

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

STATE OF OREGON,  
Plaintiff,

v.

DANIEL PIERRE PARKER IV  
Defendant.

Case No. 17CR57461

CA A167055

**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   Parker'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. Parker, 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. Parker's sentence and release him from prison pending his appeal, and ORS  
18  138.285(2)(c) explicitly requires the Court to consider Mr. Parker's health when making this  
19  determination. Given the extraordinary risk COVID-19 presents to Mr. Parker, Mr. Parker's  
20  health, as a statutory factor, should be given primary weight, and should lead to a grant of Mr.  
21  Parker's request to stay his sentence and release him from prison pending appeal. This is the only  
22  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 June 5, 2020, counsel for Mr. Parker, Deputy Public Defender Erin J. Snyder Severe,  
2           authorized counsel to advise the Court that Mr. Parker had no objection to ACLU of Oregon and  
3           CJRC appearing as *amici*. On June 8, 2020, counsel for the State of Oregon, Deputy District  
4           Attorney Matthew Lehman, authorized counsel to advise the Court that the State had no  
5           objection to ACLU of Oregon and CJRC appearing as *amici*.

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

8  
9           Dated this 8<sup>th</sup> day of June, 2020.

10  
11           By: s/Aliza B. Kaplan  
12           Professor Aliza B. Kaplan (OSB # 135523)  
13           Amber Cognata, Certified Law Student  
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21           By: s/Kelly K. Simon  
22           Kelly K. Simon (OSB # 154213)  
23           ACLU of Oregon  
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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 Solicitor General 1162 Court Street NE Salem, OR 97301 Benjamin.gutman@doj.stte.or.us	Erin J. Snyder Severe Office of Public Defense Services Appellate Division 1175 Court St. NE Salem, Oregon 97301-4030 Erin.J.Severe@opds.state.or.us
Matthew Robert Lehman Washington County District Attorney's Office 150 N 1st Ave Ste 300 MS40 Hillsboro OR 97124 matthew_lehman@co.washington.or.us	

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: June 8, 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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5 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
6 FOR WASHINGTON COUNTY  
7

8 STATE OF OREGON,  
9 Plaintiff,

10 v.

11 DANIEL PIERRE PARKER IV,  
12 Defendant.

Case No. 17CR57461

CA A167055

**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**

13  
14  
15 INTRODUCTION

16 Incarceration should not be a death sentence. However, prisons and jails across the  
17 country are being ravaged by a life-threatening virus. In Oregon prisons, the number of  
18 confirmed infections are spiking, already resulting in one death. Oregon's current prison  
19 conditions are tantamount to the potential addition of death or permanent and debilitating  
20 medical injury to every prisoner's sentence, including for people like Mr. Parker, a 42-year-old  
21 African American man.

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

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

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

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

[illegible]

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

2  
2



## ARGUMENT

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

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

The novel coronavirus that causes COVID-19 has led to a global pandemic that continues to spread at an exponential rate worldwide and across Oregon.<sup>2</sup> COVID-19 is a highly communicable virus that spreads through close human contact. There is no vaccine or cure for COVID-19, and no one is immune.<sup>3</sup> On March 11, 2020, the World Health Organization (“WHO”) labeled the outbreak a “global pandemic,” when the organization had identified 118,000 cases in 110 countries,<sup>4</sup> and it has been declared a national and state emergency.<sup>5</sup> In the span of only a few months, over 6,653,049 people globally have been diagnosed with COVID-19 and over 390,610 have died.<sup>6</sup> In the United States, as of June 4, 2020, over 1,842,101 people

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<sup>2</sup> 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).

<sup>3</sup> World Health Organization (“WHO”), *Q&A on coronavirus (COVID-19)* (Apr. 17, 2020), <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.”).

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

<sup>5</sup> Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, Wash. Post (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/> (last accessed Apr. 30, 2020); Lizzy Ackerman, *Gov. Kate Brown declares coronavirus state of emergency, announces 7 new Oregon cases*, The Oregonian, (updated Mar. 9, 2020), <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).

<sup>6</sup> Worldometer, *COVID-19 Coronavirus Pandemic*, [https://www.worldometers.info/coronavirus/?utm\\_campaign=homeAdvegas1](https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1)? (last accessed June 4, 2020); see also World Health Organization, *Coronavirus Disease 2019 (COVID-19) Situation Report 63* (Apr. 15, 2020), [https://www.who.int/docs/default-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 accessed Apr. 30, 2020).

1 have been diagnosed with COVID-19, and more than 107,029 people have died.<sup>7</sup> In Oregon, at  
2 least 4,399 people have confirmed positive tests for the virus,<sup>8</sup> and 159 have died.<sup>9</sup> These  
3 numbers grow exponentially every day, but are likely underreported due to the lack of access to  
4 COVID-19 tests.<sup>10</sup>

5 COVID-19 is a particularly contagious disease. The virus spreads from person to person  
6 through respiratory droplets caused by speaking, coughing or sneezing, close personal contact,  
7 and from contact with contaminated surfaces and objects.<sup>11</sup> It is up to 20 times more infectious  
8 than seasonal flu and spreads exponentially, doubling within days. It can survive for up to three  
9 hours in the air, four hours on copper, twenty-four hours on cardboard, and two to three days on  
10 plastic and stainless steel.<sup>12</sup> Controlling the spread of COVID-19 is made even more difficult  
11 because of the prominence of asymptomatic transmission—infection transmission by people who

12 <sup>7</sup> Centers for Disease Control and Prevention (“CDC”), *Cases in U.S.*,  
13 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited June 4,  
14 2020).

15 <sup>8</sup> Oregon Health Authority, COVID-19 data,  
16 [https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAut  
horityCOVID-19DataDashboard/COVID-  
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 June 4, 2020).

