

*To be argued by*  
Corey Stoughton (15 Minutes)

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# NEW YORK SUPREME COURT

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APPELLATE DIVISION — FIRST DEPARTMENT

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**THE PEOPLE OF THE STATE OF NEW YORK,  
EX REL. COREY STOUGHTON,  
ON BEHALF OF  
VENUS WILLIAMS, ET AL.**

*Petitioner-Appellants,*

vs

**CYNTHIA BRANN, COMMISSIONER, NEW YORK CITY  
DEPARTMENT OF CORRECTION; ANTHONY ANNUCCI,  
ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,**

*Respondent-Appellees.*

**Index No. 451609-2020**

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## **BRIEF FOR PETITIONERS-APPELLANTS**

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## INTRODUCTION

This emergency appeal seeks extraordinary relief for extraordinary circumstances – the immediate release of 10 medically vulnerable people held as pretrial and parole detainees in New York City jails on the grounds that their continued incarceration amidst the spread of COVID-19 constitutes deliberate indifference to serious medical needs in violation of the Fourteenth Amendment and the New York state constitutional right to due process.<sup>1</sup>

The court below refused to consider Petitioner-Appellants’ release on several flawed grounds. First, the court misapplied the legal standard applicable to federal claims of deliberate indifference to the serious medical needs of pre-trial detainees, holding wrongly that jail officials are not deliberately indifferent where the steps they have in response to the COVID-19 pandemic are demonstrably ineffective to contain the spread of the disease and they have refused to take the one step medical experts insist is necessary – namely, release from the City’s jail. The court did not dispute – nor could it dispute – that people with specified medical vulnerabilities, like Petitioner-Appellants, are at high risk of serious, long-term injury and death if they contract this virus. Under those circumstances, applying long-established

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<sup>1</sup> Petitioner-Appellants on this brief are Gregory Jason, Anibal Quinones, Anthony Brown, Gian Verdelli, Eleuterio Carmona, Joseph Torres, Freddie Johnson, Ricardo Gonzales, Willie Florence and Hollis Hosear. The remainder of the named petitioners in the writs brought under the above-referenced caption reserve their right to appeal the denial of their writ of habeas corpus pursuant to the notice of appeal filed on March 30, 2020.

established federal precedent to the unprecedented situation of this pandemic, the failure to release Petitioner-Appellants is deliberate indifference.

Second, in rejecting Petitioner-Appellants' state constitutional claim, the court incorrectly ruled that the State's interest in continuing to incarcerate pretrial detainees outweighed Petitioner-Appellants' interest in surviving this pandemic. In so reasoning, the court made an error of law when it required Petitioner-Appellants to prove a federal constitutional claim of deliberate indifference as a prerequisite to asserting a state constitutional claim, and made a factual error in concluding that the pandemic presents the state with greater challenges informing Petitioner-Appellants of their obligation to appear in court than in normal times, such that incarceration of medically vulnerable people is justified despite the risks of serious medical harm.

Finally, the court below found it necessary to conduct individualized inquiries as to each of the Petitioner-Appellants but then inexplicably declined to do so, instead denying the writs outright, even upon a motion to reconsider. In explaining its refusal to conduct individualized inquiries, the court ignored Petitioner-Appellants' individualized pleadings relating to their specific medical vulnerabilities and wrongly faulted Petitioner-Appellants for failing to plead evidence to support the respondents' arguments in opposition to release, even though Respondent-Appellees had provide that information to the court.

Based on these errors, the court below denied Petitioner-Appellants' writs of habeas corpus. This Court should reverse that decision and immediately grant their release. Notwithstanding whatever steps New York City's Department of Correction ("DOC") has taken to attempt to address this crisis, COVID-19 is continues to spread in the City's jails and the situation remains a crisis. According to data released by the New York City Board of Correction ("BOC"), as of April 15, 2020 – the day before this writ was filed – 1,366 currently incarcerated people are quarantined and likely exposed to COVID-19 infection and 369 currently incarcerated people have a confirmed positive test. Cumulatively, 1,390 DOC and Correctional Health Service staff have contracted the virus.<sup>2</sup> For weeks, the reported rate at which the jail population is being infected by COVID-19 has steadily remained between four and eight times higher than the rest of New York City.<sup>3</sup> For this reason, correctional public health experts – including the Board of Correction and leading doctors from within New York's own correctional health system – have continued to press for the release from custody of people over 50 or with medical conditions known as "comorbidities" for the virus, even while the jail population has been substantially reduced and despite understanding and acknowledging what the City has done to

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<sup>2</sup> This data comes from the New York City Board of Correction and is available at <https://www1.nyc.gov/site/boc/covid-19.page> (last visited May 7, 2020); Comparative data on infection rates, derived from official government sources, is collated regularly at <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last visited May 7, 2020).

<sup>3</sup> *Id.*

respond to this crisis. For medically vulnerable people like Petitioner-Appellants – who face a much higher risk of death and serious, long-term health consequences from infection – release is the only step that can satisfy the government’s constitutional obligation to protect them from serious risk of medical harm.

Petitioner-Appellants first sought urgent relief more than six weeks ago, on March 19, 2020. They have already urged the court below to reconsider its decision, to no avail. Under these circumstances, and in light of the strong evidence Petitioner-Appellants have offered to support release, this Court should exercise its jurisdiction under CPLR § 7000 *et seq.*, grant their writs of habeas corpus, and order their immediate release.

## QUESTIONS PRESENTED

1. Whether, in light of the unique threat posed by the novel coronavirus COVID-19, the failure to release medically vulnerable pretrial detainees from New York's jails, where spread of the virus has not been controlled by whatever steps have been taken to date, constitutes deliberate indifference to serious medical need. U.S. Const., Amend. XIV.
2. Whether the state's interest in securing the re-appearance of presumptively innocent people at their next court appearance or parole hearing requires the continued exposure of medically vulnerable people to the risk of a deadly infection. N.Y. Const., Art. I, § 6.
3. Whether, to the extent individualized inquiries on the suitability of release are required, the court below erred in failing to conduct those inquiries.

## STATEMENT OF FACTS

### *The COVID-19 Pandemic*

COVID-19 is a novel coronavirus that has reached pandemic status. In only a few months, 3.7 million people worldwide have been diagnosed and more than 265,000 have died.<sup>4</sup> As of the day prior to this filing, there are more than 183,770 confirmed cases of coronavirus within the New York City area, up from just 923 on March 18, 2020. Almost 19,000 people have died of the virus in the New York City area alone.<sup>5</sup> The New York City metropolitan area remains the global epicenter of the outbreak.

The numbers of people diagnosed reflect only a portion of those infected. Petitioners' Appendix (May 8, 2020) (hereinafter "A.") at 362-8. Very few people have been tested, and many are asymptomatic transmitters—people who are contagious but exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying such symptoms. A. 369-71. Even those who have tested negative may be carrying and spreading the virus.<sup>6</sup> These asymptomatic

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<sup>4</sup> N.Y. TIMES, *Live Updates*, [https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html?action=click&pgtype=Article&state=default&module=style-coronavirus&variant=show&region=TOP\\_BANNER&context=storyline\\_menu](https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html?action=click&pgtype=Article&state=default&module=style-coronavirus&variant=show&region=TOP_BANNER&context=storyline_menu) (last accessed May 7, 2020).

<sup>5</sup> N.Y. TIMES, *Live Updates* <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html> (last visited May 7, 2020).

<sup>6</sup> Harlan M. Krumholz, M.D., *If You Have Coronavirus Symptoms, Assume You Have the Virus Even if You Tested Negative*, N.Y. TIMES (Apr. 1 2020) <https://www.nytimes.com/2020/04/01/well/live/coronavirus-symptoms-tests-false-negative.html?action=click&auth=login-email&login=email&module=Spotlight&pgtype=Homepage>

transmitters include staff, vendors and incarcerated people currently cycling in and out of New York's jails on a daily and even hourly basis.

Infected people – who may not know they are infected, and may even have tested negative – can spread the disease not only by direct contact (such as congregating with fellow incarcerated people in a jail or having direct contact between an incarcerated person and a corrections officer) but also through indirect contact (such as touching a surface in a communal bathroom or eating space, or sharing breathing space in an enclosed dormitory lacking access to outside air circulation). One 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. A. 116-7. A 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 bathroom). A. 118-21. For all these reasons, COVID-19 is a much more contagious disease than previously known coronaviruses and other major recent disease outbreaks.

