

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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JEAN AZOR-EL, ANTHONY MEDINA,  
RAMON GOMEZ, RONNIE COLE,  
DAKWAN FENNELL, JAMES CARTER,  
MAURICE BARNAR, and LANCE KELLY,  
individually and on behalf of  
all others similarly-situated,

**AMENDED COMPLAINT  
AND ALTERNATIVE PETITION  
FOR A WRIT OF  
HABEAS CORPUS**

Plaintiffs,

Case No. 20-cv-3650 [consol.]

-against-

Jury Trial Demanded

CITY OF NEW YORK and KISA SMALLS,

Defendants.

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Plaintiffs Jean Azor-El, Anthony Medina, Ramon Gomez, Ronnie Cole, Dakwan Fennell, James Carter, Maurice Barnar, and Lance Kelly, by and through undersigned counsel, state the following for their Amended Complaint against Defendants the City of New York and Kisa Smalls, on personal knowledge as to their own acts and observations, and on information and belief as to all other matters.

**INTRODUCTION**

1. This case arises out of the COVID-19 pandemic and Defendants’ consistent failure to take obvious and easy-to-implement measures that would curb the spread of this disease.

2. Rikers Island houses thousands of pretrial detainees, as well as other inmates, and is one of the nation’s largest correctional institutions.

3. After COVID-19 and the risks from it became apparent in early 2020, it was immediately obvious that inmates in correctional institutions faced a high risk of contracting

COVID-19 and suffering serious complications (or even death) due to the tightly-packed, largely indoor nature of prisons and jails.

4. All inmates at Rikers are at serious risk of contracting COVID-19, and all of the Plaintiffs here (as well as all residents of Rikers' North Infirmiry Command) have serious medical needs.

5. Some inmates - including Plaintiffs - are at even greater risk of contracting COVID-19 and/or suffering serious health consequences or even death from it because they have underlying conditions, including respiratory conditions that make them highly vulnerable.

6. Basic measures taken by other correctional institutions throughout the country can help mitigate the spread of COVID-19.

7. But the City has failed to take basic, common-sense steps like distributing hand sanitizer and sanitary wipes; further, Defendants have failed to enforce effective measures to limit the entry of COVID-19 into Rikers by testing and tracing staff members and enforcing staff members' obligation to wear masks properly.

8. Plaintiffs bring this suit to protect themselves and their fellow inmates by bringing the City into line with obvious safety precautions, and seek proper accountability for the City's failure to provide these measures.

### **THE PARTIES**

9. Plaintiff Jean Azor-El ("Azor-El") is an individual detainee under the care and custody of the New York City Department of Correction, currently housed in the North Infirmiry Command ("NIC") at Rikers Island. He is a citizen of New York.

10. Plaintiff Anthony Medina ("Medina") is an individual in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), currently housed

at Sullivan Correctional Facility. Medina was previously a detainee under the care and custody of the New York City Department of Corrections at Rikers Island. He is a citizen of New York.

11. Plaintiff Ramon Gomez (“Gomez”) is in the custody of DOCCS, currently housed at Woodbourne Correctional Facility. Gomez was previously a detainee under the care and custody of the New York City Department of Correction at Rikers Island. He is a citizen of New York.

12. Plaintiff Ronnie Cole (“Cole”) is an individual detainee under the care and custody of the New York City Department of Correction, currently housed in the North Infirmery Command at Rikers Island. He is a citizen of New York.

13. Plaintiff Dakwan Fennell (“Fennell”) is an individual detainee under the care and custody of DOCCS, currently housed at Downstate Correctional Facility. Fennell was previously a detainee under the care and custody of the New York City Department of Corrections at Rikers Island. He is a citizen of New York.

14. Plaintiff James Carter (“Carter”) is an individual formerly under the care and custody of the New York City Department of Corrections, previously housed in the North Infirmery Command at Rikers Island. He is a citizen of New York.

15. Plaintiff Maurice Barnar (“Barnar”) is an individual detainee under the care and custody of the New York City Department of Correction, currently housed in the North Infirmery Command at Rikers Island. He is a citizen of New York.

16. Plaintiff Lance Kelly (“Kelly”) is an individual detainee under the care and custody of DOCCS, currently housed at Mohawk Correctional Facility. Kelly was previously a detainee under the care and custody of the New York City Department of Corrections at Rikers Island. He is a citizen of New York.

17. Defendant City of New York (“the City”) is a municipality of the State of New York. The City is a citizen of New York.

18. Defendant Kisa Smalls is an individual residing New York, who formerly served as Warden of North Infirmery Command at Rikers Island, before being reassigned in June 2020, and on information and belief was involved in creating and implementing the policies and practices at issue here until her transfer. Smalls is a citizen of New York.

### **JURISDICTION AND VENUE**

19. This Court has original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1334, because this action raises federal claims.

20. This Court has personal jurisdiction over the Defendants as the acts and events giving rise to this case occurred in New York.

21. Venue is proper in the Southern District of New York as the acts and events giving rise to this case occurred in the Southern District of New York, and Plaintiffs are or were held in custody in this District.

### **FACTS**

#### **The COVID-19 Pandemic and Its Threat**

22. COVID-19, or SARS-CoV-2, is a virus that emerged in China in or around December 2019.<sup>1</sup>

23. COVID-19 attacks the respiratory system. The most common symptoms include fever or chills, cough, difficulty breathing, fatigue, muscle aches, headaches, loss of taste or smell, sore throat, nasal congestion, runny nose, nausea or vomiting, and diarrhea.<sup>2</sup>

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<sup>1</sup> See <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (last visited 12/16/2020)

<sup>2</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited 12/16/2020)

24. COVID-19 can be spread through droplets (coughing, sneezing, etc.) or via surfaces (a person touching an infected surface and then touching their face).<sup>3</sup>

25. COVID-19 is highly infectious and very deadly: COVID-19 has caused over 1.6 million deaths worldwide, almost 300,000 of those being in the United States.<sup>4</sup>

26. Older individuals and individuals with pre-existing or underlying health conditions are significantly more at risk for facing severe complications and death if they contract COVID-19.

