IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-_____

NEW MEXICO LAW OFFICES OF THE PUBLIC DEFENDER; NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION; and AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,

Petitioners,

v.

STATE OF NEW MEXICO; MICHELLE LUJAN GRISHAM, Governor, State of New Mexico; ALISHA TAFOYA LUCERO, Secretary, New Mexico Corrections Department; and MELANIE MARTINEZ, Director, New Mexico Probation and Parole,

Respondents,

NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION; HECTOR BALDERAS, NEW MEXICO ATTORNEY GENERAL,

Real Parties in Interest.

EMERGENCY PETITION FOR WRIT OF MANDAMUS and/or HABEAS RELIEF

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Four appendices (A-D) are attached to this petition to provide background or supplemental information that inform the basis for granting relief. See Rule 12-504(B)(2) NMRA ("Any pleadings or other papers may be attached if they are necessary and appropriate to inform the Court adequately regarding the circumstances out of which the petition arises and the basis for granting relief.").

Much of the factual summary relies on recent media coverage and institutional publications for "fact[s] that [are] not subject to reasonable dispute because [they] … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 11-201(B) NMRA.

STATEMENT OF COMPLIANCE

The body of this petition exceeds the page limits (20 pages) set forth in Rule 12-504(G)(2) NMRA but is within the word limit set forth in Rule 12-504(G)(3) (6,000 words). Pursuant to Rule 12-504(H), counsel asserts that the body of the petition contains **5,569** words. Counsel used Times New Roman, a proportionally-spaced type style / type face. This brief was prepared using Microsoft Word, version 2010.

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INTRODUCTION

The current pandemic and the transmission of COVID-19 throughout the state presents an extraordinary risk to the safety of all New Mexicans. New Mexico responded early and decisively to this risk by closing schools and non-essential business, issuing a statewide stay-at-home order, prohibiting groups of people from congregating, and encouraging social distancing, increased hygiene measures, and wearing masks in public. These measures, however, are not available to inmates and will not stop an outbreak inside correctional facilities. Urgent action to prevent such an outbreak is needed not only to protect the lives and constitutional rights of inmates, but also to protect against the inevitable spread of the virus throughout corrections staff and the broader community. Such an outbreak would place unavoidable burdens on New Mexico's healthcare systems, especially in rural parts of the state ill-equipped for massive hospital admissions.

This Court has the authority and opportunity to stop preventable deaths and additional tragedy. Petitioners request dramatic reductions in the prison population to enable facilities to comply with Centers for Disease Control and Prevention ("CDC") guidelines and current New Mexico Emergency Public Health Orders mandating social distancing, heightened hygiene practices, and, when symptoms arise, safe quarantine and treatment. Without dramatic population reductions, prison conditions pose an unreasonable risk that incarcerated people will suffer

from an institutional outbreak, which constitutes cruel and unusual punishment. Petitioners thereby pray this Court exercise its extraordinary jurisdiction and instruct Respondents to take immediate steps to reduce prison populations.

JURISDICTION and AUTHORITY

This Court has jurisdiction to provide the relief sought and protect against a mass outbreak of COVID-19 inside correctional facilities. Article VI, Section 3, of the New Mexico Constitution gives this Court original jurisdiction over extraordinary writs, including mandamus, superintending control, and habeas corpus "on behalf of a person held in actual custody." A writ of mandamus is "an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562. This Court's habeas authority specifically extends to orders to release inmates being held unconstitutionally. *See Concha v. Sanchez*, 2011-NMSC-031, ¶ 2, 150 N.M. 268 (granting "a petition invoking our emergency original jurisdiction to review the indefinite detention of thirty-two courtroom spectators" held in contempt); *Peyton v. Nord*, 1968-NMSC-027, ¶ 7, 78 N.M. 717 (habeas proceedings). Given the exigencies created by the ongoing pandemic and the need for swift and final action to avoid a fatal COVID-19 outbreak, an emergency writ invoking judicial authority to order inmates released is appropriate.

Original jurisdiction is appropriate even when the matter might have been brought first in the district court, "when it is in the public interest to settle the question involved at the earliest moment." *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343 (mandamus); *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 30, 410 P.3d 201 (superintending control). Under Rule 12-504 NMRA, "If the petitioner is entitled to a writ or relief other than that requested in the petition, the petition shall not be denied, and the Court shall grant the writ or relief to which the petitioner is entitled."

This Court has jurisdiction and authority to direct an immediate reduction of the inmate population to avoid pervasive cruel and unusual punishment and due process violations. It is cruel and unusual punishment to subject inmates to the substantial risk of contracting COVID-19, which would potentially constitute a death sentence for those infected. Incarcerated persons have a "clear and undisputed right" under both the Eighth Amendment to the United States Constitution and Article II, Section 13 of the New Mexico Constitution to be free from cruel and unusual punishment and not to be "expos[ed] … to serious, communicable disease." *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) ("We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore **a condition of confinement that is sure or very likely to cause serious illness and needless**

suffering the next week or month or year.") (emphasis added); *accord Hutto v. Finney*, 437 U.S. 678, 682-85 (1978) (recognizing the need for a remedy where prisoners were crowded into cells and some had infectious diseases). Indeed, with respect to "infectious maladies," the Court observed:

> This was one of the prison conditions for which the Eighth Amendment required a remedy, **even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed**. … Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Helling, 509 U.S. at 33 (emphasis added). Thus, the affirmative obligation to protect against infectious disease empowers courts to provide remedies designed to prevent imminent harm to future health. *Id*. ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

New Mexico's Cruel and Unusual Punishment Clause similarly permits consideration of future harm to an at-risk prisoner's health. *See State v. Arrington*, 1993-NMCA-055, ¶ 11, 115 N.M. 559 (affirming the district court's alteration of a sentence to avoid a mandatory sentence where incarceration would endanger the defendant due to her serious medical needs).

As explained below, the COVID-19 outbreak likely to occur in New Mexico prisons poses a substantial risk of serious harm to every incarcerated person in this state and requires intervention by this Court. Failure to reduce the density of the correctional facilities in this jurisdiction will result in cruel and unusual punishment in violation of the Eighth Amendment and Article II, Section 13, by confining persons in "unsafe conditions" and exposing inmates "to a serious, communicable disease." *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

Similarly, under the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution, incarcerated people have a liberty interest in avoiding "atypical and significant hardship … in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The serious threat of contracting a severe, life-threatening illness is "a dramatic departure from the basic conditions" of prison life. *Id*. at 485.

Because of the public health ramifications, state courts around the country have taken similar action to the relief requested here. *See* Appendix A. As the final arbiter of the New Mexico Constitution, this Court has an obligation to take action to prevent catastrophe. Under the current circumstances, the relief requested in this petition is necessary to reduce the threat of disastrous COVID-19 outbreaks throughout the state.

PARTIES

Petitioners have standing to request relief on behalf of incarcerated people throughout the State of New Mexico. Petitioner Law Offices of the Public Defender (LOPD) must represents all indigent defendants charged with any crime that carries "a possible sentence of imprisonment" or "in any state postconviction proceeding," and "may confer with any person who is not represented by counsel and who is being forcibly detained." NMSA 1978, § 31-15-10(C), (D), (F) (2001). The New Mexico Criminal Defense Lawyers Association (NMCDLA) membership includes public defender attorneys as well as private attorneys with a vested interest in the constitutional detention of all current, former, and future clients. Finally, as a member-driven civil liberties advocacy organization that represents incarcerated New Mexicans in civil rights cases, the American Civil Liberties Union (ACLU) of New Mexico has a vested interest in potential constitutional violations against vulnerable inmate populations.

The Respondents are parties with the authority to release the inmates described in this petition. Real Parties in Interest represent the State in criminal prosecutions and thus have an interest in the execution of sentences imposed.

STATEMENT OF FACTS

Petitioners presume that the basic facts surrounding the current pandemic are undisputed. Nevertheless, because Petitioners further assert that these objective

facts have created unsafe conditions in New Mexico's correctional facilities, a summary of the basic epidemiology of COVID-19 is outlined below in addition to the facts at issue in this petition.

A. The COVID-19 pandemic presents a grave risk of harm, including serious illness and death, especially to people over age 50 and those with certain medical conditions.

COVID-19 is a novel coronavirus that has reached pandemic status. Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, Wall Street Journal (Mar. 11, 2020). As of April 13, 2020, 1,776,867 people worldwide have confirmed diagnoses, including 524,514 people in the United States and 1,245 in New Mexico. 111,828 people have died, including at least 20,444 in the United States and 26 in New Mexico. On April 12 alone, 31,633 new cases and 1,928 new deaths were reported in the United States. *See* World Health Organization, *COVID-19 Dashboard*, https://who.sprinklr.com/; New Mexico Health, *COVID-19 in New Mexico*, https://cv.nmhealth.org/.

On March 11, 2020, the Governor of New Mexico declared that the spread of COVID-19 constitutes a public health emergency and extended the emergency order through at least April 30, 2020. Executive Order 2020-004; Executive Order 2020-022. Accordingly, the Secretary of the New Mexico Department of Health

ordered all non-essential businesses in the state to close and prohibited gatherings of five or more people. Public Health Emergency Order 03-23-2020.[1]

COVID-19 is particularly contagious as it is spread through respiratory droplets or by touching a surface that has the virus on it. World Health Organization, *Q&A on coronaviruses (COVID-19)*, https://www.who.int/news-room/q-a-detail/q-a-coronaviruses (last visited Mar. 26, 2020).

New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission, rendering ineffective any screening tools dependent on identifying symptomatic behavior. Chelsea Ritschel, *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?*, The Independent (Mar. 15, 2020).

Older adults and those with certain medical conditions, such as hepatitis, autoimmune diseases, diabetes, asthma, hypertension, and heart disease, as well as pregnant women, face greater chances of serious illness or death from COVID-19.[2] *See* Appendix B-D.

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[1] *Available at* https://cv.nmhealth.org/public-health-orders-and-executive-orders/.

[2] Medical information in this petition not otherwise cited is drawn from the expert testimony of medical professionals filed in recent federal cases, attached as Appendix B-D, as well as the website of the Harvard Medical School. *See* Expert Declaration of Dr. Jonathan Golob, Appendix B; Expert Declaration of Dr. Jamie Meyer, Appendix C; Expert Declaration of Joe Goldenson, MD, Appendix D; Harvard Medical School, Coronavirus Resource Center, *As coronavirus spreads, many questions and some answers*, https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center, (last visited Mar. 19, 2020).