The transmission of COVID-19 is expected to continue 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 pandemic without effective public health

intervention, with as many as 1.5 million deaths in the most severe projections. A. 102, 353.<sup>7</sup> Even with public health interventions, recent research suggests that it will be impossible “to prevent critical care capacities from being overwhelmed by the COVID-19 epidemic.”<sup>8</sup>

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. A. 102-4. Subsequently, the Mayor of New York City declared a State of Emergency for the City. A. 105-10. The President of the United States has declared a national emergency. A. 111-2. All across New York and the nation, extraordinary steps are being taken in recognition of the unprecedented scale of this crisis, including school closures, bans on public gatherings, stay-home orders for non-essential workers, the scaling back of the entire judicial system and the expenditure of vast sums of public money to keep the economy from collapse. People who have control over their bodies have been self-isolating for weeks to prevent contracting or spreading this deadly disease.

Certain populations – those over the age of 50 and those with specific underlying medical conditions – are particularly vulnerable to serious illness and

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<sup>7</sup> 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>.

<sup>8</sup> Kissler S, Tedijanto C, Lipsitch M and Grad Y. Social distancing strategies for curbing the COVID-19 epidemic (Mar. 24, 2020) (<https://www.medrxiv.org/content/10.1101/2020.03.22.20041079v1>).

death from COVID-19. The highest risk populations, which include medically vulnerable people like Petitioner-Appellants, face a fatality rate as high as 15 percent. A. 137-76. This means that as many as one in seven infected individuals in this high-risk group will die from COVID-19. The mortality rate for people of any age with cardiovascular disease, diabetes, hypertension, chronic respiratory disease, chronic liver or kidney disease (including hepatitis and dialysis patients) and compromised immune systems (such as from cancer, HIV or auto-immune disease) are significantly elevated. A. 177-219. Preliminary research from China suggests that people aged 50-59 face a mortality rate nearly three times higher than people under the age of 40; people aged 60-69 have a mortality rate 18 times higher; the rate is 40 times higher for people aged 70-79 years old. *Id.*

Even if a COVID-19 infection is not fatal, it will often require highly specialized care for people over the age of 50 and will result in longstanding medical complications, including permanent loss of respiratory capacity, damage other vital organs including the heart, kidneys and liver, and extensive neurological damage. *Id.* Serious complications can develop rapidly, as little as five days after the first symptoms first appear. *Id.*

There is no vaccine for COVID-19. No one is immune. There is no cure nor is there any known medication to prevent or treat infection. 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 hands frequently with soap and water and near-constant disinfecting of surfaces such people come into contact with.

None of the aforementioned facts about COVID-19 were disputed by either Respondent-Appellees or the court below.

*People Imprisoned in City Jails Face an Almost Certain Risk of Contracting COVID-19*

COVID-19 is rapidly spreading in City jails notwithstanding whatever steps Respondent-Appellees have taken to contain it. On March 20, 2020, there was only one confirmed case of a resident with a positive COVID-19 diagnosis.<sup>9</sup> Just one day later, on March 21, 2020, the BOC reported that at least 21 people in New York City jails had tested positive for the virus, along with twelve DOC employees and five Correctional Health Services (CHS) employees.<sup>10</sup> According to official BOC data, as of May 6, 2020 – the day before this brief was filed – 1,366 currently incarcerated people are quarantined and likely exposed to COVID-19 infection and 369 currently incarcerated people have a confirmed positive test. Cumulatively, 1,390 DOC and

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<sup>9</sup> Chelsia Rose Marcus, *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-gf3r7q4cefaxzmqmrmuevzz3y-story.html>.

<sup>10</sup> 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).

Correctional Health Service staff have contracted the virus.<sup>11</sup> DOC has refused to release statistics on cumulative positive tests among incarcerated people, but based on the number of cumulative infections among staff, the frequent cycling of people in and out of the facility, and the high rate of releases in the past several weeks, the number is likely to be well over 1,000.

Even on their own terms, the data likely understate the snapshot of actual COVID-19 cases within the jails on any given day. An expert in correctional medicine with experience working at Rikers noted that “there is a serious risk of [this data] under-identifying the number of actual COVID-19 cases in the DOC facilities, including people in custody, DOC staff and CHS staff. We know that universal testing does not occur in correctional settings, and so the true prevalence of COVID-19 infection cannot be known and is almost certainly higher than what is being reported.” A. 534. (Affirmation of Dr. Jonathan Giftos (Apr. 1, 2020) ¶ 9 (hereinafter “Giftos Aff.”)). Respondent-Appellees’ record below confirms there is no plan for comprehensive testing in City jails and that testing has been hampered by shortages of tests, among other things. A. 51.

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<sup>11</sup> This data comes from the New York City Board of Correction and is available at <https://www1.nyc.gov/site/boc/covid-19.page> (last visited May 7, 2020); Comparative data on infection rates, derived from official government sources, is collated regularly at <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last visited May 7, 2020).

If the City were to undertake widespread testing, there is reason to believe that the number of diagnosed infections would skyrocket. In the federal prison system, for example, more than 70% of inmates who have been tested have tested positive.<sup>12</sup>

As one court has noted:

Correctional facilities that have made the decision to undertake mass testing have discovered dramatically higher numbers of infected inmates than previously imagined. For instance, when Montgomery County, Pennsylvania tested every inmate in custody, it discovered a rate of infection more than 30 times greater than what Montgomery County had identified before it began its mass testing. Similarly, when a prison in North Carolina tested all of its inmates, it discovered that it had not 39 cases—as it had previously thought—but 444 cases. In both facilities, this spike was in large part due to the number of infected inmates who have been asymptomatic.

*United States v. Pabon*, No. CR 17-165-1, 2020 WL 2112265, at \*4 (E.D. Pa. May 4, 2020).

Notwithstanding the low rate of testing in the City's jails, the rate of reported infections in New York City jails has consistently remained four to eight times higher than in the City as a whole, even as more and more New Yorkers gain access to testing.<sup>13</sup>

Simply put, when it comes to COVID-19, there is no more dangerous place to be than the City's jails. Already, there have been at least three tragic deaths of

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<sup>12</sup> Michael Balsamo, *Over 70% of tested inmates in federal prisons have COVID-19*, AP NEWS (Apr. 29, 2020), <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>.

<sup>13</sup> See *supra* note 11.

incarcerated people due to the spread of the virus in the City's jails and dozens of corrections officers and jail staff have died. A. 237-40.

The rapid and uncontrolled spread of COVID-19 in the City's jails should come as no surprise to anyone. It has long been known that infectious diseases 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. 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. A. 241-4. As established above, H1N1 is far less contagious than COVID-19.

The World Health Organization (“WHO”) has recognized that incarcerated people “are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together.” A. 380-419. The CDC, in guidance on management of COVID-19 in correctional and detention facilities, has identified that COVID-19 presents a particularly heightened danger in correctional facilities because “incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.” A. 420-45.

*Petitioner-Appellants Face Heightened Risk of Serious Injury and Death from Contracting COVID-19*

Petitioner-Appellant Gregory Jason is incarcerated because he cannot pay the bail set on his criminal case. A. 331. He is 60 years old and suffers from diabetes, high blood pressure, and a heart arrhythmia that required a stent to be implanted in his heart. A. 331, 484. The City's own Correctional Health Services ("CHS") recommended that the court release him because he is in the "highest risk group" for severe illness or death if he contracts COVID-19. A. 484. If released, CHS has pledged to provide follow up medical care in the community. *Id.*

Petitioner-Appellant Anthony Brown is incarcerated on a parole hold and \$1 bail on a criminal matter. A. 334. He is 55 years old and has asthma, high blood pressure, and cardiovascular disease. A. 494. Although initially prescribed albuterol to treat his asthma, on March 25, 2020, Mr. Brown was treated by CHS staff for an asthma flare-up and was then prescribed a nebulizer treatment as well as a second, additional prescription for a beclomethasone 40 MCG inhaler, which is a steroidal inhaler used to treat persistent asthma that is uncontrolled by albuterol alone. A. 495-8. Because of his age and health issues, CHS has deemed Mr. Brown to be in the "highest risk group" for severe illness or death if he contracts COVID-19 and recommended his release. A. 494.