17 <sup>9</sup> Oregon Health Authority, *COVID-19 Cases in Oregon*, [https://govstatus.egov.com/OR-OHA-  
COVID-19](https://govstatus.egov.com/OR-OHA-COVID-19) (last visited June 4, 2020).

18 <sup>10</sup> Meerah Powell, *New Projections Show Social Distancing Is Helping Slow Coronavirus Spread*  
19 *in Oregon*, OPB (Apr. 11, 2020), [https://www.opb.org/news/article/oregon-coronavirus-covid-  
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  
20 epidemiologist with Oregon Health Authority, stated, “It is, to me, believable that there are that  
21 many more cases out in the community that we haven’t diagnosed.”).

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

26 <sup>12</sup> Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with*  
*SARS-CoV-1*, *New England Journal of Medicine* (Mar. 17, 2020),  
<https://www.nejm.org/doi/10.1056/NEJMc2004973> (last accessed May 26, 2020); *see also*  
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](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, making direct comparisons  
more difficult,” the WHO has indicated that both the reproduction rate and infection mortality  
rate for COVID-19 are significantly higher).

are contagious but exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.<sup>13</sup>

Once contracted, COVID-19 can cause severe damage to lung tissue, which may require extensive rehabilitation and, in some cases, permanent loss of respiratory function.<sup>14</sup> The virus can also cause myocarditis (inflammation of heart muscle), leading to abnormal heart rhythms, or potentially heart failure.<sup>15</sup> An emerging body of evidence suggests that COVID-19 can trigger an over-response by the immune system, causing widespread damage to other organs, including the kidneys, and neurologic injury.<sup>16</sup>

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

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<sup>13</sup> 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 those who are asymptomatic, meaning people who have contracted the disease but are not showing symptoms); see also Occupational Health and Safety, *Experts Suggest Nearly Half 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).

<sup>14</sup> 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.”).

<sup>15</sup> *Id.* ¶ 7.

<sup>16</sup> *Id.* ¶ 7.

<sup>17</sup> *Id.* ¶ 6.

<sup>18</sup> *Id.* ¶ 5.

<sup>19</sup> *Id.* ¶ 4.

<sup>20</sup> *Id.* ¶ 4.

COVID-19 deaths have spanned the demographic spectrum. For certain groups of people, the risk of serious COVID-19 infection is greater and more likely to lead to severe medical outcomes or death.<sup>21</sup> People of any age who suffer from certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and asthma, also have significantly elevated risk.<sup>22</sup> Early reports estimate that the mortality rate can be as high as 13.2 percent for cardiovascular disease, 9.2 percent for diabetes, 8.4 percent for hypertension, 8.0 percent for chronic respiratory disease, and 7.6 percent for cancer.<sup>23</sup> Death rates are also elevated amongst older<sup>24</sup> populations. A CDC study covering results from February 12 to March 16, 2020, found that for those between the ages of 55 and 64 who tested positive for COVID-19, there was a 1.4 to 2.6 percent mortality rate. For those aged 65 to 74, the mortality rate jumped to 2.7 to 4.9

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<sup>21</sup> 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).

<sup>22</sup> 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.”).

<sup>23</sup> 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).

<sup>24</sup> The definition of “older” in prison varies, as evidence shows that people living in prison begin to show signs of “old” age at younger ages. Maurice Chammah, The Marshall Project, *Do You Age Faster in Prison?* (Aug. 24, 2015), <https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison>.

1 percent, and for those aged 75 to 84, the mortality rate jumped further to 4.3 to 10.5 percent.<sup>25</sup>

2 COVID-19 is having disproportionate impacts on communities of color. The United  
3 States has seen COVID-19 ravage Black communities as a result of the country's  
4 institutionalized racism, including, *inter alia*, racial barriers to accessing to health care, economic  
5 injustices that cause poor health or increased exposure, and overrepresentation in the criminal  
6 justice system.<sup>26</sup> One recent CDC report on hospitalization showed that 33.1 percent of those  
7 hospitalized identified their race as non-Hispanic Black, despite being only 13.4 percent of the  
8 population.<sup>27</sup> In Oregon, the impact has fallen largely on the Latinx community. According to the  
9 Oregon Health Authority's data as of June 4, 2020, 34 percent of Oregon's cases occurred in  
10 people who identified their ethnicity as Hispanic.<sup>28</sup> This is compared to the 13.3 percent of the  
11 general population.<sup>29</sup>

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

15 In light of these high rates of serious injury and fatality, and because there is no cure or  
16 vaccine, the only known effective measure to reduce the risk of serious illness and death that

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17 <sup>25</sup> CDC, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) —*  
18 *United States, February 12–March 16, 2020* (Mar. 18, 2020),  
19 <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> (last accessed Apr. 30, 2020).

20 <sup>26</sup> CDC, *COVID-19 in Racial and Ethnic Minority Groups* (Apr. 22, 2020),  
21 [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html)  
22 [minorities.html](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*  
23 *Display – Will We Finally Do Something to Correct It?* (May 11, 2020),  
24 <https://nextcity.org/daily/entry/covid-19-puts-structural-racism-on-full-display> (last accessed  
25 May 27).

