

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROSARIA CORTES LUSERO, MARIE CRUZ :
GARCIA and MICHELLE CANER, on behalf :
of themselves and all others similarly situated, :

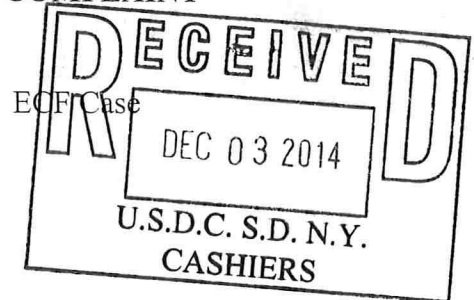
Plaintiffs, :

-versus- :

THE CITY OF NEW YORK, :

Defendant. :
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CLASS ACTION
COMPLAINT



PRELIMINARY STATEMENT

1. On a small island off the Bronx lie the remains of approximately one million people, buried in New York City's potter's field, Hart Island. Though too poor or too unknown at the time of their death to escape mass burial, during their lives the inhabitants of Hart Island were daughters and sons, brothers and sisters, mothers and fathers, grandparents and grandchildren. Family members of those buried on the island wish to visit the gravesites of their loved ones to mourn, to pray, or just to be in their presence. New York City, however, bars all such visits, choosing instead to run what should be a sacred site as a prison compound. This class-action, civil-rights action seeks to end the City's disgraceful policy of barring gravesite visits on Hart Island.
2. New York City has ceded control of Hart Island to its Department of Correction, which uses prison labor to bury the indigent and unclaimed. Though the City states Hart Island is open to the public, the Department of Correction makes it virtually impossible for anyone even to make it on to the ferry that infrequently travels to the island. And for those able to navigate the Department's process and get to the island, they not are

allowed to go beyond a small area near the dock from which there is no view of the burial grounds.

3. Plaintiffs Rosaria Cortes Lusero, Marie Garcia, and Michelle Caner want to grieve for their loved ones buried on Hart Island just as they would had their relatives been buried at any other cemetery. Instead, New York City has robbed them of their ability to properly mourn and to express the love and grief they feel for their relatives buried on the island.
4. New York City's policy and practice of barring people from visiting the gravesites of family members buried on Hart Island violate the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution and sections 3, 6, and 8 of Article I of the New York State Constitution. The plaintiffs seek declaratory and injunctive relief that will allow them to visit the gravesites of their loved ones in a manner appropriate to the grieving process.

PARTIES

5. Plaintiff ROSARIA CORTES LUSERO is a 58-year old woman who currently resides in New York City with her husband, children, and grandchildren. She wants to visit the Hart Island grave of her daughter, who died shortly before birth in 1995.
6. Plaintiff MARIE CRUZ GARCIA, the eldest daughter of plaintiff Rosaria Cortes Lusero, is a 26-year old woman who currently resides in New York City. She wants to visit the Hart Island grave of the baby sister she lost nearly twenty years ago.
7. Plaintiff MICHELLE CATHERINE CANER is a 34-year old resident of Nashville, Tennessee. She formerly resided in New York City and continues to visit on a regular basis. She wants to visit the Hart Island grave of her father.
8. Defendant the CITY OF NEW YORK ("the City") is a municipal corporation within the

State of New York. The New York City Department of Correction (“Department of Correction”) is a department of the City of New York that controls Hart Island pursuant to the New York City Administrative Code and supervises inmates who conduct burials there. The Department of Correction is also responsible for the care and detention of all prisoners in the custody of the City of New York, as well as the operation of prison facilities located in Brooklyn, Manhattan, Queens and the Bronx.

FACTS

Plaintiffs Rosaria Cortes Lusero and Marie Garcia

9. Rosaria Cortes Lusero’s daughter is one of the infants buried on Hart Island. For the past nineteen years, defendant has barred Ms. Cortes Lusero and her eldest daughter, Marie Garcia from visiting the baby’s final resting place, despite their unrelenting wish to express their love for her.
10. Ms. Cortes Lusero lost her third child in a stillbirth on October 29, 1995. That day, a doctor made a fatal attempt to reposition the infant in Ms. Cortes Lusero’s womb at Elmhurst Hospital in Queens. As a result of this procedure, the umbilical cord wrapped around the unborn child’s neck, ultimately killing her. The doctor did not perform a caesarian, and Ms. Cortes Lusero had to bear a child she already knew was dead.
11. Both Ms. Cortes Lusero and Ms. Garcia have been haunted by this loss ever since. Ms. Cortes Lusero forced hospital staff to take a photograph of her dead child shortly after the birth—a picture she has kept to this day. Although Ms. Garcia was just seven years old at the time, she remains profoundly affected by the sense of loss she felt nineteen years ago, when she learned that the baby sister she had looked forward to meeting would not be coming home to her family.

