

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

PEOPLE OF THE STATE OF NEW YORK
EX REL. LISA FREEMAN, Esq.
On behalf of

JOHN DOES 1 – 7,¹

Petitioners,

v.

DAVID HANSELL, Commissioner, New York City
Administration for Children’s Services,

Respondent.

Index No. _____

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK

Upon the relation of Lisa Freeman, Esq.,

TO THE COMMISSIONER, NEW YORK CITY
ADMINISTRATION FOR CHILDREN’S SERVICES:

WE COMMAND YOU, that you have and produce the body of Petitioners named in the Verified Petition attached hereto, by you detained, as it is said, together with your full return to this writ and the time and cause of such detention, by whatsoever name the said Petitioners are called or charged, or show cause why the Petitioners should not be produced, before the Justice presiding at Part ____ of the Supreme Court, New York County, at 60 Centre Street, NY, NY 10007 on ____ of March, 2020, to do and receive what shall then and there be considered concerning the said Petitioners and have you then and there this writ.

¹ Petitioners are not being identified by name because they are all minors 22 NYCRR § 202.5(e)(iii).

WITNESS, Honorable _____, one of the Justices of
the Supreme Court of the State of New York, this ____ day of March 2020.

By the Court Clerk

The above writ allowed this _____ day of March 2020.

Justice of the Supreme Court
of the State of New York

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**VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

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

INTRODUCTION

1. Petitioners are 7 youth, between the ages of 13 and 17, detained in secure and non-secure detention centers in New York City during the pendency of their juvenile delinquency cases. By physical design, these facilities house youth in close congregate settings, with shared dining rooms, common recreational areas, communal bathrooms and showers, and, at some sites, shared bedrooms. Considering the extraordinarily dangerous nature of the COVID-19 pandemic, with its extremely high degree of contagion and its transmission rate in New York City growing at an alarming pace, these youth are extremely vulnerable to infection by the virus and to its potentially devastating consequences. This petition seeks the immediate release from detention of these eight youth on the grounds that continuing to hold them in these facilities constitutes deliberate indifference to the risk of serious medical harm in violation of the Fourteenth Amendment and state constitutional right to due process.

2. In only a few months, 300,227 people worldwide have been diagnosed with COVID-19 and nearly 13,000 of those people have died. There is no vaccine or cure for COVID-19. No one is immune.

3. Risk mitigation in the form of social distancing and isolation is the only known strategy to protect individuals from COVID-19. To that end, in an unprecedented Executive Order, New York State Governor Andrew Cuomo has directed all New York State residents to stay at home, not go to work, and refrain from engaging in any and all unnecessary physical contact with others. Because risk mitigation is effectively impossible in juvenile detention centers, experts from youth correctional facilities all over the country have called for the immediate release of detained youth to their homes to be safely cared for by family, and if family is unavailable, to be moved to foster homes or similar non-congregate settings. Release is the only effective means of protecting these youth from contracting and transmitting COVID-19 between detained youth and of reducing the risk of exposure to staff working there. Further, with appropriate safeguards in place, including enhanced monitoring, these youth can be safely cared for in their homes.

4. COVID-19 already has reached New York City's youth detention facilities, with both detained youth and staff testing positive for the virus. Continuing to maintain these youths in this hotbed of contagion poses an unconscionable and entirely preventable risk of harm to Petitioners. Across New York City, extraordinary and unprecedented measures affecting every aspect of life are being taken in the name of protecting people from this pandemic. New York cannot leave these young and susceptible individuals behind to suffer potentially dire consequences.

PARTIES

5. I am the Director of the Special Litigation Unit of the Legal Aid Society’s Juvenile Right Practice, which is counsel to Petitioners in this matter. I make this application on behalf of the below-named Petitioners.

6. Petitioner John Doe 1 is detained in a secure detention facility controlled by Respondent New York City Administration for Children’s Services. As a result, they are at high risk for contracting COVID-19.

