

APPENDIX A

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

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

On behalf of

VENUS WILLIAMS, et al.,

Petitioners,

-against-

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

Respondents.

Index No. 451069-2020
SCID No. 30042-2020

BRIEF OF *AMICI CURIAE*
PHYSICIANS FOR HUMAN RIGHTS

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INTEREST OF AMICI CURIAE¹

Amici curiae are seven members affiliated with the international non-profit organization Physicians for Human Rights (“PHR”). As medical, scientific, public health and correctional health experts, *Amici* offer special assistance to the Court as they provide an expert perspective on the health risks and implications of this case.

PHR is focused on the protection of human rights through the core disciplines of science, medicine, and public health, both forensically and otherwise. Currently, PHR is working to ensure that individuals held in state custody, and particularly those at the highest risk of severe infection, are able to follow public health directives and guidelines regarding the COVID-19 pandemic. PHR has a substantial interest in the issues presented by this proceeding to protect those who are most vulnerable—older adults, those who are immunocompromised, those with chronic medical conditions, and pregnant women—by releasing them. These individuals are confined under conditions both conducive to coronavirus transmission and counter to the prevailing public health recommendations.

Established in 1986, PHR was founded by a group of dedicated physicians who, through meticulous, science-based and forensic documentation, sought to prevent and demand accountability for human rights violations.² PHR’s domestic advocacy focuses on, among other issues, health crises within the criminal justice system, including significant advocacy efforts to ensure that vulnerable individuals are protected by science-driven approaches to the novel challenge of mitigating the coronavirus outbreak.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

² *About Us | Our History*, Physicians for Human Rights (“PHR”), <https://phr.org/about/history/> (last visited Apr. 6, 2020).

Here, PHR similarly believes that its medical and public health perspective will aid the Court in understanding the medical science necessary to decide this case. For the reasons explained below, PHR urges the Court to grant the Legal Aid Society's petition to secure the release of certain older adults and those who suffer from chronic medical conditions or who are immunocompromised, for whom the risk of exposure can carry dire and potentially fatal consequences (the "Petitioners"). These are issues of utmost importance, not just for the parties in this case, who are especially vulnerable, but for the broader public interest in mitigating the spread of the novel coronavirus and curtailing the catastrophic effects of this unprecedented global pandemic.

Amici are the following:³

Dr. Ranit Mishori is a senior medical advisor at PHR, and Professor of family medicine at the Georgetown University School of Medicine, where she directs the department's Global Health Initiatives and Health Policy fellowship.

Dr. Allen Keller is Associate Professor of Medicine and Population Health at New York University Grossman School of Medicine and a PHR medical expert for nearly 30 years.

Josiah D. Rich, MD, MPH, a member of PHR's Advisory Council, is Professor of Medicine and Epidemiology at the Warren Alpert Medical School of Brown University, and a practicing Infectious Disease Specialist since 1994 at the Miriam Hospital Immunology Center providing clinical care for over 22 years.

Dr. Scott Allen is an expert medical advisor at PHR, and a Professor Emeritus of Medicine and former Associate Dean of Academic Affairs at the University of California, Riverside.

³ Full biographies of the amici are provided in the Affirmation of Tabitha P. Cohen.

Dr. Joseph Shin is Assistant Professor of Medicine at Weill Cornell Medicine and the Cornell Center for Health Equity, former medical director for the Weill Cornell Center for Human Rights and a medical expert for PHR for the past 10 years.

Dr. Altaf Saadi is a medical expert at PHR, board-certified neurologist at Massachusetts General Hospital (MGH), Instructor of Neurology at Harvard Medical School, and Associate Director of the MGH Asylum Clinic.

Dr. Kim Griswold, MD, MPH is an expert member of PHR's Asylum Network and Professor of Family Medicine, Psychiatry and Public Health and the Health Professions at the Jacobs School of Medicine and Biomedical Sciences.

PRELIMINARY STATEMENT

COVID-19 is a pandemic caused by the novel coronavirus, also called SAR-COV-2 (hereinafter, "coronavirus"), that has infected over 1.4 million individuals worldwide and claimed the lives of over 82,000. The United States has the most confirmed cases of any country in the world, and New York the highest infection rate of any state in the nation. New York City, in particular, is faced with over 76,000 cases of COVID-19, the disease caused by coronavirus, and over 4,000 deaths and counting. The epicenter of the pandemic in New York City, however, is the Rikers Island jail complex, which currently houses approximately 4,500 individuals and has an infection rate nine times higher than the rest of New York State. As of April 7, 2020, there were 693 confirmed cases at Rikers Island— 287 incarcerated people and 406 staff members—but due to a shortage of testing and new information about asymptomatic and presymptomatic transmission through "silent spreaders," that number is not only likely much higher, but growing exponentially by the day. COVID-19 has already claimed the life of a 53-

year-old man at Rikers Island, who was being kept at the jail on a technical parole violation.

And he will not be the last.

While all pre-trial detainees and individuals awaiting parole violation hearings at Rikers Island are susceptible to this highly contagious virus, there is a smaller number of older people, and those who are immunocompromised or suffering from chronic health conditions, who are particularly vulnerable to this disease, including the Petitioners. The global medical community is in agreement that older individuals and individuals with underlying conditions are, if infected with the novel coronavirus, most likely to become severely ill, require hospitalization and ventilator care, and be at the highest risk of death.