27. Individuals in their 40s are three times more likely to be hospitalized and ten times more likely to die from COVID-19 than people aged 18 through 29.<sup>5</sup>

28. Individuals aged 50 to 64 are four times more likely to be hospitalized and thirty times more likely to die from COVID-19 than people aged 18 through 29.<sup>6</sup>

29. The risk of serious illness or death due to COVID-19 continues to increase with an individual's age.

30. Additionally, anyone (regardless of age) is at an increased risk of serious illness or death due to COVID-19 if they have any of the following underlying/pre-existing health conditions: cancer, chronic kidney disease, chronic obstructive pulmonary disease ("COPD"), obesity, type 2 diabetes, sickle cell disease, smoking, heart problems, or any immunocompromised state.<sup>7</sup>

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<sup>3</sup> See <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (last visited 12/16/2020)

<sup>4</sup> See <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (last visited 12/16/2020)

<sup>5</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited 12/16/2020)

<sup>6</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited 12/16/2020)

<sup>7</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited 12/16/2020)

31. Conditions such as asthma, high blood pressure, type 1 diabetes, cystic fibrosis, and liver disease may also increase an individual's risk of serious illness or death from COVID-19.<sup>8</sup>

32. COVID-19 can potentially cause long-term complications, including cardiovascular issues, lung function abnormalities, acute kidney injury, smell/taste problems, memory problems, and cognitive issues.<sup>9</sup>

### **COVID-19 in Correctional Environments**

33. Correctional and detention facilities have become hotbeds for COVID-19 because social distancing is difficult to implement and even harder to enforce; incarcerated individuals share common areas such as cafeterias, phones, and bathrooms; and people (whether they be staff or individuals in custody) constantly cycle through the facilities after contact with outside communities.

34. In some facilities, COVID-19 cases have been initially identified among staff, before any cases have been identified among the incarcerated populations.<sup>10</sup>

35. Because staff move between the facility and the community daily, they risk introducing infection into the facility from the community.<sup>11</sup>

36. Around one in five U.S. prisoners has contracted the virus.<sup>12</sup>

37. Nationwide, at least 275,000 prisoners have been infected, and more than 1,700 have died, but Rikers' former medical director, Homer Venters, estimates that this statistic is "a vast undercount."<sup>13</sup>

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<sup>8</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited 12/16/2020)

<sup>9</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (last visited 12/18/2020)

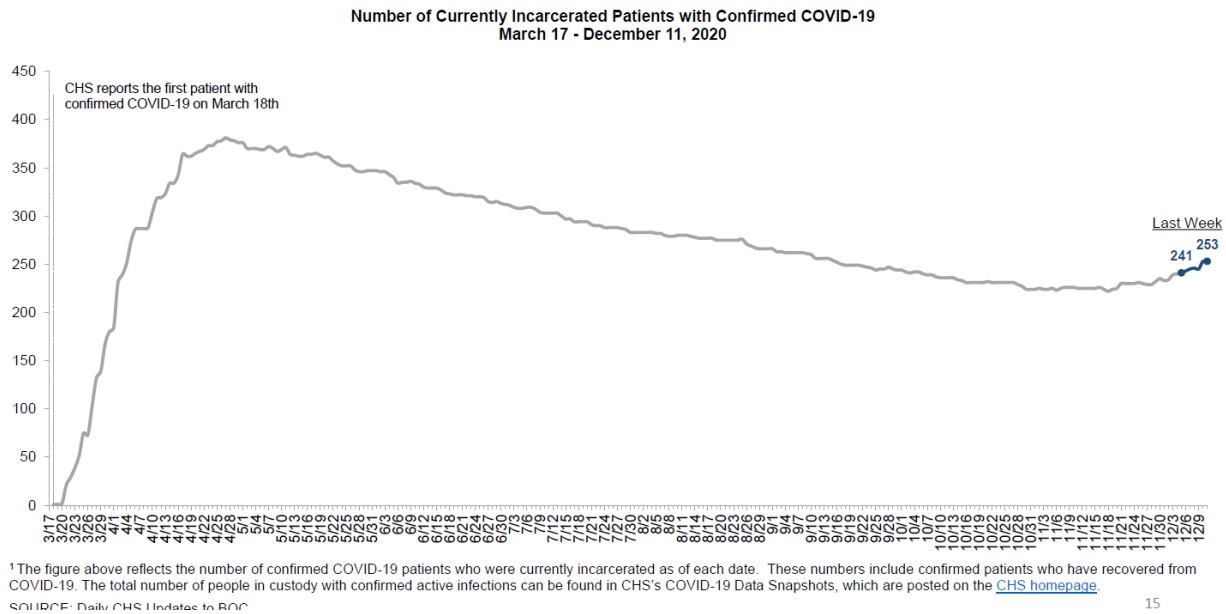
<sup>10</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html> (last visited 12/16/2020)

<sup>11</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html> (last visited 12/16/2020)

<sup>12</sup> See <https://www.kansascity.com/news/nation-world/article247943635.html> (last visited 12/18/2020)

<sup>13</sup> See <https://www.kansascity.com/news/nation-world/article247943635.html> (last visited 12/18/2020)

38. Although COVID numbers reduced for a time in Rikers, they are now rebounding, according to the most recent report by the NYC Board of Correction<sup>14</sup>:



### Proper Standards for Care, Treatment, and Prevention

39. Throughout the COVID-19 pandemic, the Centers for Disease Control and Prevention (“CDC”) has issued guidance on the proper standards for care, treatment, and prevention specifically at correction/detention facilities like Rikers.

40. The CDC advises that correction/detention facilities provide the following hygiene supplies to officers, staff, and incarcerated persons: tissues, liquid/foam soap (preferred over bar soap), masks, hand drying supplies, cleaning supplies, and alcohol-based hand sanitizer.

41. The CDC asks correction/detention centers to consider relaxing restrictions on alcohol-based hand sanitizers by allowing officers and staff to carry individual-sized bottles.

