

In the
Supreme Court of the United States

MARK WILLIAMS, WARDEN, ET AL.,

Applicants,

v.

CRAIG WILSON, ET AL.,

Respondents.

*ON APPLICATION FOR A STAY OF THE INJUNCTION
ISSUED BY THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO*

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND
BRIEF FOR PUBLIC HEALTH EXPERTS
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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MOTION FOR LEAVE TO FILE

Correctional health experts Joseph Bick, M.D., Robert L. Cohen, M.D., and Brie Williams, M.D. respectfully move this Court for leave to file the enclosed brief in support of Respondents and in opposition to the application for a stay. This motion for leave to file amicus brief is filed in accordance with the Court's expedited briefing schedule. Counsel for amici notified and conferred with counsel of record for all parties regarding filing of this amicus brief, but the expedited briefing schedule did not allow for the 10-day notice ordinarily required by Rule 37.2(a), and Applicants withheld consent. In the proposed brief, *amici* seek to offer a unique correctional health perspective and information not addressed by Respondents.

Amici are experts in infectious diseases, healthcare policy, correctional health care, and other related fields who have spent decades studying the provision of health care in correctional facilities. Based on their experience, and their review of the available information about the COVID-19 pandemic, it is their view that Respondents (petitioners-appellees below) in this action are at high risk of serious, life-threatening COVID-19 infection, and that their continued confinement puts them at a heightened risk of contracting and further spreading COVID-19.

Amici are committed to ensuring correctional facilities provide quality health care to inmates and 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 a prudent,

science-based approach to addressing the coronavirus. They respectfully submit this brief to offer their view that the application to stay the district court order should be denied, and that Applicants (respondents-appellants below) should work with state and local health officials to release individuals such as Respondents, to whom coronavirus poses a high risk of infection resulting in serious complications from COVID-19.

For the foregoing reasons, amici respectfully submit that the Court should grant leave to file the enclosed amicus brief in support of Respondents' opposition to the application for stay.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
A. The COVID-19 Pandemic Requires Proactive Social Distancing Measures.....	5
B. Jails and Prisons Are at Heightened Risk for the Spread of Coronavirus.....	7
C. Efforts to Combat COVID-19 at Elkton Are Inadequate.....	10
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
OTHER AUTHORITIES	
<p>Alexis C. Madrigal & Robinson Meyer, <i>How the Coronavirus Became an American Catastrophe</i>, <i>The Atlantic</i> (Mar. 21, 2020), https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/.....</p>	6
<p>Andrew Jacobs, et al., ‘<i>At War With No Ammo</i>’: <i>Doctors Say Shortage of Protective Gear Is Dire</i>, <i>N.Y. Times</i> (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html</p>	9
<p>Anna Flagg & Joseph Neff, <i>Why Jails Are So Important in the Fight Against Coronavirus</i>, <i>The Marshall Project</i> (Mar. 31, 2020), https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus.....</p>	7
<p>Apoora Mandavilli, <i>Infected but Feeling Fine: The Unwitting Coronavirus Spreaders</i>, <i>N.Y. Times</i> (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html</p>	8
<p>Bianca Malcolm, <i>The Rise of Methicillin-Resistant Staphylococcus aureus in U.S. Correctional Populations</i>, <i>Journal of Correctional Health Care</i> (May 13, 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3116074/.....</p>	7
<p>Centers for Disease Control and Prevention, <i>Coronavirus Disease 2019 (COVID-19): Cases and Latest Updates</i>, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated May 21, 2020)</p>	6
<p>Centers for Disease Control and Prevention, <i>Situation Summary (2020)</i>, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.....</p>	5
<p>Corr. Info. Council – CIC Info Sheet, <i>BOP – MEDICAL CARE LEVELS</i>, https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/BOP%20Medical%20Care%20Levels%205.17.17.pdf (last visited Apr. 16, 2020)</p>	11
<p>David Reuter, <i>Swine Flu Widespread in Prisons and Jails, but Deaths are Few</i>, <i>Prison Legal News</i> (Feb. 15, 2010), https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-but-deaths-are-few/</p>	7

