

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: COVID-19 PANDEMIC

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No. ADM2020-0428

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**EMERGENCY PETITION TO SUPPLEMENT COURT’S ORDER  
WITH DIRECTIVES NECESSARY TO REDUCE COVID-19 PUBLIC  
HEALTH RISKS ASSOCIATED WITH TENNESSEE JAILS,  
JUVENILE DETENTION CENTERS AND PRISONS**

Come now the undersigned organizations, on behalf of their members, and on behalf of every person currently detained in a jail, juvenile detention center, or prison in Tennessee pursuant to an order or judgment entered by any court or judge subject to the oversight of this Court, and hereby file this emergency petition seeking extraordinary relief. The undersigned organizations and individuals respectfully petition this Honorable Court to supplement the Order it entered on March 13, 2020, Suspending In-Person Court Proceedings, by providing necessary additional directives to Tennessee courts, court clerks, sheriffs, and the Tennessee Department of Corrections. The additional directives sought will protect the health and safety of the public (including incarcerated persons) from risks associated with COVID-19 outbreaks inside jails, juvenile detention centers, and prison facilities in Tennessee.

No person can lawfully be incarcerated in a jail, juvenile detention center, or prison of this State absent a valid order issued by a Tennessee court. As such, the courts of this State have the ultimate authority to control who is held in such facilities. In this unprecedented moment in history, those same courts also have a moral obligation to protect the health, safety and well-being of people so detained, because they are unable to protect themselves from exposure to the coronavirus due to the inherent conditions inside jails, detention centers, and prisons. That obligation also extends to protecting the health, safety and well-being of everyone who enters or works within those facilities, as well as the public at-large. This Court is authorized to act for this purpose by Tenn. Const. Art. VI, § 1, and Tenn. Code Ann. §§ 16-3-501 to 16-3-504 (2009).

For these reasons, the undersigned organizations and individuals hereby urgently move this Court to expand its Continuity of Operations Plan for the length of its duration to provide municipal, juvenile, general sessions, trial and appellate courts of this State, as well as court clerks, sheriffs/jailers, and the Tennessee Department of Correction, with specific and *immediate* directives necessary to reduce the public health threat of COVID-19 for those in contact with Tennessee's correctional systems and the greater community. The directives outlined herein are designed to keep incarcerated individuals, correctional officers, and Tennessee communities as safe, healthy, and virus-free as possible during this time of national and global crisis.

Petitioners submit the necessary directives include the following:

- a. To take *immediate* action to reduce substantially the population of local jails and juvenile detention centers in Tennessee by

ordering the immediate release of all persons who meet the following criteria, unless the State can demonstrate by clear and convincing evidence that the person's release would endanger the safety of a particular person or persons in the community, and that no less restrictive measure other than confinement (including electronic monitoring) can sufficiently mitigate that danger, *see generally United States v. Salerno*, 481 U.S. 739 (1987); *State v. Burgins*, 464 S.W.3d 298 (Tenn. 2015):

- i. all persons serving a misdemeanor sentence;
  - ii. all persons at an elevated risk of contracting COVID-19 and/or experiencing more serious symptoms thereof, either because of age or because of underlying health conditions, and all pregnant people;
  - iii. all persons confined pretrial who are eligible for release on bail, but remain in jail because they cannot afford to pay a money bail condition or court-ordered pretrial monitoring fees;
  - iv. all children detained on delinquency charges; and
  - v. all persons confined on pending probation or parole violation charges.
- b. To take ***immediate*** action to reduce new admissions into local jails in Tennessee by ordering the issuance of a criminal citation or summons in lieu of arrest for all qualifying individuals, pursuant to Tenn. Code Ann. § 40-7-118 and § 40-6-215.
- c. To take ***immediate*** action to reduce further new admission into local jails in Tennessee, by ordering all newly-arrested persons

who do not qualify for a citation or summons to be immediately released: 1) on their own recognizance, Tenn. Code Ann. § 40-11-115; 2) on an unsecured monetary bail, *id.*; or 3) under the supervision of a pretrial services program (at no cost to those without the ability to pay), Tenn. Code Ann. § 40-11-116(b)(1), unless the State can demonstrate by clear and convincing evidence that the person's release would endanger the safety of a particular person or persons in the community, and that no less restrictive measure other than confinement (including electronic monitoring) can sufficiently mitigate that danger. *See generally United States v. Salerno*, 481 U.S. 739 (1987); *State v. Burgins*, 464 S.W.3d 298 (Tenn. 2015).

- d. To take ***immediate*** action to reduce substantially the population of local jails or detention facilities housing persons serving felony sentences, either by suspending service of those sentences, or modifying them to provide for alternative, community-based supervision, such as probation or community corrections, at no cost to people without the ability to pay.
- e. To take ***immediate*** action to reduce new admissions into juvenile detention centers by ordering the release of all children alleged to be delinquent.
- f. To continue all sentencing hearings for persons not in custody that could result in the imposition of a jail or prison sentence.
- g. To suspend all transfers of incarcerated individuals into Department of Correction custody who are currently incarcerated in a local jail.

