

No. 20-11622

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ANTHONY SWAIN, *et al.*,

Plaintiffs-Appellees,

v.

DANIEL JUNIOR, in his official capacity as Director of the
Miami-Dade Corrections and Rehabilitation Department, and
MIAMI-DADE COUNTY, FLORIDA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
Civil Action No. 1:20-cv-21457-KMW
The Honorable Kathleen M. Williams, *United States District Judge*

**BRIEF OF CORRECTIONS EXPERTS AS *AMICI CURIAE* IN SUPPORT
OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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May 28, 2020

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

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amici* Martin F. Horn, Steve J. Martin, Richard Morgan, Dan Pacholke, Emmitt Sparkman, Phil Stanley, and Eldon Vail certify that the following persons and entities may have an interest in the outcome of this case:

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STATEMENT OF IDENTIFICATION

Amici curiae are corrections experts with extensive experience overseeing and managing prisons and jails, including facilities facing infectious disease outbreaks like the one at issue in this case. *Amici* submit that Coronavirus Disease 2019 (COVID-19)—the illness caused by the novel coronavirus—presents a special and exceptional threat to prisons and jails that must be managed effectively and urgently to prevent widespread illness and deaths. Tens of thousands of incarcerated people and prison and jail employees have already contracted the virus; many hundreds have died. These numbers are growing every day.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Correction and Probation for seven years. Additionally, Mr. Horn has served as Executive Director of the New York State Sentencing Commission.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for incarcerated people with mental impairments. He coauthored *Texas Prisons, The Walls Came Tumbling Down*, and has written numerous articles on criminal law issues. Mr. Martin is currently serving as the Federal Court Monitor in *Nunez v. New York City Department of Corrections*,

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Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012. Throughout the course of his career, Mr. Morgan was the Superintendent (Warden) of three prisons, including one facility with an inpatient hospital and two institutions with clinics. In 2002, as the Superintendent of the Washington State Penitentiary, Mr. Morgan managed an infectious disease outbreak in the prison, effectively containing the virus and mitigating the harm to incarcerated people and prison staff.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections. He started his thirty-three-year career as a correctional officer, working his way to the senior-most position for the department. As a Superintendent (Warden), Mr. Pacholke managed flu outbreaks, and as Chief of Emergency Response and later Deputy Director and Director of Prisons, he was responsible for ensuring the prisons had an up-to-date epidemic response plan.

Emmitt Sparkman is the former Deputy Commissioner of Institutions for the Mississippi Department of Corrections. His adult and juvenile corrections career spans over forty-three years. He has held line and management positions in Texas,

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Plaintiffs-Appellees consent to this brief's filing. Defendants-Appellants do not consent to its filing. Accordingly, pursuant to Federal Rule of Appellate Procedure 29(a)(2) and (3), *amici* have concurrently filed a motion seeking this Court's leave to file this brief.

RULE 29(a)(4)(E) STATEMENT

Amici certify that no party's counsel authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission.

STATEMENT OF THE ISSUES

Effective management of the COVID-19 outbreak in prisons and jails requires a multi-faceted, aggressive approach. Indeed, urgent and enforceable implementation of the measures the district court ordered of Defendants-Appellants at the Metro West Detention Center is both necessary and feasible from a correctional point of view to protect incarcerated people, jail staff, and the public from contracting and transmitting COVID-19 at this stage of the pandemic. Failing to ensure compliance with the district court's order, which is based predominately on Center for Disease Control guidance, at this stage of the pandemic risks substantial and irreparable harm of serious illness and death to all people living and working in the Jail, as well as the public. Drawing upon their expertise in the corrections field, *amici* provide this Court unique information as to why this is so.

SUMMARY OF ARGUMENT

COVID-19, the illness caused by the novel coronavirus, presents a special and exceptional threat to prisons and jails. Prisons and jails are incubators for infectious diseases. Close living quarters and often unsanitary conditions enable the rapid spread of germs. For many prisons and jails, including the one at issue in this case, social distancing at current population levels makes adequate social distancing impossible, which increases the risk and rate of exposure and infection.

