

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK
No. SJ-2020-0757**

COMMITTEE FOR PUBLIC COUNSEL SERVICES and MASSACHUSETTS
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Plaintiffs,

v.

BARNSTABLE COUNTY SHERIFF'S OFFICE, BERKSHIRE COUNTY
SHERIFF'S OFFICE, BRISTOL COUNTY SHERIFF'S OFFICE, DUKES
COUNTY SHERIFF'S OFFICE, ESSEX COUNTY SHERIFF'S OFFICE,
FRANKLIN COUNTY SHERIFF'S OFFICE, HAMPDEN COUNTY SHERIFF'S
OFFICE, HAMPSHIRE COUNTY SHERIFF'S OFFICE, MIDDLESEX
COUNTY SHERIFF'S OFFICE, NORFOLK COUNTY SHERIFF'S OFFICE,
PLYMOUTH COUNTY SHERIFF'S OFFICE, SUFFOLK COUNTY SHERIFF'S
OFFICE, and WORCESTER COUNTY SHERIFF'S OFFICE,
Defendants.

ON A CIVIL COMPLAINT FOR RELIEF PURSUANT TO
G. L. c. 211, § 3 AND FOR DECLARATORY RELIEF
PURSUANT TO G. L. c. 231A, § 1

BRIEF OF *AMICI CURIAE* PUBLIC HEALTH EXPERTS

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STATEMENTS OF INTEREST

Amici curiae, a group of experts in epidemiology, infectious diseases, public health, and healthcare for incarcerated people, have advocated for public health approaches in correctional settings throughout the pandemic, including in an *amicus* letter in *Comm. for Public Counsel Servs. v. Chief Justice of the Trial Court* (SJC-12926), filed in March 2020. *Amici* include:

Dr. Mary T. Bassett, MD, MPH, Director of the François-Xavier Bagnoud (FXB) Center for Health and Human Rights and FXB Professor of the Practice of Health and Human Rights in the Department of Social and Behavioral Science at the Harvard T.H. Chan School of Public Health. She is the former Commissioner of the New York City Department of Health and Mental Hygiene, and in July 2020 she served as senior author on a study published in *JAMA Network Open* on COVID-19 within Massachusetts jails and prisons;

Prof. Leo Beletsky, JD, MPH, Professor of Law and Health Sciences at Northeastern University School of Law & Bouvé College of Health Sciences. He is also the Director of the Health in Justice Action Lab and Associate Adjunct Professor at UC San Diego School of Medicine;

Prof. Charles Branas, PhD, Gelman Endowed Professor and Chair of the Department of Epidemiology at Columbia University Mailman School of Public Health;

Prof. Lauren Brinkley-Rubinstein, PhD, Assistant Professor of Social Medicine at UNC–Chapel Hill School of Medicine as well as a Faculty Member of the UNC Center for Health Equity Research. She also is Co-Lead Investigator and Co-Founder of the COVID Prison Project, a public-facing database that provides recent data on the state of COVID-19 within United States correctional facilities;

David Cloud, JD, MPH, Research and Program Manager at the University of California San Francisco Division of Geriatrics and a PhD candidate at the Rollins School of Public Health at Emory University;

Dr. Warren J. Ferguson, MD, Professor of Family Medicine and Community Health at the University of Massachusetts Medical School;

Prof. Robert E. Fullilove, EdD, Professor of Sociomedical Sciences at Columbia University Medical Center and Associate Dean of Community and Minority Affairs at Columbia University Mailman School of Public Health;

Dr. Mindy Thompson Fullilove, MD, Professor of Urban Policy and Health at The New School;

Dr. Sandro Galea, MD, MPH, DrPH, Dean of Boston University School of Public Health as well as Robert A. Knox Professor at Boston University School of Public Health;

Prof. Gregg Gonsalves, PhD, Assistant Professor of Epidemiology at Yale School of Medicine, Associate Adjunct Professor of Law at Yale Law School, and

Co-Director of the Global Health Justice Partnership and Collaboration for Research Integrity and Transparency;

Dr. Josiah “Jody” Rich, MD, MPH, Professor of Medicine and Epidemiology at Brown University as well as Director of the Center for Prisoner Health and Human Rights and an Attending Physician at The Miriam Hospital;

Dr. Lisa Simon, MD, DMD, Fellow in Oral Health and Medicine Integration at Harvard School of Dental Medicine. She is also a Clinical Fellow in Medicine at Harvard Medical School. Dr. Simon serves as a correctional dentist in Massachusetts; and

Dr. Bram Wispelwey, MD, MS, MPH, Chief Strategist & Co-Founder, Health for Palestine. He is also an Associate Physician at Brigham & Women’s Hospital, an Instructor in Medicine at Harvard Medical School, and a Senior Fellow at Atlantic Fellows for Health Equity.

RULE 17(C)(5) DECLARATION

Amici declare that (a) no party or party’s counsel authored the brief in whole or in part, (b) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity—other than the *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither *amici* nor their counsel represent or have represented any of the parties to the present action in another proceeding involving

similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present action.

INTRODUCTION

Nine months ago, our group of experts in epidemiology, infectious diseases, public health, and healthcare for incarcerated people, wrote to urge this Court to grant Plaintiffs’ request to safely release as many people as possible from confinement. Nine months later, the crisis of COVID-19 behind bars has accelerated dramatically, and yet the jail population is higher in the Commonwealth today than it was when the Supreme Judicial Court first issued its decision in April. We are in the midst of a period of unparalleled and uncontained community spread, demanding renewed and urgent redress.

We have not been here before. Nationally, the pandemic reaches new, tragic milestones every few days, setting grim records on daily hospitalizations and deaths.¹ And by many Massachusetts-specific metrics—including the daily number

¹ See, e.g., Christina Maxouris, *US hits record for daily Covid-19 deaths. Winter will be ‘awful’ before we see ‘some light,’ expert says*, CNN (Dec. 30, 2020), <https://www.cnn.com/2020/12/30/health/us-coronavirus-wednesday/index.html>; Jaclyn Diaz, *U.S. Surpasses 3,600 Daily Coronavirus Deaths, Breaks Prior Hospitalization Record*, NPR (Dec. 17, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/17/947417443/u-s-surpasses-3-600-coronavirus-deaths-breaks-prior-hospitalization-record>.

of new cases,² the number of communities considered high-risk red zones,³ and the Massachusetts Water Resources Authority wastewater surveillance quantifying viral RNA in Greater Boston’s wastewater⁴—the scale of the pandemic now is far more dire than it was when the full Court took swift action in the spring.

² See, e.g., Martin Finucane & Ryan Huddle, *Charts: While you’ve been worried about the future of our democracy, the coronavirus has continued to surge in Mass.*, Bos. Globe (Jan. 11, 2021), <https://www.bostonglobe.com/2021/01/11/nation/charts-while-youve-been-worried-about-future-our-democracy-coronavirus-has-continued-surge-mass> (“With the help of daily case tallies over 7,000 on Thursday, Friday, and Saturday, the seven-day average climbed further into record territory, reaching 6,033 by Sunday.”); Anne Gerard-Flynn, *Massachusetts daily COVID rate among highest in country*, Mass. Live News (Jan. 12, 2021), <https://www.masslive.com/coronavirus/2021/01/massachusetts-daily-covid-rate-among-highest-in-country.html>.

³ Asher Klein & Mike Pescaro, *190 Mass. Communities, Including Boston, Are at High Risk for COVID-19 Transmission*, NBC 10 Bos. (Dec. 31, 2020), <https://www.nbcboston.com/news/coronavirus/190-mass-communities-including-boston-are-at-high-risk-for-covid-19-transmission/2269622>; *3,760 new COVID-19 cases, 41 additional deaths reported in Massachusetts*, WCVB (Dec. 21, 2020), <https://www.wcvb.com/article/massachusetts-covid-19-cornonavirus-numbers-daily-update-december-21-2020/35031808> (“In its weekly report on Thursday, 187 communities were in the ‘Red,’ or at high risk of COVID-19, up from 158 communities last week.”); Asher Klein & Mike Pescaro, *Mass. COVID Hot Spots: More Than Half of Cities, Towns in High-Risk Red Zone*, NBC 10 Bos. (Dec. 17, 2020), <https://www.nbcboston.com/news/coronavirus/mass-covid-hot-spots-more-than-half-of-states-cities-towns-in-high-risk-red-zone/2260422>.