- h. To take *immediate* action to reduce substantially the population of Tennessee's prisons, including privately-owned detention facilities, by releasing through parole or other available mechanisms all persons who meet at least one of the following criteria, unless the State can demonstrate by clear and convincing evidence that the person's release would endanger the safety of a particular person or persons in the community, and that no less restrictive measure other than confinement (including electronic monitoring) can sufficiently mitigate that danger:
- i. are over the age of 50, considered medically fragile, or pregnant;
  - ii. have been granted parole upon the condition that they complete a program prior to release;
  - iii. have reached their parole eligibility date;
  - iv. are serving sentences solely for drug offenses;
  - v. have less than three years remaining on their sentence; or
  - vi. have been in continuous custody for 25 years or more, as this population has the lowest recidivism rate of all release categories.
- i. Should the Court find any of these categories too broad due to public safety concerns, Petitioners urge the Court to limit them only to the extent that the speculative risks associated with release clearly outweigh the known risks associated with incarcerated populations during the COVID-19 outbreak.

In support of this Emergency Petition, the undersigned state:

## COVID-19 IS A NATIONAL AND GLOBAL HEALTH EMERGENCY

1. We are living in an extreme, unprecedented, world-wide health emergency caused by the rapid spread of the deadly coronavirus. There is no vaccine against this virus,<sup>1</sup> and there is no cure for the disease it causes, COVID-19. On March 12, 2020, Tennessee Governor Bill Lee declared a state of emergency in Tennessee.<sup>2</sup> The World Health Organization has declared COVID-19 a global pandemic.<sup>3</sup> On Friday, March 13, President Trump declared a national emergency.<sup>4</sup>

2. COVID-19 is highly transmissible.<sup>5</sup> The Centers for Disease Control and Prevention (“CDC”) advise that the virus passes from person-

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<sup>1</sup> Saralyn Cruickshank, “Experts Discuss Covid-19 and Ways to Prevent Spread of Disease,” *John Hopkins Mag.* (Mar. 17, 2020), <https://hub.jhu.edu/2020/03/17/coronavirus-virology-vaccine-social-distancing-update>.

<sup>2</sup> <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf>.

<sup>3</sup> See World Health Organization, Director-General Opening Remarks (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>4</sup> <https://www.cnn.com/2020/03/13/politics/trump-national-emergency-proclamation-text/index.html>.

<sup>5</sup> Given COVID-19’s contagiousness and relatively high death rate, particularly in vulnerable populations, President Trump issued a 15-day

to-person through respiratory droplets produced when someone coughs or sneezes, and by contact with surfaces.<sup>6</sup> The number of known COVID-19 infections is increasing exponentially daily. As of March 24, 2020, there have been more than 380,000 confirmed infections globally, with the actual infection rate considered to be much higher than that.<sup>7</sup> As of that same date, 46,332 of those infections were in the United States.<sup>8</sup> With new numbers being reported daily, Tennessee health officials confirmed at least 667 known infections in 48 counties as of March 24, 2020.<sup>9</sup> As of that date, more than 16,500 people have died globally, with more than 600 deaths in the United States, two of which were in Tennessee.<sup>10</sup>

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directive to avoid gatherings in groups of more than 10 people. The President's Coronavirus Guidelines for America, Whitehouse.gov (Mar. 16, 2020), [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus\\_guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus_guidance_8.5x11_315PM.pdf).

<sup>6</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

<sup>7</sup> "Mapping the Spread of the Coronavirus in the U.S and Worldwide," Washington Post (Mar. 24, 2020), <https://www.washingtonpost.com/graphics/2020/world/mapping-spread-new-coronavirus/>.

<sup>8</sup> *Id.*

<sup>9</sup> <https://www.tn.gov/health/cedep/ncov.html>

<sup>10</sup> *Supra*, note 7.

3. The numbers of people diagnosed reflect only a portion of those infected.<sup>11</sup> Relatively few people have been tested, and many people are asymptomatic transmitters.<sup>12</sup> Thousands of people are carrying a potentially fatal disease that is easily transmitted—and few are aware of it. The current estimated incubation period is between 2 and 14 days.<sup>13</sup> Approximately 20% of people infected experience life-threatening complications, and between 1% and 3.4% die.<sup>14</sup> A significant percentage of those who do not die will require hospitalization and intensive

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<sup>11</sup> Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” L.A. Times (Mar. 10, 2020), <https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

<sup>12</sup> Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed Signs,” N.Y. Times (Feb. 26, 2020, updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,” Bus. Insider (Feb. 24, 2020), <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

<sup>13</sup> “Coronavirus Disease COVID-19 Symptoms,” Centers for Disease Control (updated: Feb. 29 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

<sup>14</sup> Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.



treatment, including ventilation.<sup>15</sup> Medical providers and medical facilities are in peril of becoming completely overwhelmed if the infection rate is not slowed.

4. COVID-19 has resulted in extraordinary measures being taken globally, nationally and locally to control the spread of the virus. In Tennessee, Governor Lee directed the closing of all schools from March 16, 2020, through at least March 31, 2020.<sup>16</sup> On March 22, 2020, he issued another order restricting social gatherings to fewer than 10 people, and closing dine-in restaurant service and gyms in Tennessee.<sup>17</sup> In Metro-Nashville Davidson County, Mayor John Cooper issued a “safer-in-home” Order on March 22, 2020, directing Nashvillians to stay at home and closing all non-essential businesses for at least two weeks.<sup>18</sup> Other Tennessee cities and counties are following suit.<sup>19</sup> The CDC has

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<sup>15</sup> Thomas C. Tsai, Benjamin H. Jacobson, Ashish K. Jah, “American Hospital Capacity And Projected Need for COVID-19 Patient Care,” *Health Affairs* (Mar. 17, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200317.457910/full/>.

