

APPENDIX D
Redacted Habeas Petition Filed in the Second Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A.B.C., <i>Petitioner,</i>)	
)	
v.)	Civ. No.
)	
THOMAS DECKER, in his official capacity as Director of the New York Field Office of U.S. Immigrations & Customs Enforcement;)	PETITION FOR WRIT
CHAD WOLF, in his official capacity as Acting Secretary, U.S. Department of Homeland Security, and CARL E. DUBOIS, in his official capacity as Sheriff of Orange County, New York,)	OF HABEAS CORPUS
<i>Respondents.</i>)	UNDER 28 U.S.C. § 2241
)	

INTRODUCTION

1. As the novel COVID-19 virus and resulting Coronavirus disease (“COVID-19”) sweeps around the world, infecting more than 191,000 and killing over 7,800 to date, Immigration and Customs Enforcement (“ICE”) continues to refuse to release the most vulnerable immigrants in their custody, including Petitioner A.B.C. (“Mr. A.B.C.” or “Petitioner”), who face an imminent risk of death or serious injury in immigration detention if exposed to COVID-19.

2. Mr. A.B.C., a 47-year-old husband, father, and grandfather and longtime resident

of the United States, is at imminent risk in immigration detention, where he cannot be adequately protected from contracting COVID-19 due to the nature of the jail environment and because his medical conditions, including human immunodeficiency virus (“HIV”) and related cognitive impairments, subject him to a heightened risk of harm and cannot be adequately addressed if or when he becomes ill.

3. Despite their inability to protect Mr. A.B.C. from near certain death or serious debilitating complications in a jail environment, and a clear path to release him, ICE obstinately disregards the only course of action that will provide Mr. A.B.C. with reasonable safety: to release Mr. A.B.C. to his loving family and supportive community who can provide a safe haven for him during this pandemic.

4. Under these circumstances, Respondents cannot provide Mr. A.B.C. with safe conditions or adequate due process. His continued detention will likely lead to death or serious medical repercussions without action by this Court. Accordingly, Mr. A.B.C. respectfully requests that this Court issue a writ of habeas corpus, ordering Respondents to promptly release him.

PARTIES

5. Mr. A.B.C. (“Mr. A.B.C.”) is a 47-year-old grandfather of three U.S.-citizens who has been diagnosed with HIV for nearly the entire 30 years he has lived in the United States. He lives in West Haverstraw, NY but has been detained by Respondents at the Orange County Correctional Facility (“Orange County Jail”) since November 26, 2019 in conjunction with removal proceedings at the Varick Street Immigration Court.

6. Respondent Thomas Decker is named in his official capacity as Director of the

New York Field Office for ICE. He is responsible for administration and management of ICE Enforcement Removal Operations in New York City and has jurisdiction over the decision to keep Mr. A.B.C. in detention. Respondent Decker's address is 26 Federal Plaza, 9th Floor, Suite 9-110, New York, NY 10278.

7. Respondent Chad Wolf is named in his official capacity as Acting Secretary of DHS. He is responsible for the enforcement of the immigration laws and routinely transacts business in the Southern District of New York. Respondent Wolf supervises Respondent Decker and is legally responsible for the pursuit of Petitioner's detention. Respondent Wolf's address is U.S. Department of Homeland Security, 800 K Street, N.W. #1000, Washington, D.C. 20528.

8. Respondent Carl E. DuBois is the Sheriff of Orange County, New York. As Sheriff, he is responsible for overseeing the administration and management of the Jail in Goshen, New York. He is sued in his official capacity. Respondent DuBois address is Orange County Sheriff's Office, Goshen, NY, 10924.

JURISDICTION

9. This action arises under the Fifth and Fourteenth Amendments to the U.S. Constitution.

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

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

VENUE

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

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

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

EXHAUSTION OF ADMINISTRATIVE REMEDIES

15. Mr. A.B.C. has no administrative remedies to exhaust through ICE or the Orange County Jail because no process exists to challenge the unconstitutional conditions of his detention or the inadequate medical care he is provided. The only process available to Mr. A.B.C. is to pursue defenses to removal—a process governed by separate laws, *see* 8 U.S.C. § 1229a, controlled by the Department of Justice rather than DHS, *see id.*, and one that will take

months, if not years, to complete—particularly in light of the current pandemic that is the basis for in this action—while Mr. A.B.C. continues to suffer severe and irreparable harm exacerbated by that pandemic.