Petitioner-Appellant Gian Verdelli is incarcerated because he cannot afford the bail set in his case. A. 336. He is 68 years old and diagnosed with pulmonary and

cardiovascular diseases. A. 499. CHS recommends his release because he is the “highest risk group” for COVID-19 due to his age and medical conditions. A. *Id.* If released, CHS would ensure that Mr. Verdelli has follow up medical care in the community. *Id.* He will also be referred to outpatient mental health treatment, and be re-connected to services with Revcore, a community-based substance abuse program where he was previously receiving treatment. *Id.*

Petitioner-Appellant Eleuterio Carmona is incarcerated because he cannot afford his bail set in his criminal case. A. 339. Mr. Carmona is 62 years old and is diagnosed with pulmonary disease and cardiovascular disease. A. 501. CHS has recommended his release because he is in the “highest risk group” for severe illness or death if he contracts COVID-19. If released, CHS would ensure that he has follow up medical care in the community. *Id.*

Petitioner-Appellant Joseph Torres is held on a parole hold and \$1 bail on a pending criminal matter. A. 335. He is 55 years old, is diagnosed with Hepatitis C and has a heart murmur. A. 335, 502. CHS has written a letter indicating that Mr. Torres is in the highest risk group for COVID-19 and recommending his release. A. 502.

Petitioner-Appellant Freddie Johnson is held on a parole hold and because he cannot afford his bail in his underlying criminal case. A. 329-30. He is 61 years old and has been diagnosed with asthma, hypertension, and cardiovascular issues. A.

504-6. He additionally suffers from chronic sinusitis and other respiratory issues, which has required the removal of a myocytoma (a benign tumor) and sinus polyps from his nose in 2017 and 2018, with resulting narrowing of the airways. *Id.* CHS wrote a letter on his behalf indicating that he is in the highest risk group for COVID-19. A. 503.

Petitioner-Appellant Ricardo Gonzales is held on a pretrial remand order on a non-violent felony matter. A. 330. He is 45 years old and diagnosed with Type I Diabetes that requires insulin treatment. A. 508-9. He is housed at the North Infirmary Command (NIC) due to his medical condition. A. 510-1. CHS has recommended his release because, due to his Type I Diabetes, Mr. Gonzales is in the highest risk group for serious illness or death if he contracts COVID-19. A. 507.

Petitioner-Appellant Willie Florence is held because he cannot afford his bail in his underlying criminal charge. A. 341. He is 54 years old and suffers from uncontrolled hypertension, which CHS classifies as a cardiovascular condition. A. 528-29. CHS has written on a letter recommending that the court consider his release because, due to his age and heart condition, he is at high risk for severe illness or death if he contracts COVID-19. A. 527.

Petitioner-Appellant Anibal Quinones is incarcerated on a parole hold and has bail set in an underlying criminal offense. A. 343. Mr. Quinones is 55 years old and has several compound health problems, including being pre-diabetic and suffering

from high blood pressure. *Id.* CHS wrote a letter recommending his release because his multiple vulnerabilities put him in the “highest risk group” for severe illness or death if he contracts COVID-19. A. 485-6. If released, CHS indicated they would ensure that he has follow up medical care in the community. *Id.*

Petitioner-Appellant Hollis Hosear is held because he cannot afford his bail in his underlying criminal charge. A. 338. He is 57 years old and diagnosed with interstitial lung disease, cardiovascular disease, and an autoimmune disease which has led to a degenerative muscle disorder, requiring the use of a cane. A. 338, 530. Mr. Hosear is in need of a lung transplant and uses a breathing machine. A. 338. CHS recommended his release because, as a result of his age and health issues, Mr. Hosear is in the “highest risk group” for severe illness or death if he contracts COVID-19. A. 530. If released, Mr. Hosear’s family would provide him with safe shelter, where he could socially isolate, and CHS would ensure that he has active health insurance, medications, and follow up medical care in the community. *Id.*

*Medical Experts Have Concluded that Release is the Only Effective Means to Protect Medically Vulnerable People from the Serious Risk of Death from COVID-19 in City Jails*

Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, correctional public health experts including the BOC – the independent agency charged with oversight of New York’s jails – have recommended the release from custody of all people whose age and/or underlying

medical conditions render them most vulnerable to COVID-19. Nonetheless, Petitioner-Appellants remain incarcerated.

On March 17, 2020, the BOC 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.” A. 272-3. The Board reasoned 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.” *Id.* Accordingly, the Board recommended 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[.]” *Id.*

On March 21, 2020, BOC issued a second advisory letter, urging judges and prosecutors to act quickly to release people, like Petitioners, who are over 50 years old and who have health conditions that make them high-risk for COVID-19. A. 377-9. They concluded, based on having “closely monitored Rikers Island and the borough jails for over sixty years” that “DOC’s and CHS’s *best efforts will not be enough to prevent viral transmission in the jails.*” *Id.* (emphasis added). The agency continued: “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.” *Id.*

New York’s preeminent correctional medical experts – including those employed by the City – are unanimous in their agreement that release is necessary to protect the health of medically vulnerable people. Dr. Robert Cohen, an expert member of the BOC, stated that “[t]he most important thing we can do right now is discharge *all of the people* who are old and have serious medical issues—those people are likely to die from a coronavirus infection.” A. 446-9.

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, stating that “we cannot change the fundamental nature of a jail” and that we “cannot socially distance” in a jail, even if there are only “dozens” of men in a dorm-like setting.” A. 274.

He renewed this call on Twitter on March 30, 2020, noting that although staff at Rikers were attempted to follow CDC guidelines and “have moved mountains to protect our patients,” “infections in our jails are growing quickly despite these efforts” and asking “that in this time of crisis the focus remain on releasing as many vulnerable people as possible.” A. 450-1.

Similarly, Dr. Rachel Bedard, a geriatrician who currently works on Rikers Island providing medical care for elderly and ill detainees, affirmed in a media

interview that effective preventative measures in a jail setting are essentially impossible, even with the best of efforts and intentions:

[Detainees at Rikers] all living in congregate settings, either dormitories of forty men, beds three and a half feet apart, or cell blocks where everybody is sharing one common space, one common hallway. These spaces are locked. These guys have absolutely no freedom of movement.

When they are moved from one location to another, a person has to take them there. That person has to open the door for them, and they have to be let through it and be walked down the hallway. When they are moved from one facility to another, somebody has to touch them and put cuffs on them. When we bring them their food, workers go from housing area to housing area with trays that have to be distributed. When we give them their medication, that has to be done for them. They can't do it for themselves. And so, if you think about how many excess human contacts that is, even compared to something like a shelter setting, you can imagine why viral spread in this environment is extra dangerous. (...)

We know that there is likely an asymptomatic spread of this disease. So when staff and officers and others are coming in and out, we just cannot make a commitment that we can protect them. It's not a fortress.

A. 452-61.

More recently, on April 10 – and therefore accounting for all the belated steps DOC claims to have taken to address the COVID-19 crisis – Dr. Bedard reiterated the degree to which prevention of infection is impossible, and underscored how DOC's efforts are simply insufficient, on their face, to address the risk of death confronting these Petitioners:

There is potential for many detainees and prisoners to die of covid-19. "Social distancing" is impossible in correctional facilities. People sleep on cots four feet apart, share bathrooms, sit in a small common space to watch television and gather for therapy sessions. Every day, staffers move among housing areas and in and out of the jails, potentially exposing dozens to contagion. Despite the health service and the Correction Department's best

efforts to identify, test and quarantine potentially infected people, the New York City jail system is set up perfectly for viral spread. People are getting very sick. Mr. Tyson [an inmate who died of COVID] was one of them.<sup>14</sup>

Dr. Homer Venters, former chief medical officer of New York City jails, similarly concluded that, “[i]n ordinary times, crowded jails overlook prisoners’ medical problems and struggle to separate them based on their security 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.*’” A. 269-71.

And Dr. Robert Greifinger, another former head of correctional health at Rikers Island, concluded in an expert declaration in another case, but based in part on his experience at Rikers 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, noting that “the public health recommendation is to release high-risk people from 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.” A. 130-3. (Decl. of Dr. Robert Greifinger, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020) ¶ 13).<sup>15</sup>

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<sup>14</sup> Dr. Rachel Bedard, *I’m a Doctor on Rikers Island, My Patients Shouldn’t Have to Die in Jail*, WASH. POST (Apr. 10, 2020) [https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288_story.html)

<sup>15</sup> The conclusions of New York’s correctional health experts were bolstered in the record below by additional opinions of medical professionals weighing in on this issue in public hearings and

## ARGUMENT

### I. FAILURE TO RELEASE PETITIONERS CONSTITUTES DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS IN VIOLATION OF THE U.S. CONSTITUTIONAL RIGHT TO DUE PROCESS.

