NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

NO. 531755

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ERIC A. FELLEMAN, ESQ., ON BEHALF OF CATHY CITRO, DIN 19A3397

Petitioner-Appellant,

-against-

WILLIAM LEE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents-Appellees.

AMICUS BRIEF OF LEGAL ORGANIZATIONS AND LAW PROFESSORS IN SUPPORT OF PETITIONER-APPELLANT

Cynthia Grant Bowman
Counsel of Record
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-0383
cgb28@cornell.edu

Counsel for Amici Curiae

Orange County Index No. EF2020-1113

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

BOOKS, ARTICLES, AND OTHER AUTHORITIES

Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. Dep't of Justice Bureau of Justice Statistics, 1, 8 (May 2013), https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf 5

Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, – Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, U.S. Dep't of Justice Bureau of Justice Statistics tbl.1 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.....5

David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 Mich. L. Rev. 2565 (2003).....13

David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction,* 86 Geo. L. J. 2481 (1998) 6

William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. Rev. 983 (1978) 14

Sonya Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, States Courts, and Education Rights*, 57 Duke L. J. 755 (2007).....9

Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 Touro L. Rev. 363 (2003) 18, 19

Eric M. Freedman, *Habeas Corpus Past and Present*, 59 Fed. L. 40 (2012) 6, 17

Robert Gangi, *Cuomo's Coronavirus Prison Failure,* N.Y. Daily News (Apr. 14, 2020), https://www.nydailynews.com/opinion/ny-oped-cuomos-coronavirus-prison-failure-20200415-sbv4q54hhzhe5mvhbk6f5sg4ae-story.html 11

Paul D. Halliday, Habeas Corpus (2012).....18

Emily Hoerner, *Hundreds of Illinois Prisoners Released as COVID-19 Spreads, but Few Elderly See Reprieve,* Injustice Watch (May 6, 2020), https://www.injusticewatch.org/news/prisons-and-jails/2020/hundreds-of-illinois-prisoners-released-as-covid-19-spreads-but-few-elderly-see-reprieve/ 12

Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L. Rev. 2143 (1996) 8

Paul Skip Laisure et al., *Release Many More People from Prison Now, Gov. Cuomo,* N.Y. Daily News (Apr. 15, 2020), https://www.nydailynews.com/opinion/ny-oped-release-more-prison-cuomo-20200415-smib6uwwarbuvjnygbpqmn5zja-story.html.....11

Saul McLeod, *Stress, Illness and the Immune System,* Simply Psychology (2010), https://www.simplypsychology.org/stress-immune.html.....4

Samantha Melamed, *Pa. Board of Pardons recommends clemency for 8 lifers, including 3 women*, Philadelphia Inquirer, (Sept. 4, 2020), https://www.inquirer.com/news/pennsylvania-board-pardons-commutation-fetterman-shapiro-reid-wyatt-evans-horton-harris-mojica-stover-20200904.html 12

Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, Marshall Project (Apr. 25, 2020), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies.....13

Nick Reisman, *Advocates: Don't Ignore COVID's Impact on New York Inmates,* Spectrum News (May 18, 2020), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/05/18/advocates--don-t-ignore-covid-s-impact-on-new-york-inmates 11

Paige St. John, *California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons*, L.A. Times (Mar. 31, 2020), https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons 12

Suzanne C. Segerstrom & Gregory E. Miller, *Psychological Stress and the Human Immune System: A Meta-Analytic Study of 30 Years of Inquiry*, 130 Psychol. Bull. 601 (2006).....4

Carol Shapiro, *Opinion: Cuomo's Next Task as a National Leader is to Spare Prisoners from COVID-19,* City Limits (Apr. 20, 2020), https://citylimits.org/2020/04/20/opinion-cuomos-next-task-as-a-national-leader-is-to-spare-prisoners-from-covid-19/.....12

Scott Singer, *"To Be or Not To Be: What Is the Answer?" The Use of Habeas Corpus to Attack Improper Prison Conditions"* 13 N. Eng. J. Crim. & Civ. Confinement 149 (1987).....20

PRELIMINARY STATEMENT

The petition for habeas corpus at issue in this case seeks the release of an incarcerated transgender woman from confinement at Eastern Correctional Facility to protect her from possible death if she remains imprisoned there during the COVID-19 pandemic. *Amici* wish to draw this Court's attention to the appropriateness of employing the writ of habeas corpus in this case by setting it in the context of the history and purposes of the writ, the case law developed concerning its use, and the essential role courts must play in this period of great risk, thereby amplifying rather than duplicating arguments briefed by the Appellant.

INTEREST OF AMICI

Amici are legal organizations, law school-based organizations, and law professors interested in the rights of incarcerated people and of LGBT individuals. Although *amici* seek the same result as the Appellant in this matter, they also share a strong interest in ensuring the effective administration of the criminal legal system in New York State and the protection of the health and dignity of incarcerated transgender persons. *Amici* New York State law professors both teach and practice within the New York State legal system and thus have a direct interest in the administration of criminal justice and an ethical

obligation to ensure that it is fair and equitable. The names of the individual law professors and of the legal organizations are listed in an Appendix to this Brief.

ARGUMENT

This case presents an emergency situation which the courts of New York State must address. The Appellant is a transgender woman incarcerated at Eastern Correctional Facility, a men's prison in Ulster County, who suffers from multiple serious medical conditions that put her at unique risk of contracting COVID-19. The trial court judge in this case said that there were serious concerns about the Appellant's health if she continued to be incarcerated during COVID but that habeas corpus relief was unavailable to her because her sentence had not yet expired (Decision & Order at 7). If that were so, of course, she would not *need* habeas corpus. Such a conclusion seriously misunderstands the nature of the writ of habeas corpus as it has developed historically and been interpreted by the courts.

Indeed, habeas is the route by which release or other relief is to be sought whenever conditions of imprisonment are unconstitutional, at whatever point that may occur during the incarcerated person's sentence. The previous decision of this Court that Judge Schreibman cites to the contrary (Decision & Order at 4) is inapposite because the appropriate calculation of the length of the

sentence was the very issue under appeal. *People ex rel. Porter v. Napoli*, 56 A.D.3d 830 (3d Dept. 2008). Here the issue is the constitutionality of continuing to incarcerate the Appellant under the current conditions. As *amici* demonstrate below, courts have repeatedly used habeas as the avenue to address this type of case, at whatever point the unconstitutionality arises during the sentence.

