

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR CURRY COUNTY

STATE OF OREGON,
Plaintiff,

v.

DANIEL PEDRO ALCAZAR,
Defendant.

Case No. 17CR17227

CA A170716

**MOTION TO APPEAR AMICI CURIAE
BY CRIMINAL JUSTICE REFORM
CLINIC AND ACLU OF OREGON**

The Criminal Justice Reform Clinic at Lewis & Clark (“CJRC”) and American Civil Liberties Union of Oregon (“ACLU of Oregon”) respectfully move for an order granting leave to appear in this matter as amici curiae and to file an amici curiae brief in this case, attached as Exhibit 1 to this motion.

The Criminal Justice Reform Clinic (CJRC) at Lewis & Clark Law School is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon’s criminal justice system. Under the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases and issues, including for clients that are currently or were formerly incarcerated. In addition to direct client casework, CJRC also works in collaboration with attorneys and organizations in Oregon on various research reports, data driven projects, and legal briefs, all designed to understand and improve Oregon’s criminal justice system.

1 ACLU of Oregon is a statewide, non-profit, and non-partisan organization with over
2 33,000 members, dedicated to defending and advancing civil rights and civil liberties for
3 Oregonians. Among other priorities, ACLU of Oregon is committed to advocating for the rights
4 of people incarcerated in Oregon corrections institutions to be protected from cruel and
5 inhumane conditions of confinement, including the right to adequate medical care.

6 The ACLU of Oregon and CJRC's proposed amici curiae brief is made in support of Mr.
7 Alcazar's motion under ORS 138.285 in light of the extraordinary risks presented by COVID-19
8 in Oregon prisons. People in custody in Oregon prisons remain crowded together in ideal
9 spreading conditions for COVID-19 and the Oregon Department of Corrections ("ODOC") has
10 already admitted it cannot implement social distancing measures without significantly reducing
11 its population. Prisons and jails across the country are being ravaged by the virus, and the
12 confirmed cases in Oregon prisons are spiking. The virus is especially risky for older people,
13 medically vulnerable people and people of color. Each person incarcerated in Oregon, including
14 Mr. Alcazar, faces the potential addition of death or permanent and debilitating medical injury to
15 every prisoner's sentence.

16 As is further explained in the proposed amici curiae brief, ORS 138.285 allows this Court
17 to stay Mr. Alcazar's sentence and release him from prison pending his appeal, and ORS
18 138.285(2)(c) explicitly requires the Court to consider Mr. Alcazar's health when making this
19 determination. Given the extraordinary risk COVID-19 presents to Mr. Alcazar, Mr. Alcazar's
20 health, as a statutory factor, should be given primary weight, and should lead to a grant of Mr.
21 Alcazar's request to stay his sentence and release him from prison pending appeal. This is the
22 only way to apply the statute consistently with the United States and Oregon Constitutions. The
23 proposed amici curiae brief therefore presents the ACLU of Oregon's and CJRC's position as to
24 the correct rule of law in this matter, and this position of law does not affect a private interest of
25 the proposed amici curiae.

26

1 On May 27, 2020, counsel for Mr. Alcazar, Deputy Public Defender Sarah Laidlaw,
2 authorized counsel to advise the Court that Mr. Alcazar had no objection to ACLU of Oregon
3 and CJRC appearing as *amici*. On May 29, 2020, counsel for the State Of Oregon, District
4 Attorney Joshua A. Spansail, authorized counsel to advise the Court that the State had no
5 objection to ACLU of Oregon and CJRC appearing as *amici* and asked that *amici* comply with
6 ORAP 8.15.

7 Mr. Alcazar filed his arguments for his Motion for Stay of Sentence and Release Pending
8 Appeal on May 26, 2020. *Amici* appear in support of those arguments and timely file this motion
9 within the seven-day deadline set forth in ORAP 8.15(4).

10 For these reasons, the ACLU of Oregon and CJRC respectfully move for an order
11 granting leave to file the proposed amici curiae brief attached as Exhibit 1.

12
13 Dated this 29th day of May, 2020.

14 By: s/Aliza B. Kaplan
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing MOTION TO APPEAR AMICI CURIAE BY CRIMINAL JUSTICE REFORM CLINIC AND ACLU OF OREGON to be served on the following person[s]:

Benjamin Gutman #160599 Solicitor General 1162 Court Street NE Salem, OR 97301 Benjamin.gutman@doj.stte.or.us	Joshua A. Spansail District Attorney Curry County District Attorney's Office 94235 Moore Street, Ste. 232 spansailj@co.curry.or.us
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by the following indicated method or methods:

- ☒ by e-mail and/or electronically mailed notice from the Court to the parties' email addresses as recorded in the Court's e-filing system on the date set forth below.
- ☐ by mailing full, true and correct copies thereof in sealed, first class postage prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.
- ☐ by causing full, true, and correct copies thereof to be hand-delivered to the parties and/or their attorneys at their last-known office addresses listed above on the date set forth below.
- ☐ by sending full, true, and correct copies thereof, via overnight courier in sealed, prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or their attorneys, on the date set forth below.
- ☐ by faxing full, true, and correct copies thereof to the fax machines which are the last-known fax numbers for the parties' and/or attorneys' offices, on the date set forth below.

DATED: May 29, 2020

s/Kelly K. Simon

EXHIBIT 1

TO MOTION TO APPEAR AMICI CURIAE BY CRIMINAL JUSTICE REFORM CLINIC AND ACLU OF OREGON

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4
5 IN THE CIRCUIT COURT OF THE STATE OF OREGON
6 FOR CURRY COUNTY

7 STATE OF OREGON,
8 Plaintiff,

9 v.

10 DANIEL PEDRO ALCAZAR,
11 Defendant.

Case No. 17CR17227

CA A170716

**PROPOSED BRIEF OF AMICI CURIAE
CRIMINAL JUSTICE REFORM CLINIC
AND ACLU OF OREGON IN SUPPORT
OF DEFENDANT’S MOTION FOR
STAY OF SENTENCE AND RELEASE
PENDING APPEAL**

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13
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15 INTRODUCTION

16 The world is in the midst of a global pandemic that has literally brought society to a halt.
17 The novel coronavirus that causes COVID-19 is a rapidly-spreading, highly contagious and
18 sometimes lethal virus. There is no vaccine and no one is immune. The risk of death or severe
19 medical outcomes is especially high for people, who have certain pre-existing medical
20 conditions, are older, or who live in communities of color.

21 Congregate living is a particular recipe for disaster during this pandemic. Health experts
22 uniformly agree that social distancing – maintaining physical distance of at least six feet from
23 others – is the only effective way to curb the spread of COVID-19. This is impossible for people
24 living and working in Oregon prisons. The Oregon Department of Corrections (“ODOC”) has
25 already admitted it cannot implement social distancing measures without significantly reducing
26 its population.

1 Incarceration should not be a death sentence. However, prisons and jails across the
2 country are being ravaged by the virus, and the confirmed cases in Oregon prisons are spiking,
3 already resulting in one death. Oregon’s current prison conditions are tantamount to the potential
4 addition of death or permanent and debilitating medical injury to every prisoner’s sentence,
5 especially for people with additional healthcare needs like Mr. Alcazar, who is living with HIV.

6 The United States and Oregon Constitutions prohibit the infliction of cruel and unusual
7 punishment. Oregon’s Constitution extends additional protections to prohibit treating people
8 confined in prison with “unnecessary rigor,” prohibiting, for example, prison conditions that
9 subject people in custody to serious health hazards. Requiring Mr. Alcazar to remain
10 incarcerated during his appeal effectively sentences him to a game of chance where the
11 consequences of losing are death or permanent, debilitating medial injury. Neither the United
12 States nor the Oregon Constitution countenances such a sentence.

13 This Court has the statutory authority under ORS 138.285 to immediately remedy these
14 violations of Mr. Alcazar’s constitutional rights and should do so by granting Mr. Alcazar’s
15 Motion for Stay of Sentence and Release Pending Appeal (“Mr. Alcazar’s Motion”). ORS
16 138.285(2)(c) explicitly requires the Court to consider Mr. Alcazar’s health when determining
17 whether to grant Mr. Alcazar’s Motion. Given the extraordinary risk COVID-19 presents to
18 people in custody, Mr. Alcazar’s health should be given substantial weight among the statutory
19 factors to consider in Mr. Alcazar’s Motion. This is also the only way to apply the statute
20 consistently with the United States and Oregon Constitutions.

21 **STATEMENT OF INTEREST OF AMICI¹**

22 The Criminal Justice Reform Clinic (“CJRC”) at Lewis & Clark Law School is a legal
23 clinic dedicated to students receiving hands-on legal experience while engaging in a critical
24 examination of and participation in important issues in Oregon’s criminal justice system. Under

25 ¹ *Amici curiae* wish to acknowledge Krystal Bosveld, Alex Hadduck, Heidi Nadel, Kristin Asai,
26 Shannon Armstrong, Matt Donohue, and Gillian Phillips for their invaluable assistance and
significant contributions in the preparation of this brief.

1 the supervision of Lewis & Clark Law School faculty, CJRC students work on a variety of cases
2 and issues, including clients currently or formerly incarcerated. In addition to direct client
3 casework, CJRC also works in collaboration with attorneys and organizations in Oregon on
4 various research reports, data driven projects and legal briefs, designed to understand and
5 improve Oregon's criminal justice system.

6 The ACLU of Oregon is a statewide, non-profit and non-partisan organization with over
7 33,000 members, dedicated to defending and advancing civil rights and civil liberties for
8 Oregonians. Among other priorities, ACLU of Oregon is committed to advocating for the rights
9 of people incarcerated in Oregon corrections institutions to be protected from cruel and
10 inhumane conditions of confinement, including the right to adequate medical care. During the
11 COVID-19 pandemic, the ACLU of Oregon has been particularly active in reaching out to
12 stakeholders throughout the criminal justice system to encourage compliance with public health
13 and constitutional standards for those incarcerated in Oregon's jails and prisons.

