

No. 20-11622

**In the United States Court of Appeals
for the Eleventh Circuit**

ANTHONY SWAIN, et al.,
PLAINTIFFS-APPELLEES

v.

DANIEL JUNIOR, Director of the Miami-Dade Corrections
and Rehabilitation Department, et al.,
DEFENDANTS-APPELLANTS

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA (1:20-CV-21457)
(THE HONORABLE KATHLEEN M. WILLIAMS, J.)*

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI
CURIAE PUBLIC HEALTH AND HUMAN RIGHTS EXPERTS IN
SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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**CERIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Amici Robert L. Cohen, M.D., Joseph Goldenson, M.D., and Brie Williams, M.D., M.S., certify that the following persons and entities may have an interest in the outcome of this case:

Advancement Project, *Counsel for Plaintiffs-Appellees*

Barnet, Emily, *Counsel for Plaintiffs-Appellees*

Bernal, Peter, *Plaintiff*

Blanco, Alen, *Plaintiff-Appellee*

Buergel, Susanna M., *Counsel for Amici*

Civil Rights Corps, *Counsel for Plaintiffs-Appellees*

Cohen, Robert L., *Amicus Curiae*

Community Justice Project, *Counsel for Plaintiffs-Appellees*

Cruz, Bayardo, *Plaintiff-Appellee*

DLA Piper LLP (US), *Counsel for Plaintiffs-Appellees*

Dream Defenders, *Counsel for Plaintiffs-Appellees*

Giller, David, *Counsel for Amici*

Goldenson, Joseph, *Amicus Curiae*

Greenberg, Ezra S., *Counsel for Defendants-Appellants*

GST LLP, *Counsel for Plaintiffs-Appellees*

Harvey, Thomas B., *Counsel for Plaintiffs-Appellees*

Hill, Winfred, *Plaintiff*

Hochstadt, Jennifer L., *Counsel for Defendants-Appellants*

Hubbard, Katherine, *Counsel for Plaintiffs-Appellees*

Jagannath, Meena, *Counsel for Plaintiffs-Appellees*

Johnson, Darren W., *Counsel for Amici*

Junior, Daniel, *Defendant-Appellant*

Karakatsanis, Alec, *Counsel for Plaintiffs-Appellees*

Kimball-Stanley, David C., *Counsel for Amici*

Martinez-Flores, Ronniel, *Plaintiff-Appellee*

Miami-Dade County, *Defendant-Appellant*

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Price-Williams, Abigail, *Miami-Dade County Attorney*

Ragsdale, Maya, *Counsel for Plaintiffs-Appellees*

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Rosenthal, Oren, *Counsel for Defendants-Appellants*

Sanoja, Katherine Alena, *Counsel for Plaintiffs-Appellees*

Simson, Emma, *Counsel for Plaintiffs-Appellees*

Smith, R.Quinn, *Counsel for Plaintiffs-Appellees*

Swain, Anthony, *Plaintiff-Appellee*

Torres, Hon. Edwin G., *United States Magistrate Judge*

Twinem, Alexandria, *Counsel for Plaintiffs-Appellees*

Viciano, Ana Angelica, *Counsel for Defendants-Appellants*

Volchok, Daniel S., *Counsel for Plaintiffs-Appellees*

Vosseler, Zach, *Counsel for Defendants-Appellants*

Williams, Hon. Kathleen M., *United States District Judge*

Williams, Brie, *Amicus Curiae*

Willis, Deondre, *Plaintiff-Appellee*

Wilmer Cutler Pickering Hale and Dorr, LLP, *Counsel for Plaintiffs-Appellees*

Yang, Tiffany, *Counsel for Plaintiffs-Appellees*

Zaron, Erica, *Counsel for Defendants-Appellants*

Amici are individual persons.

/s/ David Giller

David Giller

Pursuant to Federal Rule of Appellate Procedure 29(a), amici curiae Robert L. Cohen, M.D., Joseph Goldenson, M.D., and Brie Williams, M.D., M.S., respectfully move for leave to file a brief in support of Plaintiffs-Appellees and affirmance.

