

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRISTIAN ARRIAGA REYES, FEDOR
BONDARENKO; SANTIAGO CABRERA-
CAMPOVERDE; NOE CORNEJO MELENDE;
ALVARO NEGRETTE MEJIA,

Petitioners-Plaintiffs,

v.

THOMAS DECKER, in his official capacity as Field
Office Director, New York City Field Office, U.S.
Immigration & Customs Enforcement; CHAD WOLF,
in his official capacity as Acting Secretary, U.S.
Department of Homeland Security; WILLIAM P.
BARR, in his official capacity as Attorney General, U.S.
Department of Justice; RONALD P. EDWARDS, in his
official capacity as Director, Hudson County Jail;
STEVEN AHRENDT, in his official capacity as
Warden, Bergen County Jail;

Respondents-Defendants.

Civil Action No. 20-cv-3600
(MCA)

**FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28
U.S.C. § 2241 AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTION

1. Plaintiffs are civil immigration detainees who, by virtue of their serious and chronic medical conditions such as asthma, diabetes, and hypertension, face imminent risk of severe illness or death if they contract COVID-19 in the county jails where they are currently detained, and where the virus is already circulating. Each of the plaintiffs is subject to discretionary detention by Immigration and Customs Enforcement (“ICE”) and is statutorily eligible for release at any time. But instead, they remain trapped in what are essentially tinderboxes on the verge of explosion, at grave risk to their lives and health, separated from their families during a traumatic and unprecedented public health crisis. ICE’s failure to heed the advice of medical experts to release medically vulnerable individuals has created a risk of harm to Plaintiffs that is both unconscionably high and entirely preventable.
2. A growing number of courts around the country have ordered the immediate release of medically-vulnerable immigration detainees in recent days, recognizing both the enormous risk of harm that COVID-19 creates as well as ICE’s failure to sufficiently abate the risk of harm. *See e.g., Coronel v. Decker*, ---F. Supp. 3d---, 2020 WL 1487272 (S.D.N.Y. Mar. 27, 2020); *Avendano Hernandez v. Decker*, 20-cv-1589, 2020 WL 1547459 (S.D.N.Y. Mar. 31, 2020); *Basank v. Decker*, ---F. Supp. 3d---, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Thakker v. Doll*, 20-cv-480-EJ, Dkt. No. 47 (M.D. Penn. Mar. 31, 2020); *Bravo Castillo v. Barr*, 5:20-cv-605-TJH-AFM, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020).
3. Plaintiffs here seek the same relief in light of their pre-existing medical conditions. Packed in close quarters with other detainees and correctional staff, forced to share necessities like showers, telephones, toilets and sinks with dozens of others, and deprived of basic forms of preventative hygiene, Plaintiffs are helpless to take the key risk mitigation steps known to limit

transmission of the virus. And if they are infected, they face a heightened risk of severe illness and death within jails that have a track record of failing to provide adequate medical care even outside times of crisis.

4. Medical experts agree that reducing jail populations is critical to reducing risk during the widespread COVID-19 outbreak, and that officials must first focus on vulnerable populations to reduce harm to the entire population. Failing to heed this medical consensus and against a backdrop of extreme crisis, ICE has not sufficiently exercised its discretion to release medically-vulnerable individuals.
5. Before filing suit, Plaintiffs notified ICE of their medical conditions and requested that they be released in light of the harms they will experience if they contract COVID-19 while detained. Those pleas have fallen on deaf ears. The continued imprisonment of these high-risk individuals violates their due process rights both by constituting deliberate indifference to serious medical harm and by failing to provide procedural safeguards commensurate with the serious deprivation of life and liberty that they face.

PARTIES

6. Petitioner-Plaintiff Cristian Arriaga Reyes is a 33-year-old man who has been incarcerated by ICE since January 2020 at Hudson County Jail. He suffers from hypertension and type 2 diabetes. He is in removal proceedings at the Varick Immigration Court in New York, NY. Because of his medical conditions, Mr. Arriaga is at high risk for severe illness or death if he contracts COVID-19.
7. Petitioner-Plaintiff Fedor Bondarenko is a 35-year-old man who has been incarcerated by ICE since December 2019 at Bergen County Jail. He suffers from asthma, high blood pressure, chronic hepatitis B, acute prostatitis (deep infection of the prostate), and post-operative

complications of hemorrhoid surgery. He is in removal proceedings at the Varick Immigration Court in New York, NY. Because of his medical conditions, Mr. Bondarenko is at high risk of severe illness or death if he contracts COVID-19.