16. Even if meaningful administrative remedies were promptly available, Mr. A.B.C., as a noncitizen challenging the lawfulness of his ongoing immigration detention, is not required to exhaust them under 8 U.S.C. § 2241. *See Louisaire v. Muller*, 758 F. Supp. 2d 229, 234 (S.D.N.Y. 2010); *Garcia v. Shanahan*, 615 F. Supp. 2d 175, 180 (S.D.N.Y. 2009).

17. Moreover, the immigration agencies do not have jurisdiction to adjudicate the due process claims that Mr. A.B.C. raises here. *See, e.g., Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538–39 (S.D.N.Y. 2014) (holding that an administrative appeal challenging classification under the mandatory detention statute would be futile because the BIA “does not have jurisdiction to adjudicate constitutional issues”) (quoting *United States v. Gonzalez -Roque*, 301 F.3d 39, 48 (2d Cir. 2002)).

STATEMENT OF FACTS

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

19. At the time, there were more than 118,000 cases in 114 countries, and 4,291 people had died.¹ Only seven days later, as of March 18, there have been at least 191,127 cases

¹ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

identified in 160 countries and at least 7,807 people have died.²

20. Experts estimate that as many as 214 million people in the United States could be become infected, and as many as 1.7 million people could die.³

21. COVID-19 has already started to spread inside U.S. prisons and jails, and experts predict mass contagion is only a matter of time. *See, e.g.*, Rich Shapiro, *Coronavirus Could “Wreak Havoc” on U.S. Jails, Experts Warn*, NBC News (Mar. 12, 2020) (“An outbreak of the deadly virus inside the walls of a U.S. prison or jail is now a question of when, not if, according to health experts.”)⁴; Dr. Anne C. Spaulding, MD MPH, *Coronavirus and the Correctional Facility: for Correctional Staff Leadership* at 16, Mar. 9, 2020 (“A prison or jail is a self-contained environment, both those incarcerated and those who watch over them are at risk for airborne infections. Some make an analogy with a cruise ship. Cautionary tale #1: think of the spread of COVID-19 on the Diamond Princess Cruise Ship, January 2020. Cautionary tale #2: Hundreds of cases diagnosed in Chinese prisons.”)⁵ Even this morning, officials announced that

² Coronavirus disease 2019 (COVID-19) Situation Report – 58, March 18, 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200318-sitrep-58-covid-19.pdf?sfvrsn=20876712_2. This increase comes despite the fact that some jurisdictions, including New York, have redirected resources from testing and identifying cases to preventing the spread and treating patients.

³ Sheri Fink, *The Worst-Case Estimate for U.S. Coronavirus Deaths*, The New York Times (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

⁴ <https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586>.

⁵ https://www.ncchc.org/filebin/news/COVID_for_CF Administrators_3.9.2020.pdf; *see also*, Dr. Homer Venters, *Four Ways to Protect Our Jails and Prisons from Coronavirus*, The Hill, (Feb. 29, 2020), <https://thehill.com/opinion/criminal-justice/485236-4-waysto-protect-our-jails-and-prisons-from-coronavirus?rnd=1582932792> (“When COVID-19 arrives in a community, it will show up in jails and prisons. This has already happened in China, which has a lower rate of incarceration than the U.S.”); *see*

a corrections officer at Bergen County Jail—where other ICE detainees are held—was diagnosed with COVID-19.

22. Despite these widespread warnings, ICE and the Orange County Jail, where Mr. A.B.C. is detained, remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody, including Mr. A.B.C., against a life-threatening illness.

23. Once COVID-19 reaches the Orange County Jail, if it hasn't already, it will be nearly impossible to contain because of the close proximity between people, rules and regulations that bar some basic disease prevention measures, and restrictions that prevent people from taking steps to protect themselves from infection, such as accessing hand sanitizer or gloves.

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

25. ICE's failure to recognize this inevitability and take adequate precautions, including releasing people, demonstrates a total disregard for the constitutional rights, well-being, and humanity of immigrant detainees, including Mr. A.B.C..

26. As a person living with HIV and struggling with related cognitive difficulties, Mr. A.B.C. is particularly unsafe in the jail environment, and ICE's inability to protect him and failure to release him amount to a life-threatening violation of his constitutional right to due

also NBC, US Prisons, Jails on Alert for Spread of Coronavirus (Mar. 7, 2020), <https://www.nbc.com/news/coronavirus/us-prisons-jails-spread-of-coronavirus/2087202/> (“Coronavirus suddenly exploded in China’s prisons last week, with reports of more than 500 cases spreading across five facilities in three provinces. . . . Jail operators in the U.S. are coming to the growing realization that it’s only a matter of time before it strikes here.”).

process.