12. Hospital staff told Ms. Cortes Lusero that the City would bury the infant on an island and that she would be able to visit the grave. No one from the City or the hospital gave Ms. Cortes Lusero further information regarding where exactly her daughter would be buried or how she could visit her child's grave.
13. For almost eighteen years, Ms. Cortes Lusero and Ms. Garcia lived with the pain of not knowing where the baby had been laid to rest. Growing up, Ms. Garcia would ask her mother where her baby sister had been buried and how they could visit, and Ms. Cortes Lusero could only respond that she had been buried on an island. It was not until Ms. Garcia began investigating online in 2013 that they finally learned of the baby's final resting place on Hart Island.
14. At the same time, Ms. Garcia also learned that the Department of Correction would not allow her or her mother to visit the gravesite. Both women remain determined, however, to visit the grave.
15. Both Ms. Cortes Lusero and Ms. Garcia have thought deeply about what they would like to do when they get to the gravesite. Ms. Cortes Lusero, a lifelong Roman Catholic who was born and raised in Mexico, wants to exercise her religious beliefs and pray. She wishes to visit accompanied by family members and a priest so that they can hold a religious service memorializing her daughter at the gravesite. Ms. Garcia has kept one memento of her little sister all of these years: a pink and pastel blue baby's knit cap meant for the baby that she would not allow her parents to give away. She plans to leave the cap at the gravesite, a small memorial to the sister that she never got to know, but never forgot.

Plaintiff Michelle Caner

16. Michelle Caner's father was buried on Hart Island after dying homeless and alone four years ago. Ms. Caner was unable to say goodbye to him during his lifetime but wants to reconnect with him in his death. Unfortunately, the City's policy prevents her from fulfilling this one simple wish.
17. Ersin Nedim Caner, Ms. Caner's father, was an aerospace engineer who had emigrated from Turkey. Although Ms. Caner's parents divorced while she was a toddler, she remained in contact with her father for most of her childhood. Mr. Caner eventually moved to New York City around 1995, where he struggled with substance abuse and soon found himself homeless. Ms. Caner cut off contact with her father at the age of fifteen and learned of his whereabouts only through family and friends in the years since.
18. In September 2010, Mr. Caner died while being treated at Flushing Hospital in Queens, unbeknownst to anyone in his family. Although Mr. Caner had relatives in New York City, the City failed to identify any next of kin who could have arranged for his burial. No one in Mr. Caner's immediate family would find out that he had died and been buried on Hart Island until nearly three years later, when Ms. Caner learned of his death from an entry on a genealogy website in April 2013.
19. Immediately after learning of her father's death, Ms. Caner began contacting city officials in an attempt to find more information. She first called the New York City Morgue and was told that her father had died at Flushing Hospital. The morgue representative she spoke with told her that her father been buried in a "potter's field." After researching potter's fields online, Ms. Caner found that her father had been buried on Hart Island.
20. Although Ms. Caner wants to visit her father's gravesite, the Department of Correction

policy barring gravesite visitation has discouraged her from even trying to visit. Ms. Caner understands that she would only be permitted to visit a gazebo at the edge of the island under the Department's current policy and believes that such a visit would not bring her closure. Because a trip to Hart Island would be very difficult for Ms. Caner, both emotionally and logistically, she believes that any attempt to visit the island would be meaningless unless she is permitted to visit her father's actual gravesite to properly mourn him there.

21. Ms. Caner still wishes to visit her father's gravesite and wants to be able to visit her father's grave during her regular trips to New York City in the future. While she was unable to connect with him during his lifetime and did not have an opportunity to say goodbye to him before he died, she wants the opportunity to properly mourn him now that he has passed away.

Hart Island: A Cemetery Without Mourning

22. Hart Island is an uninhabited island located at the western end of Long Island Sound, northeast of City Island. It is one mile long and a quarter of a mile wide, comprising approximately 131 acres. The island has been owned by New York City since 1868 and is currently a part of the borough of the Bronx. While there are numerous buildings on the island from its prior roles as a sanitarium, workhouse, and drug treatment facility, the only persons who currently have regular access to the island are Department of Correction officials and inmates under their supervision.
23. Hart Island currently serves as New York City's only potter's field, a location for the burial of the indigent and of unidentified bodies. Because Hart Island is the only active potter's field in New York City today, most unidentified and indigent individuals who

pass away in the city are buried on Hart Island. On information and belief, it is the largest indigent burial ground in the United States, one of the largest cemeteries in the nation, and the largest taxpayer-funded cemetery in the world. The Department of Correction, which maintains the Hart Island cemetery and conducts burials there using inmate labor, estimates that approximately one million people are buried on the island.