8. Petitioner-Plaintiff Santiago Cabrera-Campoverde is a 36-year-old man who has been incarcerated by ICE since February 2020 at Bergen County Jail. He has hypertension and was recently taken to the hospital due to kidney stones, for which he requires surgery. He is in removal proceedings at the Varick Immigration Court in New York, NY. Because of his medical conditions, Mr. Cabrera-Campoverde is at high risk of severe illness or death if he contracts COVID-19.
9. Plaintiff-Petitioner Noe Cornejo Melende is a 40-year old man who has been detained by ICE at the Bergen County Jail since August 2019. Mr. Cornejo Melende was recently diagnosed with Bell's Palsy and has been prescribed Prednisone, an oral steroid. Oral steroids suppress patients' immune systems. He is in removal proceedings at the Varick Immigration Court in New York, NY. Because of his neurological disorder and immunocompromised condition, Mr. Cornejo Melende is at high risk of severe illness or death if he contracts COVID-19.
10. Petitioner-Plaintiff Alvaro Negrette Mejia is a 59-year-old man who has been incarcerated by ICE since March 2019 at Hudson County Jail. He suffered a heart attack approximately five years ago and has type 2 diabetes, hypertension, and high cholesterol. He is in removal proceedings at the Varick Immigration Court in New York, NY. Because of his medical conditions, Mr. Negrette is at high risk of severe illness or death if he contracts COVID-19.
11. Respondent-Defendant Thomas Decker is named in his official capacity as the Director of the New York Field Office for Immigration and Customs Enforcement within the Department of Homeland Security. He is responsible for the administration of immigration laws and the

execution of detention and removal determinations for individuals under the jurisdiction of the New York Field Office. As such, he is a custodian of Plaintiffs.

12. Respondent-Defendant Chad F. Wolf is named in his official capacity as the Secretary of the Department of Homeland Security. He is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103(a); routinely transacts business in the Southern District of New York; he supervises Respondent Decker; and is legally responsible for the pursuit of non-citizens' detention and removal. As such, he is a custodian of Plaintiffs.
13. Respondent-Defendant William Barr is named in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for the administration of the immigration laws as exercised by the Executive Office for Immigration Review, pursuant to 8 U.S.C. § 1103(g). He routinely transacts business in the Southern District of New York and is legally responsible for administering removal and bond proceedings and the standards used in those proceedings. As such, he is a custodian of Plaintiffs.
14. Respondent-Defendant Ronald P. Edwards is named in his official capacity as the Director of the Hudson County Jail. In this capacity, he is a custodian of two of the Plaintiffs. His office is located at the Hudson County Jail, Kearny, NJ.
15. Respondent-Defendant Steven Ahrendt is named in his official capacity as Warden of the Bergen County Jail. In this capacity, he is or was the custodian of four of the Plaintiffs. His office is located at the Bergen County Jail, Hackensack, NJ.

JURISDICTION & VENUE

16. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1651 (the All Writs Act); 42 U.S.C. § 1983 (Civil Rights Act); and Article I, Section 9, clause 2 of the Constitution (the

Suspension Clause). Venue properly lies in this district under both 28 U.S.C. § 1391 and 28 U.S.C. § 2241.

STATEMENT OF FACTS

New York and New Jersey are Epicenters of an Exponentially Escalating Global Pandemic.

17. On March 13, 2020, President Trump declared a national emergency in response to the coronavirus pandemic. At the time, there were just over 1,600 confirmed cases in the United States and 46 deaths. Today, less than a month later, over 328,861 cases have been confirmed across the country and have led to the death of at least 9,368 patients.

18. New York and New Jersey are epicenters of the COVID-19 in the United States with over 160,101 identified cases in New York and New Jersey and 5,076 virus-related deaths.

19. Because the coronavirus that causes COVID-19 is particularly contagious, authorities are taking unprecedented precautions to manage the public health crisis and minimize the transmission of the virus by reducing the opportunity for large groups of people to congregate.