In sum, Rikers Island is currently experiencing a major outbreak of coronavirus, meaning that it is already too late to engage in the process of identifying, assessing, and managing those who have been exposed to prevent further transmission. Further, any efforts at containment instituted at this juncture, including preventive or social distancing measures, will be entirely insufficient and inadequate to mitigate the risk posed to those most vulnerable to falling fatally ill from the disease. This is particularly true given the crowded, unsanitary, carceral environment of Rikers Island, which has already faced highly-publicized struggles to provide bare minimum health services to those in its care under ordinary circumstances.

The novel coronavirus is an extraordinarily infectious virus and an effective response requires extraordinary measures. It is the medical opinion of *Amici* that the Petitioners must be released for their own safety, the safety of staff and other individuals being held on Rikers Island, and the safety of the general public.

ARGUMENT

I. COVID-19 IS A WORLDWIDE PANDEMIC THAT POSES ESPECIALLY GRAVE DANGERS FOR OLDER PEOPLE OR PEOPLE WITH UNDERLYING MEDICAL CONDITIONS

COVID-19 is a disease caused by a novel coronavirus strain of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) that was first detected in December 2019 and has since become a global pandemic.⁴ The highly contagious virus is spread primarily through two means: respiratory droplets that are projected directly onto those within approximately six feet of an infected person who coughs, sneezes or speaks, or transmission via frequently touched surfaces.⁵ Recent evidence also suggests that if an infected person coughs or sneezes, the virus may remain suspended in the air for up to several hours.⁶

The novel coronavirus has several key characteristics that have led to the current pandemic. First, it can survive on certain surfaces for up to 72 hours, posing a significant risk of transmission on frequently touched surfaces that are not properly sanitized. And second, experiences of the disease vary – some who contract it may manifest very mild symptoms, or no symptoms at all, while for others, particularly those in certain high-risk categories, it can prove fatal. Individuals unaware that they are infected are at risk of unwittingly transmitting the virus.

⁴ Kenji Mizumoto and Gerardo Chowell, *Estimating Risk of Death from 2019 Novel Coronavirus Disease, China, January–February 2020*, 26 *Emerging Infectious Diseases*, no. 6 (forthcoming June 2020); *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, World Health Org. ("WHO") (Mar. 11, 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁵ *How COVID-19 Spreads*, Ctrs. for Disease Control and Prevention ("CDC"), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020).

⁶ *Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations*, WHO (Mar. 29, 2020), <https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations>.

In fact, research demonstrates that asymptomatic and presymptomatic transmission by “silent spreaders” accounts for 25 percent of cases.⁷

As of April 8, 2020, over 1.4 million people have been infected with coronavirus.⁸ Over 82,000 people have died globally.⁹ In the United States, the disease has proved unrelenting, with no slowdown or end in sight. The White House Coronavirus Task Force estimates over 200,000 Americans alone could ultimately lose their lives, with the projected number of deaths domestically jumping up to 2 million¹⁰ if mitigation efforts are not institutionalized nationwide. In New York City, the epicenter of the American COVID-19 crisis, over 700 individuals died in the last 24 hours alone.¹¹ And virus fatalities are not the only cause for concern. The explosion of numbers of seriously ill and hospitalized individuals has plunged many hospitals and public health systems into chaos, as health care professionals and facilities struggle to cope with a flood of patients far exceeding the system’s design and previous demand.

For the elderly and for people with underlying medical conditions, the prognosis is especially dire. The CDC defines two, often overlapping categories of individuals at heightened

⁷ Camilla Rothe et al., Correspondence, *Transmission of 2019-nCoV Infection from an Asymptomatic Contact in Germany*, 382 New Eng. J. Med. 970 (Mar. 5, 2020); *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (last visited Apr. 6, 2020); Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020*, CDC, 69 Morbidity & Mortality Wkly. Rep. (“MMWR”) (Apr. 1, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm>; Sam Whitehead, *CDC Director on Models For The Months To Come: ‘This Virus Is Going To Be With US,’* Nat’l Pub. Radio (Mar. 31, 2020), <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>.

⁸ Julia Hollingsworth, et al., *Coronavirus pandemic alters life as we know it*, CNN World (April 8, 2020), <https://www.cnn.com/world/live-news/coronavirus-pandemic-04-08-20/index.html>.

⁹ *Id.*

¹⁰ Rick Noack et al., *White House task force projects 100,000 to 240,000 deaths in U.S., even with mitigation efforts*, Washington Post (Apr. 1, 2020), <https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/>.

¹¹ *N.Y. Virus Deaths Hit New High, but Hospitalizations Slow*, N.Y. Times, <https://www.nytimes.com/2020/04/07/nyregion/coronavirus-new-york-update.html> (last updated Apr. 8, 2020).

risk for severe illness resulting from COVID-19 infection.¹² First, people over 60 are considered especially at risk, although ominously the risk of severe disease gradually increases with age beginning at 40 years old.¹³ Second, people with underlying medical conditions are at serious risk of complications related to COVID-19. This includes people who suffer from lung disease, asthma, heart conditions, high blood pressure, kidney or liver disease, HIV/AIDS, diabetes, or obesity, as well as people who are pregnant or immunocompromised.¹⁴ This immunocompromised category of vulnerable individuals also includes people with blood disorders, inherited metabolic disorders, neurological conditions, those undergoing cancer treatment, those who have undergone bone marrow or organ transplants, and any condition or treatment that weakens immune systems.¹⁵ To date, 95% of fatalities in Europe have been senior citizens, and 80% of fatalities have been individuals with chronic underlying conditions.¹⁶ Although one in five individuals worldwide who have been infected with coronavirus have become seriously ill,¹⁷ the rate of serious illness resulting from coronavirus for the elderly and immunocompromised is far greater—approximately 60% of individuals between 65 and 84 require hospitalization upon infection.¹⁸

¹² *Groups at Higher Risk for Severe Illness*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited Apr. 6, 2020).