26 <sup>27</sup> CDC, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-*  
27 *Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020* (Apr. 17,  
28 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s\\_cid=mm6915e3\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_w);  
29 United States Census Bureau, QuickFacts, Oregon,  
30 <https://www.census.gov/quickfacts/fact/table/US/IPE120218>

31 <sup>28</sup> Oregon Health Authority, Oregon's COVID-19 Cases by Demographic Group,  
32 [https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonCOVID-](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonCOVID-19CaseDemographicsandDiseaseSeverityStatewide/DemographicData?:display_count=y&:toolb)  
33 [19CaseDemographicsandDiseaseSeverityStatewide/DemographicData?:display\\_count=y&:toolb](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonCOVID-19CaseDemographicsandDiseaseSeverityStatewide/DemographicData?:display_count=y&:toolb)  
34 [ar=n&:origin=viz\\_share\\_link&:showShareOptions=false](https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonCOVID-19CaseDemographicsandDiseaseSeverityStatewide/DemographicData?:display_count=y&:toolb) (last accessed May 27, 2020)

35 <sup>29</sup> United States Census Bureau, QuickFacts, Oregon, <https://www.census.gov/quickfacts/OR>

COVID-19 presents for Black men in prison 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.”<sup>30</sup> 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.<sup>31</sup> The only assured way to curb the pandemic is through dramatically reducing interpersonal contact for everybody.<sup>32</sup>

The Center for Disease Control has provided guidelines to help limit the spread of the virus, advising everyone to clean their hands with soap and water often; avoid touching their face; avoid close contact with others; cover their face with a cloth when around others; cover coughs and sneezes with a tissue or elbow; and to clean and disinfect surfaces daily.<sup>33</sup> These guidelines are especially important for those who fall into a high-risk category.<sup>34</sup>

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<sup>30</sup> 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.

<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>33</sup> CDC, *Coronavirus Disease 2019, How to Protect Yourself & Others* (Apr. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed May 26, 2020).

<sup>34</sup> *Id.* (“Keeping distance from others is especially important for people who are at higher risk of getting very sick.”).



1           Consequently, the world literally shut down so that people can physically distance from  
2 one another.<sup>35</sup> In the United States, virtually every major institution—from schools<sup>36</sup> to places of  
3 worship,<sup>37</sup> from businesses<sup>38</sup> to legislatures<sup>39</sup>—has been urged to reduce the number of people in  
4 close quarters. All but the most essential functions halted,<sup>40</sup> and many states ordered residents to  
5 “shelter in place” or “stay home” to limit contact.<sup>41</sup> But while much of the world has met the  
6 extraordinary threat of COVID-19 with extraordinary measures to protect public health, the same  
7 urgency has not been extended to the people in prisons and other detention facilities – despite  
8 being among the most vulnerable to contracting the virus.

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13 <sup>35</sup> See, e.g., Robin Muccari and Denise Chow, *Coronavirus timeline: Tracking the*  
14 *critical moments of COVID-19*, NBC News (updated Apr. 24, 2020),

15 [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 <sup>36</sup> 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),  
19 [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)  
20 [schools-h.pdf](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools-h.pdf).

21 <sup>37</sup> CDC, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based*  
22 *Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*,  
23 [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)  
24 [faith-organizations.html](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html) (last accessed May 26, 2020).

25 <sup>38</sup> CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to*  
26 *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)  
[ncov/community/guidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html) (last accessed May 26, 2020).

27 <sup>39</sup> Nat’l Conf. of State Legislatures, *Coronavirus and State Legislatures in the News*,  
28 [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)  
29 [news.aspx](https://www.ncsl.org/research/about-state-legislatures/coronavirus-and-state-legislatures-in-the-news.aspx) (last accessed May 26, 2020).

30 <sup>40</sup> See, e.g., Robin Muccari and Denise Chow, *Coronavirus timeline: Tracking the*  
31 *critical moments of COVID-19*, NBC News (updated Apr. 24, 2020),  
32 [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)  
33 [covid-19-n1154341](https://www.nbcnews.com/health/health-news/coronavirus-timeline-trackingcritical-moments-covid-19-n1154341) (last accessed May 26, 2020).

34 <sup>41</sup> See *id.*; see also Paris Martineau, *What’s a ‘Shelter in Place’ Order, and Who’s Affected?*,  
35 WIRED (Mar. 28, 2020), <https://www.wired.com/story/whats-shelter-place-order-whos-affected/>  
36 (last accessed May 26, 2020) “Shelter in place orders generally close all nonessential businesses  
and prohibit their employees from leaving their homes to work, though the definition of  
‘essential’ businesses can vary depending on the specifics of the order.”).

1 The Oregon Health Authority reported the first suspected COVID-19 case in Oregon on  
2 February 28, 2020.<sup>42</sup> By March 8, 2020, Oregon had 14 confirmed cases.<sup>43</sup> That day, Governor  
3 Kate Brown declared a state of emergency in Oregon to address the spread of COVID-19,<sup>44</sup>  
4 which she has now extended through July 6, 2020.<sup>45</sup> Since then, Governor Brown has  
5 implemented increasingly restrictive measures via executive order to slow the spread of this  
6 highly contagious and deadly virus. This included: restricting public gatherings,<sup>46</sup> prohibiting on-  
7 site consumption of food and drink in bars and restaurants,<sup>47</sup> closing all public schools,<sup>48</sup>  
8 suspending all in-person instruction at higher education institutions,<sup>49</sup> and postponing all non-  
9 essential health care procedures, among other things.<sup>50</sup>

10 Ultimately, on March 23, 2020, Governor Brown issued Executive Order No. 20-12,  
11 titled, “Stay Home, Save Lives,” in which she ordered all Oregonians to stay home and maintain  
12 strict physical distancing when they leave home for essential purposes, prohibited all non-  
13 essential gatherings, closed all non-essential businesses, and ordered businesses to implement

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14 <sup>42</sup> Oregon Health Authority, *Oregon announces first, presumptive case of novel coronavirus*  
15 (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)  
[Novel-Coronavirus.aspx](https://www.oregon.gov/oha/ERD/Pages/Oregon-First-Presumptive-Case-Novel-Coronavirus.aspx) (last accessed May 26, 2020).