Civil Detention During the Covid-19 Pandemic Amounts to Punishment

27. Since being first identified in late 2019, COVID-19 has infected at least 191,127 people around the world and caused at least 7,807 deaths, and the pandemic is intensifying each day.

28. New York and its surrounding areas, including Westchester County, which neighbors Orange County, have become the epicenter of the outbreak. New York currently reports 2600 number of cases, including 500 hospitalizations and 21 deaths.

29. In Orange County, New York, the government has already confirmed that 33 people have been infected with COVID-19,⁶ and the Orange County Health Commissioner has advised that the best way to prevent the spread of COVID-19 is “common-sense personal hygiene, including washing your hands frequently and thoroughly . . . and avoiding unnecessary contact with others.”⁷

30. Internationally, governments and jail and prison staff have recognized the threat posed by COVID-19 and released detainees. In Iran, for example, more than 70,000 people were temporarily released from jails to curb the spread of coronavirus.⁸

⁶ Orange County Health Department, <https://www.orangecountygov.com/1936/COVID-19Coronavirus>.

⁷ Daily Freeman, Orange County Confirms three more COVID-19 Cases, Bringing Total to Six (March 14, 2020), https://www.dailyfreeman.com/news/local-news/orange-county-confirms-three-more-covid--cases-bringing-total/article_35f49df8-6624-11ea-9d62-63dc07ff9a21.html.

⁸ *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge*, Reuters (Mar. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5>.

31. In the United States, some jurisdictions, including Los Angeles and Chicago, have already taken steps to protect people in custody from the impending spread of COVID-19 by releasing people in an effort to reduce populations.⁹

32. In New York City, public officials, the jail oversight board, and even doctors working at Rikers Island within the City’s Department of Correction have argued that the City’s jails are simply unsafe and releasing people is the only humane option.¹⁰ Statement of New York City Board of Correction, March 17, 2020 (calling on the City to release people from criminal custody, prioritizing people over 50, those with underlying health conditions, detained for administrative reasons, and those who have been convicted and sentenced to one year or less).¹¹

⁹ Thirty-one district attorneys from around the country put out a joint statement calling for a reduction in jail populations, jurisdictions in California, Illinois, and Ohio have already released people from jail, and officials in Louisiana, Oregon, Pennsylvania, Virginia, and New York have made announcements that they will begin releasing people soon. Other cities are putting plans in place to do the same. *See, e.g.* Allen Kim, *Cities in the US Move to Lower Inmate Populations as Coronavirus Fears Grow*, CNN (Mar. 16, 2020), <https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-trnd/index.html>; Megan Cassidy, *Coronavirus: San Francisco, Contra Costa Prosecutors Join National Call for Jail Releases*, San Francisco Chronicle (Mar. 17, 2020) <https://www.sfchronicle.com/crime/article/Coronavirus-San-Francisco-Contra-Costa-15137291.php>.

¹⁰ *See* Ross MacDonald (@RossMacDonaldMD), Twitter (March 18, 9:51 p.m.) <https://twitter.com/RossMacDonaldMD/status/1240455796946800641> (Dr. MacDonald is the Chief Medical Officer for Correctional Health Services (“CHS”), which provides healthcare to New York City’s Department of Corrections); Rachel Bedard, (@rachelbedard), Twitter (March 18, 8:34 a.m.) <https://twitter.com/rachaelbedard/status/1240255196644741120> (Dr. Bedard is the Director of Geriatrics and Complex Care for CHS); Jonathan Giftos (@JonGiftosMD), Twitter (March 18, 10:37 p.m.) <https://twitter.com/JonGiftosMD/status/1240467288198873088> (until January 2020, Dr. Giftos was the Clinical Director of Substance Use Treatment for CHS).