Many prisons and jails are already sites of the country's highest COVID-19 infection rates. More than twenty thousand incarcerated people across the country have reportedly tested positive for the illness. Hundreds have died. Thousands of prison and jail employees have contracted the virus; many have also died. And as prison and jail employees go to and from work each day—*i.e.*, places where the infection rate dwarfs the infection rate among the general public—they risk carrying the virus with them and infecting their spouses, parents, children, and neighbors.

Adequate protective and preventive measures are critical to slowing the spread of COVID-19 infections and deaths. Prisons and jails must follow guidance from agencies like the Center for Disease Control (CDC) to ensure cleanliness and sanitation, social distancing measures and restrictions of movement, and adequate education among prison populations about the virus and its symptoms and proper protection measures. The measures the district court ordered Defendants-Appellants to implement at the Metro West Detention Center (MWDC) comply with those guidelines, and are both necessary and feasible from a correctional point of view to protect the Jail's incarcerated people, staff, and the public from contracting and transmitting COVID-19. Indeed, during emergency times like the present, adopting each of the practices and procedures the district court ordered comports with sound correctional practice to mitigate the harm of the pandemic at its current stage. Failing

to do so risks substantial and irreparable harm of serious illness and death to all people living and working in the Jail as well as the public.

ARGUMENT

1. COVID-19 Presents a Special and Exceptional Threat to Prisons and Jails, and Puts Incarcerated People, Staff, and the Public at Serious Risk.

Prisons and jails are highly susceptible to infectious disease outbreaks, and even more so during this pandemic as COVID-19 proves to be a highly infectious, rapidly spreading illness for which there is not yet an effective treatment or cure. Social distancing and isolation are among the most effective measures to slow the virus's spread. Incarcerated people, however, live together in close quarters, and conditions in prisons and jails are often unsanitary. At the same time, large numbers of prison employees enter and leave the facilities each day with the potential to bring or take the virus with them. Indeed, prisons and jails have been called the ticking time bomb of this pandemic. Once one person falls ill, transmission to many other people is inevitable.

In many communities, the bomb may have already detonated. By early May, more than twenty thousand incarcerated people across the country had reportedly tested positive for COVID-19. *See, e.g.,* The Marshall Project, *A State-by-State Look at Coronavirus in Prisons* (last updated: May 8, 2020), <https://bit.ly/2WvQARd>. Hundreds have died. *Id.* Eight of the ten largest COVID-19 outbreaks in the United States are in prisons and jails. *See* Alice Speri, *Mass Incarceration Poses a Uniquely*

American Risk in the Coronavirus Pandemic, The Intercept (May 6, 2020), <https://bit.ly/2T49Ymw>. As is the case in the general public, the availability of tests for COVID-19 in prisons and jails has varied from jurisdiction to jurisdiction but many fear the actual rate of infection among incarcerated people is much higher than the numbers systems have reported. *Id.*

Effective management of this infectious disease outbreak requires a multifaceted, aggressive approach. Ad hoc and inconsistent practices that do not account for all CDC guidelines are insufficient. And prison and jail systems that have failed to take adequate precautions to prevent the rapid spread of COVID-19 are bearing the grave consequences of their inaction. Rikers Island in New York City is especially hard-hit, with a COVID-19 infection rate exponentially higher among incarcerated people and jail staff than the national infection-rate average. The rate of infection among the city's incarcerated population is nearly four times higher than the rate of infection for New York City—one of the nation's hardest-hit areas—as a whole. *See* Coronavirus Infection Rates as of May 13, 2020, The Legal Aid Society (last accessed: May 14, 2020), <https://bit.ly/2AmHZrt>. More than 1,000 New York City corrections employees have tested positive for the illness; at least eight have died. *See, e.g., id.*; Deanna Paul & Ben Chapman, *Rikers Island Jail Guards Are Dying in One of the Worst Coronavirus Outbreaks*, Wall St. J. (Apr. 22, 2019), <https://on.wsj.com/2AvVsgT>. The rate of COVID-19 infection among Rikers staff

is on par with the most infected American workplaces. *See* Paul & Chapman, *supra* at 7.