POINT I

THIS COURT SHOULD EXERCISE ITS BROAD REMEDIAL POWERS TO PROTECT THE CONSTITUTIONAL RIGHTS OF INCARCERATED TRANSGENDER PEOPLE DURING THE COVID-19 PANDEMIC

(a) This Court's Obligation to Protect Vulnerable Minorities

The Appellant, Cathy Citro, was sentenced to 18 to 36 months for Criminal Possession of Stolen Property in the 4th Degree and will not be eligible for parole until December 16, 2020. She suffers from serious ailments that make every additional day served exceedingly dangerous to her health. She has diabetes that requires injections three times a day, for which she has to go to the prison clinic and wait among a crowd of others, often 40 to 50 persons. She has also had heart problems for 34 years, including irregular heartbeat and high blood pressure that have necessitated insertion of a stent. She is at risk of blood clots.

Moreover, as a transgender person, the Appellant is subject to conditions that contribute to immunosuppression, which make her particularly susceptible to a virus like COVID-19. Doctors and scientists have long recognized that chronic stress results in suppression of the immune system. The most chronic stressors, such as those associated with changes in identity or social roles, are associated with the most global immunosuppression. *See, e.g.*, Suzanne C. Segerstrom & Gregory E. Miller, *Psychological Stress and the Human Immune System: A Meta-Analytic Study of 30 Years of Inquiry*, 130 Psychol. Bull. 601, 618 (2006) (meta-analysis of more than 300 empirical articles on the relationship between psychological stress and the immune system), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361287/; Saul McLeod, *Stress, Illness and the Immune System*, Simply Psychology (2010), https://www.simplypsychology.org/stress-immune.html (layman's introduction to the impact of stress on the immune system).

Quite apart from the stress caused by gender dysphoria, with which Ms. Citro has been diagnosed, transgender women in prison suffer extreme stress on a daily basis. Transgender women in men's prisons in New York State are subjected to persistent physical, emotional, and sexual abuse, including verbal harassment, physical and sexual assault, humiliation, and rape by both staff and other prisoners. *See* Sylvia Rivera Law Project, *"It's War In Here": A Report*

on the Treatment of Transgender and Intersex People in New York State Men's Prisons, 17–32 (2007), https://srlp.org/its-war-in-here/. The simple act of taking a shower is risky. *Id.* at 30–31. *See also* Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. Dep't of Justice Bureau of Justice Statistics, 1, 8 (May 2013), https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf; Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, U.S. Dep't of Justice Bureau of Justice Statistics tbl.1 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (reporting that transgender prisoners are about ten times more likely to have been sexually assaulted than people in the general prison population – 39% versus 4%). All of these stresses have undoubtedly contributed to the Appellant's immune-compromised condition. Together with her underlying medical conditions, the Appellant is thus especially at risk of contracting COVID-19.

Conditions at the prison exacerbate these risks. Indeed, Appellant's health led prison authorities to restrict her activities in general, but she still is required to eat communally and share bathroom facilities. Social distancing is often impossible. In short, unless this court exercises its authority to release her, the Appellant's life is in imminent danger.

The courts have a critical role to play in this pandemic emergency.[1] That role flows from a central function of the judiciary: to protect those who cannot insulate themselves from harm. *See, e.g.*, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2482 (1998). The Supreme Court has long recognized this function, noting that courts have a special duty to protect "discrete and insular minorities" who cannot rely on the ordinary operation of the political process. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

Appellant Citro is a member of not one but two vulnerable minorities – as a transgender person and as a prisoner. Courts have recognized that transgender status requires heightened scrutiny in a large variety of cases and circumstances. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1315–17 (11th Cir. 2011) (affirming use of heightened scrutiny in case involving discharged transgender government employee): *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (finding that heightened scrutiny is appropriate for case in which

[1] As Professor Eric Freedman counsels, "we would do well to be guided in the future by a teaching of the past that continues to accord with common sense," asking what might have happened if judges had not devised innovative remedial strategies after *Brown v. Board of Education.* Eric M. Freedman, *Habeas Corpus Past and Present*, 59 FED. L. 40, 42–43 (2012).

transgender members of military and enlistees challenged ban on military service); *Adkins v. City of New York*, 143 F. Supp. 134, 139–40 (S.D.N.Y. 2015) (holding that transgender persons were a quasi-suspect class in a challenge to treatment of transgender Occupy Wall Street protester arrested by the N.Y.C. police). A recent Fourth Circuit panel applied the four-factor test for whether a group constitutes a suspect class (historical discrimination, non-relationship between the group characteristic and ability to contribute to society, a distinctive characteristic defining a discrete minority, and political powerlessness) and concluded that transgender persons were "at least a quasi-suspect class." *Grimm v. Gloucester Co. Sch. Bd.*, 2020 WL 5034430, at *16–18 (4th Cir. 2020) (holding for transgender plaintiff in case challenging exclusion of transgender boy from boys' restroom). *See also Adkins, supra*, at 139–40. As one district court in Wisconsin articulated, "[O]ther than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 952–53 (W.D. Wis. 2018) (saying that transgender status was either a suspect or quasi-suspect class in case successfully challenging exclusion of transgender surgery and treatment from the state's Medicaid program).

Incarcerated people are also a vulnerable minority. *See* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L. Rev. 2143, 2168–73 (1996). They are "truly the outcasts of society. Disenfranchised, scorned . . . [and] shut away from public view." *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J. concurring in part and dissenting in part). As disfavored people without political power, incarcerated persons cannot hope to influence the executive or legislative branch through the most basic of means, such as voting or meeting with elected officials. Incarcerated persons thus occupy a distinctly vulnerable position in society.