¹¹ New York City Board of Correction Calls for the City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020),



33. As authorities across the country take increasingly drastic measures to moderate the spread of the disease, the states of New Jersey, New York, and Connecticut have coordinated severe restrictions on gatherings and recommended that individuals isolate from one another.¹²

34. COVID-19 is already threatening to wreak havoc in area jails and prisons, as the New York City Department of Correction (“DOC”) and the George W. Hill Correctional Facility in Pennsylvania both announced employees tested positive for COVID-19,¹³ and March 18, 2020

<https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>

¹² E.g., Berkely Lovelace, Jr., *Coronavirus: NY, NJ, CT coordinate restrictions on restaurants, limit events to fewer than 50 people*, CNBC (Mar. 16, 2020), <https://www.cnbc.com/2020/03/16/new-york-new-jersey-and-connecticut-agree-to-close-restaurants-limit-events-to-less-than-50-people.html>.

¹³ See Chelsia Rose Marcus, *NYC Department of Correction Employee Tests Positive for Coronavirus*, New York Daily News (Mar. 16, 2020), <https://nypost.com/2020/03/16/doc-employee-is-the-first-nyc-worker-to-die-from-coronavirus/> (noting that the officer was the first COVID-19-related death in New York); Chelsia Rose Marcus, *NYC Correction Officer Tests Positive for Coronavirus*, New York Daily News (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-correction-officer-rikers-island-20200318-n6qzg4clibeinfcwctfbbmmtq-story.html>.

reports indicate that an incarcerated person in New York City tested positive as well.¹⁴ *See also* Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, *The New York Times* (Mar. 16, 2020) (noting that “jails experience a daily influx of correctional staff, vendors, health care workers, educators and visitors — all of whom carry viral conditions at the prison back to their homes and communities and return the next day packing the germs from back home.”).

35. Recent outbreaks of communicable diseases in immigration detention facilities foreshadow the impact once COVID-19 reaches these facilities: In 2019, a mumps outbreak across 57 immigration detention facilities throughout the country caused almost 900 cases of mumps overwhelmingly contracted inside the facilities¹⁵ before the outbreak spread to surrounding communities.¹⁶

36. The nature of detention facilities themselves, including Orange County Jail, make exposure and spread of the virus particularly harmful. Dr. Jaimie Meyer, an expert on infectious

¹⁴ Aliza Chasan, *Inmate at Rikers Tests Positive for Coronavirus, Union Official Says*, *Pix11* (Mar. 18, 2020), <https://www.pix11.com/news/coronavirus/inmate-at-rikers-tests-positive-for-coronavirus-union-official-says>.

¹⁵ Leung J, Elson D, Sanders K, et al. *Notes from the Field: Mumps in Detention Facilities that House Detained Migrants—United States, September 2018–August 2019*. *MMWR Morb Mortal Wkly*, 749–750 (2019), <http://dx.doi.org/10.15585/mmwr.mm6834a4external> icon.

¹⁶ *See* Terrence McDonald, *Bergen County Won’t Say if Mumps Outbreak Affects Only Immigrant Detainees*, *Northjersey.com* (June 13, 2019), <https://www.northjersey.com/story/news/bergen/2019/06/13/bergen-county-nj-wont-say-if-jail-mumps-outbreak-hit-only-ice-inmates/1448708001>. In addition, in 2019, thousands of individuals in 39 immigration detention centers across the country were exposed to chickenpox. *See* Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, *Vice News* (June 14, 2020), https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

diseases in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in detention centers like Orange County Jail “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.”¹⁷

37. It will be nearly impossible to prevent widespread infections inside the Orange County Jail once one person contracts the virus because detainees live, sleep, and use the bathroom in close proximity with others, and because “[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.”¹⁸

38. Similarly, it will be impossible for people, including Mr. A.B.C., to taking steps to protect himself from infection, such as washing his hands with soap or separating himself from other individuals.¹⁹

39. The Orange County Jail is “[p]articularly vulnerable” because county jails have fewer regulations for combating diseases than federal facilities and do not have space to isolate infected individuals in individual cells.²⁰

¹⁷ See Declaration of Dr. Jaimie Meyer, *Velesaca v. Wolf*, 20-cv-1803, ¶ 7 (AKH) (S.D.N.Y. Feb. 28, 2020), ECF 42 (“Meyer Decl.”).

¹⁸ Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, the Marshall Project (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus> (describing, for example, limited access to hand sanitizer and other precautionary measures).

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

²⁰ Johnathan Hogan, *As Coronavirus Spreads, Jails And Prisons Are Particularly Vulnerable*, Post Register (Mar. 9, 2020), https://www.postregister.com/news/crime_courts/as-coronavirus-spreads-jails-and-prisons-are-particularly-vulnerable/article_cf7c22ef-cb93-5a21-908f-644d7ae6c682.html.

