**Introduction**

Defendant moves the Court for a bail hearing and an order granting his release. [CLIENT] is a currently a pretrial defendant detained at the [DETENTION FACILITY], where there are now [XX] confirmed cases of COVID-19, a dangerous virus spreading rapidly across the world and through [CITY/STATE]. Continued detention puts [CLIENT] at heightened risk of contracting the virus due to the conditions of confinement at [DETENTION FACILITY].

FEDERAL: The Bail Reform Act provides for the “temporary release” of a person in pretrial custody “to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” 18 U.S.C. § 3142(i).

[STATE PRACTITIONERS: insert relevant provisions of state statues including provisions calling for considerations of a person’s medical needs in setting bail]

The health risk to [CLIENT], is heightened because of the conditions at the [DETENTION FACILITY] as described in detail below, which necessitates temporary release on bail until this pandemic has ended. [Plus any other general bail arguments]. Continued detention during this deadly pandemic would not only harm public safety, but also violate [CLIENT’s] the Due Process Clause of the Fifth Amendment as well as the Eighth Amendment prohibition on cruel and unusual punishment and the Sixth Amendment right to counsel. Furthermore, continued detention violates [CLIENT’s] basic human rights, including the prohibition on cruel, inhuman, and degrading treatment guaranteed by Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

During the period of release [CLIENT] will [Explain where client will live, who will be living with, and any proposed conditions of release].

**Factual Background**

1. **Changed Circumstances: COVID-19 Pandemic**

We are facing a serious and urgent public health crisis. On March 11, 2020, the World Health Organization officially classified COVID-19, a new strain of coronavirus, as a global pandemic.[[1]](#footnote-1) On January 21, 2020, Washington State announced the first confirmed case of coronavirus in the United States.[[2]](#footnote-2) As of [April, 6, 2020], COVID-19 has infected over [336,776] people across the United States, leading to at least [9,655] deaths.[[3]](#footnote-3)

On [date], 2020, [STATE GOVERNOR/LOCAL LEADER] declared a State of Emergency. Additional protective measures have been taken including [list state and/or local restrictions on group gatherings, school closures, etc.] As of [DATE] there are [NUMBER] of positive cases of COVID-19 in [STATE and/or LOCALITY] [and \_\_ number of confirmed deaths in STATE].

While adults over sixty years old and people with chronic medical conditions are at heightened risk for COVID-19, young, otherwise healthy individuals are not immune from infection. Data from the Centers for Disease Control and Prevention (CDC) shows that nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.[[4]](#footnote-4) In New York, for example, 18- to 49-year-olds comprise more than half of all cases in the state.[[5]](#footnote-5) With a rising number of cases in [STATE and/or LOCALITY] indicative of community spread, we must take every necessary action to protect vulnerable populations and the community at large. As one New York court judge recently recognized, “Realistically, the best—perhaps the only—way to mitigate the damage and reduce the death toll is to decrease the jail and prison population by releasing as many people as possible.” *United States* *v. Nkanga*, No. 18-CR-713, 2020 WL 1529535, at \*1 (S.D.N.Y. Mar. 31, 2020) (concluding that the court was powerless to provide bail after a prison sentence had commenced despite temporary release being the “rational and right result”).

1. **Conditions of Confinement and Spread of COVID-19**

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.[[6]](#footnote-6) Incarcerated people cycle in and out of detention facilities from all over the country, and people who work in the facilities including correctional officers, and care and service providers leave and return daily, without medical screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited.[[7]](#footnote-7) According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”[[8]](#footnote-8) Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.[[9]](#footnote-9) In China, officials have confirmed COVID-19 spreading at a rapid pace in Chinese prisons, reporting 500 cases.[[10]](#footnote-10)

Governments worldwide are releasing detained people to slow the spread of the virus. Britain plans to grant temporary release to about 4,000 people in prison.[[11]](#footnote-11) France plans to release 5,000 people; and Germany’s most populous state will release 1,000 people.[[12]](#footnote-12) Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”[[13]](#footnote-13) Courts across Iran have granted furlough to 100,000 people in prison as part of the measures to contain coronavirus across the country,[[14]](#footnote-14) almost half of the country’s entire prison population.[[15]](#footnote-15) Even countries with dysfunctional justice systems, including Afghanistan[[16]](#footnote-16) and Haiti,[[17]](#footnote-17) are releasing or planning to release people from jails and prisons as COVID-19 bears down.

