

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VASIF “VINCENT” BASANK; FREDDY  
BARRERA CARRERRO; MANUEL BENITEZ  
PINEDA; MIGUEL ANGEL HERNANDEZ  
BALBUENA; LATOYA LEGALL; CARLOS  
MARTINEZ; ESTANLIG MAZARIEGOS;  
MANUEL MENENDEZ; ANTAR ANDRES  
PENA; and ISIDRO PICAZO NICOLAS,  
*Petitioner,*

v.

THOMAS DECKER, in his official capacity as  
Director of the New York Field Office of U.S.  
Immigrations & Customs Enforcement; and  
CHAD WOLF, in his official capacity as Acting  
Secretary, U.S. Department of Homeland Security,  
*Respondents.*

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**Civ. No. 1:20-cv-02158**

**AMENDED  
PETITION FOR WRIT  
OF HABEAS CORPUS  
UNDER 28 U.S.C. § 2241**

**INTRODUCTION**

1. As the novel COVID-19 virus and resulting Coronavirus disease (“COVID-19”) sweeps around the world, infecting more than 458,000 and killing over 20,000 to date, Immigration and Customs Enforcement (“ICE”) continues to refuse to release the most vulnerable immigrants in their custody, including Petitioners here, who face an imminent risk of death or serious injury in immigration detention if exposed to COVID-19.

2. The ten people who bring this action are all detained by ICE in county jails where cases of COVID-19 have been identified, and each live with chronic medical conditions that subject them to a heightened risk of suffering serious harm or even death if they contract COVID-19. Nonetheless, ICE has not and cannot adequately protect them from contracting the deadly virus, prevent them from suffering the resulting illnesses, or provide them with necessary treatment

if or when they become ill.

3. Despite possessing the power to release Petitioners but not the ability to protect them from near-certain death or serious debilitating complications in a jail environment, ICE obstinately disregards the only course of action that will provide Petitioners with reasonable safety: releasing them to their families and communities who can provide a safe haven during this pandemic.

4. Under these circumstances, Respondents cannot provide Petitioners with safe conditions or adequate due process. Their continued detention will likely lead to death or serious medical repercussions without action by this Court. Therefore, Petitioners respectfully request that this Court issue a writ of habeas corpus, ordering Respondents to promptly release them.<sup>1</sup>

#### **PARTIES**

5. Mr. Vasif “Vincent” Basank (“Mr. Basank”) is a 54-year-old father of two U.S.-citizens and has lived in the United States for 35 years. Prior to his detention, Mr. Basank was one of the primary caregivers and emotional supports for his 20-year-old autistic son, who has a developmental age closer to that of a six-year-old. He lives in Valley Stream, NY with his family but has been detained by Respondents at the Hudson County Correctional Facility (“Hudson County Jail”) since January 10, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Mr. Basank’s age and lengthy history of smoking places him at high risk of complications or death from COVID-19.

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<sup>1</sup> If the Court declines to grant the relief contemplated in the petition immediately, Petitioners respectfully request that the Court use its inherent powers as detailed in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001) to grant them release pending the adjudication of this petition because of the extraordinary circumstances presented by the COVID-19 pandemic.

6. Mr. Freddy Barrera Carrerro (“Mr. Barrera”) is a 39-year-old father to his severely-developmentally-delayed U.S. citizen daughter who has lived in the United States since 2004. He lives in Suffolk County, NY but has been detained by Respondents at the Bergen County Correctional Facility (“Bergen County Jail”) since February 20, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Mr. Barrera’s obesity, respiratory problems, and history of gastrointestinal problems and colorectal bleeding places him at high risk for complications or death from COVID-19.

7. Mr. Manuel Benitez Pineda (“Mr. Benitez”) is a 44-year-old husband and father to three young children who fled with his family to the United States around July 2019. He lives in Ossining, NY but has been detained by Respondents at the Hudson County Jail since January 7, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Mr. Benitez has pulmonary issues and has suffered from severe pneumonia requiring lengthy hospitalization in the past, which places him at high risk for complications or death from COVID-19.

8. Mr. Miguel Angel Hernandez Balbuena (“Mr. Hernandez”) is a father of three U.S. citizen children and a 13-year resident of New York. He has been detained at the Bergen County Jail since February 26, 2020 in connection with removal proceedings at the Varick Street Immigration Court. Mr. Hernandez has diabetes, for which he takes medication, but nonetheless suffers from diabetes-related complications including impaired vision. This places him at high risk for complications or death from COVID-19.

9. Ms. Latoya Legall (“Ms. Legall”) is a 33-year-old wife and mother to U.S. citizens and a longtime resident of New York who has lived and worked in Brooklyn for over 13 years.

She is an active member of her church and costume-maker for the West Indian Day Parade in New York City. Ms. Legall has been detained by Respondents at Bergen County Jail since February 6, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Ms. Legall suffers from asthma, other respiratory problems, and a history of panic attacks, all of which significantly affect her ability to breathe, placing her at high risk for complications or death from COVID-19.

10. Mr. Carlos Martinez (“Mr. Martinez”), a 56-year-old father and legal permanent resident (“LPR”) since 1993, suffers from a severe heart disease. He was previously hospitalized for congestive heart failure, severe aortic valvular insufficiency, and acute systolic failure, requiring immediate heart valve replacement surgery. Mr. Martinez has been detained at Bergen County Jail since September 14, 2019 in connection with removal proceedings at the Varick Street Immigration Court. His advanced age and heart disease place him at high risk for complications or death from COVID-19.

11. Mr. Estanlig Mazariegos (“Mr. Mazariegos”) is a 44-year-old husband to a U.S. citizen who has lived in the United States for almost eighteen years. Mr. Mazariegos has been detained at Hudson County Jail since February 5, 2020 in connection with removal proceedings at the Varick Street Immigration Court. Compounded by his dual high blood pressure and pre-diabetes diagnoses, Mr. Mazariegos is at high risk for complications or death from COVID-19.

12. Mr. Manuel Menendez (“Mr. Menendez”) is a 31-year-old father of two U.S. citizen children and a long-time resident of Queens, New York. He has been detained by Respondents at the Bergen County Jail since August 14, 2018 in conjunction with his removal proceedings at the Varick Street Immigration Court. He suffers from chronic asthma that places

him at high risk for complications or death from COVID-19.

13. Mr. Antar Andres Pena (“Mr. Pena”) is a 36-year-old father of a 16-year-old U.S. citizen daughter and LPRhas lived in the United States since he was nine years old. He lives in Nassau County, NY and has been detained by Respondents at the Essex County Correctional Facility (“Essex County Jail”) since March 3, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Mr. Pena suffers from chronic asthma as well as chronic obstructive pulmonary disease (“COPD”) for which he has received inhalers and other lifelong medical treatment, and which places him at high risk for complications or death from COVID-19.

14. Mr. Isidro Picazo Nicolas, aka Icidro Picasso Nicolas (“Mr. Picazo”), is a 40-year-old father of three young U.S. citizen daughters and resident of the United States for over 20 years. In addition to his own children, Mr. Picazo raised his three stepchildren. He has been detained by Respondents at the Essex County Jail since February 11, 2020 in conjunction with removal proceedings at the Varick Street Immigration Court. Mr. Picazo has been diagnosed with Type II Diabetes and morbid obesity, which places him at high risk for complications or death from COVID-19.

15. Respondent Thomas Decker is should named in his official capacity as Director of the New York Field Office for ICE. He is responsible for administration and management of ICE Enforcement Removal Operations in New York City and has jurisdiction over the decision to keep Petitioners in detention. Respondent Decker’s address is 26 Federal Plaza, 9th Floor, Suite 9-110, New York, NY 10278.