¹³ Sandro Galea et al., *COVID-19: Public Health Experts Implore President Trump to Release People in Federal Prisons & ICE Detention Centers* (Mar. 27, 2020), <https://www.publichealthpublicsafety.org/>.

¹⁴ *Groups at Higher Risk for Severe Illness*, *supra* note 12; *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited Apr. 8, 2020).

¹⁵ *If you are at higher risk: How to reduce risk of infection and what to do if you get sick*, Harvard Health Publishing (Mar. 2020), <https://www.health.harvard.edu/diseases-and-conditions/if-you-are-at-higher-risk>.

¹⁶ *Over 95% of People Who Died of Coronavirus in Europe Were Over 60, Says WHO*, Time Mag., (Apr. 2, 2020), <https://time.com/5814330/who-europe-over-60/>.

¹⁷ *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, Interim guidance, WHO Reg'l Off. for Eur. (Mar. 15, 2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1.

¹⁸ *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020*, CDC, 69 MMWR 343 (Mar. 26, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w; *Older Adults*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Apr. 6, 2020).

II. COMBATTING THE RAPID SPREAD OF CORONAVIRUS AND THE RESULTING ILLNESS CAUSED BY COVID-19 REQUIRES EXTRAORDINARY RISK MITIGATION MEASURES

There is currently neither a cure nor a vaccine for coronavirus.¹⁹ There is not even a specific course of recommended treatment.²⁰ And the worst is yet to come, according to public health experts, particularly for New York, with cases expected to peak in the coming days.²¹ At this point, the only antidote for the nation's overburdened health system to combat the risk of widespread fatalities and serious illness, especially among the more vulnerable elderly or medically compromised population, is immediate and proactive intervention to mitigate spread. The consensus among health professionals globally is that the only effective management technique available is a collective effort to "flatten[] the curve,"²² a phrase used to describe the mitigation of spread through physical distancing, otherwise known as social distancing, and diligent hygiene and sanitization practices.

A. Social Distancing

Social distancing refers to the prevailing recommendation that all individuals deliberately increase the physical space between themselves and others. Specifically, public health professionals recommend six feet of distance to avoid spreading coronavirus, regardless of whether or not symptoms have manifested.²³ In order to effectuate this recommendation,

¹⁹ *How to Protect Yourself & Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Apr. 6, 2020).

²⁰ Lauren M. Sauer, *What is Coronavirus?*, Johns Hopkins Medicine Office of Critical Event Preparedness and Response, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (last visited Apr. 6, 2020).

²¹ "April is going to be worse than March. And I fear May will be worse than April." NBC News, Mayor Bill de Blasio, Meet the Press Broadcast (Full), YouTube (March 22, 2020), <https://www.youtube.com/watch?v=gOTC4grU35c>.

²² Neil M. Ferguson et al., *Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand* 7, (Imperial College COVID-19 Response Team, Mar. 16, 2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

²³ Lisa Lockerd Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, John Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine> (last visited Apr. 6, 2020).

governments across the United States and abroad have implemented drastic, but necessary, measures to prevent the congregation and mobility of vast swaths of the global population. Over 300 million Americans are currently under state executive orders designed to enforce social distancing.²⁴ And globally, over 2.6 billion people are living under social distancing orders.²⁵ The White House Coronavirus Guidelines for America summarizes the prevailing recommendation for older adults and people with serious underlying health conditions: “stay home and away from other people.”²⁶

The White House Coronavirus Taskforce recommends that all individuals, regardless of infection status, wear gloves and masks to reduce the risk of infection.²⁷ The CDC specifically recommends prisons and jails in communities with high concentrations of COVID-19 practice social distancing regardless of whether or not inmates, visitors, or employees display symptoms of infection.²⁸

For a person that displays symptoms or is diagnosed with COVID-19, public health officials recommend a more extreme form of social distancing: medical isolation. The CDC’s interim guidance for correctional and detention facilities, issued as of March 23, 2020, recommends dedicated housing areas and bathrooms for approximately 14 days for those who

²⁴ Holly Secon & Aylin Woodward, *About 95% of Americans have been ordered to stay at home. This map shows which cities and states are under lockdown*, Business Insider (Apr. 7, 2020), <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3>.

²⁵ *Coronavirus: India enters ‘total lockdown’ after spike in cases*, BBC News (Mar. 25, 2020), <https://www.bbc.com/news/world-asia-india-52024239>.

²⁶ *The President’s Coronavirus Guidelines for America*, The White House (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

²⁷ *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House (Apr. 3, 2020) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-18/>.