16 <sup>43</sup> Acker, Lizzy, *Gov. Kate Brown declares coronavirus state of emergency, announces 7 new*  
17 *Oregon cases*, The Oregonian (Mar. 8, 2020),  
[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)  
[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).

18 <sup>44</sup> Oregon Governor’s Office, Exec. Order No. 20-03, (Mar. 8, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-03.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-03.pdf); Oregon Governor’s  
19 Office, *Governor Kate Brown Declares State of Emergency to Address Coronavirus*, (Mar. 8,  
20 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36109> (last accessed  
May 26, 2020).

20 <sup>45</sup> Oregon Governor’s Office, Exec. Order No. 20-24 (May 1, 2020),  
[https://www.oregon.gov/gov/admin/Pages/eo\\_20-24.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-24.aspx).

21 <sup>46</sup> Oregon Governor’s Office, Exec. Order No. 20-07 (Mar. 17, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-07.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-07.pdf); see also Oregon  
22 Governor’s Office, Exec. Order No. 20-14 (Apr. 7, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-14.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-14.pdf).

23 <sup>47</sup> *Id.*

24 <sup>48</sup> Oregon Governor’s Office, Exec. Order No. 20-08 (Mar. 17, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-08.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-08.pdf).

25 <sup>49</sup> Oregon Governor’s Office, Exec. Order No. 20-09 (Mar. 17, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-09.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-09.pdf).

26 <sup>50</sup> Oregon Governor’s Office, Exec. Order No. 20-10 (Mar. 19, 2020),  
[https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-10.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-10.pdf).



1 work-at-home accommodations to the extent possible.<sup>51</sup> These unprecedented measures were put  
2 in place to implement what public health officials say is a necessary response to this viral  
3 pandemic: to keep people physically distant. And Oregon has vigorously defended their life-  
4 saving necessity in court.<sup>52</sup>

5 By isolating at home, maintaining six-feet of distance when going out, and using proper  
6 hygiene techniques, Oregonians were able to reduce the number of new cases by seventy-two  
7 percent.<sup>53</sup> The most recent modeling report from the Oregon Health Authority shows that social  
8 distancing has helped prevent as many as 70,000 coronavirus cases in Oregon.<sup>54</sup> But Oregon  
9 cannot congratulate itself for “flattening the curve” outside of prisons while over 14,000  
10 Oregonians languish in unsafe conditions inside the state’s prisons.

11 Indeed, Oregon’s modeling may be wildly inaccurate. The ACLU has released a data  
12 model that shows national death projections could double when taking into account incarcerated  
13 populations.<sup>55</sup> Oregon’s projections are likely similarly infirm.

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16 <sup>51</sup> Oregon Governor’s Office, Exec. Order 20-12 (Mar. 23, 2020),  
17 [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-12.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf).

18 <sup>52</sup> Oregon Governor’s Office, *Governor Kate Brown Statement on Baker County Circuit Court*  
19 *Ruling* (May 18, 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36643>, (informing the  
20 public that the circuit court ruling enjoining her stay home order would be appealed “within  
21 hours”); Oregon Governor’s Office, *Governor Kate Brown Statement on Oregon Supreme Court*  
22 *Ruling* (May 18, 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36655>, (praising the Oregon  
23 Supreme Court’s “swift action” to uphold physical distancing orders because the “science  
24 remains clear” that such measures are life-saving).

25 <sup>53</sup> Oregon Health Authority, *Working Paper: COVID-19 intervention effectiveness and epidemic*  
26 *trends for Oregon* (Apr. 22, 2020), [https://govsite-](https://govsite-assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-04-22.pdf)  
[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)  
[04-22.pdf](https://govsite-assets.s3.amazonaws.com/YdEkQPkGTSCwbUoagFhH_Oregon-COVID-19-Projections-2020-04-22.pdf) (last accessed May 26, 2020).

27 <sup>54</sup> *Id.*; Meera Powell, OPB, *New Projections Show Social Distancing Is Helping Slow*  
28 *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/)  
[coronavirus-covid-19-curve-projection-april-11/](https://www.opb.org/news/article/oregon-coronavirus-covid-19-curve-projection-april-11/).

29 <sup>55</sup> ACLU, *Flattening the Curve: Why Reducing Jail Populations is Key to Beating COVID-19*  
30 (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)  
[covid-19?redirect=covidinjails](https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails)

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

4     Public health officials have uniformly warned that transmission of the virus poses an  
5     enormous and potentially catastrophic risk to people and staff in correctional facilities, and, by  
6     extension, to their families and communities.<sup>56</sup> Prisons and other places of detention, like other  
7     congregate living environments, have high numbers of people with chronic and often untreated  
8     illnesses who live, eat, and sleep in close quarters with minimal levels of sanitation, limited  
9     access to personal hygiene, many high-contact surfaces, and no ability to stay at a safe physical  
10    distance from others.<sup>57</sup> People in custody, therefore, face increased danger of contracting  
11    COVID-19, as well as increased danger of spreading it to those around them, including staff.

12    Early CDC guidance for detention centers reiterated that the only known effective  
13    measures for protecting vulnerable people are physical distancing (i.e., remaining at least six feet  
14    away from other people), quarantining or remaining physically separated from known or  
15    potentially infected individuals, and vigilant hygiene, including washing hands with soap and  
16    water.<sup>58</sup> The United Nations Human Rights Subcommittee on Prevention of Torture and Other

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17    <sup>56</sup> Brief of Amici Curiae Public Health Rights Experts, *Maney et al v. Brown et al.*, No. 20-cv-  
18    00570 (D. Or. filed Apr. 6, 2020), ECF No. 74 (**Ex. A**); *see also* Letter from Faculty at Johns  
19    Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon.  
20    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)  
21    [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  
22    accessed May 26, 2020) (“John Hopkins Faculty Letter”); Matthew J. Akiyama, M.D., Anne  
23    Spaulding, M.D., Josiah D. Rich, M.D., *Flattening the Curve for Incarcerated Populations—*  
24    *COVID-19 in Jails and Prisons*, N. Engl. J. Med. (Apr. 2, 2020),  
25    <https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true> (last accessed May 26,  
26    2020); Nicole Westman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The  
27    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)  
28    [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).