In the United States, Attorney General William Barr recognized that “we are experiencing significant levels of infection at several of our [Bureau of Prisons] facilities.”[[18]](#footnote-18) Because these “emergency conditions” are “materially affecting the functioning of the Bureau of Prisons,” the Attorney General directed the Bureau to “expand the cohort of inmates” eligible for release: “Given the speed at which this disease has spread through the general public, it is clear that time is of the essence.”[[19]](#footnote-19) Similarly, the State of California is planning to release 3,500 people from prisons to slow the spread of the coronavirus.[[20]](#footnote-20) New York City has released about 1,000 people from jails to date.[[21]](#footnote-21) Similarly, jurisdictions around the country are refusing the admission of individuals arrested on non-violent misdemeanor charges in order to reduce jail populations.[[22]](#footnote-22) State courts across the country have instructed judges to release people from prison and reconsider detention in the face of this global pandemic. *See, e.g., Karr v. State*, No. A-13630, 2020 WL 1456469, at \*3 (Alaska Ct. App. Mar. 24, 2020) (“[C]ourts must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant’s release. Additionally, courts must re-evaluate the flight risk and safety risk posed by releasing a defendant into a community which now has fewer open businesses, fewer opportunities, for travel, and more people staying at home.”);[[23]](#footnote-23) Mem. from Mike McGrath, Chief Justice, Mont. Sup. Ct., to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020) (“Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”);[[24]](#footnote-24) Mem. from Chief Justice Beatty, S.C. Sup. Ct., to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) (“Any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk.”).[[25]](#footnote-25)

Likewise, as a result of the pandemic, individual judges have begun granting bail where the law allows them to do so. *See, e.g., United States v. Chandler*, No. 1:19-CR-867 (PAC), 2020 WL 1528120, at \*2 (S.D.N.Y. Mar. 31, 2020); *Stephens*, 2020 WL 1295155, at \*3; *Davis*, 2020 WL 1529158, at \*3; *Matter of Extradition of Toledo Manrique*, No. 19-MJ-71055-MAG-1 (TSH), 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020). Indeed, courts continue to find pretrial release necessary “for the compelling reason that it will protect Defendant, the prison population, and the wider community during the COVID-19 pandemic” –- “[e]ven if Defendant did not have a heightened susceptibility to COVID-19.” *United States v. Kennedy,* No. 18-20315, 2020 WL 1493481, at \*4 (E.D. Mich. Mar. 27, 2020), *reconsideration denied*, No. 18-20315, 2020 WL 1547878 (E.D. Mich. Apr. 1, 2020); *see also United States v. Garcha*, No. 19-CR-00663-EJD-1 (VKD), 2020 WL 1593942, at \*3-4 (N.D. Cal. Apr. 1, 2020) (granting bail); *United States v. Barkman*, No. 3:19-CR-52-RCJ (D. Nev. Mar. 17, 2020) (ordering suspension of intermittent confinement as probation condition in light of COVID-19 in order to protect defendant and people in detention facility).[[26]](#footnote-26)

1. **Specific Conditions at the [DETENTION FACILITY]**

Provide any relevant specific details regarding the detention facility at issue including:

1. Any prior outbreaks of communicable disease such as MRSA, H1N1 flu, or Tuberculosis;
2. Details regarding the number of individuals detained at the facility, the number of arrestees who come in and out of the facility each day;
3. Information about the facility’s structure and physical layout that increase risk for spread of the virus and prevent those who are at risk from being able to engage in social distancing and self-quarantine precautions as recommended by the CDC such as shared toilet and sink use within individual, shared cells; the number of individuals held together in an individual cell, and in a housing unit; shared shower facilities, restrictions on movement, size of individual cells and shared spaces, etc.
4. Details about the limited access to personal hygiene items such as tissues, soap, disinfectant, or hot water, shared phones, and limited laundry and clothing which prevent individuals from taking recommended precautions to minimize the spread of the virus.
5. Details about any relevant hygiene items that may be considered contraband or available only to incarcerated people with financial resources.
6. Details regarding impact on ability to carry out other activities relating to representation including limitations on visitation, inability to secure interpreters, and limitations on attorneys who themselves are at a higher-risk for infection due to age and/or chronic health convictions, or who live with or care for high-risk individuals.
7. Describe any limitations on alternative access to incarcerated people if a quarantine is ordered, such as unavailability or limits on the number of video conference units, phones, and other means of communication.
8. Describe any other known problems with sanitary conditions in the facility. Describe any past findings of insufficient healthcare or sanitary conditions, especially judicial findings.
9. Describe any limitations on the detention facility’s medical services, staffing, or physical plant that prevent recommended precautions from being taken.

[DETENTION FACILITY] lacks the resources necessary to engage in screening and testing of incarcerated people, correctional staff, law enforcement officers and other care and service providers who enter the facility.

As additional people are arrested who have been out in the community as the coronavirus spreads, if they are not symptomatic, they will be brought into the [DETENTION FACILTY], and held with the existing population, potentially bringing COVID-19 into this population held in large numbers, close quarters, and low sanitary conditions.

**[STATE STATUTE/The Bail Reform Act] Requires [CLIENT’S] Release**

FEDERAL: A “judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.” 18 U.S.C. § 3142(i).

STATE: insert relevant bail statute provisions/case law that provides for temporary release, or calls for the consideration of an individual’s medical needs in determining whether to detain

The circumstances that existed when [CLIENT] was ordered detained have now changed. There is a pandemic that poses a direct risk that is far greater if [CLIENT] continues to be detained during this public health crisis.