16. Respondent Chad Wolf is named in his official capacity as Acting Secretary of the

Department of Homeland Security (“DHS”). He is responsible for the enforcement of the immigration laws and routinely transacts business in the Southern District of New York. Respondent Wolf supervises Respondent Decker and is legally responsible for the pursuit of Petitioner’s detention. Respondent Wolf’s address is U.S. Department of Homeland Security, 800 K Street, N.W. #1000, Washington, D.C. 20528.

### **JURISDICTION**

17. This action arises under the Fifth Amendment to the U.S. Constitution.

18. The Court has subject matter jurisdiction over this Petition pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause); the Due Process Clauses of the Fifth Amendment to the U.S. Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus). In addition, the Court has jurisdiction to grant injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

19. The district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness of their detention. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

### **VENUE**

20. Venue for this petition for a writ of habeas corpus properly lies in the Southern District of New York pursuant to 28 U.S.C. § 2241(d) and 28 U.S.C. § 1391(b)(2).

21. Venue is proper in this District under 28 U.S.C. § 2241(d) because Petitioners are detained by Respondent Decker, whose office is located in this District. *See, e.g., Rodriguez Sanchez v. Decker*, No. 18-CV-8798 (AJN), 2019 WL 3840977, at \*2 (S.D.N.Y. Aug. 15, 2019); *Cruz v. Decker*, No. 18 Civ. 9948 (GBD) (OTW), 2019 WL 6318627, at \*6 (S.D.N.Y. Nov. 26,

2019); *You v. Nielsen*, No. 18 Civ. 5392 (AT), 2018 WL 3677892 (S.D.N.Y. Aug. 2, 2018)

22. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial portion of the events or omissions giving rise to this action occurred in this District. The removal proceedings against Petitioners are held in this District, and Petitioners' arrests, detention, and inadequate medical care are the results of actions by Respondents in this District.

### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

23. Petitioners have no administrative remedies to exhaust because no process exists through ICE or the county jails to challenge the unconstitutional conditions of detention or inadequate medical care that Petitioners are provided. The only process available to Petitioners is to pursue defenses to removal—a process governed by separate laws, *see* 8 U.S.C. § 1229a, controlled by the Department of Justice rather than DHS, *see id.*, and one that will take months, if not years, to complete—particularly in light of the current pandemic that is the basis for in this action—while Petitioners continue to suffer severe and irreparable harm exacerbated by that pandemic.

24. Even if meaningful administrative remedies were promptly available, Petitioners, as noncitizens challenging the lawfulness of their ongoing immigration detention, are not required to exhaust those remedies under 8 U.S.C. § 2241. *See Louisaire v. Muller*, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010); *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 180 (S.D.N.Y. 2009).

25. Moreover, the immigration agencies do not have jurisdiction to adjudicate the due process claims that Petitioners raise here. *See, e.g., Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538–39 (S.D.N.Y. 2014) (holding that an administrative appeal challenging classification under the mandatory detention statute would be futile because the BIA ““does not have jurisdiction

to adjudicate constitutional issues’’) (quoting *United States v. Gonzalez–Roque*, 301 F.3d 39, 48 (2d Cir. 2002)).

### STATEMENT OF FACTS

26. On March 11, 2020, the World Health Organization (“WHO”) declared COVID-19 a “global pandemic.”

27. At the time, there were more than 118,000 cases in 114 countries, and 4,291 people had died.<sup>2</sup> Merely two weeks later, there have been at least 458,927 cases identified in 172 countries and at least 20,807 people have died.<sup>3</sup>

28. Experts estimate that as many as 214 million people in the United States could be become infected, and as many as 1.7 million people could die.<sup>4</sup>

29. COVID-19 has already spread inside immigration detention centers, prisons, and jails—including the facilities where ICE is detaining Petitioners<sup>5</sup>—and experts predict mass

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<sup>2</sup> WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19, 11 March 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>3</sup> Center for Systems Science and Engineering, Johns Hopkins University, *Coronavirus COVID-19* (March 23, 2020), <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (statistics as of March 25 at 4:53 p.m.). This increase comes despite the fact that some jurisdictions, including New York, have redirected resources from testing and identifying cases to preventing the spread and treating patients, and at least 19 states (California, Connecticut, Delaware, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, Wisconsin, and West Virginia) have issued some type of statewide order restricting movement.

<sup>4</sup> Sheri Fink, *The Worst-Case Estimate for U.S. Coronavirus Deaths*, The New York Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

<sup>5</sup> Monsy Alvarado, *Handful of Guards in Self-Quarantine After Essex County Jail Officer Positive for Coronavirus*, NorthJersey.com (March 24, 2020), <https://www.northjersey.com/story/news/new->



contagion is only a matter of time. *See, e.g.,* Catherine E. Shoichet, *Doctors Warn of “Tinderbox Scenario” if Coronavirus Spreads in ICE Detention*, CNN (March 20, 2020) (quoting DHS doctors who said they are “gravely concerned” and urged the department to release a significant number of immigrant detainees “before it’s too late”);<sup>6</sup> Open Letter to ICE from Medical Professionals Regarding COVID-19<sup>7</sup> (noting that the global COVID-19 pandemic makes it “impossible to ensure that detainees will be in a ‘safe, secure and human environment,’ as ICE’s own National Detention standards state”), Rich Shapiro, *Coronavirus Could “Wreak Havoc” on U.S. Jails, Experts Warn*, NBC News (Mar. 12, 2020) (“An outbreak of the deadly virus inside the walls of a U.S. prison or jail is now a question of when, not if, according to health experts.”).<sup>8</sup>

30. Despite these widespread warnings, ICE remains woefully unprepared and incapable of taking necessary precautions to protect people in their custody at the county jails where they are detained—including the Bergen, Hudson, and Essex County jails where Petitioners are detained.

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jersey/2020/03/24/essex-county-jail-corrections-officer-tests-positive-coronavirus/2907930001/; Steve Janoski and Monsy Alvarado, *Bergen County Jail Goes on Lockdown After Immigration Detainee Tests Positive*, NorthJersey.com (March 24, 2020) <https://www.northjersey.com/story/news/coronavirus/2020/03/24/bergen-county-jail-lockdown-detainee-tests-positive-coronavirus/2910131001/>; Monsy Alvarado, *Coronavirus Outbreak Locks Down Hudson County Jail After Two Inmates Test Positive*, NorthJersey.com (March 22, 2020) <https://www.northjersey.com/story/news/coronavirus/2020/03/22/coronavirus-outbreak-locks-down-hudson-county-jail/2895687001/>; Chris Sheldon, *Medical Staffer at ICE Detention Center Tests Positive for Coronavirus*, NorthJersey.com (March 20, 2020) <https://www.nj.com/coronavirus/2020/03/medical-staffer-at-ice-detention-center-tests-positive-for-coronavirus.html>.

<sup>6</sup> <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>

<sup>7</sup> <https://nylpi.org/wp-content/uploads/2020/03/FINAL-LETTER-Open-Letter-to-ICE-From-Medical-Professionals-Regarding-COVID-19.pdf>

<sup>8</sup> <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>.

31. COVID-19 will be nearly impossible to contain now that it has reached the three jails where Petitioners are all detained because of the close proximity between people, rules and regulations that bar some basic disease prevention measures, and restrictions that prevent people from taking steps to protect themselves from infection, such as accessing hand sanitizer or gloves.

32. Indeed, the primary recommended way to avoid the spread of the virus—social isolation—is effectively impossible in a jail setting.

33. ICE's failure to recognize this inevitability and take adequate precautions, including releasing people, results in conditions that are akin to punishment and demonstrates a total disregard for the constitutional rights, well-being, and humanity of immigrant detainees, including Petitioners.

34. As people with chronic medical conditions, Petitioners are particularly unsafe in the jail environment, and ICE's inability to protect and failure to release them amounts to a life-threatening violation of their constitutional right to due process.