40. Overcrowding and deficient medical care,²¹ including immigrant detainees being given incorrect medication or even dying because of an inadequately treated illness,²² at the Orange County Jail are well documented even before the crisis.²³

41. Indeed, in February 2017, New York Lawyers for the Public Interest (“NYLPI”) published a report detailing serious deficiencies in the medical care provided to immigration detainees in facilities used by ICE.²⁴

42. The Office of the Inspector General (“OIG”) of the Department of Homeland Security (“DHS”) even concluded in a 2019 report that ICE “does not adequately hold detention facility contractors accountable for not meeting performance standards,” “issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards,” and “does not adequately share information about ICE detention contracts with key officials.”²⁵

43. Moreover, ICE has routinely failed to remedy inhumane conditions because,

²¹ See *Compliance Inspection for the Orange County Jail Goshen, New York*, U.S. Dept. of Homeland Security Office of Detention Oversight, 2 (Mar. 2017), <https://www.ice.gov/doclib/foia/odo-compliance-inspections/2017-Orange%20County-Jail-Goshen-NY-Mar-21-23-2017.pdf>.

²² See *Systemic Indifference: Dangerous & Substandard Care in US Immigration Detention*, Human Rights Watch (May 8, 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>.

²³ See Abigayle Erickson, et al., *Behind Bars in the Empire State: An Assessment of the Immigration Detention of New Yorkers*, Immigrant Advocates Response Collaborative, 18 (Mar. 2019), <https://www.immigrationadvocates.org/nonprofit/alerts/attachment.340946>.

²⁴ See *Detained and Denied: Healthcare Access in Immigration Detention*, New York Lawyers for the Public Interest (NYLPI) (2017), https://nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report_2017.pdf.

²⁵ See OIG, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

according to the OIG, “ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them, which further diminishes the usefulness of inspections.”²⁶

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

45. Now, conditions inside the Orange County Jail have already deteriorated significantly, as detainees do not have access to hand sanitizer or gloves and limited access to soap, there is rarely soap in the visitors’ bathroom, and the facility does not have adequate cleaning supplies.

46. Further, the jail has accepted new pre-trial detainees from Westchester, the epicenter of the outbreak in New York, and placed them in the immigration unit.

47. The Orange County Jail has already turned away detainees from accessing the

²⁶ See *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, Office of the Inspector General, 1 (June 26, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/20//18-06/OIG-18-67-Jun18.pdf>.

medical unit due to the possible presence of COVID-19 compromised individuals.

48. For recent visitors to the Jail, the Orange County Jail “screened” for the virus by taking each visitor’s temperature using the same thermometer, without changing or sanitizing the cover.

49. Nonetheless, ICE continues to arrest and detain people around the country, further putting people in immigration detention at risk. *See* Richard Hall, *Coronavirus: ICE Crackdown Stokes Fears for Safety of Undocumented Immigrants During Pandemic*, Independent (Mar. 15, 2020) (noting that “[i]n New York, immigration advocates have noted a marked increase in ICE activity in recent months, which has not slowed as the coronavirus outbreak has worsened.”).²⁷

50. Simultaneously, as of March 16, 2020, Mr. A.B.C. and other people detained at the Orange County Jail have lost the ability to communicate with the outside world, as the Jail has cancelled all²⁸ contact and non-contact visits, including for attorneys, and the video teleconferencing system often malfunctions and is unreliable at best.

51. Despite repeated requests by immigrant detainees, family members, advocates, and lawyers, neither ICE’s NY Field Office nor the Orange County Jail have released detailed plans about how they will protect people from Coronavirus.

²⁷ On March 18, 2020, ICE announced it would “temporarily adjust” its enforcement practices during the COVID-19 outbreak, but declined to say it would stop arresting people altogether. *See* Rebecca Klar, *ICE Pausing Most Enforcement During Coronavirus Crisis*, The Hill (Mar. 18, 2020), <https://thehill.com/latino/488362-ice-pausing-most-immigration-enforcement-during-coronavirus-crisis>.

²⁸ The Jail says that visitation is limited to “extreme need” consisting of “any event that is life concerning and would require direct communication such as birth, death, serious illness or injury.” The Jail goes on to specify that “Attorneys . . . and any other outside entity wishing to contact a prisoner must do so through video conferencing.” New Update on Orange County Sheriff Jail Visitation, March 15, 2020, <https://twitter.com/OCSheriffNY/status/1239347616481247232/photo/1>.