Liberty is the norm and “detention prior to trial or without trials is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). A single individual unnecessarily detained before trial is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system. *United States v. Montalvo-Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). Due to the crucial interests involved, it follows that a “case-by-case” approach is required at any stage of the case in assessing the propriety of pretrial detention. *See United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir. 1986) (discussing due process analysis for evaluating propriety of prolonged pretrial detention, and the interests at stake) (citations omitted), *cert. dismissed sub nom.*, *Melendez-Carrion v. United States*, 479 U.S. 978 (1986).

The courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. As Judge Weinstein held, “We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our democracy.” *United States v. Scarpa*, 815 F.Supp.88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the “unacceptably high risk of infection and death on a daily basis inside the MCC”).

This Court should consider the “total harm and benefits to prisoner and society” that continued pretrial imprisonment [CLIENT] will yield, relative to the heightened health risks posed to [CLIENT] during this rapidly encroaching pandemic. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Davis*, No. ELH-20-09, 2020 WL 1529158, at \*3 (D. Md. Mar. 30, 2020) (“The Court finds that the COVID-19 public health emergency must be considered when weighing ‘the nature and seriousness of the danger to any person or the community that would be posed by the person’s release’ and the defendant’s ‘physical and mental health.’”); *United States v. Stephens*, No. 15-CR-95 (AJN), 2020 WL 1295155, at \*3 (S.D.N.Y. Mar. 19, 2020) (“[T]he unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent … [and] “a comprehensive view of the danger the Defendant poses to the community requires considering all factors – including this one – on a case-by-case basis”); *Matter of Extradition of Toledo Manrique*, No. 19-MJ-71055-MAG-1 (TSH), 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020) (finding the risk of contracting COVID-19 to be a special circumstance that warrants bail).

**Continued Detention of [CLIENT] is a Constitutional Violation**

1. **The Fifth Amendment Due Process Clause Compels the Court to Protect [CLIENT] from Punitive Conditions of Confinement and Ensure that [CLIENT] is Afforded Adequate Medical Care.**

A pretrial detained person’s freedom from pretrial confinement is a fundamental right protected by the Due Process Clause; any government action infringing on this right must be narrowly tailored to achieve a compelling government interest. *United States v. Salerno*, 481 U.S. 739, 755 (1987). The constitutional protections of people detained pretrial arise under the Fifth Amendment Due Process Clause, which provides protection even greater than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual, but the Fifth Amendment’s due process protections do not allow pretrial punishment at all. *Id.* Although the Government has an interest in detaining a defendant to secure their appearance at trial, Government may only subject a detained person “to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.” *Id.* at 536–37.In *Kingsley v. Hendrickson*, the Supreme Court affirmed the Due Process Clause’s prohibition on pretrial punishment, and elaborated that “if the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.’” 135 S. Ct. 2466, 2470 (2015); *see also* *Doe v. Kelly,* 878 F.3d 710 (9th Cir. 2017) (“a particular restriction or condition is punishment if the restriction or condition is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective”).

In addition, people detained while awaiting trial have a substantive due process interest in freedom from deliberate indifference to their medical needs. *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Furthermore, in *Brown v. Plata*, the Supreme Court explained that a person in prison “may suffer or die if not provided adequate medical care. A prison that deprives incarcerated people of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” 563 U.S. 493, 510–11 (2011). While the claims of imprisoned people in *Brown v. Plata* arose under the Eighth Amendment, people detained before trial likewise have the legal right to adequate medical care, given that their rights are at least as great as those of convicted persons being punished by imprisonment.

[CLIENT] is therefore entitled to adequate medical care, yet the current conditions of confinement create an unreasonable risk of exposure to COVID-19 and do not provide the necessary supplies for personal and environmental hygiene necessary to protect against contraction of the virus. Accordingly, in light of the extreme risk to [CLIENT’s] health posed by the virus and the ever-increasing likelihood that [he/she/they] will contract it if [he/she/they] remains housed under current conditions, the conditions of [his/her/their] confinement should be deemed punitive, in violation of the Fifth Amendment. As such, release is appropriate to ensure [his/her/their] constitutional rights are protected and [his/her/their] life is not jeopardized during this crisis.

1. **The Eighth Amendment Prohibition Against Cruel and Unusual Punishment Compel Release Under these Extraordinary Circumstances.**

The government, in detaining defendants pretrial, must take sufficient protective measures to prevent contraction of COVID-19 in the jail population. Unreasonable risk of COVID-19 contraction will, in itself, constitute an Eighth Amendment violation.

The Supreme Court has held that exposure to environmental threats to an incarcerated person´s physical wellbeing where exposure is preventable could constitute a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. *See Helling v. McKinney*, 509 U.S. 25, 28 (1993). In *Helling,* a plaintiff alleged that he was assigned to a cell with another person who smoked five packs of cigarettes per day. *See* *id*. at 28. At issue was whether this exposure to environmental tobacco smoke (ETS) could constitute a valid claim under the Eighth Amendment, even though the plaintiff had not yet suffered harm.  *Id.* at 30. The Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff stated “a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health.”  *Id.* at 35. “Though *Helling* directly addressed an inmate’s exposure to [secondhand smoke], it tacitly acknowledged other situations in which environmental factors can pose an unreasonable risk to an inmate’s health, including exposure to ‘infectious maladies such as hepatitis and venereal disease’ caused by overcrowding, unsafe drinking water, and ‘toxic or other substances.” *Allen v. Kramer*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*7 (E.D. Cal. Aug. 17, 2016) (quoting *Helling*, 509 U.S. at 33, 35.)