7. Petitioner John Doe 2 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at a high risk for contracting COVID-19.

8. Petitioner John Doe 3 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at high risk for contracting COVID-19.

9. Petitioner John Doe 4 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at a high risk for contracting COVID-19.

10. Petitioner John Doe 5 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at high risk for contracting COVID-19.

11. Petitioner John Doe 6 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at high risk for contracting COVID-19.

12. Petitioner John Doe 7 is detained in a non-secure detention facility controlled by Respondent. As a result, they are at a high risk for contracting COVID-19.

13. Respondent David Hansell is the Commissioner of the New York City Administration for Children’s Services. Respondent is a legal custodian of Petitioners.

JURISDICTION AND VENUE

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

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

16. Copies of the detention orders pertaining to individual Petitioners are not attached hereto due to the emergency nature of this proceeding.

STATEMENT OF FACTS

The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to Youth Held in Detention Centers

17. COVID-19 is a coronavirus that has reached pandemic status. As of March 22, 2020, over 335,403 people worldwide have confirmed diagnoses, including over 33,889 people in the United States and 16,887 in New York. Indeed, as of March 22, New York state reportedly has 5% of the world's COVID-19 cases.² Over 9,324 people have died, including at least 149 in the United States and 65 in New York City. As the number of COVID-19 cases spike, New York City is now the U.S. COVID-19 Virus Epicenter.³ As of March 22, 2020, there are more than 16,887 confirmed cases of coronavirus within New York, up from 4,627 the prior day, and at least 150 deaths.⁴

18. The World Health Organization (“WHO”) has declared COVID-19 a pandemic.⁵ On March 7, 2020, the Governor of the State of New York issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.⁶ Subsequently, the Mayor of

²<https://www.nytimes.com/2020/03/22/nyregion/coronavirus-new-york-update.html>.

³ Jesse McKinley, New York City Region Is Now an Epicenter of the Corona Virus Pandemic, N.Y. TIMES (Mar. 23, 2020 8:33 AM), <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html>.

⁴ Mitch Smith et al., *Coronavirus Map: U.S. Cases Surpass 10,000*, N.Y. TIMES (Mar. 19, 2020, 11:28 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updating live; numbers expected to rise). *See also* Gwynne Hogan, *NYC Cancels Coronavirus Testing By Appointment, Urges Providers Not To Test Patients Unless Hospitalization is Required*, Gothamist March 22, 2020.

⁵ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>

⁶ Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. TIMES, (Mar. 7, 2020), <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html>.

New York City declared a State of Emergency for the City.⁷ The President of the United States has officially declared a national emergency.⁸

19. On March 20, 2020, as the number of new cases continued to rise at an astounding rate throughout the country, and with New York City identified as the epicenter of the virus, the Governor took the strictest measure yet to fight its spread, issuing a “stay at home” executive order for all residents. In a statement to the public, Governor Cuomo explained that the order prohibits non-essential gatherings of any size, requires all non-essential businesses to close, and 100 percent of their employees to work from home, and that people should stay at least six feet away from others. “Reducing density,” the Governor said, is, along with increasing hospital capacity, the most “effective way” of winning the “war against this pandemic.”⁹

20. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections.¹⁰

21. COVID-19 is a particularly contagious disease. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.¹¹ Indeed, a new study of

⁷ *DeBlasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned*. N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html>.

⁸ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/>.

⁹ <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-deployment-1000-bed-hospital-ship-usns>.

¹⁰ Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

¹¹ *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*. TIME (<https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/>) (last visited Mar. 19, 2020).

an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.¹² New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.¹³

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

23. While older individuals face greater chances of serious illness or death from COVID-19,¹⁴ it is now known that the younger population is just as susceptible of contracting the virus and may fall as ill as older people. In a virtual press conference held on March 20, 2020, WHO Director-General Tedros Adhanom Ghebreyesus warned that younger people are not only not spared of contagion, but worldwide, they make up a “significant proportion” of patients requiring hospitalization, sometimes for weeks and sometimes resulting in their deaths.¹⁵ And even when asymptomatic or suffering milder symptoms, these younger individuals still pose a very serious risk of transmission to those with whom they come into contact, including older, more

¹² Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerg Infect Dis.* 2020 Jun. (<https://doi.org/10.3201/eid2606.200412> (last visited Mar. 18, 2020)).