Mr. A.B.C.’s Ongoing Detention During the COVID-19 Pandemic is Particularly Egregious

52. Mr. A.B.C., 47-year-old devout Catholic husband, father, and grandfather of three U.S. citizens and New York resident since 1992, has been detained by ICE since November 26, 2019,²⁹ despite serious threats to his health and well-being and numerous requests for his release.

53. Prior to his detention, Mr. A.B.C. lived in West Haverstraw, NY and supported his family through his work in both landscaping and construction for the same company since 2013. In addition to providing for his family, Mr. A.B.C. is a devout member of his parish, St. Peter and St. Mary of the Assumption Roman Catholic Church.

54. Mr. A.B.C. has been diagnosed with HIV since the mid-nineties when, after a nine-month hospitalization, he managed to stabilize his health through diligent monitoring and regular treatment.

55. Despite his previously stable health, since being detained by ICE, Mr. A.B.C. has been diagnosed with Unspecified Neurocognitive Disorder Likely Caused By Chronic HIV Disease after a cognitive functioning evaluation found that he had an IQ of 67, lower than 99%

²⁹ ICE arrested Mr. A.B.C. on November 26, 2019 without a judicial warrant as he was leaving a court appearance at the Spring Valley Village Court and the government charged him as removable for being in the United States without being admitted or paroled, pursuant to Immigration and Nationality Act (“INA”) §212(a)(6)(A)(i) and placed him in removal proceedings at the Varick Street Immigration Court. Mr. A.B.C., through his attorney, filed a motion to suppress any evidence derived from Mr. A.B.C.’s courthouse arrest and terminate the proceedings against him on grounds that, should the evidence be suppressed, ICE would fail to meet its burden to prove Mr. A.B.C.’s alienage. On March 16, the immigration judge denied the motion to terminate and set a competency hearing for April 21, along with Mr. A.B.C.’s bond hearing March 26. Mr. A.B.C. has been arrested once, in 2018, and was released on bail. In February 2020, he pled guilty to NYPL § 140.20, Burglary in the Third Degree, and received a non-jail sentence of five years’ probation. Any other charges are set to be dismissed.

of his peers.

56. As people like Mr. A.B.C. age, the HIV virus attacks the central nervous system, creating neurocognitive deficits. *See* Crystal Watkins and Glenn Treisman.³⁰

57. People experiencing HIV are severely immunocompromised because HIV “attacks the body’s immune system” and damage to the immune system caused by HIV “makes it harder and harder for the body to fight off infections and some other diseases.”³¹

58. Because Mr. A.B.C. has experienced HIV for so long, he has begun to experience grave symptoms due to long-term HIV exposure in addition to a compromised immune system.

59. As an individual with a compromised immune system because of his HIV and cognitive difficulties that may impede his ability to take even basic precautionary measures, Mr. A.B.C. is at high risk of contracting Coronavirus and at a much higher risk of serious illness or death than the general population as a result.

60. According to the World Health Organization, “[P]ersons with pre-existing medical conditions [like Mr. A.B.C.] . . . appear to develop serious illness more often than others.”³²

61. Further, those with immune deficiencies like Mr. A.B.C.’s are among those most

³⁰ *Cognitive impairment in patients with AIDS—prevalence and severity*, HIV AIDS (Auckl) (Jan. 29, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4319681/>

³¹ *About HIV/AIDS*, Centers for Disease Control, accessed Mar. 16, 2020, <https://www.cdc.gov/hiv/basics/whatishiv.html>.

³² *Q&A on Coronaviruses (COVID-19)*, World Health Organization (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

likely to die from coronavirus.³³

ICE’S Failure to Release Mr. A.B.C. During the COVID-19 Pandemic Violates His Constitutional Rights

62. Although ICE detained Mr. A.B.C. under the Discretionary Detention Statute, 8 U.S.C. § 1226(a), which allows a person to be detained or released on bond, recognizance, or other conditions, the agency has refused to release him. 8 C.F.R § 236.1(c)(8).

63. ICE often releases individuals with significant medical or humanitarian needs pursuant to this authority, regardless of the detention statute under which the individuals are held.

64. ICE also releases individuals on various alternatives to detention (“ATDs”), such as check-in appointments or electronic monitoring, which can result in nearly perfect compliance rates. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that one of ICE’s ATD programs, the Intensive Supervision Appearance Program, “resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings”).