⁴ Finucane & Huddle, *supra* note 2 (“[T]ests in the southern portion of the system, which includes communities south and west of Boston, suggested that the virus had reached recordbreaking levels.”); Christina Prignano, *Coronavirus levels in Massachusetts wastewater hit new records*, Bos. Globe (Dec. 8, 2020), <https://www.bostonglobe.com/2020/12/08/nation/coronavirus-levels-massachusetts-wastewater-hit-new-records>.

Still, “the worst is yet to come.”⁵ After a surge in hospitalizations and deaths following Thanksgiving, foot traffic through airports during the holidays suggests we will continue to see more cases and ever more deaths into the winter.⁶ Governor Baker emphasized on December 21 that several hospitals were already reaching capacity, even before the anticipated post-holiday surge, because there were far fewer available hospital beds than in the spring. “There were 2,500 intensive care unit beds available in Massachusetts on April 29, but that number [as of December 21st] is at 390. Over the same time frame, the number of non-ICU beds available

⁵ Sarah Mervosh, Giulia McDonnell Nieto del Rio & Neil MacFarquhar, ‘*Numb and Heartbroken, the U.S. Confronts Record Virus Deaths*, N.Y. Times (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/coronavirus-death-record.html>; see also ‘*Things Will Get Worse, Fauci Warns, as U.S. Hits a New Daily Death Record*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/live/2021/01/07/world/covid-19-coronavirus> (last updated Jan. 14, 2021).

⁶ See, e.g., *Holiday travel increasing dramatically despite public health warnings amid COVID surge*, ABC News (Dec. 21, 2020), <https://abc7.com/holiday-travel-christmas-airport-airplane/8947333>; Michael Liedtke, *US airport traffic rising despite holiday travel warnings*, Associated Press (Dec. 20, 2020), <https://apnews.com/article/travel-public-health-health-airport-security-thanksgiving-dcac8b444c64360e1f8c283257487e98>; Diane Cho, *TSA Reports Record Number of Travelers at Logan Since March*, NBC Bos. (Dec. 28, 2020), <https://www.nbcboston.com/news/local/tsa-reports-record-number-of-travelers-at-logan-since-march/2266919> (“Despite pleas from health officials, millions of people across the country traveled to see family and friends for the holidays, marking the highest number of travelers since the start of the pandemic at Boston Logan International Airport.”).

went from 6,300 to 1,338.”⁷ Governor Baker warned, “If this second holiday season produces a surge in infections that’s similar to the one that came out of Thanksgiving, we’ll be in serious danger of overwhelming our health care system.”⁸ Anticipating an onslaught of new cases, the Baker administration reopened a field hospital in Worcester and a second field hospital in Lowell.⁹ Since reopening, the Worcester field hospital treated 161 COVID-19 patients in 22 days, one patient fewer than the total patient population served across six weeks in the spring.¹⁰ “At hospitals statewide around 75% of ICU beds are taken and health experts are worried about the trends.”¹¹

⁷ Peter Eliopoulos, *Health care system in Massachusetts under immense pressure, Gov. Baker says*, WCVB (Dec. 21, 2020), <https://www.wcvb.com/article/number-of-available-hospital-beds-shrinking-in-massachusetts/35035681>.

⁸ *Id.*

⁹ *Massachusetts Coronavirus Hospitalizations Up 129% In Past Month, Sudders Says*, CBS Bos. (Dec. 30, 2020), <https://boston.cbslocal.com/2020/12/30/massachusetts-coronavirus-hospital-capacity-icu-sudders>.

¹⁰ Marc Fortier, *Baker Discusses New COVID Strain, Warns Against New Year’s Eve Parties*, NBC 10 Bos. (Dec. 30, 2020), <https://www.nbcboston.com/news/local/gov-baker-to-provide-coronavirus-update-12/2268443>.

¹¹ *‘We’ve Lost Control Of This Epidemic’: Doctor Concerned About COVID Increase Across Mass.*, CBS Bos. (Jan. 2, 2021), <https://www.msn.com/en-us/health/medical/weve-lost-control-of-this-epidemic-doctor-concerned-about-covid-increase-across-mass/ar-BB1cpwsx?ocid=st>; Steph Solis, *As COVID patients fill hospital beds, Massachusetts eases nurse-to-patient ratio rules, coordinates cross-hospital talks*, Mass. Live News (Jan 7, 2021), <https://www.masslive.com/coronavirus/2021/01/as-covid-patients-fill-hospital-beds-massachusetts-eases-nurse-to-patient-ratio-rules-coordinates-cross-hospital-talks.html>.

Further, a new viral strain estimated to be 55–70% more transmissible is rapidly spreading in the United Kingdom,¹² and has already reached dozens of other countries, including the United States.¹³ Effective December 27th, the CDC required passengers traveling from the United Kingdom to the United States to present a negative PCR COVID test upon arrival.¹⁴ Two weeks later, the CDC announced plans to require negative tests for nearly all international air travelers.¹⁵ Nevertheless, this highly transmissible new variant has already been detected in at least ten U.S. states.¹⁶ Known infected individuals had not personally traveled,

¹² Carl Zimmer & Benedict Carey, *The U.K. Coronavirus Variant: What We Know*, N.Y. Times (Dec. 21, 2020), <https://www.nytimes.com/2020/12/21/health/new-covid-strain-uk.html>.

¹³ *Citing incoming travelers, Turkey becomes the 33rd country to find the virus variant first identified in Britain.*, N.Y. Times (Jan. 2, 2021), <https://www.nytimes.com/live/2021/01/02/world/covid-19-coronavirus#British-variant-Turkey-US-travel-restrictions>; Maxouris, *supra* note 1 (“At least 26 countries have so far reported cases of the variant, per CNN reporting.”). See generally *Emerging SARS-CoV-2 Variants*, Ctrs. for Disease Control & Prevention (Dec. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html>.

¹⁴ *Requirement for Proof of Negative COVID-19 Test for All Air Passengers Arriving from the UK to the US*, Ctrs. for Disease Control & Prevention: COVID-19 (Dec. 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-UK-air-travelers.html>.

¹⁵ Elizabeth Cohen, *CDC to require all air travelers to US to show negative coronavirus test*, CNN (Jan. 12, 2021), <https://www.cnn.com/2021/01/12/health/cdc-international-travel-covid-19-test/index.html>.

¹⁶ *US COVID-19 Cases Caused by Variants*, Ctrs. for Disease Control & Prevention (Jan. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html>; see also Karen Kaplan & Melissa Healy, *At least 9 U.S. states have new coronavirus strain from U.K.*, L.A. Times (Jan. 11,

suggesting they became infected through community transmission.¹⁷ Officials assume the variant is already spreading in Massachusetts.¹⁸ It is predicted to be the dominant strain in the U.S. by March.¹⁹ A second, perhaps more worrisome new variant has emerged in South Africa;²⁰ some experts are concerned that approved vaccines may have reduced efficacy against this variant.²¹ In either case, any “variant that spreads more easily also means that people will need to religiously

2021), <https://www.latimes.com/science/story/2021-01-11/at-least-nine-us-states-strain-uk>.

¹⁷ Joel Achenbach et al., *First case of highly infectious coronavirus variant detected in Colorado*, Wash. Post (Dec.29, 2020), https://www.washingtonpost.com/health/coronavirus-variant-colorado-us/2020/12/29/8e6379fc-4a01-11eb-a9f4-0e668b9772ba_story.html; Amanda Macias, *U.S. confirms first case of the new Covid strain discovered in UK*, CNBC (Dec. 29, 2020), <https://www.cnbc.com/2020/12/28/us-confirms-first-case-of-the-new-covid-strain-discovered-in-uk-.html>; Maxouris, *supra* note 1.