The Heightened Risk of Severe Illness or Death from COVID-19 in Jails

20. According to Dr. Robert B. Greifinger, who has worked in health care for prisoners for more than thirty years, “the conditions of immigration detention facilities pose a heightened public health risk to the spread of COVID-19, even greater than other non-carceral institutions.” *See* Declaration of Robert Greifinger ¶¶ 1, 9 (“Greifinger Decl.”).

21. The highest known person-to-person transmission rate for COVID-19 to date has taken place in settings where people are in close proximity to each other without an ability to distance themselves: in a nursing home facility in Kirkland, Washington, and in the Cook County Jail in Chicago, Illinois.

22. The conditions of jails such as those utilized by ICE in New Jersey pose an acute risk for the spread of COVID-19 due to their close quarters, the proportion of vulnerable people detained, lack of medical care resources, and inability to seal off the facility from the outside world, given jail staff still enter and leave the facilities. Greifinger ¶¶ 10-20.
23. Preventative strategies utilized by the general public, like social distancing and preventative hygiene are not possible in jails. *Id.* ¶¶ 10.
24. When an outbreak occurs, jails holding immigrant detainees are ill-equipped to engage in adequate containment and proper medical treatment for sick detainees. *Id.* ¶¶ 11 (explaining that many immigration detention centers “lack adequate medical care infrastructure to address the spread of infectious disease and treatment of high-risk people in detention”).
25. Medical experts agree that reducing the number of detainees is a necessary component of risk mitigation *Id.* ¶¶ 21-22. Any reduction in detained populations must focus on the most vulnerable detainees, in order to safeguard their health, the health of other detainees and jail staff, and the community as a whole. *Id.* ¶ 21.
26. As medical staff and resources within the facility becomes overwhelmed, regional hospitals and health centers end up bearing the brunt of providing healthcare for sick detainees—who are disproportionately likely to be those with pre-existing medical vulnerabilities. *Id.* ¶ 23. The rapid spread of an infectious disease like COVID-19 within a jail ultimately results in adverse public health outcomes for the broader community and region.
27. In the face of the current crisis, correctional systems around the country and the world, including New York City, have announced concerted efforts to reduce their detained populations. Many of these jurisdictions are focusing their release efforts on individuals

classified as high-risk. These jurisdictions also include Los Angeles County, CA; Cook County, IL; a county in Ohio; Hennepin County, MN; and San Francisco, CA.

28. On March 22, 2020, the New Jersey Supreme Court ordered, on consent, the release of the vast majority of individuals serving county jail sentences, in light of the “profound risk posed to people in correctional facilities arising from the spread of COVID-19.”
29. More recently, New York State’s Department of Corrections and Community Supervision announced that it will release 1,100 individuals from the state’s jails who were being held on technical parole violations.
30. Despite the consensus in the medical community about the need to reduce population size to improve outcomes for public health and safety, and in sharp contrast to the efforts of jurisdictions around the United States to comply with such recommendations, ICE has not announced plans to systematically reduce its detained population size.

The Risks to Plaintiffs’ Health are Particularly Acute in the Jails Where ICE is Detaining Them.

A. Both Bergen County Jail and Hudson County Correctional Facility Reported Confirmed COVID-19 Cases.

31. The New York-area jails where plaintiffs are detained—Bergen County Jail and Hudson County Correctional Facility—are especially vulnerable to rapid transmission of COVID-19 because of the unsanitary and hazardous conditions within the facilities and their history of providing poor treatment.
32. The novel coronavirus is rapidly spreading at these jails and there are multiple confirmed cases of COVID-19 amongst ICE detainees, criminal detainees, and jail staff. Last week, a correctional officer at the Hudson County Correctional Center passed away after contracting

COVID-19. And just yesterday, officials confirmed that a nurse at the jail had also passed away after contracting COVID-19.

