COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJ 2020-_____

STEPHEN FOSTER, **MICHAEL GOMES**, **PETER KYRIAKIDES**, **RICHARD O'ROURKE**, **STEVEN PALLADINO, MARK SANTOS**, **DAVID SIBINICH**, **MICHELLE TOURIGNY**, **MICHAEL WHITE**, **FREDERICK YEOMANS**, and **HENDRICK DAVIS**, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, **GLORIANN MORONEY**, Chair Massachusetts Parole Board, **THOMAS TURCO**, Secretary of the Executive Office of Public Safety and Security, and **CHARLES BAKER**, Governor of the Commonwealth of Massachusetts,

Defendants.

CLASS ACTION COMPLAINT

INTRODUCTION

1. This Complaint seeks the release of sentenced and civilly committed persons who by virtue of their age or medical condition are at imminent risk of serious illness or death if infected by COVID-19. In describing the threat posed by COVID-19, the Supreme Judicial Court has declared that "the situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary." *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, No. SJC-12926, 2020 WL 1659939, at *3 (Mass. Apr. 3, 2020).

2. The Commonwealth's prisons and jails are the perfect incubators for the disease, threatening to consume vital health care resources and endangering the general public as well as those incarcerated and correctional staff.

3. Although Defendants have made attempts to mitigate the dangers posed by COVID-19, they have failed to take steps that are readily available to reduce the incarcerated population to a reasonably safe level and protect the prisoners who must remain incarcerated.

4. The Governor has made it clear that he does not intend to take any additional action to protect prisoners or correctional staff from infection. In commenting about the petition filed by the Committee for Public Counsel Services ("CPCS") and the Massachusetts Association of Criminal Defense Lawyers, he stated:

> We don't buy as a matter of law, fact or policy that the argument that's being made before the court is the correct one. We believe the correct position is for us to be continue doing the things we're doing to keep the people inside safe, and that's gonna be the way we play this one.[1]

5. As the Supreme Judicial Court recently explained, "correctional institutions face unique difficulties in keeping their populations safe during this pandemic." *Comm. for Pub. Counsel Servs.*, 2020 WL 1659939, at *3. The risk is significantly higher than in the community in terms of risk of transmission, exposure, and harm to individuals who become infected. This is due to a number of factors, including, among others, the inability to engage in social distancing, the inability to isolate and manage known and suspected cases of COVID-19, and endemic problems of hygiene and sanitation that plague Massachusetts prisons and jails.

6. COVID-19 is now spreading rapidly throughout the Department of Correction ("DOC") and many county correctional facilities. Between April 5 and the April 13 report of the

[1] *See* Deborah Becker, *Mass. High Court Considers Releasing Some Prisoners To Prevent COVID-19 Outbreak*, New England Public Radio (Apr. 1, 2020), https://www.nepr.net/post/mass-high-court-considers-releasing-some-prisoners-prevent-covid-19-outbreak#stream/0.

Special Master in SJC-12926, the number of COVID-19 cases among prisoners, staff, and vendors across the state shot up from 30 to 243, and the number continues to rise steeply. In the few days since then, that number has climbed to 319.[2] At least five prisoners have died. Indeed, the rate of infection inside the DOC is more than twice as high as in Massachusetts as a whole. The actual number of cases in the DOC is likely far higher than the confirmed numbers because of the limited availability of COVID-19 tests and the fact that many people are asymptomatic.

7. Defendants are failing to meet their responsibility to enable social distancing in prisons and jails. Prisoners continue to be housed in close contact with each other in dormitory-style settings and double cells that do not meet the minimum space requirements established by the Department of Public Health ("DPH"). Many prisoners are using common showers, common toilets, and common sinks shared with an entire dorm or unit that are often filthy and unsanitary.

8. For example, a recent DPH inspection of the Massachusetts Treatment Center (MTC) found:

> Throughout the facility, bathrooms and shower areas were observed to be poorly maintained resulting in unsanitary conditions. The CSP is concerned with the increased risk of disease transmission with the high number of inmates being exposed to such unsanitary conditions.[3]

Not surprisingly, COVID-19 is rampant at the MTC, with 41 cases and four deaths as of April 13, 2020.

9. In contrast to correctional officials in other states, Defendants have also failed to implement readily available measures to reduce the incarcerated population, such as release to home confinement, medical furloughs, enhanced good time sentence deductions, expedited

[2] ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prison & Jails: Total Positive Tests,* data.aclum.org/sjc-12926-tracker/ (last visited April 17, 2020)
[3] See Letter from Patrick Wallace, Environmental Health Inspector, DPH, to Lisa Mitchell, Superintendent of MTC (Sept. 26, 2019) at 22, *available at* https://www.mass.gov/doc/massachusetts-treatment-center-bridgewater-september-17-2019/download.

parole hearings, review of clemency petitions, and a streamlined process to release the 300 or more individuals who have already been granted parole yet remain in custody.[4] DOC has not even been willing to identify obvious candidates for medical parole who are not competent to come forward on their own. Defendants also continue to imprison more than 150 men who have been civilly committed under G.L. c. 123, § 35, for treatment of alcohol and substance use disorders even though no such treatment is now available.

10. Defendants' failure to take reasonable measures to stop the spread of COVID-19 violates the rights of prisoners under articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights and the Fifth and Eighth Amendment of the United States Constitution, and the rights of pre-trial detainees and civilly committed individuals to substantive due process protected by the Fourteenth Amendment and articles 1, 10, and 12 of the Massachusetts Declaration of Rights.