¹⁸ Hanna Krueger, *‘Be very vigilant’: Baker says highly infectious COVID-19 variant is likely already in Mass.*, Bos. Globe (Jan. 5, 2021), <https://www.bostonglobe.com/2021/01/05/nation/be-very-vigilant-gov-baker-says-highly-infectious-uk-variant-is-likely-already-mass>.

¹⁹ Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid Cases*, N.Y. Times (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html>.

²⁰ Holly Ellyatt, *Covid variant in South Africa is ‘more of a problem’ than the one in UK, official says*, CNBC (Jan. 4, 2021), <https://www.cnbc.com/2021/01/04/south-african-coronavirus-variant-more-of-a-problem-than-uk-one.html>.

²¹ Sarah Carter, *COVID vaccines “might not” work as well on South African strain, scientists warn*, CBS News (Jan. 4, 2021), <https://www.cbsnews.com/news/covid-vaccine-new-strain-south-africa>; Joseph Guzman, *South African coronavirus strain is ‘very significant problem,’ UK health official says*, The Hill (Jan. 4, 2021), <https://thehill.com/changing-america/well-being/longevity/532574-south-african-coronavirus-strain-is-very-significant>.

adhere to precautions like social distancing, mask-wearing, hand hygiene and improved ventilation”²² “[B]ecause this seems to be so contagious, it means that overall, a lot more people are going to go into the hospital. And it also means a lot more people are going to die.”²³

One major development offers some hope: two COVID-19 vaccines have been granted emergency use authorizations by the Food & Drug Administration in the United States and are already being administered to healthcare workers, first responders, and individuals at long-term care facilities throughout the Commonwealth.²⁴ But the vaccine rollout has been significantly slower than

²² Apoorva Mandavilli, *How Does the Coronavirus Variant Spread? Here’s What Scientists Know*, N.Y. Times (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/health/coronavirus-variant-transmission.html>.

²³ *A Pandemic Update: The Variant and the Vaccine Rollout*, The Daily (Jan. 11, 2021) at 8:50, <https://www.nytimes.com/2021/01/11/podcasts/the-daily/coronavirus-variant-vaccine-pandemic.html>; see also Alvin Powell, *Highly infectious coronavirus variant dampens prospects for summer return to normal*, Harvard Gazette (Jan. 6, 2021), <https://news.harvard.edu/gazette/story/2021/01/coronavirus-variant-dampens-prospects-for-return-to-normal>.

²⁴ See Baker, *Mass. still on track to get 300,000 vaccine doses by Thursday*, WHDH (Dec. 30, 2020), <https://whdh.com/news/baker-mass-still-on-track-to-get-300000-vaccine-doses-by-thursday>; Robert Weisman, Travis Andersen & Janelle Nanos, *FDA greenlights Moderna vaccine as next shipment of Pfizer vaccine is reduced by nearly 30 percent*, Bos. Globe (Dec. 18, 2020), <https://www.bostonglobe.com/2020/12/18/nation/feds-notify-massachusetts-that-next-shipment-pfizer-vaccine-will-be-reduced-by-nearly-one-third>; Rick Sobey, *Coronavirus vaccine rollout: Nearly 2,000 Massachusetts long-term care facilities part of CVS program*, Bos. Herald (Dec. 21, 2020), <https://www.bostonherald.com/2020/12/21/coronavirus-vaccine-rollout-nearly->

anticipated: just over 3 million doses of vaccines were administered by December 30th, roughly 15% of the federal goal of administering 20 million vaccine doses by the end of December.²⁵ The vaccine rollout has also been slower than anticipated in Massachusetts: while the Baker administration has shipped 470,000 doses to providers in Massachusetts, as of January 11th only 210,000 doses were administered to patients.²⁶

Governor Baker has ensured that all incarcerated people and correctional staff will be eligible to receive vaccines as the fourth group in Phase One of vaccine distribution, to be completed by the end of February 2021.²⁷ On January

2000-massachusetts-long-term-care-facilities-part-of-cvs-program; Alysha Palumbo et al., *First Doses of Moderna's Coronavirus Vaccine Are Given in Mass.*, NBC 10 Bos. (Dec. 21, 2020), <https://www.nbcboston.com/news/coronavirus/first-doses-of-modernas-coronavirus-vaccine-arrive-monday/2262691>.

²⁵ Angelica LaVito, *Sluggish Vaccine Campaign Raises Specter of U.S. Dysfunction*, Bloomberg (Dec. 30, 2020), <https://www.bloomberg.com/news/articles/2020-12-30/u-s-states-rewrite-vaccine-rules-to-get-covid-shots-moving>.

²⁶ *Baker Announces Mass Vaccination Site at Gillette Stadium*, NBC 10 Bos. (Jan. 12, 2021), <https://www.nbcboston.com/news/local/gov-baker-to-give-covid-19-update-as-mass-reaches-severe-outbreak-level/2278323>; see also Nik DeCosta-Klipa, *Charlie Baker defends coronavirus vaccine rollout as Massachusetts lags behind its neighbors*, Boston.com (Jan. 14, 2021), <https://www.boston.com/news/coronavirus/2021/01/14/charlie-baker-defends-coronavirus-vaccine-rollout-massachusetts>.

²⁷ Sarah Betancourt, *Prisoners get high priority for vaccine*, Commonwealth Mag. (Dec. 9, 2020), <https://commonwealthmagazine.org/health/state-prisoners-get-high-priority-for-vaccine>; Laura Crimaldi, *Inmates, correctional workers to be among first to get vaccine in Mass. But rollout plan is hazy*, Bos. Globe (Dec. 12, 2020), <https://www.bostonglobe.com/2020/12/12/metro/inmates-correctional->

13th, Baker confirmed that vaccinations would begin in the state prison system on January 18th, and staff have begun to receive the Moderna vaccine in county jails.²⁸ But the vaccines will take weeks to roll out, full inoculation takes six weeks after the initial dose, the transient jail population poses logistical complexities, and plans to vaccinate the estimated 11,000 people who live or work in the county jail system remain short on details.²⁹

Further, there are legitimate concerns that many incarcerated people and correctional staff will decline a vaccine.³⁰ Medical distrust among incarcerated

workers-be-among-first-get-vaccine-mass-rollout-plan-is-hazy; Deborah Becker, *Mass. Prisoners Among The First To Get COVID Vaccines*, WBUR (Dec. 13, 2020), <https://www.wbur.org/news/2020/12/13/mass-prisoners-among-the-first-to-get-covid-vaccines> (“The state estimates that 22,000 vaccines will be needed for those living and working in correctional facilities, and officials expect the vaccines to be distributed between December and February.”).

²⁸ Sarah Betancourt, *Prisoners to start getting vaccinated next week*, Commonwealth Mag. (Jan. 13, 2021), <https://commonwealthmagazine.org/health/prisoners-to-start-getting-vaccinated-next-week> (“[A]ll staff and inmates at prisons and jails should receive their first doses within three weeks.”).

²⁹ Press Release, Baker-Polito Administration Announces Plan To Begin Vaccinations for Congregate Care Facilities, Updates to Phase Two (Jan. 13, 2021), <https://www.mass.gov/news/baker-polito-administration-announces-plan-to-begin-vaccinations-for-congregate-care>; cf. Letter from Carol A. Mici, Dep’t of Corr. Commissioner, to all DOC Employees (Jan. 7, 2021), <http://mcofu.org/docs/Memo%20to%20All%20Staff-%20Covid-19%20Vaccine%20Plan.pdf>.