The virus has not spared ill-prepared prisons and jails outside of New York. The Cook County Jail is experiencing a disaster similar to the crisis at Rikers. In mid-April, the jail's infection rate was reportedly higher than anywhere in the country. *See* Cheryl Corley, *The COVID-19 Struggle In Chicago's Cook County Jail*, NPR (Apr. 13, 2020), <https://n.pr/3dNIYR0>. In Michigan, more than half of the people incarcerated in one of the state's prison—nearly 800 people—have tested positive for COVID-19. *See* Emma Nicolas, *A Michigan prison tested all of its inmates for COVID-19. More than half have the virus.*, WZZM13 (Apr. 27, 2020), <https://bit.ly/3686Nzu>. In late April, the Federal Bureau of Prisons (BOP) Federal Correctional Institution in Elkton, Ohio, had fifty-nine confirmed cases of COVID-19 among prisoners and forty-six cases among prison employees. *See Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882, at *2 (N.D. Ohio, Apr. 22, 2020) (appeal pending). In a federal lawsuit challenging the BOP's response to the pandemic, the district court noted “it is unlikely that these figures represent the actual number of cases at the institution, given the paltry number of tests the federal government has made available for the testing of Elkton's inmates.” *Id.* Among the Ohio state prisons, the Court noted in April that nearly 2,000 prisoners had tested positive for COVID-19. *Id.* In Colorado, hundreds of men at the state's largest prison

have tested positive for the virus. *See, e.g.,* John Herrick, *Update: The latest on COVID-19 in Colorado*, The Colorado Independent (May 13, 2020), <https://bit.ly/2Avb9F3>; Elise Schmelzer, *238 inmates test positive for coronavirus at Sterling prison, the largest known outbreak in Colorado*, The Denver Post (Apr. 28, 2020), <https://dpo.st/2yNer69>. At least two have died. *See* Herrick, *supra* at 8.

COVID-19 has also spread rapidly at MWDC, as the evolving record in this case demonstrates. On the day Plaintiffs-Appellees filed this case, there were no confirmed cases of COVID-19 at the Jail. Just three weeks later, 163 incarcerated people had tested positive and over 500 were quarantined. *See* ECF No. 100 at 4; ECF No. 99. At least one man, Charles Hobbs, has died after exhibiting COVID-19 symptoms while detained pretrial at the Jail. *See* ECF No. 109.

When prisons and jails do not take necessary and adequate measures to contain the outbreak, COVID-19 threatens not only incarcerated people and prison staff but also members of the public. Jails are at an exceptionally high risk for internal and community COVID-19 transmission if they do not take adequate precautionary measures due to the constantly in-flux nature of their populations, with releases and admissions of detainees every day. A recent epidemiological study suggests that nearly 100,000 *more* people may die as a result of contracting the virus due to the nation's jail population alone, raising the U.S. death toll to twice the figures of the federal government's modeling. *See* Ed Pilkington, *Mass*

incarceration could add 100,000 deaths to US coronavirus toll, study finds, The Guardian (Apr. 22, 2020), <https://bit.ly/3fNXvgr>.