¹³ *Coronavirus: Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last visited Mar. 18, 2020).

¹⁴ Medical information in this and the petition paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. See Expert Declaration of Dr. Marc Stern: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>; Expert Declaration of Dr. Robert Greifinger: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>; Expert Declaration of Dr. Jonathan Golob <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob>; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>, (last visited Mar. 19, 2020).

¹⁵ <https://www.reuters.com/article/us-health-coronavirus-who-idUSKBN21733O>.

vulnerable adults. Indeed, for these reasons, New York City Mayor DeBlasio took the extraordinary step of closing all New York City schools.¹⁶

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

25. Youth involved in the juvenile justice system are generally less healthy than their peers. They are more likely to go for long stretches without health insurance, and as they get older, more likely than the general population to engage in sexual behavior that puts them at risk for HIV, AIDS, and other sexually transmitted infections.¹⁷

26. Moreover, sadly a twelve-year-old with no underlying medical conditions is reported to be fighting for life on a respirator from COVID-19 in Georgia.¹⁸

27. The vast majority of youth in juvenile detention are black or Hispanic and come from poor communities in New York City.¹⁹ It is well documented that these communities suffer high rates of asthma prevalence. Indeed, one in four in children in poor neighborhoods in New

¹⁶ <https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html>.

¹⁷ *To Reduce Long-Term Health Gaps, a Push for Early Intervention in Juvenile Detention*, Chris Salvo/Getty. <https://undark.org/2018/07/16/juvenile-detention-health-care-racial-disparities/>.

¹⁸ <https://www.cnn.com/2020/03/22/us/georgia-coronavirus-girl-hospitalized/index.html>.

¹⁹ In fiscal year 2018, 66.9% of all NYC youth admitted to secure detention facilities in 2018 self-identified as black and 28.5% identified as Hispanic; similarly, 67% of those admitted to non-secure detention facilities identified as black and 26% as Hispanic. <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2019/LL44DDRFY19.pdf>. Children from only 15 zip codes in NYC make up more than a third of all youth admitted to secure detention. <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2019/LL44DDRFY19.pdf>.

York City have been found to have asthma.²⁰ And according to one recent study, 1 in 5 New York City teens has undiagnosed asthma.²¹

28. The CDC has warned that people with asthma are at higher risk of getting very sick from COVID-19, which may affect the respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease.²²

29. For people with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing and shortness of breath can be especially severe.²³

30. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

31. COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.

²⁰ <https://www.nytimes.com/2003/04/19/nyregion/study-finds-asthma-in-25-of-children-in-central-harlem.html>. See also *Prevalence and Cost of Asthma in New York State* (asthma prevalence rates among Medicaid recipients were highest among children aged 0 through 17). https://www.osc.state.ny.us/reports/economic/asthma_2014.pdf. This high rate of asthma prevalence is consistent with high rates of asthma prevalence for black and hispanic youth in NY state. https://www.health.ny.gov/statistics/ny_asthma/pdf/2009_asthma_surveillance_summary_report.pdf at p. 46 (rates of asthma of 21-25% for black and hispanic middle and high schooler students).

²¹ <https://www.mdmag.com/medical-news/about-20-of-new-york-city-teenagers-have-undiagnosed-asthma>.

²² <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/asthma.html>.

²³ *Id.*

32. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

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

34. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.²⁴

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

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

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

Youth in Detention Facilities Face an Elevated Risk of COVID-19 Transmission

37. Upon information and belief, New York City juvenile detention centers, by design and operation, make it impossible for youth to engage in the necessary social distancing required to mitigate the risk of COVID-19 transmission. Detained youth have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of six feet from others.