Fed. Bureau of Prisons, <i>COVID-19 Update: COVID-19 Cases</i> , https://www.bop.gov/coronavirus/ (last updated May 21, 2020)	7, 9, 10, 11
ICE Enf't & Removal Operations, COVID-19 Pandemic Response Requirements 3 (2020), https://www.ice.gov/doclib/coronavirus/ eroCOVID19responseReqsCleanFacilities.pdf	6
Jo Ann Bobby-Gilbert, <i>Elkton Correctional Officers Fighting Invisible Enemy</i> , <i>Bus. J.</i> (Apr. 16, 2020), https://businessjournaldaily.com/correctional-officers-fighting-invisible- enemy/	10
Kulish et. al, <i>The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed.</i> , <i>N.Y. Times</i> (Mar. 29, 2020), https://www.nytimes.com/ 2020/03/29/business/coronavirus-us-ventilator-shortage.html	9
Matthew J. Akiyama, et al., <i>Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons</i> , <i>New England Journal of Medicine</i> (April 2, 2020)	10
Melissa Healy, <i>Coronavirus infection may cause lasting damage throughout the body, doctors fear</i> , <i>L.A. Times</i> (Apr. 10, 2020), https://www.latimes.com/science/story/2020-04-10/coronavirus-infection- can-do-lasting-damage-to-the-heart-liver	6
Neil M. Ferguson et al., Imperial College London, <i>Impact of Non- Pharmaceutical Interventions (NPIs) to Reduce COVID-19 Mortality and Healthcare Demand</i> 7 (2020), https://www.imperial.ac.uk/media/ imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College- COVID19-NPI-modelling-16-03-2020.pdf	5
Sarah Mervosh et al., <i>See Which States and Cities Have Told Residents to Stay Home</i> , <i>N.Y. Times</i> (Apr. 20, 2020), https://www.nytimes.com/ interactive/2020/us/coronavirus-stay-at-home-order.html	6
Stephanie M. Lee, <i>Nearly 900 Immigrants Had The Mumps In Detention Centers In The Last Year</i> , <i>Buzzfeed News</i> (Aug. 29, 2019), https://www.buzzfeednews.com/article/stephaniemlee/mumps-ice- immigrant-detention-cdc	7
Timothy Williams, et al., <i>As Coronavirus Spreads Behind Bars, Should Inmates Get Out?</i> , <i>N.Y. Times</i> (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html	9

World Health Organization, Coronavirus Disease (Covid-19) Pandemic
(2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
(last updated May 21, 2020) 5

INTEREST OF AMICI CURIAE

Amici curiae are Joseph Bick, M.D., Robert L. Cohen, M.D., and Brie Williams, M.D., M.S. Drs. Bick, Cohen, and Williams are experts in infectious diseases, healthcare policy, correctional health care and other related fields who have spent decades studying the provision of health care in correctional facilities.¹

Dr. Bick is an infectious diseases specialist and medical administrator with over 25 years' experience in correctional health care, most recently as Chief Medical Executive of the California Medical Facility in the California Department of Corrections and Rehabilitation. Dr. Bick has served as an International Technical Expert on Prisons for the United Nations Office for Project Services in Myanmar, and an Infectious Diseases consultant for the Malaysian prison system. Dr. Bick served as a federal court-appointed medical monitor to oversee health care in Alabama (*Leatherwood v. Campbell*), and has published extensively on issues related to infectious diseases in correctional settings.

Dr. Cohen 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

¹ Amici state that no counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person or entity other than amici or their counsel contributed money intended to fund the preparation or submission of this brief.

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 detention facilities.