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, Petitioner-Appellants must prove that Respondent-Appellees (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. *Pineiro*, 849 F.3d at 35.<sup>16</sup>

Applying this test, federal courts have already begun granting petitions for habeas corpus to people in federal custody on the grounds that their continued detention would violate federal due process. *See, e.g., Favi v. Kolitwenzew*, No. 20-CV-2087, 2020 WL 2114566 (C.D. Ill. May 4, 2020); *Da Silva Medeiros v. Martin*,

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litigation across the country, all of whom agree that release is the only meaningful step that can be taken to address the risk to medically vulnerable people like Petitioner-Appellants. A. 127-9.

<sup>16</sup> The same standard applies to pre-trial detainees and those held on parole warrants. *Benjamin v. Malcolm*, 646 F. Supp. 1550, 1556 n.3 (S.D.N.Y. 1986) (“[A]lleged parole violators ought not to be treated differently from other detainees, since the 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.”).

No. CV 20-178 WES, 2020 WL 2104897 (D.R.I. May 1, 2020); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 2201850 (D. Md. Apr. 30, 2020); *Chavez Garcia v. Acuff*, No. 20-CV-357-NJR, 2020 WL 1987311 (S.D. Ill. Apr. 27, 2020); *Ferreyra v. Decker*, No. 20 CIV. 3170, 2020 WL 1989417 (S.D.N.Y. Apr. 27, 2020); *Basank v. Decker*, No. 20 CIV. 2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020), *TRO converted to preliminary injunction*, 2020 WL 1953847 (S.D.N.Y. Apr. 23, 2020); *Roman v. Wolf*, CV-20-00768, 2020 WL 1952656 (C.D. Cal Apr. 23, 2020), *stay granted in part* 2020 WL 2188048 (9th Cir. May 5, 2020); *Kaur v. U.S. Dep't of Homeland Sec.*, No. 20-CV-03172, 2020 WL 1939386 (C.D. Cal. Apr. 22, 2020); *Zaya v. Adducci*, No. 20-10921, 2020 WL 1903172 (E.D. Mich. Apr. 18, 2020), *TRO converted to preliminary injunction*, 2020 WL 2079121, (E.D. Mich. Apr. 30, 2020); *Christian A.R. v. Decker*, No. CV 20-3600, 2020 WL 2092616 (D.N.J. Apr. 12, 2020); *Valenzuela Arias v. Decker*, No. 20 CIV. 2802, 2020 WL 1847986 (S.D.N.Y. Apr. 10, 2020); *Ortuño v. Jennings*, No. 20-CV-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *Coronel v. Decker*, No. 20-CV-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Castillo v. Barr*, No. CV-20-00605, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020).<sup>17</sup>

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<sup>17</sup> The court below dismissed the relevance of this federal authority on two frivolous grounds. First, the court noted that these cases involved “aliens held in immigration custody” rather than pre-trial detainees, A. 475 (Decision at 7), overlooking that the same legal standard applies to each. *Charles*

In dismissing the writs below, the court began its federal constitutional analysis by citing the wrong legal standard – improperly holding Petitioner-Appellants to the Eighth Amendment’s rather than the Fourteenth Amendment’s standard of deliberate indifference. A. 474 (Decision & Order (Apr. 16, 2020) at 6 (hereinafter “Decision”) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994))). Throughout the judgment, the court therefore applied a subjective intent standard inapplicable to the claims of pre-trial detainees, whose presumption of innocence remains undisturbed by a criminal conviction, and who retain a right to be free from *any* punishment, not merely punishment that is “cruel and unusual.” As the Second Circuit has made clear, “[u]nlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.” *Pineiro*, 849 F.3d at 35.

Applying this higher bar, the court below reached a summary conclusion that “Rikers Island’s efforts to limit the spread of the novel coronavirus are, at a very

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*v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019). Second, the court noted that these cases “only granted temporary restraining orders, but did not rule with finality on the merits,” *Id.* (Decision at 7), overlooking that, in obtaining TROs or preliminary injunctions, those petitioners met a *higher* legal standard for emergency relief than Petitioner-Appellants need to meet here.

minimum, ‘reasonable’ or ‘adequate,’ and in fact are probably far greater than that,” A. 476 (Decision at 8), without any significant engagement with or analysis of any fact that could support such a conclusion, suggesting that the court saw the question merely as one of good subjective intentions rather than objective reasonableness. As set forth below, the conclusion that Rikers Island’s efforts to limit Petitioner-Appellants’ exposure to COVID-19 are objectively reasonable or adequate is wholly incompatible with the facts about the spread of the virus in the City’s jails, contrary to the conclusions of correctional health experts – including those currently working on or with long experience working on Rikers Island – and based on a significant over-reading of the evidence presented by Respondent-Appellees.

A. Petitioner-Appellants Face Risk of Serious Injury and Death from Contracting COVID-19 in New York’s Jails, and Respondent-Appellees Knew and Should Have Known of that Risk.

There is no seriously disputing that Petitioner-Appellants face a risk of long-term injury and death from contracting COVID-19 in City jails. The court below did not find to the contrary.<sup>18</sup> The U.S. Supreme Court has acknowledged that the risk of contracting a communicable disease constitutes an “unsafe, life-threatening

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<sup>18</sup> The court criticized Petitioner-Appellants for seeking “to treat identically persons who would appear to have very different levels of susceptibility to serious illness or death from COVID-19.” A. 482 (Decision at 14). But each Petitioner-Appellant equally falls into the category of serious vulnerability defined by the CDC, the BOC, and every correctional health expert whose opinion was submitted to the court below as requiring consideration for release. *Ferreyra*, 2020 WL 1989417, at \*2 (declining to sever a joint writ for habeas corpus on grounds that “the health risks posed by COVID-19 and the constitutional claims presented do not turn on facts unique to each Petitioner beyond their having preexisting conditions that make them vulnerable to the virus.”).

condition.” *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, 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”); *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).

Following this precedent, as well as the overwhelming consensus of correctional medical professionals, federal courts have consistently recognized that COVID-19 poses a serious medical threat to medically vulnerable detainees, and on that basis granted release. *See, e.g., Ferreyra*, 2020 WL 1989417, at \*6 (“The Court takes judicial notice that COVID-19 causes severe medical complications and has increased lethality amongst people of advanced age, and those with underlying health problems, or both.”); *Basank*, 2020 WL 1481503 at \*3 (“The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality.”); (“[T]he effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions. [It] can cause serious, potentially permanent, damage

to lung tissue, and can require extensive use of a ventilator. The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions . . . . For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent.”) (internal citations omitted).

There is similarly no dispute that Respondent-Appellees are aware of the extraordinary risk COVID-19 poses to medically vulnerable people in City jails and of the imperative to release such people to prevent risk of serious harm and death. As noted above, they have been alerted to this risk by an oversight agency (the City Board of Correction), as well as prominent medical professionals within their own correctional health service, all of whom have called for the release of people over 50 or who have conditions like Petitioner-Appellants.<sup>19</sup> Indeed, the City’s correctional health service have all specifically called for the release of these individual Petitioner-Appellants. A. 484-530.

Both the Mayor of New York City and the Governor of New York have taken affirmative, if inadequate, steps to release medically vulnerable people from New

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<sup>19</sup>As alleged in the underlying petition, Respondent-Appellees have also received repeated entreaties from defender organizations to release people, including specifically Petitioner-Appellants. The petition also cited to several media stories covering various demands to release medically vulnerable people like Petitioner-Appellants. A. 102-293, 359-468 (Verified Petition ¶¶166-181).