²⁸ *FAQs for administrators, staff, people who are incarcerated, families*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html> (last updated Mar. 28, 2020).

are symptomatic or infected.²⁹ And individuals who do not display symptoms but have been exposed through close contact with someone who has been diagnosed with COVID-19 must be quarantined—for these individuals, the CDC’s guidance to correctional and detention facilities also recommends the use of dedicated housing areas and bathrooms.³⁰

B. Diligent Hygiene and Sanitization Practices

Disinfectant products are essential for reducing the spread of the novel coronavirus, as they are capable of killing the virus before transmission. Therefore, the CDC recommends that all individuals practice diligent personal hygiene in the form of frequent and prolonged handwashing. All individuals are encouraged to wash their hands with soap for at least 20 seconds or, in the alternative, to use a hand sanitizer that contains 60%-95% alcohol.³¹ The CDC recommends that jails and prisons provide free access to soap, preferably liquid soap, tissues, hand drying supplies and hand sanitizers (though alcohol-based hand sanitizers are prohibited at most correctional facilities), and stresses that it is especially important to ensure free access to these products.³² The CDC also recommends recurrent sanitization of all frequently-touched surfaces and frequently-occupied facilities with EPA-approved disinfectant products.³³ Finally, if an individual tests positive for coronavirus within a facility that houses people overnight, the CDC recommends that all areas that were visited by the individual be closed down and remain ventilated and unoccupied for 24 hours, after which it should be thoroughly cleaned.³⁴

²⁹*Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#QuarantiningCloseContacts%20> (last visited Apr. 6, 2020)..

³⁰ *Id.*

³¹ *Show Me the Science – When & How to Use Hand Sanitizer in Community Settings*, CDC, <https://www.cdc.gov/handwashing/show-me-the-science-hand-sanitizer.html> (last visited Apr. 6, 2020).

³² *FAQs for administrators, staff, people who are incarcerated, families*, *supra* note 28.

³³ *List N: Disinfectants for Use Against SARS-CoV-2*, U.S. EPA, <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> (last visited Apr. 6, 2020).

³⁴ *Cleaning and Disinfection for Community Facilities*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html#Cleaning> (last visited Apr. 6, 2020).

III. INMATES AT RIKERS ISLAND FACE A HIGH RISK OF INFECTION, SERIOUS ILLNESS AND DEATH FROM COVID-19

One could rightly say that Rikers Island is now the epicenter of the epicenter of the COVID-19 pandemic. The infection rate at Rikers Island is nine times that of New York State (which in turn has the highest rate in the United States—the country with the most confirmed cases of COVID-19 in the world).³⁵ As of April 2, 2020, at least 287 incarcerated people and 406 staff members have tested positive for coronavirus, and the numbers are growing every day.³⁶ A 53-year-old man who was being held at Rikers Island on a technical parole violation has already died from COVID-19.³⁷

Not only is the rate of infection higher than elsewhere in New York City, but the risks posed by coronavirus at Rikers Island are significantly graver, both with respect to the risk of exposure and transmission and harm to those who become infected. Current failures to provide medical care at Rikers Island will only be exacerbated by this outbreak, revealing the insufficiency of any measures taken by the Department of Corrections (“DOC”), and increasing the risk of fatalities for those who will become infected.

Public health experts agree that the only effective method of containing the spread of coronavirus is proactive and extreme social distancing, including isolating those who are ill, quarantining those who have known coronavirus exposure, and ensuring that those who are either asymptomatic or yet to be infected have adequate access to protective and sanitization

³⁵ See *COVID-19 Infection Tracking in NYC Jails*, Legal Aid Society, <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last updated Apr. 7, 2020).

³⁶ Justin Carissimo, *First Rikers Island inmate dies after testing positive for coronavirus*, CBS News (Apr. 7, 2020), <https://www.cbsnews.com/news/coronavirus-michael-tyson-rikers-island-inmate-dies-covid-19/>.

³⁷ Larry Celona and Tamar Lapin, *Rikers Island inmate dies of complications from coronavirus*, N.Y. Post (Apr. 5, 2020), <https://nypost.com/2020/04/05/rikers-island-inmate-with-coronavirus-dies/>; Salvador Hernandez, *A Man Who Died In Jail After Testing Positive For The Coronavirus Was There On A Parole Violation*, BuzzFeed News (Apr. 6, 2020), <https://www.buzzfeednews.com/article/salvadorhernandez/rikers-island-inmate-coronavirus-michael-tyson>.

equipment. Rikers Island has demonstrated that it is wholly unable to take these measures due to lack of resources, inadequate testing and screening, and the very nature of its jail environment.

A. Rikers Island is Enclosed and Crowded, with a Transient Population, Rendering Social Distancing Impossible

In the context of COVID-19, jails have been described as “the emergency rooms of correctional facilities” because of their transient populations, permeability, crowded conditions, and resultant rampant spread of the disease.³⁸ Rikers Island demonstrates the aptness of this metaphor. While Rikers Island contains a captive population, neither inmates nor staff are isolated or protected from exposure. Staff, such as correction officers and healthcare workers, continue to move between Rikers Island and their communities each day, and there is an ever-changing population of pre-trial detainees and those detained on parole violations. Given the current test scarcity, there is no ability to perform the kind of systematic testing that would ensure that silent spreaders are not bringing the disease into the facility.