#### **Civil Detention During the Covid-19 Pandemic Amounts to Punishment**

35. New York and its surrounding areas have become one of the global epicenters of the outbreak.<sup>9</sup>

36. The three counties where the jails are located—Bergen, Essex, and Hudson counties—comprise one third of the confirmed cases of COVID-19 in New Jersey, with Bergen

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<sup>9</sup> Jesse McKinley, *New York City Region is Now an Epicenter of the Coronavirus Outbreak*, N.Y. Times, March 23, 2020, <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html>

County reporting 819 positive results, Essex reporting 381 positives, and Hudson 260.<sup>10</sup>

37. Domestically and internationally, governments and jail and prison staff have recognized the threat posed by COVID-19 and released detainees.<sup>11</sup>

38. In New Jersey, as many as 800 people held in criminal custody are set to be released from county jails throughout the state this week. Notably, people who have been deemed “low risk” in criminal custody at the very jails where Petitioners are detained are expected to be released,<sup>12</sup> yet people detained civilly by ICE in these same jails will not benefit from this decision.

39. In New York City, public officials, the jail oversight board, and even doctors working within the City’s Department of Correction have argued that the City’s jails are simply

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<sup>10</sup> New Jersey COVID-19 Dashboard,  
[https://www.state.nj.us/health/cd/topics/covid2019\\_dashboard.shtml](https://www.state.nj.us/health/cd/topics/covid2019_dashboard.shtml).

<sup>11</sup> See, e.g., Zusha Elinson and Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, The Wall Street Journal (March 22, 2020), <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600> (“Local governments across the U.S. [including in California, New York, Ohio, and Texas] are releasing thousands of inmates in an unprecedented effort to prevent a coronavirus outbreak in crowded jails and prisons.”); *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge*, Reuters (Mar. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5> (noting that Iran temporarily released more than 70,000 people from jails to curb the spread of coronavirus); See, e.g. Allen Kim, *Cities in the US Move to Lower Inmate Populations as Coronavirus Fears Grow*, CNN (Mar. 16, 2020), <https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-trnd/index.html>; Megan Cassidy, *Coronavirus: San Francisco, Contra Costa Prosecutors Join National Call for Jail Releases*, San Francisco Chronicle (Mar. 17, 2020) <https://www.sfchronicle.com/crime/article/Coronavirus-San-Francisco-Contra-Costa-15137291.php>.

<sup>12</sup> See Kathleen Hopkins, *Coronavirus in NJ: 809 Jail Inmates Eligible for Release*, Asbury Park Press (March 24, 2020) <https://www.app.com/story/news/2020/03/24/coronavirus-nj-809-jail-inmates-eligible-releases/2909541001/> (noting that 35 people detained in the Bergen County Jail “were in the process of being freed” and prosecutors did not object to 48 people set to be released from the Essex County Jail); Reena Rose Sibayan, *Low-Risk Inmates Released from Hudson County Jail Due to Coronavirus*, The Jersey Journal (March 24, 2020) <https://www.nj.com/galleries/IJK5BW3RHJFKBJPEXTNU56BMYQ/>.

unsafe and releasing people is the only humane option.<sup>13</sup> See, e.g., Jan Ransom and Alan Feuer, *‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, N.Y. Times (March 20, 2020)<sup>14</sup> (quoting Dr. Rachael Bedard, a geriatrician at Rikers Island, as saying “The only meaningful public health intervention here is to depopulate the jails dramatically”); Statement of New York City Board of Correction, March 17, 2020 (calling on the City to release people from criminal custody, prioritizing people over 50, those with underlying health conditions, detained for administrative reasons, and those who have been convicted and sentenced to one year or less).<sup>15</sup>



40. As authorities across the country take increasingly drastic measures to curb the spread of the disease, New Jersey, New York, and Connecticut have coordinated severe restrictions

<sup>13</sup> See Ross MacDonald (@RossMacDonaldMD), Twitter (March 18, 9:51 p.m.)

<https://twitter.com/RossMacDonaldMD/status/1240455796946800641> (Dr. MacDonald is the Chief Medical Officer for Correctional Health Services (“CHS”), which provides healthcare to New York City’s Department of Corrections).

<sup>14</sup> <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>

<sup>15</sup> New York City Board of Correction Calls for the 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>

on gatherings and recommended that individuals isolate from one another, closing schools and non-essential businesses.<sup>16</sup>

41. COVID-19 is already wreaking havoc in area jails and prisons, including those where Petitioners are detained. Each of the jails have reported confirmed cases: Two people detained in the Hudson County Jail have tested positive for COVID-19 and the jail is now on lockdown for 14 days<sup>17</sup>; days after it announced that a corrections officer tested positive for COVID-19, the Bergen County Jail reported that a person detained by ICE has also contracted the virus<sup>18</sup>; and a “superior officer” at the Essex County Jail has tested positive.<sup>19</sup>

42. Both detainees and employees of other areas jails have also tested positive for COVID-19, with at least 60 people on Rikers Island testing positive,<sup>20</sup> as well as a medical provider

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<sup>16</sup> E.g., Berkely Lovelace, Jr., *Coronavirus: NY, NJ, CT coordinate restrictions on restaurants, limit events to fewer than 50 people*, CNBC (Mar. 16, 2020), <https://www.cnn.com/2020/03/16/new-york-new-jersey-and-connecticut-agree-to-close-restaurants-limit-events-to-less-than-50-people.html>.

<sup>17</sup> Monsy Alvarado, *Coronavirus Outbreak Locks Down Hudson County Jail After Two Inmates Test Positive*, NorthJersey.com (March 22, 2020), <https://www.northjersey.com/story/news/coronavirus/2020/03/22/coronavirus-outbreak-locks-down-hudson-county-jail/2895687001/>.

<sup>18</sup> Steve Janoski and Monsy Alvarado, *Bergen County Jail Goes on Lockdown After Immigration Detainee Tests Positive*, NorthJersey.com (March 24, 2020), <https://www.northjersey.com/story/news/coronavirus/2020/03/24/bergen-county-jail-lockdown-detainee-tests-positive-coronavirus/2910131001/>; Monsey Alvarado, *Inmates Quarantined at Bergen County Jail After Officer Tests Positive for Coronavirus*, Northjersey.com (Mar. 22, 2020), <https://www.northjersey.com/story/news/new-jersey/2020/03/22/nj-coronavirus-15-inmates-quarantined-bergen-county-jail/2894762001/>.

<sup>19</sup> Monsy Alvarado, *Handful of Guards in Self-Quarantine After Essex County Jail Officer Positive for Coronavirus*, NorthJersey.com (March 24, 2020), <https://www.northjersey.com/story/news/new-jersey/2020/03/24/essex-county-jail-corrections-officer-tests-positive-coronavirus/2907930001/>.

<sup>20</sup> Josiah Bates, *‘We Feel Like All of Us Are Gonna Get Corona.’ Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons*, TIME (March 24, 2020).

at an ICE detention center in Elizabeth, New Jersey.<sup>21</sup> See also Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times (Mar. 16, 2020) (noting that “jails experience a daily influx of correctional staff, vendors, health care workers, educators and visitors — all of whom carry viral conditions at the prison back to their homes and communities and return the next day packing the germs from back home.”).