29    <sup>57</sup> Brief of Amici Curiae Public Health Rights Experts, *Maney et al v. Brown et al.*, No. 20-cv-  
30    00570 (D. Or. filed Apr. 6, 2020), ECF No. 74 (**Ex. A**); *see also* John Hopkins Faculty Letter;  
31    *see also* Matthew J. Akiyama, M.D., Anne Spaulding, M.D., Josiah D. Rich, M.D., *Flattening the*  
32    *Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, N. Engl. J. Med. (Apr. 2,  
33    2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true> (last accessed  
34    Apr. 30, 2020).

35    <sup>58</sup> CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*  
36    *Correctional and Detention Facilities* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019->

1 Cruel, Inhuman or Degrading Treatment or Punishment called for a reduction of prison  
2 populations “by implementing schemes of early, provisional or temporary release.”<sup>59</sup> And the  
3 National Commission on Correctional Health Care specifically recommended that measures be  
4 implemented in correctional facilities to increase the physical space between all persons  
5 incarcerated and detained at such facilities.<sup>60</sup>

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

9 We, the leaders of global health, human rights and development institutions, come  
10 together to urgently draw the attention of political leaders to the heightened vulnerability  
11 of prisoners and other people deprived of liberty to the COVID-19 pandemic, and urge  
12 them to take all appropriate public health measures in respect of this vulnerable  
13 population that is part of our communities.<sup>61</sup>

14 The first recommendation in this joint statement is to reduce overcrowding, calling high  
15 population densities “an insurmountable obstacle for preventing, preparing for or responding to  
16 COVID-19.” *Id.* And on May 29, 2020, several human rights experts from across the world  
17 issued a statement urging federal and state governments in the United States to “act now” to  
18 reduce the size of its incarcerated populations, pointing to both the unique medical vulnerabilities

19 [ncov/community/correction-detention/guidance-correctional-detention.html](https://www.cdc.gov/media/releases/2020/s0529-cdc-guidance-prisons.html) (last accessed May  
20 26, 2020) (“CDC Guidance for Prisons”).

21 <sup>59</sup> 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  
24 Mechanisms relating to the Coronavirus Pandemic*, (March 25, 2020),  
25 [https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic  
26 2020.pdf](https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf).

27 <sup>60</sup> Nat’l Comm’n on Correctional Health Care, *COVID-19 Weekly Roundtable for Law  
28 Enforcement and Correctional Health Care* (Mar. 27, 2020),  
29 [https://www.ncchc.org/filebin/COVID/COVID-19\\_Roundtable\\_Week\\_2\\_March\\_27.pdf](https://www.ncchc.org/filebin/COVID/COVID-19_Roundtable_Week_2_March_27.pdf) (last  
30 accessed Apr. 30, 2020).

31 <sup>61</sup> WHO, UNODC, WHO, UNAIDS and OHCHR joint statement on COVID-19 in prisons and  
32 other closed settings (May 13, 2020), [https://www.who.int/news-room/detail/13-05-2020-unodc-  
33 who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings](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 of people in this setting and the racial and LGBTQ justice implications of failing to implement  
2 release measures in detention facilities.<sup>62</sup>

3 Oregon is already seeing the results of not taking swift action to protect people living and  
4 working in prisons, as the Oregon State penitentiary in Salem is the site of Oregon’s largest  
5 single coronavirus outbreak.<sup>63</sup> The experts agree: it is necessary to reduce prison populations.

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

8 On April 13, 2020, ODOC reported that “5,800 inmates – an estimated 40 percent of the  
9 prison population – would have to be released to allow for social distancing in prisons statewide  
10 to guard against the spread of the coronavirus.”<sup>64</sup> This stark admission that ODOC cannot  
11 implement social distancing measures—the only known way to slow and prevent transmission  
12 of the COVID-19 virus—means that ODOC cannot safely house people in its custody without  
13 significantly reducing the prison population. It means that all people living in Oregon prisons  
14 are left in a deadly holding pattern with no way to protect themselves. This includes a  
15 disproportionate number of people of color,<sup>65</sup> a large elderly population,<sup>66</sup> and people who are  
16 medically vulnerable, all of whose health must be considered under ORS 138.285(1).

17 ODOC has provided a roadmap for how it might reduce prison population sufficiently to  
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19 <sup>62</sup> Office of High Commissioner, United Nations Human Rights, *US Government urged to do*  
20 *more to prevent major outbreaks of COVID-19 in detention centres – UN experts* (May 29,

21 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E>.

22 <sup>63</sup> Noelle Crombie, *Oregon’s maximum-security prison in Salem now the site of state’s biggest*  
*single coronavirus outbreak* (May 22, 2020),

23 [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).

24 <sup>64</sup> ODOC, *DOC Response to COVID-19: AIC Population Management Scenarios* (Apr. 13,  
25 2020), <https://drive.google.com/file/d/1zyEKRHT8Ub8Dj2xzOFjLr-gRMO-jXrui/view> (last  
26 visited Apr. 30, 2020) (“ODOC Report”).

<sup>65</sup> Black, Hispanic and American Indian/Alaska Native people in Oregon are all incarcerated at  
significantly higher rates than white Oregonians. <https://www.prisonpolicy.org/profiles/OR.html>

<sup>66</sup> ODOC, *Inmate Population Profile for 05/01/2020*,  
<https://www.oregon.gov/doc/Documents/inmate-profile.pdf>.