14 ARGUMENT

15 **I. COVID-19 is an unprecedented global health crisis that requires an unprecedented** 16 **response.**

17 **A. COVID-19 is a highly infectious, rapidly-spreading virus that poses a risk of** 18 **severe medical outcomes and death.**

19 The novel coronavirus that causes COVID-19 has led to a global pandemic that continues
20 to spread at an exponential rate worldwide and across Oregon.² COVID-19 is a highly
21 communicable virus that spreads through close human contact. There is no vaccine or cure for
22 COVID-19, and no one is immune.³ On March 11, 2020, the World Health Organization
23 ("WHO") labeled the outbreak a "global pandemic," when the organization had identified

24 ² Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, Wall
Street Journal (Mar. 11, 2020), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794> (last accessed Apr. 30, 2020).

25 ³ World Health Organization ("WHO"), *Q&A on coronavirus (COVID-19)* (Apr. 17, 2020),
26 <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last accessed Apr. 30, 2020) ("To
date, there is no vaccine and no specific antiviral medicine to prevent or treat COVID-2019.").

1 118,000 cases in 110 countries,⁴ and it has been declared a national and state emergency.⁵ In the
2 span of only a few months, over 5,642,404 people globally have been diagnosed with COVID-19
3 and over 349,800 have died.⁶ In the United States, as of May 26, 2020, over 1,662,414 people
4 have been diagnosed with COVID-19, and more than 98,261 people have died.⁷ In Oregon, at
5 least 3,949 people have confirmed positive tests for the virus,⁸ and 148 have died.⁹ These
6 numbers grow exponentially every day, but are likely underreported due to the lack of access to
7 COVID-19 tests.¹⁰

8 COVID-19 is a particularly contagious disease. The virus spreads from person to person
9 through respiratory droplets caused by speaking, coughing or sneezing, close personal contact,

11 ⁴ Jamie Ducharme, *World Health Organization Declares COVID-19 a 'Pandemic.' Here's What*
12 *That Means*, Time (Mar. 11, 2020), [https://time.com/5791661/who-coronavirus-pandemic-](https://time.com/5791661/who-coronavirus-pandemic-declaration/)
13 [declaration/](https://time.com/5791661/who-coronavirus-pandemic-declaration/) (last accessed Apr. 30, 2020).

14 ⁵ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, Wash.
15 *Post* (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/> (last accessed Apr.
16 30, 2020); Lizzy Ackerman, *Gov. Kate Brown declares coronavirus state of emergency,*
17 *announces 7 new Oregon cases*, The Oregonian, (updated Mar. 9, 2020),
18 [https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-](https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-say-gov-kate-brown-declaring-state-of-emergency.html)
19 [say-gov-kate-brown-declaring-state-of-emergency.html](https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-say-gov-kate-brown-declaring-state-of-emergency.html) (last accessed Apr. 30, 2020).

20 ⁶ Worldometer, *COVID-19 Coronavirus Pandemic*,
21 https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1? (last accessed
22 May 26, 2020); *see also* World Health Organization, *Coronavirus Disease 2019 (COVID-19)*
23 *Situation Report 63* (Apr. 15, 2020), [https://www.who.int/docs/default-](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200415-sitrep-86-covid-19.pdf?sfvrsn=c615ea20_6)
24 [source/coronaviruse/situation-reports/20200415-sitrep-86-covid-19.pdf?sfvrsn=c615ea20_6](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200415-sitrep-86-covid-19.pdf?sfvrsn=c615ea20_6) (last
25 accessed Apr. 30, 2020).

26 ⁷ Centers for Disease Control and Prevention (“CDC”), *Cases in U.S.*,
<https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 26,
2020).

⁸ Oregon Health Authority, COVID-19 data,
[https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAut](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19DataDashboard/COVID-19EPICases?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false)
[horityCOVID-19DataDashboard/COVID-](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19DataDashboard/COVID-19EPICases?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false)
[19EPICases?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19DataDashboard/COVID-19EPICases?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false)
(last visited May 26, 2020).

⁹ Oregon Health Authority, *COVID-19 Cases in Oregon*,
<https://govstatus.egov.com/OR-OHA-COVID-19> (last visited May 26, 2020).

¹⁰ Meerah Powell, *New Projections Show Social Distancing Is Helping Slow Coronavirus Spread*
in Oregon, OPB (Apr. 11, 2020), [https://www.opb.org/news/article/oregon-coronavirus-covid-](https://www.opb.org/news/article/oregon-coronavirus-covid-19-curve-projection-april-11/)
[19-curve-projection-april-11/](https://www.opb.org/news/article/oregon-coronavirus-covid-19-curve-projection-april-11/) (last accessed Apr. 30, 2020) (Dr. Dean Sidelinger, state
epidemiologist with Oregon Health Authority, stated, “It is, to me, believable that there are that
many more cases out in the community that we haven’t diagnosed.”).

1 and from contact with contaminated surfaces and objects.¹¹ It is up to 20 times more infectious
2 than seasonal flu and spreads exponentially, doubling within days. It can survive for up to three
3 hours in the air, four hours on copper, twenty-four hours on cardboard, and two to three days on
4 plastic and stainless steel.¹² Controlling the spread of COVID-19 is made even more difficult
5 because of the prominence of asymptomatic transmission—infection transmission by people who
6 are contagious but exhibit limited or no symptoms, rendering ineffective any screening tools
7 dependent on identifying symptomatic behavior.¹³

8 Once contracted, COVID-19 can cause severe damage to lung tissue, which may require
9 extensive rehabilitation and, in some cases, permanent loss of respiratory function.¹⁴ The virus
10 can also cause myocarditis (inflammation of heart muscle), leading to abnormal heart rhythms,
11 or potentially heart failure.¹⁵ An emerging body of evidence suggests that COVID-19 can

14 ¹¹ CDC, *Frequently Asked Questions: How Covid-19 Spreads*, www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads (last accessed May 26, 2020); Centers for Disease
15 Control and Prevention, *Transmission-Based Precautions*,
16 <https://www.cdc.gov/infectioncontrol/basics/transmission-based-precautions.html> (last accessed
17 Apr. 30, 2020).

17 ¹² Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with
18 SARS-CoV-1*, *New England Journal of Medicine* (Mar. 17, 2020),
19 <https://www.nejm.org/doi/10.1056/NEJMc2004973> (last accessed May 26, 2020); *see also*
20 WHO, *Coronavirus Disease 2019 (COVID-19) Situation Report 46* (Mar. 6, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_4 (last accessed May 26, 2020)
(While “estimates for both COVID-19 and influenza viruses are very context and time-specific,
21 making direct comparisons more difficult,” the WHO has indicated that both the reproduction
22 rate and infection mortality rate for COVID-19 are significantly higher).

23 ¹³ CDC, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed May 26, 2020 (COVID-19 may also be spread by
24 those who are asymptomatic, meaning people who have contracted the disease but are
25 not showing symptoms); *see also* Occupational Health and Safety, *Experts Suggest Nearly Half
26 of Those with Coronavirus Could be Asymptomatic* (Apr. 9, 2020),
<https://ohsonline.com/articles/2020/04/09/experts-suggest-nearly-half-of-those-with-coronavirus-could-be-asymptomatic.aspx> (last accessed May 26, 2020).

¹⁴ Declaration of Dr. Jonathan Louis Golob, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT, at
¶ 7 (W.D. Wash. Mar. 16, 2020),
<https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob> (last
accessed May 26, 2020) (“Golob Dec.”).

¹⁵ *Id.* ¶ 7.

1 trigger an over-response by the immune system, causing widespread damage to other organs,
2 including the kidneys, and neurologic injury.¹⁶

3 Most people in higher risk categories who develop serious illness will need advanced
4 support. This requires highly specialized equipment like ventilators that are in limited supply,
5 and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory
6 therapists, and intensive care physicians.¹⁷ Even some younger and healthier people who contract
7 COVID-19 may require supportive care, which includes supplemental oxygen, positive pressure
8 ventilation, and in extreme cases, extracorporeal mechanical oxygenation.¹⁸ For people in the
9 highest-risk populations, the fatality rate of COVID-19 infection is about 15 percent.¹⁹ Patients
10 who do not die from serious cases of COVID-19 may face prolonged recovery periods, including
11 extensive rehabilitation from neurologic damage, loss of digits, and loss of respiratory capacity.²⁰

12 COVID-19 deaths have spanned the demographic spectrum. For certain groups of people,
13 the risk of serious COVID-19 infection is greater and more likely to lead to severe medical
14 outcomes or death.²¹ People of any age who suffer from certain underlying medical conditions,
15 including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and
16 dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from
17 cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited
18 metabolic disorders, stroke, developmental delay, and asthma, also have significantly elevated

19
20 ¹⁶ *Id.* ¶ 7.

¹⁷ *Id.* ¶ 6.

¹⁸ *Id.* ¶ 5.

¹⁹ *Id.* ¶ 4.

²⁰ *Id.* ¶ 4.

²¹ CDC, *People who are at higher risk for severe illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed May 26, 2020); World Health Organization, *Q&A on coronaviruses (COVID-19) – Who is at risk of developing severe illness*, (Apr. 8, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last accessed Apr. 30, 2020); The Oregonian, *List of underlying conditions putting people at higher risk of coronavirus illness, according to Oregon health officials*, (Mar. 22, 2020), <https://www.oregonlive.com/coronavirus/2020/03/list-of-underlying-conditions-putting-people-at-higher-risk-of-coronavirus-illness-according-to-oregon-health-officials.html> (last accessed May 26, 2020).