43. Recent outbreaks of communicable diseases in immigration detention facilities foreshadow the impact of COVID-19 inside these facilities: In 2019, a mumps outbreak across 57 immigration detention facilities throughout the country caused almost 900 cases of mumps overwhelmingly contracted inside the facilities<sup>22</sup> before the outbreak spread to surrounding communities.<sup>23</sup>

44. The nature of detention facilities themselves make exposure and spread of the virus particularly harmful. Dr. Jaimie Meyer, an expert on infectious diseases in the context of jails and

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<https://time.com/5808020/rikers-island-coronavirus/> (quoting a spokesperson for the officers union describing New York City jails as “the epicenter of the epicenter” of the COVID-19 pandemic)

<sup>21</sup> Chris Sheldon, *Medical Staffer at ICE Detention Center Tests Positive for Coronavirus*, NorthJersey.com (March 20, 2020) <https://www.nj.com/coronavirus/2020/03/medical-staffer-at-ice-detention-center-tests-positive-for-coronavirus.html>.

<sup>22</sup> See Leung J, Elson D, Sanders K, et al. *Notes from the Field: Mumps in Detention Facilities that House Detained Migrants—United States, September 2018–August 2019*. MMWR Morb Mortal Wkly, 749–750 (2019), <http://dx.doi.org/10.15585/mmwr.mm6834a4external> icon.

<sup>23</sup> See Terrence McDonald, *Bergen County Won’t Say if Mumps Outbreak Affects Only Immigrant Detainees*, Northjersey.com (June 13, 2019), <https://www.northjersey.com/story/news/bergen/2019/06/13/bergen-county-nj-wont-say-if-jail-mumps-outbreak-hit-only-ice-inmates/1448708001>. In addition, in 2019, thousands of individuals in 39 immigration detention centers across the country were exposed to chickenpox. See Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (June 14, 2020), [https://www.vice.com/en\\_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox](https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox).

prisons, recently submitted a declaration in this District noting that the risk of COVID-19 to people held in New York-area detention centers, including the Hudson, Bergen County, and Essex County jails, “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.”<sup>24</sup> Other experts in correctional services and infectious diseases predict the same.<sup>25</sup>

45. Two medical experts who work for DHS recently warned Congress of the “tinderbox scenario” as COVID-19 spreads to immigration detention centers and the resulting “imminent risk to the health and safety of immigrant detainees” and the public.<sup>26</sup> They recommend that ICE release people from immigration detention to protect those individuals as well as the broader community, and emphasize that because such a large number of detainees will be infected, “[a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community.”

46. The former head of ICE, John Sandweg, similarly stated that “shrinking the

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<sup>24</sup> Declaration of Dr. Jaimie Meyer, *Velesaca v. Wolf*, 20-cv-1803, ¶ 7 (AKH) (S.D.N.Y. Feb. 28, 2020), ECF 42 (“Meyer Decl.”)

<sup>25</sup> See Declaration of Dr. Homer Venters, *Frailhat v. U.S. Imm. and Customs Enforcement*, 19-cv-1546-JGB, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (“Venters Decl.”) at ¶ 12 (opining that “the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”); Declaration of Dr. Carlos Franco-Paredes, *id.* at ECF No. 81-12 (“Franco-Paredes Decl.”) (“Immigration detention centers in the U.S. are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARSCoV- 2, which causes COVID-19. Given the large population density of immigration detention centers and the ease of transmission of this viral pathogen, the attack rate inside these centers will take exponential proportions, consuming significant medical and financial resources.”).

<sup>26</sup> Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.



population [of ICE detainees] is exactly what he would do if he still led the agency, focusing first on releasing people over the age of 65 and those with compromised immune systems.”<sup>27</sup>

47. It will be nearly impossible to prevent widespread infections inside the Hudson, Bergen, and Essex County jails now that the virus is in the facilities because detainees live, sleep, and use the bathroom in close proximity with others, and because “[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.”<sup>28</sup>

48. Similarly, it is impossible for people, including Petitioners, to take steps to protect themselves from infection, such as washing his hands with soap or separating himself from other individuals.<sup>29</sup>

49. The Hudson, Bergen, and Essex County jails are “[p]articularly vulnerable” because county jails have fewer regulations for combating diseases than federal facilities and do not have space to isolate infected individuals in individual cells.<sup>30</sup>

50. The deplorable conditions of immigration detention at these facilities have been

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<sup>27</sup> Camilo Montoya-Galvez, *“Powder kegs”: Calls grow for ICE to release immigrants to avoid coronavirus outbreak*, CBS News (Mar. 19, 2020), <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>; *see also, e.g.*, Venters Decl. at ¶ 23 (“ICE must release all people with risk factors to prevent their serious illness and/or death.”).

<sup>28</sup> Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, the Marshall Project (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus> (describing, for example, limited access to hand sanitizer and other precautionary measures).

<sup>29</sup> Nicole Wetsman, *Prisons and Jails Are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

<sup>30</sup> Johnathan Hogan, *As Coronavirus Spreads, Jails and Prisons Are Particularly Vulnerable*, Post Register (Mar. 9, 2020), [https://www.postregister.com/news/crime\\_courts/as-coronavirus-spreads-jails-and-prisons-are-particularly-vulnerable/article\\_cf7c22ef-cb93-5a21-908f-644d7ae6c682.html](https://www.postregister.com/news/crime_courts/as-coronavirus-spreads-jails-and-prisons-are-particularly-vulnerable/article_cf7c22ef-cb93-5a21-908f-644d7ae6c682.html).



widely documented. *See, e.g.,* Office of the Inspector General (“OIG”), *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, OIG-19-47, 8-10 (June 3, 2019)<sup>31</sup> (describing an unannounced inspection of the Essex facility that found health risks including that “mold permeated all walls in the bathroom area” and inadequate personal hygiene supplies); Human Rights First, *Ailing Justice: New Jersey: Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention* (Feb. 2018)<sup>32</sup> (identifying problems with access to water and attorney-client meeting space at Essex and inadequate medical care at Hudson); OIG, *Concerns about ICE Detainee Treatment and Care at Detention Facilities*, OIG-18-32, 3 (Dec. 11, 2017)<sup>33</sup> (describing an unannounced inspection of Hudson County Jail that found conditions of confinement that “undermine the protection of the detainees’ rights, their humane treatment, and the provision of a safe and healthy environment.”); *Detained and Denied: Healthcare Access in Immigration Detention*, New York Lawyers for the Public Interest (NYLPI) (2017)<sup>34</sup> (detailing serious deficiencies in the medical care provided to immigration detainees in New-York-area facilities). Hudson and Bergen County Jails are also chronically overcrowded. *See Behind Bard in the Empire State: An Assessment of the Immigration Detention of New Yorkers*, 12 (2019).<sup>35</sup>

51. The DHS OIG even concluded in a 2019 report that ICE “does not adequately hold

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<sup>31</sup> <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>

<sup>32</sup> <https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf>.

<sup>33</sup> <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

<sup>34</sup> [https://nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report\\_2017.pdf](https://nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report_2017.pdf).

<sup>35</sup> <https://dl1jikt90t87hr.cloudfront.net/323/wp-content/uploads/sites/2/2019/03/State-of-Immigration-Detention-of-NYers-v5.pdf>.

detention facility contractors accountable for not meeting performance standards,” “issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards,” and “does not adequately share information about ICE detention contracts with key officials.”<sup>36</sup>

52. Moreover, ICE has routinely failed to remedy inhumane conditions because, according to the OIG, “ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them, which further diminishes the usefulness of inspections.”<sup>37</sup>

53. NY-area immigration detention centers specifically are “dangerously under-equipped and ill-prepared to prevent and manage a COVID-19 outbreak, which would result in severe harm to detained individuals, jail and prison staff, and the broader community.” Meyer Decl. at ¶¶ 26-27. These facilities’ past record on addressing individuals’ serious health needs and emergency care shows that the facilities are not prepared to “identify, monitor, and treat a COVID-19 epidemic.” *Id.* at ¶¶ 33-34. Reducing the number of people in detention is critical to mitigating risk for those inside detention and in the surrounding communities. *Id.* at ¶ 37.