PARTIES

11. Plaintiff Stephen Foster is imprisoned in the Old Colony Correctional Center. He is 43 years old with a history of numerous serious medical conditions—including heart failure, infective endocarditis, septic emboli to the brain, lungs, spine, and joints, and serious ears, nose, and throat complications—that heighten his risk of death should he contract COVID-19. After accounting for his good conduct in prison (*i.e.*, his eligibility for an early release due to "earned good time"), Mr. Foster is scheduled to complete his 3- to 5-year sentence for assault and battery and related convictions in 2022, and he is eligible for parole in June 2020. A petition for Mr. Foster's release on medical parole is pending with the DOC.

12. Plaintiff Michael Gomes is currently imprisoned in Massachusetts Correctional Institution ("MCI") Concord. He is 50 years old and had a liver transplant in 2016, which

[4] *See Comm. for Pub. Counsel Servs.*, 2020 WL 1659939, at *3.

requires Mr. Gomes to take daily anti-rejection medication that leaves him immunocompromised. He is imprisoned for failing a drug test while on probation in August 2019 after his sister, mother, and daughter all died within 90 days of each other and he relapsed. Mr. Gomes is set for release in July 2021 and will be eligible for parole in May 2020. Currently, he lives in a prison dormitory with over 80 other people who sleep in bunk beds just three feet apart.

13. Plaintiff Peter Kyriakides is imprisoned in Pondville Correctional Center, a minimum security and pre-release prison run by the DOC. He is incarcerated on a probation violation and is set to complete his sentence on June 1, 2020. Currently, he lives in a two-person cell that is five feet long and four feet wide, making it impossible for him to maintain six feet's distance from his cellmate. He is 52 years old and has asthma for which he is prescribed two inhalers.

14. Plaintiff Richard O'Rourke is imprisoned in the Plymouth County Correctional Facility. He is 64 years old and has a history of respiratory conditions, including multiple hospitalizations for bronchitis and severe pneumonia. He has already served more than 14 months of his three-year sentence for operating a vehicle while under the influence, and he will be eligible for parole in approximately seven months.

15. Plaintiff Steven Palladino is imprisoned in MCI Norfolk. He is 52 years old and has insulin-dependent diabetes as well as kidney disease. He has served eight and a half years of a 10- to 12-year sentence, plus two years on and after for committing non-violent financial and related crimes. He was participating in the dog training program at MCI Norfolk until the prison was locked down due to the virus and the dogs were removed.

16. Plaintiff Mark Santos was recently imprisoned in the Massachusetts Alcohol and Substance Abuse Center ("MASAC"), which is located at MCI Plymouth. He was civilly committed to MASAC solely for treatment of his substance use disorder. Starting in mid-March, substance use treatment at MASAC was drastically curtailed, and in early April 2020 all treatment at the facility was cancelled. Mr. Santos is 23 years old. He was released from MASAC on April 9, 2020, and now lives with his mother.

17. Plaintiff David Sibnich is imprisoned in the Pondville Correctional Center. He is 61 years old and suffers from high blood pressure and a diagnosis of probable prostate cancer. In 1982, Mr. Sibnich was sentenced to life in prison with the possibility of parole for armed robbery. The Parole Board approved him for parole more than a year ago, and he was scheduled to move to a long-term residential program in his home state, New York, in March, but he remains incarcerated at Pondville.

18. Plaintiff Michelle Tourigny is imprisoned in MCI Framingham. She is 53 years old and suffers from serious medical conditions, including spinal stenosis, morbid obesity, a heart condition that requires a pacemaker, and a lung that has been surgically partially removed. Ms. Tourigny is living in the Health Services Unit because of her medical conditions, which means she is in routine contact with sick prisoners as well as medical and correctional staff. She is serving a second-degree life sentence for killing her abusive boyfriend in 1998, and a petition for her release on medical parole is pending with the DOC.

19. Plaintiff Michael White is imprisoned in MCI Concord. He is 35 years old and has COPD as well as severe asthma. He is currently living in a dormitory with over 80 other people, all of whom sleep in bunk beds and share just five lunch tables and two bathrooms. Now that MCI Concord has been locked down, they are all always in the room together, and he is

often within arm's reach of others. He is scheduled to complete his sentence for unarmed robbery in July 2021.

20. Plaintiff Frederick Yeomans is imprisoned in the Barnstable County Correctional Facility for driving with a suspended license. He is 72 years old and has been diagnosed with heart disease and high blood pressure. Mr. Yeomans is eligible for release later this year after accounting for earned good time, and he would otherwise complete his sentence in October 2021.

21. Plaintiff Hendrick Davis is imprisoned in the Massachusetts Treatment Center ("MTC"). Mr. Davis is 37 years old and suffers from stage-four kidney disease. He has served more than four years of his five-year to five-year-and-a-day sentence. With good time, he will be eligible for release later this year.

22. Defendant Carol Mici is the Commissioner of the Massachusetts Department of Correction. By statute, Defendant Mici is responsible for the administration of all correctional facilities in Massachusetts, including county correctional facilities and MASAC. *See* G.L. c. 124, § 1. Defendant Mici maintains an office at 50 Maple Street, Suite 3, Milford, Massachusetts 01757. She is sued in her official capacity.

23. Defendant Gloriann Moroney is the chair of the Massachusetts Parole Board. As such, she is the executive and administrative head of the agency. Her powers and duties include developing and implementing the policies and procedures of the agency. G.L. c. 27, § 4; 120 CMR 101.02(3). Her regular place of business is 12 Mercer Road, Natick, Massachusetts 01760. She is sued in her official capacity.