1 risk.²² Early reports estimate that the mortality rate can be as high as 13.2 percent for
2 cardiovascular disease, 9.2 percent for diabetes, 8.4 percent for hypertension, 8.0 percent for
3 chronic respiratory disease, and 7.6 percent for cancer.²³ Death rates are also elevated amongst
4 older populations. A CDC study covering results from February 12 to March 16, 2020, found
5 that for those between the ages of 55 and 64 who tested positive for COVID-19, there was a 1.4
6 to 2.6 percent mortality rate. For those aged 65 to 74, the mortality rate jumped to 2.7 to 4.9
7 percent, and for those aged 75 to 84, the mortality rate jumped further to 4.3 to 10.5 percent.²⁴
8 And COVID-19 is also having disproportionate impacts on communities of color. The United
9 States has seen COVID-19 ravage Black communities as a result of the country's
10 institutionalized racism, including, *inter alia*, racial barriers to accessing to health care, economic
11 injustices that cause poor health or increased exposure, and overrepresentation in the criminal
12 justice system.²⁵ One recent CDC report on hospitalization showed that 33.1 percent of those
13 hospitalized identified their race as non-Hispanic Black, despite being only 13.4 percent of the
14 population.²⁶ In Oregon, the impact has fallen largely on the Latinx community. According to the

15 ²² See *supra* note 12; see also WHO, *Coronavirus disease (COVID-19) advice for the public: Myth busters*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters> (last accessed May 26, 2020) (“Older people, and people with pre-existing medical conditions (such as asthma, diabetes, heart disease) appear to be more vulnerable to becoming severely ill with the virus.”).

16 ²³ WHO, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, at 12 (Feb. 2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last accessed May 26, 2020).

17 ²⁴ CDC, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020* (Mar. 18, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> (last accessed Apr. 30, 2020).

18 ²⁵ CDC, *COVID-19 in Racial and Ethnic Minority Groups* (Apr. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last accessed May 27); Next City, *COVID-19 Puts Structural Racism On Full Display – Will We Finally Do Something to Correct It?* (May 11, 2020), <https://nextcity.org/daily/entry/covid-19-puts-structural-racism-on-full-display> (last accessed May 27).

19 ²⁶ CDC, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020* (Apr. 17, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_w; United States Census Bureau, QuickFacts, Oregon, <https://www.census.gov/quickfacts/fact/table/US/IPE120218>

Oregon Health Authority’s data as of May 26, 2020, 34 percent of Oregon’s cases occurred in people who identified their ethnicity as Hispanic.²⁷ This is compared to the 13.3 percent of the general population.²⁸

B. Oregon, like the rest of the world, literally screeched to a halt to carry out necessary physical distancing measures, the best known way to effectively curb the spread of the virus.

In light of these high rates of serious injury and fatality, and because there is no cure or vaccine, the only known effective measure to reduce the risk of serious illness and death that COVID-19 presents for vulnerable people is to prevent them from being infected in the first place. And the only known way to slow and prevent transmission is primarily through a practice known as “social distancing” or “physical distancing.”²⁹ Physical distancing requires people to stay at least six feet away from all other people to control the spread of the virus. These measures are particularly important because the coronavirus spreads aggressively, and people can spread it even if they do not feel sick or exhibit any symptoms.³⁰ The only assured way to curb the pandemic is through dramatically reducing interpersonal contact for everybody.³¹

²⁷ Oregon Health Authority, Oregon’s COVID-19 Cases by Demographic Group, https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonCOVID-19CaseDemographicsandDiseaseSeverityStatewide/DemographicData?:display_count=y&:toolbar=n&:origin=viz_share_link&:showShareOptions=false (last accessed May 27, 2020)

²⁸ United States Census Bureau, QuickFacts, Oregon, <https://www.census.gov/quickfacts/OR>

²⁹ WHO, *Q&A on Coronavirus (COVID-19)*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (“To date, there is no vaccine and no specific antiviral medicines against COVID-2019.”) (last accessed Apr. 30, 2020); Johns Hopkins University, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, <https://cutt.ly/VtYYiDG> (last accessed May 26, 2020); Declaration of Dr. Robert B. Greifinger at ¶ 8, ECF No. 4, *Coreas v. Bounds*, 8:20-cv-00780 (D. Md. Apr. 1, 2020) (“Social distancing and hand hygiene are the only known ways to prevent the rapid spread of COVID-19.”); Golob Decl. ¶ 8.

³⁰ CDC, *Social Distancing, Keep your Distance to Slow the Spread* (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last accessed May 26, 2020).

³¹ Harry Stevens, *Why outbreaks like coronavirus spread exponentially, and how to ‘flatten the curve,’* Washington Post (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator/> (last accessed May 26, 2020).

1 The Center for Disease Control has provided guidelines to help limit the spread of the
2 virus, advising everyone to clean their hands with soap and water often; avoid touching their
3 face; avoid close contact with others; cover their face with a cloth when around others; cover
4 coughs and sneezes with a tissue or elbow; and to clean and disinfect surfaces daily.³² These
5 guidelines are especially important for those who fall into a high-risk category.³³

6 Consequently, the world literally shut down so that people can physically distance from
7 one another.³⁴ In the United States, virtually every major institution—from schools³⁵ to places of
8 worship,³⁶ from businesses³⁷ to legislatures³⁸—has been urged to reduce the number of people in
9 close quarters. All but the most essential functions halted,³⁹ and many states ordered residents to
10 “shelter in place” or “stay home” to limit contact.⁴⁰ But while much of the world has met the

11 ³² CDC, *Coronavirus Disease 2019, How to Protect Yourself & Others* (Apr. 24, 2020),
12 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed
May 26, 2020).

13 ³³ *Id.* (“Keeping distance from others is especially important for people who are at higher risk of
getting very sick.”).

14 ³⁴ See, e.g., Robin Muccari and Denise Chow, *Coronavirus timeline: Tracking the*
15 *critical moments of COVID-19*, NBC News (updated Apr. 24, 2020),
[https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-](https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-covid-19-n1154341)
16 [covid-19-n1154341](https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-covid-19-n1154341) (last accessed May 26, 2020).

17 ³⁵ CDC, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs to*
18 *Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)* (Mar. 25, 2020),
[https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools-h.pdf)
19 [schools-h.pdf](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools-h.pdf).

20 ³⁶ CDC, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based*
21 *Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*,
[https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html)
22 [faith-organizations.html](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html) (last accessed May 26, 2020).

23 ³⁷ CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to*
24 *Coronavirus Disease 2019 (COVID-19)*, May 2020, [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html)
25 [ncov/community/guidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) (last accessed May 26, 2020).

26 ³⁸ Nat’l Conf. of State Legislatures, *Coronavirus and State Legislatures in the News*,
[https://www.ncsl.org/research/about-state-legislatures/coronavirus-and-state-legislatures-in-the-](https://www.ncsl.org/research/about-state-legislatures/coronavirus-and-state-legislatures-in-the-news.aspx)
news.aspx (last accessed May 26, 2020).

³⁹ See, e.g., Robin Muccari and Denise Chow, *Coronavirus timeline: Tracking the*
critical moments of COVID-19, NBC News (updated Apr. 24, 2020),
[https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-](https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-covid-19-n1154341)
covid-19-n1154341 (last accessed May 26, 2020).

⁴⁰ See *id.*; see also Paris Martineau, *What’s a ‘Shelter in Place’ Order, and Who’s Affected?*,
WIRED (Mar. 28, 2020), <https://www.wired.com/story/whats-shelter-place-order-whos-affected/>
(last accessed May 26, 2020) “Shelter in place orders generally close all nonessential businesses

1 extraordinary threat of COVID-19 with extraordinary measures to protect public health, the same
2 urgency has not been extended to the people in prisons and other detention facilities – despite
3 being among the most vulnerable to contracting the virus.

4 The Oregon Health Authority reported the first suspected COVID-19 case in Oregon on
5 February 28, 2020.⁴¹ By March 8, 2020, Oregon had 14 confirmed cases.⁴² That day, Governor
6 Kate Brown declared a state of emergency in Oregon to address the spread of COVID-19,⁴³
7 which she has now extended through July 6, 2020.⁴⁴ Since then, Governor Brown has
8 implemented increasingly restrictive measures via executive order to slow the spread of this
9 highly contagious and deadly virus. This included: restricting public gatherings,⁴⁵ prohibiting on-
10 site consumption of food and drink in bars and restaurants,⁴⁶ closing all public schools,⁴⁷
11 suspending all in-person instruction at higher education institutions,⁴⁸ and postponing all non-
12 essential health care procedures, among other things.⁴⁹

13 and prohibit their employees from leaving their homes to work, though the definition of
14 ‘essential’ businesses can vary depending on the specifics of the order.”).

15 ⁴¹ Oregon Health Authority, *Oregon announces first, presumptive case of novel coronavirus*
(Feb. 28, 2020), [https://www.oregon.gov/oha/ERD/Pages/Oregon-First-Presumptive-Case-](https://www.oregon.gov/oha/ERD/Pages/Oregon-First-Presumptive-Case-Novel-Coronavirus.aspx)
16 [Novel-Coronavirus.aspx](https://www.oregon.gov/oha/ERD/Pages/Oregon-First-Presumptive-Case-Novel-Coronavirus.aspx) (last accessed May 26, 2020).

17 ⁴² Acker, Lizzy, *Gov. Kate Brown declares coronavirus state of emergency, announces 7 new*
Oregon cases, The Oregonian (Mar. 8, 2020),
18 [https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-](https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-say-gov-kate-brown-declaring-state-of-emergency.html)
19 [say-gov-kate-brown-declaring-state-of-emergency.html](https://www.oregonlive.com/coronavirus/2020/03/7-new-coronavirus-cases-in-oregon-officials-say-gov-kate-brown-declaring-state-of-emergency.html) last accessed May 26, 2020).