³⁰ Roni Caryn Rabin, *In Massachusetts, Inmates Will Be Among First to Get Vaccines*, N.Y. Times (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/health/coronavirus-vaccine-prisons-massachusetts.html> (“Distrust of the medical system is rampant, and doctors who work in the state’s prisons anticipate deep skepticism about the vaccine, among

people grows out of the history of medical experimentation on incarcerated and detained people,³¹ the history of medical racism³² and experimentation on Black people and other people of color³³—who are starkly overrepresented in jails and prisons in the Commonwealth,³⁴ the lack of access to independent credible public

both inmates and correctional officers. ‘I’m expecting a lot of resistance,’ said Dr. Alysse Wurcel, an infectious disease specialist at Tufts Medical Center in Boston. ‘There’s just a lot of distrust,’ added Dr. Wurcel, who is also a Covid-19 consultant to the Massachusetts Sheriffs’ Association. ‘If you don’t trust the medical care you’re getting in the facility, how are you going to trust the needle in your arm?’”); *see also* Jackson Cote, ‘*You couldn’t pay me to take it’: As COVID vaccine rolls out for Massachusetts first responders, some police, fire departments split on taking it*, Mass Live News (Jan. 2, 2021), <https://www.masslive.com/police-fire/2021/01/you-couldnt-pay-me-to-take-it-as-covid-vaccine-rolls-out-for-massachusetts-first-responders-some-police-fire-departments-split-on-taking-it.html>.

³¹ Paul P. Christopher et al., *Exploitation of prisoners in clinical research: perceptions of study participants*, 38 IRB 7 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4793400> (authors include *amicus* expert Josiah D. Rich).

³² Ayah Nuriddin et al., Perspective, *Reckoning with histories of medical racism and violence in the USA*, 396 The Lancet 949 (Oct. 3, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32032-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32032-8/fulltext); *see also* Austin Frakt, Opinion, *Bad Medicine: The Harm That Comes From Racism*, N.Y. Times (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html>.

³³ *See, e.g.*, Darcell P. Scharff et al., *More than Tuskegee: understanding mistrust about research participation*, 21 J. Health Care for the Poor & Underserved 879 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4354806>.

³⁴ *See, e.g.*, Elizabeth Tsai Bishop et al., Criminal Justice Policy Program, Harvard Law School, Racial Disparities in the Massachusetts Criminal System at 1, 4, 11, 35, 39, 43 (2020), <http://cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

health information from confined settings,³⁵ and longstanding deficiencies in medical care in county jails and state prisons across the Commonwealth by providers like Wellpath.³⁶ “[C]oncerns about safety and effectiveness and mistrust of vaccines generally” also play a role.³⁷ Public guidance indicates that vaccination for individuals in corrections environments “will be coordinated by the management of those facilities,”³⁸ which will do little to allay medical distrust.

These concerns are not merely abstract. Middlesex Sheriff Koutoujian conducted a

³⁵ See Jörg Pont et al., *Prison health care governance: guaranteeing clinical independence*, 108 Am. J. Pub. Health 472 (2018); see also David Cloud, Vera Inst. of Justice, *On Life Support: Public Health in the Age of Mass Incarceration* 14 (2014), https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf (report authored by *amicus* expert).

³⁶ See, e.g., Commonwealth of Mass., Office of the State Auditor, *Official Audit Report of Massachusetts Department of Correction For the Period July 1, 2016 through June 30, 2018* (Jan. 9, 2020), <https://www.mass.gov/doc/audit-of-the-department-of-correction/download> (two-year audit of DOC medical care finding failure to comply with authoritative guidance for sick call requests, doctors’ appointments, health insurance coverage, and medications during reentry preparation); Christine Willmsen & Beth Healy, *When Inmates Die Of Poor Medical Care, Jails Often Keep It Secret*, WBUR (Mar. 23, 2020), <https://www.wbur.org/investigations/2020/03/23/county-jail-deaths-sheriffs-watch> (“[W]hen people suffered from dire medical conditions in Massachusetts county jails they were often ignored or mistrusted, with fatal consequences. The sheriffs and for-profit companies increasingly responsible for [incarcerated people’s] health care face little oversight . . .”).

³⁷ Deborah Becker, *Sheriff’s Survey: Many Mass. Prisoners May Be Reluctant To Receive COVID-19 Vaccine* (Jan. 14, 2021), <https://www.wbur.org/commonhealth/2021/01/14/middlesex-jail-vaccine-survey>.

³⁸ *When can I get the COVID-19 vaccine?*, Mass. Dep’t Pub. Health, <https://www.mass.gov/info-details/when-can-i-get-the-covid-19-vaccine#phase-1-> (last visited Jan. 13, 2021).

survey of incarcerated people at his Billerica jail, and “[o]f the 406 incarcerated people who responded to the sheriff’s survey, 40 percent said they would take an approved COVID-19 vaccine right now if it were offered to them free of charge and 60 percent said they would refuse the vaccination”³⁹ Further, Hampden County Sheriff Cocchi “conducted a survey and found that about a quarter of the 878 people in custody said they want the vaccine.”⁴⁰ Among those surveyed, the majority of detained and incarcerated people would decline the vaccine. Nevertheless, many expressed openness to learning more. Ensuring that incarcerated people may consult with credible, independent health professionals and trusted community providers is essential to ensuring incarcerated people can make informed choices about vaccines.

Scientists are still working to determine whether the vaccines prevent transmission as well as infection,⁴¹ and there is still much we do not know about

³⁹ Colin A. Young, *State’s inmates set to be vaccinated next week, though many hesitant*, Patriot Ledger (Jan. 14, 2021), <https://www.patriotledger.com/story/news/2021/01/14/states-inmates-begin-vaccinated-some-hesitant/4157312001>.

⁴⁰ Becker, *supra* note 37.

⁴¹ See, e.g., Katherine J. Wu, *Vaccines Take a While to Kick In. Experts Say That Means the Body Is Doing Its Job.*, N.Y. Times (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/health/covid-vaccine-side-effects.html> (“It’s also unclear how well Pfizer’s vaccine can guard against asymptomatic infections, or if it will substantially curb the coronavirus’s ability to spread from person to person. That means measures like masking and distancing remain essential even after full vaccination.”).

the risks of reinfection with COVID-19.⁴² One month ago, the Michigan state health department announced it was reviewing cases of possible COVID-19 reinfection after 115 incarcerated people in Michigan prisons who had already been diagnosed with COVID-19 once before tested positive again after 90 days or longer.⁴³ In short, the vaccines are not a panacea. Even as vaccines roll out, and especially as the rollout has been significantly slower than predicted,⁴⁴ redoubling

⁴² See *Reinfection with COVID-19*, Ctrs. for Disease Control & Prevention (Oct. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>; see also Flora Marzia Liotti et al., *Assessment of SARS-CoV-2 RNA Test Results Among Patients Who Recovered From COVID-19 With Prior Negative Results*, JAMA Internal Med.: Research Letter (Nov. 12, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2773053>; Akiko Iwasaki, *What reinfections mean for COVID-19*, The Lancet Infectious Diseases (Oct. 12, 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30783-0/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30783-0/fulltext); Richard L. Tillett et al., *Genomic evidence for reinfection with SARS-CoV-2: a case study*, The Lancet Infectious Diseases (Oct. 12, 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30764-7/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30764-7/fulltext).

⁴³ Angie Jackson, *State reviewing possible COVID-19 reinfections after 115 prisoners test positive twice*, Detroit Free Press (Dec. 12, 2020), <https://www.freep.com/story/news/local/michigan/2020/12/12/covid-coronavirus-reinfection-michigan-prisoners/3876185001>. This is not the first time concerns have arisen about the prospect of reinfection in carceral environments based on apparent cases. See Mark Shenefelt, *Disease expert offers clues to COVID-19 reinfection cases*, Standard-Examiner (Oct. 30, 2020), https://www.standard.net/news/health-care/disease-expert-offers-clues-to-covid-19-reinfection-cases/article_10ff9d6f-7f97-5aa3-84ff-f5cf6b0ee08f.html (noting uncertainty about whether 12 positive COVID-19 test results at Utah’s Weber County Jail in October were “rare reinfection cases or genetic leftovers from a summer outbreak”).