24. Defendant Thomas Turco is Secretary of the Executive Office of Public Safety and Security of the Commonwealth of Massachusetts ("EOPSS"). As such, he oversees the

Department of Correction, including the Section 35 program at MASAC. *See* G.L. c. 6A, § 18. He maintains an office at 1 Ashburton Place, Boston, MA 02108. He is sued in his official capacity.

25. Defendant Charles Baker is the Governor of the Commonwealth of Massachusetts and retains ultimate executive authority over the operation of the DOC and the county correctional institutions. Under Chapter 639 of the Acts of 1950, the legislature granted the governor "any and all authority over persons and property" to the extent permissible under the constitution of Massachusetts to address the emergency, including—explicitly—to protect the "[h]ealth or safety of inmates of all institutions," *id*. § 7(a). Governor Baker maintains an office at the Massachusetts State House, Office of the Governor, Room 105, Boston, Massachusetts 02133. He is sued in his official capacity.

FACTS

The COVID-19 Outbreak Has Created a Public Health Emergency that Threatens the Lives of Massachusetts Prisoners

26. As of April 16, there were 32,181 confirmed cases of COVID-19 and 1,245 deaths from the virus in Massachusetts. Roughly 3,400 patients are currently admitted to hospitals with either confirmed or suspected cases of coronavirus, including more than 970 in the intensive-care units. Nation-wide, over 650,000 Americans have contracted COVID-19 and more than 31,000 have died—more than in any other country on the globe.

27. Massachusetts prisons and jails are fast becoming an epicenter of the COVID-19 pandemic as COVID-19 spreads quickly within them. The Department of Correction and

Sheriffs' reports to the SJC's Special Master reflect that, as of April 17, 319 prisoners and staff have been diagnosed with the virus and five prisoners have died.[5]

28. The number of COVID-19 cases is expanding rapidly with some prisons showing astonishingly high levels of infection. For example, on April 13, there were two confirmed inmate cases at the Hampshire County Jail and House of Correction; just two days later, 11 prisoners (7.2% of the population) and one staff member had tested positive.[6] At MCI-Framingham, the state prison for women, 26 prisoners—13.2 % of all prisoners in the facility—had tested positive by April 14, up from only four cases a week earlier.

29. COVID-19 is a particularly contagious disease. According to the Centers for Disease Control and Prevention (the "CDC"), it spreads "mainly from person-to-person" between those "who are in close contact with one another (within about 6 feet)" and from contact with contaminated surfaces.[7] A recent study showed that the virus can survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.[8]

30. The most common symptoms of COVID-19 include fever, cough, and shortness of breath, but one need not present any symptoms to have the virus or be contagious. The average incubation period (*i.e.*, the time between exposure and development of symptoms) for COVID-19 is about five days, and 98% of those who develop symptoms will do so within 12 days.

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[5] *See* ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prison & Jails: Total Positive Tests*, data.aclum.org/sjc-12926-tracker/ (last visited April 17, 2020).
[6] Michael Connors, *Hampshire jail reports 11 inmates with coronavirus*, Daily Hampshire Gazette (Apr. 14, 2020, 6:41 PM), https://www.gazettenet.com/More-inmates-at-the-Hampshire-County-jail-test-positive-for-COVID-19-33893116.
[7] *Coronavirus Disease 2019 (COVID): How to Protect Yourself and Others*, CDC (Apr. 13, 2020), http://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.
[8] *Novel Coronavirus Can live on Some Surfaces for Up to 3 Days, New Tests Show*, TIME https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/ (last visited Mar. 31, 2020).

31. Older adults and people with pre-existing health conditions such as cardiovascular diseases, respiratory diseases, liver disease, and diabetes are at increased risk for severe COVID-19 complications and death. Mortality from COVID-19 increases substantially with age: risk of death starts increasing among people in their sixties and then increases dramatically for each decade of life thereafter.[9] In Massachusetts, 99% of deaths due to COVID-19 have been among residents over age 50.[10]

32. Massachusetts prisoners are particularly vulnerable to COVID-19 disease. The DOC has the highest percentage of elderly prisoners compared to all other states.[11] According to the DOC, 983 inmates (11%) were over 60 years old and 2,510 (29%) were over 50 years old in 2019.[12] This population bears a significant burden of chronic illness, including respiratory conditions, cardiovascular disease, diabetes, and liver disease.[13]

33. Persons who are incarcerated are at high risk of complications and death from COVID-19 at a younger age than the general public. This is because they experience "accelerated aging," meaning they develop chronic conditions and disability about 10-15 years earlier than the general population due to multiple layers of medical vulnerability (*e.g.*, poverty, poor access to health care, and substance use). They also experience worsening of chronic health problems due to the resource-constrained, high-stress environments of jails and prisons.

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[9] Tedros Adhanom Ghebreyesus, Director-General, World Health Organization, Opening Remarks at the Media Briefing on COVID-19 (3 March 2020), *available at* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---3-march-2020.

[10] Andrew Ryan, *Elderly residents continue to bear the brunt of coronavirus infection in Mass., data show*, Boston Globe (Apr. 9, 2020), *available at* https://www.bostonglobe.com/2020/04/09/nation/elderly-residents-continue-bear-brunt-coronavirus-infection-mass-data-show/.

[11] Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs: Older individuals have more chronic illnesses and other ailments that necessitate greater spending*, Pew Charitable Trusts (Feb. 20, 2018). https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs

[12] Massachusetts DOC, *Inmate and Prison Research Statistics*. https://public.tableau.com/profile/madoc#!/vizhome/MADOCJan1Snapshot/Jan1Snapshot.