20 ⁴³ Oregon Governor’s Office, Exec. Order No. 20-03, (Mar. 8, 2020),
21 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-03.pdf; Oregon Governor’s
22 Office, *Governor Kate Brown Declares State of Emergency to Address Coronavirus*, (Mar. 8,
23 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36109> (last accessed
24 May 26, 2020).

25 ⁴⁴ Oregon Governor’s Office, Exec. Order No. 20-24 (May 1, 2020),
26 https://www.oregon.gov/gov/admin/Pages/eo_20-24.aspx.

27 ⁴⁵ Oregon Governor’s Office, Exec. Order No. 20-07 (Mar. 17, 2020),
28 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-07.pdf; *see also* Oregon
29 Governor’s Office, Exec. Order No. 20-14 (Apr. 7, 2020),
30 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-14.pdf.

31 ⁴⁶ *Id.*

32 ⁴⁷ Oregon Governor’s Office, Exec. Order No. 20-08 (Mar. 17, 2020),
33 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-08.pdf.

34 ⁴⁸ Oregon Governor’s Office, Exec. Order No. 20-09 (Mar. 17, 2020),
35 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-09.pdf.

36 ⁴⁹ Oregon Governor’s Office, Exec. Order No. 20-10 (Mar. 19, 2020),
https://www.oregon.gov/gov/Documents/executive_orders/eo_20-10.pdf.

1 Ultimately, on March 23, 2020, Governor Brown issued Executive Order No. 20-12,
2 titled, “Stay Home, Save Lives,” in which she ordered all Oregonians to stay home and maintain
3 strict physical distancing when they leave home for essential purposes, prohibited all non-
4 essential gatherings, closed all non-essential businesses, and ordered businesses to implement
5 work-at-home accommodations to the extent possible.⁵⁰ These unprecedented measures were put
6 in place to implement what public health officials say is a necessary response to this viral
7 pandemic: to keep people physically distant. And Oregon has vigorously defended their life-
8 saving necessity in court.⁵¹

9 By isolating at home, maintaining six-feet of distance when going out, and using proper
10 hygiene techniques, Oregonians were able to reduce the number of new cases by seventy-two
11 percent.⁵² The most recent modeling report from the Oregon Health Authority shows that social
12 distancing has helped prevent as many as 70,000 coronavirus cases in Oregon.⁵³ But Oregon
13 cannot congratulate itself for “flattening the curve” outside of prisons while over 14,000
14 Oregonians languish in unsafe conditions inside the state’s prisons.

15
16
17
18 ⁵⁰ Oregon Governor’s Office, Exec. Order 20-12 (Mar. 23, 2020),
19 https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf.

20 ⁵¹ Oregon Governor’s Office, *Governor Kate Brown Statement on Baker County Circuit Court*
21 *Ruling* (May 18, 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36643>, (informing the
22 public that the circuit court ruling enjoining her stay home order would be appealed “within
23 hours”); Oregon Governor’s Office, *Governor Kate Brown Statement on Oregon Supreme Court*
24 *Ruling* (May 18, 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36655>, (praising the Oregon
25 Supreme Court’s “swift action” to uphold physical distancing orders because the “science
26 remains clear” that such measures are life-saving).

27 ⁵² Oregon Health Authority, *Working Paper: COVID-19 intervention effectiveness and epidemic*
28 *trends for Oregon* (Apr. 22, 2020), [https://govsite-](https://govsite-assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-04-22.pdf)
29 [assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-](https://govsite-assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-04-22.pdf)
30 [04-22.pdf](https://govsite-assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-04-22.pdf) (last accessed May 26, 2020).

31 ⁵³ *Id.*; Meera Powell, OPB, *New Projections Show Social Distancing Is Helping Slow*
32 *Coronavirus Spread in Oregon* (April 11, 2020), [https://www.opb.org/news/article/oregon-](https://www.opb.org/news/article/oregon-coronavirus-covid-19-curve-projection-april-11/)
33 [coronavirus-covid-19-curve-projection-april-11/](https://www.opb.org/news/article/oregon-coronavirus-covid-19-curve-projection-april-11/).

1 Indeed, Oregon’s modeling may be wildly inaccurate. The ACLU has released a data
2 model that shows national death projections could double when taking into account incarcerated
3 populations.⁵⁴ Oregon’s projections are likely similarly infirm.

4 **II. While prisons are a perfect storm for COVID-19, response efforts pale in**
5 **comparison to the significant threat posed to those living and working in detention**
6 **facilities.**

7 Public health officials have uniformly warned that transmission of the virus poses an
8 enormous and potentially catastrophic risk to people and staff in correctional facilities, and, by
9 extension, to their families and communities.⁵⁵ Prisons and other places of detention, like other
10 congregate living environments, have high numbers of people with chronic and often untreated
11 illnesses who live, eat, and sleep in close quarters with minimal levels of sanitation, limited
12 access to personal hygiene, many high-contact surfaces, and no ability to stay at a safe physical
13 distance from others.⁵⁶ People in custody, therefore, face increased danger of contracting
14 COVID-19, as well as increased danger of spreading it to those around them, including staff.

16 ⁵⁴ ACLU, *Flattening the Curve: Why Reducing Jail Populations is Key to Beating COVID-19*
17 (2020) [https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-](https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails)
18 [covid-19?redirect=covidinjails](https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails)

19 ⁵⁵ Brief of Amici Curiae Public Health Rights Experts, *Maney et al v. Brown et al.*, No. 20-cv-
20 00570 (D. Or. filed Apr. 6, 2020), ECF No. 74 (Ex. A); *see also* Letter from Faculty at Johns
21 Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon.
22 Larry Hogan, Gov. of Maryland (Mar. 25, 2020), [https://bioethics.jhu.edu/wp-](https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf)
23 [content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf](https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf) (last
24 accessed May 26, 2020) (“John Hopkins Faculty Letter”); Matthew J. Akiyama, M.D., Anne
25 Spaulding, M.D., Josiah D. Rich, M.D., *Flattening the Curve for Incarcerated Populations—*
26 *COVID-19 in Jails and Prisons*, N. Engl. J. Med. (Apr. 2, 2020),
<https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true> (last accessed May 26,
2020); Nicole Westman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The
Verge (Mar. 7, 2020), [https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-](https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap)
[health-outbreak-covid-19-flu-soap](https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap) (last accessed May 26, 2020).

⁵⁶ Brief of Amici Curiae Public Health Rights Experts, *Maney et al v. Brown et al.*, No. 20-cv-
00570 (D. Or. filed Apr. 6, 2020), ECF No. 74 (Ex. A); *see also* John Hopkins Faculty Letter; *see*
also Matthew J. Akiyama, M.D., Anne Spaulding, M.D., Josiah D. Rich, M.D., *Flattening the*
Curve for Incarcerated Populations—Covid-19 in Jails and Prisons, N. Engl. J. Med. (Apr. 2,
2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true> (last accessed
Apr. 30, 2020).

1 Early CDC guidance for detention centers reiterated that the only known effective
2 measures for protecting vulnerable people are physical distancing (i.e., remaining at least six feet
3 away from other people), quarantining or remaining physically separated from known or
4 potentially infected individuals, and vigilant hygiene, including washing hands with soap and
5 water.⁵⁷ The United Nations Human Rights Subcommittee on Prevention of Torture and Other
6 Cruel, Inhuman or Degrading Treatment or Punishment called for a reduction of prison
7 populations “by implementing schemes of early, provisional or temporary release.”⁵⁸ And the
8 National Commission on Correctional Health Care specifically recommended that measures be
9 implemented in correctional facilities to increase the physical space between all persons
10 incarcerated and detained at such facilities.⁵⁹

11 The calls to respond to the threat in prison environments have continued for months. On
12 May 13, 2020, the United Nations Office on Drugs and Crime, the United Nations Human Rights
13 Office of the Commissioner, WHO, and UNAIDS issued a joint statement saying:

14 We, the leaders of global health, human rights and development institutions, come
15 together to urgently draw the attention of political leaders to the heightened vulnerability
16 of prisoners and other people deprived of liberty to the COVID-19 pandemic, and urge
17 them to take all appropriate public health measures in respect of this vulnerable
population that is part of our communities.⁶⁰

18 ⁵⁷ CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
19 *Correctional and Detention Facilities* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed May
20 26, 2020) (“CDC Guidance for Prisons”).

21 ⁵⁸ Office of the High Commissioner, United Nations Human Rights, Subcommittee on
22 Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Advice*
23 *of the Subcommittee on Prevention of Torture to States Parties and National Preventive*
Mechanisms relating to the Coronavirus Pandemic, (March 25, 2020),
<https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

24 ⁵⁹ Nat’l Comm’n on Correctional Health Care, *COVID-19 Weekly Roundtable for Law*
25 *Enforcement and Correctional Health Care* (Mar. 27, 2020),
https://www.ncchc.org/filebin/COVID/COVID-19_Roundtable_Week_2_March_27.pdf (last
26 accessed Apr. 30, 2020).

⁶⁰ WHO, UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and
other closed settings (May 13, 2020), <https://www.who.int/news-room/detail/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>.

1 The first recommendation in this joint statement is to reduce overcrowding, calling high
2 population densities “an insurmountable obstacle for preventing, preparing for or responding to
3 COVID-19.” *Id.* And on May 29, 2020, several human rights experts from across the world
4 issued a statement urging federal and state governments in the United States to “act now” to
5 reduce the size of its incarcerated populations, pointing to both the unique medical vulnerabilities
6 of people in this setting and the racial and LGBTQ justice implications of failing to implement
7 release measures in detention facilities.⁶¹

9 Oregon is already seeing the results of not taking swift action to protect people living and
10 working in prisons, as the Oregon State penitentiary in Salem is the site of Oregon’s largest
11 single coronavirus outbreak.⁶² The experts agree: it is necessary to reduce prison populations.