Courts have applied *Helling* to “contagious diseases caused by overcrowding conditions, *Brown v. Mitchell*, 327 F. Supp. 2d 615, 650 (E.D. Va. July 28, 2004); contaminated water, *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001); compelled use of chemical toilets, *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. Sep. 11, 1995), asbestos, *Wallis v. Baldwin* 70 F.3d 1074 (9th Cir. 1995), [and] paint toxins, *Crawford v. Coughlin*, 43 F. Supp. 2d 319, 325 (W.D.N.Y. 1999).” *Allen*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*8.

Perhaps most applicable to COVID-19, a number of cases have applied *Helling* to the exposure of detained people to Valley Fever in California. Relying on *Helling*, *Allen* *v. Kramer* concluded that a detained plaintiff had alleged an Eighth Amendment violation because he was housed in the Central Valley where there was a relatively high risk of contracting Valley Fever. *See* *Allen*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at \*1, 11. *Shabazz* adopted *Allen*’s reasoning and came to the same conclusion. *Shabazz v. Beard*, 2018 U.S. Dist. LEXIS 31785, 2018 WL 1071173, at \*7-9 (E.D. Cal. Feb. 27, 2018); *see also* *Jackson v. California* 2014 U.S. Dist. LEXIS 22966, at \*32-38 (E.D. Cal. Feb. 20, 2014, No. 1:13-cv-01055-LJO-SAB) (overruled on other grounds in *Hines v. Youseff*, 914 F.3d 1218, 1231 (9th Cir. 2019) (explicitly declining to reach Eighth Amendment question but reversing on fact-specific finding of qualified immunity)).

The reasoning of *Allen* *v. Kramer*, *Shabazz v. Beard*, and *Jackson v. California*, and other cases applying *Helling* to exposure to environmental risks applies with equal or greater force to COVID-19, and establishes that officials who fail to adequately protect incarcerated people from the risk of contracting COVID-19 violate the Eighth Amendment. *See Plata v. Newsom,* No. 4:01-cv-01351 at *\**8 (“As a general matter, we agree that the Eighth Amendment requires Defendants to take adequate steps to curb the spread of disease within the prison system.”);[[27]](#footnote-27) *id*. (Mueller, C.J., concurring) at 15 (arguing that the court “retains broad equitable powers that might permit some reconsideration of the current [population] cap in light of the unprecedented exigent circumstances” posed by COVID-19.). Where protections from COVID-19 for incarcerated clients are insufficient, as in this case, whether for the jail population as a whole or for particularly at-risk individuals, release is constitutionally mandated.

Here, [CLIENT] is housed at a facility that is unable to adequately protect [his/her/their] from contracting the virus, and more importantly, places [his/her/their] at a heightened risk of exposure due to the environmental conditions of the [DETENTION FACILITY]. [His/Her/Their] continued detention under these conditions violates the Eighth Amendment, and necessitates [his/her/their] immediately release pending containment of the virus.

1. **The Sixth Amendment Demands [CLIENT’s] Release.**

The conditions of confinement at the [DETENTION FACILITY] have gutted [CLIENT’s] Sixth Amendment right to the effective assistance of counsel. Until [CLIENT] is released, [he/she/they] will continue to suffer violations of [his/her/their] constitutional rights.

The Sixth Amendment right to counsel is the cornerstone of our adversarial system of criminal justice. As the Second Circuit recently found in the throes of this pandemic, “The right to consult with legal counsel about being released on bond, entering a plea, negotiating and accepting a plea agreement, going to trial, testifying at trial, locating trial witnesses, and other decisions confronting the detained suspect, whose innocence is presumed, is a right inextricably linked to the legitimacy of our criminal justice system.” *Federal Defenders of New York, Inc. v. Bureau of Prisons*, No. 19-1778, 2020 WL 1320886, at \*11 (2d. Cir. Mar. 20, 2020). In recognition of this vital right, BOP regulations instruct that detention center wardens “*shall provide* the opportunity for pretrial inmate-attorney visits on a seven-days-a-week basis.” 28 C.F.R. § 551.l 17(a) (emphasis added).

A detention facility therefore violates the Sixth Amendment when it “unreasonabl[y] interfere[s] with the accused person’s ability to consult counsel.” *Benjamin v. Fraser*,264 F.3d 175, 185 (2d Cir. 2001). Unreasonable interference requires a showing far less alarming than the one present here. In *Benjamin,* the Second Circuit held that New York City correctional facilities violated the right to counsel when defense attorneys “routinely face[d] unpredictable, substantial delays in meeting with clients” and were “forced to wait between 45 minutes and two hours, or even substantially longer, after arriving at a facility to see a client.” 264 F.3d at 179. These circumstances, where the Second Circuit refused to dissolve a consent decree providing judicial supervision of legal visitation in City correctional facilities, are far less jarring than [CLIENT] has been forced to endure.