54. Conditions inside the county jails have already deteriorated significantly, as detainees do not have access to hand sanitizer or gloves and limited access to soap. In the last week, detainees at the Hudson County Jail have been limited to how often they are allowed to flush

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<sup>36</sup> See OIG, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

<sup>37</sup> See *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, Office of the Inspector General, 1 (June 26, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

the toilet.

55. Further, the county jails are not following—and cannot follow—proper social distancing measures to ensure the virus does not spread among detainees, as the facilities are housing multiple people per cell. Moreover, while all three jails have severely limited the number of hours per day people may be outside their cells, during those times, people are sharing common spaces – including recreation areas, shower and telephones – without intermittent cleaning of surfaces, further encouraging spread of the virus.

56. Additionally, the jails are not responding to medical complaints. Detainees who request medical attention are largely ignored. Detainees who are visibly sick are not being isolated but rather are sharing cells and even soap with other detainees.

57. These conditions threaten the safety of detainees, like Petitioners, at the Hudson, Bergen, and Essex County jails. The conditions have deteriorated so significantly that detainees at Hudson County Jail and Essex County Jail, and possibly Bergen County Jail, have been on hunger strike.<sup>38</sup> People in detention have little to no reliable information about developments in the pandemic, and people report that officers threaten violence—even showing guns—in response to requests for information or to be taken to medical. Such conditions severely compromise the safety of detainees like Petitioners, particularly if or when corrections officers and other jail staff become sick or refuse to come to work.

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<sup>38</sup> Joe Atmonavage, *ICE Detainees Go on Hunger Strike in N.J. Amid Coronavirus Fears, Lawyers Say*, Newjersey.com (Mar. 19, 2020) <https://www.nj.com/coronavirus/2020/03/we-would-rather-die-on-the-outside-than-in-here-ice-detainees-go-on-hunger-strike-in-nj-amid-coronavirus-fears-lawyers-say.html> (reporting that people held at Hudson County Jail have not being given soap, conditions are unsanitary, and officials have kept them on lockdown for up to 24 hours at a time)

58. Nonetheless, ICE continues to arrest and detain people around the country, further putting people in immigration detention at risk. *See* Richard Hall, *Coronavirus: ICE Crackdown Stokes Fears for Safety of Undocumented Immigrants During Pandemic*, Independent (Mar. 15, 2020) (noting that “[i]n New York, immigration advocates have noted a marked increase in ICE activity in recent months, which has not slowed as the coronavirus outbreak has worsened.”).<sup>39</sup>

59. Simultaneously, Petitioners, and other people detained at Hudson, Bergen, and Essex County jails, have lost the ability to communicate with the outside world, as the jails have cancelled all in-person visits for family members—including non-contact visits—and heavily-restricted attorney visitation.<sup>40</sup> At Hudson County Jail, attorneys and families are now dependent on a video teleconferencing system to communicate with detainees, a system that malfunctions frequently and is at best unreliable. Even so, these limited teleconferencing systems are not available at Bergen County Jail or Essex County Jail at all. At those facilities, attorneys cannot even reliably contact people they represent. Such severe limitations on access to counsel significantly impede the ability of detainees, including Petitioners, to prepare for court hearings that might advance their case toward a resolution.

60. Despite repeated requests by immigrant detainees, family members, advocates, and lawyers, neither ICE’s NY Field Office nor Hudson or Bergen County Jails where Petitioners are

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<sup>39</sup> On March 18, 2020, ICE announced it would “temporarily adjust” its enforcement practices during the COVID-19 outbreak, but declined to say it would stop arresting people altogether. *See* Rebecca Klar, *ICE Pausing Most Enforcement During Coronavirus Crisis*, The Hill (Mar. 18, 2020), <https://thehill.com/latino/488362-ice-pausing-most-immigration-enforcement-during-coronavirus-crisis>.

<sup>40</sup> For example, the Hudson County Jail says that visitation is limited to “extreme need” consisting of “any event that is life concerning and would require direct communication such as birth, death, serious illness or injury.”

detained have released detailed plans about how they will protect those in custody from Coronavirus.<sup>41</sup>

**Petitioners’ Ongoing Detention During the COVID-19 Pandemic is Particularly Egregious**

61. Due to their age and/or medical conditions and compromised health, Petitioners are at heightened risk of serious complications if they contract COVID-19. The Centers for Disease Control (“CDC”) has identified that people, such as Petitioners, with advanced age or chronic medical conditions “are at higher risk of getting very sick from this illness.”<sup>42</sup> According to the World Health Organization, “persons with pre-existing medical conditions [like Petitioners] . . . appear to develop serious illness more often than others.”<sup>43</sup>

62. People with heart disease and other cardiovascular diseases, like Mr. Martinez, are

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<sup>41</sup> ICE issued guidance, which is itself insufficient, *see* Venters Decl. ¶¶ 14-20, but those guidelines have not been implemented at the Hudson, Bergen, or Essex County jails. The Essex County Jail issued its own limited guidance regarding COVID-19, but, even assuming that they can or will be applied, those protocols are similarly inadequate as they do not contain procedures for proactively identifying or protecting at-risk groups, testing measures, or other basic infection controls (e.g., access to sanitizer). *See id.* Recently, in response to a similar petition filed in the Southern District of New York for a petitioner detained in a different NY ICE detention facility, the Orange County Jail, Judge Lewis J. Liman issued ordered the government to address 12 separate topics, including whether access to medical care and equipment is available at the jail and whether certain protective measures are in place, including social distancing and unrestricted access to soap and water. *See Aguilar Flores v. Decker*, No. 20-cv-2422, ECF No. 6 (LJL) (S.D.N.Y. Mar. 23, 2020) (order).

<sup>42</sup> *See People at Risk for Serious Illness from COVID-19*, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions — like heart disease, lung disease and diabetes, for example — seem to be at higher risk of developing serious COVID-19 illness.”) (hereinafter, “CDC Risk Factors”).

<sup>43</sup> *Q&A on Coronaviruses (COVID-19)*, World Health Organization (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

at a heightened risk of developing severe complications and dying from contracting COVID-19. Based on a study of COVID-19 patients in Wuhan, China, cardiovascular disease was, along with advanced age, first among all comorbidities as an “independent prognostic factor[.]” for COVID-19-related death, with up to 65.3% of hospitalized patients suffering with cardiovascular or cerebrovascular diseases.<sup>44</sup> Other studies report a 10% fatality rate for COVID-19 patients with cardiovascular complications.<sup>45</sup> Moreover, in prior coronaviruses (*e.g.*, SARS) with a similar patterns of comorbidity, cardiovascular disease increased the risk of death twelvefold.<sup>46</sup>

63. Mr. Martinez, a 56-year-old father and lawful permanent resident (“LPR”) since 1993, suffers from a severe heart disease, compounded by his advanced age. In 2014, he was diagnosed with congestive heart failure, severe aortic valvular insufficiency, and acute systolic failure, requiring immediate heart valve replacement surgery and almost a month of intensive care. Though Mr. Martinez requires ongoing monitoring by a cardiologist and was advised to get a pacemaker immediately before he was detained by ICE, ICE did not provide cardiological attention or care for over six months after detaining him. Mr. Martinez often experiences exhaustion and shortness of breath, telltale signs of an exacerbated heart condition that subject him to severe complications if he was to contract COVID-19.

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<sup>44</sup> Xianxian Zhao, et al., *Incidence, clinical characteristics and prognostic factors of patients with COVID-19: a systematic review and meta-analysis*, (Mar. 17, 2020) (under peer review), <https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.full.pdf+html>.

<sup>45</sup> See *What heart patients should know about coronavirus*, American Heart Association News (Mar. 18, 2020), <https://www.heart.org/en/news/2020/02/27/what-heart-patients-should-know-about-coronavirus>.