33. The experience of an ICE detainee at Bergen County Jail (a client of The Bronx Defenders) who tested positive for COVID-19 demonstrates ICE's lack of preparedness to deal with the consequences of its refusal to timely release medically-vulnerable detainees and its failure to prevent the virus from spreading in its facilities. Even once this individual, who had pre-existing health conditions, tested positive for COVID-19 at a local hospital, he was taken back to the jail and held there for days. Eventually, days after he was diagnosed, he was released after repeated requests by his attorney. Upon his discharge, he felt so ill that he and a family member who came to pick him up attempted to walk to the nearest hospital. However, he began throwing up shortly after leaving ICE custody and called an ambulance.
34. While confined at the jail after his positive test diagnosis, this individual was unable to contact his attorney. Additionally, despite his attorney's repeated attempts to speak to an ICE officer or jail official after learning from the client's family that he had tested positive for COVID-19, she was unable to obtain any information regarding his health or a decision on the urgent release request for over 24 hours.

B. Unsanitary Conditions and Failure to Provide Adequate Medical Care Even During Non-Crisis Times

35. ICE detainees at both jails have also reported that conditions have deteriorated in recent weeks as the facilities take ad hoc and insufficient measures to try to contain transmission, including by widespread and arbitrary use of extreme isolation at both jails. Detainees at both facilities report 23.5 hour lockdowns during which they are not permitted to leave their cells. During the 30 minutes each day that they are allowed outside their cells, they must choose between showering and calling their family or attorneys. This level of isolation from the outside world

is not only draconian, but ineffective, as detainees still share infrequently-sanitized or cleaned common spaces, telephones, and showers when allowed out of their cells.

36. Detainees also describe insufficient hand soap, hand sanitizer, and access to cleaning supplies, and previously reported at times being deprived of toilet paper. Some detainees also report that jail officials have forbidden them from flushing toilets frequently, adding to unsanitary conditions. Attorneys who visited the jails prior to the end of contact visits confirmed that there was a lack of hand soap in the visitors' bathrooms, meaning that visitors would carry in whatever germs they entered the facility with.
37. Further contributing to the elevated risk of harm is these jails' track record of failure to provide adequate and prompt medical care even before the current pandemic. *See* Declaration of Marinda Van Dalen ¶¶ 18-45. Examples of inadequate care at these specific facilities includes a history of denial of vital medical treatment such as dialysis and blood transfusions; subjecting detainees in need of surgeries to unconscionable delays; altering established treatment regimens; failing to provide necessary mental health services; overuse of solitary confinement; and ignoring repeated requests for care from detainees with serious symptoms. *Id.* ¶¶ 23-36. These deficiencies in medical treatment have placed individuals at risk of strokes, heart attacks, renal failure, amputation, life-threatening heart conditions, kidney failure, and blindness. *Id.* ¶¶ 41-44. Last year, a mumps outbreak at Bergen County Jail resulted in the quarantine of dozens of immigration detainees for several weeks.
38. The Department of Homeland Security's own Office of the Inspector General also recently reported on the substandard care, long waits for medical care and hygiene products, and mistreatment in ICE detention facilities.

The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death to Those with Certain Medical Conditions.

39. COVID-19 can lead to severe illness, extended hospitalization, and death. Greifinger Decl. ¶¶

5-6. Older patients and those with chronic underlying conditions are at a particularly high risk for severe cases and complications. *Id.* ¶¶ 5-7. Underlying medical conditions that may increase the risk of serious COVID-19 for individuals of any age “include blood disorders, kidney or liver disease, compromised immune system, endocrine disorders, including diabetes, metabolic disorders, heart and lung disease, neurological and neurologic and neurodevelopmental conditions, and current or recent pregnancy.” *Id.* ¶ 7.

40. According to preliminary data from China, 20% of high-risk individuals who contract COVID-19 have died. *Id.* ¶ 5.

41. Those in high-risk categories who do not die may have prolonged serious illness requiring hospital care, including ventilators that will likely be in very short supply. *Id.* ¶ 6.

Plaintiffs Are Medically-Vulnerable Individuals Who Face a Heightened Risk of Severe Harm if They Contract COVID-19 While Detained.

42. Plaintiffs in this case face unprecedented and imminent harm because COVID-19 has already started to spread in their jails. Each plaintiff has one or more underlying medical conditions that renders him particularly vulnerable to severe illness or death if he contracts the disease.