<sup>16</sup> <https://www.tn.gov/governor/news/2020/3/16/governor-lee-issues-statement-regarding-statewide-school-closure.html>.

<sup>17</sup> <https://www.tn.gov/governor/news/2020/3/22/gov--bill-lee-signs-executive-order-mandating-alternative-business-models-for-restaurants-and-gyms--lifts-alcohol-regulations.html>.

<sup>18</sup> <https://www.asafenashville.org/safer-at-home-order/>

<sup>19</sup> *See e.g.*, “Memphis, Shelby County Municipalities Issue “Safer-at-Home” Orders to curb the Spread of COVID-19,” WMC Action News (Mar. 23, 2020), <https://www.wmcactionnews5.com/2020/03/23/mayor-issues->

issued guidance that gatherings of more than 10 people must not occur. The CDC also urges social distancing – every person should remain at least six feet distant from every other person. Proper hygiene, including frequent cleaning of all surfaces, and frequent, thorough hand-washing is also recommended.<sup>20</sup>

5. Governors in states where COVID-19 outbreaks occurred earlier than in Tennessee have taken even more extraordinary measures to curb the spread of the virus. In California, New York, Connecticut, Illinois, Louisiana, Ohio, Oregon, Delaware, Indiana, Massachusetts, Michigan, New Jersey, New Mexico, and West Virginia, nearly one-third of all U.S. residents have been ordered to “shelter-in-place.”<sup>21</sup> More than 2,000 physicians from across Tennessee sent a letter to Governor Lee pleading with him to impose a similar order here for at least the next two weeks. This letter was endorsed by the Middle Tennessee Mayors

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[safer-home-order-memphis/](https://www.wsmv.com/news/sumner_county/sumner-co-issues-safer-at-home-declaration-effective-tuesday/article_de87f568-6d14-11ea-9bfd-93205e634300.html); Chuck Morris, “Sumner Co. Issues ‘Safer At Home’ Declaration Effective Tuesday,” WSMV News (Mar. 23, 2020), [https://www.wsmv.com/news/sumner\\_county/sumner-co-issues-safer-at-home-declaration-effective-tuesday/article\\_de87f568-6d14-11ea-9bfd-93205e634300.html](https://www.wsmv.com/news/sumner_county/sumner-co-issues-safer-at-home-declaration-effective-tuesday/article_de87f568-6d14-11ea-9bfd-93205e634300.html).

<sup>20</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>

<sup>21</sup> Alicia Lee, “These States Have Implemented Stay-At-Home Orders”, CNN (March 24, 2020), <https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-order-trnd/index.html>.

Caucus, who urged Governor Lee to “consider the recommendation of the medical community.”<sup>22</sup>

6. People who have control over their bodies are self-isolating to prevent contracting or spreading this deadly disease. None of the recommended measures for mitigating the spread of COVID-19 are available for persons confined in jails, juvenile detention centers, and prisons, or for those who must interact with them. These facilities are congregate environments, in which people are confined in close proximity to one another and their keepers. Many, such as the Hamblen County, TN, jail, are overcrowded and unsanitary places where surfaces are rarely, if ever, washed.<sup>23</sup> “Current conditions at the Hamblen County jail are so dire that inmates are faced with inadequate clothing and sleeping arrangements while being shackled to walls and door handles.”<sup>24</sup>

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<sup>22</sup> Phil Williams, “1500+ TN Physicians urge governor to order shelter-in-place,” *NewsChannel5* (Mar. 21, 2020), <https://www.newschannel5.com/news/newschannel-5-investigates/1-500-tn-physicians-urge-governor-to-order-shelter-in-place>.

<sup>23</sup> See Richard Oppel, “A Cesspool of a Dungeon: The Surging Population in Rural Jails,” *New York Times* (Dec. 19, 2020), <https://www.nytimes.com/2019/12/13/us/rural-jails.html>.

<sup>24</sup> Joel Ebert, “Hamblen County Jail Inmates Faced with Poor Clothing, Unsanitary Conditions, New Federal Lawsuit Contends,” *KnoxNews* (Feb. 25, 2020), <https://www.knoxnews.com/story/news/local/2020/02/25/hamblen-county-tennessee-jail-inmates-face-unsanitary-conditions-federal-lawsuit-says/4860221002/>.

7. Hamblen County is not alone. On October 31, 2019, roughly half of Tennessee’s jails were operating over capacity, including one jail (Van Buren County) operating at 600% of its capacity.<sup>25</sup> That day, Tennessee jails were holding 31,204 people, more than half of whom (15,902) were pretrial detainees. Another 4,816 of those people (roughly 15%) were serving sentences for misdemeanor convictions.<sup>26</sup> The number of people housed in Tennessee’s jails has not changed drastically in the past four months.