The extreme risk of COVID-19 has not gone unnoticed among prison and jail employees. In Texas, the State’s law enforcement union has publicly urged officers across the state to comply with CDC guidelines, including by “rigorously” following all personal hygiene recommendations. *See* A Message from CLEAT Executive Director: COVID-19, CLEAT (Mar. 13, 2020), <https://bit.ly/2Z6Xu18>. And the union has begged the Texas governor to add COVID-19 to the list of presumptive illnesses for officers and threatened to sue on behalf of any family of an officer who dies as a result of contracting the virus. *See* Jennifer Kendall, *CLEAT threatens legal action if officers’ families not granted benefits for COVID-19 deaths*, FOX 7 (Apr. 30, 2020), <https://bit.ly/2WYulCz>. Still, at least five correctional officers have already died. *Id.* In the District of Columbia, the Fraternal Order of Police for the District of Columbia Department of Corrections Labor Committee—the labor union representing approximately 900 employees who work at the D.C. Jail—filed an *amicus* brief in support of the plaintiffs’ motion for a temporary restraining order regarding precautionary measures to mitigate the risk of COVID-19 infection and transmission. *See Banks v. Booth*, Doc. 23, No. 1:20-cv-00849-CKK (D.D.C., Apr. 2, 2020). And in Chicago, lawyers for employees of the Cook County Jail sent a

letter to Sheriff Dart and the President of the Cook County Board of Commissioners urging the executives to take greater steps to ensure the safety of all lives in the Jail.

The numbers of confirmed cases of COVID-19 among incarcerated people and prison and jail employees increase every day. The deaths do, too. Prison systems and administrators must implement certain measures to account for this public health emergency to minimize harm and protect lives. And they must adhere to these measures for at least the duration of this stage of the pandemic.

2. The Precautionary Measures the District Court Ordered Are Both Necessary to Protect Incarcerated People, Prison Staff, and the Public, and Feasible from a Correctional Point of View.

During times of emergency like the present, it is imperative for prison and jail administrators to *at minimum* defer to the recommendations of agencies like the CDC for mitigating and managing the harm COVID-19 poses to incarcerated people, prison staff, and the public. Critically, the CDC does not recommend a one-size-fits-all approach. The agency's Interim Guidelines on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities state that all guidelines "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions. *See* Interim Guidelines, Center for Disease Control, *available at* <https://bit.ly/3fRYwUA>. Drawing from these CDC guidelines, the district court ordered Defendants-Appellants to implement measures regarding cleanliness, personal protective

equipment (face masks), COVID-19 testing, social distancing, and prisoner education at the Jail to mitigate the spread of COVID-19 among its population—all of which are necessary at this stage of the pandemic to protect the Jail’s incarcerated people, its staff, and the public, and feasible from a correctional point of view. Urgent and enforceable adoption of each of the practices and procedures the district court ordered comports with sound correctional practice to mitigate the harm of the pandemic. Failing to do so risks substantial and irreparable harm of serious illness and death to all people living and working in the Jail, as well as the public.

Adequate cleanliness and sanitation measures in prisons and jails are critical to slowing COVID-19’s infection rate. The CDC’s Interim Guidelines, for example, provide that facilities must ensure incarcerated people are able to frequently wash their hands and disinfect surfaces. *See id.* The CDC requires prisons to ensure sufficient stock of hygiene and cleaning supplies—including alcohol-based sanitizer containing at least sixty percent alcohol, liquid soap and hand-drying supplies, tissues, and disinfectants—are on hand and available. *Id.* The availability of hand sanitizer is especially important in areas of prisons where handwashing is not possible, including in certain areas of housing units, the cafeteria, the medical unit, the commissary and pill lines, and the laundry unit.

While the CDC retains the possibility of an exception to the hand-sanitizer requirement “based on [a prison’s] security restrictions,” prisons and jails can and

should suspend any security-based restriction on alcohol-sanitizer during this pandemic. In fact, incarcerated people in other states are manufacturing and/or packaging large volumes of hand sanitizer for the general public's use. *See, e.g.,* Christina Carrega, *Nearly 100 prison inmates in NY to produce 100K gallons of hand sanitizer weekly*, ABC News (Mar. 10, 2020), <https://abcn.ws/36um0ec>. Other prison systems, including Washington, have suspended rules prohibiting alcohol-based sanitizer for the duration of the COVID-19 pandemic. *See, e.g.,* COVID-19 Frequently Asked Questions, Dep't of Corrections, Wash. State, <https://bit.ly/2TAoVga> (last accessed: May 25, 2020). Indeed, in addition to practicing social distancing, the use of hand sanitizer appears to be a cornerstone of addressing the spread of the virus. While there is some risk associated with the misuse of alcohol-based sanitizer, due usually to the fact that it is flammable, that risk pales in comparison to the benefit of hand sanitizer to the greater incarcerated population and prison staff. Prison and jail administrators may ameliorate any specific risk of this nature by providing, for example, alcohol-based sanitizing wipes or spray in sufficient quantity rather than liquid sanitizer.