1. Amici curiae are experts in infectious diseases, healthcare policy, correctional healthcare, human rights and other related fields who have spent decades studying the provision of healthcare in detention facilities. Based on their experience, and their review of the available information about the COVID-19 pandemic, it is their view that Plaintiffs-Appellees in this action are at high risk of serious, life-threatening coronavirus infection, and that their continued confinement under the circumstances found below would put them at a heightened risk of contracting and further spreading COVID-19.

2. On April 7, 2020, Judge Kathleen M. Williams granted Plaintiffs' motion for temporary restraining order addressing Plaintiffs' conditions of confinement.

3. On April 28, 2020, Judge Kathleen M. Williams granted in part and denied in part Plaintiffs' motion for a preliminary injunction addressing Plaintiffs' conditions of confinement and reporting obligations by Defendants, and on April 29, 2020, Defendants filed notice of appeal to this Court.

4. Amici now request leave to file a brief in support of Plaintiffs-Appellees and affirmance of the district court's preliminary injunction.

5. Counsel for amici have conferred with counsel for the parties, and counsel for Plaintiffs-Appellees consent to this motion. Counsel for Defendants-Appellants state: “Appellants object to the motion because Appellants would be prejudiced under the expedited briefing schedule in our ability to reply to the proposed amicus brief within 4 days. And the introduction of any new expert opinion on appeal is inappropriate.”

6. In deference to the expedited briefing schedule in this case and the concerns raised by Defendants-Appellants, amici file this motion contemporaneously with Plaintiffs-Appellees’ principal brief, rather than within the seven day period following permitted by Fed. R. App. P. 29. *See Spaho v. United States Attorney General*, 837 F.3d 1172, 1174 n.1 (11th Cir. 2016).

7. Amici have an interest in the disposition of this case: they are committed to ensuring that detention facilities treat their detainees with dignity and move proactively to mitigate the public health crisis sweeping the nation. Amici understand the COVID-19 pandemic has placed enormous strains on society, and are committed to doing their part to ensure that detention facilities provide quality healthcare to prisoners, do not exacerbate the health risks of detainees, and take a prudent, science-based approach to addressing the coronavirus. Amici respectfully submit this brief to offer their view that Plaintiffs-Appellees and similarly situated detainees at Miami Dade’s Metro West Detention Center (“Metro West”) are at unnecessarily

heightened risk from the potential impacts of COVID-19 while detained at Metro West.

8. The Court would benefit from amici's brief because as physicians, correctional health experts and human rights experts, amici are best-suited to provide a unique and necessary correctional health perspective in this case, which is directly relevant to the Court's ruling on the order below.

9. As amici's brief explains, the COVID-19 virus poses enormous risks for detention facilities such as Metro West. The virus has the ability to spread with tremendous speed in such settings, and detention facilities that fail to contain the spread of the virus will find themselves ill-equipped to meet the medical needs of those infected. Without engaging in adequate measures to protect detainees and staff, detention facilities jeopardize not only the health of detainees and staff, but also the public at large, as detention facility employees spread the virus outside prison walls. Amici's brief thus illustrates the importance of the issue presented for the Court and underscores the enormous stakes for both Plaintiff-Appellees' and society's well-being in addressing the threat of COVID-19 in detention facility populations.

10. Accordingly, amici request that the attached brief in support of Plaintiffs-Appellees and affirmance of the district court's order below be filed with the Court.

Respectfully submitted,

/s/ David Giller

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ATTORNEYS FOR AMICI CURIAE

MAY 28, 2020

CERTIFICATE OF SERVICE

I, David Giller, a member of the Bar of this Court and counsel for amici curiae Robert L. Cohen, M.D., Joseph Goldenson, M.D., and Brie Williams, M.D., M.S., certify that, on May 28, 2020, a copy of the attached motion was filed with the Clerk and served on the parties by the Court through the Court's electronic filing system; and that counsel

Thomas B. Harvey (via <tharvey@advancementproject.org>),

Tiffany Yang (via <tyang@advancementproject.org>),

Katherine Claire Hubbard (via <alec@civilrightscorps.org>),

Alexandria Twinem (via <alec@civilrightscorps.org>) and

Meena Jagannath (via <meena@communityjusticeproject.com>)

have been served via email on the basis of written consent under Fed. R. App. P. 25(c)(2)(B). I further certify that all parties required to be served have been served.