Accordingly, the courts are obligated to intervene when conditions in prisons threaten the constitutional rights, health, and lives of incarcerated people, especially when other branches of government have failed to act. Such was the case in the sweeping judicial reform of the California prison system that the Supreme Court approved in *Brown v. Plata*, 563 U.S. 493 (2011), where the courts were required to take bold steps to address prison overcrowding because:

> the rights of California's prisoners have repeatedly been ignored. Where the political process has utterly failed to protect the constitutional rights of a minority, the courts can, and must, vindicate those rights.

Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 1003 (E.D. Cal. 2009) (holding by a special three-judge court that there was no alternative to issuing a release order to reduce the prison population).

State courts are of particular importance in this regard. *See generally* Sonya Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Education Rights*, 57 Duke L. J. 755 (2007). Indeed, many state courts have recognized that the judicial deference owed to the executive and legislature are not due "when the other branches of government fail . . . to remedy unconstitutional situations that violate people's rights. . . . In fact, many courts recognize that the limits to their deference are not discretionary." *Id.* at 766–67; *see also Campaign for Fiscal Equity v. State*, 861 N.E.2d 50, 62 (N.Y. 2006) (Kaye, C.J. concurring in part and dissenting in part) (stating that when the state fails to fulfill its constitutional duty, the court is compelled to act in its stead); *Londonderry Sch. Dst. SAU #12 v. State*, 907 A.2d 988, 996 (N.H. 2006) (stating that when other branches fail, "a judicial remedy is not only appropriate but essential"); *Robinson v. Cahill*, 351 A.2d 713, 724 (N.J. 1975) (stating that a court "must use power equal to its responsibility" as "the designated last-resort guarantor of the Constitution's command").

Courts have fulfilled their duty to protect individual rights by liberally construing laws necessary to safeguard vulnerable groups. *See, e.g.*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (stating that "statutes are to be construed liberally in favor of the Indians. . . ."); *Steelworkers v. Weber*, 443 U.S. 193, 201–02 (1979) (rejecting a "literal construction" of Title VII of the Civil Rights Act of 1964 that would undermine employment opportunity for people of color). Thus, because of their distinct vulnerability, noncitizens, Native Americans, and people of color are entitled to special protection by the courts—and so are both transgender persons and incarcerated people.

(b) This Court's Obligation to Act When the Executive and Legislative Branches Have Failed to Address an Emergency

In this case, the courts of New York are called upon to address the health, safety, welfare, and constitutional rights of a transgender person in a New York State prison threatened by a terrible disease that has ravaged incarcerated people and correctional staff statewide. The statistics cited in Appellant's Brief (at 8-9) undoubtedly understate the scope of COVID-19's spread in New York prisons, as the Department of Corrections and Community Supervision

(DOCCS) has tested only about three percent of the state prison population. *See* Timothy Williams et al., *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. Times (June 16, 2020), https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html. Cases in prisons have soared, with prison deaths rising by 73 percent between mid-May and mid-June. *Id.* Prisons testing every incarcerated person in one state resulted in the total number infected quadrupling. *Id.* If COVID-19 could not be contained on luxurious cruise ships or in nursing homes, it certainly cannot be contained in a prison.

Advocates have filed clemency petitions and petitions for medical parole with a paltry response from the governor and executive branch, and the legislature has also done nothing to address the dangerous situation in the prisons (and likely will not without the executive's direction).[2] In short, the

[2] *See, e.g.*, Steve Zeidman, *Sitting Ducks: COVID Threatens Many N.Y. Prisoners; Why Won't Cuomo Grant More Clemency?*, N.Y. Daily News (Sept. 12, 2020), https://www.nydailynews.com/opinion/ny-oped-the-covid-crisis-in-our-prisons-20200912-bnltorrg5rejxezha3fpsak7eu-story.html; Robert Gangi, *Cuomo's Coronavirus Prison Failure*, N.Y. Daily News (Apr. 14, 2020), https://www.nydailynews.com/opinion/ny-oped-cuomos-coronavirus-prison-failure-20200415-sbv4q54hhzhe5mvhbk6f5sg4ae-story.html; Paul Skip Laisure et al., *Release Many More People from Prison Now, Gov. Cuomo*, N.Y. Daily News (Apr. 15, 2020), https://www.nydailynews.com/opinion/ny-oped-release-more-prison-cuomo-20200415-smib6uwwarbuvjnygbpqmn5zja-story.html; Nick Reisman, *Advocates: Don't Ignore COVID's Impact on New York Inmates,* Spectrum News (May 18, 2020), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/05/18/advocates--don-t-ignore-covid-s-impact-on-new-york-inmates (describing the legislature's failure at a hearing on COVID-19's impact on communities of color to address the impact of COVID-

executive and legislative branches of New York State government have failed to take meaningful action to address this threat to the lives of thousands of people who lack the power to influence the policies and practices that place them in harm's way. New York's prisons remain virtually as packed today as they were at the beginning of this outbreak.

This inaction is in sharp contrast to actions in other states.[3] As recently as September 2020, the Pennsylvania Board of Pardons recommended clemency for eight incarcerated persons serving life sentences for crimes including murder.[4] On the federal level, the CARES Act has recommended

---

19 on people in prison); Carol Shapiro, *Opinion: Cuomo's Next Task as a National Leader is to Spare Prisoners from COVID-19,* City Limits (Apr. 20, 2020), https://citylimits.org/2020/04/20/opinion-cuomos-next-task-as-a-national-leader-is-to-spare-prisoners-from-covid-19/.

[3] *See, e.g.*, Emily Hoerner, *Hundreds of Illinois Prisoners Released as COVID-19 Spreads, but Few Elderly See Reprieve,* Injustice Watch (May 6, 2020), https://www.injusticewatch.org/news/prisons-and-jails/2020/hundreds-of-illinois-prisoners-released-as-covid-19-spreads-but-few-elderly-see-reprieve/; Stacey Barchenger, *NJ Identifies 781 More Eligible Inmates as Releases Begin to Stem Coronavirus in Prisons*, northjersey.com (Apr. 29, 2020), https://www.northjersey.com/story/news/new-jersey/2020/04/29/nj-identifies-781-more-inmates-eligible-release-stem-coronavirus/3042772001/; Paige St. John, *California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons*, L.A. Times (Mar. 31, 2020), https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons.