There is no vaccine for COVID-19. No one is immune. The only known methods to reduce the risk of contracting COVID-19 are to prevent infection in the first place through social distancing and improved hygiene.

B. People incarcerated in New Mexico prisons and jails face an elevated risk of COVID-19 transmission.

People in congregate environments (where people live, eat, and sleep in close proximity) like prisons and jails face increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus on cruise ships[3] and in nursing homes.[4] For example, New Mexico's major outbreak events have thus far been in long-term care facilities.[5]

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[3] *See* CDC, *COVID-19 and Cruise Ship Travel*, https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-cruise-ship (last visited Apr. 5, 2020); *see also* Barbara Starr & Ryan Browne, *Sailor aboard USS Theodore Roosevelt dies of coronavirus*, CNN (Apr. 13, 2020), *available at* https://www.cnn.com/2020/04/13/politics/theodore-roosevelt-sailor-coronavirus/index.html (with 92% of crew members tested, "[n]early 600 sailors on the Roosevelt have tested positive for Covid-19," one has died, and four more have been hospitalized).

[4] CDC, *Preparing for COVID-19: Long-term Care Facilities, Nursing Homes*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fprevent-spread-in-long-term-care-facilities.html (last visited Apr. 5, 2020).

[5] *Department of Health, City of Albuquerque announce COVID-19 outbreak, deaths at long-term care facility*, NM Department of Health, (Apr. 3, 2020), https://nmhealth.org/news/alert/2020/4/?view=894 (reporting "an outbreak of COVID-19 at the La Vida Llena long-term care facility in Albuquerque where two residents have died, and 19 residents and three staff members have tested positive for COVID-19 with additional test results still pending").

1. Jails and prisons are extremely vulnerable to outbreaks.

Conditions in jails and prisons pose an even higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Jails have a greater risk because of closer quarters, the proportion of vulnerable people detained, and scant medical care resources. According to one epidemiology professor, "If you wanted to set up a situation that would promote rapid transmission of a respiratory virus, you would say prison: it's close quarters, unsanitary, individuals in frequent contact." Daniel A. Gross, *"It Spreads Like Wildfire": The Coronavirus Comes to New York's Prisons*, The New Yorker (Mar. 24, 2020).[6]

Experts predict that "[a]ll prisons and jails should anticipate that the coronavirus will enter their facility." Evelyn Cheng & Huileng Tan, *China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons*, CNBC (Feb. 20, 2020).[7] In fact, because of similar vulnerabilities and close quarters, a jail in Chicago is now the largest-known source of infections in the country. *Coronavirus Live Updates: A jail in Chicago is now the largest-known source of U.S. infections*, New York Times (Apr. 8, 2020) (with only two diagnoses in late March, 238

[6] *Available at* https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons.
[7] *Available at* https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html.

inmates and 115 staff members tested positive as of Wednesday April 8, 2020, but the vast majority had not been tested).[8] As of April 12, 2020, 306 detainees have tested positive, 20 of those are hospitalized outside the jail, three detainees have died, and 218 staff members have tested positive. *See 3rd Detainee at Cook County Jail Dies After Contracting Coronavirus*, NBC-Chicago (April 12, 2020) ("Nurses said last week that treatment inside the jail is at a 'minimum,' the virus is quickly spreading because of the conditions, and some inmates should be released due to the virus' spread.").[9]

COVID-19 has spread to correctional facilities across the country, even in facilities that stated they were implementing screening protocols. *See, e.g.*, Tess Sheets & Monivette Cordeiro, *Central Florida Jails Ready Coronavirus Plans as State Prisons Cut Visitation, Add Screening*, Orlando Sentinel (Mar. 13, 2020), https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-jails-prisons-florida-20200312-m675t3zssjhafl3j5nud7gzbuq-story.html; Fed. Bureau of Prisons COVID-19 Action Plan, Fed. BOP (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

[8] *Available at* https://www.nytimes.com/2020/04/08/us/coronavirus-live-updates.html?action=click&module=Spotlight&pgtype=Homepage#link-7634e187.
[9] *Available at* https://www.nbcchicago.com/news/local/3rd-detainee-at-cook-county-jail-dies-after-contracting-coronavirus/2254741/.

"In less than a month, the Bureau of Prisons has gone from having one case of COVID-19 to, as of Wednesday [April 8] afternoon, having at least 253 federal inmates and 85 prison staff sick with the disease." Kimberly Kindy, *Inside the deadliest federal prison, the seeping coronavirus creates fear and danger*, Washington Post (Apr. 9, 2020).[10] "In the last three weeks, eight inmates in the U.S. Bureau of Prisons system have died of COVID-19." *Id.* At the Oakdale prison in Louisiana, more than 100 inmates are under quarantine and four staff members have tested positive. *Id*. However, the Washington Post reports that "only those [inmates] ill enough to be taken to a hospital are tested," so accurate numbers of positive cases "might never be known." *Id*.

In New Mexico, at least one jail inmate has already tested positive, but inmates are extremely under-tested so the number of positive cases is likely much higher. Christina Rodriguez, *Inmate at MDC tests positive for COVID-19*, KOB (Mar. 30, 2020).[11] Other jail and Corrections inmates around the state have shown COVID-19 symptoms and were placed in quarantine, including an inmate in the Santa Fe County Jail and an inmate at the Western New Mexico Correctional Facility in Grants, which is a community that staffs two prisons, a county jail, and

[10] *Available at* https://www.washingtonpost.com/national/inside-the-deadliest-federal-prison-the-seeping-coronavirus-creates-fear-and-danger/2020/04/09/deeceb6e-75b4-11ea-a9bd-9f8b593300d0_story.html.
[11] *Available at* https://www.kob.com/albuquerque-news/mdc-detainee-tests-positive-for-covid-19-/5687646/.

an ICE detention facility. Amanda Martinez, *County jail inmate tests negative for COVID-19,* Santa Fe New Mexican (Mar. 19, 2020).[12] As of April 13, 2020, an inmate of the Santa Fe County Jail tested positive for COVID-19. Kyle Land, *Inmate tests positive for virus at Santa Fe County jail*, ABQ Journal (April 13, 2020).[13] Additionally, at the Otero County immigration detention facility a detainee and employee have both tested positive for the virus. Nathan O'Neal, *ICE detainee, employee test positive for COVID-19 in NM*, KOB (Apr. 10, 2020).[14]

The CDC Guidance for detention centers reiterates that the only known effective measures for protecting vulnerable people are social distancing, quarantining or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and hot water.[15] The National Commission on Correctional Health Care also recommends that measures be implemented in correctional facilities to increase the physical

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[12] *Available at* https://www.santafenewmexican.com/news/coronavirus/county-jail-inmate-tests-negative-for-covid-19/article_88a4a36e-69f2-11ea-8001-8fae726dcc31.html.

[13] Available at https://www.abqjournal.com/1443328/inmate-tests-positive-for-virus-at-santa-fe-county-jail.html.

[14] *Available at* https://www.kob.com/new-mexico-news/ice-detainee-employee-test-positive-for-covid-19-in-nm/5698078/.

[15] CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

space between all individuals in custody. Nat'l Comm'n on Correctional Health Care, *COVID-19 Weekly Roundtable for Law Enforcement and Correctional Health Care* (Mar. 27, 2020).[16]

2. *Because of close quarters and asymptomatic transmission, current precautions in New Mexico prisons are insufficient.*

In an interview with KUNM Radio, New Mexico Corrections Department ("NMCD") Secretary Alisha Tafoya Lucero agreed that NMCD facilities are unable to implement social distancing in their "closed environment." Marisa Demarco, et al., *YNMG & COVID: Behind The Walls*, KUNM (Mar. 30, 2020).[17] For instance, the facilities cannot "open new units and separate beds out," in order for inmates to remain six feet apart. *Id*.

Incarcerated New Mexicans also cannot maintain adequate levels of preventive hygiene. They are required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use. Many inmates live in dormitory-style sleeping arrangements, sleeping in beds close together. They lack ready access to soap and water for washing hands; certainly not as often as necessary to prevent transmission. Food preparation and service is communal, served by other incarcerated workers drawn from different housing

[16] *Available at* https://www.ncchc.org/filebin/COVID/COVID-19_Roundtable_Week_2_March_27.pdf.
[17] *Available at* https://www.kunm.org/post/ynmg-covid-behind-walls.

areas within the facility, with little opportunity for surface disinfection and no personal protective equipment (PPE), such as masks.

Upon information and belief, soap and paper towels are not being provided by many facilities. Often, the only means to access soap is by purchasing it in commissary—which is not an option for many detainees who lack access to funds. The fact that symptomatic inmates tend to be quarantined *together* also disincentivizes reporting symptoms; if a person with a fever or cough does not actually have the virus, being transferred to an unsafe quarantine all but guarantees they will contract it. *Cf.* Kindy, Washington Post, *supra* Note 10 ("Prisoners, fearing they may be abandoned in an isolation cell and left for dead, are not reporting their symptoms.").

Put simply, inmates do not have the privilege of protecting themselves from infection. New Mexico prisons lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.

The dangers of asymptomatic transmission continue to threaten New Mexico detention facilities. Most facilities have revealed only symptom-reactive policies in response to COVID-19—that incarcerated people will be separated and treated if they display symptoms—which are ineffective to stop the rampant asymptomatic transmission of the disease. *See supra*, Ritschel, *Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* The Santa Fe County

Detention Center, for example, could not avoid an inmate becoming infected, despite increased safety protocols, including medically screening and separately housing those newly booked. *See supra*, Land, *Inmate tests positive* (noting test results pending for 8 staff members and 33 other inmates with whom the sick inmate lived in a dorm-style pod).

NMCD plans to "medically screen" inmates who are new arrivals at a facility and staff members before they begin their shifts and plans to test inmates who present symptoms of the virus.[18] This screening and testing process overlooks the fact that many who are infected with COVID-19 do not show signs of illness. CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Mar. 19, 2020). Secretary Tafoya Lucero has recognized that the most immediate risk to the incarcerated population will be exposure by staff who enter the prison from the larger community. *Supra* Marisa Demarco, et al., KUNM.