[CLIENT] has borne a complete disruption of his right to counsel since [date]. On [date], 2020, the [DETENTION FACILITY] entirely shut its doors to legal and social visitation, and there is no reason to believe that a request for an in-person attorney visit will be granted in the foreseeable future. During this time, [CLIENT] has been denied phone calls to his attorney and lacked computer access. [Add relevant facts re: FACILITY and CLIENT’s access to counsel, attempts to contact client, client attempts to contact counsel, etc.] This is inconsistent with the constitutional right to counsel. In *Wolfish v. Levi*, the Second Circuit held that the MCC “severely constrained” a jailed person’s “access to legal counsel” where dedicated attorney visiting hours were limited to two hours a day, and most attorney visits were “made in the general visiting rooms during visiting hours thereby entailing long delays, limiting the attorney’s time with his client, and totally vitiating confidentiality.” 573 F.2d 118, 133 (2d Cir. 1978) (holding the), *rev’d on other grounds,* 441 U.S. 520 (1979).

In addition to being unable to meet with counsel in person, [CLIENT] has suffered a complete inability to review critical discovery in preparation for trial. The conditions at [DETENTION FACILITY] prevent [CLIENT] from evaluating discovery materials. Critically, [CLIENT] does not have access to a computer to review discovery. [Add facility- and case-specific details.] [CLIENT] has spoken with his unit counselor about his legal needs, but has received no assurances of when he will regain access to a computer outfitted to review discovery. And because his counsel visits have been suspended, he cannot use the computers in the legal visiting room to review his discovery.

Further, in the likely event that someone at the [DETENTION FACILITY] tests positive for COVID-19, the entire facility will go on a total lockdown [if it has not done so already], further inhibiting [CLIENT’s] constitutional rights. That event will mark the complete evisceration of Mr. Chandler’s right to counsel.

As the public health crisis rapidly evolves, so too does the judiciary’s perspective on release. Judges have been reassessing their rulings in light of new facts. *See, e.g., United States v. Hudson*, 19-CR-496 (CM) (Mar. 13, 2020) (granting an application for bail based on compelling reasons related to the current health crisis, five days after denying a similar request); *Chandler*, 2020 WL 1528120, at \*1-2 (S.D.N.Y. Mar. 31, 2020) (granting an application for bail based on Sixth Amendment concerns in light of the COVID-19 crisis after denying at least two previous applications). Here, the complete cessation of legal visits, combined with [CLIENT’s] inability to adequately review discovery, makes it impossible to adequately prepare for trial in violation of the Sixth Amendment.

[CLIENT] remains innocent until proven guilty. To mount an effective defense at trial, [CLIENT] must be released from custody. This extraordinary moment requires judicial intervention to safeguard [CLIENT’s] constitutional rights.

**Continued Detention of [CLIENT] is a Human Rights Violation**

When the government deprives someone of their liberty, their health care becomes a state responsibility. They are entitled to the same standards of care that are available to the outside community.[[28]](#footnote-28) [CLIENT’s] continued detention at the [DETENTION FACILTY] is a violation of [his/her/their] basic human rights. Specifically, it violates the prohibition on cruel, inhuman, and degrading treatment guaranteed by both the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). The continued of [CLIENT] at the [DETENTION FACILTY] violates the prohibition on cruel, inhuman, and degrading treatment because it dramatically increases the likelihood that [he/she/they] will contract COVID-19, not receive adequate medical care, and develop a critical illness or die. Subjecting [CLIENT] to these conditions of confinement is inhumane, and it a violation of the [his/her/their] most basic human rights under the ICCPR and the CAT.

**A. The ICCPR and the CAT Are Binding International Law**

The ICCPR embodies the judicial guarantees recognized as indispensable by civilized people and is considered part of the International Bill of Human Rights. It is a United Nations treaty that entered into force on March 23, 1976, and was ratified by the United States in 1992, making its obligations legally binding. *See* 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967). It expressly prohibits “cruel, inhuman or degrading or treatment or punishment.” *Id.*, art. 7.

The CAT is the most comprehensive international human rights treaty concerning torture, obligating countries to prohibit and prevent torture and cruel, inhuman, or degrading treatment in all circumstances. The CAT entered into force on June 26, 1987, and was ratified by the United States on October 21, 1994. *See* 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984).