65. Upon learning of the dangerous results if he develops Coronavirus, Mr. A.B.C. filed a release request on March 10, 2020, asking that ICE exercise either its discretion or parole authority under 8 C.F.R § 215.5(b) to immediately release him on recognizance, bond, or reasonable conditions of release because of the urgent risks posed to him by COVID-19.

66. Mr. A.B.C. also submitted his request to the Assistant U.S. Attorneys who handle immigration cases in the Southern District of New York on Monday, March 16.

³³ Jieliang Chen, *Pathogenicity and Transmissibility of 2019-nCoV—A Quick Overview and Comparison with Other Emerging Viruses*, *Microbes and Infection* (Feb. 4, 2020), <https://doi.org/10.1016/j.micinf.2020.01.004>

67. On March 18, 2020, the Assistant U.S. Attorneys responded that they had no substantive answer or timeframe for ICE’s response to Mr. A.B.C.’s request.

68. To date, ICE has not provided an answer to Mr. A.B.C.’s release request.

69. Nonetheless, despite these repeated requests and the heightened risk to Mr. A.B.C.’s health and well-being, ICE has continued to detain him.

LEGAL FRAMEWORK

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

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

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

72. Because the rights of these detainees are broader than those guaranteed under the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments governs the claims of immigrant detainees who challenge punitive or otherwise unsafe or inhumane

conditions. *Charles v. Orange County*, 925 F.3d 73, 82; *Darnell*, 849 F.3d 17, 29; *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State . . . so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”).

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

74. Where a risk is obvious, such as during a contagious disease outbreak, it is fair for a factfinder to assume that the government official was aware of the risk. *See, e.g., Charles*, 925 F.3d 73, 87 (“A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *see*

also *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (expressing “great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems” where those authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” such as “exposure of inmates to a serious, communicable disease”).

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

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

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

Release is the Appropriate Remedy Where the Petitioner Raises Substantial Claims and Extraordinary Circumstances Exist.

78. Where a habeas petitioner is deprived of safe conditions and adequate care for his conditions, the Court must order the petitioner's immediate release.

79. This Court has "inherent authority to grant bail to habeas petitioners." *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001); *see also Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978) ("A district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody."); *Elkimya v. Dep't of Homeland Sec.*, 484 F.3d 151, 153-54 (2d Cir. 2007) (recognizing federal courts' "inherent authority to admit to bail petitioners in immigration cases") (quoting *Mapp*, 241 F.3d at 226); *cf. Vacchio v. Ashcroft*, 404 F.3d 663, 673 (2d Cir. 2005) (explaining that a prior panel released petitioner on bail under *Mapp* during the pendency of the appeal of his habeas petition challenging mandatory detention); *cf. D'Alessandro v. Mukasey*, No. 08-cv-914 (RJA) (VEB), 2009 WL 799957, at *4 (W.D.N.Y. Mar. 25, 2009) (conducting a bail hearing under *Mapp* and ordering the petitioner's release under conditions of supervision in the context of prolonged detention under 8 U.S.C. § 1231).

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

81. When assessing whether substantial claims exist, the district court must assess whether "the [habeas] petition present merits that are more than slightly in petitioner's favor."

Richard v. Abrams, 732 F. Supp. 24, 25 (S.D.N.Y. 1990) (citing *Rado v. Manson*, 435 F. Supp. 349, 350–51 (D. Conn. 1977)).

82. The “extraordinary circumstances” element is satisfied where the petitioner, like here, alleges serious medical concerns or irreparable harm. *See, e.g., Vacchio*, 404 F.3d at 673 (granting release under *Mapp* during the pendency of petitioner’s appeal of his mandatory detention habeas petition because “extraordinary circumstances found in the instant case are analogous to a showing of irreparable harm”); *cf. United States v. Mett*, 41 F.3d 1281, 1282 n.4 (9th Cir. 1994) (in the criminal prisoner context, noting that extraordinary circumstances warranting bail for habeas petitioners “include a serious deterioration of health while incarcerated”).