Incarcerated persons have little to no agency over their environment or to whom they are exposed, and have extremely limited privacy, making their own efforts to achieve social distancing ineffectual. At Rikers Island, detainees live in close, crowded quarters, in dormitory-style housing, communally share the same toilets and the same phones, and sit elbow to elbow during mealtimes.³⁹ While the medical community recommends that people stay six feet apart from one another,⁴⁰ beds in Rikers Island jails are only 15 to 24 inches apart.⁴¹ Even inmates who suffer from chronic health conditions that make them uniquely vulnerable to COVID-19

³⁸ Mary Harris, “*Like a Cruise Ship Mixed With a Nursing Home, Plus Violence*,” Slate Mag. (Apr. 6, 2020), <https://slate.com/technology/2020/04/coronavirus-covid19-rikers-island-jail-conditions-infections-freedom.html>.

³⁹ Jan Ransom & Alan Feuer, “*We’re Left for Dead: Fears of Virus Catastrophe at Rikers Jail*,” N.Y. Times (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>; Zak Cheney-Rice, “*We’re Going to All Start Dropping: Rikers Inmates on Life as Prisoners of COVID-19*,” N.Y. Mag. Intelligencer (Apr. 1, 2020), <https://nymag.com/intelligencer/2020/04/rikers-inmates-on-life-as-prisoners-of-the-coronavirus.html>.

⁴⁰ Lisa Lockerd Maragakis, *supra* note 23.

⁴¹ Jan Ransom & Alan Feuer, *supra* note 39; Zak Cheney-Rice, *supra* note 39.

have reported being housed in a dorm with 20 others.⁴² This results in a constant risk for person to person transmission of coronavirus. There is an “incredible amount of excess contact” in the Rikers Island environment, because incarcerated individuals are not permitted to do anything or go anywhere by themselves without being accompanied by staff, whether during transport, when receiving medication, during meals, or even just walking down the hallway.⁴³ And there is poor ventilation, which promotes highly efficient spread of the disease through droplets from coughing and other means.⁴⁴

The impossibility of engaging in the recommended social distancing, when compounded by scant resources, has proved catastrophic in the jail environment. For these reasons, the Senior Director of Geriatrics and Complex Care Services at Rikers Island has described the environment “as the world’s worst cruise ship crossed with the world’s worst nursing home, plus violence.”⁴⁵

B. Rikers Island Lacks the Protective and Hygienic Resources Essential to Mitigating the Spread of Coronavirus

Protective gear is currently in short supply in the United States, and Rikers Island, with its limited resources, is particularly ill-equipped to provide sufficient protective equipment for either people who are incarcerated or staff, which increases the risk for everyone in the facility. Further, multiple reports have confirmed that Rikers Island has failed to provide other necessary mitigation measures. This includes adequate opportunities to exercise essential hygiene measures, such as offering sufficient hand soap and alcohol-based sanitizers, or cleaning

⁴² Julia Craven, *Coronavirus Cases Are Spreading Rapidly on Rikers Island*, Slate Mag. (Apr. 2, 2020), <https://slate.com/news-and-politics/2020/04/rikers-coronavirus-cases-increase.html>.

⁴³ Mary Harris, *supra* note 38.

⁴⁴ Raven Rakia, *A sinking jail: The environmental disaster that is Rikers Island*, Grist (Mar. 15, 2016), <https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/>; Jan Ransom & Alan Feuer, *supra* note 39.

⁴⁵ Mary Harris, *supra* note 38.

and disinfecting high-touch surfaces such as doorknobs and light switches. Instead, detainees have resorted to desperate measures, reportedly using alcohol pads provided after a haircut to sanitize telephones, holding telephones with socks, and using diluted shampoo for disinfectant.⁴⁶ This is, of course, not in line with medical sanitation guidelines, which recommend EPA-approved cleaning products, diluted bleach, and alcohol solutions with at least 70% alcohol to disinfect surfaces.⁴⁷ But none of these solutions is available at Rikers Island, where detainees are not given proper cleaning supplies, and necessary sanitation products containing the appropriate levels of alcohol are in fact prohibited.

C. Rikers Island Lacks the Medical Resources Needed to Save High-Risk Patients from Dying

In addition to being unable to contain the coronavirus outbreak, Rikers Island does not have the medical resources necessary to treat those who exhibit symptoms, and is particularly ill-equipped to provide care to those at risk of falling seriously ill. Those in high-risk populations are more likely to develop serious, prolonged infections that require the use of highly-specialized equipment including ventilators. Complications from COVID-19, including severe damage to lungs, the heart, the liver, or other organs, can manifest at an alarming pace. Adequate treatment requires expensive hospital care involving an entire team of providers, including physicians with specialized backgrounds in respiratory conditions and infectious disease. Patients who do not die from serious cases of COVID-19 may nevertheless face prolonged recovery periods, including extensive rehabilitation from the loss of respiratory capacity and from heart damage.

Doctors at Rikers Island are already “overwhelmed” and “pleading...to get people off [the island] as soon as possible.”⁴⁸ There are numerous reports of Rikers Island’s commonplace

⁴⁶ Jan Ransom & Alan Feuer, *supra* note 39.

⁴⁷ *How to Protect Yourself & Others*, *supra* note 19.