York’s jails, further acknowledging the scale of the unfolding catastrophe and the need to release people like Petitioner-Appellants. Likewise, two of the City’s prominent prosecutors endorsed, in principle, the need to release medically vulnerable people in order to prevent them from the risk of death in custody. A. 275-9. One of them even admitted the City’s knowledge of Respondent-Appellees’ knowledge of the impossibility of controlling the spread of this particular virus in carceral environments, writing that “[g]iven the conditions in which incarcerated people live — limited access to soap and water; shared bathrooms, mess halls and living quarters — this population is especially vulnerable to the virus, and *largely unable to prevent its spread.*”<sup>20</sup> As recently as April 21, the New York City Comptroller wrote to the City Respondent-Appellees noting that “thousands of people in custody and staff remain at risk in our city jails,” noting “the rising number of deaths” on Rikers and stating that “the City’s response to date is nowhere near proportional to the scale of the crisis.”<sup>21</sup>

As noted above, courts across the country have issued legal rulings concluding that medically vulnerable people face serious risk of adverse outcomes, including

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<sup>20</sup> Eric Gonzales, *Andrew Cuomo, Stop a Coronavirus Disaster, Release People from Prison*, N.Y. TIMES (Mar. 30 2020), <https://www.nytimes.com/2020/03/30/opinion/nyc-prison-release-covid.html?action=click&module=Opinion&pgtype=Homepage>.

<sup>21</sup>Letter from Scott Stringer to Commissioner Brann and Mayor DeBlasio (April 21, 2020) (available at [https://comptroller.nyc.gov/wp-content/uploads/2020/04/4.21.20-Letter-to-Mayor-de-Blasio-and-Commissioner-Brann.pdf?utm\\_source=Media-All&utm\\_campaign=6f1d4487f5-EMAIL\\_CAMPAIGN\\_2017\\_05\\_31\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_7cd514b03e-6f1d4487f5-153826265](https://comptroller.nyc.gov/wp-content/uploads/2020/04/4.21.20-Letter-to-Mayor-de-Blasio-and-Commissioner-Brann.pdf?utm_source=Media-All&utm_campaign=6f1d4487f5-EMAIL_CAMPAIGN_2017_05_31_COPY_01&utm_medium=email&utm_term=0_7cd514b03e-6f1d4487f5-153826265))

death. These decisions have also served as notice to Respondent-Appellees of the urgent need to release Petitioner-Appellants because controlling the COVID-19 virus is not possible in a correctional setting. *See, e.g., Coronel*, 2020 WL 1487274 at \*3 (finding that “[i]t is not possible to isolate [people in jails] from the outside world (including from staff and vendors who may have been exposed to COVID-19), nor is it possible to isolate them from one another”); *Basank*, 2020 WL 1481503 at \*3 (holding that “[t]he nature of detention facilities makes exposure and spread of the virus particularly harmful” and describing the COVID-19 situation in carceral institutions as a “tinderbox scenario” for vulnerable detainees); Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) (“Due to the confines of [correctional] facilities, it will be *virtually impossible* to contain the spread of the virus” and thus to protect medically vulnerable populations from the risk of death) (emphasis added).<sup>22</sup>

These authorities’ conclusions about the impossibility or near-impossibility of preventing the spread of COVID-19 in jails has proven true in New York City. As established above, the infection rate in the City jails is extremely high, with many hundreds of inmates diagnosed as positive on any given day, thousands exposed to

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<sup>22</sup>The Montana Chief Justice’s memorandum is available at <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

the virus, and more reported infections every day as this pandemic continues to spread. Whatever steps Respondent-Appellees have taken, they are not working, at least not fast enough to protect Petitioner-Appellants from this disease. “A prison official may be liable for a substantial risk of serious harm to inmates in spite of efforts reasonably calculated to reduce the risk, if he intentionally refuses other reasonable alternatives and the dangerous conditions persist.” *Tafoya v. Salazar*, 516 F.3d 912, 918 (10th Cir. 2008).

By way of contrast, a recent court decision ordered a sentence reduction to release a federal inmate with *no* medical vulnerability from a prison, nonetheless finding “extraordinary circumstances” to justify release because “it has become increasingly apparent that the [Bureau of Prisons] has failed to control the outbreak” where only “33 prisoners and 17 staff at the facility have tested positive for COVID-19.” *United States v. Kelly*, No. 3:13-CR-59, 2020 WL 2104241, at \*6-7 (S.D. Miss. May 1, 2020). The emergency in New York City jails dwarfs this problem, with thousands of inmates and staff having tested positive even with incomplete testing, underscoring the incredible magnitude of the threat to Petitioner-Appellants’ health and the imperative to release them.

B. The Court Below Erred in Finding that Respondent-Appellees Have Effectively Responded to the Serious Threat COVID-19 Poses to Medically Vulnerable People Like Petitioners-Appellants.

Respondent-Appellees' intentional failure to release Petitioner-Appellants despite being aware of their medical vulnerabilities and the substantial risk COVID-19 poses to them, as the virus continues to spread despite the City's ineffective efforts to control it, is a reckless failure to protect them from serious medical harm. In concluding otherwise, the court below ignored irrefutable data indicating that COVID-19 is spreading in City jails, medical expert advice that release is necessary, and admissions from City and State officials that containing the spread is impossible and release of vulnerable people is necessary. Instead, the court erred as a matter of law in crediting Respondent-Appellees' subjective good faith based on affirmations indicating they have taken some actions to respond to this crisis.

On that basis alone, the court should reverse and order Petitioner-Appellants' release. Even beyond that error, however, in deeming the City's response to COVID-19 beyond reproach, the court below overlooked egregious gaps in the record Respondent-Appellees created, failing to recognize how that record supports a finding of deliberate indifference.

1. *The Court Below Erred by Finding Respondent-Appellees' Response to the Virus Reasonable Despite Undisputed Evidence that the Virus Continues to Spread and Cannot Be Effectively Controlled in the City's Jails.*

Deliberate indifference is measured neither by subjective good faith nor by the quantity of steps corrections officials have taken. Rather, it is measured by the quality of those steps and, specifically, whether it is objectively reasonable to believe those steps satisfy Respondent-Appellees' affirmative obligation to protect the health and lives of people in their custody. In the context of preventing infectious disease, as long-standing case law makes clear, that means taking steps that show some indication of *actually controlling* the spread of the disease, something the City indisputably has not done.

In a case finding corrections officials liable for failing to protect people in prison from a tuberculosis outbreak, for example, the Eighth Circuit recognized that prison "officials did respond, although inadequately, to the tuberculosis outbreak," including by taking a wide range of specific steps for screening and treatment. Nonetheless, the appellate court upheld a district court's finding of deliberate indifference based on those corrections officials' repeated failures to adopt more effective remedies to actually stem that outbreak. *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990). While mere negligence cannot establish a constitutional violation, "a consistent pattern of . . . negligent conduct is sufficient to establish deliberate indifference to serious medical needs." *Id.* at 533.

Applying this well-established standard for assessing deliberate indifference in the context of infectious disease, courts have acknowledged that, when it comes to protecting medically vulnerable people, the extraordinary COVID-19 pandemic requires more than the good faith in the face of a spreading virus – it requires release. New York Supreme Court Justice Dwyer found deliberate indifference and ordered the release of several similarly situated petitioners, based record indistinguishable from the instant case, noting that:

Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Again, prison officials are obliged to take “reasonable care” to mitigate the risk posed by Covid-19. That is so especially for prisoners who can fairly expect extremely serious consequences if they contract the disease. “Reasonable care” and “mitigation” obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a Band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an *effective* ameliorative measure. . . . [T]he escalating numbers of the infected show that what Rikers has done is not remotely effective.

*People ex rel. Stoughton on behalf of Hogan v. Brann*, No. 451078/2020, 2020 WL 1679209, at \*4 (N.Y. Sup. Ct. Apr. 6, 2020). Other lower New York courts have also found deliberate indifference requiring the release of medically vulnerable people. *See, e.g., Gregor ex rel. Lawrence v. Reynolds*, No. CV20-0150, 2020 WL 1910116 (Sup. Ct. Essex Apr. 17, 2020) (Meyer, J.).

Likewise, federal courts on similar records have ordered the release of medically vulnerable people from jails and detention centers, notwithstanding copious efforts in those facilities to respond to COVID-19. “As prison officials are

beginning to recognize around the country, even the most stringent precautionary measures—short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease.” *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at \*8 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020). In converting the temporary restraining order to a preliminary injunction in that case, the *Malam* court acknowledged jail officials’ range of precautionary actions – inclusive of the steps the City claims to have taken here – but noted that reliance on that litany of responses “turns a blind eye to the weight of public health evidence recognizing Petitioner’s release as the only reasonable response to an extraordinary and deadly pandemic. . . . No conditions of confinement at the Calhoun County Correctional Facility will be sufficient to protect this Petitioner’s health, life, and constitutional rights.” *Malam v. Adducci*, No. 20-10829, 2020 WL 1899570, at \*2 (E.D. Mich. Apr. 17, 2020).