It appears that many facilities plan to warehouse all of their symptomatic detainees together, in communal living spaces. *See supra* Demarco, et al., KUNM (NMCD plans to house symptomatic individuals within its medical units). This measure will do little to prevent transmission among detainees, especially since

[18] New Mexico Corrections Department, *Precautions NMCD is taking in response to the virus*, https://cd.nm.gov/covid-19-updates/.

some "symptomatic" detainees may actually have another ailment and then *become* infected with COVID-19 as a *consequence* of the facility's quarantine protocol. Without including rapid testing in the protocol, group isolation actually results in forced exposure.

NMCD has failed to implement protocols sufficient to screen, detect, or identify incarcerated people or staff who have been infected. Upon information and belief, corrections officers do not have adequate PPE and report that screening is not standardized and there is a lack of guidance and training on what to do if an inmate appears symptomatic. There is no clear plan for dealing with an outbreak and no communication of any such plan to the officers in the facilities.

As a result of these conditions, "[a] group of more than two dozen New Mexico prison inmates, many with compromised immune systems, are considering legal claims against the state Corrections Department for its 'gross negligence and deliberate indifference to the dangers of COVID-19.'" Jeff Proctor, *Legal Threat Over Prison COVID-19 Potential*, Santa Fe Reporter (Mar. 17, 2020).[19]

[19] *Available at* https://www.sfreporter.com/news/2020/03/17/legal-threat-over-prison-covid-19-potential/; *cf.* https://www.acludc.org/en/cases/banks-v-booth-challenging-life-threatening-lack-covid-19-precautions-dc-jail ("On March 30, 2020, the ACLU-DC and the Public Defender Service for the District of Columbia filed a class action lawsuit on behalf of all the detainees in D.C.'s jails.").

C. An Outbreak of COVID-19 in prisons will quickly spread to surrounding New Mexico communities.

Transmission in detention facilities endangers the surrounding communities. This is true for at least two reasons.

First is basic community spread. Correctional staff carry the virus with them as they enter and leave the facility. Josiah Rich, et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus,* Washington Post (Mar. 17, 2020).[20] In addition to exposing inmates at the facility, infected correctional staff expose their families and broader communities. Meanwhile, some inmates will be released through the normal operation of the justice system and, if infected but asymptomatic, will unwittingly carry the virus outside.

Second, because prisons lack the necessary medical resources to care for COVID-19 cases, an outbreak within a prison would inevitably require reliance on the surrounding community's healthcare system. Patients with serious cases of COVID-19 require intensive care and advanced medical support, including ventilator assistance for respiration and intensive care support, which can quickly exceed local health care resources. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive

[20] *Available at* https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/.

rehabilitation from neurological damage and loss of respiratory capacity. *See* Appendix B-D. Without sufficient ICU units the fatality rate is certain to rise.

As sick inmates are transferred to area hospitals, the potential for community spread is exacerbated. Furthermore, as of April 4, 2020, "New Mexico is projecting that its hospitals will have just 27% of the intensive care beds needed at the peak of the coronavirus outbreak." Dan Mckay & Dan Boyd, *Three more deaths as NM virus outbreak accelerates*, ABQ Journal (Apr. 4, 2020).[21] "The peak stress on hospitals statewide is projected to be between mid-April and early May." *Id*. Thus, an outbreak within a prison also drains the surrounding community's healthcare resources.

D. Significant inmate release is necessary to address the risk of serious harm by ensuring manageable inmate populations.

As the Governor has acknowledged, "The only real way to attack this virus is to stay away from it." *Supra*, Mckay & Boyd, ABQ Journal. Public health officials and correctional oversight boards around the country are urging correctional institutions to use any means available to immediately reduce the prison and jail populations. *See* Vera Institute of Justice, *Guidance for Preventative Measures to Coronavirus for Jails, Prisons, Immigration Detention Centers and Youth Facilities* (Mar. 18, 2020); Andrew Naughtie, *Coronavirus: US Doctors*

[21] *Available at* https://www.abqjournal.com/1440205/three-more-deaths-as-nm-virus-outbreak-accelerates.html.

Demand Immediate Release of Prisoners and Detainees to Avert Disaster, Independent (Mar. 9, 2020).[22]

Confronted with this reality, courts across the country have already taken steps to limit incarceration during this crisis. *See* Appendix A. In late March, United States Attorney General William Barr directed the Bureau of Prisons to increase the use of home confinement for inmates in an effort to slow the spread of coronavirus in federal prisons. *Barr tells federal prisons to use home confinement*, CBS News (Mar. 27, 2020).[23] Subsequently, Barr "directed federal prison officials to accelerate and expand early release programs for the sickest inmates." *Supra*, Kindy, Washington Post.[24]

Dr. Marc Stern, a correctional health expert, has recommended the "release of eligible individuals from detention, with priority given to the elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19."[25] Another correctional health expert, Dr. Robert

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[22] *Available at* https://www.vera.org/downloads/publications/coronavirus-guidance-jails-prisons-immigration-youth.pdf; https://www.independent.co.uk/news/world/americas/coronavirus-us-prison-release-doctors-medical-workers-symptoms-a9410501.html.

[23] *Available at* https://www.cbsnews.com/video/barr-tells-federal-prisons-to-use-home-confinement-amid-virus-outbreak/?ftag=CNM-00-10aac3a.

[24] As of April 10, the Federal Bureau of Prisons had released at least 886 inmates to home confinement. *COVID-19 Home Confinement Releases*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/index.jsp (last accessed Apr. 10, 2020).

[25] *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), Decl. of Dr. Marc Stern, ¶¶ 9, 11, *available at* https://www.aclu.org/legal-document/dawson-v-

Greifinger, concluded that "the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage."[26]

Here in New Mexico, a group of sixty medical professionals wrote a letter urging state officials to release people convicted of non-violent crimes in order to avoid a COVID-19 outbreak in the prisons and jails. The authors agreed with experts across the country that "The safest way to ensure that a jail or prison does not become a site for COVID-19 to spread is to reduce the number of people who are incarcerated." Phaedra Haywood, *Medical providers ask state to release inmates*, Santa Fe New Mexican (Mar. 30, 2020).[27]

There are over 15,000 people incarcerated in New Mexico's prisons and jails.[28] The only way to sufficiently address the risk to incarcerated people and corrections staff is to reduce the inmate population to a point where effective distancing measures can be implemented. As Dr. Homer Venters, former chief

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asher-expert-declaration-dr-marc-stern.

[26] *Id.*, Decl. of Dr. Robert Greifinger, ¶ 13, *available at* https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger.

[27] *Available at* https://www.santafenewmexican.com/news/coronavirus/medical-providers-ask-state-to-release-inmates/article_28ec48ee-7089-11ea-8873-5b52a107906d.html.

[28] *See New Mexico profile*, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/NM.html (last visited Apr. 8, 2020).

medical officer of New York City jails, recently said, "[i]n ordinary times, crowded jails overlook prisoners' medical problems and struggle to separate them based on their security classification…. If jails have to add quarantines and sequestration of high-risk prisoners to the mix[,] … they will find managing a COVID-19 outbreak '*simply almost impossible*.'" Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (Mar. 12, 2020).[29]

Recently, the Governor has pleaded with New Mexicans via social media to take her social distancing orders seriously, urging New Mexicans to recognize that "There are lives in the balance." She instructed that no one should be spending time with anyone they do not live with.[30] Yet she has not taken any meaningful action to protect the thousands of New Mexicans currently behind bars.

On April 6, 2020, the Governor issued an executive order to begin releasing prisoners in NMCD custody to reduce the potential for spreading the virus.[31] However, that order describes a very narrow class of inmates, and in the short-term (when NM will experience a peak in the stress on health care infrastructure) will reduce the prison populations by only about ten inmates statewide. Elisa Kaplan, *Gov. orders early release of some inmates*, ABQ Journal (Apr. 6, 2020).[32] Drastic

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[29] *Available at* https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/.
[30] *Available at* https://twitter.com/GovMLG/status/1247934932556513281?s=20.
[31] *See* Executive Order 2020-021 (Apr. 6, 2020).
[32] *Available at* https://www.abqjournal.com/1440938/gov-orders-early-release-of-

reduction of New Mexico's prison population is necessary to protect incarcerated people, those working in correctional facilities, and the larger community from the devastating ripple effects that a prison outbreak would cause.

REQUEST FOR RELIEF

Based on the foregoing, Petitioners respectfully pray that this Court issue an extraordinary writ and:

1. Order the Governor and Secretary of Corrections to immediately review all Corrections inmates and expedite the release either to Community Corrections or Probation and Parole supervision[33] of the following categories of inmates:

    a. All individuals solely serving a sentence for probation or parole revocation not predicated on the commission of a new criminal offense (approximately one-third of the total Corrections population);

    b. Individuals who are at increased risk of serious illness from COVID-19, including but not limited to individuals aged 60 or older; individuals with diabetes, cardiovascular disease, renal disease, liver

some-inmates-from-prison.html.

[33] Corrections must relax the usual parole plan requirements in light of the public health emergency to facilitate the release of as many people who have completed their court-imposed term of incarceration. For example, inmates should be permitted to reside with a family member with a felony record.

disease, chronic lung disease or moderate to severe asthma; individuals who are immunocompromised; individuals who have cancer or have had cancer in the last 5 years; individuals who have other underlying medical conditions or any other risk factors identified by the CDC. *See* NMSA 1978, § 31-21-25.1 (1994) (medical or geriatric parole);

c. Individuals currently serving in-house parole or who have one year or less on their maximum term of imprisonment. *See* NMSA 1978, §§ 33-9-1 to -10 (2013) (Adult Community Corrections Act, authorizing NMCD to place offenders who are within twelve months of parole eligibility into community-based settings, provided they have never been convicted of a felony offense involving a firearm);

d. Pregnant individuals, *supra* § 31-21-25.1;

e. Individuals incarcerated for a nonviolent offense or offenses. *Cf.* NMSA 1978, § 33-2A-7 (2002) (authorizing early release of non-violent offenders via the now-defunct "corrections population control commission"); and

f. Any other individual for whom release is appropriate. *See* NMSA 1978, § 33-2-29 (1978) ("In case of any pestilence or contagious sickness breaking out among the convicts, the [corrections department] may cause the convicts confined therein or any of them to be removed to

some suitable place of security where such of them as may be sick shall receive necessary medical attention and such convicts must be returned as soon as may be to the penitentiary to be confined according to their respective sentences, if the same be unexpired."); N.M. Const. art. V, § 6 ("Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.").