⁴⁸ Zak Cheney-Rice, *supra* note 39.

neglect of detainees under ordinary circumstances,⁴⁹ a powerful indicator that it is seriously unprepared for the flood of people who will need urgent care. And any past failures to provide adequate medical care for detainees, such as many of the Petitioners, who suffer from underlying chronic health conditions, will result in an increased risk that they will become severely ill if infected or even die.⁵⁰

IV. RELEASE IS THE ONLY MEANS OF MITIGATING THE DANGERS OF COVID-19 IN RIKERS ISLAND

DOC has released a COVID-19 Preparation and Action Plan (the “DOC Action Plan” or the “Plan”), which lays out strategies related to communication, cleaning and prevention, screening and health care, and social distancing.⁵¹ However, none of these strategies addresses all of the medical recommendations already issued for either coronavirus or COVID-19, nor can they be applied effectively in the Rikers Island environment. But perhaps the most blatant failure in the Plan is the absence of any guidance or measures to address the specific risks and needs of the older, the chronic-disease suffering and the immunocompromised individuals most susceptible to falling seriously ill from COVID-19. A fundamental component of virtually every public health guidance issued in response to coronavirus is specified recommendations for this

⁴⁹ *Former Physician At Rikers Island Exposes Health Risks Of Incarceration*, Nat’l Pub. Radio (Mar. 18, 2020) <https://www.npr.org/sections/health-shots/2019/03/18/704424675/former-physician-at-rikers-island-exposes-health-risks-of-incarceration>; Michael Winerip & Michael Schwartz, *New York City to End Contract With Rikers Health Care Provider*, N.Y. Times (June 10, 2015), <https://www.nytimes.com/2015/06/11/nyregion/report-details-failings-of-corizon-rikers-island-health-provider.html>.

⁵⁰ Prior outbreaks at jail facilities, such as the H1N1 “swine flu” in 2009 and the 2012 influenza outbreak, which resulted in deaths of those incarcerated and revealed insufficient resources for treatment, serve as harrowing examples of the damage coronavirus may bring to Rikers Island unless urgent and sweeping action is taken. See David M. Reutter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, Prison Legal News (Feb. 15, 2010), <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-but-deaths-are-few/>; see also *Influenza Outbreaks at Two Correctional Facilities — Maine, March 2011*, CDC, 61(13) MMWR 229 (Apr. 6, 2020), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6113a3.htm>. Further, both of these outbreaks occurred in the “best case” scenario, as there were effective and available vaccines.

⁵¹ *New York City Department of Correction: COVID19 Preparation & Action Plan*, New York City Department of Correction (“NYCDOC”), <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Apr. 6, 2020).

vulnerable population because of the particularly devastating risks it faces. Universally, these recommendations center on one major premise: “stay [] away from other people.”⁵²

The DOC Action Plan, on its face, inadequately manages the rapid spread of coronavirus and the danger posed to high-risk individuals, and its insufficiency is underscored by the ever-increasing number of infections at Riker Island, as well as the recent death of an inmate. As the risk of infection, serious illness, and death for the particularly vulnerable population being held at Rikers Island is unjustifiably high, medical guidance demands Petitioners’ immediate release.

A. The DOC Action Plan Communication Strategies Flout Current Medical Guidance

The communication strategies that the DOC Action Plan purports to have implemented are insufficient, and moreover, their messaging is inconsistent with current medical guidance. As part of its COVID-19 communications strategy, “DOC has conspicuously posted informational posters in facilities, visitor areas and court commands” with “advice on basic health guidance and precautions” such as covering coughs and washing hands.⁵³ In addition to these informational posters, DOC has also displayed PSA images throughout the facility, and has urged staff to stay home if they are feeling sick. However, these communication measures are all woefully deficient.

Informational posters and urging staff to stay home if they are “feeling sick” ignores the fact that coronavirus is already rampant within Rikers Island, and does not account for the latest medical research reflecting that even people who do not “feel sick” could be carriers of the virus.⁵⁴ Putting to the side the impracticability of identifying all staff who may be carriers of coronavirus, those in custody at Rikers Island have little control over the extent to which they

⁵² *The President’s Coronavirus Guidelines for America*, *supra* note 26.

⁵³ *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

⁵⁴ *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020*, *supra* note 18; Whitehead, *supra* note 7.

can isolate or quarantine themselves, and thus even those endeavoring to follow the informational posters' guidance cannot fully distance themselves in the jail environment. One lone infected person failing to follow the guidance, whether staff or detainee, can infect between 2-3 people or even more in the jail environment, and by themselves hinder any efforts by DOCS to protect the facility from the further spread of coronavirus.

B. The DOC Action Plan's Cleaning and Prevention Requirements Are Both Impracticable and Insufficient

In a crowded carceral environment like Rikers Island, any cleaning and prevention measures taken to prevent the spread of coronavirus amount to the medical equivalent of rearranging deck chairs on the Titanic.

DOC has instituted measures requiring "cleaning and sanitizing all DOC housing units, dayrooms, and common spaces once per day," as well as cleaning and sanitizing contact surfaces, phones, and shower areas at regular intervals. Transport buses are to be cleaned daily, except "[a]ny transport bus that is transporting a person who is symptomatic of a respiratory illness will be sanitized immediately after transporting that individual."⁵⁵

It is the opinion of *Amici* that these measures are either infeasible, unlikely to be fully enforced, or insufficient even if they were followed. Firstly, the incarcerated individuals themselves are responsible for cleaning and sanitation. Given that some may very well be carriers of the virus but not presenting symptoms or presenting only mild symptoms, this risks further spread of the disease around the facility. Secondly, as discussed in Section III.A.2, there have been multiple reports of failures to provide proper cleaning products, with those responsible for sanitation mixing shampoo with water in a desperate attempt to disinfect surfaces, which of