1 allow for social distancing, by identifying 5,962 people in custody who could be considered for  
2 release or alternative housing on an expedited basis.<sup>67</sup> This includes 1,624 people who are over  
3 60 years of age or whom ODOC has deemed “most vulnerable” or “vulnerable” to COVID-19,  
4 1,754 who are within 6 months of release, and 2,584 who are within 6-12 months of release.<sup>68</sup> It  
5 is nearly two months later, and Oregonians are still waiting for action from its government  
6 leaders to begin to reduce the prison population to a safe size.<sup>69</sup> People in custody— including  
7 those who are particularly susceptible to becoming severely sick or dying from it—are still  
8 languishing in prison. And thousands of people, many of whom are scheduled to be released  
9 within six to twelve months anyway, are at risk of dying in prison instead.

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

12 On May 20, 2020, tragedy struck in Oregon’s prisons when the first person living in one  
13 of the state prisons died from COVID-19.<sup>70</sup> At the time, 148 people in custody had tested  
14 positive. At that rate, and without the ability to implement physical distancing measures, Oregon  
15 is well on its way to another death of a person trapped in harm’s way.

16 As of June 4, 2020, ODOC reported 211 confirmed COVID-19 cases in its facilities –  
17 165 people in custody and 46 staff.<sup>71</sup> This is up from a single confirmed staff case on April 1,  
18 2020.<sup>72</sup> It is unknown how many people have actually contracted the virus in Oregon prisons,

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19 <sup>67</sup> ODOC Report.

20 <sup>68</sup> *Id.*

21 <sup>69</sup> As of May 26, 2020, nearly 1000 Oregonians had signed the ACLU of Oregon’s petition  
22 demanding action from Oregon’s government leaders to reduce Oregon’s prison population to  
23 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).

24 <sup>70</sup> Noelle Crombie, *First Oregon prison inmate dies of coronavirus*, *The Oregonian* (May 21,  
25 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)  
26 [prison-officials-say.html](https://www.oregonlive.com/crime/2020/05/oregon-inmate-has-died-from-coronavirus-prison-officials-say.html)

<sup>71</sup> 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 June 4, 2020).

<sup>72</sup> Noelle Crombie, *Prison employee is first confirmed coronavirus case in Oregon Department*  
*of Corrections*, *The Oregonian* (Apr. 1, 2020),  
[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).

1 however, because ODOC has conducted only very limited testing of those “showing signs and  
2 symptoms of flu/COVID-19, including fever, cough and shortness of breath...[and] targeted  
3 concentric contact testing of asymptomatic adults”<sup>73</sup> As of June 4, 2020, ODOC had only tested  
4 611 of the nearly 14,500 people in custody, with only 25 pending tests.<sup>74</sup>

5 Comparing these results to the trajectory of positive COVID-19 tests in the Oregon  
6 population demonstrates how quickly Oregon prisons can become major outbreak sites like we  
7 now see in the Oregon State Penitentiary. As of March 10, 2020, Oregon had 29 positive  
8 COVID-19 tests.<sup>75</sup> This number doubled within two days, and in a week increased more than six-  
9 fold to 184 cases.<sup>76</sup> Oregon now has 4,399 positive tests as of June 3, 2020. These numbers  
10 show the rapid upswing of positive tests even with the benefit of widespread and unprecedented  
11 social distancing measures being followed outside Oregon prisons.

12 Even if Oregon continues to see its curve flatten outside of Oregon prisons, the number of  
13 COVID-19 cases among people living and working in Oregon prisons is likely to continue to  
14 increase dramatically because, as ODOC admits, they are only following social distancing  
15 guidelines “to the best of their abilities,” but Oregon’s prisons “are not built for” such needs.<sup>77</sup> It  
16 is impossible for people who are incarcerated or working in prisons to practice physical  
17 distancing.

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

20 The dire warnings from public health officials about the risks to people in prisons are  
21 already playing out in Oregon prisons just as it has played out in places of detention around the

22 <sup>73</sup> Frequently Asked Questions, *COVID-19 Response*,  
<https://www.oregon.gov/doc/covid19/Pages/faq.aspx> (last visited May 26, 2020).

23 <sup>74</sup> COVID-19 Tracking Tool, *supra* note 70

24 <sup>75</sup> Oregon Health Authority, COVID-19 data,  
[https://public.tableau.com/profile/oregon.health.authority.covid.19#!/vizhome/OregonHealthAut  
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25 visited May 26, 2020).

26 <sup>76</sup> *Id.*

<sup>77</sup> ODOC, *DOC’s Response to the Novel Coronavirus in Oregon*,  
<https://www.oregon.gov/doc/covid19/Pages/faq.aspx> (last accessed May 26, 2020).



country. The Oregon State Penitentiary is currently the site of Oregon’s largest COVID-19 outbreak. Oregon need not speculate about what will happen in its prisons if it does not take immediate steps to reduce prison populations and implement social distancing in its prisons.

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

- Rikers Island in New York confirmed its first positive COVID-19 case on March 18, 2020. Six days later, 52 people at Riker’s Island were confirmed positive for COVID-19, and another 96 were under observation awaiting results. By April 1, it had 231 cases among inmates and 233 cases among staff.<sup>78</sup> This represents nearly seven times the infection rate of the population of the state of New York.<sup>79</sup>
- On March 23, the Cook County Jail in Chicago placed two individuals with positive COVID-19 tests in isolation cells.<sup>80</sup> Just over two weeks later, the jail had 350 positive cases—238 inmates and 115 staff members, and on April 8, 2020, the jail was deemed “the nation’s largest-known source of coronavirus infections.”<sup>81</sup> Jail officials have acknowledged that these numbers likely underestimate the actual problem, as the vast majority of the 4,500-person incarcerated population has not been tested.<sup>82</sup>
- 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.<sup>83</sup>

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.