Prisons and jails must also provide incarcerated people with sufficient quantities of hand soap, preferably in liquid form, and paper towels or access to hand-drying machines. Frequent, aggressive hand washing is another pillar to fighting COVID-19. One small bar of hand soap per week is grossly inadequate to

foster the hand washing that must occur to mitigate the spread of the illness. *See generally* CDC Interim Guidelines, *supra* at 10 (prisons must provide soap “sufficient to allow frequent hand washing”). Incarcerated people must have enough supplies to wash and dry their hands frequently and for the duration the CDC recommends.

And regarding cleaning supplies (gloves and cleaning towels or rags) and disinfectants, prisons and jails must implement intensified cleaning and disinfecting of all surfaces in housing and common-use areas and ensure incarcerated people have access to these supplies to regularly clean their living areas. Facilities should ensure frequent, regular cleaning and implement procedures to record when each cleaning occurs to ensure accountability. Frequent cleaning of common surfaces in the housing units, bathrooms, and dining hall is necessary, given what is known about the spread of COVID-19, and is feasible from a correctional point of view, where incarcerated people often already work as janitors or porters in these areas.

Just as minimizing movement is key to mitigating the spread of COVID-19 among the general public, ensuring social distancing among incarcerated people is a cornerstone of combatting the transmission of this virus. Where social distancing is not possible, the risk of infection cannot be fully abated. Consistent use of clean facemasks is also necessary at this stage of the pandemic, and especially until widespread COVID-19 testing is available. Prison and jail administrators must work

consistently and constantly to adapt to evolving circumstances, including reductions in the incarcerated populations, to ensure that they modify and adapt facilities to accommodate greater social distancing. Once widespread testing is available and implemented, any person who tests positive for COVID-19 must be quarantined for the duration of his illness.

Finally, the above measures are only as effective as those who are entrusted to implement and follow them are informed. Education among the Jail population is imperative. The men must receive general information and updates about COVID-19, including the virus's symptoms and how it is transmitted, in a format they understand. Jail staff must provide incarcerated people with instructions on how to use a facemask and why its use is important, as well as explain the importance of social distancing. Incarcerated people must understand how to protect themselves from the virus, including how to properly wash their hands. They need to know that they will not be responsible for medical copays for the duration of the pandemic and, thus, should seek medical attention if they feel ill. This information must be accessible in multiple formats—on written signage, via verbal presentations, in languages other than English, etc.—throughout the jail's common areas.

CONCLUSION

The nation's prisons and jails are incubators for COVID-19. Without adequate protective measures in place, scores of people have and will fall ill. Many more will

die. As the public acquires more information about the virus every day, certain measures of mitigation and prevention are clear: vigorous methods of cleanliness and sanitation, personal protective equipment, social distancing, and education. The district court ordered Appellants to take measures in each of the above categories—all of which are necessary and feasible from a correctional point of view. Immediate and enforceable implementation of these measures in the Metro West Detention Center is imperative and comports with sound correctional practice, and must be in practice for the duration of this stage of the pandemic. As Justice Sotomayor acknowledged recently in a similar case,

The stakes could not be higher.¹

Respectfully submitted,

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¹ *Valentine v. Collier*, 590 U.S. ____ (2020) (Sotomayor, J. respecting denial of application to vacate stay).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,609 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a), because this document has been prepared in a proportionally spaced typeface using Times New Roman in font size 14.

Dated: May 28, 2020

s/ Danielle C. Jefferis
Danielle C. Jefferis

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Danielle C. Jefferis
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