24. New York City's policy bars family members—and all other members of the public—from visiting gravesites on Hart Island.
25. The City's policy barring gravesite visitation conflicts with a long and deeply rooted historical tradition in the United States and nations around the world to allow family members to honor the dead as they see fit, including through gravesite visitation. Ancient cultures, from the Romans to the Greeks, have emphasized the essential importance of burying and honoring the dead. In this country, a number of states have recognized the right to visit a loved one's grave for the purposes of honoring his or her memory, either at common law or by statute. Some of these states have recognized this common law right for over a century. Moreover, Americans have been marking the graves of their loved ones since the early colonial period, so that their final resting places would not be forgotten. Today, it is common for Americans to leave flowers, coins, and other mementos at the graves of loved ones as a way of memorializing the departed. All of these practices are demonstrative of the deeply rooted historical tradition of honoring the dead.
26. The policy also prevents the free exercise of religion for those who hold visiting gravesites as a critical component and tenet of faith. Many religions place significant importance on visiting gravesites. In Roman Catholic tradition, family members visit the

graves of loved ones to pray that their souls will have salvation in the afterlife. One significant manifestation of this tradition is the Mexican Day of the Dead, in which the faithful visit their relatives' graves in order to pray, leave gifts, and decorate the gravesites as an act of remembrance and celebration. Similar customs, which can be traced back to the ancient Christian tradition of All Souls' Day, exist in other Catholic cultures around the world. Muslims believe that visiting the graves of deceased loved ones yields significant benefits, including strengthening one's relationship with the past and directing one to do good deeds. Jewish law exhorts believers to visit the cemetery on holy days and walk on the graves. Jews also observe a centuries-old custom of leaving small stones or pebbles at the graveside to leave lasting evidence of the visit and to ask God to watch over the souls of the departed. Leaving stones at the gravesite is a *mitzvah*, both a commandment given by God and a good deed. The City's policy barring any form of gravesite visitation prevents members of all of these religions from exercising their sincere beliefs in their faiths.

27. New York City is fully aware that family members wish to visit gravesites on Hart Island but has refused to lift its policy barring such visits. There has been significant press coverage about access to Hart Island, including a November 2013 New York Times article highlighting that family members are not allowed to visit gravesites. The City has also been informed of the access problems by members of the public. Melinda Hunt, the director of the Hart Island Project, a non-profit organization committed to gaining access to the island, has worked for the past twenty years to highlight the problems of visitation to Hart Island. Her activities have included testifying to the New York City Council about the limitations to access while Department of Correction officials were present.

Finally, prior to filing this lawsuit, the New York Civil Liberties Union (“NYCLU”) repeatedly sought to engage the City about changing its policy, all to no avail.

The Gazebo Visits Allowed by the Department of Correction Are No Alternative to Gravesite Visits

28. The Department does permit visits to “an area with a gazebo for reflection” in lieu of access to gravesites, but for family members such visits are no substitute for access to gravesites. The gazebo is located at the edge of the island, far enough from the burial sites that a visitor standing on the gazebo has no view of the graves at all. Such visits do not allow family members to connect with their deceased loved ones in any meaningful way, nor do they comport with historical and religious mourning traditions. On information and belief, visitors to the gazebo are afforded little privacy in their mourning, and instead are searched and accompanied at all times by Department of Correction officers. Visitors to the gazebo are also prohibited from bringing items that mourning family members often use to honor and remember their loved ones, such as flowers or other mementos.
29. For the plaintiffs, only a gravesite visit would be adequate to mourn their lost loved ones. Ms. Cortes Lusero wishes to hold a service at the gravesite to memorialize her lost daughter. Ms. Garcia wants to leave a memento at the gravesite. And Ms. Caner wants to say goodbye to her father not just in some random place, but where he will rest for eternity. Being able to stand on the gazebo on Hart Island would do nothing for grieving family members who wish to visit the gravesites of their loved ones.
30. In addition to being inadequate, visits to the gazebo on Hart Island are nearly impossible to obtain. Although the Department of Correction website states that the island is “open to the public,” family members who follow the Department’s instructions to schedule a

gazebo visit often find their efforts impeded by a number of bureaucratic hurdles, including disconnected phone calls, unreturned messages, and impolite behavior. Plaintiff Marie Garcia experienced these difficulties firsthand when she called the Department, only to be transferred through a maze of different contacts, put repeatedly on hold, and left unable to schedule a visit. These problems are not isolated and instead appear to reflect standard Department practice. To verify this, a New York University law student working under the supervision of a NYCLU attorney called the Department in September 2014 on multiple occasions to schedule a visit to Hart Island. Although the student followed the Department's instructions to schedule a gazebo visit, the calls were ignored or transferred to someone who could not or would not assist. The student also left a voicemail message requesting a visit, but no Department official has ever responded.