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<sup>78</sup> Miranda Bryant, *Coronavirus spread in Rikers is a ‘public health disaster,’ says jail’s top doctor*, The Guardian (Apr. 1, 2020), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> (last accessed Apr. 30, 2020).

<sup>79</sup> 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).

<sup>80</sup> 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>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 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 **III. A stay of Mr. Parker’s sentence and his release pending appeal is the only result**  
2 **that satisfies ORS 138.285 and the United States and Oregon constitutions.**

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

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

7 The rationale for this principle is simple enough: when the State by  
8 affirmative exercise of its power so restrains an individual’s liberty  
9 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[.]

10 *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 US 189, 199-200 (1989). Conditions that  
11 pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against  
12 cruel and unusual punishment, and the government cannot “ignore a condition of confinement  
13 that is sure or very likely to cause serious illness and needless suffering the next week or month  
14 or year.” *Helling v. McKinney*, 509 US 25, 33 (1993).

15 The Eighth Amendment protects prisoners against conditions that would present them  
16 with a clear risk of contracting an infectious disease. For instance, inmates cannot be  
17 commingled with others having hepatitis and venereal disease. *Hutto v. Finney*, 437 US 678, 682  
18 (1978) (Eighth Amendment violated where mattresses used by prisoners with infectious diseases  
19 were distributed “at random” for use by others”); *see also Gates v. Collier*, 501 F2d 1291, 1300-  
20 04 (5th Cir 1974) (Eight Amendment violation affirmed in face of “rampant unsanitary  
21 conditions” including circumstances where “inmates with serious contagious diseases are  
22 allowed to mingle with the general prison population”); *Wallis v. Baldwin*, 70 F3d 1074, 1077  
23 (9th Cir 1995) (involuntary exposure to asbestos supports Eighth Amendment claim). And the  
24 Supreme Court has held that the Eighth Amendment’s prohibition against exposing prisoners to  
25 infectious diseases applies even when the plaintiff cannot yet “prove that he is currently suffering  
26 serious medical problems caused by” the exposure. *Helling*, 509 US at 32; *Hoptowit v. Spellman*,



1 753 F2d 779, 784 (9th Cir 1985) (health risks caused by inadequate fire prevention, lighting,  
2 poor ventilation, vermin, plumbing problems and other safety hazards were Eighth Amendment  
3 violations); *Ramos v. Lamm*, 639 F2d 559, 570 (10th Cir 1980) (numerous sanitation deficiencies  
4 constitutionally impermissible).

5 Conditions of confinement must be analyzed in context, and courts must “consider the  
6 effect of each condition in the context of the prison environment, especially when the ill-effects  
7 of particular conditions are exacerbated by other related conditions.” *Wright v. Rushen*, 642 F2d  
8 1139, 1134 (9th Cir 1981).

9 Oregon courts have similarly held that dangerous and unsanitary prison conditions are a  
10 violation of the prohibition against cruel and unusual punishment contained in Article I, Section  
11 16 of the Oregon Constitution. *See, e.g., Bedell v. Schiedler*, 307 Or 562 (1989) (plaintiff brought  
12 cruel and unusual punishment claim based on “failure to provide adequate ventilation and  
13 circulation,” being forced to share a small space with tobacco smokers, and as a result suffered  
14 “clogged sinuses, severe headaches, dry and irritated skin and a sore throat,” prompting Oregon  
15 Supreme Court to note that “prisoners . . . are entitled to an environment that does not  
16 unnecessarily subject them to serious health hazards.”); *Taylor v. Peters*, 360 Or 460, 462-63  
17 (2016) (finding “cognizable constitutional violations” where plaintiff was “confined under  
18 conditions in which other prisoners are ‘continually’ throwing feces and urine into his cell,”  
19 because these allegations amounted to confinement “in an environment that subjected him to  
20 serious health hazards”); *Weidner v. Zenon*, 124 Or App 314 (1993) (allegation by wheelchair-  
21 bound plaintiff that he lacked access to fire escape sufficient to state claim under Section 16  
22 because of the “life-threatening implications”).

23 The decisions in *Hutto*, *Gates*, *Bedell*, and *Taylor*, among others, establish that placing an  
24 inmate in a situation that creates an elevated risk of potentially lethal infection constitutes cruel  
25 and unusual punishment under both United States and Oregon Constitutions. Mr. Parker’s  
26 vulnerability to COVID-19, surely places him alongside those incarcerated in the above cases.

1 Given the acute dangers of the current prison environment, ODOC's COVID-19 infection trends,  
2 and the racial disparities in prison and this pandemic, the attendant high risk of death or  
3 permanent injury to Mr. Parker becomes closer to a certainty with each passing day. This is  
4 compounded by the unconstitutional nature of Mr. Parker's Count I non-unanimous conviction.  
5 It is cruel and unusual punishment to keep Mr. Parker incarcerated based the Oregon prison  
6 system's failure to provide minimally adequate preventative measures for COVID-19.

7 **B. Oregon prison conditions violate Mr. Parker's Article I, section 13 right to be**  
8 **free from unnecessary rigor while in custody.**

9 Article I, section 13 of the Oregon Constitution states that "No person arrested, or  
10 confined in jail, shall be treated with unnecessary rigor." The section "ha[s] antecedents as early  
11 as New Hampshire's 1783 constitution" and "reflect[s] a widespread interest in penal reform"  
12 wherein "punishments [were to be] made less 'sanguinary' (i.e. bloody)." *Sterling v. Cupp*, 290  
13 Or 611, 617 (1981). The Oregon Supreme Court has explained that "[t]he guarantee against  
14 'unnecessary rigor' . . . [is not] confined only to such historically 'rigorous' practices as  
15 shackles, the ball and chain, or to physically brutal treatment or conditions, though these are the  
16 most obvious," but instead extends to any unnecessary abuse, which reaches as far as "the  
17 imposition of a needless indignity . . . [that] goes beyond recognized necessity." *Id.* at 619-20.  
18 Once a person establishes a cognizable abuse, the question becomes whether the action is  
19 justified by necessity. *Id.* at 625. Here, keeping Mr. Parker locked in prison subjects him to an  
20 unjustified health risk.