2. Order the Governor, Secretary of Corrections, and Director of Probation and Parole to:

a. Temporarily suspend any incarceration to jail or prison for technical parole violations such as failing a drug test, missing a meeting with an officer, association, violating curfew, or using alcohol;[34]

b. Identify inmates eligible for medical or geriatric parole and facilitate their release as long as public safety is protected;

c. Hold additional and expedited parole hearings to expedite the release of parole-eligible inmates;

[34] *See* Jan Ransom, *Jailed on a Minor Parole Violation, He Caught the Coronavirus and Died*, New York Times (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/nyregion/rikers-coronavirus-deaths-parolees.html.

d. Identify individuals detained and/or incarcerated in NMCD for technical parole violations and facilitate their immediate release;

e. Identify inmates serving in-house parole for lack of an approved placement and quickly determine if placement requirements can be relaxed so that person can be released from the facility so long as public safety is protected;

f. Work with the district attorneys or the attorney general to ensure that any victims are timely notified of any release in accordance with statute. NMSA 1978, § 31-26-12(D) (2009).

3. Order the Secretary of Corrections to report daily regarding the number of NMCD staff and inmates who have been tested for COVID-19, presumptive and confirmed positive cases, and number of individuals currently held in quarantine.

4. At this Court's discretion, it may appoint a special master to oversee execution the above actions, applying a strong presumption of release as outlined above, but resolving individual disputes between parties by applying narrow public safety exceptions.

5. In the alternative, Petitioners ask this Court to order mediation, directing the parties to jointly develop a plan for reducing the population of New Mexico's prisons.

CONCLUSION

"When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment." *DeShaney v. Winnebago Cty Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

For the first time in history, all fifty states have declared a public health emergency.[35] These are unprecedented circumstances. The risk to inmates, corrections staff, and the broader community is profound. Petitioners urge this Court to consider the devastation and human suffering that will likely result if current efforts at social isolation are not applied to incarcerated people. This Court has the authority and opportunity to stop preventable mass deaths and additional tragedy. Petitioners pray this Court issue its writ to grant the relief requested.

Respectfully Submitted,

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[35] *See* Justine Coleman, *All 50 states under disaster declaration for first time in US history*, The Hill (Apr. 12, 2020), https://thehill.com/policy/healthcare/public-global-health/492433-all-50-states-under-disaster-declaration-for-first.

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Certificate of Service

I hereby certify that a copy of this pleading was served electronically to the Respondents and Real Parties in Interest this **14th** day of April, 2020 by email to:

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Appendix A: Court Actions Across the Country to Reduce Incarceration in Light of Covid-19

This chart provides only a sample of the judicial action taken throughout the country as judges continue to respond to the COVID-19 pandemic.

State	Judicial Body	Forum	Nature of Relief
Arizona	Coconino County court system and jail, Judge Dan Slayton, along with other county judges	Court order	• As of March 20, 2020, Judge Dan Slayton and other county judges have released around 50 people who were held in the county jail on non-violent charges.[1]
California	Sacramento Superior Court, Judge Hom	Order	• The Court entered a standing order authorizing their sheriff to release those within 30 days of release, regardless of crime.[2]
Hawaii	Hawaii Supreme Court	Order	• On April 2, 2020, the Hawaii Supreme Court appointed a special master to oversee the effort to reduce the state's jail and prison population.[3]
Kentucky	Kentucky, Chief Justice John Minton Jr.	Letter to state judges and court clerks	• Kentucky, Chief Justice John Minton Jr. told the state's judges and court clerks to release jail inmates "as quickly as we can" noting, "jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions," and that courts have the responsibility "to work with jailers and other county officials to safely release as many defendants as we can as quickly as we can."[4]

Michigan	Chief Justice Bridget M. McCormack, Michigan Supreme Court	Joint Statement	• In a Joint statement, Chief Justice McCormack urged judges to "use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk[,]… release far more people on their own recognizance while they await their day in court…[a]nd judges should use probation and treatment programs as jail alternatives.[5]
Montana	Supreme Court of Montana, Chief Justice McGrath	Letter to Judges	• Chief Justice of the Montana Supreme Court urged judges to "review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses."[6]
New Jersey	New Jersey Supreme Court, Chief Justice Rabner	Consent Order	• In New Jersey, after the Supreme Court ordered briefing and argument on why it should not order the immediate release of individuals serving county jail sentences, the Attorney General and County Prosecutors agreed to create an immediate presumption of release for every person serving a county jail sentence in New Jersey.[7]
New York	New York State Supreme Court, Bronx County, Justice Doris M. Gonzales	Judicial ruling based on writ of habeas corpus	• In a habeas petition brought by the Legal Aid Society, a Justice Doris M. Gonzales ordered the release of 106 individuals currently held at Rikers Island on a non-criminal technical parole violation. These individuals were selected in the petition by virtue of their age and/or underlying medical condition.[8]
Ohio	Ohio Supreme Court, Chief Justice Maureen O'Connor	News Conference	• Chief Justice O'Connor urged "judges to use their discretion and release people held in jail and incarcerated individuals who are in a high-risk category for being infected with the virus."[9]

Pennsylvania	Pennsylvania Supreme Court	Order	• On April 3, the Pennsylvania Supreme Court ordered the chief judge of all counties to "immediately" engage in a review of the "current capabilities of their county correctional institutions . . . to address the spread of COVID-19," "to ensure that the county correctional institutions in their districts address the threat of COVID-19," as necessary "to identify individuals of incarcerated persons for potential release" and "to undertake efforts to limit the introduction of new inmates into the county prison system."[10]
Utah	Utah Supreme Court and Utah Judicial Council, Chief Justice Durrant	Administrative Order	• The Chief Justice of the Utah Supreme Court ordered that for defendants in-custody on certain misdemeanor offenses, "the assigned judge must reconsider the defendant's custody status and is encouraged to release the defendant subject to appropriate conditions."[11]
Washington	Washington Supreme Court	Order	• On April 10, 2020, the Washington Supreme Court ordered the Governor and Secretary of Corrections "to immediately exercise their authority to take all necessary steps to protect the health and safety of the named petitioners and all Department of Corrections inmates in response to the COVID-19 outbreak, and to report to the Court in writing no later than noon on Monday, April 13, 2020, all steps that have been taken and will be taken and their emergency plan for implementation."[12]
Wyoming	Fremont County	Order	• Riverton Circuit Court Judge Wesley Roberts ordered the release of 30 inmates from the Fremont County Detention Center.[13]

Federal Criminal Detention	D. Alaska	Order	• The United States District Court for the District of Alaska issued an Order establishing an expedited process for at-risk prisoners to file for release.[14]
	C.D. Cal, Judge James V. Selna	Minute Order	• The Court granted temporary release for 90 days, pursuant to 18 U.S.C. § 3142 (i), which authorizes discretionary temporary release when necessary for a person's defense or another compelling reason. Judge Selna held the defendant's age and medical conditions, which place him in the population most susceptible to COVID-19, and in light of the pandemic, to constitute "another compelling reason" and granted his temporary release.[15]
	D. Ct., Judge Jeffrey A. Meyer	Order	• Judge Meyer ordered the release of defendant stating that "the conditions of confinement at Wyatt are not compatible" with current COVID-19 public health guidance concerning social distancing and avoiding congregating in large groups. Judge Meyer is one of four federal judges in Connecticut who has released inmates in connection with the COVID-19 pandemic.[16]
	D.D.C., Judge Randolph D. Moss	Minute Order	• Judge Moss released defendant, despite acknowledging offense charged--marijuana distribution and felon in possession—"is serious" because among other factors mitigating public safety concerns "incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's release to home confinement."[17]

	D.D.C., Judge Randolph D. Moss	Memorandum Opinion	• Judge Moss released defendant while awaiting trial after weighing the risk to the public of releasing defendant [charged with distribution of child pornography] directly against risk to community safety if defendant remained incarcerated in light of the COVID-19 pandemic.[18]
	D. Nev., Judge Jones	Opinion and Order	• Judge Jones delayed defendant's date to surrender to begin his intermittent confinement by a minimum of 30 days because "[i]n considering the total harm and benefits to prisoner and society . . . temporarily suspending [defendant's] intermittent confinement would appear to satisfy the interests of everyone during this rapidly encroaching pandemic." In coming to this conclusion, the court placed weight on the fact that "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; because infection control is challenging in these settings.[19]
	D. S.C., Judge David C. Norton	Order	• Judge Norton granted compassionate release for 73-year-old with severe health conditions under the First Step Act, "[g]iven defendant's tenuous health condition and age, remaining incarcerated during the current global pandemic puts him at even higher risk for severe illness and possible death, and Congress has expressed its desire for courts to [release federal inmates who are vulnerable to COVID-19]."[20]

	N.D. Cal., Judge Vince Chhabria	Sua Sponte Order	• Judge Chhabria issued a sua sponte decision extending defendant's surrender date from June 12, 2020 to September 1, 2020 stating: "By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided . . . To avoid adding to the chaos and creating unnecessary health risks, offenders who are on release and scheduled to surrender to the Bureau of Prisons in the coming months should, absent truly extraordinary circumstances, have their surrender dates extended until this public health crisis has passed."[21]
	N.D. Cal., Judge Hixson	Order	• Judge Hixon released a 74-year old in light of COVID-19 holding "[t]he risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail. Release under the current circumstances also serves the United States' treaty obligation to Peru, which – if there is probable cause to believe Toledo committed the alleged crimes – is to deliver him to Peru alive."[22]
	S.D.N.Y., Judge Paul A. Engelmayer	Amended Order	• Judge Englemayer granted defendant temporary release from custody, pursuant to 18 U.S.C. § 3142(i), "based on the unique confluence of serious health issues and other risk factors facing this defendant, including but not limited to the defendant's serious progressive lung disease and other significant health issues, which place him at a substantially heightened risk of dangerous complications should be contract COVID-19 as compared to most other individuals."[23]