[13] Maruschak LM, Berzofsky M, Unangst J. Medical problems of state and federal prisoners and jail inmates, 2011-12. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics; 2015 Feb.

Advanced age and chronic health conditions such as these substantially increase risk for severe COVID-19 complications, including death.[14]

34. The CDC and other public health agencies have universally prescribed social distancing—every person should remain at a distance of at least six feet from every other person—and rigorous hygiene—including regular and thorough hand washing with soap and water, the use of alcohol-based hand sanitizer, proper sneeze and cough etiquette, and frequent cleaning of all surfaces—as the only ways to meaningfully mitigate the spread of this virus.

35. The CDC has issued guidance stating that "[a]lthough social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19."[15] The SJC also observed in *Comm. for Pub. Counsel Servs.*, *supra*, that "maintaining adequate physical distance, i.e., maintaining six feet of distance between oneself and others, may be nearly impossible in prisons and jails." 2020 WL 1659939, at *3. Indeed, a spokesperson for Bristol County House of Correction recently acknowledged, "Six feet apart is practically impossible in any correctional setting, in any jail, in any prison, in any state, in any county, anywhere."[16]

Conditions in Massachusetts Prisons and Jails Expose Prisoners to Serious Risk of Contracting COVID-19

36. Few of the recommended measures for mitigating the spread of COVID-19 are reliably available for persons confined in correctional facilities and for those who must interact with them. Correctional facilities are inherently congregate environments, where large groups of people live, eat, and sleep in close contact with one another.

[14] World Health Organization (2014). Prisons and Health. Edited by: Stefan Enggist, Lars Møller, Gauden Galea and Caroline Udesen. Accessed at: http://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.
[15] CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, at 4 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidancecorrectional-detention.
[16] Julia Rock & Sara Van Horn, *Lawsuit Calls for Emergency Release of ICE Detainees in a Massachusetts County*, The Appeal (Mar. 30, 2020), https://theappeal.org/lawsuit-ice-massachusetts-coronavirus/.

Housing Arrangements

37. The DOC admits social distancing is virtually impossible for prisoners. In a letter to the Supreme Judicial Court dated April 2, 2020, the DOC wrote that approximately 72% of its population cannot maintain the six-foot recommended distancing while sleeping. *Comm. for Pub. Counsel Servs. et al. v. Chief Justice of the Trial Court et al.*, SJC-12926, Dkt. 56 (Mass. decided April 3, 2020).

38. Most correctional facilities rely heavily on dormitory-style housing in which prisoners share space for sleeping, eating, and recreation and use common toilets, sinks, and showers. Some dormitories hold over 100 prisoners, who sleep within 2 to 3 feet of one another. People in these units cough and sneeze on each other and are not provided masks.

39. The use of dormitory-style housing in medical units and assisted living units, which house many of the most vulnerable prisoners, is particularly problematic. For example, the Clinical Stabilization Unit ("CSU") at MCI-Norfolk holds some sixteen prisoners, largely elderly, with medical conditions such as COPD and congestive heart failure, who live, sleep and eat in close proximity to each other. The CSU at MCI-Shirley holds a similarly vulnerable population.

40. Even where dormitories are not used, most prisons and jails rely on double- and triple-bunking of cells, that do not comply with the minimum standards for cell and floor space set by the Department of Public Health. Where cells are double bunked, it is impossible to maintain social distance because prisoners are locked into a small space together, and continue to depend on nurses and correctional officers to meet their needs. Although many county facilities report that prisoners in two-person cells are asked to lie at opposite ends of the bed (head-to-foot)

to create six feet of distance, given the close quarters and poor circulation, this offers no meaningful protection even if the prisoners stayed in bed all day.

41. On April 3, 2020, the Department of Correction instituted a system-wide lockdown, which means that prisoners are confined to their cells or dorms for at least 23 hours daily. This is not a sustainable response to the inevitable spread of COVID-19. Indefinite lock-ins will take too great a toll on the mental health of vulnerable prisoners, and will also not be effective at controlling the virus since it requires officers and medical staff to go cell to cell all day long, bringing food and medicine, as well as monitoring the health of prisoners. This is of grave concern, as the design and staffing of such units do not provide for the frequent monitoring that patients with this virus require. A patient's condition can worsen dramatically in a matter of hours.

42. The DOC and some counties have quarantined individuals who may have been exposed to COVID-19 in the same housing unit as individuals with confirmed COVID 19 disease. For example, a woman at MCI Framingham with severe COPD had tested negative for the virus when checked at an outside hospital, but she was subsequently quarantined in a cell in a unit where the other prisoners had a confirmed COVID-19 diagnosis. She has now also tested positive for the virus.

43. Prisoners who need medication or medical care are often forced to be in close proximity to each other. Medical units are small, and prisoners who are called to these units for appointments will frequently wait together in small rooms where they cannot maintain distance from one another. Many prisoners receive medication in "medication lines" where they stand one right behind another while waiting to receive their prescribed medications. At MTC, for

example, a prisoner with a dry cough and a fever suggestive of COVID-19 was made to wait in the same compact med-line as other prisoners, some of whom were also coughing.

44. Because of the lockdown, most prisoners now eat meals in their units instead of a "chow hall." This does not eliminate risk of contamination or ensure proper social distancing. In dormitories, even prisoners who avoid communal tables and eat at their bunks are still within a few feet of one another.