21 The Oregon Supreme Court has found that prison conditions that subject inmates to  
22 unnecessary health hazards are within the ambit of section 13. In *Bedell*, for instance, the  
23 Supreme Court cited section 13 as the source of a prisoner's "entitle[ment] to an environment  
24 that does not unnecessarily subject them to serious health hazards." 307 Or at 570 n2 (accepting  
25 allegations of environment that led to prisoner "unnecessarily suffering clogged sinuses, severe  
26 headaches, dry and irritated skin and a sore throat" "requir[ed] immediate judicial scrutiny").

1 Other Oregon courts have held that section 13 prohibits subjecting prisoners to “a serious,  
2 immediate, and ongoing health hazard.” *Taylor*, 274 Or App 477, at 480-81 (plaintiff adequately  
3 alleged section 13 violation by alleging “that other inmates continuously thr[e]w feces and urine  
4 into plaintiff’s cell”); *see also Weidner*, 124 Or App at 317 (cognizable claim for habeas relief on  
5 section 13 grounds where lack of access to fire escape had “life-threatening implications”).

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

16 What is necessary for prisons during the COVID-19 pandemic is to safely house people  
17 in an environment where physical distancing can be implemented or to safely transition people  
18 back home where they can practice physical distancing with the rest of the community. Mr.  
19 Parker can safely return to his family and the community. The Court and the State have a range  
20 of less restrictive and safer options to address any public safety concerns for Mr. Parker and  
21 thousands in custody, including conditioning release if necessary. Every day that Mr. Parker  
22 stays incarcerated in a prison that does not practice social distancing brings him a day closer to  
23 infection with a virus that could kill or permanently injure him. This is especially unnecessary in  
24 light of the fact that a law deemed racist and unconstitutional put him in harm’s way in the first  
25 place. If being subjected to tobacco smoke in an enclosed area (*Bedell*) or being exposed to feces  
26 and urine (*Taylor*) can amount to the application of unnecessary rigor, subjecting Mr. Parker to a

1 deadly virus most certainly constitutes unnecessary rigor and violates Article I, section 13 of the  
2 Oregon Constitution.

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

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

14 Given ODOC’s admitted inability to implement social distancing measures, the spiking  
15 rates of infection among the limited number of people tested in Oregon prisons, the outbreaks  
16 already beginning in Oregon’s prisons, and ODOC’s failure to implement sufficient measures to  
17 protect from infection people who are particularly vulnerable to the virus’s most drastic  
18 outcomes, Mr. Parker’s health should be of utmost concern. Additionally, the other factors  
19 enumerated in ORS 138.285(2) applicable to Mr. Parker’s case do not provide countervailing  
20 considerations that justify Oregon’s current violations of Mr. Parker’s constitutional rights. The  
21 only way to apply ORS 138.285 consistently with the United States and Oregon Constitutions in  
22 this case is to give predominant and primary weight to Mr. Parker’s health, order a stay of Mr.  
23 Parker’s sentence, and order his release from prison pending the resolution of his appeal.

24 //

25 //

1 Anything less would put the Court's application of ORS 138.285 at direct odds with Mr. Parker's  
2 constitutional and basic human rights.

3 **CONCLUSION**

4 For the reasons stated above the Court should grant Mr. Parker's Motion.

5  
6 Dated this 8<sup>th</sup> day of June, 2020.

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UNITED STATES DISTRICT COURT  
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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> As of May 13, 2020, there were 4,170,424 confirmed cases and 287,399 deaths in 215 countries, areas, or territories worldwide.<sup>3</sup> 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.<sup>4</sup>

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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> It is for precisely this reason that dozens of state governments have instituted mandatory social

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<sup>2</sup> 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>.

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

<sup>4</sup> See Centers for Disease Control and Prevention, *Situation Summary* (2020), [cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsummary.html](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).

<sup>5</sup> 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>.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *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.<sup>8</sup>

Although these measures are welcomed and necessary, they would have been more effective if governments had acted proactively, rather than merely prescriptively.<sup>9</sup> The United States now has over 1,364,061 confirmed cases and over 82,246 fatalities.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

## **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

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<sup>8</sup> 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>.

<sup>9</sup> 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.").

<sup>10</sup> 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>.

<sup>11</sup> 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/>.

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



more common in jail settings than in communities at large.<sup>13</sup> 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.<sup>14</sup> In New York, jails have seen infection rates *nine* times higher than the broader community.<sup>15</sup> Given the continued dearth of testing across the country, these numbers clearly (and likely dramatically) understate the problem.<sup>16</sup> 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%.<sup>17</sup>

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

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<sup>13</sup> 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>.

<sup>14</sup> 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>.

<sup>15</sup> 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>.

<sup>16</sup> *Id.*

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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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<sup>18</sup> 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>.

<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> The virus even has led to shortages of less specialized equipment such as face masks and gloves.<sup>22</sup>

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

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<sup>20</sup> 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.”).

<sup>21</sup> 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>.

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

### 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[.]"<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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

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<sup>23</sup> 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.").

<sup>24</sup> 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>.

<sup>25</sup> 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>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

have to include reductions in incarcerated populations.<sup>28</sup> 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.

DATED this 15<sup>th</sup> day of May, 2020.

Respectfully submitted,

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<sup>28</sup> 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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