42. The CDC also recommends that correction/detention facilities intensify their cleaning and disinfecting procedures; high-touch surfaces/objects (such as door knobs, light

<sup>14</sup> See NYC Board of Correction Weekly COVID-19 Update, <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-5-12-11-20.pdf>

switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, telephones, and computer equipment) should be cleaned and/or disinfected several times per day.<sup>15</sup>

43. The CDC instructs facilities to have officers, staff, and inmates wear surgical masks or N95 masks; cloth masks are not PPE and should not be used as a substitute for surgical or N95 masks but can be worn to protect others in the surrounding area from respiratory droplets generated by the wearer.<sup>16</sup>

44. The CDC also encourages all individuals to “social distance,” or keep at least six feet away from others, to mitigate the spread of COVID-19.

45. In correction/detention facilities, the CDC makes the following recommendations relating to social distancing:

- a. Increasing space between seating in holding cells and common areas.
- b. Choosing recreation spaces where individuals can properly socially distance and staggering recreation times and cleaning/disinfecting between each group.
- c. Staggering meal times, increasing space between seats at cafeterias, and/or serving meals directly inside housing units or cells.
- d. Suspending group activities or otherwise decreasing group sizes.
- e. Rearranging housing situations to ensure social distancing and minimizing the intermingling of housing units.
- f. Medically isolating any incarcerated individuals who show symptoms of or test positive for COVID-19.

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<sup>15</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 12/16/2020)

<sup>16</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#correctional-facilities> (last visited 12/16/2020)



46. The CDC recommends that correction/detention facilities conduct COVID-19 testing for staff, officers, and incarcerated individuals as much as is feasibly possible.

47. Of course, the CDC recommends testing and quarantine for all persons who exhibit symptoms of COVID-19 or have had close contact with anyone who tested positive for COVID-19.

48. The CDC recommends that all new inmates or detainees be tested for COVID-19 and to be placed in isolation until the facility can be reasonably certain that the individual does not have COVID-19.

49. The CDC recommends that detention/correction facilities pursue broad testing strategies for officers, staff, and even inmates if possible.

#### **Plaintiffs' Individual Health Conditions**

50. All Plaintiffs in this case are at high risk of serious illness or death if they contract (or re-contrast) COVID-19.

51. Azor-El is 47 years old. He suffers from obstructive sleep apnea ("OSA"), a disorder that is characterized by the repetitive collapse of the upper airway during sleep. Because of his OSA, Azor-El must use a C-PAP machine while sleeping. Azor-El's condition substantially limits the major life activities of breathing and sleeping. Azor-El has tested positive for COVID-19 antibodies.

52. Fennell is 45 years old. He suffers from diabetes and OSA. Because of his OSA, Fennell must use a C-PAP machine while sleeping. Diabetes substantially limits numerous major life activities, including the ability to eat without restriction, and OSA substantially limits the major life activities of breathing and sleeping.

53. Barnar is 50 years old. He suffers from OSA and must use a C-PAP machine while sleeping. OSA substantially limits the major life activities of breathing and sleeping. Barnar reports that he has antibodies for COVID-19, indicating that he has contracted the virus.

54. Medina is 42 years old. He is legally blind and neuropathically disabled; his conditions substantially limit the major life activity of seeing, as well as consequent activities that require sight.

55. Gomez is 30 years old. He is deaf and mute. Gomez recently had bone cancer. While he is now in remission, he is recovering from the effects of radiation and chemotherapy, which include a weakened immune system. Cancer and its effects on the immune system substantially limits Gomez's ability to engage in many major life activities because he must use more caution. Gomez is also substantially limited in the major life activities of hearing and speaking. Gomez tested positive for COVID-19 twice while at NIC.

56. Carter is 51 years old. He suffers from asthma, a heart murmur, a urologic bladder, left leg numbness and weakness, and cervical spine injuries encompassing a slipped disc. He suffers from the effects of sustaining three gunshots to his left leg in 2019, including nerve damage, numbness, and tingling sensations that substantially limit his ability to walk. In addition, Carter's urologic conditions mean he must use a catheter to void his bladder, and he is substantially limited in the major life activity of urination. Carter tested positive for COVID-19 while at NIC.

57. Cole is 59 years old. He is wheelchair bound after a gunshot injury, which caused serious nerve damage. Cole also suffers from sleep apnea and must use a C-PAP machine while sleeping. His conditions substantially limit the major life activities of walking, sleeping, and breathing.

58. Kelly is 55 years old. He suffers from chronic obstructive pulmonary disease (“COPD”), asthma, and sleep apnea. He also wears hearing aids and has chronic back pain. Kelly must use a C-PAP machine while sleeping. His conditions substantially limit the major life activities of sleeping and breathing.

59. Some of Plaintiffs are or were parolees detained on suspected parole violations, while others were pretrial detainees not on parole.

### **The Course of COVID-19 at Rikers**

60. New York State reported its first COVID-19 case in March 2020.

61. On March 31, 2020, Rikers reported 180 COVID-19 cases with an infection rate of 3.910%. By way of comparison, the infection rate in the United States as a whole at the time was 0.053%.<sup>17</sup>

62. On April 30, 2020, Rikers reported 376 COVID-19 cases with an infection rate of 9.856%, while the United States’ infection rate was 0.328%.<sup>18</sup>

63. On May 27, 2020, Rikers reported 348 COVID-19 cases with an infection rate of 8.72%, while the United States’s infection rate was 0.53%.<sup>19</sup>

64. As of July 31, 2020, the infection rate for DOC staff and those in DOC custody has far exceeded the infection rate of New York City, New York State, and the United States as a whole.<sup>20</sup>

65. The New York City Board of Correction (“BOC”) compiles weekly COVID-19 updates.

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<sup>17</sup> See [https://legalaidnyc.org/wp-content/uploads/2020/03/3\\_31\\_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails-1.pdf](https://legalaidnyc.org/wp-content/uploads/2020/03/3_31_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails-1.pdf) (last visited 12/17/2020)