[4] Samantha Melamed, *Pa. Board of Pardons recommends clemency for 8 lifers, including 3 women*, Philadelphia Inquirer (Sept. 4, 2020), https://www.inquirer.com/news/pennsylvania-board-pardons-commutation-fetterman-shapiro-reid-wyatt-evans-horton-harris-mojica-stover-20200904.html.

action to reduce prison populations, and the First Step Act directs the Bureau of Prisons to place incarcerated people who pose a low risk to public safety on home confinement when possible. CARES Act, Pub L. No. 116-136, § 12003 (2020); First Step Act of 2018, § 602, Pub. L. No. 115-391, 132 Stat. 5194, 5238 (2018). Attorney General Barr told prison officials to maximize the release of people in prison to home confinement to prevent spread of the virus. Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, Marshall Project (Apr. 25, 2020), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies.

In the current emergency, the judiciary is the institution obligated—indeed, the only avenue available at present—to address claims of constitutional violations flowing from the potentially lethal spread of COVID-19. *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 Mich. L. Rev. 2565, 2591–92 (2003). The courts of New York State must take up this challenge.

In this case, the Court need not craft a tool de novo. The Court has available to it an instrument to protect the Appellant's health, safety, and civil rights: the writ of habeas corpus. In the remainder of this brief, *amici* discuss

the reasons why habeas is an appropriate route to address unconstitutional prison conditions by releasing the Appellant from custody.

POINT II

THE WRIT OF HABEAS CORPUS HAS EVOLVED INTO A REMEDY FOR THE VIOLATION OF INCARCERATED PEOPLE'S CIVIL RIGHTS.

(a) The Origins of the "Great Writ" from an Instrument to Challenge the Jurisdiction of the Executive into an Instrument to Safeguard Individual Rights

A review of the historical development of the writ of habeas corpus reveals that it evolved from an instrument to challenge executive branch jurisdiction to a tool used to safeguard the health and safety of people in prison and redress inhumane conditions of their imprisonment. As Justice Brennan wrote in *Fay v. Noia*, "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty." 372 U.S. 391, 401 (1963). The origins of habeas corpus lie in the struggles for jurisdiction among a variety of institutions in England: superior versus local courts; among rival superior courts; common law courts versus equity courts, ecclesiastical courts, admiralty courts, and the Privy Council; Parliament versus the King and the Star Chamber. *See generally* William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. Rev. 983 (1978). The

development of the doctrine culminated in the Habeas Corpus Act of 1679. 31 Car. 2, c.2 (Eng.).

Colonists in the United States assumed that the writ was part of their heritage as "Englishmen," and its denial to them was a major cause of the American Revolution, as detailed in the complaints levied by the Continental Congress in 1774. Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 Cal. L. Rev. 635, 647 (2015). Although several colonies attempted to include a guarantee of habeas corpus in their foundational documents, these were all vetoed by King James II. *Id*. at 645. After war broke out, denial of habeas corpus to captured Americans evoked great controversy, focusing especially on the conditions in which the prisoners were held—for example, the treatment of Revolutionary War hero Ethan Allen and the Green Mountain Boys when captured, both on the ship to England and in prison there. *Id*. at 649–52. The English maintained that the captives were not prisoners of war but treasonous Englishmen, which should have entitled them to the writ of habeas corpus. *Id*. at 651. Indeed, rumors that Ethan Allen (who was well known) was about to file a writ led the English to ship him back to the colonies, and his treatment on the return trip improved because of the threat of a habeas filing in England. *Id*. at 654. Parliament solved the dilemma by suspending the writ of habeas corpus in 1777. *Id*. at 669–74.

The English also held American prisoners on prison ships, and the conditions of those in New York harbor led them to be called "Hell Afloat" because of the disease and high death rate on them. *Id*. at 680. The similarity to prisons during the COVID-19 pandemic is striking. Denial to the American prisoners of the right to file writs of habeas corpus to challenge their confinement on the ships further enraged the revolutionary colonists.

Henry Laurens, who had been president of the Continental Congress, was captured and detained in the Tower of London in 1780. Edmund Burke pleaded his cause in Parliament because the harsh conditions in that prison were causing Laurens's health to deteriorate. *Id*. at 684. After the defeat of the English, Laurens returned to a high position in the government of his home state of South Carolina, and one of the first acts of the General Assembly was to make sure that the protections of the English Habeas Corpus Act of 1679 were included in the new legal framework. *Id*. at 694.

This historic importance of the writ of habeas corpus during the colonial period and Revolutionary War—in particular its relevance to the conditions of imprisonment of Americans—contributes to our understanding of what the Founders meant to achieve when they included a reference to the writ of habeas corpus in the Suspension Clause of the Constitution: a fundamental protection, to be suspended in only the most extreme cases, against illegal imprisonment,

including confinement under circumstances incompatible with basic respect for human dignity. U.S. Const. art. I, § 9.

(b) Post-independence Development and Expansion of the Writ of Habeas Corpus in the United States

Habeas corpus had an honored position among the liberties that had been won by the Revolution, and its use was developed beyond that in England. By 1833, the English Habeas Corpus Act "ha[d] been in substance, incorporated into the jurisdiction of every state in the Union." Joseph Story, Commentaries on the Constitution of the United States 208 (1833). Recall, for example, that *The Amistad* case, 40 U.S. (15 Pet.) 518 (1841), which resulted in freeing captured Africans who faced deadly conditions if they were not released, was brought on a writ of habeas corpus. This caused former President John Quincy Adams, who argued on behalf of the African people who had been captured and bound for enslavement, to tell the Supreme Court that the case posed a challenge to "the power and independence of the judiciary itself" and that, if the court did not release the Africans, it would "disable[] forever the effective power of the habeas corpus." Freedman, *supra* note 1, at 41. The 1867 Habeas Corpus Act, 14 Stat. 385 (1867), extended the constitutional writ to people in state prisons in order to address injustices in the South during Reconstruction, demonstrating, in the words of a leading scholar of habeas corpus, that "the writ

had always been at its most effective when judges used it to address new problems." Paul D. Halliday, Habeas Corpus 308 (2012).