Because the United States has ratified both the ICCPR and the CAT, Article VI of the Constitution declares them to be the “supreme law of the land.” U.S. Const. art. VI. They are “treaties made … under the authority of the United States,” which like the Constitution itself and the “laws of the United States,” are binding on all federal and state courts. *Id.* (“the Judges in every State shall be bound thereby”). *See* Restatement (Third) of Foreign Relations Law of the United States § 111, cmt. c. Indeed it is well-established that U.S. courts are “bound by the law of nations which is part of the law of the land.” *The Nereide*, 13 U.S. (9 Cranch) 388, 423, 3 L.Ed. 769 (1815); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

Therefore, in ratifying the ICCPR, the United States agreed to “ensure that any person whose rights or freedoms [recognized under the ICCPR] are violated shall have an effective remedy,” “[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the [United States], and to develop the possibilities of judicial remedy” and “[t]o ensure that the competent authorities shall enforce such remedies when granted.” ICCPR art. 2, para. 3. Likewise, in ratifying the CAT, the United States agreed to “take effective … judicial or other measures to prevent acts of torture,” CAT, art. 2, as well as “other acts of cruel, inhuman or degrading treatment,” *id.*, art. 16, and “ensure that any individual who alleges he has been subjected to torture … has the right to complain to, and have his case promptly and impartially examined by, its competent authorities.” *Id.*, art. 13.

Significantly, these obligations are “non-derogable,” meaning that by their own terms, there is no public emergency that excuses compliance. *See* CAT, art. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”); *see also* Committee Against Torture, General Comment No. 2, (Jan. 24, 2008) (“[T]he Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure”); ICCPR, art. 4 (no derogation permitted even “[i]n a time of public emergency which threatens the life of the nation.”). Indeed, the point is to ensure that governments respect certain basic human rights at all times, *especially* during a crisis.

**B**. **The Conditions of Confinement Violate the ICCPR and the CAT.**

Under current conditions, the [DETENTION FACILTY] is incapable of providing adequate health care to [CLIENT]. [Add FACILITY-specific info & cites]; *see also,* Affidavit of Jonathan Giftos, M.D., *United States v. Chandler*, No. 19-cr-867 (S.D.N.Y., Mar. 23, 2020) (noting that there are only two doctors for 700 jailed people at MCC in New York City, and that the facility has a history of halting medical care entirely during previous times of crisis). The medical care at the [DETENTION FACILTY] has repeatedly failed to adequately address even routine medical conditions, including for [CLIENT, if applicable]. [CLIENT] does not deserve to contract COVID-19 because of the lack of hygiene and medical care the [DETENTION FACILTY].

Far from providing adequate healthcare in the face of the current pandemic, facilities like the [DETENTION FACILTY] are breeding grounds for disease even under everyday conditions. *See* Stuart Kinner et al., *Prisons and custodial settings are part of a comprehensive response to COVID-19*, Lancet, Apr. 2020, at 188 (Mar. 17, 2020) (“Prisons are epicenters for infectious diseases because of … the unavoidable close contact in often overcrowded, poorly ventilated, and unsanitary facilities, and the poor access to health-care services”). Infection rates for tuberculosis are between 10 and 100 times higher than in the community, and people in prison are five times more likely to be living with HIV.[[29]](#footnote-29) But these are not everyday conditions. COVID-19 is exceptionally contagious, infecting people at nearly twice the rate of the flu.[[30]](#footnote-30) And because there is currently no vaccine or cure for COVID-19, the primary focus is on preventing the spread of the virus. To prevent new infections, the CDC strongly recommends the following actions: thorough and frequent handwashing, cleaning surfaces with Environmental Protection Agency approved disinfectants, keeping at least 6 feet of space between people, quarantine procedures, and social distancing.[[31]](#footnote-31)

Yet people in detention, including [CLIENT], cannot take the exceptional measures necessary to stop the spread of the virus. They cannot “social distance” themselves because they are locked in small cells with other people. They cannot wash their hands regularly because there is often no soap available. They cannot use hand sanitizer because it is considered contraband. They cannot cover their mouths when handcuffed. Infected individuals are not being isolated because of space constraints and security concerns. Consequently, at least one facility in New York City has an infection rate 7 times higher than the statewide average and 119 times higher than mainland China.[[32]](#footnote-32)

As the UN High Commissioner for Human Rights stated on March 25, 2020, “detention facilities are overcrowded, in some cases dangerously so. People are often held in unhygienic conditions and health services are inadequate or even non-existent. Physical distancing and self-isolation in such conditions are practically impossible.”[[33]](#footnote-33) The High Commissioner therefore urged governments and relevant authorities to “work quickly to reduce the number of people in detention.” *Id*. The UN Subcommittee on the Prevention of Torture called on governments in response to COVID-19 to “reduce prison populations and other detention populations wherever possible.”[[34]](#footnote-34) And the Council of Europe said it was imperative to consider alternatives to deprivation of liberty, particularly in situations of overcrowding.[[35]](#footnote-35) Most recently, the United Nations’ Inter-Agency Standing Committee, the longest-standing and highest-level humanitarian coordination forum of the UN system, called on public authorities to “take immediate steps to address prison overcrowding, including measures to respect WHO guidance on social distancing and other health measures” and prioritize “[r]elease of individuals, including children, persons with underlying health conditions, persons with low risk profiles and who have committed minor and petty offences, persons with imminent release dates and those detained for offences not recognized under international law.”[[36]](#footnote-36)