<sup>18</sup> See [https://legalaidnyc.org/wp-content/uploads/2020/05/4\\_30\\_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf](https://legalaidnyc.org/wp-content/uploads/2020/05/4_30_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf) (last visited 12/17/2020)

<sup>19</sup> See [https://legalaidnyc.org/wp-content/uploads/2020/05/5\\_27\\_-Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf](https://legalaidnyc.org/wp-content/uploads/2020/05/5_27_-Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails.pdf) (last visited 12/17/2020)

<sup>20</sup> See <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last visited 12/16/2020)

66. According to the BOC's report for December 5, 2020, through December 11, 2020, the number of currently incarcerated patients with confirmed COVID-19 is 253 (12 more than the prior week).<sup>21</sup>

67. The number of COVID-19 cases for incarcerated people has been steadily climbing since mid-November.

68. To date, three detainees at Rikers have died from COVID-19.

69. Inmates continued to face the risk of contracting the virus, including and especially newly-admitted inmates.

70. Even those inmates who show evidence of having contracted the virus continue to face serious medical threats, as people can still become reinfected. Further, COVID-19 infection can result in serious - and at this point, not-fully-known - complications.

#### **Rikers' Response to COVID-19**

71. When the COVID-19 pandemic hit New York City hard in March 2020, Plaintiffs were housed at the North Infirmary Command building on Rikers Island.

72. North Infirmary Command ("NIC") is a medical facility that used to be a warehouse.

73. NIC houses sick, wounded, and medically-vulnerable inmates, making its residents even more likely to contract, spread, face severe complications from, and/or die from COVID-19.

74. Since early March 2020, when COVID-19 began overwhelming New York City, Defendants have failed to institute appropriate safety measures to protect inmates from contracting COVID-19.

#### ***The City Has Policies to Wear Masks - But Officers Observe it In the Breach***

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<sup>21</sup> See <https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-5-12-11-20.pdf> (last visited 12/17/2020)

75. On March 22, 2020, the DOC issued a directive allowing correctional officers and staff to wear their own face masks at work. But nothing in the directive mandated that correctional officers and staff wear masks at all times.

76. On April 3, 2020, Commissioner Cynthia Brann and Chief of Department Hazel Jennings issued an order requiring all officers and staff to wear face masks and requiring all persons in custody to wear face masks in congregate settings. This order also required that all staff be in possession of latex gloves.

77. The DOC agrees that at the present point, the biggest risk for an inmate contracting COVID would come from exposure to staff who might be bringing COVID in from outside the facility.

78. In reality, the DOC is not following its own directives, putting everyone at the Rikers facilities at risk.

79. Correctional officers were not wearing face masks correctly, if at all; those wearing face masks often did not have the masks covering their noses.

80. The DOC does not mandate that correctional officers and staff wear gloves.

81. In August and September 2020, correctional officers at Rikers were not wearing face masks or latex gloves, even when they were in close proximity with detainees.

82. On several occasions, visitors to the Rikers facilities observed officers interacting with one another and even escorting detainees without wearing face masks at all.

83. Correctional officers escorted detainees to their video-call booths without wearing masks and could be seen in the background of video-calls without masks on.

84. Correctional officers also fail to wear masks and gloves when distributing food to detainees.

85. Some detainees are fed “buffet” style; in other words, food was left out in large containers and detainees had to serve themselves by touching, handling, and breathing on food.

***Overpopulation and Inadequate Social Distancing***

86. Rikers did not implement adequate social distancing in dormitories, cells, or other sleeping areas.

87. Not all incarcerated individuals are sleeping at least six feet apart.

88. Beds in some sleeping areas and dormitories are only three-and-a-half to four feet apart; detainees are enforcing social distancing on their own to the best of their ability.

89. Rikers instructed individuals to sleep head-to-toe (which would not result in six feet of distance between inmates) rather than creating adequate social distance.

90. Correctional officers are not enforcing social distancing rules; instead, detainees were monitoring each other to make sure they were staying at least six feet apart.

91. The DOC attempted to lower jail populations in NYC by releasing select detainees, but these efforts were far from adequate.

92. The City has tried to make it seem that crowding and congestion have been reduced significantly; for instance, in a recent media statement, the Department of Correction claimed that the Department “was overall operating at 64.8% capacity as of Dec. 3.”<sup>22</sup>

93. But this is a misleading statistic; in fact, much of the Department is operating at much higher density, because the Department is leaving empty certain areas that formerly housed inmates.

94. Despite the need to space inmates out, the City has been closing facilities that formerly open.

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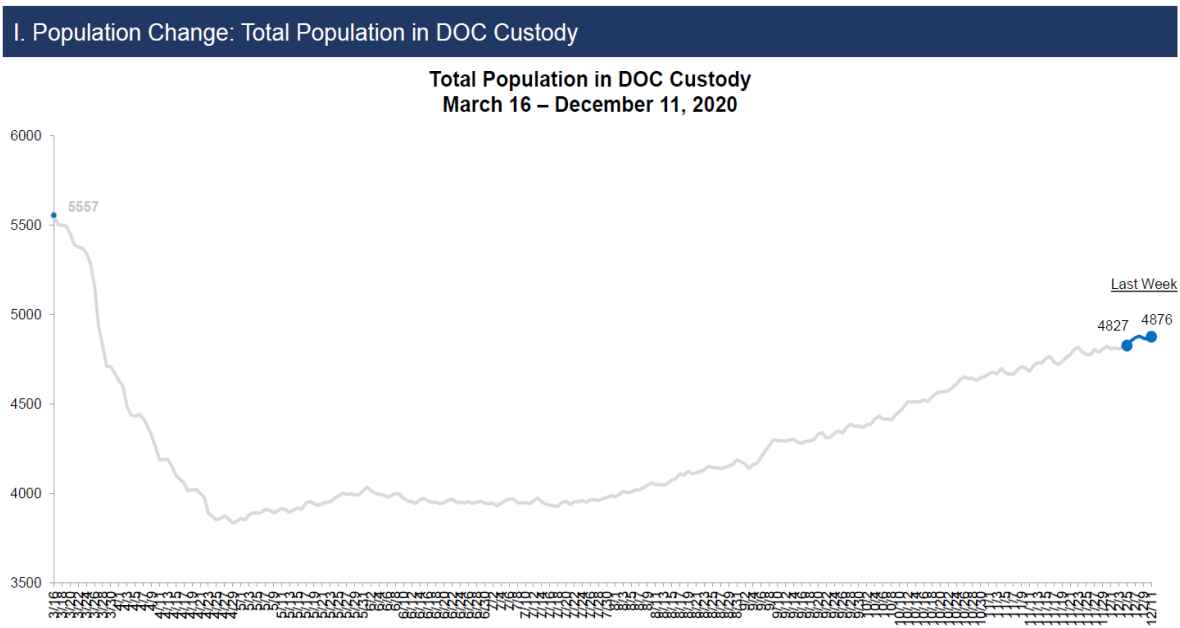
<sup>22</sup> See <https://www.nydailynews.com/coronavirus/ny-covid-aoc-rikers-island-20201214-lrvysrefuba5lhotrih5kgpmpa-story.html> (last visited 12/18/20).