⁴⁴ Maxouris, *supra* note 1 (“And while the ongoing vaccinations continue to offer hope, the process is taking longer than many health officials hoped, and it likely

existing public health interventions—wearing masks or face coverings, washing hands, maintaining physical distance, avoiding unventilated indoor environments—is essential to allow vaccines to do their work.⁴⁵

SUMMARY OF ARGUMENT

Depopulation remains the most effective way to protect public health in congregate environments—especially prisons and jails with limited ventilation, open communal toilets,⁴⁶ high concentrations of medically vulnerable and elderly people, deficient medical care,⁴⁷ and environments where physical distancing is

[will] be months before the country will begin to see a meaningful impact, experts said.”).

⁴⁵ *Frequently Asked Questions about COVID-19 Vaccination*, Ctrs. for Disease Control & Prevention (Dec. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html> (“While experts learn more about the protection that COVID-19 vaccines provide under real-life conditions, it will be important for everyone to continue using **all the tools** available to us to help stop this pandemic, like covering your mouth and nose with a mask, washing hands often, and staying at least 6 feet away from others. Together, COVID-19 vaccination and following CDC’s recommendations for how to protect yourself and others will offer the best protection from getting and spreading COVID-19.”) (emphasis in original); *see also* Apoorva Mandavilli, *Here’s Why Vaccinated People Still Need to Wear a Mask*, N.Y. Times (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/health/covid-vaccine-mask.html>; Joanne Silberner, *Why You Should Still Wear A Mask And Avoid Crowds After Getting The COVID-19 Vaccine*, NPR (Jan. 12, 2021), <https://www.npr.org/sections/health-shots/2021/01/12/956051995/why-you-should-still-wear-a-mask-and-avoid-crowds-after-getting-the-covid-19-vac>.

⁴⁶ Knuvl Sheikh, *Flushing the Toilet May Fling Coronavirus Aerosols All Over*, N.Y. Times (June 16, 2020),

<https://www.nytimes.com/2020/06/16/health/coronavirus-toilets-flushing.html>.

⁴⁷ Emily A. Wang et al., *Opinion, COVID-19, Decarceration, and the Role of Clinicians, Health Systems, and Payers: A Report From the National Academy of*

nearly impossible.⁴⁸ *Infra* at 36. Depopulation and vaccination work hand-in-hand. For vaccines to do their job, we need to provide conditions so that they can succeed—chiefly, population decompression to enable physical distancing.

In December, the nonpartisan thinktank Prison Policy Initiative released a study quantifying the additional cases of COVID-19 in the community linked to outbreaks of COVID-19 in correctional settings. The study authors estimate that, between May 1st and August 1st, when we were seeing far fewer cases, there were 6,682 additional cases of COVID-19 in Massachusetts directly attributable to mass incarceration.⁴⁹ We implore this Court to swiftly require substantial reductions in Massachusetts correctional populations, which research predicts will prevent

Sciences, Engineering, and Medicine, 324 J. Am. Med. Ass’n 2257, 2257 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2773226> (“Unlike in nursing homes and other long-term care facilities, which were also sources of outbreaks, health care in prisons and jails has no mandatory independent quality oversight nor is it integrated with the community health systems. The consequences include variability and failures in pandemic management.”).

⁴⁸ Alexandria Macmadu et al., Comment, *COVID-19 and mass incarceration: a call for urgent action*, 5 *The Lancet Pub. Health* E571, E571 (Nov. 1, 2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30231-0/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30231-0/fulltext) (“Expanding testing, enhancing cleaning protocols, and guaranteeing access to personal protective equipment might help to mitigate outbreaks, but these strategies alone will not contain the virus. One approach, however, can markedly reduce the risk of COVID-19 transmission in correctional facilities and surrounding communities, relieve the dual stresses of overcrowding and underfunding[:] . . . decarceration.”).

⁴⁹ Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, Prison Policy Initiative (Dec. 2020), <https://www.prisonpolicy.org/reports/covidsread.html>.

infections and deaths. Further, requiring regular weekly surveillance testing in correctional settings—especially for staff, who travel outside of prison and jail environments daily—is key to diagnose and contain cases early, before they spread into outbreaks.⁵⁰ *Infra* at 43. Finally, the Commonwealth has sufficient capacity to process correctional surveillance tests. *Infra* at 48.

ARGUMENT

I. Decarceration remains the gold standard intervention for public health in correctional settings during the COVID-19 pandemic.

In March, a chorus of public health experts, epidemiologists, and advocates for incarcerated people made clear that depopulating the unhygienic, unventilated, congregate environments of jails and prisons was crucial to stave off outbreaks and flatten the curve.⁵¹ Criminal legal system stakeholders were initially responsive, reducing county jail populations by 22% across the country between March 15 and April 15.⁵² Massachusetts saw a 15% reduction in incarceration overall between

⁵⁰ See, e.g., *COVID-19 Testing*, Broad Institute, <https://www.broadinstitute.org/covid-19-testing> (last visited Dec. 22, 2020) (“In certain settings where individuals live in close quarters, it is critical to detect infections before there has been much opportunity for transmission.”).

⁵¹ See, e.g., Nathaniel Lash, Opinion, *The Coronavirus Has Found a Safe Harbor*, N.Y. Times (Dec. 18, 2020), <https://www.nytimes.com/interactive/2020/12/18/opinion/jails-covid.html> (“As the tide of Covid-19 cases rose in March, the message for jails and prisons was unambiguous: Get people out, or see a disaster unfold.”).

⁵² Jasmine Heiss et al., Vera Inst. of Justice, *The Scale of the COVID-19-Related Jail Population Decline* (Aug. 2020), <https://www.vera.org/downloads/publications/the-scale-of-covid-19-jail->

March and August.⁵³ But for the last *twelve weeks*, the jail population in many Massachusetts counties, and overall in the Commonwealth, has been higher than on April 6th, when the Supreme Judicial Court’s initial decision first went into effect.⁵⁴ And with jury trials beginning to resume, admissions to the sentenced population in houses of correction may begin to tick up anew.⁵⁵

Even with the alarming dearth of correctional testing, available data show that at least one in five incarcerated people has contracted COVID-19, both nationally and in Massachusetts.⁵⁶ Compared to the general public, incarcerated

[population-decline.pdf](#) (“The data shows that the bulk of the jail population reduction occurred between March 15 and April 15, with a 22 percent decline during that month. . . . In May, as many states and counties began allowing businesses to reopen, the jail population started to tick upward.”).

⁵³ Macmadu et al., *supra* note 48, at E571.

⁵⁴ The Massachusetts jail population on April 6 was 4,194 people. According to the Weekly Count sheets prepared by the Department of Correction, the statewide jail population has had a higher count nearly every week of available data since mid-October: October 12, 4206; October 19 not available; October 26, 4252; November 2, 4311; November 9, 4281; November 16, 4324; November 23, 4190 (four fewer people than on April 6); November 30, 4320; December 7, 4306; December 14, 4279; December 21, 4241; December 28, 4196; January 4: 4255; January 11: 4332. Weekly count sheets for 2020 are available here:

<https://www.mass.gov/lists/weekly-inmate-count-2020>. Weekly count sheets for 2021 are available here: <https://www.mass.gov/lists/weekly-inmate-count-2021>.

⁵⁵ Tonya Alanez, *Jury trials resume on a test basis after monthslong pandemic hiatus*, *Bos. Globe* (Jan. 13, 2021), <https://www.bostonglobe.com/2021/01/13/metro/jury-trials-resume-test-basis-after-monthslong-pandemic-hiatus>.

⁵⁶ Beth Schwartzapfel et al., *1 in 5 Prisoners in the U.S. Has Had COVID-19*, *The Marshall Project* (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

people are even more vulnerable to catching COVID-19 and to becoming seriously ill or dying from it.⁵⁷ A research letter by doctors and researchers at Harvard Medical School and the Harvard T.H. Chan School of Public Health, including *amicus* group member Dr. Bassett, analyzed aggregate data from Massachusetts jail and prisons from the Special Master reports in *Comm. for Public Counsel Servs. v. Chief Justice of the Trial Court* from April 5, 2020 to July 8, 2020. The authors found that “The rate of COVID-19 among incarcerated individuals was nearly 3 times that of the Massachusetts general population and 5 times the US rate”⁵⁸ To date, more than 500,000 people in U.S. prisons and jails have been infected with COVID-19 by official counts—which likely undercount the total number of infections.⁵⁹ As the full Court has repeatedly acknowledged, “Everyone in a prison setting is at increased risk due to the difficulty in maintaining physical

⁵⁷ Liesel M. Hagan et al., *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020*, Ctrs. for Disease Control & Prevention: Morbidity and Mortality Weekly Report (MMWR) (Aug. 21, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm> (“Challenges in practicing physical distancing and other prevention strategies within correctional and detention facilities place persons in these settings, many of whom have chronic diseases, at high risk for SARS-CoV-2 exposure.”); *see also* Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249>.