8. Many of the people detained in jail and prison suffer from underlying health conditions, including asthma, diabetes, and hypertension, which place them at an elevated risk for contracting serious COVID-19.<sup>27</sup> In 2018, 1,776 of Tennessee’s prisoners were age 60

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<sup>25</sup> Tennessee Department of Correction, “Jail Summary Report: October 2019,”

<https://www.tn.gov/content/dam/tn/correction/documents/JailOctober2019.pdf>. *See also* Governor Bill Lee’s Criminal Justice Investment Task Force Report (“CJITF Report”), p. 5 (noting that at the end of 2018, local county jails in Tennessee housed over 8,500 individuals sentenced for felony offenses, and at least half of those jails were overcrowded), <https://www.tn.gov/content/dam/tn/governoroffice-documents/governorlee-documents/CJInvestmentTaskForceReport.pdf>.

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

<sup>27</sup> *See* “Are You at Higher Risk for Severe Illness?” Center for Disease Control & Prevention (Mar. 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

or older.<sup>28</sup> Like a cruise ship or a nursing home, jails and prisons are an environment in which COVID-19 can easily gain a foothold and spread rapidly with devastating consequences.

9. During pandemics, jail facilities become “ticking time bombs” as “[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases.”<sup>29</sup> As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” *See* Exhibit 1, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7 (Mar. 15, 2020). This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19.

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<sup>28</sup> CJITF Report, *supra* note 19, at p. 29.

<sup>29</sup> *See* Saint Louis University, “Ticking Time Bomb,” *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

10. Jails, juvenile detention centers, and prisons are not and cannot become an isolated environment. By necessity, members of the free community, including correctional officers, attorneys, medical personnel, and others, must enter and leave these facilities on a daily basis.

11. Science shows that, within jails and prisons, isolation, segregation, and lockdown are ineffective against COVID-19, Meyer Decl. ¶ 10, and regardless, jails and prisons rarely have the physical space to accomplish these efforts for the existing population. COVID-19 can survive in the air, so separation in a facility where there is still other movement of people, and occasional interaction, will not contain it. Surfaces are still touched—inside cells, in bathrooms, and in transport, at the very least. Further, the reality is that some contact with others, whether through close proximity or actual contact, is inevitable. Kitchen staff, intake staff, officers and medical staff all interact with incarcerated people as a matter of course, even on lockdown.

12. The world already knows the extreme risks that jails and prisons pose for the spread of COVID-19. Last month, the virus rapidly spread across China’s prisons and jails. As of February 25, there were 555 confirmed infections in five prisons of three provinces – Hubei, Shandong, and Zhejiang. As of February 29, 806 people in Wuhan city prisons were infected by the virus.<sup>30</sup> It has also spread rapidly in Iran,

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<sup>30</sup> The Justice Collaborative, “Explainer: Prisons and Jails are Particularly Vulnerable to Covid-19 Outbreaks,” available at

prompting U.S. Secretary of State Mike Pompeo to call for Iran to release Americans detained there because of the “deeply troubling [r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”<sup>31</sup> Recognizing the unique risks to jail populations, courts across Iran granted 54,000 inmate furloughs as part of the measure to contain coronavirus across the country.<sup>32</sup>

13. Cities throughout the United States, and in Tennessee, are about to experience the same thing. In New York, at least 38 people on Rikers Island have been diagnosed with COVID-19: 21 prisoners and 17 employees, including 6 healthcare workers.<sup>33</sup> Once COVID-19 infections occur in jail and prison facilities, it is too late to stop the spread, and everyone in contact with that facility is at heightened risk of contracting

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<https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

<sup>31</sup> Jennifer Hansler and Kylie Atwood, “Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak,” CNN (Mar. 10, 2020), at <https://cnn.it/2W4OpV7>.

<sup>32</sup> Claudia Lauer and Colleen Long, “US Prisons, Jails on Alert for Spread of Coronavirus,” The Associated Press (Mar. 7, 2020), at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

<sup>33</sup> “21 Inmates, 17 Employees Test Positive for COVID-19 on Rikers Island: Officials”, *NBC New York*, (Mar. 22, 2020), <https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/>.

the disease, and in turn spreading the virus to others they contact in their homes, neighborhoods, and communities.<sup>34</sup>

14. When COVID-19 infection occurs and spreads in a jail, juvenile detention, or prison, a significant number of prisoners and detainees will require urgent medical care. The capacity of the medical service providers in these facilities would quickly be overwhelmed, exacerbating the death toll and the risks to all involved.

15. Accordingly, medical experts who specialize in corrections health are recommending that populations of detention centers, jails and prisons in the U.S. be immediately and dramatically reduced from current levels, in order to maximize the opportunity for appropriate distancing, proper sanitization and hygiene, and appropriate care for those who are or may be infected with COVID-19. According to Dr. Jonathan Giftos, former Medical Director for Correctional Health Services at Riker's Island, "the only way to really mitigate the harm of rapid spread of coronavirus in the jail system is through depopulation,

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<sup>34</sup> "The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside." *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; *See also* Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, [https://www.ncchc.org/filebin/news/COVID\\_for\\_CF\\_Administrators\\_3.9.2020.pdf](https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf).