Sanitation and Hygiene Problems

45. The risk of contracting an infectious disease is also elevated in Massachusetts correctional facilities because they are not sanitary environments. People share toilets, sinks, and showers, and often have limited access to soap, hand sanitizer, hot water, and other necessary hygiene items. Surfaces are infrequently washed, if at all, and cleaning supplies are in short supply.

46. The bathrooms are cleaned too infrequently. One prisoner described the sinks and toilets as sometimes being "clogged with fecal matter and toilet paper" despite cleaning once a day in the morning. At Pondville Correctional Center, the floor beneath a urinal shared by 50 prisoners is regularly covered with urine. Others have noted that showers are cleaned only every few days, despite the fact that "[e]ven on a good day, you don't want to accidentally touch those walls." Some showers are not even cleaned after they are used by prisoners quarantined for potential COVID-19 infection, which leads others in the facility to avoid using the showers altogether.

47. The Department of Public Health ("DPH") inspects all Massachusetts correctional facilities twice per year to assess compliance with the health and sanitation standards set forth in 105 CMR 451. These reports show that the DOC and county sheriffs

routinely fail to meet minimum standards that promote and protect the health and safety of their populations, even under non-emergency conditions. According to the most recent inspections from late 2019 and early 2020, only one of the Commonwealth's 35 correctional facilities had zero repeat environmental health violations at its most recent inspection; 25 of them (71%) had 50 or more repeat violations; 11 (31%) had more than 190 repeat violations each.[17] For example, the most recent report for MCI-Norfolk, notes 475 repeat violations. Given the current strained state of staffing in correctional institutions, it is virtually impossible to ensure virus-free surfaces.

48. The lack of social distancing is made worse by prisons' and jails' failure to provide sufficient personal protective equipment to prevent the spread of disease.

49. Most facilities do not give prisoners masks. Most correctional staff have masks, but some officers wear them irregularly, some not at all; officers do not always wear masks or gloves when handing out meals. Medical staff do not always wear masks and gloves, or change gloves between patients. Since the lockdown at MCI-Shirley, diabetic prisoners receive insulin injections in their cells from nurses wearing the same gloves used when giving injections to other prisoners.

Inadequate Medical Care

50. Incarcerated people in Massachusetts lack access to timely, quality medical care. A federal court recently found that, even though "Massachusetts does not recognize capital punishment," the DOC was "neither able nor willing to provide" for a prisoner's medical needs, and that as a result of its "woeful disregard" for his well-being, the DOC was "slowly killing him." It therefore ordered the DOC to transfer the prisoner to a non-correctional health care

[17] The 2019 inspection reports are available here: https://www.mass.gov/lists/2019- correctional-facility-inspection-reports. The 2020 inspection reports are available here: https://www.mass.gov/lists/2020-correctional-facility-inspection-reports.

setting where he could receive constitutionally adequate care. *Reaves v. Dep't of Correction*, 392 F. Supp. 3d 195, 200, 210 (D. Mass. 2019).

51. On January 9, 2020, the Massachusetts Office of the State Auditor released a two-year audit of the DOC medical care, finding failure to comply with authoritative guidance for sick call requests, doctors' appointments, health insurance coverage, and medications during reentry preparation under normal operations.[18] The State Auditor wrote:

> Sick Call Request Forms (SCRFs) were not processed or triaged within 24 hours (72 on weekends) and/or were not completely filled out by nurses and/or physicians, and inmates were not always seen by a qualified healthcare professional (QHP) within seven days after they submitted SCRFs. Without timely treatment for physical and mental health issues, an inmate's condition could worsen.

52. About one-third of people whose records were audited were not seen within a week. At a time of pandemic, these existing deficiencies are only likely to worsen as more people become infected and need urgent, intensive care.

53. Similar limitations plague county jails. An in-depth investigation published by WBUR in March found that those who "suffered from dire medical conditions in Massachusetts county jails [] were often ignored or mistrusted, with fatal consequences. The sheriffs and for-profit companies increasingly responsible for [incarcerated people's] health care face little oversight, and often have withheld the circumstances of these deaths from the public—even from [incarcerated people's] families."[19]

[18] Suzanne Bump, Office of the State Auditor, Massachusetts Department of Correction Official Audit Report, pp 11-12 (Jan. 9, 2020), *available at* https://www.mass.gov/doc/audit-of-the-department-of-correction/download.
[19] Christine Willmsen & Beth Healy, *Dying on the Sheriff's Watch*, WBUR 4-part audio series, *available at* https://www.wbur.org/investigations/2020/03/26/jail-lawsuits-sheriffs-watch.

Reducing the Prison Population Is the Only Meaningfully Means to Prevent the Harm Caused by COVID-19 in Prisons and Their Surrounding Communities

54. Courts, public health experts, and corrections professionals agree that a significant decrease in the incarcerated population is essential to combat the spread of COVID-19 among prisoners, staff, and the greater community.

55. Reducing the incarcerated populations serves four critical public health aims: (1) targeting prisoners who are at elevated risk of suffering from severe symptoms of COVID-19; (2) allowing those who remain incarcerated to better maintain social distancing and avoid other risks associated with forced communal living; (3) helping to "flatten the curve" of COVID-19 cases among incarcerated populations and limit the impact of transmission both inside correctional facilities and in the community; and (4) reducing the burden on the correctional system in terms of treating critically ill patients, as well as the burden on the community health care system where they may have to be hospitalized.

56. In order to meaningfully decrease the risk of COVID-19 infections, Defendants must act to reduce the prisoner population sufficiently to ensure social distancing and permit personal hygiene in compliance with CDC guidelines.