/s/ David Giller

David Giller

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STATEMENT OF THE ISSUES

Amici Curiae Robert L. Cohen, M.D., Joe Goldenson, M.D., and Brie Williams, M.D., M.S., a group of medical, public health and human rights experts who are familiar with the unique dangers associated with infectious diseases in detention facilities, urge this Court to affirm the district court's preliminary injunction. R.100 ("Order"). It is critical that Defendants-Appellants comply with recent medical guidance, including that of the Centers for Disease Control and Prevention ("CDC"), on precautions against contracting COVID-19, including social/physical distancing, personal protection equipment ("PPE"), sanitizing supplies and practices, quarantine and isolation protocols, and the continued release of qualified inmates on an expedited basis, so as to provide a constitutionally reasonable threshold of safety for the incarcerated individuals, prison staff and visitors and the community at large. Compliance with the safety guidelines as described in the Order will minimize not only the public health risk to Plaintiffs-Appellees, but also to other detainees, facility staff and visitors and the public at large.

SUMMARY OF THE ARGUMENT

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 canceling of public events, the closing of schools and businesses and stay-at-home orders to the general public. There is no vaccine or cure for COVID-19. The 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, naval carriers 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 unusually difficult to practice or implement in a detention facility setting, such as Metro West Detention Center (“Metro West”) operated by Miami-Dade County, where detainees 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 Metro West, detention 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 detention facilities is not just necessary to protect detainees themselves, but also to protect staff and visitors. Because staff and visitors cycle in and out of detention facilities, if appropriate mitigation measures are not taken immediately, those individuals risk spreading the disease to the broader community. Accordingly, the time to act is now, before it is too late.

INTEREST OF AMICI CURIAE

Amici curiae are experts in infectious diseases, healthcare policy, correctional healthcare, human rights and other related fields who have spent decades studying the provision of healthcare in detention facilities.¹ Based on their experience and their review of the available information about the COVID-19 pandemic, it is their view that Plaintiffs-Appellees in this action are at high risk of serious, life-threatening coronavirus infection and ensuing

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 other than amici or their counsel contributed money intended to fund its preparation or submission. *Amici* have moved for leave of the Court to file under FRAP 29(a).

COVID-19 disease, and that the order below was appropriate. Their continued confinement at Metro West—where, as of the time of the Order, well over 150 people already have tested positive for the coronavirus—puts them at a heightened risk of contracting and further spreading coronavirus.

Amici are committed to ensuring detention facilities provide quality healthcare to detainees, and that correction facilities do not exacerbate the health risks of their detainees. They understand that 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 Order should be affirmed, and that Defendants-Appellants should comply with recent medical guidance, including that of the CDC, on precautions against contracting COVID-19, including social/physical distancing, PPE, sanitizing supplies and practices, quarantine and isolation protocols, and the continued release of qualified inmates on an expedited basis, so as to provide a constitutionally reasonable threshold of safety for the inmates, staff and visitors, and the community at large.

Amici are the following:

Robert L. Cohen, M.D., has worked as a physician, administrator and expert in the care of prisoners for 40 years. Dr. Cohen was the Director of

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

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

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

Brie Williams, M.D., M.S., 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.

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 27, 2020, there were

5,491,678 confirmed cases of COVID-19 and 349,190 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 gird against 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

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

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.

which the virus spreads, and the fact that no effective 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 all over the United States, jeopardizing both the health and economic well-being of millions of Americans.⁸ The United States now has over 1,670,000 cases and over 99,000 fatalities.⁹ It has been approximated that 3.4% of infected persons die.¹⁰ Even patients

⁶ *Id.* at 15.

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

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 in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated May 27, 2020).

¹⁰ *See* ICE Enf't & Removal Operations, COVID-19 Pandemic Response

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.

B. Detention Centers Are at Heightened Risk for the Spread of Coronavirus

As the Order below recognized, R.100 at 4-6, detention centers, which are enclosed, congregate environments in which it is difficult to fully implement and enforce social distancing, are at a heightened risk for the spread of coronavirus. Numerous public health officials have recognized that outbreaks of contagious diseases are more common in detention settings than in communities at large.¹² For example, 1,312 confirmed cases of coronavirus

Requirements 3 (2020), <https://www.ice.gov/doclib/coronavirus/ero-COVID19responseReqsCleanFacilities.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>.