95. The City is aware of the possibility of reopening these closed facilities, but has not done so, without offering any justification.

96. In October 2020, for example, most individuals in custody were housed in housing areas that were above 75% capacity.

97. On November 2, 2020, several of the dormitories at Rikers were at or above 90% capacity, with several being at full capacity.

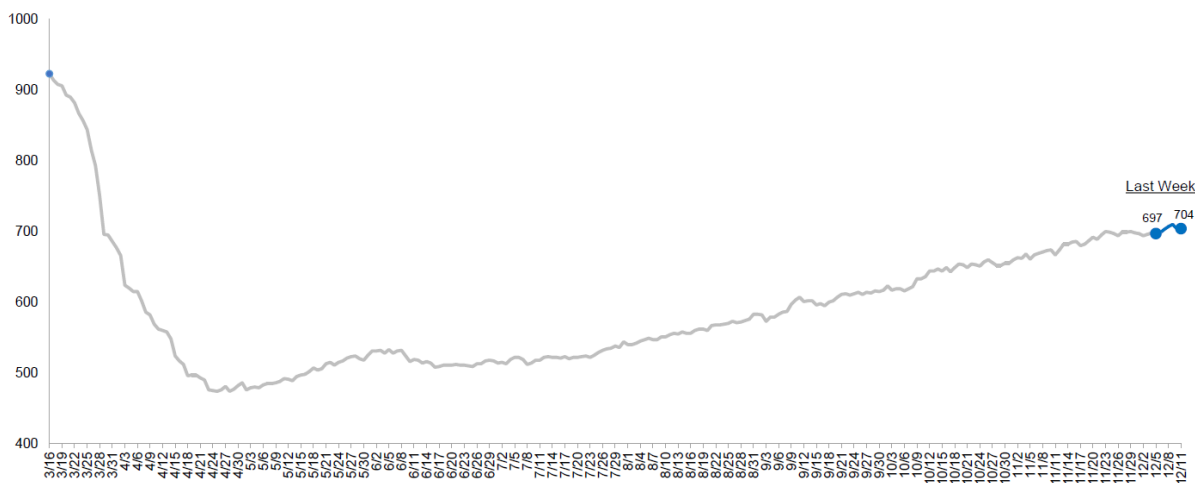
98. The Board of Correction has released a report showing graphically the rebound of the population towards pre-pandemic levels; as of the most recent data, the DOC’s population is 87.7% of pre-pandemic levels (4876 now vs. 5557 before pandemic measures were taken):



99. The BOC’s most recent report also shows that the number of inmates aged 50+ (and thus in a more vulnerable category) is also rebounding:

## I. Population Change: Population of 50+-Year-Olds in Custody

Total Population of 50+-Year-Olds in Custody, 3/16/2020 - 12/11/2020

*Inadequate Sanitization and Cleaning of High-Touch Surfaces*

100. The DOC has a duty to keep Rikers safe and sanitary.

101. On March 28, 2020, Chief of Department Hazel Jennings issued an order regarding televisits; the order instructs that there should be a thirty minute window between televisits during which staff must clean and sanitize the conference booths.

102. The DOC and Rikers have not been following this directive; detainees must sanitize and clean the phones and booths themselves if they are even able to access cleaning supplies.

103. The cleaning solution used by Rikers must stay on a surface for ten minutes in order for the surface to be disinfected.

104. But inmates are only able to wipe down phones on arrival at their booths and cannot wait ten minutes for the solution to dry--inmates are only allowed thirty minutes for their video conferences.



105. On the other hand, commercially available sanitary wipes, such as Lysol wipes, can kill COVID-19 in as little as two minutes.<sup>23</sup>

106. But the DOC is not providing detainees with sanitary wipes or any other adequate cleaning and sanitizing supplies if detainees wish to clean things themselves.

107. Rikers has not increased the rate or intensity of cleaning at its facilities.

108. Rikers staff and officers are not cleaning or sanitizing high-touch surfaces such as phones, door knobs, tables, chairs, and bathrooms, and other high-touch surfaces at Rikers.

109. The burden falls on incarcerated individuals to clean and sanitize their living areas as well as high-touch surfaces.

110. In its May through August 2020 report on environmental conditions, the Office of Compliance Consultants (“OCC”) found that the DOC is not yet in compliance with sanitation mandates.

#### ***Inadequate Measures to Ensure Hand Hygiene***

111. The DOC is not providing detainees with hand sanitizer.

112. Instead, incarcerated individuals are provided with bar soap, even though the CDC recommends the use of liquid/foam soap over bar soap.