38. Youth charged in Family Court as juvenile delinquents (individuals alleged to have engaged in criminal conduct between their seventh and eighteenth birthday²⁵) who are remanded during the pendency of their cases are housed in secure or non-secure detention centers in the custody of Respondent.

39. All youth remanded to secure detention are held in Crossroads Juvenile Detention Facility, operated by Respondent's Division of Youth and Family Justice ("DYFJ"). Youth remanded to non-secure detention are held in one of eight facilities run by non-profit organizations under contract with DYFJ. Both secure and non-secure detention facilities confine the youth in close quarters with shared living spaces and common gathering areas, and both experience constant turnover of detained youth and staff, making them breeding grounds for infection and transmission of COVID-19.

40. Youth at Crossroads are assigned to housing units comprised of individual cells connected by a common area with a shared bathroom. Individual cells lack sinks or toilets. Each housing unit eats all its meals in a communal dining room, used by all housing units in the facility, with the possible exception of the single Special Housing Unit. Upon information and belief, now,

²⁵ Family Court Act § 301.2(1).

each housing unit may be eat all meals in its common area. During waking hours, when not in school or other programs, youth generally are in their unit's common area. Due to the virus, school is not being held in separate classrooms, but only "remotely." As a result, youth are spending the majority of their days together in their housing unit's common area, which does not allow for social distancing.

41. Non-secure detention facilities, while designated as "non-secure," also are locked facilities. Each facility has the capacity to house twelve detained youth.²⁶ Prior to Mayor De Blasio's closing of NYC's public schools, youth in non-secure detention were taken to one of two specially designated schools outside of their facility. School is now being conducted on a remote basis, so youth are no longer transported to school, but remain locked into their housing facility, where they eat together, use common bathrooms and showers, spend time together in common areas, and often share bedrooms. Here, too, it is not possible to practice social distancing.

42. Youth in non-secure detention are brought to secure detention in order to obtain any needed medical care, leading to further exposure of youth in secure and non-secure detention.

43. At both secure and non-secure detention centers, the population continually changes, with new detained youth entering and others being discharged on a daily basis. Secure and non-secure detention centers also handle "police admits," youth who because of the timing of their arrest have not yet been arraigned by a judge to determine whether they need to be detained. As a result, youth in detention are continuously exposed to new detained youth, as they are to different staff members who alternate from shift to shift. As the virus spreads, staff will undoubtedly continue to fall ill, increasing the turnover and exposure of youth in the facility.

²⁶ 9 NYCRR 180-1.3(D)(3).

44. Infectious diseases that are communicated by air or touch, such as COVID-19, are more likely to spread in congregate environments, such as detention centers – places where people live, eat, and sleep in close proximity. Recent events demonstrate that people are particularly vulnerable to transmitted COVID-19 infection where their ability to practice social distancing is limited and they either share common areas where the infection risk is high or they unavoidably come into contact with persons who themselves were exposed to situations that carried a high degree of risk of infection.

45. The highest known person-to-person transmission rate for COVID-19 to date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California. Each of these congregate settings became veritable breeding grounds for transmission of COVID-19.

46. The conditions of New York City detention facilities pose a higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Detention centers have a greater risk because of closer quarters, the proportion of vulnerable people detained, and sub-optimal medical care resources.²⁷

47. Juvenile detention centers, much like jails, impose limited mobility and heightened confinement on their detainees and feature shared dining and bathroom accommodations, make them particularly vulnerable to the transmission of infection. In China and Iran, major and

²⁷ See, e.g., Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (Oct. 2007), <https://doi.org/10.1086/521910> (in jails “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”); see also Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020).

devastating COVID-19 outbreaks occurred in prisons, and experts predict the same will happen here.²⁸