¹² See David Reuter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, Prison Legal News (Feb. 15, 2010), <https://www.prison-legalnews.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),

have emerged in ICE facilities out of 2,535 tested.¹³ Given the dearth of testing, these numbers likely dramatically understate the problem.¹⁴ One study using data from early March has found that under an optimistic scenario, 72% of individuals in ICE detention facilities would be expected to be infected within 90 days, while under a more pessimistic scenario, nearly 100% of detainees would be infected by day 90.¹⁵

The risk for widespread contagion is exacerbated by the fact that staff, visitors, contractors and vendors all pass between communities and detention facilities, and each group can bring infectious diseases into and out of those facilities. Moreover, the detainees themselves have to make court appearances and, each time they appear, they risk contracting infections and introducing them into the detention facility upon return. Additionally, detention facility populations are constantly turning over, as detainees cycle in

<https://www.buzzfeednews.com/article/stephaniemlee/mumps-ice-immigrant-detention-cdc>.

¹³ *ICE Guidance on COVID-19 – Confirmed Cases*, <https://www.ice.gov/coronavirus> (last updated May 27, 2020).

¹⁴ *See id.*

¹⁵ Michael Irvine, et al., *Modeling COVID-19 and impacts on U.S. Immigration and Enforcement (ICE) detention facilities*, *J. Urban Health* (2020), https://whistleblower.org/wp-content/uploads/2020/04/Irvine_JUH_ICE_COVID19_model.pdf.

and out of detention, with each new detainee potentially carrying coronavirus and introducing it into the facility's population.

These factors, all of which make it effectively impossible for detention facilities to protect themselves from outbreaks outside their walls, are made worse by the fact that it is difficult to identify and isolate individuals who are infected, who may suffer from only mild symptoms or even be entirely asymptomatic while still carrying and spreading the disease. Indeed, as many as 1 in 4 cases of coronavirus will not present symptoms and yet remain contagious.¹⁶ Unfortunately, detention 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.¹⁷

¹⁶ 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>.

¹⁷ This is particularly unfortunate because putting testing resources toward prison populations is typically a wise strategy for allocating limited resources. Most COVID-19 infections will not result in death or serious illness, so it is most important to identify infections among populations where those dire outcomes are more likely to occur. According to the Bureau of Justice Statistics, it is estimated that 39.8 percent of people in jail have a chronic health condition. See Laura M. Maruschack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, p. 21, U.S. Dept. of Justice, Office of Justice Programs, Bureau

The unique attributes of detention facilities also make it difficult to fully adopt and implement the mitigation efforts that have become a necessary safeguard of life outside these facilities. That is because immigration detention facilities are enclosed environments, much like the cruise ships, naval carriers or nursing homes that have proven susceptible to COVID-19 outbreaks. Nonetheless, the social distancing that has been the hallmark of the United States' COVID-19 prevention efforts remains the cornerstone of such efforts in detention facilities as well, as recommended by the CDC.¹⁸ Detainees share close quarters, including shared living quarters and bunk beds, dining halls, bathrooms, showers, telephones, law libraries and other common areas, each presenting dangerous opportunities for transmission.¹⁹

of Justice Statistics (Feb. 2015), *available at* <https://www.bjs.gov/content/pub/pdf/mpsfj1112>. As a general matter, the risk profile of an incarcerated person is likely to be similar to someone who is 10 years their senior due to either a lack of resources prior to incarceration, the stresses of incarcerated life or a combination of both.

¹⁸ See R100 at 7-8 (quoting *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>).

¹⁹ Poor inmate hygiene has in previous years led to staph infection outbreaks, spread by, *inter alia*, the shared use of soap and towels and person-to-person contact via contaminated hands. See *Management of Methicillin-Resistant Staphylococcus aureus (MRSA) Infections*, Federal

Spaces within detention facilities are poorly ventilated, which promotes the spread of diseases. Other hygiene-based prevention strategies are similarly lacking in a detention setting. Detainees 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. At best, staff can only sporadically clean or sanitize high-touch surfaces like door handles, light switches or telephones. In fact, in these facilities detainees often have to clean the facility themselves, without adequate supplies or protective equipment, which further exposes them to infection.