	S.D.N.Y., Judge Alison J. Nathan	Opinion & Order	• Judge Nathan ordered the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department based in part on "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic" which may place "at a heightened risk of contracting COVID-19 should an outbreak develop [in a prison]."[24]
Federal Immigration Detention	9th Cir., Judges Wardlaw, M. Smith, and Judge Siler, 6th Cir., sitting by designation.	Sua Sponte Order	• The panel held "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court."[25]
	C.D. Cal, Judge Terry J. Halter, Jr.	TRO and order to show cause based on writ of habeas corpus	• Judge Halter ordered the release of two ICE detainees. The court found that in detention "[p]etitioners have not been protected [against risks associated with COVID-19]. They are not kept at least 6 feet apart from others at all times. They have been put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers. Moreover, the Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility. While social visits have been discontinued at Adelanto, the rotation of guards and other staff continues."[26]

	D. Mass, Judge Mark L.Wolf	Oral Order	• Judge Wolf ordered the release, with conditions, from ICE custody a member of the class in *Calderon v. Nielsen* based, in part, on the "extraordinary circumstances" posed by COVID-19.[27]
	S.D.N.Y., Judge George B. Daniels	Memorandum Decision and Order	• Judge Daniels ordered the release, under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), of an individual as there was likelihood of success on the merits and COVID-19 risks and individual's own medical issues constituted "extraordinary circumstances warranting release."[28]
	S.D.N.Y., Judge Alison J. Nathan	Opinion and Order	• Judge Nathan ordered the immediate release of four detainees finding "no evidence that the government took any specific action to prevent the spread of COVID-19 to high-risk individuals . . . held in civil detention."[29]
	S.D.N.Y., Judge Analisa Torres	Memorandum Decision and Order.	• Judge Torres granted immediate release on recognizance for ten individuals in immigration detention who have a variety of chronic health conditions that put them at high risk for COVID-19. These conditions include obesity, asthma, diabetes, pulmonary disease, history of congestive heart failure, respiratory problems, gastrointestinal problems, and colorectal bleeding. The court held detainees face serious risks to their health in confinement and "if they remain in immigration detention constitutes irreparable harm warranting a TRO."[30]

[1] Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, Arizona Daily Sun (updated Mar. 25, 2020), https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html.

[2] *Standing Order of the Sacramento Superior Court*, No. SSC-20-PA5 (Mar. 17, 2020), https://www.saccourt.ca.gov/general/standing-orders/docs/ssc-20-5.pdf.

[3] Yoohyun Jung, *Special Master Appointed To Recommend On COVID-19 Jail Releases*, Honolulu Civil Beat (Apr. 2, 2020), https://www.civilbeat.org/2020/04/special-master-appointed-to-decide-on-covid-19-jail-releases/

[4] Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind.*, The Appeal (Mar. 25, 2020), https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus; John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, Lexington Herald Leader (Mar. 23, 2020), https://www.kentucky.com/news/coronavirus/article241428266.html.

[5] *Joint Statement of Chief Justice Bridget M. McCormack*, Mich. Sup. Ct. and Sheriff Matt Saxton, Exec. Dir., Mich. Sheriff Ass'n (Mar. 26, 2020), https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf.

[6] *Letter from Chief Justice Mike McGrath*, Mont. Sup. Ct, to Mont. Ct. of Ltd. Jurisdiction Judges (Mar. 20, 2020), https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333.

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[8] *People of the State of New York, ex rel., v. Cynthia Brann*, No. 260154/2020 (Sup. Ct. NY Mar. 25, 2020), https://linkprotect.cudasvc.com/url?a=https%3a%2f%2flegalaidnyc.org%2fwp-content%2fuploads%2f2020%2f03%2fLAS-Mass-Parole-Holds-Writ.pdf&c=E,1,pDbcoVtCJ0c6j6E8cI3m276yaRsx-nzttikQuvDWwS91mRHj6RhL8o5pEJmJl-lk86sC7-f1rq9dTIh2Pe3ZmAUcoZCiC9er2g4Z4mL_ToQ,&typo=1; *see also* Frank G. Runyeon, *NY Judges Release 122*

Inmates as Virus Cases Spike in Jails, Law360 (March 27, 2020), https://www.law360.com/newyork/articles/1257871/ny-judges-release-122-inmates-as-virus-cases-spike-in-jails.

[9] Press Conference, Ohio Chief Justice Maureen O'Connor and Gov. Mike DeWine (Mar. 19, 2020); *see also* WLWT5, *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges* (Mar. 19, 2020), https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560#.

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[11] Order, *Administrative Order for Court Operations During Pandemic* (Utah Mar. 21, 2020), https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf.

[12] Order on Motion, *Colvin v. Inslee*, No. 98317-8 (Wash. Apr. 10, 2020).

[13] Clair McFarland, *Riverton Circuit Court Judge Releases Jail Inmates over Virus*, Casper Star Tribune (Mar. 20, 2020), https://trib.com/news/state-and-regional/riverton-circuit-court-judge-releases-jail-inmates-over-virus/article_0030215d-4e52-508a-a176-b8f97e6aa8d9.html.

[14] Miscellaneous General Order 20-12, *In the Matter of Expedited Detention Hearing Procedures Effective April 7, 2020* (D. Alaska, Apr. 7, 2020).

[15] Minute Order, *United States v. Michaels*, 8:16-cr-76-JVS, (C.D. Cal. Mar. 26, 2020), https://drive.google.com/file/d/1BeWih63M7FKreKEvLJyIQevYSivGA_PU/view.

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[17] Minute Order, *United States v. Jaffee*, No. 19-cr-88 (RDM) (D.D.C. Mar. 26, 2020), https://drive.google.com/file/d/1AYfIU6QKCOEIpX5Vh3Af6BDqO8goZ5WE/view.

[18] *United States v. Harris*, No. 19-cr-356 (RDM) (D.D.C. Mar. 26, 2020), https://drive.google.com/file/d/1aO3BNOKB8ukL20A76Mu7Fn0GyCng0Ras/view.

[19] *United States v. Barkma*, No. 19-cr-0052 (RCJ-WGC), 2020 U.S. Dist. LEXIS 45628, at *3 (D. Nev. Mar. 17, 2020), https://drive.google.com/file/d/1o35MokiprkmhzCUUieg_Eua6e05v4zOw/view.

[20] *United States v. Copeland*, No. 2:05-cr-135-DCN, at 7 (D.S.C. Mar. 24, 2020), https://drive.google.com/file/d/1tyA8Kjvld23QTLoWo7xbAdqLEOCCVC4q/view.

[21] *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020), https://drive.google.com/file/d/1H47EQMXtQZkXFv_GXSffAV6Xkse3-kpl/view.
[22] *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, No. 19-mj-71055-MAG, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020), https://drive.google.com/file/d/1AfU1ft4Lcm60QbPhjgo9HgGAHkbPKPzD/view.
[23] AM. Order, *United States v. Perez*, 19-cr-297 (PAE), at 1 (S.D.N.Y. Mar. 19, 2020), https://drive.google.com/file/d/17xE8qdGeeTI2d2dWjNDfwmxLc8GxTtfA/view.
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[25] *Xochihua-Jaimes v. Barr*, No. 18-cv-71460 (9th Cir. Mar. 23, 2020), https://drive.google.com/file/d/16eh6qMzihmNlSEq0SzmCSQx98OiLn38l/view
[26] *Castillo v. Barr*, No. 20-cv-605 (TJH)(AFM), at 10 (C.D.Cal. Mar. 27, 2020), https://drive.google.com/file/d/1BeFuU-Lrjj-VVeA6QA2O7zLud7aWIvEN/view.
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[28] *Jovel v. Decker*, No. 12-cv-308 (GBD), at 2(S.D.N.Y. Mar. 26, 2020), https://drive.google.com/file/d/1mrJ9WbCgNGeyWn1cy3xAvo61yJWnaDe8/view.
[29] *Coronel v. Decker*, No. 20-cv-2472 (AJN), at 10 (S.D.N.Y. Mar. 27, 2020), https://legalaidnyc.org/wp-content/uploads/2020/03/20cv2472-Op.-Order-3.27.20.pdf.
[30] *Basank v. Decker*, No. 20-cv-2518 (AT), at 7, 10 (S.D.N.Y. Mar. 26, 2020), https://drive.google.com/file/d/1FJ7tU9JCskKPh4xkoe4j3YgoQ5y2_y0P/view.

Appendix B

DECLARATION OF DR. JONATHAN LOUIS GOLOB

I, Jonathan Louis Golob, declare as follows:

1. I am an Assistant Professor at the University of Michigan School of Medicine in Ann Arbor, Michigan, where I am a specialist in infectious diseases and internal medicine. At the University of Michigan School of Medicine, I am a practicing physician and a laboratory-based scientist. My primary subspecialization is for infections in immunocompromised patients, and my recent scientific publications focus on how microbes affect immunocompromised people. I obtained my medical degree and completed my residency at the University of Washington School of Medicine in Seattle, Washington, and also completed a Fellowship in Internal Medicine Infectious Disease at the University of Washington. I am actively involved in the planning and care for patients with COVID-19. Attached as Exhibit A is a copy of my curriculum vitae.

2. COVID-19 is a novel zoonotic coronavirus that has been identified as the cause of a viral outbreak that originated in Wuhan, China in December 2019. The World Health Organization has declared that COVID-19 is causing a pandemic. As of March 12, 2020, there are over 140,000 confirmed cases of COVID-19. COVID-19 has caused over 5,000 deaths, with exponentially growing outbreaks occurring at multiple sites worldwide, including within the United States.

3. COVID-19 makes certain populations of people severely ill. People over the age of fifty are at higher risk, with those over 70 at serious risk. As the Center for Disease Control and Prevention has advised, certain medical conditions increase the risk of serious COVID-19 for people of any age. These medical conditions include: those with lung disease, heart disease, diabetes, or immunocompromised (such as from cancer, HIV, autoimmune diseases), blood disorders (including sickle cell disease), chronic liver or kidney disease, inherited metabolic disorders, stroke, developmental delay, or pregnancy.