<sup>46</sup> Kevin Clerkin et al., *COVID-19 and Cardiovascular Disease* at 5 (Mar. 20, 2020) (under peer review), <https://www.ahajournals.org/doi/pdf/10.1161/CIRCULATIONAHA.120.046941>.

64. Similarly, people with diabetes or pre-diabetes, like Mr. Mazariegos, Mr. Picazo, and Mr. Hernandez, are at a heightened risk of severe illness or death from contracting COVID-19. Diabetes is a chronic illness that, without proper treatment, can affect many major organs, including the heart, blood vessels, eyes, and kidneys.<sup>47</sup> The CDC has specifically identified people with diabetes as classes of persons who are likely to suffer from severe and possibly fatal complications if they were to contract COVID-19.<sup>48</sup> In addition, pre-diabetes, *i.e.*, blood sugar levels that are higher than normal, makes it more difficult for the immune system to launch a proper immune response to viral respiratory infections.<sup>49</sup>

65. In Italy, “[d]iabetes was the second most common condition among COVID-19 patients who died: 35.5% had the illness.”<sup>50</sup> In addition, “[t]he condition may make COVID-19 worse because some viruses thrive on higher blood glucose levels, and people with diabetes also have compromised immune systems”<sup>51</sup> Moreover, as the American Diabetes Association warns,

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<sup>48</sup> See *supra* n.42, CDC Risk Factors; see also *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, The Lancet (Mar. 11, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that people with diabetes had much higher rates of serious complications and death than people without diabetes).

<sup>49</sup> *What happens when a person with prediabetes get a viral infection? New study provides in-depth look*, Stanford Medicine (May 29, 2019), <https://scopeblog.stanford.edu/2019/05/29/what-happens-when-a-person-with-prediabetes-get-a-viral-infection-new-study-provides-in-depth-look/> (discussing Zhou, W., Sailani, M.R., Contrepois, K. et al. Longitudinal multi-omics of host–microbe dynamics in prediabetes. *Nature* 569, 663–671 (2019), <https://doi.org/10.1038/s41586-019-1236-x>).

<sup>50</sup> *10 Common Health Conditions that Increase Risk of Death from the Coronavirus, including Diabetes and Heart Disease*, Business Insider, <https://www.businessinsider.com/hypertension-diabetes-conditions-that-make-coronavirus-more-deadly-2020-3>.

<sup>51</sup> *Id.*

“[h]aving heart disease or other complications in addition to diabetes increases the chance of getting seriously ill from COVID-19.”<sup>52</sup>

66. Ms. Mazariegos, a 44-year-old who has lived in the United States for almost eighteen years, is diagnosed with high blood pressure<sup>53</sup> and pre-diabetes. Those dual diagnoses make Mr. Mazariegos particularly vulnerable to COVID-19 and significantly more likely to become seriously ill if he develops coronavirus.

67. Mr. Mazariegos’ health has also been threatened due to lockdowns at the Hudson County Jail in response to the COVID-19 outbreak. As a consequence of the altered schedule, his meals have become irregular, which has had the effect of his blood sugar precipitously spiking. Such dramatic effects on his blood sugar put him at risk of developing diabetes, which is a risk factor for COVID-19 in itself.

68. Mr. Picazo, a 40-year-old father of three young U.S. citizen daughters and a longtime resident of the United States, has been diagnosed with diabetes and morbid obesity.<sup>54</sup> Due to these comorbid conditions, Mr. Picazo is at a much higher risk of serious illness or death than the general population should he be exposed to COVID-19.

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<sup>52</sup> American Diabetes Association, COVID-19 (Coronavirus), <https://www.diabetes.org/coronavirus-covid-19>.

<sup>53</sup> Hypertension, or high blood pressure, is also one of the risk factors that have been identified as causing serious illness or death from COVID-19. *See supra* ¶ 62; *see also* Web MD, Coronavirus and High Blood Pressure: What’s the Link?, <https://www.webmd.com/lung/coronavirus-high-blood-pressure#1> (“Data from China and Italy -- countries hit early by the virus -- show higher risk of COVID-19 infections and complications in people with high blood pressure.”).

<sup>54</sup> *Supra* n.42, CDC Risk Factors (“People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease might also be at risk”).



69. Mr. Hernandez, a New York resident for over thirteen years and the father to three U.S. citizen children, also suffers from diabetes. Though he takes medication for his condition, he suffers from diabetes-related complications, including impaired vision. Diabetes places Mr. Hernandez at severe risk of complications or even death from COVID-19.

70. Mr. Hernandez has also recently developed a cough and chills while in detention and asked to see a doctor, but was told that he could not see a doctor without filing a written request for medical attention. He promptly submitted that request but has still not seen a doctor, and remains housed with another individual, who also has a cough.

71. People with chronic lung disease, asthma, or other respiratory complications, like Mr. Basank, Mr. Barrera, Mr. Benitez, Ms. Legall, Mr. Menendez, and Mr. Pena, are also at a heightened risk of severe illness or death from contracting COVID-19. According to the CDC, people with chronic lung disease or moderate to severe asthma are at high-risk for severe illness from COVID-19.<sup>55</sup>

72. Likewise, “[p]atients with existing illnesses that cause breathlessness, wheezing or lung problems run a higher risk of developing severe cases of COVID-19 infection due to the new coronavirus,” and “[p]atients with shortness of breath [are] 3.7 times more likely to have severe COVID-19 disease and 6.6 times more likely to need intensive care than those without.”<sup>56</sup>

73. Further, smoking causes many health issues that increase the risk for developing

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<sup>55</sup> See *supra* n.42, CDC Risk Factors.

<sup>56</sup> Kate Kelland, *Patients with breathing, lung problems at highest risk with COVID-19 - study*, Reuters (Mar. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-breathing/patients-with-breathing-lung-problems-at-highest-risk-with-covid-19-study-idUSKBN2153ED>.

serious illness once a person contracts COVID-19.<sup>57</sup> Indeed, among Chinese patients diagnosed with COVID-19 associated pneumonia, the disease progression (including to death) was 14 times higher for patients with a history of smoking.<sup>58</sup>

74. Mr. Basank, a 54-year-old father of two U.S. citizen children and a U.S. resident since 1985, is at higher risk than the general population for serious illness arising from COVID-19 due to his advanced age and long history of smoking. Mr. Basank reports having smoked multiple cigarettes daily for over 20 years, making him particularly susceptible to severe complications as a result of COVID-19.

75. Mr. Barrera, a 39-year-old man who has lived in the United States for 16 years and is the father to a U.S. citizen daughter, has suffered with respiratory complications for year. He gets winded frequently and feels like he is “suffocating” when he climbs a flight of stairs. Mr. Barrera also suffers from colorectal bleeding. Mr. Barrera is also obese, which puts him at a higher risk if he contracts COVID-19. One study found almost two-thirds of those who become seriously

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<sup>57</sup> Tanya Lewis, *Smoking or Vaping May Increase the Risk of a Severe Coronavirus Infection*, Scientific American (Mar. 17, 2020), (“All these things make me believe that we are going to have more severe cases [of COVID-19]—especially [in] people who are [long-term] smokers or vapers,”); Gina Yu, *How Smoking, Vaping, and Drug Use Might Increase Risks from COVID-19*, CNN (Mar. 20, 2020) (“Because Covid-19 attacks the lungs, those who smoke tobacco or marijuana or who vape may be especially threatened.”).

<sup>58</sup> Stanton A. Glantz, PhD, *Reduce Your Risk of Serious Lung Disease Caused by Corona Virus by Quitting Smoking And Vaping*. UCSF Center for Tobacco Control Research and Education (Mar. 6, 2020), <https://tobacco.ucsf.edu/reduce-your-risk-serious-lung-disease-caused-corona-virus-quitting-smoking-and-vaping>.

ill from COVID-19 are overweight or obese.<sup>59</sup> As an individual with a history of breathing, obesity, and other health problems, Mr. Barrera is at a much higher risk of serious illness or death than the general population from COVID-19.