43. **Cristian Arriaga Reyes.** Mr. Arriaga is a 33-year-old man who has been incarcerated by ICE at the Hudson County Jail since January 2020. He is a long time New Yorker with strong community support in Queens. If released, he will live with his brother in Flushing and receive the support of his sisters, with whom he is very close. Mr. Arriaga’s sole criminal conviction is a 2018 conviction for attempted endangering the welfare of a child, for which he received a sentence of a one-year conditional discharge.

44. Mr. Arriaga suffers from type 2 diabetes and hypertension and has been prescribed daily medication and insulin shots for his condition. In the last two months, Mr. Arriaga's blood sugar levels have been well above the medically recommended range. Additionally, jail staff have refused to give Mr. Arriaga Advil for his arthritis.
45. Because of his medical conditions, Mr. Arriaga is at high risk for severe illness or death if he contracts COVID-19. Based on these conditions, The Legal Aid Society filed a written request for release with ICE on March 19, 2020, describing Mr. Arriaga's equities, severe medical conditions, and the risks he faces if he contracts COVID-19 in jail. ICE has not responded to his request.
46. **Fedor Bondarenko.** Mr. Bondarenko is a 35-year-old man who ICE has incarcerated since December 2019 at Bergen County Jail. Fearing persecution in his home country of Russia, Mr. Bondarenko applied for asylum shortly after entering the United States. He has no criminal convictions and no criminal record at all in the United States.
47. Mr. Bondarenko suffers from asthma, high blood pressure, chronic hepatitis B, acute prostatitis (deep infection of the prostate), and post-operative complications of hemorrhoid surgery. Mr. Bondarenko experiences constant pain, intermittent bleeding due to hemorrhoids, and frequent urination.
48. Prior to his immigration hearing on March 19, 2020, Mr. Bondarenko, through his Bronx Defenders' attorney, filed a motion for changed circumstances on bond based on ineffective assistance of his prior counsel and new evidence regarding his lack of flight risk, worsening health, and risks of COVID-19 infection. However, the Immigration Judge refused to even hear him on that motion as she stated she had not received the hard copy in her file; she further

refused to accept the courtesy copy of the motion that had been emailed to her and instead adjourned Mr. Bondarenko's case to April 16, 2020.

49. Because of his medical co-morbidities, Mr. Bondarenko is at high risk of severe illness or death if he contracts COVID-19. Based on these conditions, The Bronx Defenders filed a written request for release with ICE on March 13, 2020, and sent updated medical information on March 31, describing his equities, severe medical conditions, and the risks he faces if he contracts COVID-19 in jail. ICE has not responded to his request.

50. **Santiago Cabrera Campoverde.** Mr. Cabrera is a 36-year-old man who ICE has incarcerated at Bergen County Jail since January 2020. He has lived in the United States since 2005, during which time he has worked consistently. Mr. Cabrera has multiple U.S. citizen and lawful permanent resident family members in the New York area with whom he is close, as well as a 16-year-old daughter whom he supports. His first wife passed away from cancer in 2010 and he is his daughter's only living parent. He will return to living in Brooklyn, where he resided prior to his detention, if released.

51. Mr. Cabrera suffers from hypertension, for which he takes medication, and kidney stones, for which he requires surgery. Mr. Cabrera was taken to an external clinic this month while in ICE custody as a result of intense stomach pain and was diagnosed with kidney stones. The physician prescribed him pain medication and recommended that he receive surgery for the kidney stones. Mr. Cabrera also is receiving daily medication for his high blood pressure; he has had a history of hypertension for the past six years.

52. In the 15 years he has resided in the U.S., Mr. Cabrera has been arrested on two occasions, resulting in a single conviction. The first arrest, in 2013, resulted in a conviction for driving while ability impaired under New York Vehicle and Traffic Law ("VTL") § 1192.1, an

infraction under New York law. The second arrest, in September 2019, involved a top charge of misdemeanor assault in the third degree for events that allegedly occurred in July and August 2019; all those charges were fully dismissed in January 2020.

53. Because of his medical conditions Mr. Cabrera is at high risk for severe illness or death if he contracts COVID-19. Based on these conditions, The Bronx Defenders filed a written request for release with ICE on March 29, 2020, describing Mr. Cabrera's equities, severe medical conditions, and the risks he faces if he contracts COVID-19 in jail. ICE has not responded to his request.