4. For all people, even in advanced countries with very effective health care systems such as the Republic of Korea, the case fatality rate of this infection is about ten fold higher than that observed from a severe seasonal influenza. In the more vulnerable groups, both the need for care, including intensive care, and death is much higher than we observe from influenza infection: In the highest risk populations, the case fatality rate is about 15%. For high risk patients who do not die from COVID-19, a prolonged recovery is expected to be required, including the need for extensive rehabilitation for profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity that can be expected from such a severe illness.

5. In most people, the virus causes fever, cough, and shortness of breath. In high-risk individuals as noted above, this shortness of breath can often be severe. Even in younger and healthier people, infection of this virus requires supportive care, which includes supplemental oxygen, positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation.

6. Most people in the higher risk categories will require more advanced support: positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation. Such care requires highly specialized equipment in limited supply as well as an entire team of care providers, including but not limited to 1:1 or 1:2 nurse to patient ratios, respiratory therapists and intensive care physicians. This level of support can quickly exceed local health care resources.

7. The COVID-19 virus can severely damage the lung tissue, requiring an extensive period of rehabilitation and in some cases a permanent loss of respiratory capacity. The virus also seems to target the heart muscle itself, causing a medical condition called mycocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, which reduces the heart's ability to pump, leading to rapid or abnormal heart rhythms in the short term, and heart failure that limits exercise tolerance and the ability to work lifelong. There is emerging evidence that the virus can trigger an over-response by the immune system in infected people, further damaging tissues. This cytokine release syndrome can result in widespread damage to other organs, including permanent injury to the kidneys (leading to dialysis dependence) and neurologic injury.

8. There is no vaccine for this infection. Unlike influenza, there is no known effective antiviral medication to prevent or treat infection from COVID-19. Experimental therapies are being attempted. The only known effective measures to reduce the risk for a vulnerable person from injury or death from COVID-19 are to prevent individuals from being infected with the COVID-19 virus. Social distancing, or remaining physically separated from known or potentially infected individuals, and hygiene, including washing with soap and water, are the only known effective measures for protecting vulnerable communities from COVID-19.

9. COVID-19 is known to be spreading in the Seattle, Washington-area community. As of March 11, 2020 there are 270 confirmed cases of COVID-19 (an increase of 36 from March 10, 2020) and twenty-seven deaths from COVID-19 in the Seattle area. This

represents the largest known outbreak in the United States, and one the largest known outbreaks in the world as of March 12, 2020.

10. Nationally, without effective public health interventions, CDC projections indicate about 200 million people in the United States could be infected over the course of the epidemic, with as many as 1.5 million deaths in the most severe projections. Effective public health measures, including social distancing and hygiene for vulnerable populations, could reduce these numbers.

11. Based on the recovered genomes of the virus from the community analyzed by the Nextstrain project run by Dr. Trevor Bedford of the Fred Hutchinson Cancer Research Center in Seattle, it is known that the infection is being shared from person to person in and around Seattle. COVID-19 strains have specifically traced infection between residents and staff members of a skilled nursing facility in the Seattle area. This evidence suggests that COVID-19 is capable of spreading rapidly in institutionalized settings. The highest known person-to-person transmission rates for COVID-19 are in a skilled nursing facility in Kirkland, Washington and on afflicted cruise ships in Japan and off the coast of California. The strain of virus spreading in the Seattle area is genetically related to the strain of virus that spread readily on the cruise ships.

12. The COVID-19 outbreak in Seattle has resulted in the need for unprecedented public health measures, including multiple efforts to facilitate and enforce social distancing. These include encouraging employees to work from home, bans of gathering of more than 250 people, closure of schools, closure of the University of Washington campus in Seattle, limitations of visitation to skilled nursing facilities, and cancellation of major public events. Individuals have been asked to delay or cancel health care procedures in order to free up capacity within the system.

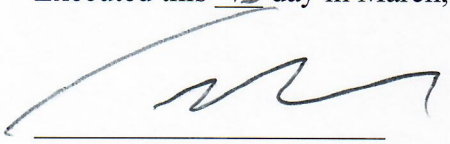
13. During the H1N1 influenza ("Swine Flu") epidemic in 2009, jails and prisons were sites of severe outbreaks of viral infection. Given the avid spread of COVID-19 in skilled nursing facilities and cruise ships, it is reasonable to expect COVID-19 will also readily spread in detention centers, particularly when residents cannot engage in proper hygiene and isolate themselves from infected residents or staff.

14. This information provides many reasons to conclude that vulnerable people, people over the age of 50 and people of any age with lung disease, heart disease, diabetes, or immunocompromised (such as from cancer, HIV, autoimmune diseases), blood disorders (including sickle cell disease), chronic liver or kidney disease, inherited metabolic disorders, stroke, developmental delay, or pregnancy living in an institutional setting,

such as an immigration detention center, with limited access to adequate hygiene facilities and exposure to potentially infected individuals from the community are at grave risk of severe illness and death from COVID-19.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day in March, 2020 in Ann Arbor, Michigan.



Dr. Jonathan Louis Golob

Appendix C

Declaration of Dr. Jaimie Meyer

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

I. Background and Qualifications

1. I am Dr. Jaimie Meyer, an Assistant Professor of Medicine at Yale School of Medicine and Assistant Clinical Professor of Nursing at Yale School of Nursing in New Haven, Connecticut. I am board certified in Internal Medicine, Infectious Diseases and Addiction Medicine. I completed my residency in Internal Medicine at NY Presbyterian Hospital at Columbia, New York, in 2008. I completed a fellowship in clinical Infectious Diseases at Yale School of Medicine in 2011 and a fellowship in Interdisciplinary HIV Prevention at the Center for Interdisciplinary Research on AIDS in 2012. I hold a Master of Science in Biostatistics and Epidemiology from Yale School of Public Health.

2. I have worked for over a decade on infectious diseases in the context of jails and prisons. From 2008-2016, I served as the Infectious Disease physician for York Correctional Institution in Niantic, Connecticut, which is the only state jail and prison for women in Connecticut. In that capacity, I was responsible for the management of HIV, Hepatitis C, tuberculosis, and other infectious diseases in the facility. Since then, I have maintained a dedicated HIV clinic in the community for patients returning home from prison and jail. For over a decade, I have been continuously funded by the NIH, industry, and foundations for clinical research on HIV prevention and treatment for people involved in the criminal justice system, including those incarcerated in closed settings (jails and prisons) and in the community under supervision (probation and parole). I have served as an expert consultant on infectious diseases and women's health in jails and prisons for the UN Office on Drugs and Crimes, the Federal Bureau of Prisons, and others. I also served as an expert health witness for the US Commission on Civil Rights Special Briefing on Women in Prison.

3. I have written and published extensively on the topics of infectious diseases among people involved in the criminal justice system including book chapters and articles in leading peer-reviewed journals (including Lancet HIV, JAMA Internal Medicine, American Journal of Public Health, International Journal of Drug Policy) on issues of prevention, diagnosis, and management of HIV, Hepatitis C, and other infectious diseases among people involved in the criminal justice system.

4. My C.V. includes a full list of my honors, experience, and publications, and it is attached as Exhibit A.

5. I am being paid $1,000 for my time reviewing materials and preparing this report.

6. I have not testified as an expert at trial or by deposition in the past four years.

II. Heightened Risk of Epidemics in Jails and Prisons

7. The risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected. There are several reasons this is the case, as delineated further below.

8. Globally, outbreaks of contagious diseases are all too common in closed detention settings and are more common than in the community at large. Prisons and jails are not isolated from communities. Staff, visitors, contractors, and vendors pass between communities and facilities and can bring infectious diseases into facilities. Moreover, rapid turnover of jail and prison populations means that people often cycle between facilities and communities. People often need to be transported to and from facilities to attend court and move between facilities. Prison health is public health.

9. Reduced prevention opportunities: Congregate settings such as jails and prisons allow for rapid spread of infectious diseases that are transmitted person to person, especially those passed by droplets through coughing and sneezing. When people must share dining halls, bathrooms, showers, and other common areas, the opportunities for transmission are greater. When infectious diseases are transmitted from person to person by droplets, the best initial strategy is to practice social distancing. When jailed or imprisoned, people have much less of an opportunity to protect themselves by social distancing than they would in the community. Spaces within jails and prisons are often also poorly ventilated, which promotes highly efficient spread of diseases through droplets. Placing someone in such a setting therefore dramatically reduces their ability to protect themselves from being exposed to and acquiring infectious diseases.

10. Disciplinary segregation or solitary confinement is not an effective disease containment strategy. Beyond the known detrimental mental health effects of solitary confinement, isolation of people who are ill in solitary confinement results in decreased medical attention and increased risk of death. Isolation of people who are ill using solitary confinement also is an ineffective way to prevent transmission of the virus through droplets to others because, except in specialized negative pressure rooms (rarely in medical units if available at all), air continues to flow outward from rooms to the rest of the facility. Risk of exposure is thus increased to other people in prison and staff.

11. Reduced prevention opportunities: During an infectious disease outbreak, people can protect themselves by washing hands. Jails and prisons do not provide adequate opportunities to exercise necessary hygiene measures, such as frequent handwashing or use of alcohol-based sanitizers when handwashing is unavailable. Jails and prisons are often under-resourced and ill-equipped with sufficient hand soap and alcohol-based sanitizers for people detained in and working in these settings. High-touch surfaces (doorknobs, light switches, etc.) should also be cleaned and disinfected regularly with bleach to prevent virus spread, but this is often not done in jails and prisons because of a lack of cleaning supplies and lack of people available to perform necessary cleaning procedures.

12. Reduced prevention opportunities: During an infectious disease outbreak, a containment strategy requires people who are ill with symptoms to be isolated and that caregivers have

access to personal protective equipment, including gloves, masks, gowns, and eye shields. Jails and prisons are often under-resourced and ill-equipped to provide sufficient personal protective equipment for people who are incarcerated and caregiving staff, increasing the risk for everyone in the facility of a widespread outbreak.

13. Increased susceptibility: People incarcerated in jails and prisons are more susceptible to acquiring and experiencing complications from infectious diseases than the population in the community.[1] This is because people in jails and prisons are more likely than people in the community to have chronic underlying health conditions, including diabetes, heart disease, chronic lung disease, chronic liver disease, and lower immune systems from HIV.