The City of New York Can Accommodate Gravesite Visits on Hart Island

31. Upon demand of an attorney who had previously sued over access, the Department of Correction made an exception to its policy and allowed two women to visit the gravesites of their stillborn children in 2014. Both visits occurred without incident. Both women chose to walk to the gravesite and encountered no difficulties in reaching their destinations. GPS navigation made it easy to locate the gravesites, and one of the women reported that a path led directly from the shore to the grave. Furthermore, neither woman encountered or saw inmates during their visits.
32. There is no reason that such visits cannot be extended to others wishing to visit the gravesites of family members. However, even after these exceptions were granted, the official policy barring gravesite visits remains in effect.

CLASS ALLEGATIONS

33. The plaintiffs bring this class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on their own behalf and on behalf all other persons similarly situated.
34. Specifically, the named plaintiffs seek to represent a certified plaintiff class consisting of all individuals with a child, parent, sibling, grandparent, grandchild, first cousin, aunt, uncle, niece, or nephew buried on Hart Island.
35. The members of this class are too numerous to be joined in one action. The City buries approximately 1,500 deceased on Hart Island each year, and the Department of Correction estimates that as many as one million people have been buried on the island. Every child, parent, sibling, grandparent, grandchild, first cousin, aunt, uncle, niece, or nephew of a deceased person buried on Hart Island constitutes a member of this class.
36. There are questions of law and fact common to the class that predominate over questions affecting only individual members, including but not limited to: whether defendant has violated fundamental familial association, free association, free expression, religious expression, and/or privacy rights protected by the United States Constitution and the Constitution of the State of New York in preventing individuals from visiting family members buried on Hart Island.
37. The claims of the named plaintiffs are typical of those of the class members and, by pursuing their own interests, the named plaintiffs will advance the interests of the absent class members. Each member of the class has at least one family member buried on Hart Island, the grave of whom they are unable to freely visit due to significant barriers imposed by the Department of Correction.
38. The class representatives will fairly and adequately protect the interests of the class.

There are no conflicts of interest between the class representatives and the absent class members, and the class representatives will vigorously prosecute this action on behalf of the class.

39. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.
40. The plaintiff class should be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure for determination of liability because defendant has acted on grounds generally applicable to the class, thereby making class-wide declaratory and injunctive relief appropriate.

CAUSES OF ACTION

41. The defendant's actions violate the plaintiffs' rights under the United States Constitution, including the First and Fourteenth Amendments, and 42 U.S.C. § 1983.
42. The defendant's actions violate the plaintiffs' rights under the New York Constitution, including sections 3, 6, and 8 of Article I.

JURISDICTION AND VENUE

43. This Court has subject-matter jurisdiction over the plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4).
44. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that the plaintiffs' claims arise in the Southern District of New York.
45. This court has supplemental jurisdiction over all state constitutional claims pursuant to 28 U.S.C. § 1367(a).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that this Court:

- (1) Assume jurisdiction over this matter;
- (2) Certify this action as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- (3) Issue a declaratory judgment that the City of New York's current Hart Island visitation policy violates the United States Constitution and the New York State Constitution;
- (4) Issue an injunction enjoining the City of New York from enforcing its Hart Island visitation policy in its current form;
- (5) Issue an order requiring the City of New York to provide reasonable gravesite access to all members of the class;
- (6) Award the plaintiffs attorneys' fees and costs; and,
- (7) Grant any other relief the Court deems appropriate.

Respectfully Submitted,


CHRISTOPHER DUNN

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Dated: December 3, 2014
New York, N.Y.

On the Complaint:

CLARK BINKLEY*
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Law Students
New York University School of Law
Civil Rights Clinic

* The plaintiffs and the New York Civil Liberties Union Foundation will be seeking leave of court to permit these students to serve as attorneys in this matter pursuant to the Southern District's Plan for Student Practice in Civil Actions.