57. Other state systems and the federal system have recognized and acted upon the immediate and pressing necessity of reducing prisoner populations in response to COVID-19.

58. On April 3, 2020, Attorney General William Barr issued a memorandum affirming the Federal Bureau of Prisons' "profound obligation to protect the health and safety of all inmates," and recognizing that, despite "extensive precautions to prevent COVID-19 from entering [BOP] facilities and infecting our inmates," those measures "have not been perfectly effective." Accordingly, he ordered the BOP to take more aggressive steps, immediately, to

transfer prisoners to home confinement, even if electronic monitoring will be not be available.[20] The BOP has now released over 1,100 prisoners to home confinement.

59. In Colorado, Governor Polis issued an executive order that suspended the caps and criteria Colorado places on the accrual of good time credits in order to allow the DOC to award earned time credits. Additionally, the Colorado governor suspended and relaxed the criteria for individuals to be released to Special Needs Parole, which is similar to medical parole in Massachusetts.

60. In California, Governor Newsom announced his plans to accelerate the release of 3,500 people from state prisons in an effort to reduce the population as COVID-19 infections spread.

61. In Illinois, the Governor Pritzker took numerous actions to reduce the prison population, including: reviewing and granting commutation petitions; suspending the required 14-day notification to the district attorney for inmates released early as a result of earned good conduct credits; suspending the 14-day limit for medical furloughs and allowing furloughs for medical purposes; and creating a population management task force for the purpose of prioritizing the review of individuals for possible release through statutorily permissible means, such as awarding 180 days of earned discretionary credits, and electronic detention. Illinois also identifies all prisoners within nine months of their release date and conducts individualized reviews to determine whether they are eligible for early release.

62. The Iowa Department of Corrections has announced that it is expediting the release of about 700 prisoners, or 7% of its population, who are approved for parole or work release.

[20] Memorandum from Attorney General William Barr to the Director of Bureau of Prisons (Apr. 3, 2020), *available at* https://www.justice.gov/file/1266661/download.

63. In New York, Governor Cuomo ordered the release of more than 1,000 people who are in prisons and jails across the state on the basis of a parole violation.

64. The Vermont Department of Correction has worked to reduce its population by releasing people on furlough and probation.

65. In California, the Department of Corrections and Rehabilitation released over 3,500 prisoners by doing things like expedited parole for prisoners with 60 or fewer days left to serve on their sentences.

66. Other states, like Oklahoma and Wisconsin, have taken steps to reduce the populations in prisons by halting new admissions from county jails into state prison facilities.

67. The Federal Bureau of Prisons ("BOP"), at the direction of the Attorney General, has released over 1,1000 prisoners to home confinement, increasing home confinement by over 40%. The BOP has been "aggressively screen[ing] all potential inmates" for eligibility.

68. Unlike other states, Massachusetts officials have failed to take action to effectuate the release of prisoners despite their clear authority to do so. The Governor has refused to act on his near plenary emergency powers when it comes to the health and safety of prisoners, publicly confirming his intention to stick with a failing status quo. There have been no commutations, no furloughs, no increase in earned good times, no releases by the DOC to home confinement, little if any increase in the use of medical parole, and no effort by the parole board to streamline the parole process or modify the criteria for release in light of COVID-19.

69. Both the parole board and the DOC informed the SJC at oral argument in the CPCS case that they had made no changes to their ordinary release practices. At that time, the board told the Court that there were over 300 prisoners whom it had already approved for parole but who remained incarcerated. Despite the Court's Order, which urged the DOC and the parole

board to work together to effectuate releases, the Special Master's April 12 report discloses that the board has only released 58 people on parole since the Order issued.

70. The Defendants' meager efforts are illustrated by the fact that the DOC population dropped by only 111 between April 5-13, while the jail and house of correction populations actually *increased* by more than 600 people. And there is no evidence that either the parole board or the DOC has released anyone in this period who would not have been released anyway.

Civil Commitment under G.L. c. 123 § 35 to Correctional Facilities for Treatment of Alcohol and Substance Use Disorders Cannot Be Justified Because the Facilities Are Unsafe and Have Ceased to Offer the Requisite Treatment

71. G.L. c. 123, § 35 provides that if a court finds that a person has an alcohol or substance use disorder and there is a likelihood of serious harm as a result, the court may order such person to be committed for a period not to exceed 90 days. Such commitments "shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health." *Id.*

72. If there are no beds available in a DPH licensed or approved facility, or "if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility," men—but not women—can be placed in a correctional facility designated by the commissioner of the DOC.

73. The DOC houses Section 35 men at the Massachusetts Alcohol and Substance Abuse Center ("MASAC"), located at MCI Plymouth. The DOC has also entered into a Memorandum of Understanding with the Hampden County Sheriff's Department to operate a Section 35 facility in the Hampden County Correctional Center.

74. Every year, over 2,000 men are committed to correctional facilities under Section 35. As of March 30, 2020, there were 103 men civilly committed to MASAC and 79

men civilly committed to Hampden County. Almost all were placed in a correctional institution only because there was no room in a DPH-licensed treatment facility.