12
13 **A. ODOC has admitted it cannot comply with social distancing measures
without significantly reducing the prison population.**

14 On April 13, 2020, ODOC reported that “5,800 inmates – an estimated 40 percent of the
15 prison population – would have to be released to allow for social distancing in prisons statewide
16 to guard against the spread of the coronavirus.”⁶³ This stark admission that ODOC cannot
17 implement social distancing measures—the only known way to slow and prevent transmission
18 of the COVID-19 virus—means that ODOC cannot safely house people in its custody without
19 significantly reducing the prison population. It means that all people living in Oregon prisons
20 are left in a deadly holding pattern with no way to protect themselves. This includes a

21 ⁶¹ Office of High Commissioner, United Nations Human Rights, *US Government urged to do*
22 *more to prevent major outbreaks of COVID-19 in detention centres – UN experts* (May 29,
23 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E>.

24 ⁶² Noelle Crombie, *Oregon’s maximum-security prison in Salem now the site of state’s biggest*
single coronavirus outbreak (May 22, 2020),
25 [https://www.oregonlive.com/coronavirus/2020/05/oregons-maximum-security-prison-in-salem-](https://www.oregonlive.com/coronavirus/2020/05/oregons-maximum-security-prison-in-salem-now-the-site-of-states-biggest-single-coronavirus-outbreak.html)
[now-the-site-of-states-biggest-single-coronavirus-outbreak.html](https://www.oregonlive.com/coronavirus/2020/05/oregons-maximum-security-prison-in-salem-now-the-site-of-states-biggest-single-coronavirus-outbreak.html).

26 ⁶³ ODOC, *DOC Response to COVID-19: AIC Population Management Scenarios* (Apr. 13,
2020), <https://drive.google.com/file/d/1zyEKRHT8Ub8Dj2xzOFjLr-gRMO-jXrui/view> (last
visited Apr. 30, 2020) (“ODOC Report”).

1 disproportionate number of people of color,⁶⁴ a large elderly population,⁶⁵ and people who are
2 medically vulnerable, all of whose health must be considered under ORS 138.285(1).

3 ODOC has provided a roadmap for how it might reduce prison population sufficiently to
4 allow for social distancing, by identifying 5,962 people in custody who could be considered for
5 release or alternative housing on an expedited basis.⁶⁶ This includes 1,624 people who are over
6 60 years of age or whom ODOC has deemed “most vulnerable” or “vulnerable” to COVID-19,
7 1,754 who are within 6 months of release, and 2,584 who are within 6-12 months of release.⁶⁷ It
8 is nearly a month later, and Oregonians are still waiting for action from its government leaders
9 to begin to reduce the prison population to a safe size.⁶⁸ People in custody—including those
10 who are particularly susceptible to becoming severely sick or dying from it—are still
11 languishing in prison. And thousands of people, many of whom are scheduled to be released
12 within six to twelve months anyway, are at risk of dying in prison instead.

13 **B. Not surprisingly, COVID-19 cases are spiking in Oregon prisons, already**
14 **causing 1 death.**

15 On May 20, 2020, tragedy struck in Oregon’s prisons when the first person living in one
16 of the state prisons died from COVID-19.⁶⁹ At the time, 148 people in custody had tested
17 positive. At that rate, and without the ability to implement physical distancing measures, Oregon
18 is well on its way to another death of a person trapped in harm’s way.

20 ⁶⁴ Black, Hispanic and American Indian/Alaska Native people in Oregon are all incarcerated at
21 significantly higher rates than white Oregonians. <https://www.prisonpolicy.org/profiles/OR.html>

22 ⁶⁵ ODOC, *Inmate Population Profile for 05/01/2020*,
<https://www.oregon.gov/doc/Documents/inmate-profile.pdf>

23 ⁶⁶ ODOC Report.

24 ⁶⁷ *Id.*

25 ⁶⁸ As of May 26, 2020, nearly 1000 Oregonians had signed the ACLU of Oregon’s petition
26 demanding action from Oregon’s government leaders to reduce Oregon’s prison population to
reduce the risk of COVID-19. See *ACLU of Oregon, Incarceration Should Not Be a Death*
Sentence, <https://action.aclu.org/petition/or-covid-prisons-petition> (last accessed May 26, 2020).

27 ⁶⁹ Noelle Crombie, *First Oregon prison inmate dies of coronavirus*, The Oregonian (May 21,
2020) [https://www.oregonlive.com/crime/2020/05/oregon-inmate-has-died-from-coronavirus-](https://www.oregonlive.com/crime/2020/05/oregon-inmate-has-died-from-coronavirus-prison-officials-say.html)
[prison-officials-say.html](https://www.oregonlive.com/crime/2020/05/oregon-inmate-has-died-from-coronavirus-prison-officials-say.html)

1 As of May 26, 2020, ODOC reported 188 confirmed COVID-19 cases in its facilities –
2 149 people in custody and 39 staff.⁷⁰ This is up from a single confirmed staff case on April 1,
3 2020.⁷¹ It is unknown how many people have actually contracted the virus in Oregon prisons,
4 however, because ODOC has conducted only very limited testing of those “showing signs and
5 symptoms of flu/COVID-19, including fever, cough and shortness of breath...[and] targeted
6 concentric contact testing of asymptomatic adults”⁷² As of May 26, 2020, ODOC had only tested
7 532 of the nearly 14,500 people in custody, with only a single pending test.⁷³

8 Comparing these results to the trajectory of positive COVID-19 tests in the Oregon
9 population demonstrates how quickly Oregon prisons can become major outbreak sites like we
10 now see in the Oregon State Penitentiary. As of March 10, 2020, Oregon had 29 positive
11 COVID-19 tests.⁷⁴ This number doubled within two days, and in a week increased more than six-
12 fold to 184 cases.⁷⁵ Oregon now has 3,879 positive tests as of May 26, 2020. These numbers
13 show the rapid upswing of positive tests even with the benefit of widespread and unprecedented
14 social distancing measures being followed outside Oregon prisons.

15 Even if Oregon continues to see its curve flatten outside of Oregon prisons, the number of
16 COVID-19 cases among people living and working in Oregon prisons is likely to continue to
17 increase dramatically because, as ODOC admits, they are only following social distancing
18

19
20 ⁷⁰ COVID-19 Tracking Tool, COVID-19 Status at Oregon Department of Corrections Facilities,
<https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx> (last visited May 26, 2020).

21 ⁷¹ Noelle Crombie, *Prison employee is first confirmed coronavirus case in Oregon Department*
of Corrections, The Oregonian (Apr. 1, 2020),
22 [https://www.oregonlive.com/coronavirus/2020/04/prison-employee-is-first-confirmed-case-of-](https://www.oregonlive.com/coronavirus/2020/04/prison-employee-is-first-confirmed-case-of-covid-19-in-oregon-department-of-corrections.html)
[covid-19-in-oregon-department-of-corrections.html](https://www.oregonlive.com/coronavirus/2020/04/prison-employee-is-first-confirmed-case-of-covid-19-in-oregon-department-of-corrections.html).

23 ⁷² Frequently Asked Questions, *COVID-19 Response*,
<https://www.oregon.gov/doc/covid19/Pages/faq.aspx> (last visited May 26, 2020).

24 ⁷³ COVID-19 Tracking Tool, *supra* note 50.

25 ⁷⁴ Oregon Health Authority, COVID-19 data,
[https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAut-](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19SummaryTable_15889676399110/TotalPersonsTestedSummaryTable)
[horityCOVID-19SummaryTable_15889676399110/TotalPersonsTestedSummaryTable](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAuthorityCOVID-19SummaryTable_15889676399110/TotalPersonsTestedSummaryTable) (last
26 visited May 26, 2020).

⁷⁵ *Id.*

1 guidelines “to the best of their abilities,” but Oregon’s prisons “are not built for” such needs.⁷⁶ It
2 is impossible for people who are incarcerated or working in prisons to practice physical
3 distancing.

4 **C. Without immediate action, more Oregon prisons will likely become**
5 **epicenters of deadly COVID-19 outbreaks in Oregon.**

6 The dire warnings from public health officials about the risks to people in prisons are
7 already playing out in Oregon prisons just as it has played out in places of detention around the
8 country. The Oregon State Penitentiary is currently the site of Oregon’s largest COVID-19
9 outbreak. Oregon need not speculate about what will happen in its prisons if it does not take
10 immediate steps to reduce prison populations and implement social distancing in its prisons.

11 Examples from across the country illustrate what happens when correctional facilities do
12 not act urgently to protect people in custody from COVID-19:

- 13 • Rikers Island in New York confirmed its first positive COVID-19 case on March 18,
14 2020. Six days later, 52 people at Riker’s Island were confirmed positive for COVID-
15 19, and another 96 were under observation awaiting results. By April 1, it had 231 cases
among inmates and 233 cases among staff.⁷⁷ This represents nearly seven times the
infection rate of the population of the state of New York.⁷⁸
- 16 • On March 23, the Cook County Jail in Chicago placed two individuals with positive
17 COVID-19 tests in isolation cells.⁷⁹ Just over two weeks later, the jail had 350 positive
18 cases—238 inmates and 115 staff members, and on April 8, 2020, the jail was deemed
19 “the nation’s largest-known source of coronavirus infections.”⁸⁰ Jail officials have
acknowledged that these numbers likely underestimate the actual problem, as the vast

20
21 ⁷⁶ ODOC, *DOC’s Response to the Novel Coronavirus in Oregon*,

22 <https://www.oregon.gov/doc/covid19/Pages/faq.aspx> (last accessed May 26, 2020).

23 ⁷⁷ Miranda Bryant, *Coronavirus spread in Rikers is a ‘public health disaster,’ says jail’s top*
24 *doctor*, The Guardian (Apr. 1, 2020), [https://www.theguardian.com/us-news/2020/apr/01/rikers-](https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster)
25 [island-jail-coronavirus-public-health-disaster](https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster) (last accessed Apr. 30, 2020).