A court reviewing petitions to release medically vulnerable people from the Essex, Bergen and Orange county jails in New Jersey also acknowledged that while the jails “have taken some steps to mitigate the spread of COVID-19, the risk of Petitioners’ infection is still very real,” and went on to list a range of steps similarly inclusive of every step the City claims to have undertaken here, from screening and separation protocols, to enhanced sanitation and encouragement of social distancing, as well as several steps the City has not taken, such as widespread testing.

Nonetheless, the court found that “[t]hese measures are likely result in some reduction of risk of infection, but they are insufficient.” *Ferreya*, 2020 WL 1989417, at \*9.

The list of courts reaching similar conclusions continues to grow. *See, e.g., Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at \*2 (N.D. Ohio Apr. 22, 2020) (acknowledging respondents’ implementation of a similar range of measures to respond to the COVID-19 threat, “[b]ut despite their efforts, the [jail] officials fight a losing battle” as the virus continued to spread, requiring petitioners’ release); *Banks v. Booth*, DC, No. CV 20-849(CKK), 2020 WL 1914896, at \*6 (D.D.C. Apr. 19, 2020) (crediting jail officials’ declarations detailing extensive steps to respond to the virus, but finding deliberate indifference on the basis that “the data for COVID-19 infection rates decries Defendants’ argument that Plaintiffs’ risk of infection is the same as that of the outside community.”); *United States v. Rodriguez*, No. 2:03-CR-00271, 2020 WL 1627331 at \*8 (E.D. Pa. Apr. 1, 2020) (“Many of the recommended measures to prevent infection are impossible or unfeasible in prison. The government’s assurances that the BOP’s ‘extraordinary actions’ can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease at the facility where Mr. Rodriguez is housed.”); *United States v. Kennedy*, No. 18-20315, 2020 WL 1493481 at \*1 (E.D. Mich. Mar. 27, 2020), *reconsideration denied*, No. 18-20315, 2020 WL 1547878 (E.D. Mich. Apr.

1, 2020) (noting that “[e]ven if all CDC’s interim recommendations are followed . . . [The] Court is concerned that such measures will prove insufficient to stem deadly outbreaks” in jails); *Basank*, 2020 WL 1481503 at \*5 (“At oral argument, Respondents represented that ICE and the detention facilities in which Petitioners are housed are taking certain measures to prevent the spread of virus. . . . These measures are patently insufficient to protect Petitioners.”); *Committee for Public Counsel Servs. v. Chief Justice of the Trial Ct.*, SJC-12926 (Mass. Apr. 3, 2020) (ordering a presumption of release for pretrial detainees in Massachusetts, and noting that “[m]aintaining adequate physical distance, i.e., maintaining six feet of distance between oneself and others, may be nearly impossible in prisons and jails.”); *United States v. Fellela*, No. 3:19-CR-79, 2020 WL 1457877 at \*1 (D. Conn. Mar. 20, 2020) (“All levels of government nationwide have recently taken drastic measures in light of the COVID-19 pandemic to promote ‘social distancing’ and to prohibit the congregation of large numbers of people with one another. But, as is true for most jails and prisons, the conditions of confinement at Wyatt are not compatible with these safeguards.”).

The range of measures New York City has undertaken to respond to COVID-19 in its jails is no more capable of addressing the risk of transmission to medically vulnerable people than in any of the cases cited above. As correctional medical expert Dr. Jonathan Giftos, a professional with many years of experience working

on Rikers Island, concluded in his declaration supporting the instant petition, the CDC has recommended many steps for correctional institutions but “even if all of them are take and executed with perfection, they still cannot effectively control the risk of transmission.” A. 534-5 (Giftos Aff. ¶ 10). Immutable aspects of the design and operations of New York’s jails make it impossible to engage in the necessary social distancing required to mitigate the risk of transmission, even in the less crowded conditions Respondent-Appellees claim to have achieved, and notwithstanding their policy of “encouragement” to do so. A. 536-7 (Giftos Aff. ¶¶ 15-18). People in City jails have limited freedom of movement and no control over the movements of corrections officers and other residents with whom they are required to congregate on a daily basis. Food preparation and service is communal, requiring people to touch the same surfaces and share poorly ventilated common space, eating food served by other incarcerated workers drawn from many different housing areas within the jail.

Both single-cell and dormitory-like sleeping arrangements present obstacles to social distancing. While some dormitories may be operating at lower capacity than earlier this year, it is still not possible to socially distance in a dormitory setting because, no matter the population level, people share common sinks, toilets, showers, phones, tables and dayroom benches. Even DOC’s “enhanced sanitation procedures” cannot adequately sanitize those spaces to prevent transmission, as

Petitioner-Appellants' experts stated and none of Respondent-Appellees witnesses refuted. *Id.* (Giftos Aff. ¶17.) Single-cell residents also must still use shared showers, phones and video terminals used for court appearances and must move about in narrow hallways to reach communal spaces for meals, showers, and court appearances. *Id.* (Giftos Aff. ¶ 18.) For all these reasons, social distancing is simply not possible in congregate settings like the City jails, and none of Respondent-Appellees' witnesses conclude otherwise. To the contrary, New York City's correctional health experts – from Dr. McDonald to Dr. Bedard to Dr. Venters – are unanimous in agreeing that release of medically vulnerable people like Petitioner-Appellants is imperative. *See supra* Statement of Facts.

While there is no disputing Respondent-Appellees have taken many (if belated) steps in the wake of the COVID-19 crisis, there is likewise no disputing, based on the data showing the continued spread of the infection and expert testimony concluding that control within the jail environment is impossible, that those steps are not sufficient to protect people with medical vulnerabilities. Despite a plethora of affidavits submitted on this subject detailing various responses to the crisis, Respondent-Appellees did not submit a single piece of public health evidence suggesting that their responses could actually prevent Petitioner-Appellants from contracting COVID-19 and facing the inevitable medical risks vulnerable people like them face.

As another court considering a similar case concluded, “the public health evidence . . . strongly suggests that release is the only justifiable option consistent with public health principles. Respondent may disagree with this conclusion, but to contest it here she must provide the Court with public health or other scientific evidence regarding the level of risk to Petitioner given the precautions taken.” *Zaya*, 2020 WL 1903172, at \*4. *See also Da Silva Medeiros*, 2020 WL 2104897 at \*3 (“The Court does not doubt that Wyatt’s precautions may be adequate to ensure the safety of many if not most detainees, but that is not the question presently before the Court. Because these Petitioners’ health issues distinguish them from a typical detainee . . . measures designed to mitigate the spread of infection, even perfectly executed, are inadequate to protect vulnerable persons like them.”). Respondent-Appellees have produced no public health evidence, nor any evidence whatsoever, to contradict Petitioner-Appellants’ evidence indicating the steps undertaken in the City jails are utterly inadequate to protect Petitioner-Appellants from serious medical harm. On that basis alone, the lower court erred and this Court should find deliberate indifference.

2. *Even If Respondent-Appellees Could Control the Spread of COVID-19 in the City Jails, The Steps They Claim to Have Taken are Recklessly Insufficient.*

Serious examination of City's record of its actions to date only further underscores the reckless insufficiency of those steps, for several separate and independent reasons.

First, Respondent-Appellees evidence demonstrates that they are recklessly responding to the COVID-19 crisis by failing to have any plan for systematic testing in the jails. Petitioner-Appellants' expert notes that testing is not widely available in prisons and jails. A. 534 (Giftos Aff. ¶ 9). Respondent-Appellees' affiant on this subject, Dr. Patricia Yang, confirms the lack of any plan for comprehensive testing, stating that "[t]esting strategy is also guided by laboratory capacity and availability of supplies" and notably declining to offer any actual information about who is being tested and how often. A. 315-20 (Yang Aff. ¶ 22).

Courts have found deliberate indifference based on the failure to test for COVID-19. *See, e.g., Ferreyra*, 2020 WL 1989417 at \*10 (finding deliberate indifference, in part, because "Respondents have offered no evidence indicating that testing is systematically used to ascertain the scope of, contain, and treat the outbreak—or the threat of an outbreak in the case of the Orange County Jail."); *Basank*, 2020 WL 1953847 at \*9 (noting that jail officials "offered no evidence indicating that testing is widely offered or used to ascertain the scope of the outbreak,

in order to better contain and treat the outbreak within the facilities”); *cf. Zaya*, 2020 WL 2079121 at \*6 (in extending an emergency order based on a finding of deliberate indifference, ordering respondent to show cause as to why it could not test all staff and detainees in a Michigan county jail).