113. But the DOC does not provide detainees with ready access to water for handwashing.

114. The DOC is not adequately restocking paper towels and soap in bathrooms.

#### ***Dangerous Lack of Testing and Quarantining***

115. The DOC has not implemented any broad testing policy for officers and staff.

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<sup>23</sup> See <https://www.lysol.com/products/disinfecting-wipes> (last visited 12/18/2020)

116. New staff members entering the facility are not isolated or quarantined, as recommended by the CDC.

117. The DOC does not mandate any of its staff or officers to get tested on a regular basis.

118. The DOC is no longer quarantining new detainees arriving at Rikers.

119. In early March 2020, the NIC Respiratory Therapist confiscated the C-PAP machines from Azor-El, Fennell, Kelly, Barnar, and Cole, all individuals who require the C-PAP machines to sleep.

120. Although the C-PAP machines have now been returned, Plaintiffs being deprived of them has resulted in both physical and emotional harm to them.

**Reasonable Measures that Rikers Could - But Won't - Take**

121. Since the outbreak of COVID-19, correctional facilities throughout the United States have been responding to the threat placed on inmates and staff.

122. While the City has taken some measures to control the outbreak, it also has failed to take other, easily and safely implemented measures that other correctional and government facilities have implemented without incident, including (a) making alcohol-based hand sanitizer available to inmates; (2) making sanitary wipes (such as Clorox wipes, Lysol wipes, or paper towels with sanitizing spray) available to clean high-touch surfaces like doorknobs and sinks; (3) enforcing staff compliance with mask mandates; and (4) testing staff for COVID.

123. The City has no legitimate interest in failing to implement these measures as they are safe, easily done, not unreasonably costly, and have benefits that far outweigh any burdens. In some instances, the City's failure to implement these measures is based in nothing more than paranoia about unrealistic scenarios that ignores the clear and present danger of COVID-19.

***Hand Sanitizer Is Safe, Cheap, and Effective - But the City Won't Get It***

124. Even from relatively early on in the pandemic, one of the first types of measures recommended was to use alcohol-based hand sanitizer when it is not feasible to wash one's hands.

125. In the busy and relatively high-density environment of a prison, it is not always possible to wash one's hands with soap and warm water, because bathrooms are either crowded or plumbing is not working properly.

126. The City recognizes the benefits of hand sanitizer; in fact, the City's policies expressly instruct staff at Rikers to use alcohol-based hand sanitizer when not able to wash their hands with soap and water.

127. Alcohol-based hand sanitizer is inexpensive and easy to procure.

128. For instance, ULINE - one of the country's largest suppliers of industrial products - sells a foam-based Purell hand sanitizer pack that has 1,500 applications per cartridge for \$49 (and a lower price in bulk) - a little over three cents per use.<sup>24</sup>

129. But the City says it will not purchase or distribute hand sanitizer because it can be weaponized or lit on fire.

130. The City has not pointed to any actual instance *anywhere* that an inmate has attacked anyone with hand sanitizer or lit it on fire.

131. The City also expresses worries that inmates will drink hand sanitizer. But again, the City has not pointed to a single situation *anywhere* that an inmate in a correctional facility has actually drunk hand sanitizer.

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<sup>24</sup> See [https://www.uline.com/BL\\_6978/Purell-Touch-Free-Dispenser](https://www.uline.com/BL_6978/Purell-Touch-Free-Dispenser) (last visited 12/13/2020).

132. The City's worries, to the extent they are even reality-based, can be mitigated by using foam-based hand sanitizer rather than gel, by using single-dose dispensers, and/or by having staff distribute single squirts of hand sanitizer.

133. In New York State, other inmates actually manufacture hand sanitizer at the *maximum security* Great Meadow Correctional Facility; if maximum-security, sentenced prisoners can manufacture vats of hand sanitizer safely, it is hard to believe that the risk of misuse from receiving a squirt of it is seriously high.<sup>25</sup>

134. The City routinely distributes laundry detergent and twine to inmates; detergent also generally contains alcohol, and twine can be used to choke or bind someone, but the City does not let that prevent it from distributing these items to most inmates.<sup>26</sup>

***Wipes: Even the City Agrees that High-Touch Surfaces Need Cleaning***

135. Doorknobs, bathrooms, and phone areas are especially high-touch areas, which require constant cleaning and availability of sanitizing materials so that inmates can sanitize high-touch surfaces after they have been used by others.

136. But the City has not made sanitizing materials widely available.

137. The City at one point distributed some alcohol wipes near the phones, around the middle of May, but after that point did not distribute wipes. The fact that the City did distribute wipes shows that the City knows these products are necessary and feasible, but the City has simply stopped distributing them.

138. The City also has not employed or designated any additional staff to clean or sanitize high-touch surfaces and high-traffic areas at Rikers.

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<sup>25</sup> See <https://time.com/5799710/new-york-hand-sanitizer-prison-labor/>; <https://slate.com/news-and-politics/2020/03/new-york-prison-labor-hand-sanitizer-coronavirus.html> (last visited 12/18/20).

<sup>26</sup> See NYC DOC Handbook for Detained and Sentenced Individuals, [https://www1.nyc.gov/assets/doc/downloads/pdf/HB\\_ENG.pdf](https://www1.nyc.gov/assets/doc/downloads/pdf/HB_ENG.pdf) (p. 33).

139. At least one other court during COVID-19 has directly ordered that a correctional system provide sanitary solution to inmates to clean surfaces. *See Banks v. Booth*, 468 F. Supp. 3d 101, 126 (D.D.C. 2020) (“Defendants shall ensure that inmates have access to the necessary materials to clean their cells, including cleaning solutions which protect against COVID-19 and adequate cleaning textiles and tools.”).

***There Is No Excuse for Not Having a Testing Regime***

140. COVID-19 is most likely to come into Rikers via staff members, because they enter and exit the facility on a daily basis, and have contact with the general public when not at Rikers.

141. In fact, Deputy Commissioner Patricia Feeney admits that the highest risk in introducing COVID-19 into Rikers comes from staff.

142. But the DOC has not instituted any broad COVID-19 testing regime for incarcerated individuals, officers, or staff.

143. The DOC does not mandate that its officers and staff get tested regularly.

144. In New York, even hair stylists are required to get tested for COVID-19 every two weeks and must show negative results to continue operating.