48. Just this week, New York City jails were hit with a large COVID-19 outbreak.²⁹ The New York City Board of Correction reports that as of March 21, 2020, “at least twelve [Department of Correction (“DOC”)] employees, five [Correctional Health Services] employees, and twenty-one people in custody have tested positive for the virus. There are more than 58 individuals currently being monitored in the contagious disease and quarantine units (up from 26 people on March 17).”³⁰

49. As of March 23, 2020, it is reported that DOC’s Rikers Island has 60 confirmed COVID cases among inmates, up from just 8 cases on Friday.³¹

50. Indeed, COVID-19 already has reached New York City youth detention centers. As of March 23, 2020, at least two staff two staff members working at Crossroads, responsible for transporting detained youth to and from court, have contracted the virus and been hospitalized with respiratory problems.³²

51. Given that the period during which a COVID-19 infection incubates in a person before that person develops symptoms is estimated to be between 2 and 14 days,³³ and given the

²⁸ Evelyn Cheng and Huileng Tan, China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons, CNBC, Feb. 20, 2020, (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis), available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html>.

²⁹ <https://www.latimes.com/world-nation/story/2020-03-22/38-positive-for-coronavirus-in-nyc-jails-including-rikers>.

³⁰ <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf>

³¹ <https://twitter.com/Taniel/status/1242138921229848576>.

³² Eileen Grench, *Three Juvenile Detention Staff Test Positive for COVID-19, But No Teens Released*, THE CITY (Mar. 20, 2020) <https://thecity.nyc/2020/03/juvenile-detention-staff-test-positive-but-no-kids-sprung.html>; <https://www.pix11.com/news/coronavirus/positive-covid-19-test-in-bronx-juvenile-detention-center>. A third staff member, employed at Horizon Juvenile Detention Center, which houses adolescents charged in criminal court, also has tested positive. *Id.*

³³ <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

current lack of access to testing,³⁴ there is little doubt that the actual number of infected youth and staff in secure detention is already much higher and will continue to grow. The Legal Aid Society has been receiving daily reports of symptomatic, suspected COVID-19 positive individuals in New York City juvenile detention centers.

52. ACS has not implemented protocols sufficient to protect either the youth in detention or staff working in the facilities. There is no indication that ACS has even taken such risk-mitigation measures as ensuring all staff and youth have access to cleaning and sanitation supplies and giving youth instruction on how to properly wash their hands and sanitize all surfaces throughout the day. Moreover, given the constant influx of new detained youth, there simply are no measures absent unavailable mandatory and prompt testing to address those youth who may be in the incubation period of the virus or asymptomatic carriers of it.³⁵

53. ACS has suspended family visits to detention centers to reduce transmission, but that isolates youth from their families and support networks. The suspension of all visits for youth in detention during this incredibly stressful period places them at risk of significant emotional harm. The vast majority of youth in the juvenile justice system have experienced trauma and suffer from mental health disorders. According to the Vera Institute, in 2014 “approximately 85 percent of young people assessed in secure detention intake reported at least one traumatic event, including

³⁴ On March 20, 2020, the NYC Department of Health issued NYC Health Advisory # 8 which now expressly discourages non-hospitalized testing for COVID-19. NYC health officials have directed medical providers to stop testing patients, except those sick enough to require hospitalization. Only testing that would impact a patient's treatment should be done. Associated Press, *Coronavirus NY: Health Officials Provide Limits on Testing Patients for COVID-19* (March 21, 2020). Due the critical shortage of protective equipment for health care workers, swabs and transport media, and in order to reduce transmission of the virus, non-hospitalized patients will no longer be tested in order to preserve protective equipment for health care workers. <https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2020/covid-19-03202020.pdf>

³⁵ *Coronavirus: Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

sexual and physical abuse, and domestic or intimate partner violence. Furthermore, one in three young people screened positive for Post-Traumatic Stress Disorder (PTSD) and/or depression.”³⁶

54. Cutting youth off from visits by their families and supports during this difficult, anxiety-producing time increases the emotional toll associated with their detention.