⁵⁸ Monik C. Jiménez et al., *Epidemiology of COVID-19 Among Incarcerated Individuals and Staff in Massachusetts Jails and Prisons*, J. of the Am. Med. Ass’n Network Open (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7442924>.

⁵⁹ *Virus Cases in US Jails and Prisons Surpass 500,000*, N.Y. Times (Jan. 4, 2021), <https://www.nytimes.com/live/2021/01/04/world/covid-19-coronavirus/virus-cases-in-us-jails-and-prisons-surpass-500000>.

distance from others and in spending time outdoors, practices which have met with some success in civilian environments.” *Commonwealth v. Nash*, 486 Mass. 394, 409 (2020). Since April, two men have died from COVID-19 in county jails.⁶⁰

Heightened populations make infection control much more difficult.⁶¹

Within the last six weeks, there have been outbreaks confirmed in Essex County,⁶² Hampden County,⁶³ Plymouth County,⁶⁴ Suffolk County,⁶⁵ and Worcester

⁶⁰ Deborah Becker, *DOC Tightens Visitor Policy To Stop Spread Of Coronavirus In Prisons*, WBUR (Dec. 21, 2020), <https://www.wbur.org/news/2020/12/21/doc-stop-spread-coronavirus-prisons>.

⁶¹ See generally Jackie Jahn et al., *Incarceration is a Public Health Crisis, During COVID-19 and Beyond*, Ctr. for Primary Care, Harvard Med. Sch. (Dec. 8, 2020), <http://info.primarycare.hms.harvard.edu/blog/incarceration-covid-19>.

⁶² Julie Manganis, *New outbreak at Middleton Jail leads to suspension of visits*, Salem News (Dec. 9, 2020), https://www.salemnews.com/news/local_news/new-outbreak-at-middleton-jail-leads-to-suspension-of-visits/article_8fd8cc35-c210-5ea8-98f2-f75adc648f6f.html (“40 inmates, 27 correctional officers, two other employees and eight private contractors have active infections.”).

⁶³ Nick Aresco, *128 COVID-19 cases at Hampden County Jail in Ludlow*, WWLP (Dec. 9, 2020), <https://www.wwlp.com/news/health/coronavirus-local-impact/128-covid-19-cases-at-hampden-county-jail-in-ludlow> (“The jail has 82 inmates and 46 staff members who have tested positive.”).

⁶⁴ Joe Difazio, *Plymouth County jail sees COVID-19 spike; more than 40 inmates, two dozen correctional officers test positive*, Patriot Ledger (Dec. 9, 2020), <https://www.patriotledger.com/story/news/2020/12/09/more-than-40-inmates-test-positive-covid-19-plymouth-county-jail/6506628002>.

⁶⁵ Deborah Becker, *Coronavirus Cases Spike At Another Massachusetts Prison*, WBUR (Nov. 24, 2020), <https://www.wbur.org/news/2020/11/24/coronavirus-cases-massachusetts-prison-dci-shirley> (“As for county jails, an outbreak was reported at the Suffolk County House of Correction last week. A spokesman for the Suffolk County Sheriff has not responded to questions about the current testing numbers there.”).

County.⁶⁶ Advocates also warned of an outbreak in Bristol County⁶⁷—though the Bristol County Sheriff’s Department denied the outbreak, relying on a lack of positive test results to disclaim the existence of positive cases—no doubt attributable at least in part to extremely limited testing. Other counties have similarly trumpeted their lack of cases, but again based on limited testing.⁶⁸

There is robust evidence for the life-saving effects of decarceration, published in leading peer-reviewed journals including the *New England Journal of Medicine*, *The Lancet Infectious Diseases*, the *Journal of Urban Health*, and the *Annals of Epidemiology*.⁶⁹ The medical, epidemiological, and public health

⁶⁶ Brad Petrishen, *Worcester County jail on modified lockdown: Uptick in COVID-19 cases prompts facilities to limit inmate movements*, *Telegram & Gazette* (Jan. 4, 2021), <https://www.telegram.com/story/news/courts/2021/01/04/worcester-county-jail-modified-lockdown-after-uptick-covid-19-cases/4134940001> (noting 57 of 570 incarcerated people had tested positive as well as 40 staff over the last month).

⁶⁷ Kiernan Dunlop, *An advocacy group claims there’s a COVID outbreak at the jail. Not true, says the sheriff.*, *Standard Times* (Dec. 12, 2020), <https://www.southcoasttoday.com/story/news/coronavirus/2020/12/12/group-claims-covid-outbreak-new-bedford-jail-bristol-county-sheriffs-office-says-theres-not/6510960002>.

⁶⁸ See, e.g., Adam Sennott, *As virus cases rise in Middlesex County, Billerica jail implements new safety measures*, *Bos. Globe* (Dec. 4, 2020), <https://www.bostonglobe.com/2020/12/04/metro/virus-cases-rise-middlesex-county-billerica-jail-implements-new-safety-measures> (noting only 60 tests total between September 29 and December 4, without “a single positive result”).

⁶⁹ See, e.g., Matthew J. Akiyama et al., *Perspective, Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons*, 382 *New Eng. J. Med.* 2075 (2020); Carlos Franco-Paredes et al., *Decarceration and community re-entry in the COVID-19 era*, 21 *Lancet Infectious Diseases* e10 (2020), <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930730-1>; Noel Rest et al., *Prison Population Reductions and COVID-19: A Latent Profile*

consensus is that “[d]ecision-makers should prioritize reductions in the jail population . . . and testing asymptomatic populations . . . to manage COVID-19 within correctional settings.”⁷⁰ A sweeping October report released by the National Academies of Sciences, Engineering, and Medicine explains:

Decarceration — reducing the population of prisons and jails by releasing and diverting people away from incarceration as they enter the criminal justice system — can lower the risk of infection for older and other high-risk incarcerated persons, and allow correctional facilities to more easily implement other COVID-19 prevention strategies such as physical distancing.⁷¹

Analysis Synthesizing Recent Evidence From the Texas State Prison System, Brief Report, J. Urb. Health (Dec. 18, 2020), <https://link.springer.com/article/10.1007/s11524-020-00504-z> (finding based on observational study that housing persons at 85% of prison capacity was associated with lower risk of COVID-19 infection and death); Lisa B. Puglisi et al., *Estimation of COVID-19 basic reproduction ratio in a large urban jail in the United States*, 53 *Annals of Epidemiology* 103 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S1047279720303471?via%3Dihub>; Anna Harvey et al., Nat’l Comm’n on COVID-19 & Criminal Justice, *COVID-19, Jails, and Public Safety: December 2020 Update* (2020), https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/covid-19_jails_and_public.pdf.

⁷⁰ Giovanni S. P. Malloy et al., *The effectiveness of interventions to reduce COVID-19 transmission in a large urban jail*, medRxiv preprint (June 18, 2020), <https://www.medrxiv.org/content/medrxiv/early/2020/06/18/2020.06.16.20133280.full.pdf>.