Once an outbreak occurs, as it already has at Metro West, R.100 at 4, it is extremely difficult to properly treat those who become 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. While serious infections have developed in all demographics, they are much more likely to occur in high-risk populations.

Bureau of Prisons Clinical Practice Guidelines, 1-2 (April 2012), <https://www.bop.gov/resources/pdfs/mrsa.pdf>.

The coronavirus epidemic has created a high demand for ventilators and resulted in short supply around the world.²⁰ The virus has even 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, respiratory, cardiac and kidney care. Detention facilities are unable to address these needs. The novel coronavirus outbreak is already straining hospital capacity across the country. The problem will be dangerously exacerbated if Metro West does not act immediately to reduce the risk to those detainees who are susceptible to serious infection.²²

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>.

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>.

C. Metro West’s Efforts to Combat COVID-19 Are Inadequate

When the litigation below was filed on April 5, 2020, there were no confirmed positive cases of COVID-19 diagnosed at Metro West. R.100 at 4. With increased testing implemented later in April, Miami-Dade County began to identify expanding infection numbers in the three facilities in its system.²³ By the date of the Order below, April 29, Metro West had confirmed 163 positive cases via testing. R.100 at 4. At the time, the rate of positive tests at Metro West was twice that of the average for Miami-Dade County.²⁴ And by contrast to the state (and federal) prison systems, Miami-Dade County “has only intermittently released details on positive tests among the ranks of inmates and corrections officers.”²⁵ Under such circum-

²³ See David Ovalle, *From 1 to 59: Number of Miami jail inmates with the coronavirus surges as testing expands*, Miami Herald (April 21, 2020), <https://www.miamiherald.com/news/local/crime/article242181986.html>; Daniel Rivero, *Inmate Coronavirus Cases In Miami-Dade Have Exploded*, WUSF News (Apr. 27, 2020), <https://wusfnews.wusf.usf.edu/post/inmate-coronavirus-cases-miami-dade-have-exploded>

²⁴ See Daniel Rivero, *Inmate Coronavirus Cases In Miami-Dade Have Exploded*, WUSF News (Apr. 27, 2020), <https://wusfnews.wusf.usf.edu/post/inmate-coronavirus-cases-miami-dade-have-exploded>

²⁵ See David Ovalle, *One Miami jail has 159 inmates positive for coronavirus as contagion spreads behind bars*, Miami Herald (Apr. 27, 2020), <https://www.miamiherald.com/news/local/crime/article242313861.html>

stances—escalating infections and erratic reporting—the Order’s requirement that the status at Metro West be monitored and reported regularly provides vital information for responding to the outbreak. R.100 at 27 (noting figures had not been made public), 51-52 (ordering reporting). The COVID-19 outbreak has continued at Metro West since the Order. On May 3, Miami-Dade County reported the death at Metro West of an inmate, Charles Hobbs Jr., who had tested positive for COVID-19.²⁶ The lead plaintiff in this case, Anthony Swain, “was rushed to Jackson Memorial Hospital on May 10 because he couldn’t breathe. The next day, he tested positive for the viral disease.”²⁷

The district court credited the summary expert report (R.70) that Metro West was employing conditions of housing and inmate movements that made social distancing impossible, taken together with declarations from current and former inmates, and testimony of medical professionals.

²⁶ See David Ovalle, *Miami jail inmate diagnosed with the coronavirus dies at hospital after ‘shaking violently’*, Miami Herald (May 4, 2020), <https://www.miamiherald.com/news/local/community/miami-dade/article242476766.html>

²⁷ Atena Sherry, *Miami Inmate Who Sued Over Jail Conditions Now Has COVID-19*, Miami New Times (May 18, 2020), <https://www.miaminewtimes.com/news/anthony-swain-miami-inmate-in-lawsuit-positive-for-covid-19-11638347>

R.100 at 11-16, 34-35. The expert report detailed numerous failures of social distancing, including in dormitory accommodations, recreation areas, dining areas, and telephone areas. R.70 at 2. The expert report also documented a failure to appropriately isolate inmates from purported quarantine units from the general population in a medical setting. R.70 at 3. The Order thus found it uncontroverted that Metro West was not implementing social distancing guidance effectively, R.100 at 35, and rightly credited testimony that measures such as PPE and hygienic supplies cannot effectively contain an outbreak of coronavirus like that present at Metro West absent effective social distancing. R.100 at 34.