releasing as many people as possible with focus on those at highest risk of complication.”<sup>35</sup> Three other experts, Professor Josiah Rich, Professor Scott Allen, and Dr. Mavis Nimoh agree that “[a]uthorities should release those who do not pose an immediate danger to public safety, while also reducing arrests and delaying sentencings...Those being held in jails simply due to their inability to afford bail, or for minor infractions or violations, can generally be released promptly by the judiciary or even the local sheriff. Those eligible for parole can and should be released.”<sup>36</sup>

16. In addition to releasing persons already in jail, juvenile detention centers, and prisons, courts must also reduce the number of new people entering into them. “Bringing more people into the correctional setting during this period creates additional risk. In the absence of more comprehensive judicial reform, law enforcement can consider limiting further incarceration to egregious crimes rather than

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<sup>35</sup> “Recipe for disaster: The spread of coronavirus among detained population,” *MSNBC* (Mar. 18, 2020), <https://www.msnbc.com/all-in/watch/-recipe-for-disaster-the-spread-of-coronavirus-among-detained-populations-80947781758>.

<sup>36</sup> Josiah Rich, Scott Allen and Mavis Nimoh, “We must release prisoners to lessen the spread of coronavirus,” *Washington Post* (Mar. 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>. Josiah Rich is professor of medicine and epidemiology at Brown University. Scott Allen is professor of medicine emeritus at the University of California at Riverside. Mavis Nimoh is executive director of the Center for Prisoner Health and Human Rights at the Miriam Hospital.

populating our jails and prisons with individuals convicted of non-violent crimes.”<sup>37</sup>

17. In a recent presentation to correctional healthcare workers developed in cooperation with the CDC, Dr. Anne Spaulding, a professor of epidemiology and the director of the Emory Center for the Health of Incarcerated Persons, encouraged jurisdictions to consider alternatives to incarceration or detention, such as at-home electronic monitoring and community corrections.<sup>38</sup>

18. These concerns and recommendations apply to jails, juvenile detention centers, and prisons throughout Tennessee. In Nashville-Davidson County, Sheriff Daron Hall has already sounded the alarm. In a recent statement, Hall said they “fully expect to have COVID-19 positive cases in our facilities. It’s critical we reduce the inmate population now.”<sup>39</sup> In Shelby County, it is already too late to stop COVID-

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<sup>37</sup> Dr. Oluwadamilola T. Oladeru, Adam Beckman, Dr. Gregg Gonsalves, “What COVID-19 Means For America’s Incarcerated Population – And How To Ensure It’s Not Left Behind,” *Health Affairs* (Mar. 10, 2020), <https://222.healthaffairs.org/doi/10.1377/hblog20200310.290180/full/>.

<sup>38</sup> Dr. Anne Spaulding, Coronavirus COVID-19 and the Correctional Facility for the Correctional Healthcare Worker (Mar. 9, 2020), [https://www.ncchc.org/filebin/news/COVID for CF. HCW 3.9.20.pdf](https://www.ncchc.org/filebin/news/COVID%20for%20CF.HCW%203.9.20.pdf).

<sup>39</sup> Daron Hall, Nashville-Davidson County Sheriff, March 20, 2020, <https://sheriff.nashville.gov/category/media-center/news-releases/>.

19 from entering the jail, as one employee there who regularly interacts with new arrestees has now been diagnosed with COVID-19.<sup>40</sup>

19. Bold action is a necessity in Tennessee, not only for the health and well-being of all those confined in jails, juvenile detention centers and prisons, but also for the safety of the larger community. Corrections officials are aware of this, but they are limited in what they can do to provide safety, or to reduce the populations of their facilities.<sup>41</sup>

### **COURT OFFICIALS IN OTHER JURISDICTIONS ARE IMPLEMENTING MEASURES TO PROTECT PUBLIC SAFETY FROM COVID-19 OUTBREAKS IN JAILS AND PRISONS**

20. Throughout the State of Tennessee, the United States and the world, congregate environments are being temporarily closed in the interest of public health. Residents of more than 15 states have now been ordered to “shelter at home.” Businesses and other organizations throughout the nation and the State of Tennessee have shut down their

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<sup>40</sup> Mitchell Koch and Peter Fleischer, “Employee at Shelby County Jail Tests Positive for COVID-19,” WREG Memphis (Mar. 23, 2020), <https://wreg.com/news/employee-at-shelby-county-jail-tests-positive-for-covid-19/>.

<sup>41</sup> Chris Francescani and Luke Barr, “Fearing outbreaks and riots, nation’s prison and jail wardens scramble to respond to coronavirus threat: *Prisoners are literally trapped inside cells as the virus spreads, experts say*,” ABC News (March 19, 2020), <https://abcnews.go.com/Health/fearing-outbreaks-riots-nations-prison-jail-wardens-scramble/story?id=69676840>.

operations – from shopping malls, to bars and restaurants, gyms, movie theaters, churches, convention centers, hotels, and professional sports teams. The universal goal is to minimize contact that fosters the spread of the virus, particularly among groups of more than 10 people. Criminal justice leaders in other jurisdictions have already taken emergency action to do the same in correctional settings.