⁷¹ Press Release, Nat’l Academies of Sciences, Engineering & Medicine, *To Adhere to Public Health Guidelines and Mitigate COVID-19, Officials Should Use Their Discretion to Minimize Incarceration, Says New Report* (Oct. 20, 2020), <https://www.nationalacademies.org/news/2020/10/to-adhere-to-public-health-guidelines-and-mitigate-covid-19-officials-should-use-their-discretion-to-minimize-incarceration-says-new-report>; Emily A. Wang et al., Nat’l Academies of Sciences, Engineering & Med., *Decarcerating Correctional Facilities During*

Jails have more regular admissions and releases than prisons, and can be a particularly dangerous source of community spread.⁷² Researchers using data from Cook County Jail in Chicago to analyze the relationship between jailing practices and community infections at the ZIP code level found that jail–community cycling was a significant predictor of cases of COVID-19, accounting for 55 percent of the variance in case rates across ZIP codes in Chicago and 37 percent of the variance in all of Illinois.⁷³ “On average, for each person cycled through Cook County Jail, [the] research shows that an additional 2.149 cases of Covid-19 appeared in their ZIP code within three to four weeks after the [detained person’s] discharge. At least 60 percent of these cases were in Black-majority ZIP codes.”⁷⁴ Further, according to national data, “the proportion of jail populations composed of Black individuals rose during the pandemic.”⁷⁵ In a pandemic that disproportionately causes illness and death among people of color, Black people in particular, the

COVID-19: Advancing Health, Equity, and Safety (2020),
<https://www.nap.edu/read/25945/chapter/1>.

⁷² See Lash, *supra* note 51 (“Jails aren’t the same as prisons. They hold people who are awaiting trial or bail, as well as [people] serving shorter sentences for less serious crimes. Population turnover is high, and communal dormitories, where the coronavirus is particularly apt to spread, are common.”).

⁷³ Erin Reinhart & Daniel L. Chan, *Incarceration And Its Disseminations: COVID-19 Pandemic Lessons From Chicago’s Cook County Jail*, 39 *Health Affairs* 1412 (2020), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00652>.

⁷⁴ Erin Reinhart, Opinion, *Stop Unnecessary Arrests to Slow Coronavirus Spread*, *N.Y. Times* (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/coronavirus-jail.html>.

⁷⁵ Harvey, *supra* note 69, at 4, 18–21.

racial justice implications of continued incarceration are stark. The solution must be not only to safely release people in line with the detailed National Academies recommendations—including essential policy components for safe reentry—but also to prevent pretrial incarceration in the first instance.

Few jurisdictions have taken sustained steps to protect public health and safety through large-scale decarceration or altered arrest and jailing practices. Dr. Emily Wang, the director of Yale School of Medicine’s Health Justice Lab and lead author of the National Academies study, warns “There’s no question with a new peak in infections that we have to be decarcerating now If we don’t have larger-scale decarceration efforts, we won’t control Covid.”⁷⁶

II. Routine surveillance testing is an essential practice to prevent outbreaks in correctional environments.

Regular, universal testing in a corrections environment—or any congregate living environment with daily inflow and outflow—is necessary to ensure early detection of asymptomatic or pre-symptomatic carriers. According to best estimates from the CDC, 40% of COVID-19 cases are asymptomatic, and 50% of transmissions occur before symptom onset.⁷⁷ “[P]eople without symptoms carry

⁷⁶ Lash, *supra* note 51.

⁷⁷ *COVID-19 Pandemic Planning Scenarios*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last updated Sept. 10, 2020); Daniel P. Oran & Eric J. Topol, *Prevalence of asymptomatic SARS-CoV-2 infection: a narrative review*, M20-

just as much virus in their nose, throat and lungs as those with symptoms, and for almost as long.”⁷⁸ Patients showing symptoms today may have inadvertently spread the disease for the past two weeks. Because of the long incubation period and the high percentage of asymptomatic or pre-symptomatic transmission, a one-time test offers minimal, and potentially incorrect, information in determining whether someone is or will become infected after a potential exposure: “a person might become infectious and/or develop symptoms within two weeks after exposure. Therefore, it is possible, in some cases, to be tested too early. For example, a negative result on day four after an exposure could become a positive result on day 10.”⁷⁹ Regular screenings mitigate this problem.

3012, *Annals of Internal Medicine* (2020),
<https://www.acpjournals.org/doi/10.7326/M20-3012>.

⁷⁸ Apoorva Mandavilli, *Even Asymptomatic People Carry the Coronavirus in High Amounts*, *N.Y. Times* (Aug. 6, 2020),
<https://www.nytimes.com/2020/08/06/health/coronavirus-asymptomatic-transmission.html>.

⁷⁹ Erika Edwards, *CDC director walks back testing guidance, but does not alter recommendations on website*, *NBC News* (Aug. 27, 2020),
<https://www.nbcnews.com/health/health-news/cdc-director-walks-back-testing-guidance-does-not-alter-recommendations-n1238428>; *COVID-19 Genetic PCR Tests Give False Negative Results if Used Too Early*, *Imaging Tech. News* (June 10, 2020), <https://www.itnonline.com/content/covid-19-genetic-pcr-tests-give-false-negative-results-if-used-too-early> (describing Johns Hopkins study in the *Annals of Internal Medicine*).

An August 2020 CDC *Morbidity and Mortality Weekly Report* on mass testing in correctional institutions suggested that regular screenings, including of staff, could be crucial to control outbreaks:

First, testing staff members at regular intervals, regardless of symptoms, could become an important part of facilities' COVID-19 prevention and mitigation plans, in collaboration with relevant stakeholders, including labor unions. In this study, more than half of the facilities identified their first case among staff members, consistent with previous CDC findings that staff members can introduce the virus into correctional and detention environments.⁸⁰

An evidence-based practice requires regular, universal surveillance testing, including of all staff, and to follow any recent exposure with multiple rounds of testing spaced days and weeks apart. “[R]epeated assurance testing is necessary to avoid outbreaks.”⁸¹ Given concerns about lack of universal vaccine uptake among correctional employees and incarcerated people detailed above, regular, repeated testing is an essential component of any ongoing public health response to COVID-19 in jails and prisons.

To date, staff testing has not met this public health mandate. Although the DOC conducted “universal” testing in late spring (April-June, 2020), that

⁸⁰ Hagan et al., *supra* note 57.

⁸¹ Atul Gawande, *We Can Solve the Coronavirus-Test Mess Now—If We Want To*, *New Yorker* (Sept. 2, 2020), <https://www.newyorker.com/science/medical-dispatch/we-can-solve-the-coronavirus-test-mess-now-if-we-want-to>.

universality only applied to incarcerated people; the DOC did not test all staff within each correctional institution. Accordingly, the Harvard research letter on Massachusetts prisons and jails noted, “Case and testing rates among staff could not be calculated.”⁸² To date no sheriff has required regular universal testing of staff,⁸³ and although the DOC entered an agreement with the correction officers union on November 2, 2020 allowing for compulsory staff testing,⁸⁴ that agreement (1) has not been implemented according to its own definition of surveillance testing and (2) does not cover corrections officers in county systems. Indeed, the sheriffs who have conducted even a single round of universal testing have largely done so *after* outbreaks within their jails or houses of correction.⁸⁵ There are at least 4,500 staff across the Commonwealth’s sheriff departments, including

⁸² Jiménez et al., *supra* note 58.

⁸³ See generally Special Master’s Weekly Report, *Comm. for Public Counsel Servs. v. Chief Justice of the Trial Court*, SJC-12926 (Jan. 7, 2021).

⁸⁴ Memorandum of Agreement Between the Commonwealth of Massachusetts Executive Office of Public Safety and Security, Department of Correction, and Massachusetts Correction Officers Federated Union Regarding Surveillance Testing for COVID-19 (Nov. 2, 2020), <http://mcofu.org/docs/MCOFU.COVID.Testing.11-20.pdf>.

