]eople who are over 50; [and] [p]eople who have underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system[.]"[40]

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[37] Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543.

[38] Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf .

[39] *Id.*

[40] *Id.*

88. Ross McDonald, the Chief Medical Officer of CHS, publicly called for the release from Rikers Island of "as many [people] as possible" on Twitter on March 18, 2020:[41]

[41] https://twitter.com/RossMacDonaldMD/status/1240455796946800641

Ross MacDonald
@RossMacDonaldMD

A message from the Chief Physician of Rikers Island for the judges and prosecutors of New York: We who care for those you detain noticed how swiftly you closed your courts in response to #COVID19 1/x

9:51 PM · Mar 18, 2020 · Twitter for iPhone

5.7K Retweets **16.8K** Likes

Ross MacDonald @RossMacDonaldMD · 15h
Replying to @RossMacDonaldMD
This was fundamentally an act of social distancing, a sound strategy in public health. But the luxury that allows you to protect yourselves, carries with it an obligation to those you detain. 2/x

3 475 4.1K

Ross MacDonald @RossMacDonaldMD · 15h
You must not leave them in harm's way 3/x

2 341 3.6K

Ross MacDonald @RossMacDonaldMD · 15h
To be clear, the public servants who care for those in your jails have been planning for this storm for weeks and months. We will muster every tool of public health, science and medicine to try to keep our patients safe. We will apply every novel treatment and scarce test. 4/x

3 349 3.5K

Ross MacDonald @RossMacDonaldMD · 15h
We will put ourselves at personal risk and ask little in return. But we cannot change the fundamental nature of jail. We cannot socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of a cruise ship recklessly boarding more passengers each day. 5/x

4 547 3.8K

Ross MacDonald @RossMacDonaldMD · 15h
A storm is coming and I know what I'll be doing when it claims my first patient. What will you be doing? What will you have done? We have told you who is at risk. Please let as many out as you possibly can. end.

37 947 6.1K

89. Similarly, Dr. Rachel Bedard, a geriatrician who works on Rikers Island providing medical care for elderly and ill detainees, explained why effective preventative measures in a jail setting are nearly impossible.

> You cannot implement effective social distancing in a room that sleeps forty men. You cannot implement effective social distancing when those forty men are using two or three sinks and one of them may be broken. You cannot implement effective social distancing when the staff interacts with all of them and has to touch all of them in the course of a day. . . . [Detainees] don't have our own cleaning supplies. They can't wipe down their own surfaces. They have to wait for someone to come in and do that for them.[42]

Dr. Bedard stated that Rikers' physicians' public cry for immediate release of large numbers of detainees is unprecedented but necessary because "the moral calculus has changed and our voices needed to be heard on this issue."[43] Dr. Bedard noted that, to be effective, the DOC must release "hundreds of people . . . so that the jail population is decreased enough that you don't just benefit the people who are released but you also benefit those who are left behind—and the staff who take care of them and the officers who take care of them."[44]

90. Likewise, the District Attorneys of New York and Kings County have endorsed a plan to identify and release people who are "elderly" or other "[p]opulations that the CDC has classified as vulnerable (those with asthma, cancer, heart disease, lung disease, and diabetes)."[45]

91. Despite this endorsement, no such plans exist to identify and release these categories of people. Instead, the District Attorney of New York has engaged in a limited process

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[42] Jennifer Gonnerman, A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus, New Yorker Magazine, *available at* https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus (last visited Mar. 22, 2020).
[43] *Id.*
[44] *Id.*
[45] Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of those in Custody (Mar. 18, 2020), https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf.

to review individual cases in a time-consuming manner and has refused to consent to the release of the vast majority of people despite their age and medical conditions, including Petitioners.

92. Courts and public officials in other jurisdictions, including in Los Angeles, California and parts of Ohio and Texas, have already responded by taking steps to facilitate the release of elderly and sick prisoners, and to reduce jail populations by refusing the admission to jails of individuals arrested on certain charges.[46] In Iran, one of the first countries to see the outbreak of COVID-19, 85,000 inmates were temporarily released back to their communities amid virus concerns.[47]

93. Courts across the country have also begun granting specific applications for release of pretrial detainees, with many more such applications pending. *See, e.g., United States v. Raihan*, No. 20-cr-68 (BMC) (JO), 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 that facility [the Manhattan Detention Center], the more we're increasing the risk to the community"); *United States v. Barkman*, 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."); *In The Matter Of The Extradition Of*

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[46] *See, e.g.*, Alene Tchekmedyian et al, *L.A. County releasing some inmates from jail to combat coronavirus,* L.A. Times, (Mar. 16, 2020, 7:25 PM), https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html); WKBN Staff, *Local county jails making changes due to coronavirus outbreak,* WKBN (Mar. 12, 2020) ("The Mahoning County [Ohio] Sheriff's Office is refusing all non-violent misdemeanor arrests at the county jail"), https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/; *see also* Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to* jail, DALLAS MORNING NEWS (Mar. 12, 2020 5:57 PM), https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/.

[47] *Hard-hit Iran frees more prisoners amid coronavirus outbreak,* AL JAZEERA (Mar. 17, 2020), https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html .

