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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION

PAUL MANEY; GARY CLIFT; GEORGE  
NULPH; THERON HALL; DAVID HART;  
MICAHA 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.

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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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