55. Gladys Carrion, former Commissioner of ACS, issued a statement noting that visitation for incarcerated youth is “essential” to their emotional well-being and she, along with other experts in the juvenile justice system, are pressing for the release of detained youth to their homes whenever possible, given that the facilities are not equipped to handle the crisis.³⁷

Release Is Required to Address the Risk of Serious Medical Harm

56. On March 20, 2020, Youth Corrections Leaders for Justice (“YCLJ”), a group comprised of youth corrections officials across the country (co-chaired by Vincent Schiraldi, former Commissioner of New York City Department of Probation, and former ACS Commissioner Gladys Carrion), issued a joint statement signed by 30 current and former youth correctional administrators calling for the immediate release of youths in juvenile detention facilities to protect them from COVID-19.³⁸

57. In the press release announcing YCLJ’s statement, Mr. Schiraldi is quoted as saying:

As a nation, we have decided that it is not safe for our children to be in school together. That means it is certainly not safe for them to live in congregate care facilities with hundreds of other youth, 24/7. . . Those of us who have run these places know that the idea of social distancing is preposterous in such an environment and introducing the virus to locked facility would be devastating.³⁹

³⁶ https://www.vera.org/downloads/Publications/innovations-in-nyc-health-and-human-services-policy-juvenile-detention-reform/legacy_downloads/transition-brief-juvenile-detention-reform.pdf at 12. See also, <https://www.nctsn.org/trauma-informed-care/trauma-informed-systems/justice/essential-elements> (80% of juvenile-justice involved youth report experiencing trauma).

³⁷ Recommendations for Youth Justice Systems During the COVID-19 Emergency. <https://yclj.org/covid19statement>.

³⁸ *Id.*

³⁹ <https://yclj.org/covid19pressrelease>

58. In a similar initiative, youth justice advocates in twenty-two states, New York among them, sent letters to their governors, juvenile justice system administrators, and other state and local officials, demanding the release of detained and incarcerated youth and the halting of new admissions to protect youth from the spread of COVID-19.⁴⁰

59. Physicians for Correctional Reform issued a statement calling for the release of children in juvenile detention and describing the health risks posed by COVID-19 in carceral settings:

Transmission of infectious diseases in adult jails and prisons is incredibly common, especially those transmitted by respiratory droplets. For example, it is estimated that up to one quarter of the U.S. prison population has been infected with tuberculosis, a rate of active TB infection that is six to ten times higher than the general population. Flu outbreaks are regular occurrences in jails and prisons across the United States. With a mortality rate 10 times greater than the seasonal flu and a higher R0 (the average number of individuals who can contract the disease from a single infected person) than Ebola, an outbreak of COVID-19 in youth detention and correctional facilities would be devastating.⁴¹

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

⁴⁰ Copies of the letters may be found at the following address: https://docs.google.com/document/d/1WR7L2dWyrDP5_XC21Nm3RlupILm5QG8dbXQ-d1ETIA4/edit

⁴¹ <https://njdc.info/wp-content/uploads/PFCJR-Statement.pdf> at 2.

61. Ross MacDonald, the Chief Medical Officer of CHS, publicly called for the release from Rikers Island of “as many [people] as possible” on Twitter on March 18, 2020: ⁴²



62. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, has concluded that “[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has

⁴² <https://twitter.com/RossMacDonaldMD/status/1240455796946800641>

recommended the “release of eligible individuals from detention, with priority given to the elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19.”⁴³

Failure to Release Petitioners Constitutes Deliberate Indifference to Serious Medical Harm

63. Allowing ACS to continue to detain Petitioners under conditions in which they are unable to take the only known steps to protect themselves from transmission of COVID-19 constitutes deliberate indifference to serious medical harm in violation of the United States and New York State constitutions.