Alejandro Toledo Manrique, 2020 WL 1307109, (N.D. Cal. March 19, 2020) (ordering pre-trial detainee's release on bond despite finding the person was a flight risk and despite the fact that no cases had yet been confirmed in the San Mateo County jail, since by the time there is a case it will likely be "too late"); *U.S. v. Stephens*, 19cr95, 2020 WL 1295155, (AJN) (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."); *United States v. Perez* 19-cr-297 (PAE), Dkt. No. 62 (March 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").

94. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, has concluded that "[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk." For that reason, Dr. Stern has recommended the "release of eligible individuals from detention, with priority given to the elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19."[48]

95. Another correctional health expert in that same court case, Dr. Robert Greifinger, concluded that "even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy." Accordingly, in his opinion, "the public health recommendation is to release high-risk people from

[48]Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern.

detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage."[49]

96. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or working in prisons and jails.

97. Release of the most vulnerable people also reduces the burden on New York's limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

Failure to Release Petitioners Constitutes Deliberate Indifference to Serious Medical Harm

98. Continuing to incarcerate people who have been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where taking the only known steps to prevent transmission are virtually impossible, constitutes deliberate indifference to serious medical harm in violation of the United States and New York State constitutions.

99. The Due Process clause of the Fourteenth Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). To establish a federal constitutional claim, Petitioners must prove that Respondents (1) 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 (2) they knew, or should have known, that the condition posed an excessive risk to health or safety. *Id.* at 35. The same standard applies to pre-trial detainees held on bail and those held on parole warrants. *Benjamin v. Malcolm*, 646 F. Supp. 1550, 1556 (S.D.N.Y. 1986) ("[A]lleged parole violators ought not to be treated differently from other detainees, since the

[49] Decl. of Dr. Robert Greifinger ¶ 13, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger

charges of parole violation standing against them are unproven, and in many instances, involve the same charges as those for which they are substantively detained."); *Hamilton v. Lyons*, 74 F.3d 99, 106 (5th Cir. 1996) ("[We] apply *Bell*'s standard to detained parolees only to the extent that we recognize that a parolee arrested for a subsequent crime has a due process right to be free from punishment for the subsequent crime until convicted of the subsequent crime.").

100. There is an even stronger due process right to be free from unconstitutional conditions of confinement under the New York State Constitution. In *Cooper v. Morin,* 49 N.Y.2d 69, 79 (1979), the Court of Appeals concluded that the state due process clause accords even greater protection for pretrial detainees than the federal constitution, holding that "what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement." For the government to prevail, it must prove a "compelling governmental necessity" for any restrictions on pretrial detainees' liberty interests. *People ex rel. Schipski v. Flood*, 88 A.D.2d 197 (2nd Dep't 1982). This is an "exacting standard." *Id.* The state's interests are limited to those arising from the "only legitimate purpose for pretrial detention . . . to assure the presence of the detainee for trial." *Id*. at 81; *see also Schipski*, 88 A.D.2d at 199-200 (holding county jail's blanket policy of 22-hour lock-in for a certain category of pretrial detainees violates the state's due process guarantee); *Powlowski v. Wullich*, 102 A.D.2d 575, 587 (1984) (holding that because a jail's practice of depriving pretrial detainees of recreation and exercise "violates the federal standard, it, a fortiori, must fail the more stringent standard balancing test prescribed for violations of our state due process clause").

101. The U.S. Supreme Court and courts throughout New York have recognized that the risk of contracting a communicable disease constitutes an "unsafe, life-threatening condition" that threatens "reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). *See also 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"); *Narvaez v. City of New York*, No. 16-CV-1980 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying "motion to dismiss Plaintiff's claim that the City of New York violated Plaintiff's rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB" during his pretrial detention); *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (acknowledging that prisoner could state claim under § 1983 for confinement in same cell as inmate with serious contagious disease).

102. Respondents are well aware of the extraordinary risk COVID-19 poses to people in New York City jails. As pleaded above, they have alerted to this risk by the Board of Correction, their own correctional health service, and at least two of New York's elected District Attorneys.

103. On March 13, 2020, the Legal Aid Society sent a letter to Respondent the New York City Department of Correction ("DOC") noting multiple complaints from incarcerated clients about the lack of basic sanitation raising concerns about the ability to manage the risk of COVID-19 in New York City jails.[50]

104. Since at least March 15, 2020, attorneys in the Legal Aid Society's Parole Revocation Defense Unit have sent lists of medically vulnerable people held on parole warrants, including several of the Petitioners, to Respondent Department of Correction and Community Supervision ("DOCCS"), asking for their urgent release.

105. DOCCS has not responded to these requests.

[50] Letter from Justine Luongo, Attorney-in-Charge, Legal Aid Society Criminal Defense Practice, to Commissioner Cynthia Brann, N.Y.C. Department of Corrections, and Elizabeth Glazer, Mayor's Office of Criminal Justice (Mar. 13, 2020), https://legalaidnyc.org/wp-content/uploads/2020/03/LAS-Letter-to-NYC-re-COVID-19-Preparedness-in-City-Jails.pdf.