83. Applying this Circuit’s *Mapp* framework in *D’Alessandro v. Mukasey*, the court found release under conditions of supervision the appropriate remedy in the 8 U.S.C. § 1231 context where the petitioner suffered with “a number of serious, potentially debilitating health problems,” which continued to deteriorate in ICE detention. No. 08-cv-914, 2009 WL 799957, at *3 (W.D.N.Y. March 25, 2009). The court concluded that the petitioner’s “chronic and debilitating health conditions, while not ‘emergent,’ . . . certainly constitute exceptional circumstances setting his case apart and making bail necessary to make the habeas remedy effective, and to prevent further deterioration of his health.” *Id.* at *4; *see also S.N.C. v. Sessions*, No. 18-cv-7680 (LGS), 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (finding extraordinary circumstances and ordering release where the petitioner was suffering with Post Traumatic Stress Disorder, “a condition that the detention environment aggravates,” as well as depression and physical pain in ICE custody); *Kiaddii v. Sessions*, 18-cv-1584, at *3 (Dkt. No. 9)

(S.D.N.Y. Mar. 2, 2018) (finding extraordinary circumstances under *Mapp* and ordering release where the petitioner presented evidence that “her health has deteriorated while in ICE’s custody”).

84. The COVID-19 pandemic unquestionably presents exceptional circumstances warranting release. To be sure, just yesterday, Judge Nathan ordered a federal criminal pre-trial detainee’s release on conditions in light of COVID-19. *See United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y March 19, 2020) (explaining that “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent” and that “inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop”).

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION: RESPONDENTS’ FAILURE TO ADEQUATELY PROTECT MR. A.B.C. IN LIGHT OF THE COVID-19 OUTBREAK VIOLATES DUE PROCESS

85. Petitioner repeats and re-alleges paragraphs 1-84 of this petition.

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

87. Because of the conditions in the county jails that serve as immigration detention facilities, Mr. A.B.C. is not able to take steps to protect himself—such as social distancing, using hand sanitizer, or washing his hands regularly—and the government has not provided adequate protections. When COVID-19 reaches the immigrant detention facilities in a matter of days as experts predict, the already deplorable conditions in these facilities will be exacerbated, and the

ability to protect oneself will become even more impossible.

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

**SECOND CAUSE OF ACTION:
RESPONDENTS' FAILURE TO PROVIDE ADEQUATE MEDICAL CARE AND
PROTECTION TO PEOPLE, SUCH AS MR. A.B.C., AT HIGH RISK OF SERIOUS
HARM FROM COVID-19 VIOLATES DUE PROCESS**

89. Petitioner repeats and re-alleges paragraphs 1-84 of this petition.

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

91. Mr. A.B.C.'s HIV status, compromised immune system, and related cognitive impairments place him at a heightened risk of contracting COVID-19 and suffering serious medical harm, or even death, as a result.

92. Because Respondents are aware that failing to adequately protect Mr. A.B.C. could have tragic results and yet have not taken necessary or appropriate precautions, Respondents have acted with deliberate indifference to his serious medical needs in violation of the Due Process Clause.

PRAYER FOR RELIEF

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

- 1) Assume jurisdiction over this matter;

- 2) Enjoin Respondents from moving the Petitioner from the New York City area while habeas proceedings are pending;
- 3) Under the Court's inherent powers as detailed in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), order Respondents to immediately release Mr. A.B.C., under any appropriate conditions, to end the violations of his due process rights and resulting harm he is suffering, including the risk of severe illness or death upon being infected by COVID-19 in a jail setting;³⁴
- 4) Order Respondents not to re-detain Mr. A.B.C. pending the culmination of removal proceedings against him, including all administrative or judicial appeals;
- 5) Award Petitioner his costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412, or other statute; and
- 6) Grant any other and further relief that this Court deems just and proper.

Dated: March 19, 2020
Brooklyn, New York

Respectfully submitted,

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³⁴ If the Court determines that immediate release pursuant to *Mapp* is not justified at this time, Mr. A.B.C. respectfully requests that the Court conduct a bail hearing where Respondents must prove, by clear and convincing evidence, that Mr. A.B.C.'s ongoing detention is necessary and does not violate his due process because Respondents have not acted with deliberate indifference towards Mr. A.B.C.'s serious medical needs and risk of severe illness or death if exposed to COVID-19. *See Celestin v. Decker*, 17-Civ.-2419, Tr. at 13-14 (S.D.N.Y. Apr. 17, 2017) (bench decision) (Abrams, J.) (district court holding bond hearing for immigration habeas petitioner, noting that "[t]he federal courts have inherent authority to admit to bail individuals properly within their jurisdictions, including in the immigration context." (quoting *Mapp v. Reno*, 241 F.3d at 226)).

Counsel for Petitioner