76. Mr. Benitez, a 44-year-old husband and father to three young children and devout Christian, has pulmonary issues that make him increasingly vulnerable to contracting COVID-19 and suffering serious or fatal illness as a result. In 2017, Mr. Benitez suffered from severe pneumonia and was hospitalized for approximately 25 days.

77. Ms. Legall, a 33-year old long-time resident, mother, and wife, suffers from asthma and respiratory problems. Ms. Legall has suffered from asthma symptoms while in detention and is deeply anxious about her health and safety.

78. Mr. Menendez, a 31-year-old father of two U.S. citizen children, also suffers from chronic asthma that places him at high risk of serious illness if he were to contract COVID-19.

79. Mr. Pena, a 36-year-old who has been an LPR since he arrived in the United States at the age of nine and father to a 16-year-old U.S. citizen daughter, suffers from chronic asthma as well as chronic obstructive pulmonary disease (“COPD”) for which he has received inhalers and other lifelong medical treatment. According to the Mayo Clinic, COPD is “a chronic inflammatory lung disease that causes obstructed airflow from the lungs. Symptoms include breathing difficulty.” COPD is generally accompanied by significant lung damage and respiratory problems, and respiratory distress is the most common cause of death from coronavirus. Mr. Pena’s health

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<sup>59</sup> Laura Donnelly, *Obese or Overweight Coronavirus Patients Most in Need of Critical Care*, The Telegraph (Mar. 23, 2020), <https://www.telegraph.co.uk/news/2020/03/23/obese-overweight-coronavirus-patients-need-critical-care/>.

conditions therefore make him extremely vulnerable to serious injury or death as a result of the COVID-19 pandemic.

80. Therefore, COVID-19's spread to the county jails where Petitioners are detained poses a severe and deadly threat to Petitioners, all of whom suffer from chronic illnesses and are therefore at a much higher risk of serious illness or death from COVID-19 than the general population.

**ICE'S Failure to Release Petitioners During the COVID-19 Pandemic Violates Their Constitutional Rights**

81. ICE often releases people, such as Petitioners, who have significant medical or humanitarian needs pursuant to its clear authority under 8 C.F.R. § 236.1(c)(8), regardless of the detention statute under which the individuals are held.

82. Upon learning of the dangerous results if they develop Coronavirus, Petitioners filed release requests between March 12, 2020, and March 24, 2020, asking that ICE exercise its parole authority under 8 C.F.R. § 215.5(b) to immediately release them on recognizance or reasonable conditions of release because of the urgent risks posed by COVID-19.

83. To date, ICE has not provided an answer to any of Petitioners' release requests.

84. Petitioners also submitted their requests to the Assistant U.S. Attorneys who handle immigration cases in the Southern District of New York on March 16, March 20, and March 24, 2020.

85. On March 18, 2020, the Assistant U.S. Attorneys responded that they had no substantive answer or timeframe for ICE's response to certain Petitioners' release requests. On March 20, 2020, the Assistant U.S. Attorneys responded that they had no information and

suggested that Petitioners reach out directly to ICE.

86. Despite these repeated requests and the heightened risk to Petitioners’ health and well-being, and the rapidly deteriorating situation related to the COVID-19 pandemic, ICE has continued to detain Petitioners.

## LEGAL FRAMEWORK

### ***Punitive Conditions of Confinement, Including Failure to Provide Adequate Medical Care, for Civil Detainees Violate the U.S. Constitution***

87. The U.S. Constitution prohibits pretrial and civil detainees from being detained in punitive conditions of confinement because the purpose of such detention is allegedly not punitive. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). As a result, these detainees, including immigrant detainees, “may not be punished in any manner—neither cruelly and unusually nor otherwise.” *Id.* (explaining that protections for pretrial detainees, who may not be punished at all, are broader than those for convicted prisoners, for whom the Eighth Amendment provides protection against cruel and unusual punishment).

88. Accordingly, the due process rights of civil detainees such as immigrant detainees “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see also Darnell*, 849 F.3d at 33 (noting that in the Second Circuit, due process conditions of confinement jurisprudence “generally mirrors” Eighth Amendment jurisprudence).

89. Because the rights of these detainees are broader than those guaranteed under the Eighth Amendment, the Due Process Clause of the Fifth Amendment governs the claims of immigrant detainees who challenge punitive or otherwise unsafe or inhumane conditions. *Charles v. Orange County*, 925 F.3d 73, 82; *Darnell*, 849 F.3d 17, 29; *see also DeShaney v. Winnebago*

*Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State . . . so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”).

90. Immigrant detainees establish a due process violation for unconstitutional conditions of confinement by showing that a government official “knew, or should have known” of a risk to a condition of confinement that “posed an excessive risk to health.” *Darnell*, 849 at 35; *Charles*, 925 F.3d at 87 (noting that due process violations can be proven, in part, by showing that government officials either “*knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health” or “*should have known*”) (emphasis in original); *see also Darnell* at 29 (describing the elements of a due process conditions of confinement claim as a subjective prong—that an officer acted with “at least deliberate indifference” and an objective prong—towards conditions that “pose an unreasonable risk of serious damage to [one’s] health”); *see also Charles*, 925 F.3d at 86 (“[T]hose in civil detention . . . are also afforded a right to be free from deliberate indifference to their serious medical needs.”).

91. Where a risk is obvious, such as during a contagious disease outbreak, it is fair for a factfinder to assume that the government official was aware of the risk. *See, e.g., Charles*, 925 F.3d 73, 87 (“A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (expressing “great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems” where those

authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” such as “exposure of inmates to a serious, communicable disease”).

92. When considering whether a condition amounts to a serious medical need or poses an excessive risk to health, one of the key identifiers for courts in the Second Circuit is “a condition of urgency such as one that may produce death, degeneration, or extreme pain.” *Charles*, 925 F.3d at 86; *see also id.* at 86 (listing factors that indicate a serious medical need to include “whether a reasonable doctor or patient would find the injury important and worthy of treatment, whether the medical condition significantly affects an individual’s daily activities, and whether the illness or injury inflicts chronic and substantial pain).

93. An immigrant detainee need not demonstrate that “they actually suffered from serious injuries” to show a due process violation. *Darnell*, 849 F.3d at 31; *Helling*, 509 U.S. at 33. Rather showing conditions that “pose an unreasonable risk of serious damage to [one’s] future health” may be sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35).

94. Further, immigrant detainees may establish a constitutional violation through “mutually enforcing” aggregate conditions where the existence of one condition, such as unsanitary conditions or a communicable disease outbreak, exacerbates an “identifiable human need,” such as food or medical care. *See Darnell*, 849 F.3d at 30-31.

***Immediate Relief—in the Form of Release—is Warranted Pursuant to Mapp v. Reno While the Petitioners’ Habeas Petitions are Pending***

95. This Court has “inherent authority to grant bail to habeas petitioners” pending the

adjudication of petitions. *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001); *see also Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978) (“A district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody.”); *Elkimya v. Dep’t of Homeland Sec.*, 484 F.3d 151, 153-54 (2d Cir. 2007) (recognizing federal courts’ “inherent authority to admit to bail petitioners in immigration cases”) (quoting *Mapp*, 241 F.3d at 226); *cf. Vacchio v. Ashcroft*, 404 F.3d 663, 673 (2d Cir. 2005) (explaining that a prior panel released petitioner on bail under *Mapp* during the pendency of the appeal of his habeas petition); *D’Alessandro v. Mukasey*, No. 08-cv-914 (RJA) (VEB), 2009 WL 799957, at \*4 (W.D.N.Y. Mar. 25, 2009) (finding release under conditions of supervision appropriate where the petitioner suffered “a number of serious, potentially debilitating health problems,” which continued to deteriorate in ICE detention).