The conditions [CLIENT] faces in [DETENTION FACILITY] amount to cruel, inhuman, or degrading treatment and violate [CLIENT’s] human rights under ICCPR and the CAT. See, e.g., *Ltaief v. Tunisia*, Comm. No. 189/2001, CAT/C/31/D/189/2001 (2003) (finding that prison overcrowding in the context of contagious disease and a lack of medical care amounted to cruel, inhuman, or degrading treatment); *Cabal v. Australia*, Comm. No. 1020/2001, CCPR/C/78/D/1020/2001 (2003) (recognizing that failure to separate detained people with communicable diseases from other detained people could raise issues under art. 6, respecting the right to life, and art. 10, concerning the treatment of persons deprived of their liberty, which incorporates art. 7, the prohibition on cruel, inhuman, or degrading treatment); *Arredondo v. Peru*, Comm. No. 688/1996, CCPR/C/69/D/688/1996(finding that contagious diseases and a lack of medical care were among the conditions of confinement constituting a violation of art. 10 and meriting release); *Uchetov v. Turkmenistan*, Comm. No. 2226/2012,CCPR/C/117/D/2226/2012 (2016) (finding cruel, inhuman, or degrading treatment based on conditions that included an overcrowded prison where people infected with tuberculosis were kept together with healthy people).

Continuing to detain [CLIENT] in [DETENTION FACILTY] amidst the COVID-19 pandemic, without access to proper sanitary measures or adequate health care, is a human rights violation requiring [his/her/their] release. Indeed, no other action will ensure [his/her/their] rights are protected.

The Court should take these international obligations into account when determining if there is a “compelling reason” for release under § 3142(i). Courts should interpret any ambiguous statutes to accord with treaty obligations and customary international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *see also* *Rebecca Crootof*, Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon, 120 Yale L.J. 1784, 1792 (2011) (“The Charming Betsy canon … shields customary international law and treaties from being unintentionally overwritten by apparently contradictory statutes with multiple fairly possible interpretations.”). Here, the *Charming Betsy* doctrine weighs heavily in favor of releasing people currently detained. A violation of international human rights obligations is most certainly a “compelling reason” under § 3142(i), as is the serious illness or death [CLIENT] should this court not order [his/her/their] release.

**Conditions of Release Are Available That Allow [CLIENT] To Be Treated Humanely While Also Ameliorating Any Danger To The Community**

From [CLIENT’s] perspective, [his/her/their] life—not only [his/her/their] liberty—is on the line, creating a powerful incentive to abide by any release conditions the Court may impose and changing the calculus that initially led to the denial of bail in this case. **[address specific concerns that led client to be detained]**

OUTLINE CONDITIONS UNDER WHICH CLIENT WILL BE RELEASED: including residence plan and release conditions. According to the UN High Commissioner for Human Rights, “When people are released, they should be medically screened and measures taken to ensure that if needed they receive care and proper follow-up, including health monitoring.”[[37]](#footnote-37)

[CLIENT] poses a lower risk of violating supervision, particularly during a global pandemic during which even leaving the house will endanger [his/her/their] life.

**Conclusion**

[CLIENT] is among the vulnerable population at heightened risk of getting very sick from this illness. For all of the above reasons, [CLIENT]should be granted release on bond.