145. Nationally, as of December 8, 2020, new cases among prison staff members were at an all-time high.<sup>27</sup>

***Not Ensuring Social Distancing***

146. The congregate nature of a correctional facility makes social distancing challenging.

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<sup>27</sup> See The Marshall Project, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited 12/17/2020)

147. Social distancing - a distance of six feet or more between people - has widely been established as one of the most effective ways, and potentially the single most effective way, of preventing COVID-19's spread.

148. Despite that, the City has not taken adequate steps to ensure social distancing.

149. The City has even at Rikers Island other, closed facilities that could be reopened to accommodate inmates.

150. The City has failed to adequately reduce population density, and actually has increased the number of admissions to Rikers recently.

151. In late April 2020, the population of Rikers Island was under 4,000 inmates.

152. But since then, the population has steadily climbed. As of December 4, 2020, there were 4,821 inmates on the island.

153. In the facilities where inmates are confined, they are not consistently kept six feet apart.

154. Many inmates sleep in dormitory-style settings with less than six feet between each other, and high-use areas like phone booths and bathrooms are allowed to have congested lines and crowds.

155. Further, there is no adequate social distance in "day rooms" where inmates congregate during the day.

***The Most Basic Measure: Wear a Mask***

156. Since the beginning of the pandemic, the most basic protective measure, communicated to every member of the public, has been to wear a mask.

157. It is critical that a mask is worn properly, i.e., over both the mouth and the nose, because COVID-19 can reside in and be breathed in and out of both the nose and the mouth.

158. At the beginning of the pandemic, Rikers staff members routinely flouted the mask mandate, and many failed to wear a mask at all.

159. This included when preparing food; Kelly reports that when he was in Rikers' RNDC mess hall unit from May to September 2020, inmates and staff consistently failed to wear masks and gloves.

160. In NIC today, Azor-El and Barnar have observed staff wearing masks more, but many staff fail to put the masks over their nose, meaning that they can easily spread and contract coronavirus because this orifice is not covered.

#### *Other Concerns*

161. COVID-19 is a dynamic and rapidly evolving problem.

162. One of the issues that has become apparent is the lack of adequate ventilation and failing roofs.

163. It is feasible for correctional facilities (and other institutions) to install air filters to combat COVID-19.

164. On information and belief, Rikers has not installed any such filters, and has inadequate insulation.

165. Other measures can include UV lamps, humidity control, airflow management, and staff to specialize in using such equipment. On information and belief, Rikers has not implemented these measures.

166. Further, on information and belief, given the age of Rikers as a facility, various roofing is leaking or failing, and may contain asbestos.

167. Throughout the COVID-19 pandemic, Rikers experienced food shortages and has failed to provide its residents with sufficiently nutritious meals.

168. Further, during COVID-19, staffing has been inadequate, leading to additional threat levels to inmates, especially vulnerable inmates, since there are fewer correctional officers to guard the facility and break up fights, and fewer medical staff available, meaning serious delays in providing medicine and necessary medical care.

169. Rikers also denied Plaintiffs full commissary purchases despite Plaintiffs having pre-hearing status. Inmates will have their commissary privileges, in which they have a protectable liberty/property interest, suspended based on suspicion or accusation alone, and without relevant rules being posted throughout the facility. *See also* N.Y. Corr. Law 138(5).

170. Inmates are also being detained unnecessarily long as trials and other proceedings are delayed; the slowdowns of COVID-19 have meant that inmates are delayed in proceeding to hearings and trials.

### **CLASS ALLEGATIONS**

171. Plaintiffs pray that this Court certify the following class: “All individuals detained, incarcerated, and/or housed at Rikers from March 1, 2020, to present.”

172. The class is so numerous that joinder of all members is impracticable. Rikers has incarcerated thousands of individuals during COVID-19, and the population is largely transitory.

173. There are common issues of law and fact affecting all inmates, including but not limited to the policies and practices at issue.

174. Plaintiffs make claims typical of the proposed class.

175. Plaintiffs will fairly and adequately protect the interests of the class. Their interests are aligned with the interests of the proposed class, and they are ready and willing to prosecute this action, and have engaged counsel willing and able to undertake this matter.



176. A class action is appropriate because Defendants have acted or refused to act on grounds applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

177. Alternately, a class action is appropriate because issues common to the class predominate over individual issues. The driving issue here is the policies and procedures.

## **CLAIMS**

### **COUNT I**

#### **Violation of the Rehabilitation Act 29 U.S.C. § 701 et seq.**

178. Plaintiffs incorporate each and every foregoing and succeeding paragraph of this Complaint as if fully set forth here.

179. The Rehabilitation Act, 29 U.S.C. § 701 et seq., requires that covered entities provide reasonable accommodation to people with disabilities. *See also* 29 U.S.C. § 794(a).

180. The City is a covered entity under the Rehabilitation Act because it receives federal funding, including funding for its correctional programs.

181. Plaintiffs and others like them, including but not limited to residents of NIC, are and were disabled within the meaning and coverage of the Rehabilitation Act.

182. The City failed and continues to fail to accommodate Plaintiffs by taking reasonable measures to ensure that they had access to necessary medical devices, including adaptive devices for visual impairments and C-PAP machines. The City also failed and fails, as set forth above, to take measures necessary to protect medically-vulnerable inmates from COVID-19.

183. Plaintiffs have been damaged, and continue to face the future prospect of irreparable harm, from the City's failures.

184. The City has acted in reckless disregard of the Plaintiffs' rights and the rights of other inmates, and has been willful in failing to take necessary measures to accommodate Plaintiffs and those like them, and to stop the spread of COVID-19.

185. Plaintiffs respectfully prays that this Court adjudge Defendants liable for violation of the Rehabilitation Act, and grant all relief allowed under the law, as set forth in the Prayer in this Complaint.

**COUNT II**  
**Violation of the Americans with Disabilities Act**  
**42 U.S.C. § 12101 et seq.**

186. Plaintiffs incorporate each and every foregoing and succeeding paragraph of this Complaint as if fully set forth here.