Dr. Williams is a Professor of Medicine in the University of California San Francisco Division of Geriatrics, where she collaborates with colleagues from criminal justice, public safety, and the law to integrate a healthcare perspective into criminal justice reform. She also co-directs the ARCH (Aging Research in Criminal Justice Health) Network, funded by the National Institute on Aging, which is a national group of researchers across multiple disciplines focused on developing evidence to better understand the health and healthcare needs of older adults and people with serious illness who reside in prisons and jails.

Based on their experience and review of the available information about the COVID-19 pandemic, it is amici’s view that people with conditions like Respondents’ are at high risk of serious, life-threatening coronavirus infection. Their continued confinement at Elkton Federal Correctional Institution (“Elkton”)—where, according to Federal Bureau of Prisons (“BOP”) statistics, there are confirmed active cases of coronavirus among 128 inmates and 8 staff, and 9 inmates have died—subjects them to a heightened risk of contracting and further spreading coronavirus.

Amici are committed to ensuring correctional facilities provide quality health care to inmates and 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 a prudent, science-based approach to addressing the coronavirus. They respectfully submit this brief to offer their view that the application to stay the district court order should be denied, and that Applicants should work with state and local health officials to release individuals such as Respondents, to whom coronavirus poses a high risk of infection resulting in serious complications from COVID-19.

SUMMARY OF ARGUMENT

Amici urge this Court to deny the application to stay the district court's preliminary injunction order. It is critical that Applicants work with local health officials to reduce the number of inmates at Elkton in order to minimize the public health risk to Respondents and other inmates, as well as correctional facility staff and the public at large.

The novel coronavirus is an extremely infectious virus which causes potentially deadly COVID-19. It has created a global health crisis and led to the adoption and implementation of unprecedented mitigation strategies around the world, including the cancellation of public events, the closing of schools and businesses, and stay-at-home orders to the general public. There is not yet a vaccine or cure for COVID-19. The coronavirus can infect and seriously harm anyone. And yet it also is clear that some categories of people are at

higher risk than others. In particular, the likelihood that a coronavirus infection will become serious or life-threatening is much higher if the infected person is advanced in age or has certain underlying medical conditions.

Managing the spread of coronavirus within detention facilities is critically important because they are enclosed environments, like cruise ships or nursing homes, where one infected person can unleash a rapidly spreading outbreak. The only way to mitigate the risk of serious infection is through hygienic measures such as frequent hand washing and physical distancing that limits exposure. However, these prevention methods are all but impossible to practice or implement in a detention facility setting, such as Elkton, where incarcerated people are crowded together, sleep in dormitory-style rooms, share bathroom products, and rarely have access to sanitizing products. Moreover, once an outbreak occurs, as it already has at Elkton, correctional facilities are rarely equipped to provide the care and support needed to treat patients suffering from coronavirus infection, or from severe COVID-19.

Acting quickly to mitigate the enormous risk associated with correctional facilities is not just necessary to protect inmates themselves, but also to protect employees and the public at large. Because staff cycle in and out of correctional facilities, if appropriate mitigation measures are not taken immediately, those individuals risk spreading the disease to the broader community. The time to act is now, before it is too late.

ARGUMENT

A. The COVID-19 Pandemic Requires Proactive Social Distancing Measures

The COVID-19 pandemic is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). As of May 21, 2020, there were 4,904,413 confirmed cases of COVID-19 and 323,412 deaths worldwide.² Due to the ease with which the coronavirus spreads, these numbers will continue to rise.³

The consensus of doctors and epidemiologists since the emergence of COVID-19 as a global pandemic has been that the only way to reduce the spread of the virus is to take proactive and early action to “flatten the curve.”⁴ 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.⁵ In other words, social distancing is necessary at every level, including the institutional level. Given the speed with which the virus spreads, and the fact that no effec-

² World Health Organization, Coronavirus Disease (Covid-19) Pandemic (2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last updated May 21, 2020).

³ See Centers for Disease Control and Prevention, Situation Summary (2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

⁴ 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>.