⁵⁵ *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

course contravenes CDC sanitation guidelines.⁵⁶ Lastly, neither correction officers nor incarcerated individuals have been provided with sufficient protective equipment, such as masks and gloves,⁵⁷ a blatant flouting of the CDC recommendation that they be worn by both sick and well individuals.⁵⁸

C. Rikers Island Cannot Effectively Screen and Identify Those Infected with Coronavirus

Rikers Island is utterly unable to screen and identify the ill, due both to limited resources and the nature of the coronavirus. In particular, Rikers Island lacks the screening and testing resources crucial to identifying and containing the spread of coronavirus. While the scarcity of testing has proven an issue across New York and the United States more broadly, it is particularly devastating at Rikers Island, which is poorly-positioned to identify individuals most vulnerable to becoming gravely ill from the disease due to insufficient and inaccurate medical records. These issues are only compounded by the fact that silent spreaders at Rikers Island can and undoubtedly continue to transmit the disease while asymptomatic.⁵⁹

D. Effective and Humane Social Distancing Measures are Impossible at Rikers Island at this Point

The DOC Action Plan advocates for social distancing,⁶⁰ recognizing it as the only effective means of preventing the spread of coronavirus. However, as discussed in Section III.A.1, the DOC Action Plan cannot change the fact that Rikers Island is a congregate space by its very nature, with constant contact with other communities through staff comings and goings.

⁵⁶ Jan Ransom & Alan Feuer, *supra* note 39.

⁵⁷ *Id.*

⁵⁸ *How to Protect Yourself & Others*, *supra* note 19.

⁵⁹ Recent studies show that presymptomatic and asymptomatic transmission account for 25% of cases. Whitehead, *supra* note 7.

⁶⁰ *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

And, of course, even were social distancing practicable, it is too late to rely on such measures, as Rikers Island already faces a massive outbreak that has put everyone on the island at risk.

The DOC social distancing guidelines state, “Where possible in dormitory housing units, DOC is ensuring there is an empty bed in between people in custody to increase space while sleeping” and promote taking “precautions like refraining from sitting on others’ beds where possible.”⁶¹ Taking measures “where possible” is simply not sufficient, and does little to address the fact that dormitory bedrooms are fundamentally unsafe.

Further, for those who do manifest symptoms, measures taken at Rikers Island in response have been alarmingly insufficient. DOC has indicated that it intends to separate those who appear “sick,”⁶² but the reports of inmates coughing all night indicate that it has failed to do so.⁶³ Additionally, confining ill inmates together in enclosed living spaces contravenes CDC guidance, which recommends medical isolation for individuals displaying symptoms, including dedicated housing areas and bathrooms; and that if an individual tests positive for COVID-19 within a facility that houses people overnight, all areas that were visited by the individual be closed down, remain ventilated and unoccupied for 24 hours, and then thoroughly cleaned.⁶⁴ This is all of course impossible at Rikers Island, which does not have the capacity to provide each of its hundreds of COVID-19 cases with the separate housing area and bathrooms that they might have if released, or the capacity to evacuate and close down entire housing units or areas visited by an infected person.

⁶¹ *Id.*

⁶² *New York City Department of Correction Pandemic Plan Coronavirus COVID19*, Corr. Officers’ Benevolent Ass’n, Inc., <https://www.cobanyc.org/sites/default/files/images/banners/2019/pdf/coronavirus-2.pdf> (last visited Apr. 6, 2020).

⁶³ Zak Cheney-Rice, *supra* note 39.

⁶⁴ *COVID-19 basics: Symptoms, spread and other essential information about the new coronavirus and COVID-19*, Harvard Health Publishing, <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics> (last updated Apr. 6, 2020).

While DOC has suspended all in-person visitation,⁶⁵ staff continue to come and go between their communities and the jail as their shifts require. Each time they enter and leave, staff risk contracting infections and spreading them both within and outside of Rikers Island. Moreover, depriving detainees of in-person contact with their families and communities exacerbates the trauma of incarceration, and may either lead to or exacerbate existing mental health challenges. And though “most” in-person court appearances have been suspended,⁶⁶ Rikers Island’s inmate population is itself constantly turning over, with each new detainee potentially carrying coronavirus and introducing it into the facility’s population.

Were Rikers Island to respond to the outbreak with more extreme quarantine or isolation measures such as solitary confinement, that would similarly fail as a containment strategy, in addition to being cruel and inhumane. The CDC has specifically recommended against using solitary confinement or any measure associated with behavioral punishment as a means to address COVID-19, instead recommending and explicitly differentiating medical isolation.⁶⁷ It also bears mentioning that solitary confinement is by now well-recognized for its devastating impact on both physical and mental health,⁶⁸ and would be an inhumane punishment inflicted on those who are in need of medical care.

Further, the extreme attempted social distancing measures that DOC has taken or could take, when compounded with the stress of incarceration during the COVID-19 pandemic, may create and contribute to chronic mental health conditions. The incarcerated individuals face

⁶⁵ *Visit Schedule*, NYC DOC, <https://www1.nyc.gov/site/doc/inmate-info/visit-schedule.page> (last visited Apr. 6, 2020).

⁶⁶ *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

⁶⁷ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 29.