96. Granting release under *Mapp* is appropriate where (1) “the habeas petition raise[s] substantial claims,” and 2) “extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective.” *Mapp*, 241 F.3d at 229 (internal quotation marks and citations omitted).

97. When assessing whether substantial claims exist, the district court must assess whether “the [habeas] petition present merits that are more than slightly in petitioner’s favor.” *Richard v. Abrams*, 732 F. Supp. 24, 25 (S.D.N.Y. 1990) (citing *Rado v. Manson*, 435 F. Supp. 349, 350–51 (D. Conn. 1977)).

98. The “extraordinary circumstances” element is satisfied where the petitioner, like here, alleges serious medical concerns. *See, e.g., Umana Jovel v. Decker*, 20-cv-00308-GBD-SN, Dkt. No. 26 at 7–9, Report and Recommendation (S.D.N.Y. March 24, 2020) (finding that court



has authority under *Mapp* to release an individual detained pursuant to 8 U.S.C. § 1226(c), the mandatory detention statute, and finding “extraordinary circumstances” merited such relief where the petitioner “has raised serious concerns that his health condition, which may increase his vulnerability to COVID-19, would render meaningless any bond hearing that will be held once the immigration courts have returned to their normal operating procedures.”); *D'Alessandro*, 2009 WL 799957, at \*4 (noting that the petitioner’s “chronic and debilitating health conditions, while not ‘emergent,’ . . . certainly constitute exceptional circumstances setting his case apart and making bail necessary to make the habeas remedy effective, and to prevent further deterioration of his health.”); *see also S.N.C. v. Sessions*, No. 18-cv-7680 (LGS), 2018 WL 6175902, at \*6 (S.D.N.Y. Nov. 26, 2018) (finding extraordinary circumstances and ordering release where the petitioner was suffering with Post Traumatic Stress Disorder, “a condition that the detention environment aggravates,” as well as depression and physical pain in ICE custody); *Kiaddii v. Sessions*, 18-cv-1584, at \*3 (Dkt. No. 9) (S.D.N.Y. Mar. 2, 2018) (finding extraordinary circumstances under *Mapp* and ordering release where the petitioner presented evidence that “her health has deteriorated while in ICE’s custody”); *cf. United States v. Mett*, 41 F.3d 1281, 1282 n.4 (9th Cir. 1994) (in the criminal prisoner context, noting that extraordinary circumstances warranting bail for habeas petitioners “include a serious deterioration of health while incarcerated”).

99. The COVID-19 pandemic unquestionably presents extraordinary circumstances warranting release. This week alone, a magistrate judge in this District determined that release was warranted under *Mapp* in light of the COVID-19 pandemic, *see Umana Jovel*, 20-cv-00308-GBD-SN, Dkt. No. 26 at 7–9, and the U.S. Court of appeals for the Ninth Circuit granted release to a person in immigration detention, ordering that “in light of the rapidly escalating public health

crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petition be immediately released from detention . . . .” *Xochihua-Jaimes v. Barr*, No. 18-cv-17460 (9th Cir. Mar. 23, 2020) (order). Last week in this District, Judge Nathan ordered a federal criminal pre-trial detainee’s release on conditions in light of COVID-19. *See United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y March 19, 2020) (explaining that “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent” and that “inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop”). Around the country, other courts have reached similar conclusions. *See, e.g., In the Matter of the Extradition of Alejandro Toledo Manrique*, 19-mj-71055, 2020 WL 1307109 (N.D. Cal March 19, 2020) (“The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”); *United States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 (D. Nev. March 17, 2020) (“There is a pandemic that poses a direct risk that is far greater if [a new person is admitted to the facility]. The risk runs in two directions—to [the detainee] and to the institution.”).

### **CLAIMS FOR RELIEF**

#### **FIRST CAUSE OF ACTION: RESPONDENTS’ FAILURE TO ADEQUATELY PROTECT PETITIONERS IN LIGHT OF THE COVID-19 OUTBREAK VIOLATES DUE PROCESS**

100. Petitioners repeat and re-allege paragraphs 1-99 of this petition.

101. The Due Process Clauses guarantees immigrant detainees the right to be detained in a safe situation, free from punitive conditions of confinement. *See* U.S. Const. Amend V, XIV. The government violates that guarantee where a widespread outbreak of a contagious disease subjects detainees to inhumane conditions without adequate protection.

102. Because of the conditions in the county jails that serve as immigration detention facilities, Petitioners are not able to take steps to protect themselves—such as social distancing, using hand sanitizer, or washing their hands regularly—and the government has not provided adequate protections. Since COVID-19 has already reached the county jails where Petitioners are detained, the already deplorable conditions will be exacerbated, and the ability to protect oneself will become even more impossible.

103. The government's failure to adequately protect Petitioners from these punitive conditions, or release them from the conditions altogether, constitutes an egregious violation of Petitioners' due process rights.

**SECOND CAUSE OF ACTION:  
RESPONDENTS' FAILURE TO PROVIDE ADEQUATE MEDICAL CARE AND  
PROTECTION TO PETITIONERS AT HIGH RISK OF SERIOUS HARM FROM  
COVID-19 VIOLATES DUE PROCESS**

104. Petitioners repeat and re-allege paragraphs 1-99 of this petition.

105. The Due Process Clause guarantees immigrant detainees the right to be provided with adequate medical care. *See* U.S. Const. Amend V. The government violates that guarantee where they are unable to address serious medical needs during an outbreak of a contagious disease, and that contagion exacerbates the existing medical condition.

106. Petitioners' chronic conditions—including severe heart disease, chronic obstructive pulmonary disease, diabetes, and chronic asthma—place them at a heightened risk of contracting COVID-19 and suffering serious medical harm, or even death, as a result.

107. Because Respondents are aware that failing to adequately protect Petitioners could have tragic results and yet have not taken necessary or appropriate precautions, Respondents have

acted with deliberate indifference to Petitioners' serious medical needs in violation of the Due Process Clause.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays that this Court grant the following relief:

- 1) Assume jurisdiction over this matter;
- 2) Enjoin Respondents from moving the Petitioners from the New York City area while habeas proceedings are pending;
- 3) Order Respondents to immediately release Petitioners, under any appropriate conditions, to end the violations of their due process rights and resulting harm they are suffering, including the risk of severe illness or death upon being infected by COVID-19 in a jail setting;<sup>60</sup>
- 4) Order Respondents not to re-detain Petitioners pending the culmination of removal proceedings against him, including all administrative or judicial appeals;
- 5) Award Petitioners their costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, or other statute; and
- 6) Grant any other and further relief that this Court deems just and proper.

Dated: March 25, 2020  
Brooklyn, New York

Respectfully submitted,

/s/ Brooke Menschel  
Brooke Menschel, Esq.  
Mary (Van Houten) Harper, Esq.

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<sup>60</sup> If the Court determines that immediate release is not justified at this time, Petitioners respectfully requests that the Court conduct a bail hearing where Respondents must prove, by clear and convincing evidence, that Petitioners' ongoing detention is necessary and does not violate due process because Respondents have not acted with deliberate indifference towards their serious medical needs and risk of severe illness or death if exposed to COVID-19. *See Celestin v. Decker*, 17-Civ.-2419, Tr. at 13-14 (S.D.N.Y. Apr. 17, 2017) (bench decision) (Abrams, J.) (district court holding bond hearing for immigration habeas petitioner, noting that "[t]he federal courts have inherent authority to admit to bail individuals properly within their jurisdictions, including in the immigration context." (*quoting Mapp v. Reno*, 241 F.3d at 226)).

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