⁵ *Id.* at 1.

tive treatment or vaccine currently exists, such social distancing measures are the only effective measures available to us at the moment.⁶ It is for precisely this reason that dozens of state governments—at the recommendation of the CDC—have instituted mandatory social distancing policies, leading at one time to “a stunning 95 percent of the population” being placed under orders to stay at home.⁷

The coronavirus has wreaked havoc across the United States, jeopardizing both the health and economic well-being of millions of Americans.⁸ The United States now has over one and a half million cases and over 93,000 fatalities.⁹ It has been approximated that 3.4% of infected persons die.¹⁰ Even patients who recover might suffer from permanent damage to their lungs and other vital organs.¹¹ Accordingly, social distancing should not only be practiced, but also mandated and enforced by all levels of government and their institutions.

⁶ *Id.* at 15.

⁷ Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay Home*, N.Y. Times (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

⁸ *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/>.

⁹ 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> (last updated May 21, 2020).

¹⁰ *See ICE Enf't & Removal Operations, COVID-19 Pandemic Response Requirements 3* (2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

¹¹ Melissa Healy, *Coronavirus infection may cause lasting damage throughout the body, doctors fear*, L.A. Times (Apr. 10, 2020), <https://www.latimes.com/science/story/2020-04-10/coronavirus-infection-can-do-lasting-damage-to-the-heart-liver>.

B. Jails and Prisons Are at Heightened Risk for the Spread of Coronavirus

Jails and prisons such as Elkton, which are enclosed environments in which it is impossible to implement and enforce social distancing, are at heightened risk for the spread of coronavirus. Numerous public health officials have recognized that outbreaks of contagious diseases are more common in correctional settings than in communities at large.¹² Indeed, over 3,000 confirmed cases of coronavirus have emerged in BOP's federal correctional facilities.¹³ Given the dearth of testing, these numbers likely dramatically understate the problem.¹⁴ In some areas, jails have seen infection rates *nine* times higher than the broader community.¹⁵

The risk for widespread contagion is exacerbated by the fact that staff, contractors and vendors all pass between communities and correctional facilities, and each group can bring infectious diseases into and out of those facilities. Additionally, correctional facility populations are constantly turning over, with about 200,000 people nationwide flowing into

¹² 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/>; 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>.

¹³ Fed. Bureau of Prisons, *COVID-19 Update: COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last updated May 21, 2020).

¹⁴ *Id.*

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

and out of jails every week. Each entrant potentially carries COVID-19 and introduces it into the facility's population.¹⁶

All of those factors make it effectively impossible for correctional facilities to protect themselves from outbreaks outside their walls. And the difficulty identifying and isolating individuals who are infected, who may suffer from only mild symptoms or even be entirely asymptomatic while still carrying and spreading the disease, only further exacerbates the problem. Indeed, as many as 1 in 4 cases of coronavirus will not present symptoms and yet remain contagious.¹⁷ Unfortunately, correctional facilities typically do not have the ability to perform the kind of systematic screening and testing that would be required to ensure that the virus does not enter or circulate within these facilities.

The unique attributes of correctional facilities also make it impossible to adopt and implement the mitigation efforts that have become a necessary safeguard of life outside these facilities. That is because these facilities are enclosed environments, much like the cruise ships, naval carriers, or nursing homes that have proven susceptible to COVID-19 outbreaks. The social distancing that has been the hallmark of the United States' COVID-19 prevention efforts has not proven possible in such settings. Incarcerated people share close living quarters and bunk beds, dining halls, bathrooms, showers, telephones, law libraries, and other common areas, each presenting dangerous opportunities for transmission. Spaces within correctional facilities often are poorly ventilated, which promotes the

¹⁶ *Id.*

¹⁷ 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>.

spread of diseases. Inmates do not typically have access to sufficient soap and alcohol-based sanitizers to engage in the kind of frequent hand washing recommended throughout the rest of the country.¹⁸ At best, staff and inmates themselves can only sporadically clean or sanitize high-touch surfaces such as door handles, light switches, or telephones.