⁸⁵ See, e.g., Rick Sobey, *Coronavirus outbreaks at Massachusetts jail, substance abuse center lead to calls for more testing*, Bos. Herald (Oct. 7, 2020), <https://www.bostonherald.com/2020/10/07/coronavirus-outbreaks-at-massachusetts-jail-substance-abuse-center-lead-to-calls-for-more-testing> (“Because of the rapid spread in the Middleton Jail, the state Department of Public Health recommended mandatory testing for all inmates and employees at the facility. In addition to the 139 positive inmate cases, 33 employees tested positive.”)

roughly 4,200 corrections officers.⁸⁶ The single highest week of county staff testing was the week of December 3, when 482 county corrections officers and 337 other county staff were tested, aggregated from across the Commonwealth.⁸⁷ There have been only nine weeks since April 5th when more than 100 county corrections officers—aggregated across thirteen sheriff departments—were tested in a given week; there have been only six weeks since April 5th when more than 100 other staff—aggregated across thirteen sheriff departments—were tested in a given week.⁸⁸ Massachusetts jails and prisons are not closed campuses, and with limited visitation, the primary vectors of transmission in correctional environments are staff.⁸⁹ Staff enter and leave the facilities each day. Without regular universal staff testing to find asymptomatic carriers, the risk of COVID-19 outbreaks grows.⁹⁰

⁸⁶ Exec. Office for Admin. & Finance, Public Consulting Group, *Sheriffs’ Funding Formula 2 (2016)*, <https://www.mass.gov/doc/attachment-c-sheriffs-funding-formula/download> (4,170 corrections officers in 2016).

⁸⁷ Special Master’s Weekly Report, *Comm. for Public Counsel Servs. v. Chief Justice of the Trial Court*, SJC-12926 at 1–3 (Jan. 7, 2021).

⁸⁸ *Id.*

⁸⁹ Hagan et al., *supra* note 57 (“SARS-CoV-2, the virus that causes COVID-19, can be transmitted to and from the surrounding community through staff member and visitor movements as well as entry, transfer, and release of incarcerated and detained persons.”).

⁹⁰ *Id.* (“[M]ass testing irrespective of symptoms, combined with periodic retesting, can identify infections and support prevention of widespread transmission in correctional and detention environments.”).

III. The Commonwealth has capacity to increase surveillance testing.

This Court may fear that regular surveillance testing in corrections environments would outstrip existing testing capacity. But over the last two months, the Commonwealth has made a concerted effort to increase testing capacity and availability, both for the general public and for specific settings where regular testing is required for risk management, like public schools and long-term care facilities. Although prisons and jails were excluded from congregate care testing guidelines⁹¹—without medical justification—the Baker administration has rightfully included correctional settings in its congregate vaccination plan, explaining during a January 13th conference “congregate facilities are congregate facilities”⁹² The affidavit of Dr. Wurcel submitted as Defendants’ Exhibit 3 indicates she asked the Department of Public Health for guidance on universal screening in jails “during the spring of 2020,” Aff. of Dr. Alysse G. Wurcel ¶ 11,

⁹¹ Exec. Office of Health & Hum. Servs., Residential and Congregate Care Programs: 2019 Novel Coronavirus (COVID-19) Surveillance Testing Guidance (Dec. 31, 2020), <https://www.mass.gov/doc/eohhs-congregate-care-surveillancetesting-guidance> (mandating baseline testing of all staff members and regular staff surveillance testing every two to four weeks, where a positive test result triggers testing of all residents and staff who share physical space, in a wide range of state-managed congregate care settings, including in Department of Mental Health and Department of Youth Services facilities).

⁹² Mike Deehan, *Mass. Shelters, Prisons And Other Residential Programs Next Up For Vaccines, Baker Says*, WGBH News (Jan. 13, 2021), <https://www.wgbh.org/news/politics/2021/01/13/mass-shelters-prisons-and-other-residential-programs-next-up-for-vaccines-baker-says>.

and at the time they did not recommend it. Given Governor Baker’s statements this week, the administration may now embrace different guidance.

In November, the Massachusetts High Technology Council pushed for expanded coronavirus testing capacity and laid out a plan for expanding capacity through state, local, and federal coordination.⁹³ That same month, Governor Baker announced plans to double staff testing at all long-term care facilities and for testing distribution in public school districts across the state.⁹⁴ In early December, Governor Baker announced another expansion of testing, including an increase in free testing sites from 17 to 25.⁹⁵ “To date, the state has allocated more than \$150 million for COVID-19 free testing, including surveillance testing programs in congregate settings and investments in laboratory capacity to process samples.”⁹⁶

⁹³ *Calls Mount for More Coronavirus Testing in Mass.*, NBC 10 Bos. (Nov. 24, 2020), <https://www.nbcboston.com/news/local/calls-mount-for-more-coronavirus-testing-in-mass/2239901>.

⁹⁴ Jon Chesto, *COVID-19 testing in Mass. is ‘far short’ of levels needed to stop the spread*, Bos. Globe (Nov. 23, 2020), <https://www.bostonglobe.com/2020/11/23/business/covid-19-testing-mass-is-far-short-levels-needed-stop-spread>; see also *These Mass. Schools Are Eligible for Rapid Coronavirus Tests in December*, NBC 10 Bos. (Nov. 19, 2020), <https://www.nbcboston.com/news/local/these-mass-schools-are-eligible-for-rapid-coronavirus-tests-in-december/2235863>.

⁹⁵ *Mass. Increasing COVID Testing, Will Limit Some Elective Surgeries at Hospitals*, NBC 10 Bos. (Dec. 7, 2020), <https://www.nbcboston.com/news/local/gov-baker-to-provide-update-on-coronavirus-testing-in-mass/2250336>.

⁹⁶ *Governor Baker announces new coronavirus testing sites in Massachusetts*, WWLP (Dec. 7, 2020), <https://www.wwlp.com/news/health/coronavirus-local->

In January, Baker announced a new plan to offer pooled testing to schools districts across the state, a program which will cost \$15 to \$30 million to implement, in order to enable more districts to resume in-person learning.⁹⁷ Massachusetts residents support funding “relief efforts focused on testing and vaccinations”⁹⁸ Evidence-based, public health imperatives demand that surveillance testing be extended to corrections environments, just as vaccinations have been.⁹⁹

IV. It is more urgent to act now than it was in March.

Given the state of the pandemic—with Massachusetts hospitals already at 75% ICU capacity before a likely explosion of new COVID-19 cases over the next few weeks, including a soon-to-be-dominant highly transmissible new strain—releasing incarcerated and detained people and reducing the flow of new people into correctional settings would protect people from harm and save lives. As the

[impact/watch-live-governor-baker-provides-coronavirus-testing-in-massachusetts-update.](#)

⁹⁷ James Vaznis, *Baker announces coronavirus pool testing to be made available to all Massachusetts public schools*, Bos. Globe (Jan. 8, 2021), <https://www.bostonglobe.com/2021/01/08/metro/baker-says-coronavirus-pool-testing-will-be-made-available-all-schools-mass>.

⁹⁸ Anissa Gardizy, *Mass. residents support raising taxes on wealthy individuals, companies to fund COVID relief*, Bos. Globe (Jan. 13, 2021), <https://www.bostonglobe.com/2021/01/13/business/mass-residents-support-raising-taxes-wealthy-individuals-companies-fund-covid-relief>.

⁹⁹ See Laura Crimaldi, *Prisoners to begin receiving vaccines next week*, Bos. Globe (Jan. 13, 2021) <https://www.bostonglobe.com/2021/01/14/nation/prisoners-begin-receiving-vaccines-next-week> (“[A]ll the data and all the evidence makes pretty clear that congregate care settings are at-risk communities no matter how you define them.”).

full Court explained in *Nash* last month, “we must take such steps as are open to us to reduce the number of incarcerated individuals, and to protect those who remain incarcerated from the dangers of COVID-19, while at the same time protecting the safety of the public, the families of those who are released, and the individuals themselves.” *Nash*, 486 Mass. at 409. Since that decision was issued on December 14, more than 400 additional cases have been confirmed across county jails. This Court must act quickly to prevent further tragedies.

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MASS R. APP. P. 16(K) CERTIFICATION

I hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16, 17, and 20. It is typewritten in 14-point, Times New Roman font, and complies with the length limit of 20(a)(2)(c) because it was produced with a proportionally spaced font and does not contain more than 7,500 non-excluded words. This document contains 7,406 non-excluded words as counted by the word-processing system used to prepare it.

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CERTIFICATE OF SERVICE

On January 15, 2021, I served a copy of this brief on all parties by email.

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