Second, Respondent-Appellees’ heavy emphasis on flawed screening protocols in their response to the virus further demonstrates the recklessness of their approach. The City’s affirmations, as well as its “COVID19 Preparation & Action Plan,” A. 258-63, describe a system of screening and separating people based on observed symptoms. Dr. Yang stated that even people who are known to have been exposed to COVID-19 are “kept in the same housing unit in which they were exposed” unless they actually exhibit symptoms.”

The record before the court below definitively established that this is not an effective means to control COVID-19 transmission because of the danger of asymptomatic transmission. A. 535-6 (*Giftos Aff.* ¶¶ 12-14).<sup>23</sup> As many as 25% of people infected with COVID-19 may not show any symptoms whatsoever, *Id.* (*Giftos Aff.* ¶ 12), ensuring the continued spread of the virus to other incarcerated people, including Petitioner-Appellants. Other courts have reached the same

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<sup>23</sup> See also CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Mar. 19, 2020); 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).

conclusion. *See Ferreyra*, 2020 WL 1989417 at \*8 (“For detainees with underlying conditions like Petitioners’, monitoring them for signs of infection is too little, too late.”); *Zaya*, 2020 WL 2079121 at \*5 (“[S]creening measures, with an emphasis on symptoms, are insufficient to adequately reduce the risk of irreparable injury to detainees with a heightened risk of severe illness and death from COVID-19. Screening for symptoms will do nothing to prevent asymptomatic transmission.”). Even if separation could be effective, moreover, which it cannot, separating or quarantining people with the virus does not prevent its spread within a facility, and may even backfire. *See Fraihat v. U.S. Immigration & Customs Enft*, No. CV-19-1546, 2020 WL 1932570 at \*4 (C.D. Cal. Apr. 20, 2020) (“Simple segregation or solitary confinement measures as an outbreak management technique tend to backfire . . . . Unless an individual is held in a negative pressure room, his or her respiratory droplets may still flow outwards to the rest of the facility.”).

Third, Respondent-Appellees’ record suffers from the fatal flaw of speaking to policy aspirations for the control of the virus, rather than to effective implementation of those policies. In examining a similar petition for release from the Washington, D.C. jail, the court dismissed evidence that jail officials “recently implemented new social distancing practices, such as limiting the number of inmates who can use the recreation areas at the same time” because they “have yet to submit any evidence that these practices are being implemented.” *Banks*, 2020 WL

1914896, at \*7. The court further examined declarations from jail officials very similar to the ones produced by Respondent-Appellees here, discussing cleaning protocols and access to cleaning supplies, as well as screening and quarantine measures, but found them wanting, noting that “it is not clear whether or not these declarations are based on [the declarants’] personal observations of the conditions at the facilities. Both declarations state that the information is based on personal knowledge ‘including information provided to me by other District of Columbia employees in the course of my official duties.’ As such, there is some uncertainty as to whether these declarations are based on policies which are on the books or the actual conditions of the facilities.” *Id.* at \*8. Similarly here, Respondent-Appellees’ witnesses do not purport to describe actual sanitary conditions within the City jails, or provide information about whether masks or other PPE are in fact available, or that social distancing is occurring in practice.

It has long been established that the mere existence of policies does not suffice to satisfy the government’s obligations to protect people’s health in jails; failure to implement policies or to adjust course when the evidence shows that they are not working, or not working fast enough, can also constitute deliberate indifference, even under heightened Eighth Amendment standards. *See Cash v. County of Erie*, 654 F.3d 324, 334–38 (2d Cir. 2011) (finding sufficient evidence to support a jury finding of deliberate indifference where sheriff failed to act in the face of evidence

that his policy designed to prevent sexual assault was not preventing sexual assaults); *Tafoya*, 516 F.3d at 919 (same). Simply put, a failure to address the gap between policy and practice is yet another reason why Respondent-Appellees’ record was facially insufficient to rebut Petitioner-Appellants’ strong case – based on the continued spread of the virus, expert testimony about the impossibility of social distancing and general insufficiency of the City’s efforts, evidence of a lack of testing, and an over-reliance on utterly ineffective symptom-based screening – for deliberate indifference.

The court below failed to undertake any serious engagement with the facts Respondents-Appellees proffered. Despite concluding that “Rikers Island’s efforts to limit the spread of the novel coronavirus are, at a very minimum, ‘reasonable’ or ‘adequate,’ and in fact are probably far greater than that,” A. 476 (Decision at 8), the court below did not cite to any particular fact supporting that conclusion, nor did the court engage with any of the Petitioner-Appellants’ criticism of the notable gaps, vagueness and lack of foundation in the City’s affidavits or weigh the conflicts between some of their assertions and the evidence offered by Petitioner-Appellants.<sup>24</sup>

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<sup>24</sup>As argued above, Petitioner-Appellants have met their burden to establish deliberate indifference and an entitlement to relief on the record presented. To the extent the Court finds it necessary to resolve any material factual disputes as to the scope or effectiveness of Respondent-Appellees’ alleged steps to combat COVID-19, however, the Court should remand this matter to Supreme Court with instructions to hold an evidentiary hearing to permit the full development of the factual record including resolution of the facts disputed among the parties, including cross-examination

As noted above, however, this Court need not resolve any factual disputes relating to the efficacy of the City’s actions, for the simple reason that even they are perfectly executing the steps their witnesses have outlined, the spread of COVID-19 in New York’s jails continues and the threat to medically vulnerable petitioners cannot be managed by those steps. In this respect, Respondent-Appellees are similarly situated to other parties courts have found deliberately indifferent. “What is not in dispute is the medical evidence and testimony from numerous doctors that other measures—absent social distancing—are not alone sufficient to stop the spread of the virus. Also unrebutted is the fact that over the brief course of this litigation . . . the rate of inmate infections has increased dramatically. . . . [E]ven considering the measures Defendants have adopted—and setting aside the numerous factual disputes as to the consistency and efficacy of those measures—the record nonetheless can be seen to demonstrate deliberate indifference to a serious risk of harm to Plaintiffs. . . . Defendants’ contention that the actions they have taken to date are sufficient is belied by the exponential rate of infection since this case commenced.” *Swain v. Junior*, No. 1:20-CV-21457-KMW, 2020 WL 2078580, at \*15-16 (S.D. Fla. Apr. 29, 2020), *stay pending appeal granted*, 2020 WL 2161317 (11th Cir. May 5, 2020).

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of the City’s witnesses, rather than crediting the Appellees’ contested facts, as the court did below both in denying the initial petition and the motion to reconsider. *See Grossman ex rel. Petion v. Brann*, 2020-02919 (App. Div. 2d Dept. Apr. 7 2020) (remanding appeal of a writ due to Supreme Court’s failure to develop a factual record sufficient to permit appellate review).

*See also Kevin M.A. v. Decker*, No. CV 20-4593 (KM), 2020 WL 2092791, at \*8 (D.N.J. May 1, 2020) (acknowledging factual disputes about the extent of jail officials’ actions but holding that “[i]t is not necessary to resolve them because my decision will rest primarily on the petitioner’s medical condition (which does not seem to be disputed) and the danger to his health in an institutional setting.”). The same conclusion holds in this case. On that basis, the court should find deliberate indifference under the Fourteenth Amendment and order Petitioner-Appellants’ release.

## II. FAILURE TO RELEASE PETITIONERS CONSTITUTES DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS IN VIOLATION OF THE NEW YORK CONSTITUTIONAL RIGHT TO DUE PROCESS.

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.” *See also People ex rel. Schipski v. Flood*, 88 A.D.2d 197, 199-200 (2nd Dep’t 1982); *Powlowski v. Wullich*, 102 A.D.2d 575, 587 (4th Dep’t 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”).

For the reasons amply stated above, it is beyond dispute that Petitioner-Appellants face a grave risk of death if they continue to be confined in New York City’s jails.

For the government to prevail in the face of that grave harm, it must prove a “compelling governmental necessity” for restricting these pretrial detainees’ liberty interests. *Schipski*, 88 A.D.2d at 197. 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. As in the initial decision to hold a pretrial detainee, public safety plays no role in the assessment of the state’s interest.