(c) History of the Writ of Habeas Corpus in New York State

New York was one of the colonies that tried to include the writ of habeas corpus in its colonial Charter, in both 1683 and 1691, only to have the provision vetoed by King James II. Tyler, *supra*, at 645. After the American Revolution, in 1787 New York State passed a statute identical to the English Habeas Corpus Act of 1679. *Id*. at 695; *see* L. 1787, c. 39. But unlike other states, New York did not include habeas corpus in its state constitution until 1821. When it did so, it took the text directly from the U.S. Constitution, with very minor alterations: "The privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require its suspension." N.Y. Const. of 1821, art. VII, § 6. The current text is virtually identical. N.Y. Const. art. I, § 4. Yet New York continues to have a statutory right of habeas corpus as well, which is more typically cited in the case law. N.Y. C.P.L.R. art. 70.[5]

[5] The explanation for having two types of habeas corpus in New York State—statutory and constitutional—is interesting. In the late 18th century, Americans, influenced by their English heritage, failed to distinguish between constitutions and legislation as sources of fundamental rights; after all, the British have no constitution, and the writ of habeas corpus was codified in a simple act of Parliament. *See generally* Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 Touro L. Rev. 363 (2003). Thus, New York only added a formal bill of rights to its state constitution in 1821, by which time

Consistent with the history and development of habeas corpus, New York courts have repeatedly relied upon habeas in cases challenging conditions of imprisonment, even in cases where the petitioner did not prevail on other grounds. *Amici* endorse the arguments about the availability of the writ of habeas corpus to challenge conditions of confinement under New York law—through either release or remediation—made by counsel for the Appellant in Appellant's Brief (at 14-18).

POINT III

NEW YORK STATE COURTS SHOULD INTERPRET THE WRIT OF HABEAS CORPUS PARALLEL TO THE CASE LAW ON HABEAS CORPUS IN FEDERAL COURTS.

Although this Court will decide on the basis of New York State law, a review of federal law on the applicability of the writ of habeas corpus to cases alleging unconstitutional prison conditions is relevant to its decision. Quite apart from the persuasive value of federal precedent, the New York State Constitution's habeas corpus provision is identical to that in the U.S. Constitution (see Pt. II (c), above), and its interpretation of that clause should be similar to that of the identical language by the federal courts. Moreover, of

constitutional thought had developed so that the distinction between fundamental constitutions and subordinate statutes was clear. *Id*. at 375, 377.

course, incarcerated people in New York State prisons are entitled to the protections of the federal constitution as well as those of New York law.

(a) The United States Supreme Court Has Endorsed the Applicability of the Writ of Habeas Corpus to Prison Conditions Cases.

The United States Supreme Court has endorsed the applicability of habeas corpus as a vehicle to address the conditions of one's imprisonment. Early cases clearly support the applicability of the writ in prison conditions cases. *See, e.g.*, *In re Bonner*, 151 U.S. 242 (1894) (approving use of the writ where petitioner challenged the place of his confinement); *Johnson v. Avery*, 393 U.S. 483, 483 (1969) (holding that a prison regulation barring prisoner from aiding others in preparation of petitions for post-conviction relief by denying him law books and a typewriter was "invalid as in conflict with the federal right of habeas corpus"); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (holding that prisoner's action challenging recreational, educational, and religious practices, lack of hygiene facilities, and disciplinary measures was cognizable in habeas corpus). *See also* Scott Singer, *"To Be or Not To Be: What Is the Answer?" The Use of Habeas Corpus to Attack Improper Prison Conditions"* 13 N. Eng. J. Crim. & Civ. Confinement 149, 149–53 (1987). None of these Supreme Court cases has been overruled, and they continue to be cited. *See, e.g.*, *Aamer v. Obama*, 742 F.3d 1023, 1031 (D.C. Cir. 2014).

The Supreme Court left the limits of habeas corpus open in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), in which the Court was asked to decide whether the prisoner's claim, involving the loss of good time credits, should be brought under habeas corpus or § 1983. The Court decided that "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal," but said that "we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983." *Id.* at 499–500. Although the question was raised in *Nelson v. Campbell*, involving the appropriate vehicle to challenge a medical procedure to carry out a death sentence, it was not fully answered. 541 U.S. 637, 643 (2004) (finding that "constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of [the core of habeas corpus] and may be brought pursuant to § 1983 in the first instance," but not foreclosing the applicability of habeas corpus). The Court's later decision in *Boumediene v. Bush*, which confirmed that habeas corpus is available to people detained as "enemy combatants" at the United States Naval Station at Guantanamo Bay, also left the question of habeas as a vehicle to challenge conditions of confinement open. 553 U.S. 723, 792 (2008) ("[W]e need not discuss the reach of the writ with respect to claims of

unlawful conditions of treatment or confinement."). That is how the D.C. Circuit interprets it:

> Although the Supreme Court has avoided resolving the issue, this circuit has not. Our precedent establishes that one in custody may challenge the conditions of his confinement in a petition for habeas corpus, and we must 'adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court.'

See *Aamer*, 742 F.3d at 1032 (citations omitted)).

Given the lack of definitive guidance from the Supreme Court on the use of habeas corpus to challenge conditions of confinement, various circuits, including the Second Circuit, have interpreted the question as allowing for such challenges to be brought in habeas. *See, e.g.*, *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008), *cert. denied*, 555 U.S. 1118 (2009). The Second Circuit's interpretation is most relevant to people in New York State prisons, although *amici* will discuss case law in other jurisdictions as well.

(b) The Second Circuit Has Long Applied the Writ of Habeas Corpus to Challenges to Prison Conditions.