Respectfully submitted,

1. *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (Mar. 11, 2020), at https://bit.ly/2W8dwpS. [↑](#footnote-ref-1)
2. *First Patient With Wuhan Coronavirus Is Identified in the U.S.*, The New York Times (Jan. 21, 2020), at https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html. [↑](#footnote-ref-2)
3. *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (April 6, 2020), at https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html (updating regularly). [↑](#footnote-ref-3)
4. *Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S.*, The New York Times (Mar. 20, 2020), at https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html. [↑](#footnote-ref-4)
5. *Coronavirus Live Updates*, The New York Times (Mar. 22, 2020) at https://www.nytimes.com/2020/03/22/world/coronavirus-updates-world-usa.html (updating regularly). [↑](#footnote-ref-5)
6. Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, *at* <https://doi.org/10.1086/521910>. [↑](#footnote-ref-6)
7. Laura M. Maruschak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, *at* <https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf> [↑](#footnote-ref-7)
8. “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), *at* <https://bit.ly/2W9V6oS>. [↑](#footnote-ref-8)
9. *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) *at* <https://bit.ly/2TNcNZY>. [↑](#footnote-ref-9)
10. Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) *at* <https://bit.ly/2vSzSRT>. [↑](#footnote-ref-10)
11. Hugo Miller, et al., *EU Ministers Meet on Prison Virus Risks Amid Inmate Releases*, Bloomberg (Apr. 5, 2020), <https://www.bloomberg.com/news/articles/2020-04-05/u-k-to-release-up-to-4-000-inmates-as-prison-virus-cases-grow> (last visited Apr. 6, 2020). [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) *at*  https://cnn.it/2W4OpV7. [↑](#footnote-ref-13)
14. Parisa Hafezi, *Iran Extends Prison Furloughs As Coronavirus Death Toll Rises*, Reuters (Mar. 29, 2020), https://www.reuters.com/article/us-health-coronavirus-iran/iran-extends-prison-furloughs-as-coronavirus-death-toll-rises-idUSKBN21G0DV (last visited Apr. 3, 2020). [↑](#footnote-ref-14)
15. World Prison Brief, Iran, <https://www.prisonstudies.org/country/iran> (last visited Apr. 3, 2020). [↑](#footnote-ref-15)
16. AFP, *Afghanistan to Release Up to 10,000 Prisoners to Slow Coronavirus Spread,* Yahoo! News (Mar. 26, 2020), <https://news.yahoo.com/afghanistan-release-10-000-prisoners-slow-coronavirus-spread-211850224.html>. [↑](#footnote-ref-16)
17. Caleb Lefèvre, *Covid-19: Special Hearings on the Horizon to Release Inmates*, Le Nouvelliste (Mar. 30, 2020), <https://translate.google.com/translate?client=firefox-b-1-d&client=tw-ob&um=1&ie=UTF-8&hl=en&sl=ht&tl=en&u=https%3A%2F%2Flenouvelliste.com%2Farticle%2F214223%2Fcovid-19-des-audiences-speciales-a-lhorizon-pour-liberer-des-detenus> (last visited Apr. 3, 2020); Margaret L. Satterthwaite (@SatterthwaiteML), Twitter (Mar. 30, 2020, 4:46PM), <https://twitter.com/SatterthwaiteML/status/1244727743520129029>. [↑](#footnote-ref-17)
18. Office of the Attorney General, *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* (Apr. 3, 2020) at 1, available at https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000. [↑](#footnote-ref-18)
19. *Id*. at 1-2. [↑](#footnote-ref-19)
20. Paige St. John, *California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons*, Los Angeles Times (Mar. 31, 2020), <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>. [↑](#footnote-ref-20)
21. Stephen Rex Brown & Chelsia Rose Marcius, *NYC district attorneys alarmed by accounts of horrible conditions at Rikers amid coronavirus outbreak*, N.Y. Daily News (Apr. 6, 2020), <https://www.nydailynews.com/new-york/ny-district-attorneys-rikers-conditions-20200406-rdjvtuwfsndqtmzuit3t66bkhq-story.html>. [↑](#footnote-ref-21)
22. *See generally*, *Responses to the COVID-19 pandemic*, Prison Policy Initiative, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Apr. 6, 2020). [↑](#footnote-ref-22)
23. *Available at* <https://appellate-records.courts.alaska.gov/CMSPublic/UserControl/OpenBailDocument?caseNumber=A13630>. [↑](#footnote-ref-23)
24. *Available at* <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>. [↑](#footnote-ref-24)
25. *Available at* <https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2461>. [↑](#footnote-ref-25)
26. *Available at* <https://www.leagle.com/decision/infdco20200318c90>. [↑](#footnote-ref-26)
27. *Available at* <https://www.courtlistener.com/recap/gov.uscourts.cand.76/gov.uscourts.cand.76.3261.0.pdf>. [↑](#footnote-ref-27)
28. World Health Organization, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention* (Mar. 15, 2020) at 3. [↑](#footnote-ref-28)
29. Penal Reform International, *Coronavirus: Healthcare and Human Rights of People in Prison* (Mar. 16, 2020) at 4, available at <https://cdn.penalreform.org/wp-content/uploads/2020/03/FINAL-Briefing-Coronavirus.pdf>. [↑](#footnote-ref-29)
30. Pien Huang, *How The Novel Coronavirus And The Flu Are Alike ... And Different*, NPR (Mar. 20, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/20/815408287/how-the-novel-coronavirus-and-the-flu-are-alike-and-different> (last visited Apr. 3, 2020) (noting that “each coronavirus case seems to infect about 2 to 2.5 additional people” while “[t]he average patient spreads the flu virus to about 1.3 others.”). [↑](#footnote-ref-30)
31. Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), available at<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. [↑](#footnote-ref-31)
32. Molly Griffard (@MollyGriffard), Twitter (Mar. 24, 2020, 2:42PM), <https://twitter.com/MollyGriffard/status/1242522219147939840/photo/1>. [↑](#footnote-ref-32)
33. Michelle Bachelet, *Urgent Action Needed to Prevent COVID-19 “Rampaging Through Places of Detention”* (Mar. 25, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E> [↑](#footnote-ref-33)
34. Subcommittee on Prevention of Torture, *Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms Relating to the Coronavirus Pandemic* (Mar. 25, 2020) at 3. [↑](#footnote-ref-34)
35. Council of Europe, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, CPT/Inf(2020)13 (Mar. 20, 2020) at 1. [↑](#footnote-ref-35)
36. Inter-Agency Standing Committee, *COVID-19: Focus on Persons Deprived of Their Liberty* (Mar. 27, 2020) at 3. [↑](#footnote-ref-36)
37. Bachelet, *supra* note 27. [↑](#footnote-ref-37)