75. Section 35 commitments are controversial even in ordinary times, especially commitments to correctional facilities. In 2017, the Legislature repealed the provisions in Section 35 that allowed women to be committed to a correctional facility. In 2019, the commission established by the legislature to evaluate Section 35 recommended that the "Commonwealth should prohibit civilly-committed men from receiving treatment for addictions at any criminal justice facility." [21]

76. On March 20, 2020, the Substance Abuse and Mental Health Services Administration ("SAMHSA")—the agency within the U.S. Department of Health and Human Services that leads public health efforts to address mental health and substance use disorders—issued guidance on how to respond to the COVID-19 pandemic. It says: "For those with substance use disorders, inpatient/residential treatment has not been shown to be superior to intensive outpatient treatment. Therefore, in these extraordinary times of risk of viral infection, it is recommended that intensive outpatient treatment services be utilized whenever possible."[22]

77. The DOC policy and the DPH regulations mandate that persons committed under Section 35 be offered a minimum of four hours of treatment every day.[23] Nevertheless, in mid-March, MASAC cancelled all classes and reduced treatment to one group per day. In early April, the entire facility was placed in lock-down, and even that one group per day was eliminated. Individuals civilly committed to MASAC for treatment now receive no treatment at all.

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[21] Section 35 Commission Report (July 1, 2019) *avaibable at* https://www.mass.gov/doc/section-35-commission-report-7-1-2019/download.
[22] SAMHSA, Considerations for the Care and Treatment of Mental and Substance Use Disorders in the COVID-19 Epidemic (March 20, 2020), *available at* https://www.samhsa.gov/sites/default/files/considerations-care-treatment-mental-substance-use-disorders-covid19.pdf.
[23] *See* 105 C.M.R. § 164.133 (D)(2).

78. After admission, MASAC patients are housed in the "C Dorm" for detoxification. Many describe this unit as filthy and stinking of the vomit, urine, and excrement of patients in the throes of cold-turkey withdrawal. This is confirmed by DPH sanitation inspections that describe plumbing in poor repair, mold on the ceilings, scum on shower walls, a missing door on a bathroom stall, and "generally dirty" conditions.[24]

79. Beds in the medical section of C Dorm are close together, making social distancing virtually impossible, and do not comply with DPH standards regarding the minimum floor space for each occupant.

80. Other MASAC detainees live in units where two patients are typically housed in cells that were designed for one person. These cells also fail to comply with DPH standards that call for each cell or sleeping area to contain at least 60 square feet of floor space for each occupant.

81. Since the lockdown began, MASAC patients have been confined to their cells all day. They are allowed to leave only to use the bathroom, go to medication line, or use the telephone.

82. Because the cells are so small, social distancing is impossible if the patient has a cellmate. There is only one bathroom for each unit, and patients must stand in line close to each other to receive medication. Most are taking some kind of medication.

83. There is no soap in the bathroom and no hand-sanitizer anywhere for detainees. They must bring their own soap to the bathroom. Although most correctional officers and staff now wear masks, the DOC has not provided patients with masks.

[24] Department of Public Health, Bureau of Environmental Health, Community Sanitation Program Report (February 11, 2020), *available at* https://www.mass.gov/doc/massachusetts-alcohol-and-substance-abuse-center-masac-in-plymouth-january-30-2020/download.

84. Concerns about the safety of Section 35 patients are heightened because the average stay is only 30-40 days, and the rapid turnover of the population makes it impossible to adequately screen newly admitted residents.

85. The Mens' Addiction Treatment Center (MATC)—the only DPH licensed Section 35 facility for men—is operating at only 70% of capacity as the number of Section 35 commitments drops, and treatment is still provided there. Section 35 provides that these beds must be filled before a man may be civilly committed to a correctional facility.

86. Section 35 requires the superintendent to review the necessity of the commitment of all MASAC and Hampden patients after 30 days, and every 15 days thereafter until the commitment expires. It also authorizes the superintendent to release a patient at any time if she determines that release will not result in the likelihood of serious harm. On information and belief, the superintendent has not conducted a release review for any patient prior to the mandatory 30-day review since the COVID-19 emergency began.

CLASS ACTION ALLEGATIONS

87. This action is properly maintained as a class action pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure.

88. The named Plaintiffs seek to represent a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for serious complication or death from COVID-19 due to underlying medical condition or age (the "medically vulnerable subclass"); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123 §. 35 for treatment of an alcohol or substance use disorder (the "Section 35 subclass").

89. The class is so numerous that joinder of all members is impracticable. The medically vulnerable subclass has thousands of members as almost 30 percent of the DOC prisoners are over age 50, while many others have serious medical conditions that make them particularly vulnerable to COVID-19. There are currently more than 150 members of the Section 35 subclass at MASAC and the Hampden County Correctional Facility, and over 2,000 individuals are committed to correctional facilities under Section 35 each year.

90. Defendants have acted or failed to act in a manner that is generally applicable to each member of the putative class, making class-wide injunctive and declaratory relief appropriate and necessary.

91. The questions of law and fact raised by the named Plaintiffs are common to all members of the putative class. They include, but are not limited to:

- Whether Plaintiffs and the putative class face a substantial risk of serious harm from COVID-19 while incarcerated in a Massachusetts prison or jail;
- Whether Defendants have taken sufficient measures to abate the risk of serious harm to Plaintiffs and the putative class stemming from the COVID-19 pandemic;
- Whether Defendants have taken sufficient measures to reduce the incarcerated population to a level that will ensure Plaintiffs and the putative class do not face an unreasonable risk of harm as a result of the COVID-19 pandemic; and
- Whether confining patients civilly committed for treatment of alcohol and substance use disorders under G.L. c. 123, § 35, under conditions that pose an unreasonable threat to their safety, and without affording them treatment for their disorders, violates their right to substantive due process.