The Court of Appeals for the Second Circuit has long interpreted habeas corpus to apply to challenges to prison conditions. As the court said in 2001, the writ applies to "such matters as the administration of parole . . . prison disciplinary actions, prison transfers, type of detention and prison conditions." *Thompson*, 525 F.3d at 209 (quoting *Jiminian v. Nash*, 245 F.3d 144, 146 (2d

Cir. 2001)) (reversing dismissal of habeas claims that included a challenge to maximum security status). *See also* *Boudin v. Thomas*, 732 F.2d 1107, 1111–12 (2d Cir. 1984) (affirming use of habeas to challenge assignment to administrative segregation and denial of contact visits with infant child); *Kahane v. Carlson*, 527 F.2d 492, 498 (2d Cir. 1975) (Friendly, J., concurring) (affirming district court's finding of a First Amendment violation in denial of kosher food to an Orthodox rabbi).

Of most relevance to the case at hand are those in which the Second Circuit has applied habeas corpus to address unconstitutional prison conditions concerning health. In *Roba v. United States*, for example, the Court viewed a challenge to a prison transfer based on health reasons as a challenge to prison conditions and a valid use of habeas corpus relief. 604 F.2d 215, 219 (2d Cir. 1979) (reversing district court and approving use of habeas to prevent transfer of prisoner with pulmonary edema because it would seriously endanger his health). Subsequently, a federal district court within the Second Circuit was faced with a case in which a female petitioner filed a writ of habeas corpus alleging that the treatment she was receiving in prison for cervical cancer was inadequate. *See* *Ilina v. Zickefoose*, 591 F. Supp. 2d 145 (D. Conn. 2008). The district court, after reviewing the history of habeas in the Second Circuit, found that "the Second Circuit envisions [habeas corpus] as a broad remedy available

to federal prisoners challenging the conditions of their confinement rather than as a limited way to challenge only certain prison conditions" and denied the government's motion to dismiss on the grounds that her claim was not cognizable under habeas. *Id.* at 149–50.

In short, the Supreme Court's holding in this case that release upon a writ of habeas corpus is not available is contrary to the law in the Second Circuit, which allows prison conditions claims, both those involving some sort of release prior to expiration of a sentence and those seeking remediation within the prison setting, to be brought via a writ of habeas corpus.

(c) Other Federal Circuits Also Recognize the Applicability of the Writ of Habeas Corpus in Prison Conditions Cases.

The decision of the court below is also contradicted by the law in the vast majority of federal judicial circuits, which recognize that writs of habeas corpus may be brought to challenge prison conditions prior to the expiration of an incarcerated person's sentence.[6]

The D.C. Circuit has most fully developed the law on this topic. It has allowed habeas claims to challenge prison conditions and detention prior to expiration of a sentence for quite some time. *See, e.g.*, *United States v. Wilson*,

[6] The Fifth, Ninth, and Tenth Circuits apparently do not recognize habeas claims to challenge prison conditions in most cases, although their decisions are not well reasoned, based primarily upon a faulty reading of *Preiser v. Rodriquez*. *See Aamer*, 742 F.3d at 1037–38 (discussing and criticizing the reasoning underlying the decisions in those circuits).

471 F.2d 1072, 1081 (D.C. Cir. 1972) (finding that the petitioner "unquestionably has the right to challenge the conditions of his confinement"); *Hudson v. Hardy*, 424 F.2d 854, 856 n.3 (D.C. Cir. 1970) (stating that "[h]abeas corpus tests not only the fact but also the form of detention"); *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953) (finding that habeas corpus was available where petitioner sought transfer from an institution for the criminally insane to an institution for treatment of the mentally ill).

The D.C. Circuit's most thorough analysis of the applicability of habeas corpus to cases involving health conditions appears in *Aamer v. Obama*, in which detainees at Guantanamo Bay challenged the conditions of their confinement, specifically, forced feeding during a hunger strike. The court stated that:

> [A]lthough petitioners' claims undoubtedly fall outside the historical core of the writ, that hardly means they are not a "proper subject of statutory habeas." "Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.'" Boumediene, 553 U.S. at 780 . . . .

Aamer, 742 F.3d at 1030 (citations omitted). After a review of its own precedents, along with the Supreme Court cases and cases from other circuits on this issue, the court concluded that the petitioners were entitled to raise their claims based on the writ. *Id.* at 1038.

Significantly, the D. C. Circuit's analysis cut through the argument about whether there was a distinction between seeking release or seeking changes in prison conditions, with habeas available only in the first types of cases, by noting that "this distinction is largely illusory, as either of these two forms of relief may be reframed to comport with the writ's more traditional remedy of outright release." *Id.* at 1035. In other words, courts may, as they have done, simply order release on condition that prison conditions are not remedied; when that is impossible, release is appropriate. Judge Tatel found a "near-complete overlap" of the two sorts of challenges. *Id. See also* *Al-Qahtani v. Trump*, 2020 WL 1079176 (Mar. 6, 2020) (finding habeas relief appropriate in case involving failure to treat mental illness of detainee at Guantanamo). This jurisprudence directly contradicts the trial court's assertion in this case that habeas relief, including release, is not available prior to expiration of a sentence.

The Seventh Circuit also recognizes habeas as an appropriate avenue of relief if it would result either in release or in a "quantum change in the level of custody." *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991). The federal district court there has recognized claims for release, furlough, or transfer to home detention because of COVID-19 as appropriately brought under habeas corpus under the Seventh Circuit standard. *See* *Money v. Pritzker*, 2020 WL

1820660, at *22 (N.D. Ill. Apr. 10, 2020) (denying relief on grounds of failure to exhaust state remedies).

Other judicial circuits have recognized these claims as well, in cases brought by petitioners whose sentences had not expired. The Sixth Circuit was the first to develop the law on this topic, holding in 1944 that the writ of habeas corpus should be "liberally applied" and was applicable in a case challenging conditions of confinement. *Coffin v. Reichard*, 143 F.2d 443, 444 (6th Cir. 1944). The petitioner in *Coffin* alleged severe bodily harm had been inflicted upon him by both guards and incarcerated people. *Id.* Applying the writ, the court found that:

> A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows. . . .