54. **Noe Cornejo Melende.** Noe Cornejo Melende is a 40-year old long-time New Yorker who has been detained in ICE custody since August 2019. He is being held at the Bergen County Jail. He has lived in the New York area for about 16 years and has strong family ties in this country, including a U.S. citizen wife and four U.S. citizen stepchildren who he is helping to raise. If released, Mr. Cornejo Melende would live with his stepson in Westbury, New York. His wife and younger stepchildren, who were forced to relocate to Texas while Mr. Cornejo has been detained so that his in-laws could assist with childcare, will also return to Westbury and live with them.

55. Mr. Cornejo has a criminal conviction stemming from an arrest in 2017 for driving while intoxicated under VTL § 1192.2 and for driving without a license under Vehicle and Traffic Law § 509.1. He has a second conviction stemming from an arrest in 2019 for aggravated driving while intoxicated under Vehicle and Traffic Law § 1192.2a and aggravated unlicensed operation of a motor vehicle under Vehicle and Traffic Law § 511.3. Mr. Cornejo served a custodial sentence for the second case, for a term of four months. He also has an earlier disorderly conduct conviction from 2014 under New York Penal Law § 240.20.

56. Mr. Cornejo Melende was recently diagnosed with Bell's Palsy and has been prescribed Prednisone for his condition. Prednisone is an oral steroid, which suppresses his immune systems. Because of his immune system is suppressed, and because of his underlying neurological condition, he is at high risk for severe illness or death if he contracts COVID-19. Based on these conditions, The Legal Aid Society filed a written request for release with ICE on April 1, 2020, describing Mr. Conejo's equities, severe medical conditions, and the risks he faces if he contracts COVID-19 in jail. ICE has not responded to his request.

57. **Alvaro Negrette Mejia.** Mr. Negrette is a 59-year-old lawful permanent resident of the United States who has lived in the United States for over three decades. He has been detained in ICE custody at the Hudson County Jail since March 2019. Mr. Negrette has strong family ties in the country, including a U.S. citizen daughter and three U.S. citizen grandchildren. He was also a critical source of support and care to his ailing elderly mother, who passed away in 2019 while he was in ICE custody.

58. Stemming from a single case in 1992, Mr. Negrette has convictions for sexual abuse and endangering the welfare of a child. He also has 2002 and 2007 convictions for failure to register as a sex offender and two convictions from the 1980s for driving while intoxicated and driving while ability impaired, respectively. Mr. Negrette has not had any criminal contacts in over a decade, has not served a custodial sentence since his release in 1997, and has demonstrated significant rehabilitation including maintaining a loving relationship with his children and grandchildren and caring for his ailing mother. Mr. Negrette suffered a heart attack approximately five years ago, and he has type 2 diabetes, hypertension, and high cholesterol. Because of the lockdown at Hudson, Mr. Negrette reports that he is not receiving his insulin at the same time every day, which has complicated his ability to manage his medical conditions.

59. Because of his medical conditions, Mr. Negrette is at high risk for severe illness or death if he contracts COVID-19. Based on these conditions, The Legal Aid Society filed a written request for release with ICE on March 23, 2020, describing Mr. Negrette's equities, severe medical conditions, and the risks he faces if he contracts COVID-19 in jail. ICE has not responded to his request.

ICE was on Notice of the Risks of COVID-19 to Medically Vulnerable Detainees.

60. Because each of the individual plaintiffs in this case brought their medical conditions to ICE's attention, the Defendants had actual knowledge of their high-risk of harm from contracting COVID-19.

61. Defendants have also long been on notice of the risk that COVID-19 poses generally to persons with certain underlying medical conditions. Indeed, medical experts who contracted with the DHS Office of Civil Rights and Civil Liberties raised concerns to the Department in February and March 2020.¹ On March 19, 2020, they brought their concerns to the House and Senate Committees on Homeland Security. Allen & Rich Letter at 2. They explained that in order to save both the lives of detainees and in the community at large, "minimally, DHS should consider releasing all detainees in high risk medical groups[.]" *Id.* at 5-6.