64. The Due Process clause of the Fourteenth Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). This proscription applies equally to youth confined pursuant to juvenile delinquency matters. See *Schall v. Martin*, 467 U.S. 253 (1984). To establish a federal constitutional claim, Petitioners must prove that Respondents (1) acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though (2) they knew, or should have known, that the condition posed an excessive risk to health or safety. *Id.* at 35.

65. The State also owes an affirmative duty to protect youth with whom it has developed a “special relationship.” The State holds liability when it takes individuals into custody against their will and fails to provide for their basic needs. *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power 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...it transgresses the substantive limits on

⁴³ Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

state action set by the Eighth Amendment and the Due Process Clause.”). Both the United States Supreme Court and the Second Circuit have determined that a special relationship exists between the State and incarcerated prisoners, as well as between the State and involuntarily committed individuals. *Id.* at 199. As the Second Circuit has emphasized, “involuntary custody [is] the linchpin of any special relationship exception.” *Matican v. New York*, 524 F.3d 151, 156 (2d Cir. 2008). Thus, it is well established that, if the State is holding an individual in its custody involuntarily, it is obligated to provide constitutionally adequate care and safety.

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

67. The U.S. Supreme Court and courts throughout New York have recognized that the risk of contracting a communicable disease constitutes an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). *See also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *Narvaez v. City of New York*, No. 16-CV-1980 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying “motion to dismiss Plaintiff’s claim that the City of New York violated Plaintiff’s rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB” during his pretrial detention); *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (acknowledging that prisoner could state claim under § 1983 for confinement in same cell as inmate with serious contagious disease).

68. Respondent is well aware of the extraordinary risk COVID-19 poses to people in New York City juvenile detention facilities. Since at least March 13, 2020, Dawne A. Mitchell, the attorney-in-charge of the Juvenile Rights Practice of the Legal Aid Society, has been in near daily contact with ACS officials regarding this crisis and our ongoing and ever-increasing concern about the ability to manage the risk of COVID-19 in the city’s juvenile detention centers.

69. As pleaded above, numerous media outlets have covered these and other calls to action.

70. Whatever steps Respondent has taken to manage the risk of COVID-19 will fail because, as pleaded above, Respondent is not capable of managing that risk in a confined close-quartered environment.

71. Further, the Honorable Jeanette Ruiz, Administrative Judge of New York Family Court, has issued an order reducing the number of courtrooms that are operating throughout the

City, and on March 16, 2020, the court's Deputy Administrative Judge, George Silver, signed an order providing, *inter alia*, that remand orders in juvenile delinquency cases may be extended beyond their expiration dates, until such time as the court re-calendars or terminates the action. Juveniles will thus be spending significantly longer times than usual in detention. Given the rate at which COVID-19 has been skyrocketing in New York City, the longer these youth remain in detention facilities, with their woefully inadequate protections, the greater the likelihood they will fall sick and spread the virus among themselves and staff.

72. The Family Court Act imposes strict limitations on remanding youth to detention and there is a strong presumption against taking such extreme action. Section 320.5(3)(a) of the Family Court Act states that a respondent shall be detained only upon a finding that no alternative to detention, including conditional discharge, exists, and that there is a substantial probability that the respondent shall not appear in court on the return date or a serious risk he or she may commit a criminal act before the return date.

73. Further, F.C.A. § 320.5(5) requires that before remanding a juvenile to detention, the court make a determination that continuation of the juvenile in the home would be contrary to his or her best interests based on the facts and circumstances available to the court at the time of the remand order. The circumstances have changed dramatically since the remand orders were issued against Petitioners and it is no longer the case that continuation in the home is contrary to their best interests.

74. Moreover, safeguards can be put in place to minimize any risks presented by releasing the Petitioners from detention. Family Court Act § 320.5(3)(c) provides that if the court makes a finding that detention is necessary, it may consider, as an alternative to detention, electronic monitoring of the respondent, if such electronic monitoring would significantly reduce

the risk of re-arrest or failure to appear.⁴⁴ Additionally, the court may order home confinement, already directed by the Governor’s executive order, and require phone and video monitoring to ensure compliance.