92. The legal violations alleged by the named Plaintiffs and the resultant harms are typical of those raised by each member of the putative class. The named Plaintiffs will fairly and adequately protect the interests of the class. There is no conflict between the interests of the named Plaintiffs and the proposed class.

93. Plaintiffs' counsel are competent and experienced in class action and complex civil rights litigation and have committed sufficient resources to fully litigate this case through trial and any appeals.

CLAIMS FOR RELIEF

First Cause of Action

Violation of the Rights of Incarcerated Persons As Guaranteed by Articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights

(Alleged by all Plaintiffs incarcerated at Massachusetts state prisons and County correctional facilities on behalf of themselves and all others similarly situated)

94. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

95. By incarcerating Plaintiffs under conditions that put them in grave and imminent danger of contracting the COVID-19 virus, and failing to implement an effective mechanism to reduce the incarcerated population to a safe level, Defendants are violating Plaintiffs' rights to be free from cruel or unusual punishment and rights to substantive due process, as guaranteed by articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights, and secured by G.L. c. 231A, § 2.

Second Cause of Action

Violation of the Rights of Incarcerated Persons under the Eighth and Fourteenth Amendments of the U.S. Constitution

(Alleged by all Plaintiffs incarcerated at Massachusetts state prisons and County correctional facilities on behalf of themselves and all others similarly situated)

96. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

97. By incarcerating Plaintiffs under conditions that put them in grave and imminent danger of contracting the COVID-19 virus, and failing to implement an effective mechanism to reduce the incarcerated population to a safe level, Defendants are deliberately indifferent to the substantial risk of serious harm suffered by Plaintiffs in violation of their right to be free from cruel and unusual punishment and their right to substantive due process guaranteed by the Eighth and Fourteenth Amendments, as secured by 42. U.S.C. § 1983.

Third Cause of Action

Violation of the Rights of Persons Incarcerated under G.L. c. 123 § 35, under Substantive Due Process Provisions of the Massachusetts Declaration of Rights and the U.S. Constitution

(Alleged by Plaintiff Santos on behalf of himself and the subclass of all persons civilly committed to correctional facilities under G.L. c. 123, § 35)

98. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully set forth herein.

99. Confining individuals civilly committed under G.L. c. 123, § 35 to correctional facilities is a massive curtailment of their liberty.

100. Confining Section 35 patients in a correctional institution that poses a substantial risk of harm to their health and safety is a substantial departure from accepted professional judgment, practice, or standards.

101. Confining Section 35 patients in an unsafe correctional institution that does not offer treatment for alcohol or substance use disorders is not reasonably related to the treatment and protective purposes of Section 35.

102. The incarceration of Plaintiff Santos and all others civilly committed to a correctional facility under Section 35 therefore violates the substantive due process provisions of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and Art. 1, 10, and 12 of the Massachusetts Declaration of Rights, and G.L. c. 231A, § 2.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief: Certify a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for serious complication or death from COVID-19 due to underlying medical condition or age, ("medically vulnerable subclass"); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123 §. 35 for the purpose of receiving treatment for an alcohol or substance use disorder, ("Section 35 subclass").

1. For the duration of the COVID-19 emergency, enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from:

a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;

b. Housing any prisoner in a cell, room, dorm, or other living area that does not meet the minimum size standards established by the DPH in 105 CMR 451.320-322;

c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person;

d. Maintaining any Medical or Health Services Unit, or medication distribution area, in which prisoners must wait for or receive treatment or medication within six feet of another person, other than their medical provider; or

e. Transferring any prisoner from a county jail to the DOC.

2. Enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from confining in a correctional facility the Plaintiffs or any other person civilly committed under G.L. c. 123 § 35.

3. Order the Defendants to immediately reduce the number of people confined in prisons and jails by at least a sufficient number to ensure compliance with the relief requested in No. 2 above, prioritizing release for Plaintiffs in the medically vulnerable subclass. Mechanisms for population reductions should include but not be limited to:

a. Expanded use of home confinement;

b. Expanded use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;

c. Maximizing the award of good conduct deductions, including completion credits and "boost time" under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D;

d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed;

e. Maximizing the use of commutation and clemency; and

f. Maximizing the use of the Governor's emergency powers and all other available mechanisms to grant releases to all those who are vulnerable to serious illness and death from COVID-19 due to age or underlying medical condition, and all those who are within one year of release, unless there is clear and convincing evidence that such release would pose a risk to public safety outweighing the public health risk of their continued incarceration.

4. Order the Parole Board to:

a. Exercise its authority under G.L. c. 127, § 130, and 120 Code Mass. Regs. § 200.10 (2017), to make all persons serving house of correction sentences eligible for early parole;

b. Consider the dangers posed by COVID-19 when it evaluates whether "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130;

c. Presumptively grant parole to all parole eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;

d. Expedite the actual release of all individuals who have been granted parole or medical parole contingent on approval of a home plan or satisfaction of some other condition;

e. Ensure that no prisoner is held beyond his "release to supervision date" under G.L. c. 127, § 130B; and

f. Conduct parole hearings for all parole eligible prisoners no later than 60 days prior to their parole eligibility date, as required by G.L.c. 127, § 136.

5. Appoint the Special Master from *Comm. for Pub. Counsel Servs. et al. v. Chief Justice of the Trial Court et al*., SJC-12926 to oversee compliance and implementation of the Court's orders in this case.

6. Award Plaintiffs their reasonable attorneys' fees and costs; and

7. Grant Plaintiffs such other and further relief as the Court considers just and proper.

Dated: April 17, 2020

Respectfully Submitted,

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