Nonetheless, it is also worth noting that Miami-Dade Corrections stated it mandated masks for all staff and inmates as early as April 3, 2020. R.100 at 22,²⁸ yet the Order cited declarations that masks were not *in fact* distributed in sufficient quantities or regularity to provide adequate medical protection. R.100 at 17-18. Similarly, despite an avowed *policy* of providing adequate hygienic supplies, the Order cited declarations that the actual provision of such supplies was erratic and inadequate. R.100 at 18. The fact

²⁸ David Ovalle, *From 1 to 59: Number of Miami jail inmates with the coronavirus surges as testing expands*, Miami Herald (April 21, 2020), <https://www.miamiherald.com/news/local/crime/article242181986.html>

that Metro West possesses adequate masks and cleaning supplies, R.70 at 2, and distributes them in some fashion to inmates, as Defendants-Appellants contend, R.100 at 21-22, is not inconsistent with inmates not actually receiving them in a timely fashion or sufficient quantity, although the parties dispute to what extent this is true. R.100 at 33-34. Overall, the picture painted is that of a facility that seemingly understands what it should do, and has promulgated some potentially beneficial policies, but has failed to adequately implement those policies in practice, especially with regard to social distancing.

It is welcome that Metro West has acted to decrease its population through release of detainees,²⁹ as the expert report suggested as an “overarching recommendation.” R.70 at 2. Indeed, other governments appear to have recognized this risk and acted accordingly by releasing thousands from

²⁹ See David Ovalle, *Miami jail inmate diagnosed with the coronavirus dies at hospital after ‘shaking violently’*, Miami Herald (May 4, 2020), <https://www.miamiherald.com/news/local/community/miami-dade/article242476766.html> (“Prosecutors, defense lawyers and judges have succeeded in reducing the overall jail population, from about 4,000 to about 3,200, releasing inmates who pose less of a risk to public safety.”); Atena Sherry, *Miami Inmate Who Sued Over Jail Conditions Now Has COVID-19*, Miami New Times (May 18, 2020), <https://www.miaminewtimes.com/news/anthony-swain-miami-inmate-in-lawsuit-positive-for-covid-19-11638347>

detention and incarceration settings.³⁰ But Metro West must also fully and effectively address the risk that remains for those who remain within its walls and protect them to the extent medically possible from the further spread of coronavirus. From a public health perspective, it is irrelevant whether Metro West does so in order to avoid (or avoid further) intervention by the courts, or directly compelled by judicial intervention, as the parties here seem to argue. *See* R.100 at 31-32.

In short, it was medically appropriate and necessary for the district court to enter the Order in order to compel Defendants-Appellants to effectively put into practice (to the extent they were not already) the medical guidance that can slow the spread of coronavirus at the Metro West detention facilities and protect inmates and staff—and communities more broadly—from the virus itself and the inherent risk of developing serious complications of COVID-19.

³⁰ *See, e.g.,* Paige St. John, *California to release 3,500 inmates early as coronavirus spreads inside prisons*, L.A. Times (Mar. 31, 2020), <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>.

CONCLUSION

For these reasons, the district court's Order should be AFFIRMED.

Respectfully submitted,

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David Giller

MAY 28, 2020

CERTIFICATE OF SERVICE

I, David Giller, a member of the Bar of this Court and counsel for amici curiae Robert L. Cohen, M.D., Joseph Goldenson, M.D., and Brie Williams, M.D., M.S., certify that, on May 28, 2020, a copy of the attached brief was filed with the Clerk and served on the parties by the Court through the Court's electronic filing system; and that counsel

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have been served via email on the basis of written consent under Fed. R. App. P. 25(c)(2)(B). I further certify that all parties required to be served have been served.

/s/ David Giller

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