14. Jails and prisons are often poorly equipped to diagnose and manage infectious disease outbreaks. Some jails and prisons lack onsite medical facilities or 24-hour medical care. The medical facilities at jails and prisons are almost never sufficiently equipped to handle large outbreaks of infectious diseases. To prevent transmission of droplet-borne infectious diseases, people who are infected and ill need to be isolated in specialized airborne negative pressure rooms. Most jails and prisons have few negative pressure rooms if any, and these may be already in use by people with other conditions (including tuberculosis or influenza). Resources will become exhausted rapidly and any beds available will soon be at capacity. This makes both containing the illness and caring for those who have become infected much more difficult.

15. Jails and prisons lack access to vital community resources to diagnose and manage infectious diseases. Jails and prisons do not have access to community health resources that can be crucial in identifying and managing widespread outbreaks of infectious diseases. This includes access to testing equipment, laboratories, and medications.

16. Jails and prisons often need to rely on outside facilities (hospitals, emergency departments) to provide intensive medical care given that the level of care they can provide in the facility itself is typically relatively limited. During an epidemic, this will not be possible, as those outside facilities will likely be at or over capacity themselves.

17. Health safety: As an outbreak spreads through jails, prisons, and communities, medical personnel become sick and do not show up to work. Absenteeism means that facilities can become dangerously understaffed with healthcare providers. This increases a number of risks and can dramatically reduce the level of care provided. As health systems inside facilities are taxed, people with chronic underlying physical and mental health conditions and serious medical needs may not be able to receive the care they need for these conditions. As supply chains become disrupted during a global pandemic, the availability of medicines and food may be limited.

18. Safety and security: As an outbreak spreads through jails, prisons, and communities, correctional officers and other security personnel become sick and do not show up to

[1] *Active case finding for communicable diseases in prisons*, 391 The Lancet 2186 (2018), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31251-0/fulltext.

work. Absenteeism poses substantial safety and security risk to both the people inside the facilities and the public.

19. These risks have all been borne out during past epidemics of influenza in jails and prisons. For example, in 2012, the CDC reported an outbreak of influenza in 2 facilities in Maine, resulting in two inmate deaths.[2] Subsequent CDC investigation of 995 inmates and 235 staff members across the 2 facilities discovered insufficient supplies of influenza vaccine and antiviral drugs for treatment of people who were ill and prophylaxis for people who were exposed. During the H1N1-strain flu outbreak in 2009 (known as the "swine flu"), jails and prisons experienced a disproportionately high number of cases.[3] Even facilities on "quarantine" continued to accept new intakes, rendering the quarantine incomplete. These scenarios occurred in the "best case" of influenza, a viral infection for which there was an effective and available vaccine and antiviral medications, unlike COVID-19, for which there is currently neither.

III. Profile of COVID-19 as an Infectious Disease[4]

20. The novel coronavirus, officially known as SARS-CoV-2, causes a disease known as COVID-19. The virus is thought to pass from person to person primarily through respiratory droplets (by coughing or sneezing) but may also survive on inanimate surfaces. People seem to be most able to transmit the virus to others when they are sickest but it is possible that people can transmit the virus before they start to show symptoms or for weeks after their symptoms resolve. In China, where COVID-19 originated, the average infected person passed the virus on to 2-3 other people; transmission occurred at a distance of 3-6 feet. Not only is the virus very efficient at being transmitted through droplets, everyone is at risk of infection because our immune systems have never been exposed to or developed protective responses against this virus. A vaccine is currently in development but will likely not be able for another year to the general public. Antiviral medications are currently in testing but not yet FDA-approved, so only available for compassionate use from the manufacturer. People in prison and jail will likely have even less access to these novel health strategies as they become available.

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[2] *Influenza Outbreaks at Two Correctional Facilities — Maine, March 2011*, Centers for Disease Control and Prevention (2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6113a3.htm.

[3] David M. Reutter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, Prison Legal News (Feb. 15, 2010), https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-but-deaths-are-few/.

[4] This whole section draws from Brooks J. Global Epidemiology and Prevention of COVID19, COVID-19 Symposium, Conference on Retroviruses and Opportunistic Infections (CROI), virtual (March 10, 2020); *Coronavirus (COVID-19)*, Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/index.html; Brent Gibson, *COVID-19 (Coronavirus): What You Need to Know in Corrections*, National Commission on Correctional Health Care (February 28, 2020), https://www.ncchc.org/blog/covid-19-coronavirus-what-you-need-to-know-in-corrections.

21. Most people (80%) who become infected with COVID-19 will develop a mild upper respiratory infection but emerging data from China suggests serious illness occurs in up to 16% of cases, including death.[5] Serious illness and death is most common among people with underlying chronic health conditions, like heart disease, lung disease, liver disease, and diabetes, and older age.[6] Death in COVID-19 infection is usually due to pneumonia and sepsis. The emergence of COVID-19 during influenza season means that people are also at risk from serious illness and death due to influenza, especially when they have not received the influenza vaccine or the pneumonia vaccine.

22. The care of people who are infected with COVID-19 depends on how seriously they are ill.[7] People with mild symptoms may not require hospitalization but may continue to be closely monitored at home. People with moderate symptoms may require hospitalization for supportive care, including intravenous fluids and supplemental oxygen. People with severe symptoms may require ventilation and intravenous antibiotics. Public health officials anticipate that hospital settings will likely be overwhelmed and beyond capacity to provide this type of intensive care as COVID-19 becomes more widespread in communities.

23. COVID-19 prevention strategies include containment and mitigation. Containment requires intensive hand washing practices, decontamination and aggressive cleaning of surfaces, and identifying and isolating people who are ill or who have had contact with people who are ill, including the use of personal protective equipment. Jails and prisons are totally under-resourced to meet the demand for any of these strategies. As infectious diseases spread in the community, public health demands mitigation strategies, which involves social distancing and closing other communal spaces (schools, workplaces, etc.) to protect those most vulnerable to disease. Jails and prisons are unable to adequately provide social distancing or meet mitigation recommendations as described above.

24. The time to act is now. Data from other settings demonstrate what happens when jails and prisons are unprepared for COVID-19. News outlets reported that Iran temporarily released 70,000 prisoners when COVID-19 started to sweep its facilities.[8] To date, few state or federal prison systems have adequate (or any) pandemic preparedness plans in

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[5] *Coronavirus Disease 2019 (COVID-19): Situation Summary*, Centers for Disease Control and Prevention (March 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/summary.html.

[6] *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study.* The Lancet (published online March 11, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext

[7] *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease*, Centers for Disease Control and Prevention (March 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

[8] *Iran temporarily releases 70,000 prisoners as coronavirus cases surge*, Reuters (March 9, 2020), https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5.

place.[9] Systems are just beginning to screen and isolate people on entry and perhaps place visitor restrictions, but this is wholly inadequate when staff and vendors can still come to work sick and potentially transmit the virus to others.

IV. Risk of COVID-19 in ICE's NYC-Area Detention Facilities

25. I have reviewed the following materials in making my assessment of the danger of COVID-19 in the Bergen, Essex, Hudson, and Orange County jails ("ICE's NYC-area jails"): (1) a declaration by Marinda van Dalen, a Senior Attorney in the Health Justice Program at New York Lawyers for the Public Interest (NYLPI); (2) the report *Detained and Denied: Healthcare Access in Immigration Detention*, released by NYLPI in 2017; and (3) the report *Ailing Justice*: *New Jersey*, *Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention*, released by Human Rights First in 2018.

26. Based on my review of these materials, my experience working on public health in jails and prisons, and my review of the relevant literature, it is my professional judgment that these facilities are dangerously under-equipped and ill-prepared to prevent and manage a COVID-19 outbreak, which would result in severe harm to detained individuals, jail and prison staff, and the broader community. The reasons for this conclusion are detailed as follows.

27. The delays in access to care that already exist in normal circumstances will only become worse during an outbreak, making it especially difficult for the facilities to contain any infections and to treat those who are infected.

28. Failure to provide individuals with continuation of the treatment they were receiving in the community, or even just interruption of treatment, for chronic underlying health conditions will result in increased risk of morbidity and mortality related to these chronic conditions.

29. Failure to provide individuals adequate medical care for their underlying chronic health conditions results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality if they do become infected.

30. People with underlying chronic mental health conditions need adequate access to treatment for these conditions throughout their period of detention. Failure to provide adequate mental health care, as may happen when health systems in jails and prisons are taxed by COVID-19 outbreaks, may result in poor health outcomes. Moreover, mental health conditions may be exacerbated by the stress of incarceration during the COVID-19 pandemic, including isolation and lack of visitation.

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[9] Luke Barr & Christina Carrega, *State prisons prepare for coronavirus but federal prisons not providing significant guidance, sources say*, ABC News (March 11, 2020), https://abcnews.go.com/US/state-prisons-prepare-coronavirus-federal-prisons-providing-significant/story?id=69433690.

31. Failure to keep accurate and sufficient medical records will make it more difficult for the facilities to identify vulnerable individuals in order to both monitor their health and protect them from infection. Inadequate screening and testing procedures in facilities increase the widespread COVID-19 transmission.

32. Language barriers will similarly prevent the effective identification of individuals who are particularly vulnerable or may have symptoms of COVID-19. Similarly, the failure to provide necessary aids to individuals who have auditory or visual disabilities could also limit the ability to identify and monitor symptoms of COVID-19.

33. The commonplace neglect of individuals with acute pain and serious health needs under ordinary circumstances is also strongly indicative that the facilities will be ill-equipped to identify, monitor, and treat a COVID-19 epidemic.

34. The failure of these facilities to adequately manage single individuals in need of emergency care is a strong sign that they will be seriously ill-equipped and under-prepared when a number of people will need urgent care simultaneously, as would occur during a COVID-19 epidemic.

35. For individuals in these facilities, the experience of an epidemic and the lack of care while effectively trapped can itself be traumatizing, compounding the trauma of incarceration.

V. Conclusion and Recommendations

36. For the reasons above, it is my professional judgment that individuals placed in ICE's NYC-area jails are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death.

37. Reducing the size of the population in jails and prisons can be crucially important to reducing the level of risk both for those within those facilities and for the community at large.

38. As such, from a public health perspective, it is my strong opinion that individuals who can safely and appropriately remain in the community not be placed in ICE's NYC-area jails at this time. I am also strongly of the opinion that individuals who are already in those facilities should be evaluated for release.