For facilities such as Elkton, where COVID-19 has already infected at least 128 inmates and killed nine,¹⁹ it is extremely difficult to properly treat those who have been infected or limit the spread of the virus. COVID-19's most common symptoms are fever, cough and shortness of breath. Serious cases can require invasive measures to manage respiratory function, including the use of highly specialized equipment like ventilators. The coronavirus epidemic has created a high demand for ventilators and resulted in short supply around the world.²⁰ The virus even has led to shortages of less specialized equipment such as dialysis machines, face masks and gloves.²¹

The necessary clinical management for those infected with coronavirus, especially those in high-risk populations, is labor-intensive. It requires that nurses tend to a limited number of patients at a time, and often requires physicians with specialized backgrounds in infectious diseases and respiratory, cardiac and kidney care. Correctional facilities are

¹⁸ 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 “Even as a visitor . . . if you want to wash your hands, you’ve got to walk out and go into another building to do it.”).

¹⁹ Fed. Bureau of Prisons, *COVID-19 Update: COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last updated May 21, 2020).

²⁰ 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>.

²¹ 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>.

unable to address these needs. The novel coronavirus outbreak is already straining hospital capacity across the country. The problem will be dangerously exacerbated if jails and prisons do not act immediately to reduce their prison populations and contain the spread of the virus by releasing those inmates who are at the greatest risk of serious infection.²²

C. Efforts to Combat COVID-19 at Elkton Are Inadequate

BOP, which is responsible for the custody and care of federal inmates, including at Elkton, has proven unable to implement solutions to protect inmates and staff from the spread of the virus. As of May 21, 1,735 federal inmates and 191 BOP staff have confirmed positive test results for COVID-19 nationwide; 2,767 inmates and 392 staff have recovered; and 59 inmate deaths have been attributed to COVID-19.²³ Eight prison employees at Elkton have tested positive for the coronavirus.²⁴ BOP's failure to provide testing, failure to order employee quarantines, and policy of asking employees not to work only if they have a fever, will inevitably endanger more inmates, staff and the community at large.²⁵

Elkton is a BOP Medical Care Level 2 facility where approximately half of the inmates have pre-existing medical conditions and are particularly at risk.²⁶ So far at Elkton,

²² 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>.

²³ Fed. Bureau of Prisons, *COVID-19 Update: COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last updated May 21, 2020).

²⁴ *Id.*

²⁵ See Jo Ann Bobby-Gilbert, *Elkton Correctional Officers Fighting Invisible Enemy*, *Bus. J.* (Apr. 16, 2020), <https://businessjournaldaily.com/correctional-officers-fighting-invisible-enemy/>.

²⁶ See Corr. Info. Council – CIC Info Sheet, *BOP – MEDICAL CARE LEVELS*, https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/BOP%20Medical%20Care%20Levels%205.17.17.pdf (last visited Apr. 16, 2020).

128 inmates have tested positive and nine inmates have already died from the coronavirus.²⁷ Many more may be infected. Releasing Respondents and other medically vulnerable inmates before it is too late is the safest approach for inmates, staff and the public.

In short, it was appropriate and necessary for the district court to order the release of at-risk inmates in order to stop the spread of coronavirus at the Elkton and to protect inmates and staff—and communities more broadly—from the virus itself and the inherent risk of developing serious complications of COVID-19.

²⁷ Fed. Bureau of Prisons, *COVID-19 Update: COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last updated Apr. 29, 2020).

CONCLUSION

The application for a stay of the preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATIONS

I, Roberto Finzi, counsel for amici curiae and a member of the Bar of this Court, hereby certify that this brief complies with the type-volume limitation of Rule 33.1(g) because it contains 2,739 words, excluding the parts of the brief exempted by Rule 33.1(d).

/s/ ROBERTO FINZI
ROBERTO FINZI

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