26 ⁷⁸ The Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, (last updated April 26,
2020), <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (last accessed Apr. 30,
2020).

⁷⁹ Timothy Williams & Danielle Ivory, *Chicago’s Jail is Top U.S. Hot Spot as Virus Spreads*
Behind Bars, The New York Times (Apr. 8, 2020),
<https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

⁸⁰ *Id.*

majority of the 4,500-person incarcerated population has not been tested.⁸¹

- Ohio’s Marion County Correctional Institution, where widespread testing was done, reported that at least 80 percent of the approximately 2,500 people in custody and at least 169 staff members tested positive for COVID-19.⁸²

Oregon and its peers make plain just how quickly and dangerously COVID-19 spreads in carceral settings. Every one of the 14,500 people in Oregon prisons risks COVID-19 infection and for those most vulnerable to the virus, a prison sentence risks becoming a death sentence.

III. A STAY OF MR. ALCAZAR’S SENTENCE AND HIS RELEASE PENDING APPEAL IS THE ONLY RESULT THAT SATISFIES ORS 138.285 AND THE UNITED STATES AND OREGON CONSTITUTIONS.

A. Prison conditions for Mr. Alcazar amount to cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 16.

The Eighth Amendment of the United States Constitution guarantees a prisoner’s right to a sanitary and safe detention environment:

The rationale for this principle is simple enough: when the State by 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 US 189, 199-200 (1989). Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, and the government cannot “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.” *Helling v. McKinney*, 509 US 25, 33 (1993).

The Eighth Amendment protects prisoners against conditions that would present them with a clear risk of contracting an infectious disease. For instance, inmates cannot be

⁸¹ *Id.*

⁸² Sarah Volpenheim, *Ohioans protest treatment of Marion prisoners left exposed to coronavirus*, Marion Star (Apr. 25, 2020), <https://www.marionstar.com/story/news/local/2020/04/26/ohioans-protest-treatment-marion-prisoners-exposed-coronavirus/3027722001/> (last visited Apr. 28, 2020).

1 commingled with others having hepatitis and venereal disease. *Hutto v. Finney*, 437 US 678, 682
2 (1978) (Eighth Amendment violated where mattresses used by prisoners with infectious diseases
3 were distributed “at random” for use by others”); *see also Gates v. Collier*, 501 F2d 1291, 1300-
4 04 (5th Cir 1974) (Eight Amendment violation affirmed in face of “rampant unsanitary
5 conditions” including circumstances where “inmates with serious contagious diseases are
6 allowed to mingle with the general prison population”); *Wallis v. Baldwin*, 70 F3d 1074, 1077
7 (9th Cir 1995) (involuntary exposure to asbestos supports Eighth Amendment claim). And the
8 Supreme Court has held that the Eighth Amendment’s prohibition against exposing prisoners to
9 infectious diseases applies even when the plaintiff cannot yet “prove that he is currently suffering
10 serious medical problems caused by” the exposure. *Helling*, 509 US at 32; *Hoptowit v. Spellman*,
11 753 F2d 779, 784 (9th Cir 1985) (health risks caused by inadequate fire prevention, lighting,
12 poor ventilation, vermin, plumbing problems and other safety hazards were Eighth Amendment
13 violations); *Ramos v. Lamm*, 639 F2d 559, 570 (10th Cir 1980) (numerous sanitation deficiencies
14 constitutionally impermissible).

15 Conditions of confinement must be analyzed in context, and courts must “consider the
16 effect of each condition in the context of the prison environment, especially when the ill-effects
17 of particular conditions are exacerbated by other related conditions.” *Wright v. Rushen*, 642 F2d
18 1139, 1134 (9th Cir 1981).

19 Oregon courts have similarly held that dangerous and unsanitary prison conditions are a
20 violation of the prohibition against cruel and unusual punishment contained in Article I, Section
21 16 of the Oregon Constitution. *See, e.g., Bedell v. Schiedler*, 307 Or 562 (1989) (plaintiff brought
22 cruel and unusual punishment claim based on “failure to provide adequate ventilation and
23 circulation,” being forced to share a small space with tobacco smokers, and as a result suffered
24 “clogged sinuses, severe headaches, dry and irritated skin and a sore throat,” prompting Oregon
25 Supreme Court to note that “prisoners . . . are entitled to an environment that does not
26 unnecessarily subject them to serious health hazards.”); *Taylor v. Peters*, 360 Or 460, 462-63

(2016) (finding “cognizable constitutional violations” where plaintiff was “confined under conditions in which other prisoners are ‘continually’ throwing feces and urine into his cell,” because these allegations amounted to confinement “in an environment that subjected him to serious health hazards”); *Weidner v. Zenon*, 124 Or App 314 (1993) (allegation by wheelchair-bound plaintiff that he lacked access to fire escape sufficient to state claim under Section 16 because of the “life-threatening implications”).

The decisions in *Hutto*, *Gates*, *Bedell*, and *Taylor*, among others, establish that placing an inmate in a situation that creates an elevated risk of potentially lethal infection constitutes cruel and unusual punishment under both United States and Oregon Constitutions. Mr. Alcazar’s HIV-positive status surely places him alongside those incarcerated in the above cases. The human immunodeficiency virus is a medical condition that may increase Mr. Alcazar’s risk of harm should he become infected with COVID-19, and given current COVID-19 infection trends, the attendant high risk of death or permanent injury becomes closer to a certainty with each passing day. It is cruel and unusual punishment to keep Mr. Alcazar incarcerated based on his current medical condition and the Oregon prison system’s failure to provide minimally adequate preventative measures for COVID-19.

B. Oregon prison conditions violate Mr. Alcazar’s Article I, section 13 right to be free from unnecessary rigor while in custody.

Article I, section 13 of the Oregon Constitution states that “No person arrested, or confined in jail, shall be treated with unnecessary rigor.” The section “ha[s] antecedents as early as New Hampshire’s 1783 constitution” and “reflect[s] a widespread interest in penal reform” wherein “punishments [were to be] made less ‘sanguinary’ (i.e. bloody).” *Sterling v. Cupp*, 290 Or 611, 617 (1981). The Oregon Supreme Court has explained that “[t]he guarantee against ‘unnecessary rigor’ . . . [is not] confined only to such historically ‘rigorous’ practices as shackles, the ball and chain, or to physically brutal treatment or conditions, though these are the most obvious,” but instead extends to any unnecessary abuse, which reaches as far as “the

1 imposition of a needless indignity . . . [that] goes beyond recognized necessity.” *Id.* at 619-20.

2 Once a person establishes a cognizable abuse, the question becomes whether the action is
3 justified by necessity. *Id.* at 625. Here, keeping Mr. Alcazar locked in prison subjects him to an
4 unjustified health risk.

5 The Oregon Supreme Court has found that prison conditions that subject inmates to
6 unnecessary health hazards are within the ambit of section 13. In *Bedell*, for instance, the
7 Supreme Court cited section 13 as the source of a prisoner’s “entitle[ment] to an environment
8 that does not unnecessarily subject them to serious health hazards.” 307 Or at 570 n2 (accepting
9 allegations of environment that led to prisoner “unnecessarily suffering clogged sinuses, severe
10 headaches, dry and irritated skin and a sore throat” “requir[ed] immediate judicial scrutiny”).
11 Other Oregon courts have held that section 13 prohibits subjecting prisoners to “a serious,
12 immediate, and ongoing health hazard.” *Taylor*, 274 Or App 477, at 480-81 (plaintiff adequately
13 alleged section 13 violation by alleging “that other inmates continuously thr[e]w feces and urine
14 into plaintiff’s cell”); *see also Weidner*, 124 Or App at 317 (cognizable claim for habeas relief on
15 section 13 grounds where lack of access to fire escape had “life-threatening implications”).

16 Necessity during this pandemic does not justify Mr. Alcazar’s detention. The Oregon
17 Supreme Court looked to prevailing national and international standards and best practices in
18 order to glean appropriate principles to inform its Article I, section 13 analysis. *See Sterling v.*
19 *Cupp*, 290 Or 611, 620-22 (1981) (en banc) (citing, *inter alia*, the American Bar Association and
20 “the United Nations and other multinational bodies” to determine what constitutes a cognizable
21 indignity). Health organizations across the globe from the CDC to WHO, public health experts,
22 and human right organizations all have consistently put out guidance that physical distancing is
23 necessary during this pandemic, including in prisons. These experts and organizations have also
24 called for necessary prison and jail population reductions to allow physical distancing to be
25 implemented.

1 What is necessary for prisons during the COVID-19 pandemic is to safely house people
2 in an environment where physical distancing can be implemented or to safely transition people
3 back home where they can practice physical distancing with the rest of the community. Mr.
4 Alcazar can safely return home. The Court and the State have a range of less restrictive and safer
5 options to address any public safety concerns for Mr. Alcazar and thousands in custody,
6 including conditioning release if necessary. Every day that Mr. Alcazar stays incarcerated in a
7 prison that does not practice social distancing brings him a day closer to infection with a virus
8 that could kill or permanently injure him. If being subjected to tobacco smoke in an enclosed
9 area (*Bedell*) or being exposed to feces and urine (*Taylor*) can amount to the application of
10 unnecessary rigor, subjecting Mr. Alcazar to a deadly virus most certainly constitutes
11 unnecessary rigor and violates Article I, section 13 of the Oregon Constitution.