21. On March 23, 2020, the New Jersey Supreme Court issued an Order directing lower courts to commute or suspend sentences being served by people held in county jails, due to the dangers posed by COVID-19.<sup>42</sup> This extraordinary Order directs that any person in the State of New Jersey currently serving a county jail sentence as a condition of probation or as a result of a municipal court conviction be released within 48 hours.<sup>43</sup> It also establishes detailed procedures for local authorities to follow in implementing that Order, while emphasizing the important public safety reasons for significantly reducing jail populations.<sup>44</sup>

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<sup>42</sup> A copy of the Court's Order is available at: [https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22 -  
\\_Consent\\_Order\\_Filed\\_Stamped\\_Copy-1.pdf](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

22. On March 20, 2020, Kentucky’s Chief Justice John Minton Jr. urged state court officials “to clear out all of the jail inmates you safely can, ahead of the virus, if you aren’t doing so.”<sup>45</sup>

23. In Cleveland, Ohio, criminal court judges have released dozens of pre-trial detainees and anticipate the eventual release of 300 detainees from the Cuyahoga County jail, where “almost any kind of inmate was considered.”<sup>46</sup>

24. In Washington, D.C., the D.C. Superior Court Chief Judge “issued an emergency order allowing police and prosecutors to exercise discretion to determine whether a person arrested should be held until their first court appearance or given citation release with notice of their future court date.”<sup>47</sup>

25. Thirty-three elected prosecutors from across the nation, in jurisdictions ranging from California to Mississippi, recently signed a

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<sup>45</sup> See Kentucky Department of Public Advocacy, “Reduce Jail Population to Protect KY from COVID-19,” <https://dpa.ky.gov/News-and-Public-Information/Pages/Reduce-Jail-Population-to-Protect-KY-from-COVID-19.aspx>.

<sup>46</sup> “Ohio jail Releases Hundreds of Inmates Due to Coronavirus Concerns,” *Oklahoma’s News4* (Mar. 16, 2020, 8:36 AM), <https://kfor.com/health/coronavirus/ohio-jail-releases-hundreds-of-inmates-due-to-coronavirus-concerns/>.

<sup>47</sup> “DC Superior Court Issues Emergency Order Allowing Police/Prosecutorial Discretion re: Detaining Arrestees,” District of Columbia Courts Newsroom (Mar. 16, 2020), [https://newsroom.dccourts.gov/press-release/stories-20200316#.Xm\\_xsekxS3.twitter](https://newsroom.dccourts.gov/press-release/stories-20200316#.Xm_xsekxS3.twitter).

public statement calling for urgent measures to “dramatically reduce the number of incarcerated individuals,” to protect incarcerated populations from the threat of COVID-19.<sup>48</sup>

26. In Nashville-Davidson County, the District Attorney and Public Defender have reached agreements to release certain individuals from jail on a case-by-case basis, but that process is slow, and still requires a court appearance and approval of the presiding judge.<sup>49</sup> Meanwhile, the Tennessee Association of Criminal Defense Lawyers has called upon Tennessee’s state and local leaders to act to protect the health and safety of incarcerated persons and those who work in close connection with them.<sup>50</sup>

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<sup>48</sup> Fair and Just Prosecution, Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody (last updated Mar. 18, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

<sup>49</sup> Steven Hale, “If An OutBreak Happens in the Jail, It’s Gonna Be Devastating,” Nashville Scene (Mar. 21, 2020), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21123656/if-an-outbreak-happens-in-the-jail-its-gonna-be-devastating>; Steven Hale, “25 People Released from Davidson County Jail in Anti-Outbreak Effort,” Nashville Scene (Mar. 23, 2020), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21123961/25-people-released-from-davidson-county-jail-in-antioutbreak-effort>.

<sup>50</sup> Jamie Satterfield and Travis Dorman, “Tennessee Courts Suspend Some Proceedings, Lawyers Question Jail Conditions Amid Pandemic,” KnoxvilleNews (Mar. 13, 2020),

## POPULATION REDUCTION IS ESSENTIAL TO PROTECT THE CONSTITUTIONAL RIGHTS OF JAIL, JUVENILE DETENTION CENTER, AND PRISON DETAINEES

27. To date, Tennessee's governmental leaders have provided very little, if any, public guidance or direction to courts and legal system actors regarding measures that are urgently needed to reduce the significant public health risks associated with outbreaks of COVID-19 in Tennessee's jails, juvenile detention centers, and prisons.<sup>51</sup>

28. If immediate action is not taken to reduce the population of jails, juvenile detention centers and prisons in Tennessee, persons detained there will remain at grave and unacceptable risk of contracting COVID-19, which is a serious and potentially life-threatening illness for which no vaccine or cure exists. Other serious and irreversible consequences are also likely, with ripple effects that will negatively impact the public at large, including:

- a. spread of infection to hundreds, if not thousands, of people who work every day inside jails, juvenile

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<https://www.knoxnews.com/story/news/crime/2020/03/13/coronavirus-tennessee-courts-suspend-some-proceedings-amid-covid-19/5041181002/>.