39. This is more important still for individuals with preexisting conditions (e.g., heart disease, chronic lung disease, chronic liver disease, suppressed immune system, diabetes) or who are over the age of 60. They are in even greater danger in these facilities, including a meaningfully higher risk of death.

40. It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in these facilities is a matter of days, not weeks. Once a case of

COVID-19 identified in a facility, it will likely be too late to prevent a widespread outbreak.

41. Health in jails and prisons is community health. Protecting the health of individuals who are detained in and work in these facilities is vital to protecting the health of the wider community.

I declare under penalty of perjury that the foregoing is true and correct.

March 15, 2020
New Haven, Connecticut

Dr. Jaimie Meyer

Appendix D

Declaration of Joe Goldenson, MD

1. I am a medical physician with 33 years of experience in correctional health care. For 28 years, I worked for Jail Health Services of the San Francisco Department of Public Health. For 22 of those years, I served as the Director and Medical Director. In that role, I provided direct clinical services, managed public health activities in the San Francisco County jail, and administered the correctional health enterprise, including its budget, human resources services, and medical, mental health, dental, and pharmacy services.

2. I served as a member of the Board of Directors of the National Commission on Correctional Health Care for eight years and was past President of the California chapter of the American Correctional Health Services Association. In 2014, I received the Armond Start Award of Excellence from the Society of Correctional Physicians, which recognizes its recipient as a representative of the highest ideals in correctional medicine.

3. For 35 years, I held an academic appointment as an Assistant Clinical Professor at the University of California, San Francisco.

4. I have worked extensively as a correctional health medical expert and court monitor. I have served as a medical expert for the United States District Court for the Northern District of California for 25 years. I am currently retained by that Court as a medical expert in *Plata v. Newsom*, Case No. 3:01-cv-01351 (N.D. Cal.), to evaluate medical care provided to inmate patients in the California Department of Correctional Rehabilitation. I have also served as a medical expert/monitor at Cook County Jail in Chicago and Los Angeles County Jail, at other jails in Washington, Texas, and Florida, and at prisons in Illinois, Ohio, and Wisconsin.

The nature of COVID-19

5. The SARS-nCoV-2 virus, and the human infection it causes, COVID-19 disease, is a global pandemic and has been termed a global health emergency by the WHO. Cases first began appearing sometime between December 1, 2019 and

December 31, 2019 in Hubei Province, China. Most of these cases were associated with a wet seafood market in Wuhan City.

6. On January 7, 2020, the virus was isolated. The virus was analyzed and discovered to be a coronavirus closely related to the SARS coronavirus which caused the 2002-2003 SARS epidemic.

7. COVID-19 is a serious disease. The overall case fatality rate has been estimated to range from 0.3 to 3.5%, which is 5-35 times the fatality associated with influenza infection. COVID-19 is characterized by a flu-like illness. While more than 80% of cases are self-limited and generally mild, overall some 20% of cases will have more severe disease requiring medical intervention and support.

8. The case fatality rate varies significantly depending on the presence of certain demographic and health factors. The case fatality rate varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases) for those with pre-existing medical conditions including cardio-vascular disease, respiratory disease, diabetes, and immune compromise.

9. Among patients who have more serious disease, some 30% will progress to Acute Respiratory Distress Syndrome (ARDS) which has a 30% mortality rate overall, higher in those with other health conditions. Some 13% of these patients will require mechanical ventilation, which is why intensive care beds and ventilators have been in insufficient supply in Italy, Iran, and in parts of China.

10. COVID-19 is widespread. Since it first appeared in Hubei Province, China, in late 2019, outbreaks have subsequently occurred in more than 160 countries and all populated continents, heavily affected countries include Italy, Spain, Iran, South

Korea, and the US. The U.S. is now the world's most affected country. As of April 3, 2020, there have been 972,303 confirmed human cases globally and 50,322 known deaths. The pandemic has been termed a global health emergency by the WHO. It is not contained and cases are growing exponentially.

11. In the United States alone, the CDC reports 239,279 cases and 5,443 deaths as of April 3, 2020. The Louisiana Department of Health reports 10,297 cases and 370 dead as of April 3. All these numbers are likely underestimates because of limited availability of testing.

12. SARS-nCoV-2 is now known to be fully adapted to human-to-human spread. This is almost certainly a new human infection, which also means that there is no pre-existing or "herd" immunity, allowing for very rapid chains of transmission once the virus is circulating in communities.

13. The U.S. CDC estimates that the reproduction rate of the virus, the R0, is 2.4-3.8, meaning that each newly infected person is estimated to infect on average 3 additional persons. This is highly infectious and only the great influenza pandemic of 1918 (the Spanish Flu as it was then known) is thought to have higher infectivity. This again is likely a function of all human populations currently being highly susceptible. The attack rate given an exposure is also high, estimated at 20-30% depending on community conditions, but may be as high as 80% in some settings and populations. The incubation period is thought to be 2-14 days, which is why isolation is generally limited to 14 days.

14. There is currently no vaccine for COVID-19, and no cure. The only know ways to prevent the spread of SARS-nCoV-2 involve measures such as thorough

handwashing, frequent decontamination of surfaces, and maintaining six feet of physical distance between individuals ("social distancing").

The risks of COVID-19 in detention facilities

15. COVID-19 poses a serious risk to prisoners, workers, and anyone else in detention facilities. Detention facilities, including prisons like Oakdale, have long been associated with high transmission probabilities for infectious diseases, including tuberculosis, multi-drug resistant tuberculosis, MRSA (methicillin resistant staph aureus), and viral hepatitis.

16. The severe epidemic of Tuberculosis in prisons in Central Asia and Eastern Europe was demonstrated to increase *community* rates of Tuberculosis in multiple states in that region, underscoring the risks prison outbreaks can lead to for the communities surrounding a prison.

17. Infections that are transmitted through droplets, like influenza and SARS-nCoV-2 virus, are particularly difficult to control in detention facilities, as social distancing and proper decontamination of surfaces is virtually impossible.

18. For example, several deaths were reported in the US in immigration detention facilities associated with ARDS following influenza A, including a 16-year old male immigrant child who died of untreated ARDS in custody in May 2019.

19. A number of features of these facilities can heighten risks for exposure, acquisition, transmission, and clinical complications of these infectious diseases. These include physical/mechanical risks such as overcrowding; population density in close confinement; insufficient ventilation; shared toilet, shower, and eating environments; and limits on hygiene and personal protective equipment

such as masks and gloves in some facilities. Limits on soap (copays are common) and hand sanitizer, since they can contain alcohol, are also risks for spread.

20. Additionally, the high rate of turnover and population mixing of staff and detainees increases likelihoods of exposure. This has led to prison outbreaks of COVID-19 in multiple detention facilities in China, associated with introduction into facilities by staff. The current outbreak in the detention facility of Riker's Island in New York City is an example—and in the first days of that outbreak, the majority of cases were among prison staff, not inmates.

21. In addition to the nature of the prison environment, prison and jail populations are also at additional risk due to high rates of chronic health conditions, substance use, mental health issues, and, particularly in prisons, aging and chronically ill populations who may be vulnerable to death or severe illnesses after infection from COVID-19 disease.

22. While every effort should be made to reduce exposure in detention facilities through internal mitigation efforts, this may be extremely difficult to achieve and sustain quickly enough. It is therefore an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible.

23. Given the experience in China as well as the literature on infectious diseases in jail, additional outbreaks of COVID-19 among the U.S. jail and prison populations are inevitable, as evidenced in Oakdale. Releasing as many inmates as possible is important to protect the health of inmates, correctional facility staff, health care workers at jails and other detention facilities, the community as a

whole. Indeed, according to the World Health Organization, "enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages."[1]

24. From news reports, it is my understanding that 5 prisoners have died at FCI Oakdale. 18 detainees and 17 staff members have COVID-19, and that dozens more have symptoms. Even these dozens may represent the tip of the iceberg, since newly-infected people typically do not show symptoms for 2-14 days, and since the infection spreads rapidly to additional people. News outlets have reported that four detainees have already died from COVID-19 in FCI Oakdale. Given the way the disease has progressed elsewhere, we can expect the death toll to mount rapidly.

25. It is my understanding that FCI Oakdale has five open bay / dorm housing units, eight housing units with multiple-occupancy cells, and no housing units with single occupancy cells, but a number of segregation units. It also my understanding that FCI Oakdale may have upward of 100 new admissions in a given month and roughly 1,700 detainees in the facility on any given day; that staff that enter and leave the facility regularly; and that detainees share restroom and shower facilities and eat communally prepared food.

26. Based on these understandings, it is my opinion that the exponential infection of rate for COVID-19 we already see in the community would be magnified within

[1] World Health Organization, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance (Mar. 15, 2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf.

FCI Oakdale. Adequate social distancing would be impossible to maintain. What's more, the infection in FCI Oakdale would not stay limited to the facility, but would worsen infection rates in the broader community. The death rate will increase substantially before it starts to diminish without major interventions. This is why leaving implementation in the hands of local officials alone, who lack the expertise and resources and were incapable of preventing the outbreak in the first place or treating those who eventually died, is insufficient.

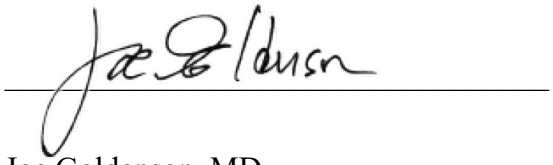
27. It is my public health recommendation that everyone who is medically-vulnerable to severe symptoms and death from COVID-19, as defined in this lawsuit,[2] be released from FCI Oakdale immediately, taking precautions that they are released to a place where they can maintain medically appropriate isolation for at least 14 days and receive any necessary and available testing healthcare for underlying chronic conditions.

28. It is my public health recommendation that a public health expert be appointed to oversee operations related to preventing further spread of COVID-19 in FCI Oakdale, which may include authorizing further staggered release of detainees until it is possible to maintain consistent social distancing and appropriate hygiene within the facility.

[2] "Persons held at Oakdale over the age of 50 , as well as all current and future persons held at Oakdale of any age who experience (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (last two weeks) pregnancy."

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of April 2020 in Alameda County, CA



Joe Goldenson, MD

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