⁶⁸ Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J. of L. & the Biosciences 1 (2019); *Apodaca v. Raemisch*, 864 F.3d 1205 (10th Cir. 2017), *cert denied*, 139 S. Ct. 5 (2018).

isolation, a lack of social visitation, total loss of agency and freedom of movement, and yet are also deprived of the ability to protect themselves from an infectious and potentially deadly disease. This intensifies the trauma of incarceration, and will only exacerbate existing mental health conditions and contribute to the development of new mental health conditions, which may in turn result in poor health outcomes and even death.⁶⁹

V. A COVID-19 OUTBREAK AT RIKERS ISLAND ALSO POSES DANGERS TO THE GREATER PUBLIC

A large outbreak at Rikers Island would likely have a dramatic impact both inside and outside the jail, both in terms of the heightened risk posed by the disease to incarcerated and non-incarcerated people alike, and the toll it would take on an already-besieged public health system with limited resources. Recognizing that it cannot provide adequate medical care to the inevitable number of individuals who fall seriously ill from COVID-19, the DOC Action Plan provides that patients may receive care at “acute care facilities within the NYC Health + Hospitals system.”⁷⁰ However, the COVID-19 outbreak has put a strain on the entire country’s health care system, and the situation is especially dire for hospitals in New York, where the number of people hospitalized has been skyrocketing. Both New York State Governor Andrew Cuomo and New York City Mayor Bill de Blasio have warned the public that New York City is in dire need of ventilators.⁷¹ The lack of hospital capacity will be dangerously exacerbated if

⁶⁹ Brian Honermann, *An “Epidemic Within an Outbreak:” The Mental Health Consequences of Infectious Disease Epidemics*, O’Neill Inst. for Nat’l and Global Health L. (Feb. 26, 2015), <https://oneill.law.georgetown.edu/epidemic-within-outbreak-mental-health-consequences-infectious-disease-epidemics/>; Norbert Müller, *Infectious Diseases and Mental Health*, 179 *Comorbidity of Mental and Physical Disorders* 99 (2015); James M. Shultz, *Mental Health Consequences of Infectious Disease Outbreaks*, <https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/flrtc/documents/Slides-MH-CONSEQUENCES-OF-ID-OUTBREAKSV2.pdf> (last visited Apr. 6, 2020).

⁷⁰ *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

⁷¹ John E. Greve, *New York only has enough ventilators for six more days, says Governor Cuomo*, *The Guardian* (Apr. 2, 2020), <https://www.theguardian.com/us-news/2020/apr/02/new-york-ventilators-coronavirus-andrew-cuomo>; Noah Higgins-Dunn, Berkeley Lovelace Jr., William Feuer, *New York City doesn’t have enough ventilators for next week, Mayor de Blasio says*, *CNBC* (Apr. 3, 2020), <https://www.cnn.com/2020/04/03/nyc-doesnt-have-enough-ventilators-for-next-week-mayor-de-blasio-says.html>.

Rikers Island does not act immediately to release those individuals who are at the greatest risk of serious infection. The Petitioners, who are all older, have chronic medical conditions, and/or are immunocompromised individuals, are exactly the high-risk population that would be most likely to exhibit severe symptoms and need hospitalization, increasing the need for access to a rapidly shrinking pool of ventilators.⁷² Only their immediate release will provide them with the best chance at avoiding contracting coronavirus, and requiring health services that neither Rikers Island nor New York City is currently able to provide.

We understand that Petitioners, as a condition of their release, would undergo DOC's medical discharge planning, and that their release would be subject to an approved medical plan. Further, as clients of the Legal Aid Society, the Petitioners will benefit from assigned social workers who will direct them to any necessary health services. From a public health perspective, this is eminently preferable to their current circumstances, which subjects both them and the greater public to untenable risks.

The unjustifiable public health threat that congregating incarcerated individuals (and in particular vulnerable individuals) poses to our larger societal effort to combat COVID-19 has been recognized by carceral facilities across this nation. To date, local jails in over 15 states across the country have released incarcerated individuals in an effort to slow the spread of coronavirus.⁷³ Los Angeles County jails released 1,700 inmates before a single individual tested positive for coronavirus.⁷⁴ California has begun to roll out new plans to release 3,500

⁷² The DOC Action Plan itself acknowledges that “[p]eople who are most at risk for severe illness are older adults or those who have chronic health conditions,” such as Petitioners. *New York City Department of Correction: COVID19 Preparation & Action Plan*, *supra* note 51.

⁷³ *Responses to the COVID-19 pandemic*, Prison Policy Initiative, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Apr. 6, 2020).

⁷⁴ Arlene Tchekmedyian & Matt Hamilton, *L.A. jail inmates say lack of soap and toilet paper heightens coronavirus fear: ‘Like slow torture’*, L.A. Times (Mar. 30, 2020), <https://www.latimes.com/california/story/2020-03-30/coronavirus-inmates-hygiene-supply-shortage-la-jails>.

individuals before the end of May, though only sixteen incarcerated persons have so far been diagnosed with coronavirus in the state.⁷⁵ Nationwide, a consensus is forming that unprecedented times call for such unprecedented action.

CONCLUSION

For the foregoing reasons, Physicians for Human Rights respectfully urges the Court to grant the motion to reargue or, in the alternative renew, the original Petition and order Petitioners' immediate release.

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Respectfully submitted,


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⁷⁵ Paige St. John, *California to release 3,500 inmates early as coronavirus spreads inside prisons*, L.A. Times (Mar. 31, 2020) <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>.

⁷⁶ This brief was also prepared with the assistance of Hyatt Mustefa, Law Clerk at Cleary Gottlieb Steen and Hamilton LLP.