12 **C. The Court is explicitly directed to take these unconstitutional conditions into**
13 **account under ORS 138.285.**

14 The narrow issues before this Court is whether Mr. Alcazar’s sentence should be stayed
15 and whether Mr. Alcazar should be released from prison pending his appeal. This inquiry is
16 governed by ORS 138.285(1), which states that “[a] . . . circuit court may enter an order in a
17 criminal action . . . staying execution of a sentence, or a portion of a sentence, pending the
18 resolution of an appeal.” ORS 138.285(2) enumerates eight factors the Court must consider in
19 making this determination, including “[t]he health of the defendant.” ORS 138.285(2)(c). The
20 considerations of these factors must comport with Oregon and federal constitutional standards. In
21 this case, Mr. Alcazar’s health should be given significant weight given the risk of death or
22 severe medical outcomes he faces if he contracts COVID-19.

23 Given ODOC’s admitted inability to implement social distancing measures, the spiking
24 rates of infection among the limited number of people tested in Oregon prisons, the outbreaks
25 already beginning in Oregon’s prisons, and ODOC’s failure to implement sufficient measures to
26 protect from infection people who are particularly vulnerable to the virus’s most drastic

1 outcomes, Mr. Alcazar's health should be of utmost concern. Additionally, the other factors
2 enumerated in ORS 138.285(2) applicable to Mr. Alcazar's case do not provide countervailing
3 considerations that justify Oregon's current violations of Mr. Alcazar's constitutional rights. The
4 only way to apply ORS 138.285 consistently with the United States and Oregon Constitutions in
5 this case is to give predominant and primary weight to Mr. Alcazar's health, order a stay of Mr.
6 Alcazar's sentence, and order his release from prison pending the resolution of his appeal.
7 Anything less would put the Court's application of ORS 138.285 at direct odds with Mr.
8 Alcazar's constitutional and basic human rights.

9 **CONCLUSION**

10 For the reasons stated above the Court should grant Mr. Alcazar's Motion.

11
12 Dated this 29th day of May, 2020.

13
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DISTRICT OF OREGON
EUGENE DIVISION

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NULPH; THERON HALL; DAVID HART;
MICAH RHODES; and SHERYL LYNN
SUBLET, *individually, on behalf of a class of
other similarly situated,*

Plaintiffs,

v.

KATE BROWN, COLETTE PETERS; HEIDI
STEWART; MIKE GOWER; MARK NOOTH;
ROB PERSSON; and KEN JESKE,

Defendants.

Case No. 6:20-cv-00570-SB

**BRIEF OF AMICI CURIAE PUBLIC
HEALTH RIGHTS EXPERTS**

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INTRODUCTION

Amici Curiae, public health officials and experts familiar with the unique dangers associated with infectious diseases in jails and prisons, urge this Court to grant Plaintiffs’ Motion for Temporary Restraining Order (Dkt. # 14) and grant injunctive relief that would implement social distancing and improved hygiene protocols throughout the Oregon Department of Corrections (“ODOC”) facilities. A necessary part of that strategy must be reducing the number of incarcerated people at ODOC facilities. Such a strategy will minimize not only the public health risk to Plaintiffs, but also to other inmates, correctional facility staff, and the public at large.

The coronavirus disease 2019 (“COVID-19”) is an extremely infectious disease. It has created an unprecedented global health crisis and led to the adoption and implementation of novel but necessary mitigation strategies around the world, including the canceling of public events, the closing of schools and businesses, and stay-at-home orders to the general public. There is no vaccine or cure for COVID-19. The virus has proven that it can infect, harm, and kill anyone. But the risk is particularly acute for people with health conditions like the Plaintiffs in this case.

Managing the spread of COVID-19 within correctional facilities is critically important because they are enclosed environments, like cruise ships, that are highly susceptible to epidemics. In the case of COVID-19 specifically, the only way to mitigate the risk of serious infection is through hygienic measures like frequent hand washing and social distancing to limit exposure. But those prevention methods are all but impossible in a jail or prison setting, in which inmates are crowded together, forced to share bathroom and dining facilities, and largely deprived of regular access to the kinds of cleaning products—like soap and hand sanitizer—that

public health officials have emphasized as particularly important in the fight against COVID-19. Once an outbreak occurs, correctional facilities are rarely equipped to provide the intensive care and support needed to treat patients suffering from a severe COVID-19 infection.

Acting quickly to mitigate the enormous risk associated with correctional facilities is not just necessary to protect those who are incarcerated, but also to protect staff and visitors. Moreover, because staff and contractors cycle in and out of these facilities on a daily basis, failure to implement appropriate and immediate mitigation measures will result in those individuals spreading the disease to the broader community.¹ Accordingly, the time to act is now, before it is too late.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are experts in infectious diseases, healthcare policy, correctional healthcare, and other related fields, who have spent decades studying the provision of healthcare in correctional facilities. Based on their experience, and their review of the available information about the COVID-19 pandemic, it is their view that people with conditions like Plaintiffs are at high risk of serious, life-threatening COVID-19 infection, and that their continued confinement in ODOC facilities subjects them to a heightened risk of contracting and further spreading COVID-19.

Amici are committed to ensuring correctional facilities provide quality healthcare to inmates, and that correctional facilities do not exacerbate the health risks of their inmates, their staff, or the public at large. They understand the COVID-19 pandemic has placed enormous strains on society, and are committed to doing their part to ensure that correctional facilities take

¹ Indeed, ODOC's limitations on visitors and some contractors suggests Defendants understand this crucial point, even as they fail to sufficiently account for it in ODOC policy.

a prudent, science-based approach to addressing the virus. They respectfully submit this brief to offer their view that facilities like those run by ODOC should work with state and local health officials to release from incarceration individuals to whom COVID-19 poses a high risk of serious infection and to ensure that jails and prisons across the state take immediate steps to better protect those individuals who do remain in custody during the pandemic.

Amici are the following:

Robert L. Cohen, M.D., has worked as a physician, administrator, and expert in the care of prisoners for 40 years. Dr. Cohen was the Director of the Montefiore Rikers Island Health Services from 1981 through 1986. In 1986, he was appointed Vice President for Medical Operations of the New York City Health and Hospitals Corporation. Dr. Cohen represented the American Public Health Association on the Board of the National Commission for Correctional Health Care for 17 years. He has served as a federal court-appointed monitor overseeing efforts to improve medical care for prisoners in Florida (*Costello v. Wainwright*), Ohio (*Austin v. Wilkinson*), New York (*Milburn v. Coughlin*), and Michigan (*Hadix v. Caruso*). He also has been appointed to oversee the care of all prisoners living with HIV in Connecticut (*Doe v. Meachum*). He currently serves on the nine-member New York City Board of Correction, which regulates and oversees New York City's correctional facilities.

Joe Goldenson, M.D., is a medical physician with 28 years of experience as the Director/Medical Director for Jail Health Services for the San Francisco Department of Public Health. He also has served as a member of the Board of Directors of the National Commission on Correctional Health Care, and was past President of the California chapter of the American Correctional Health Services Association. He has worked extensively as a correctional health medical expert and court monitor. He is currently one of the medical experts retained by the

federal district court in *Plata v. Newsome*, Case No. 3:01-cv-01351 (N.D. Cal.), to evaluate medical care provided to inmate patients in the California Department of Correctional Rehabilitation. He also has been a medical expert/monitor for Cook County Jail in Chicago and Los Angeles County Jail, as well as in jails and prisons in Washington State, Texas, Florida, Ohio, and Wisconsin.

Michael Puisis, D.O., is an internist who has worked in correctional medicine for 35 years. He began working at the Cook County Jail as a physician in 1985 and became the Medical Director of Cook County Jail from 1991 to 1996 and Chief Operating Officer for the medical program at the Cook County Jail from 2009 to 2012. He has worked in and managed correctional medical programs in multiple state prisons, including in Illinois and New Mexico. He has worked as a monitor or expert for federal courts, and as a correctional medical expert for the Department of Justice, on multiple cases. He also has participated in revisions of national standards for medical care for the National Commission on Correctional Health Care and for the American Public Health Association. He also participated in revising tuberculosis standards for the Centers for Disease Control. Dr. Puisis has edited the only textbook on correctional medicine, *Clinical Practice in Correctional Medicine*.

FACTUAL BACKGROUND

Amici adopt and incorporate by reference the factual background set forth in Plaintiffs' Complaint (Dkt. # 1).

ARGUMENT

I. Mitigating the Number of Infections, Hospitalizations, and Deaths Caused by the COVID-19 Pandemic Requires Proactive Social Distancing Measures.

The COVID-19 pandemic is an ongoing global health crisis caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The novel coronavirus that causes COVID-

19 first emerged in the province of Hubei, China, in December 2019.² As of May 13, 2020, there were 4,170,424 confirmed cases and 287,399 deaths in 215 countries, areas, or territories worldwide.³ Due to the apparent ease with which the virus spreads, those numbers have risen quickly in the United States (and elsewhere) over the last several weeks and will continue to rise exponentially without continued drastic government action.⁴

The consensus of doctors and epidemiologists since the emergence of COVID-19 as a global pandemic has been that the only way to guard against spread of the virus is to take proactive and early action to “flatten the curve.”⁵ Accordingly, a leading and frequently-cited report from the Imperial College London has suggested that “suppression will minimally require a combination of social distancing of the entire population, home isolation of cases, and household quarantine of their family members,” in addition to school and university closures.⁶ In other words, social distancing is necessary at every level of society, including the institutional level. Given the ease and speed with which the virus spreads, such social distancing measures may have to remain in place as long as 18 months until a vaccine is successfully developed.⁷ It is for precisely this reason that dozens of state governments have instituted mandatory social

² Kenji Mizumoto & Gerardo Chowell, *Estimating Risk of Death from 2019 Novel Coronavirus Disease, China, January–February 2020*, 26 *Emerging Infectious Diseases*, no. 6, June 2020, <https://doi.org/10.3201/eid2606.200233>.

³ World Health Organization, *Coronavirus Disease (Covid-19) Pandemic* (2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

⁴ See Centers for Disease Control and Prevention, *Situation Summary* (2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsummary.html.

⁵ See, e.g., Neil M. Ferguson, *et al.*, Imperial College London, *Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand* 7 (2020), <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

⁶ *Id.* at 1.