Id. at 445. This statement is particularly relevant to the case at hand, in which Appellant's imprisonment has been made "more burdensome than the law allows" as its continuance during a severe and life-threatening epidemic turns it into a potential death sentence. More recently (but prior to COVID-19), the Sixth Circuit applied its precedent to another habeas case raising an Eighth Amendment claim. *See Adams v. Bradshaw*, 644 F.3d 481, 482–83 (6th Cir. 2011) (approving use of habeas to challenge a method of execution by lethal

injection). *See also* *Brennan v. Cunningham*, 813 F.2d 1, 4–5 (1st Cir. 1987) (holding that challenge to conditions other than fact or length of confinement may be brought under habeas); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005) (finding habeas appropriate where challenging regulations limiting time in community confinement); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975) (approving federal jurisdiction in habeas corpus to redress punitive segregation without a hearing for "wearing the wrong kind of clothing.").

The Eighth Circuit recognizes habeas claims to challenge prison conditions but with a somewhat heightened standard: the allegations must amount to "a substantial infringement of a constitutional right." *Willis v. Ciccone*, 506 F.2d 1011, 1019 (8th Cir. 1974); *see also* *Albers v. Ralston*, 665 F.2d 812, 815 (8th Cir. 1981). Significantly, however, cases involving conditions detrimental to a prisoner's health have been held to be actionable under habeas in the Eighth Circuit. *See, e.g.*, *Black v. Ciccone*, 324 F. Supp. 129, 132 (W.D. Mo. 1970).

In light of this case law, it is clear that courts have jurisdiction to employ habeas corpus to address prison conditions and thus vindicate their duty to protect incarcerated people, either by remediation or by release when remediation is impossible, as in the case at hand, even prior to expiration of the

Appellant's sentence. Most recently, federal courts have relied upon the Great Writ to address the nationwide crisis in our prisons due to COVID-19, ordering the release or furlough of incarcerated persons prior to expiration of their sentences. *See, e.g., Wilson v. Williams*, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020); *Martinez-Brooks v. Easter*, 2020 WL 2405350 (D. Conn. May 12, 2020). This Court should do the same here.

Appellant, who is seeking habeas relief in the face of conditions that have become life-threatening, should not be stymied by formalisms of the sort that Roscoe Pound derided as the "sporting theory of justice." *Buran v. Coupal*, 661 N.E.2d 978, 981 (N.Y. 1998) (Kaye, C.J.).

CONCLUSION

Amici legal organizations and law professors believe that the situation in the case before this Court is precisely the sort our courts are intended to address: to protect people like the Appellant, who is at unique risk of death from COVID-19 if not released yet lacks the means to protect herself. Both the history of the writ of habeas corpus and its interpretation by the courts indicate

that it is the appropriate instrument to accomplish this essential role. This Court should rule accordingly and reverse the judgment of the court below.

September 21, 2020
Ithaca, New York

Respectfully submitted,

By: _____ s _____

CYNTHIA GRANT BOWMAN
Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-0383
cgb28@cornell.edu

APPENDIX

List of *Amici* Legal Organizations and Law Professors

Legal Organization *Amici*

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 4 million members and supporters dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since the start of the COVID-19 pandemic, the ACLU has engaged in extensive litigation in numerous state and federal courts seeking the release and/or increased protection of medically vulnerable people incarcerated in jails and prisons across the country. To date, the ACLU and its affiliates have filed more than 30 such civil actions nationwide. As such, the release of the medically vulnerable individuals in this case is of paramount concern to the ACLU and its supporters.

Center for HIV Law and Policy

The Center for HIV Law and Policy ("CHLP") is a national legal resource and support hub that challenges barriers to the sexual health and rights of people on the basis of stigmatized health status or identity. We do this through legal advocacy, high-impact policy initiatives, and creation of cross-issue partnerships, networks and resources that amplify the power of communities to mobilize for change that is rooted in racial, gender and

economic justice. CHLP's interest in this case is correcting the court's misinterpretation of the writ of habeas corpus to ensure the legal system in New York State protects the health and dignity of incarcerated persons with chronic health conditions.

Center on Race, Inequality, and the Law at New York University School of Law

The Center on Race, Inequality, and the Law at New York University School of Law ("Center") was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color and drive inequality along lines of identity. The Center's top priority is wholesale reform of the criminal legal system, which has, since its inception, been infected by bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation aimed at cleansing the criminal legal system of policies and practices that perpetuate injustice and inequitable outcomes. No part of this brief purports to represent the views of New York University School of Law or New York University.

Center on Race, Law, and Justice at Fordham Law School

The Center on Race, Law, and Justice engages in domestic and global issues of race, law, and equity that will help identify, analyze, and create new solutions to the key civil rights challenges of our time.

CUNY School of Law Criminal Defense Clinic

The CUNY School of Law Criminal Defense Clinic ("Defenders") is a Clinical class offered to law students in their final year of law school. In Defenders, students under close faculty supervision represent indigent people in various criminal legal proceedings. For the past several years, Defenders students have represented numerous people preparing for parole, filing administrative appeals from denials of parole, and filing Article 78 petitions in New York State Supreme Court challenging denials of parole. As such, Defenders has a significant interest in ensuring the full, proper and continued enforcement of all laws, rules and regulations governing the parole process in New York State.

Lambda Legal Defense and Education Fund

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal seeks to address the particular vulnerability of LGBT people in custody and to protect and advance the rights of LGBT people to access medically necessary health care. Lambda

Legal has appeared as counsel or amicus curiae in numerous federal and state court cases involving the rights of incarcerated LGBT pople.

National Lawyers Guild

The National Lawyers Guild was formed in 1937 and holds to the principle that human rights must be more sacred than property interests. For decades, it has admitted "jailhouse lawyers," inmates who assist other inmates in pursuing litigation, as full members of the organization. It has long supported prisoner causes, including providing the bulk of the legal team that represented the Attica Brothers following the uprising at New York's Attica Prison in 1971.

National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists.