In this case, it is obvious that the state’s interest in securing Petitioner-Appellants’ appearance at their next court or parole hearing is dwarfed by the threat of death posed by the COVID-19 pandemic spreading uncontrollably in New York’s jails. The court below dismissed Petitioner-Appellants’ interest out of hand on the basis that the court “has already concluded that [their federal constitutional] right will not be violated by these petitioners’ continued detention,” thereby finding nothing to balance against the state’s interest. A. 478 (Decision at 10). But that is obviously flawed reasoning. Petitioner’s interest is not in proving a federal

constitutional claim, but in avoiding COVID-19 infection. The court's reasoning would make proving a state constitutional claim impossible unless a petitioner had already won a federal claim, an outcome incompatible with binding Court of Appeals authority noting the more expansive protections available under our state constitution.

The court below likewise erred in exaggerating the state's interest in continuing to incarcerate Petitioner-Appellants in order to secure their appearance at trial. The court wrongly assumed that "the risk of non-appearance is far greater in this unique situation" of the COVID-19 pandemic because courts could not provide a "date certain to return" or provide so-called "Parker warnings" that admonish criminal defendants of the adverse consequences of failure to return. A. 473-4, 480 (Decision at 5-6, 10). There is no basis for this assumption. The court could have exercised its own discretion to provide Petitioner-Appellants with *Parker* warnings, if doing so was deemed necessary to effectuate their release, either by requiring their production to the court or by issuing written warnings from the Court about the consequences of failing to return, just as court officers routinely hand defendants general written instructions upon their release from a criminal courthouse. Moreover, Petitioner-Appellants each are represented by a defense attorney from the Legal Aid Society who is able to directly communicate information about their next court date, the importance of remaining in touch with defense counsel, and the

consequences of failure to appear for any subsequent court dates. There is no communication barrier sufficient to justify denying an otherwise legitimate claim for release based on the threat of COVID-19.<sup>25</sup>

### III. THE COURT BELOW ERRED IN DECLINING TO CONDUCT INDIVIDUALIZED DETERMINATIONS REGARDING THE RELEASE OF PETITIONERS.

The court below further denied the petition on the basis that “[a]s presented to the Court . . . there is no ground for an individualized review of each Petitioner’s individual circumstances.” A. 480 (Decision at 12). As argued above, each of Petitioner-Appellants is entitled to release because they share a CDC-documented medical vulnerability making exposure to COVID-19 an unreasonable risk of death or serious, long-term medical harm, rendering a more detailed individualized review unnecessary. But to the extent a further individualized review was required, the court was wrong to conclude that it was impossible and further erred in deny Petitioner-Appellants the opportunity to present whatever evidence the court found missing from the record before it.

The court chided Petitioner-Appellants in particular for not providing “criminal history, ties to the community or history of nonappearance” so that the

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<sup>25</sup> More broadly, *People v. Parker*, 57 N.Y.2d 136, 141 (1982), does not create a cognizable state interest in delivery of the co-called “*Parker* warnings”; they are merely a prophylactic measure designed to prevent courts from violating criminal defendants’ rights by proceeding with trials *in absentia* without proper notice that could be a consequence of failure to appear.

court could “differentiate those who present risk of flight from those who do not.” A. 481 (Decision at 13). But that information forms no part of Petitioner-Appellants’ *prima facie* case for release based on deliberate indifference to their serious medical needs, nor did the court cite any authority to the contrary. The instant petition is not a bail application. To the extent that Respondents-Appellees sought to establish, e.g., the state’s interest in the balancing test set forth under the state constitution it was their burden to produce evidence in support of that proposition, and they did produce it, giving the court below ample opportunity to examine individualized circumstances or ask any of the parties present at the hearing to expand upon the information provided. *See* A. 294-327.

#### CONCLUSION

For the above reasons, the court should immediately grant Petitioner-Appellants writs of habeas corpus. “As the death rate from COVID-19 continues to grow, especially for those with preexisting health conditions, every day counts.” *United States v. Park*, No. 16-CR-473 (RA), 2020 WL 1970603 at \*1 (S.D.N.Y. Apr. 24, 2020).

Respectfully Submitted,

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COREY STOUGHTON  
*Of Counsel*  
May 2020

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, :  
EX REL. Corey Stoughton on behalf of Venus  
Williams, et al.

Petitioner- Appellants,  
v.

: Index no. 451609-2020

CYNTHIA BRANN, COMMISSIONER, :  
NEW YORK CITY DEPARTMENT OF :  
CORRECTION; ANTHONY ANNUCCI, :  
ACTING COMMISSIONER, NEW YORK :  
STATE DEPARTMENT OF CORRECTIONS :  
AND COMMUNITY SUPERVISION,

Respondent-Appellees.

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ADDENDUM

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 N.Y.C.R.R. § 1250.8(j), appellant states the following:

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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-----X  
**STATEMENT PURSUANT TO RULE 5531**

1. The index number in the Court below was 451609/2020.
2. The full names of the original parties were People of the State of New York ex rel. Williams, Venus; Morales, Melinda; Johnson, Freddie; Roman, Tony; King, James; Gonzales, Ricardo; Hammond, Thomas; Jason, Gregory; Vasquez, Willie; Monks, Edward; Vasquez, Louis; Blanding, John; Bell, Alan; Bynum, Gregory; Ingram, Kevin; Martinez, Herverto Thompson, Jerome; Lee, Wilson; Brown, Anthony; Victor-Sanchez, Carlos; Greene, Christopher; Eleby, James; Lopez, Dean; Davis, Lisa; Torres, Joseph; Castro Diaz, Hector; Gardner, Bernard; Verdelli, Gian; Hutt, Ronald; Harrell, Melvin; Figueroa, Daniel; Jones, Jimmy; Willis, David; Hernandez, Providencio; Paredes, George; Richardson, Eric; Farfan, Leslie; Hosear, Hollis; Cusberts, William; Carmona, Eleuterio; Byrd, Edward; Gamble, Kevin; Wilson, Junior; Pemberton, Edward; Sanders, Steven; Flores, Elieser; Goggins, William; Florence, Willie; Shaw, George; Salaam, Sekou; Reyes, Rigoberto; Bulwer, James; Jackson, Charles; Pyakurel, Govinda; Chapman, Victor Gonzalez, Luis; Barnes, Ronnie; Quinones, Anibal; Seals, Sonny; Harris, Scott; Perez, Thomas; Correa, Nelson; Duke, Victor; Cummings, Anthony; Delacruz, Eliezer; Brown, Leroy Vega, Raphael; Flood, Victor; Elijah Green; Brown, Vincent; Vasquez, Hector; McCoy, Robert; Nimmons, Allen; Alequin, Erick

Lamar, Eddie; Williams, Dominick; Kellam, Robert; Estrada, Guillermo; Irby, Michael; Alson, Ray; Chestnut, Ronald; Hoyt, Michael; Harrison, Jeffrey; Fraticelli, Hernino; Reid, Michael; Wilson, Kip (John Doe); Luckey, Rickey; Virdree, Michael; Manaiza, Noel; Johnson, Elijah; Brown, Vincent; Lopez, Michael; Garner Sr., Keith; Rivera, John; Jersey, James (Curry); Turner, Andrew Iszard, Henry; Jones, Anthony; Smalls, Dennis; Smith, Al; Torres, Ralph; Sosa, Samuel; Davis, Wayne; Jones, Gregory; Shumate, Craig; Antigua, Ramon A. ; Russell, David; Lorenzo, Ramon; Springs, John; Peterson, Thomas; Eans, Stephon; Callahan Joseph; Robertson, Derek; Saunders, William; Curtis, John; Olivares, Efren; Bey, Terhan against Cynthia Brann, Commissioner, New York City Department of Correction and Anthony Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision.

3. This action was commenced in Supreme Court, New York County.
4. This action was commenced by the filing of a petition for a writ of habeas corpus.
5. This appeal is from a judgment of the Supreme Court, New York County, dismissing petitioner-appellants' petition for a writ of habeas corpus.
6. This is an appeal from a judgment rendered on March 20, 2020 and affirmed upon grant of motion to renew or in the alternative reargue on April 13, 2020 (Statsinger, J.).
7. Petitioner-Appellants were granted permission to appeal as poor people on the original record. The appendix method is being used.