⁷ *Id.* at 15.

distancing policies; indeed, as of April 28, about 70% of America's population, roughly 236 million people, were living under some form of lockdown order.⁸

Although these measures are welcomed and necessary, they would have been more effective if governments had acted proactively, rather than merely prescriptively.⁹ The United States now has over 1,364,061 confirmed cases and over 82,246 fatalities.¹⁰ Indeed, COVID-19 has wreaked havoc all over the United States and across the world, jeopardizing both the health and economic well-being of millions of Americans.¹¹ The worst-case scenario in the Imperial College study above suggests that the United States could suffer up to 2.2 million deaths as a result of the COVID-19 crisis.¹²

II. Jails and Prisons Are at a Heightened Risk for the Spread of COVID-19.

Jails and prisons such as those operated by ODOC are closed environments in which it is impossible to implement and enforce the kinds of social distancing guidelines recommended by the Centers for Disease Control and Prevention ("CDC"), and are thus at a heightened risk for the spread of COVID-19. It is common knowledge that outbreaks of contagious diseases are

⁸ Holly Secon and Aylin Woodward, *A map of the US cities and states under lockdown – and those that are reopening*, Business Insider (Apr. 28, 2020), <https://www.businessinsider.com/us-map-stay-at-home-orders-lockdowns-2020-3>.

⁹ See Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality at 3 ("Cities in which these interventions were implemented early in the epidemic were successful at reducing case numbers while the interventions remained in place and experienced lower mortality overall.").

¹⁰ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases and Latest Updates, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹¹ See generally Alexis C. Madrigal & Robinson Meyer, *How the Coronavirus Became an American Catastrophe*, The Atlantic (Mar. 21, 2020), <https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/>.

¹² Impact of Non-Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality at 7.

more common in jail settings than in communities at large.¹³ COVID-19 will be no exception. Over the past several weeks, hundreds of COVID-19 diagnoses have been confirmed at local, state, and federal correctional facilities.¹⁴ In New York, jails have seen infection rates *nine* times higher than the broader community.¹⁵ Given the continued dearth of testing across the country, these numbers clearly (and likely dramatically) understate the problem.¹⁶ Indeed, figures provided by the Bureau of Prisons show that out of 2,700 tests in the federal prison system, nearly 2,000 came back positive—more than 70%.¹⁷

These factors are made worse in the context of this virus because it is difficult to identify and isolate those individuals who are infected with COVID-19. Those who are infected with COVID-19 may suffer from only mild symptoms or even be entirely asymptomatic, but still be

¹³ See David Reuter, *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/>; see also Bianca Malcolm, *The Rise of Methicillin-Resistant Staphylococcus aureus in U.S. Correctional Populations*, Journal of Correctional Health Care (May 13, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3116074/>; Stephanie M. Lee, *Nearly 900 Immigrants Had The Mumps In Detention Centers In The Last Year*, BuzzFeed News (Aug. 29, 2019), <https://www.buzzfeednews.com/article/stephaniemlee/mumps-ice-immigrant-detention-cdc>.

¹⁴ See Katie Park, *et al.*, *Tracking the Spread of Coronavirus in Prisons*, The Marshall Project (Apr. 24, 2020), <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>; see also Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. Times (Apr. 8, 2020) <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>; Adolfo Flores and Hamed Aleaziz, *Fear Among Immigrant Detainees Spreads As Coronavirus Outbreaks Hit ICE Detention Centers*, BuzzFeed News (Apr. 10, 2020), <https://www.buzzfeednews.com/article/adolfoflores/immigrant-detainees-ice-coronavirus-outbreaks-jails>.

¹⁵ Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, The Marshall Project (Mar. 31, 2020), <https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus>.

¹⁶ *Id.*

¹⁷ Michael Balsamo, *Over 70% of tested inmates in federal prisons have COVID-19*, Associated Press (Apr. 29, 2020) <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>.

carrying and spreading the disease. In fact, recent estimates suggest that as many as 1 in 4 cases of COVID-19 will not present symptoms and yet remain contagious.¹⁸ Unfortunately, correctional facilities typically do not have the ability to perform the kind of systematic testing that would be required to ensure that the virus does not enter the facility.

The unique attributes of correctional facilities also make it impossible for those facilities to adopt and implement the mitigation efforts that have become a necessary safeguard of life outside those institutions. That is because these facilities are enclosed environments, much like the cruise lines that have proven susceptible to COVID-19 outbreaks. The social distancing that has been the hallmark of the United States' COVID-19 prevention efforts is simply not possible in such a setting. Incarcerated people share close quarters, including dining halls, bathrooms, showers, and other common areas, each presenting dangerous opportunities for transmission.¹⁹ Additionally, spaces within correctional facilities often are poorly ventilated, which promotes the spread of diseases. Other hygiene-based prevention strategies are similarly ineffective in a correctional setting. Inmates will not typically have access to sufficient soap and alcohol-based sanitizers to engage in the kind of frequent hand washing encouraged by medical professionals

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¹⁸ Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020) <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

¹⁹ Poor inmate hygiene has in previous years led to staph infection outbreaks, spread by, *inter alia*, the shared use of soap and towels and person-to-person contact via contaminated hands. See Federal Bureau of Prisons Clinical Practice Guidelines, Management of Methicillin-Resistant Staphylococcus aureus (MRSA) Infections, 1-2 (April 2012), <https://www.bop.gov/resources/pdfs/mrsa.pdf>.

throughout the country.²⁰ And staff often do not clean or sanitize—either at all or on a consistent basis—high-touch surfaces like door handles or light switches throughout the institutions.

For ODOC facilities, once an inmate or staff member becomes infected with COVID-19, it will be extremely difficult to properly treat those infected or limit the spread of the virus. COVID-19's most common symptoms are fever, cough, and shortness of breath. Serious cases can develop that require invasive measures to improve respiratory function, such as intubation. Appropriate care for such cases almost always includes the use of highly specialized equipment like ventilators. The COVID-19 virus has put ventilators in high demand and short supply among hospitals and other healthcare providers around the world, making it even less likely that jails and prisons will have ready access to such equipment any time soon.²¹ The virus even has led to shortages of less specialized equipment such as face masks and gloves.²²

The necessary treatment for those infected with COVID-19, especially those experiencing more serious symptoms, is labor-intensive. It requires that nurses care for a limited number of patients at a time, and often requires physicians with specialized backgrounds in respiratory care. ODOC's facilities are unable to address these needs sufficiently. The novel coronavirus outbreak is already straining hospital capacity across the country. It should come as no surprise then that correctional medical facilities, already underequipped, will be even more

²⁰ See Timothy Williams, *et al.*, *As Coronavirus Spreads Behind Bars, Should Inmates Get Out?*, N.Y. Times (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> (explaining that in some correctional facilities “[e]ven as a visitor . . . if you want to wash your hands, you’ve got to walk out and go into another building to do it.”).

²¹ Kulish, *et al.*, *The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed.*, N.Y. Times (Mar. 29, 2020) <https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html>.

²² See Andrew Jacobs, *et al.*, *‘At War With No Ammo’: Doctors Say Shortage of Protective Gear Is Dire*, N.Y. Times (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

compromised as staff members themselves become ill.²³ Thus, the pandemic, and all the havoc it has wreaked across the country and throughout the world, will be dangerously exacerbated if jails and prisons do not act immediately to reduce their populations and contain the spread of the virus.²⁴

III. ODOC's Efforts to Combat COVID-19 Are Inadequate.

So far, ODOC's protocols for combatting the coronavirus within its walls have been inadequate. For example, while ODOC's website claims it is complying with CDC guidelines, it also admits that its "facilities were not designed to keep people six feet away from one another[.]"²⁵ Indeed, most glaringly, ODOC's website indicates that "current housing situations will remain in place," meaning ODOC prisoners continue to sleep together in cramped dormitories.²⁶ ODOC's website indicates its facilities are "intensifying efforts" to protect the elderly and others who are most vulnerable to COVID-19, but it does not indicate any specific measures being taken to do so.²⁷

In short, ODOC's efforts fall short of the kind of comprehensive, proactive response necessary to prevent viral spread. Notably, after social distancing efforts failed at Rikers Island in New York, the jail's top doctor was forced to conclude that any successful response would

²³ See, e.g., Jan Ransom & Alan Feuer, *'We're Left for Dead': Fears of Virus Catastrophe at Rikers Jail*, N.Y. Times (Mar. 30, 2020) <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html> ("[T]he rate of infection in city jails has continued to climb, and by Monday, 167 inmates, 114 correctional staff and 23 health workers had tested positive.").

²⁴ Matthew J. Akiyama, *et al.*, *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, New England Journal of Medicine (April 2, 2020) <https://www.nejm.org/doi/full/10.1056/NEJMp2005687>.

²⁵ Oregon Department of Corrections, COVID-19 Response, DOC's Response to the Novel Coronavirus in Oregon, Frequently Asked Questions (accessed May 1, 2020), <https://www.oregon.gov/doc/covid19/Pages/faq.aspx>.

²⁶ *Id.*

²⁷ *Id.*

have to include reductions in incarcerated populations.²⁸ ODOC, too, must accept that conclusion in order to stop the spread of COVID-19 in its correctional institutions and protect those who are most vulnerable to the illness.

CONCLUSION

For these reasons, Plaintiffs' request for a temporary restraining order should be granted, and Defendants should be required to take all of the steps necessary to protect vulnerable individuals from contracting COVID-19, including releasing such individuals whenever possible.

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Respectfully submitted,

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²⁸ Meagan Flynn, *Top doctor at Rikers Island calls the jail a 'public health disaster unfolding before our eyes'*, Wash. Post (Mar. 31, 2020) <https://www.washingtonpost.com/nation/2020/03/31/rikers-island-coronavirus-spread/>.

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