<sup>51</sup> Anita Wadhwani, "In Tennessee's Overcrowded Rural Jails, A Patchwork of Responses to the COVID-19 Crisis," *The Tennessean* (Mar. 17, 2020), <https://www.tennessean.com/story/news/health/2020/03/18/tennessee-jails-patchwork-responses-covid-19-crisis/5023400002/>.

detention centers, and prisons, including healthcare workers, as well as their families;

- b. spread of infection to defense attorneys, who need to visit detained clients and are not always able to do so in a safe manner, and their families;
- c. spread of infection to judicial staff, clerks, other court personnel, and members of the public (and all of their families) when in-person court hearings are necessary and social distancing measures are unavailable or not feasible;
- d. reduced availability of hospital beds and other healthcare resources due to sick detainees and correctional staff;
- e. reduced and inadequate staffing of jails, juvenile detention centers, and prisons where populations remain high, and high numbers of employees are sick, which in turn creates additional (and unnecessary) safety risks; and
- e. overall reduced efficacy of social distancing measures in Tennessee.

29. In contrast, immediately lowering the population of jails, juvenile detention centers, and prisons will mean fewer people at risk of becoming sick (“flattening the carceral-infection curve”), and an increased ability to successfully treat those who become sick.

30. Persons confined in prisons and jails must “be furnished with the basic human needs, one of which is ‘reasonable safety.’” *Helling v.*



*McKinney*, 509 U.S. 24, 33-34 (1993) (citing *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 200 (1989)). The due process rights of a pretrial detainee “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Those rights are violated if he is “incarcerated under conditions posing a substantial risk of serious harm,” and the “state of mind is one of ‘deliberate indifference’ to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal citation omitted); see, e.g., *Hardy v. District of Columbia*, 601 F.Supp.2d 182, 190 (D.D.C. 2009) (violation of constitutional rights of pretrial detainee if the officials “knowingly disregarded a substantial risk of serious harm of which they were aware”).

31. Given what is known today about the spread of coronavirus and COVID-19, the Court cannot reasonably presume no harm will befall prisoners and detainees in jails, juvenile detention centers, and prisons from this virus. Jailers in Tennessee know that detection of COVID-19 in the facilities they operate is imminent, and that inaction will have a serious impact not only on those held there, but also on those who work there.<sup>52</sup> To ignore that reality is the epitome of deliberate indifference.

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<sup>52</sup> “We fully expect to have COVID-19 positive cases in our facilities. It’s critical we reduce the inmate population now. As criminal justice leaders we need to take action because of the serious impact this virus will have on sheriff’s office staff and inmates.” Davidson County Sheriff Daron Hall, March 20, 2020, <https://sheriff.nashville.gov/sheriff-daron-hall-working-to-reduce-jail-population-during-covid-19-national-public-health-emergency/>.

32. To expose detainees and prisoners to the unmitigated risk of contracting COVID-19 – when there are obvious mitigating steps that can be taken – is constitutionally impermissible. COVID-19 is a dangerous communicable disease, and correctional facilities are a perfect breeding ground. To allow pretrial detainees or convicted prisoners to suffer unnecessary exposure to this virus violates the constitutional imperative that they be afforded “reasonable safety” while they are confined. *See* Tenn. Code Ann. § 41-2-109; *cf. Helling*, 509 U.S. at 33 (the Eighth Amendment may be violated even where a possible infection might not affect all of those exposed.)

33. Failure to act in accordance with speed and urgency to lower drastically the population of jails, juvenile detention centers, and prisons across Tennessee will constitute a wholesale violation of the constitutional rights of those confined there.

**PUBLIC SAFETY CAN BE PROTECTED WHILE REDUCING  
CARCERAL POPULATIONS IN TENNESSEE TO MITIGATE RISK  
OF COVID-19 INFECTION**

34. Petitioners understand that COVID-19 is not the only public safety concern our community faces. If the State can demonstrate by clear and convincing evidence that releasing someone from a jail, juvenile detention center, or prison who is charged with or convicted of a criminal offense would endanger the safety of a particular person or persons in the community, and that no measures less restrictive than confinement can

reasonably mitigate that danger, confinement may remain appropriate. *See generally United States v. Salerno*, 481 U.S. 739 (1987).

35. In reality, a significant number of people confined within Tennessee’s jail, juvenile detention centers, and prisons today could be released without endangering public safety or the safety of any particular person. This includes the thousands of people who have already been deemed bailable by courts, but remain in jail simply because they cannot afford to pay the monetary condition set by the judge for their release.<sup>53</sup> A detainee’s exposure to the coronavirus should not be based on his financial circumstances, but judges throughout Tennessee unlawfully set unaffordable monetary bail conditions on a daily basis in violation of the constitution.<sup>54</sup>

36. On March 13, 2020, the Chief Justice of the Tennessee Supreme Court declared a state of emergency for the Judicial Branch of Tennessee government in response to the COVID-19 pandemic, and issued an Order activating a Continuity of Operations Plan for the courts of Tennessee. The Order states it is intended to be interpreted broadly “for protection of the public from risks associated with COVID-19.” The Order also applies statewide to all courts and court clerks’ offices except

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<sup>53</sup> *See supra* note 19.

<sup>54</sup> *See e.g., Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758 (M.D. Tenn. 2016); *McNeil v. Community Prob. Servs., LLC*, 945 F.3d 991 (6<sup>th</sup> Cir. 2019) (upholding preliminary injunction against Sheriff of Giles County, TN, prohibiting enforcement of detention orders where monetary bail condition was unlawfully set); *Torres v. Collins* Case No. 2:20-cv-00026, filed in the United States District Court, Eastern District of Tennessee, on Feb. 16, 2020.

administrative courts within the Executive Branch and federal courts and federal court clerks' offices located in Tennessee.