106. Numerous media outlets have covered these and other calls to action.[51]

107. Whatever steps Respondents have taken to manage the risk of COVID-19 will fail because, as pleaded above, Respondents are not capable of managing that risk in a jail environment. Indeed, Respondent's facilities went from just one known case to at least twenty-one cases in twenty-four hours.

108. Respondents' intentional failure to release Petitioners while actually aware of the substantial risk of COVID-19 plainly constitutes deliberate indifference.

109. The affirmative obligation to protect against infectious disease empowers Courts to provide remedies designed to prevent imminent harm to future health. *Helling*, 509 U.S. at 33 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."); *Sanchez v. State of New York*, 99 N.Y.2d 247, 254 (2002) (recognizing that it is "duty of the State, as [petitioner's] custodian, to safeguard and protect him from the harms it should reasonably foresee based on its knowledge derived from operation of a maximum security prison."). *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) ("We have held that prisoners may not be deprived of their basic human needs—*e.g.,* food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health.") (citation and internal quotation marks omitted)

110. Immediate release pursuant to a writ of habeas corpus is available to address constitutional violations arising from circumstances or conditions of confinement. *People ex rel.*

[51] *See, e.g.*, Chelsia Rose Marcius, *Coronavirus prompts Legal Aid, Manhattan DA, to call for release of state parolees from city jails*, N.Y. DAILY NEWS (Mar, 17, 2020) https://www.nydailynews.com/coronavirus/ny-coronavirus-nyc-rikers-island-parole-correction-department-20200317-flg4paly5nesddfbtfkone6hki-story.html; *see also supra.*

Brown v. Johnston, 9 N.Y.2d 482, 485 (1961) (habeas petition may be used to address "restraint in excess of that permitted by . . . constitutional guarantees"); *Kaufman v. Henderson*, 64 A.D.2d 849, 850 (4th Dep't 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."). A person is "not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society" by virtue of incarceration. *Brown*, 9 N.Y.2d at 485. Hence, the "right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment[,] mental or physical." *Id*. (internal citation omitted). Thus, courts have addressed whether the failure to address medical needs has risen to the level of a constitutional violation, requiring immediate release. See, e.g., *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 250–51 (2d Dep't 1993) (habeas petition addressing whether failure to provide adequate medical care constituted cruel and unusual punishment or deliberate indifference).

111. The Court of Appeals has explained that the State has a duty "to protect [incarcerated people] from unlawful and onerous treatment, mental or physical." *Id*. at 485 (citations omitted). Indeed, habeas relief is the *only* remedy available in such circumstances. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

112. While there is limited precedent on this issue, New York's habeas jurisprudence in general has long contemplated the possibility that habeas claims for release based on conditions could be entertained *if* a petitioner could establish that the appropriate remedy was release. *See People ex rel. Sandson v Duncan*, 306 A.D.2d 716, 716–17 (3d Dept. 2003) (upholding denial of the writ because, "[w]hile success on the instant motion might entitle petitioner to the medication he seeks, it would not excuse him from serving the remainder of his sentence" and reasoning that

"[h]abeas corpus will be granted only in cases where success would entitle the petitioner to immediate release"); *People ex rel. Barnes v. Allard,* 807 N.Y.S.2d 688, 689 (3d Dept. 2006) ("As for petitioner's complaint regarding the correctional facility's alleged deliberate indifference to his medical needs, . . . it would not entitle him to immediate release, thus making habeas corpus relief unavailable").

113. On March 20, 2020, this Court (Statsinger, J.), denied a similar petition for release on behalf of 116 other pre-trial detainees on Rikers Island. While the Court has not yet issued an opinion in that matter, from the bench the Court indicated that it found those petitioners had not met the standard for deliberate indifference in part because it found that release was not the only option available to cure the risk posed to medically vulnerable people in jail. That decision is being appealed.

114. These Petitioners respectfully submit that in the intervening days, the rapid escalation of the spread of COVID-19 on Rikers Island and the Respondents' failure to take sufficient steps to adequately reduce the size of the jail population and remove vulnerable people warrants a different conclusion with respect to this Petition.

Respondents Have Authority to Release Petitioners

115. Petitioners have not been committed and are not detained by virtue of any judgment, decree, final order or process of mandate issued by a court or judge of the United States in a case where such court or judge has exclusive jurisdiction to order him released.

116. Petitioners held on parole warrants may be released by Respondent Annucci without prejudice to later refiling of parole violation charges after the threat of COVID-19 has abated, pursuant to 9 NYCRR §8004.3(e)(i).

117. Petitioners are not detained by virtue of any final judgment or decree of a competent tribunal or civil or criminal jurisdiction. Petitioners have no other holds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court issue a writ of habeas corpus and order Petitioners' immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause of the United States and New York State constitutions.

Dated: March 24, 2020
New York, New York

Respectfully Submitted,

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Attorneys for Petitioners

Corey Stoughton, an attorney admitted to practice law in the State of New York, states that she has read the foregoing petition and that same is true to her own knowledge, except for those portions stated on information and belief, for which citations are provided.

Dated: March 24, 2020
New York, NEW YORK

Corey Stoughton