75. In *Schall v. Martin*, 467 U.S. 253 (1984), the Supreme Court upheld the constitutionality of F.C.A. § 320.5(3)(a), based, inter alia, on the fact that the period of confinement was to be “brief” and “strictly limited in time,” contemplating the “maximum possible detention” for a youth accused of a serious crime as being seventeen days. *Id.* at 270. Youth in custody today are facing protracted detention due to COVID-19, certainly far longer than that envisioned by the Supreme Court. In addition to the very real health risks confronting youth in detention during the pandemic, they also face violations of their due process rights to meaningful access to counsel and to speedy trial and disposition, the guarantees of which the *Schall* Court cited in upholding the detention statute. *Id.* It is especially important for youth to participate in their defense. Such participation includes meaningful, private consultations with attorneys and gathering and reviewing evidence. For young people it is much more important to have these conversations with their attorneys in person to gauge the young person’s understanding and capacity.

76. With very few exceptions, juvenile delinquency youth face at most 18 months placement⁴⁵ on felony charges, of which they spend between 6 and 12 months in placement, serving the remainder of their time on supervised community release. It is excessive and punitive to keep youth in detention for months on end before they even go to trial when they are at such

⁴⁴ This provision, and the provision requiring the court to consider all available alternatives to detention, including conditional release, before issuing a remand order, were added to the statute in 2008 to strengthen the legislative policy of limiting detention to only those situations where the loss of liberty is an “absolute necessity.” See Sobie, Supplemental Practice Commentaries, McKinney’s Cons Laws of N.Y., Book 29A, Family Court Act § 320.5.

⁴⁵ Placement in juvenile delinquency proceedings is the equivalent of sentencing in adult criminal proceeding.

grave risk of health issues and will only likely serve a few additional months if there is ever a finding. Rehabilitation is a hallmark of the juvenile justice system where education and treatment feature prominently. Detention facilities such as Crossroads are not designed for long term treatment and education of youth.

77. Clearly, when balancing the harm to these juveniles by remaining confined in detention during the COVID-19 pandemic, where they continue to be exposed to the very high risk of infection, against the benefit to the public and judicial system of maintaining their remand status, due process demands their immediate release. *Cf. U.S. v. Stephens*, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting defendant bail upon finding that “unprecedented and extraordinarily dangerous” nature of COVID-19 pandemic and heightened risk of contracting it in jail setting provided changed circumstances to compel reconsideration of original remand order).

78. Respondent’s intentional failure to release Petitioners while actually aware of the substantial risk of COVID-19 infection and transmission plainly constitutes deliberate indifference.

Habeas Relief Is the Appropriate Remedy in this Circumstance

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

exposed to conditions that pose an unreasonable risk of serious damage to [their] future health.”) (citation and internal quotation marks omitted).

80. Immediate release pursuant to a writ of habeas corpus is available to address constitutional violations arising from circumstances or conditions of confinement. *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas petition may be used to address “restraint in excess of that permitted by...constitutional guarantees”); *Kaufman v. Henderson*, 64 A.D.2d 849, 850 (4th Dep’t 1978) (“[W]hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment.”).

81. A person is “not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society” by virtue of incarceration. *Brown*, 9 N.Y.2d at 485. Thus, courts have addressed whether the failure to address medical needs has risen to the level of a constitutional violation, requiring immediate release. *See, e.g., People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 250–51 (2d Dep’t 1993) (habeas petition addressing whether failure to provide adequate medical care constituted cruel and unusual punishment or deliberate indifference). Indeed, habeas relief is the *only* remedy available in such circumstances. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

Respondents Have Authority to Release Petitioners

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

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

PRAYER FOR RELIEF

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

Dated: March 25, 2020
New York, New York

Respectfully Submitted,

/s/

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

Dated: March 25, 2020
New York, New York

Lisa Freeman