37. The Court's Order was an important and necessary step to protect the health, safety and welfare of those involved in our legal system, as well as the public at large. The primary effect of the Court's Order is suspension of all in-person court proceedings throughout Tennessee until at least March 31, 2020, with limited exceptions, including those necessary to protect constitutional rights of criminal defendants. In this unprecedented time, however, more is required.

38. As Tennessee responds to the coronavirus pandemic within its borders, the Court's intervention is also necessary to ensure the protection of the constitutional rights, including the right to "reasonable safety," of all persons who are: 1) detained inside local jails in Tennessee, or become subject to detention inside those jails while the Order remains in effect; 2) detained inside juvenile detention centers, or become subject to detention inside those centers while the Order remains in effect; or 3) detained inside a Tennessee prison, including privately-owned detention facilities, or become subject to detention in prison while the Order remains in effect.

39. The ***release of all detainees*** in jails, juvenile detention centers, or prisons within the following categories is presumptively consistent with public safety, unless the State can demonstrate by clear and convincing evidence that the person's release would endanger the safety of a particular person or persons in the community, and that no less restrictive measure other than confinement (including electronic monitoring) can sufficiently mitigate that danger:

- a. persons serving misdemeanor sentences;
- b. persons confined pretrial who are eligible for release on bail, but remain in jail because they cannot afford to pay a money bail condition or court-ordered pretrial monitoring fees;
- c. children detained on delinquency charges;
- d. persons confined on probation or parole violation charges;
- e. persons at an elevated risk of contracting COVID-19 and/or experiencing more serious symptoms thereof, either because of age (over 50 years old) or because of underlying health conditions;
- f. persons who are pregnant;
- g. persons serving felony sentences who have been granted parole upon the condition that they complete a program prior to release;
- h. persons serving felony sentences who have reached their parole eligibility date;
- i. persons serving felony sentences solely for drug offenses;
- j. persons serving felony sentences who have less than three years remaining on their sentences; or
- k. persons serving felony sentences, including life sentences, who have been in continuous custody for 25 years or more, as this population has the lowest recidivism rate of all release categories.

40. Also, *limiting new admissions to jail, juvenile detention centers, and prisons* is presumptively consistent with public safety, absent a showing by clear and convincing evidence that there are no conditions upon which the person can be released into the community and reasonably assure the safety of a particular person or persons in the community. Accordingly, diversion from admission to jail, juvenile detention centers, and prisons is presumptively consistent with public safety in the following categories:

- a. all persons arrested and determined to be bailable who cannot afford to pay the monetary bail set;
- b. all pregnant people;
- c. all juveniles alleged to be delinquent;
- d. all persons at an elevated risk of contracting COVID-19 and/or experiencing more serious symptoms thereof, either because of age or because of underlying health conditions;
- e. all persons allegedly in violation of probation or parole; and
- f. all persons currently incarcerated in a local jail awaiting transfer to prison who do not qualify for release under the criteria outlined herein should remain housed locally.

41. With the filing of this Petition today, the undersigned urgently seek this Court's protection from the public health risks associated with a COVID-19 outbreak in Tennessee's jails, juvenile detention centers, and prisons, on behalf of themselves, their members,

the people who are or will be subject to incarceration in a Tennessee jail, juvenile detention center, or prison during this pandemic, and the public at large.

WHEREFORE, Petitioners respectfully move that this Court:

1. Entertain this Petition and the supporting materials with all due haste; and
2. Grant the relief sought by supplementing the Order it entered on March 13, 2020 Suspending In-Person Court Proceedings with directives for municipal, juvenile, general sessions, trial, and appellate courts in Tennessee, as well as court clerks, sheriffs, and the Department of Corrections, to immediately, and within three days of its Order, establish procedures to reduce the populations of local jails, juvenile detention centers, and prison facilities by releasing persons consistent with the presumptions outlined herein.

Respectfully submitted,



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**With and on behalf of the following organizations and their members:**

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**No Exceptions**, Jeannie Alexander, Executive Director, Nashville, TN

**Just City**, Josh Spickler, Executive Director, Memphis, TN

**Unheard Voices Outreach**, Rahim Buford, Founder & Executive Director,  
Nashville, TN

**Tennessee Association of Criminal Defense Lawyers**, Jonathan Cooper,  
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**Southerners on New Ground-Nashville**, Angela Henderson, Statewide  
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**Participatory Defense Nashville**, Gicola Lane, Nashville, TN

**Highlander Research & Education Center**, Ash-Lee Henderson,  
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**Jonah’s Journey**, Susan Moffitt, Director, Goodlettsville, TN

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**RTTC Collective**, Theeda Murphy, Nashville, TN

**Redneck Revolt -- Chattanooga Chapter**, Jacob Rawls

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**Black Mama’s Bail Out Knoxville**, Charice Starr

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**Black Voters Matter Fund**, Timothy Hughes, Nashville, TN

**SONG Knoxville**, Brandi Augustus

**Workers' Dignity**, Cecilia Prado, Nashville, TN

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**National Juvenile Justice Network**, Alyson Clements, Director of Advocacy

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**Silicon Valley De-Bug/National Participatory Defense Network**, Charisse Domingo, San Jose, California