New York Civil Liberties Union

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union. The NYCLU is a

nonprofit, nonpartisan organization with tens of thousands of members across the State. The NYCLU is committed to the defense and protection of civil rights and civil liberties, including the constitutional rights of people incarcerated. In particular, the NYCLU regularly engages in litigation challenging the unconstitutional detention of incarcerated people. *See, e.g., People of the State of New York ex rel. Pace et al. v. Schiff*, Index No. E2020-671 (Sup. Ct., Sullivan Cty) (habeas corpus proceeding challenging the incarceration of medically vulnerable people incarcerated at the Sullivan County jail who face a significant risk of severe illness or death from COVID-19 as violating the Eighth and Fourteenth Amendments); *see also People of the State of New York rel. Kunkeli v. Anderson*, Index No. 90-2018 (Sup. Ct., Dutchess Cty) (habeas corpus proceeding challenging the incarceration of indigent defendants on unaffordable bail without regarding to their ability to pay as violating the Fourteenth Amendment). And, the NYCLU recently reached a landmark settlement[7] of one of the nation's strongest jail or prison policies protecting the rights of transgender, gender nonconforming, nonbinary, and intersex people in custody -- addressing housing placements, safety, access to medical care among others issues. *See*, Faith v. Steuben

[7] Settlement Agreement & New Policy, https://www.nyclu.org/sites/default/files/field_documents/2020-07-22_faith_final_settlement_agreement_redacted.pdf (last visited Sept. 8, 2020).

County, No. E2019-1208CV, (N.Y. Sup. Ct. (filed August 22, 2019) As this case presents a critical issue regarding the unconstitutional detention of a woman who is transgender and incarcerated in men's jail and faces a high risk of severe illness and death from COVID-19, it is of great interest to the NYCLU.

New York Legal Assistance Group

Founded in 1990, the New York Legal Assistance Group ("NYLAG") is a not-for-profit organization dedicated to providing free civil legal services to New York's low income families. NYLAG'S comprehensive range of services includes direct representation, case consultation, advocacy, community education, training, financial counseling, and impact litigation. NYLAG reaches underserved populations by placing attorneys within community centers, courts, hospitals and local agencies. NYLAG'S LGBTQ Law Project provides free legal services to LGBTQ New Yorkers including people who identify as transgender, gender non-conforming and non-binary. We provide representation in name and gender marker changes, immigration and family law matters, employment and housing discrimination, and access to public benefits. The LGBTQ Law Project has conducted on-site intakes and consultations with clients incarcerated at the transgender housing unit within the New York City jail system, and has represented formerly incarcerated clients. Thus, NYLAG

is in a unique position to inform the court, and has a strong interest in the outcome of this proceeding.

Transgender Law Center

The Transgender Law Center ("TLC") was founded in 2002 and is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming ("TGNC") people alive, thriving, and fighting for liberation. TLC also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Law Professor *Amici*

Claudia Angelos
Clinical Professor of Law
New York University School of Law

Daniel J. Awrey
Professor of Law
Cornell Law School

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
Cornell Law School

Craig M. Boise
Dean and Professor of Law
Syracuse University College of Law

Michael Boucai
Associate Professor
University at Buffalo School of Law

Cynthia Grant Bowman
Dorothea S. Clarke Professor of Law
Cornell Law School

Elizabeth Brundige
Clinical Professor of Law
Cornell Law School

Bennett Capers
Stanley A. August Professor of Law
Brooklyn Law School

Rosa Castello
Professor of Legal Writing
St. John's Law

Luis E. Chiesa
Professor of Law
Director of the Buffalo Criminal Law Center
University at Buffalo
The State University of New York

Angela B. Cornell
Clinical Professor of Law
Cornell Law School

Cynthia Godsoe
Professor of Law
Brooklyn Law School

Rachel T. Goldberg
Assistant Clinical Professor of Law
Cornell Law School

Bernard E. Harcourt
Isidore and Seville Sulzbacher
Professor of Law
Columbia University Law School

Susan Hazeldean
Associate Professor of Law
Director of the LGBT Advocacy Clinic
Brooklyn Law School

Esther Hong
Acting Assistant Professor of Lawyering
NYU School of Law

Sital Kalantry
Clinical Professor of Law
Cornell Law School

Mitchell Kane
Gerald L. Wallace Professor Taxation
NYU School of Law

Jaclyn Kelley-Widmer
Assistant Clinical Professor of Law
Cornell Law School

Sylvia A. Law
Elizabeth K. Dollard Professor
of Law, Medicine and Psychiatry,
Emerita
Co-Director, Arthur Garfield Hays
Civil Liberties Program
NYU School of Law

Howard Leib
Adjunct Professor of Law
Cornell School of Law and Syracuse
University College of Law

Odette Lienau
Professor of Law and Associate Dean
for Faculty Research & Intellectual
Life
Cornell Law School

Beth Lyon
Clinical Professor of Law and
Associate Dean for Experiential
Education
Cornell Law School

Estelle M. McKee
Clinical Professor
Cornell Law School

Michael B. Mushlin
Professor of Law
Elisabeth Haub School of Law at Pace
University

Prianka Nair
Assistant Professor of Clinical Law
Co-director, Disability and Civil
Rights Clinic
Brooklyn Law School

Anthony O'Rourke
Joseph W. Belluck & Laura L. Aswad
Professor of Law
Director of the Advocacy Institute
University at Buffalo School of Law

Frank Pasquale
Professor of Law
Brooklyn Law School

Aziz Rana
Professor of Law
Cornell Law School

Martha Rayner
Clinical Associate Professor of Law
Fordham University School of Law

Sarah Rogerson
Professor of Law
Albany Law School

Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School

Michael A. Schwartz
Associate Professor of Law
Syracuse University College of Law

Steven H. Shiffrin
Charles Frank Reavis, Sr., Professor of Law Emeritus
Cornell University Law School

Vincent M. Southerland
Adjunct Professor and Director of Center on Race, Inequality, and the Law
NYU School of Law

Eleanor Stein
Adjunct Professor of Law
Albany Law School

Laura S. Underkuffler
J. DuPratt White Professor of Law
Cornell Law School

Daniel A. Warshawsky
Professor of Law
New York Law School

Keir M. Weyble
Clinical Professor of Law
Cornell Law School

Michelle Fongyee Whelan
Clinical Professor of Law
Cornell Law School

Steven Zeidman
Professor of Law
CUNY School of Law

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: body of brief 14 point; footnotes 12 point

Line spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this statement is 6,691.

Dated: September 21, 2020

_____ s _____
Cynthia Grant Bowman