62. John Sandweg, a former acting director of ICE, has written publicly about the need to release nonviolent detainees because ICE detention centers "are extremely susceptible to outbreaks of

¹ See March 19, 2020 letter from Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH to House and Senate Committees on Homeland Security, available at <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf> [Hereinafter "Allen & Rich Letter"].

infectious diseases” and “preventing the virus from being introduced into these facilities is impossible.”²

63. Moreover, advocates put Defendants on notice of the risks posed to individuals in New Jersey on March 20, 2020.

No Other Forum, Including ICE and Immigration Courts, Can Provide Meaningful Relief to Abate the Harm to Plaintiffs.

64. ICE has the authority to release individuals like Plaintiffs, whose detention is governed by the discretionary detention statute, 8 U.S.C. § 1226(a). Despite the exigent circumstances, ICE continues to improperly deny release or bond to plaintiffs, whose equities and minimal or temporally-distant criminal histories demonstrate that they are neither dangers to the community nor risks of flight.

65. ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments, including conditions of supervision while released. For example, ICE’s conditional supervision program, called Intensive Supervision Appearance Program (“ISAP”), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings.

66. Counsel for Plaintiffs, The Legal Aid Society (“LAS”) and The Bronx Defenders (“BXD”), routinely liaise with ICE officials and with counterparts at the U.S. Attorney’s Office to secure the release of clients with severe medical conditions or other compelling circumstances on

² See John Sandweg, “I Used to Run ICE. We Need to Release the Nonviolent Detainees.” *The Atlantic* (March 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/> (Ex. T to Haas Decl.).

conditions or reasonable bond. Consistent with this practice, both LAS and BXD reached out to the government to identify high-risk clients, including Plaintiffs.

67. Under normal circumstances, individuals like Plaintiffs would be able to seek either initial or changed-circumstances bond hearings in the immigration courts. At such hearings, agency precedent requires the individuals to bear the burden of proving they are not a danger nor a flight risk in order to win release on bond.
68. Under this system, each of these Plaintiffs is detained, at high risk of severe illness or death, without the government ever having had to justify the need for their detention to any neutral adjudicator. And without this Court's intervention, the government will never have to make any showing to justify its detention decisions.
69. Making matters worse, the COVID-19 pandemic has caused the Varick Immigration Court, in New York City, where the Plaintiffs' removal proceedings are venued, to no longer provide an effective forum for them to vindicate their right to have their custody reviewed. This is true for a number of reasons: detainees can no longer consistently or privately communicate with their counsel; the Immigration Court is incapable of providing effective and adequate mechanisms for remote appearances by attorneys; detainees, their family members, and counsel can no longer collect the required evidence and documentation to meet their burden of proof in bond hearings given the closure of most public and private institutions and restrictions on movement; and finally, because it has become increasingly difficult to post bond even should an immigration judge set bond due to several bond office closures.
70. First, both facilities at which Plaintiffs are detained ended contact visits for legal visitation due to COVID-19. However, because there is no other effective, reliable, and confidential manner

to communicate with clients, the end of contact visits has rendered it prohibitively difficult to have the in-depth private conversations required for representation in bond or other matters.

71. While Hudson County Correctional Facility has video teleconference systems that attorneys can use to speak to detainees, the system is plagued by technological problems including poor quality of video and audio, frequent malfunctions, and a lack of privacy at the jail. Since the onset of the pandemic, attorneys have been forced to use the video systems with much greater frequency, but the systems have not expanded capacity. As a result, scheduled appointments have been canceled, no additional time slots have been made available, and audio and video quality has deteriorated further. As such, this method of communicating with plaintiffs is inadequate.
72. Bergen County Jail lacks remotely-accessible video teleconference systems. The ability of attorneys to request legal phone calls with their clients that are free, confidential, or easily accessible has fluctuated in the past three weeks, with some calls being completed successfully while other requests for phone calls going unanswered.
73. Second, the Varick Immigration Court has not formulated policies or implemented mechanisms that allow attorneys to adequately represent their clients in the context of this public health crisis. Normally, attorneys appear in person from court, even as their clients appear either by video teleconference or in person. Now, however, as officials at every level of government have issued instructions to avoid contact and stay at home to the greatest extent possible, attorneys are frequently seeking to appear by telephone and find effective mechanisms of service of documents to the Immigration Court.
74. A number of attorneys have filed urgent requests for bond hearings to be scheduled on behalf of their clients in the past three weeks but many have been unable to obtain responses from

court staff, or been scheduled for hearings within weeks or longer instead of within days as requested.