187. The Americans with Disabilities Act, as amended ("ADA"), 29 U.S.C. § 12101 et seq., requires that covered entities provide reasonable accommodation to people with disabilities. This includes but is not necessarily limited to Title II of the ADA.

188. The City is a covered entity under the ADA.

189. Plaintiffs and others like them, including but not limited to residents of NIC, are and were disabled within the meaning and coverage of the ADA.

190. The City failed and continues to fail to accommodate Plaintiffs by taking reasonable measures to ensure that they had access to necessary medical devices, including adaptive devices for visual impairments and C-PAP machines. The City also failed and fails, as set forth above, to take measures necessary to protect medically-vulnerable inmates from COVID-19, and failed to give Plaintiffs access to their existing accommodations (such as a low-light environment, which Medina needed), and delayed giving them medical treatment, including medications.

191. Plaintiffs have been damaged, and continue to face the future prospect of irreparable harm, from the City's failures.

192. The City has acted in reckless disregard of the Plaintiffs' rights and the rights of other inmates, and has been willful in failing to take necessary measures to accommodate Plaintiffs and those like them, and to stop the spread of COVID-19.

193. Plaintiffs respectfully prays that this Court adjudge Defendants liable for violation of the ADA, and grant all relief allowed under the law, as set forth in the Prayer in this Complaint.

**COUNT III**  
**Violation of 42 U.S.C. § 1983**  
**Inhumane Conditions of Confinement and**  
**Failure to Attend to Serious Medical Needs**

194. Plaintiffs incorporate each and every foregoing and succeeding paragraph of this Petition as if fully set forth here.

195. Defendants are state actors within the meaning and coverage of the Eighth and Fourteenth Amendments to the United States Constitution.

196. Under the Fourteenth Amendment's due process clause, pretrial detainees, including parolees in revocation proceedings, have the right to humane conditions of confinement and to have their serious medical needs addressed.

197. Defendants knew or should have known posed an excessive risk to health or safety.

198. Additionally and/or in the alternative, under the Eighth Amendment's prohibition on cruel and unusual punishments, as incorporated against states and local governments under the Fourteenth Amendment, prisoners have the right to humane conditions of confinement and to have their serious medical needs addressed.

199. Defendants actually know of and have disregarded an excessive risk to inmate health or safety.

200. The Defendants' actions, which reflect actual custom, policy, and usage of the City, reflect deliberate indifference to the threat of COVID-19 and the Plaintiffs' and other inmates' safety and serious medical needs.

201. The conditions Defendants have maintained and continue to maintain pose an unreasonable risk of serious damage to the health of Plaintiffs and other inmates, including but not limited to the risk of serious damage to physical and mental soundness.

202. Exposing any person to this risk unwillingly violates contemporary standards of societal decency.

203. Defendants are aware of this unreasonable risk, and yet have maintained substandard conditions at Rikers Island.

204. Even if Defendants were not actually aware of the risk (which again, they are), they should be aware of it given the nine months of experience that the correctional community nationwide has with the COVID-19 pandemic and the wide availability of information and resources on how to combat it.

205. As a result of this deliberate indifference, Plaintiffs have suffered damages, including but not limited to aggravation of the symptoms of their underlying medical conditions and inability to sleep due to lack of a C-PAP machine (resulting in physical symptoms such as headaches, sore throats, and fatigue).

206. Plaintiffs have been damaged and continue to face the future prospect of irreparable harm, from the City's failures.

207. The City has acted in reckless disregard of the Plaintiffs' rights and the rights of other inmates, and has been willful in failing to take necessary measures.

208. Further, as set forth above, Plaintiffs' due process rights have been violated by pre-hearing suspension of commissary privileges, inadequate nutrition, inadequate staffing and medical care, and inability to access or proceed with the judicial process.

209. Plaintiffs respectfully pray that this Court adjudge Defendants liable for violation of 42 U.S.C. § 1983, and grant all relief permitted by law, as set forth in the Prayer in this Complaint.

**COUNT IV**  
**Petition for a Writ of Habeas Corpus**  
**28 U.S.C. § 2241**

210. Plaintiffs incorporate each and every foregoing and succeeding paragraph of this Complaint as if fully set forth here.

211. Petitioners are being held in custody by a governmental actor, the City of New York.

212. The conditions of confinement in Rikers Island are so grave that confinement in this facility under the present conditions constitutes cruel and unusual punishment and/or a violation of the due process clause of the Fourteenth Amendment.

213. Accordingly, Plaintiffs in the alternative seek the relief of release from confinement or transfer to another facility.

214. Plaintiffs respectfully pray that this Court issue an order to show cause why Plaintiffs should not be released or transferred to a safer custodial environment outside Rikers, to order such release or transfer, and grant all relief permitted by law, as set forth in the Prayer in this Complaint.

**JURY DEMAND**

Plaintiffs respectfully demand a jury trial on all issues so triable.

**PRAYER FOR RELIEF**

Plaintiffs respectfully pray that this Court enter judgment in their favor and against Defendants, and grant all relief allowed under law, including but not limited to:

- A. Actual economic damages;
- B. Actual non-economic damages, including damages for emotional distress;
- C. Punitive damages, liquidated damages, and civil penalties;
- D. Attorney's fees, expert fees, and costs;
- E. Declaratory and injunctive relief, including but not limited to an injunction commanding Defendants to take reasonable measures to control and prevent the spread of COVID-19 in New York City correctional facilities, including but not limited to: distribution of hand sanitizer, distribution of sanitary wipes or materials to wipe down high-touch surfaces, implementation of a testing regime of staff, effective enforcement of mask mandates, adequate ventilation, adequate access to soap and water, and effective social distancing;
- F. Release from custody and/or transfer to a safer custodial environment; and
- G. Any other and/or further relief that the Court deems just and proper.

Dated: December 18, 2020

Respectfully submitted,

KEENAN & BHATIA, LLC

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**CERTIFICATE OF SERVICE**

I certify service of the foregoing on the date of filing by filing it through the Court's CM/ECF system, which will automatically transmit notice to counsel of record for Defendants.

By: \_\_\_/s E.E. Keenan\_\_\_\_\_