75. On Monday, March 23, 2020, the Department of Justice announced that the Varick Immigration Court would be closed the following day after a court staffer was confirmed positive for COVID-19. On the same day, the National Association of Immigration Judges said that a judge at Varick had been diagnosed with pneumonia and was tested for COVID-19.
76. On Thursday, March 26, the Varick Immigration Court announced a new policy that is likely to significantly worsen existing problems. In an email to several legal service providers, a court administrator announced that until April 10, all Varick Immigration Court cases will be heard by judges located at the Fort Worth Immigration Adjudication Center in Fort Worth, Texas.
77. This change causes many concerns including the ability of attorneys to timely receive and review evidence filed by the government and the likelihood of evidence filed on behalf of detainees timely reaching the center in Fort Worth.
78. On Friday, March 27, the first day that the Fort Worth judges were supposed to preside over Varick Immigration Court cases, several attorneys who were scheduled to go forward that day were never called by the Court. On Monday, March 30, the second day, some attorneys were called for their clients' hearings but cases could not practically move forward due to issues with the receipt and submission of evidence. Attorneys also reported problems hearing everything happening in the courtroom during hearings given the multiple connections involved. And judges from other parts of the country are reportedly hearing Varick Immigration Court cases this coming week.
79. Third, due to widespread closure of government offices and private businesses, and the directives for individuals to stay at home to the greatest extent possible, it has become

prohibitively difficult for detainees to meet their burden of proof in bond hearings. Courts in New York recently closed except for non-essential functions, and have stopped producing certificates of disposition or copies of court files in a timely manner in response to records requests. However, immigration judges routinely draw adverse inferences and deny bond when individuals fail to produce documentary evidence, such as criminal court documents, police reports, hospital and school records, to support their applications for bond. Making such a showing is nearly impossible under the present circumstances.

80. Finally, the only facility in New York City where immigration bonds can be posted has been closed for several days, requiring people to travel to the bond office in Newark, New Jersey.

CAUSES OF ACTION

FIRST CLAIM

Violation of the Right to Substantive Due Process

81. Defendants' conduct violates Plaintiffs' right to substantive due process under the Fifth Amendment of the United States Constitution.

82. Defendants' conduct violates Plaintiffs' right to procedural due process under the Fourteenth Amendment of the United States Constitution.

SECOND CLAIM

Violation of the Right to Procedural Due Process

83. Defendants' conduct violations Plaintiffs' right to procedural due process under the Fifth Amendment of the United States Constitution.

84. Defendants' conduct violates Plaintiffs' right to procedural due process under the Fourteenth Amendment of the United States Constitution.

PRAYER FOR RELIEF

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

- 1) Assume jurisdiction over this matter;
- 2) Issue a Writ of Habeas Corpus on the ground that Plaintiffs' continued detention violates the Due Process Clause, and order Plaintiffs' immediate release, with appropriate conditions as necessary;
- 3) In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, with appropriate conditions as necessary, on the grounds that their continued detention violates Plaintiffs' due process rights;
- 4) In the alternative, issue an order requiring Defendants to provide Plaintiffs with constitutionally adequate, individualized hearings within 48 hours at which the Department of Homeland Security bears the burden of establishing by clear and convincing evidence that continued detention is justified in light of the grave risks to Plaintiffs' health and well-being in ICE custody, at which Plaintiff's vulnerability to COVID-19 is weighed as a factor favoring release; and at which the detainee's ability to pay and alternative conditions of release are considered; or to immediately release Plaintiffs if such a bond hearing does not occur as specified;
- 5) Issue a declaration that Defendants' continued detention of Plaintiffs, who are at increased risk for severe illness from COVID-19, violates the Due Process Clause;
- 6) Award reasonable attorneys' fees and costs for this action;
- 7) Grant any other and further relief that this Court deems just and proper.

Dated: April 6, 2020
New York, NY

Respectfully submitted,

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**Petition for permission to file pro hac vice
forthcoming*

***Petition for permission to file pro hac vice
forthcoming; not admitted in D.C.; practice
limited to federal court.*

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