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**TO THE GOVERNOR MIKE DeWINE  
and the  
OHIO ADULT PAROLE AUTHORITY**

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**Patricia Sharp, Shiloh Israel, Michelle Jones, and John Tiedjen**

Applicants on Behalf of Themselves and All Similarly-Situated  
Ohio Department of Rehabilitation and Correction Prisoners

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**EMERGENCY APPLICATION FOR CATEGORICAL RELIEVE  
FOR THE PRESERVATION OF PUBLIC HEALTH AND CIVIL RIGHTS  
DURING THE COVID-19 PANDEMIC**

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**TABLE OF CONTENTS**

**I. Overview ..... 1**

**II. Purpose..... 1**

    A. COVID-19 is an Uncontained Pandemic..... 1

    B. The State of Ohio Is Aware of the Significant Risks of Substantial Harm Presented by COVID-19..... 2

    C. COVID-19 Poses Acute Risks to Prisoners and Correctional Staff. .... 5

    D. ODRC Prisoners Face Serious Medical Risks Relating to COVID-19 ..... 8

    E. Ohio Prisons Do Not Have Capacity to Provide Adequate Medical Care for Prisoners’ Serious Medical Risks and Needs and Many Will Die..... 11

    F. Dense Prison Populations Must be Dispersed to Preserve Prisoners’ Constitutional Rights and Wellbeing, to Reduce Burdens on Rural Health Care Facilities, and Ensure Safety of Surrounding Communities. .... 15

**III. Eligibility for Release Pursuant to Categorical Reprieve..... 17**

**IV. Conditions of Reprieve ..... 19**

**V. Executive Legal Authority for Categorical Reprieve..... 19**

**VI. Compliance with Marsy’s Law ..... 20**

**VII. Eligibility of Applicants Patricia Sharp, Shiloh Israel, Michelle Jones, and John Tiedjen ..... 20**

    A. Patricia Sharp..... 20

    B. Shiloh Israel..... 21

    C. Michelle Jones ..... 21

    D. John Tiedjen ..... 22

**VIII. Conclusion ..... 22**

**EMERGENCY APPLICATION FOR CATEGORICAL REPRIEVE  
FOR THE PRESERVATION OF PUBLIC HEALTH AND CIVIL RIGHTS  
DURING THE COVID-19 PANDEMIC**

**I. OVERVIEW**

Executive Reprieve is an act of mercy. The preservation of human life in the wake of COVID-19 has required unprecedented application of executive power and orders issued for the protection of public health. Executive power must now also be exercised to grant the mercy of reprieve to reduce and disperse Ohio’s prison population. Categorical reprieve is necessary to preserve human life and safety in Ohio—both inside and outside of prison walls.

The Ohio Constitution bestows Governor DeWine with near absolute power to grant reprieve for sentences of Ohio prisoners. Here, unprecedented events and the interests of justice demand granting of categorical clemency—in the form of reprieve—for incarcerated Ohioans.

Due to the COVID-19 pandemic, reprieve—and immediate dispersal of dense prison populations—is essential to the health and safety of Ohio’s general population and incarcerated people. A central aspect of the State’s plan to fight COVID-19 has progressed from social distancing to staying at home in small groups. This isolation will prevent widespread death due to exposure and limited resources to treat people who contract COVID-19. Permitting prison populations to persist at current numbers and density is a brewing human rights disaster.

This Application sets forth an unprecedented categorical request for reprieve and immediate release for a significant number of prisoners presently incarcerated in Ohio’s prisons. The scope of this emergency request is narrowly tailored to address the scope of the public health crisis facing Ohio.

On behalf of themselves and all similarly-situated prisoners in Ohio Department of Rehabilitation and Correction prisons, Applicants Patricia Sharpe, Shiloh Israel, Michelle Jones, and John Tiedjen respectfully request that the Governor grant an Emergency Categorical Reprieve for the purposes of public health in prisons and in our communities and to preserve the civil rights of prisoners throughout Ohio.

**II. PURPOSE**

**A. COVID-19 is an Uncontained Pandemic.**

The extraordinary measure requested in this Emergency Application for Categorical Reprieve is designed to mitigate unprecedented risk to the health and safety of each Ohioan caused by the present global COVID-19 pandemic. The World Health Organization’s most recent Situation Report on COVID-19 identifies 823,626 confirmed global cases of COVID-19, and 40,598 deaths.<sup>1</sup> As of April 1, 2020, the United States has at least 186,101 cases,

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<sup>1</sup> See World Health Organization, “Coronavirus disease 2019 (COVID-19): Situation Report—72” (April 1, 2020), available at [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b_2).

and 3,603 deaths.<sup>2</sup> COVID-19 is an uncontained pandemic in the United States. Evidencing rapid spread, since January 2020 COVID-19 is now in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.<sup>3</sup> The virus is spreading exponentially. Overall, COVID-19's basic reproduction number is somewhere between 2.4 and 3.8, which means that "each newly infected person is estimated to infect on average 3 additional persons."<sup>4</sup>

The reported number of COVID-19 cases and associated deaths almost certainly understates the problem, as community spread has been ongoing starting in Washington State in early March and continues to spread undetected as there are insufficient tools to perform all necessary testing. Those who have been exposed are asked to self-quarantine and are tested only if severe symptoms require. While the United States has not yet performed enough tests to accurately capture the true scope of this disease within its borders, the overall trend in the United States indicates continued exponential growth in cases of COVID-19.

### **B. The State of Ohio Is Aware of the Significant Risks of Substantial Harm Presented by COVID-19.**

Noting that statistics are rapidly changing, as of April 1, 2020, according to the Ohio Department of Health's website, there are 2,547 active COVID-19 cases in the State of Ohio, with 222 ICU admissions, 679 hospitalizations, and 65 deaths. At this time, nine percent of people who contract COVID-19 in Ohio are hospitalized in the ICU, and overall, twenty-eight percent of people who contract COVID-19 in Ohio require hospitalization. Seventy-two of Ohio's eighty-eight counties have documented COVID-19 cases.<sup>5</sup> Pursuant to these numbers, of Ohio's 1,238 existing ICU beds, capacity already hovers around nearly 50% of ICU beds occupied.<sup>6</sup> According to the Ohio Department of Health, the projected peak for COVID-19 cases in Ohio will not arrive until late April.<sup>7</sup>

Both Ohio's Department of Health Director, Dr. Amy Acton, and Governor Mike DeWine have strongly encouraged hospitals to use the Ohio Department of Health for

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<sup>2</sup> See Center for Disease Control and Prevention, "Coronavirus Disease 2019 (COVID-19) Cases in the US" (April 1, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Declaration of Chris Breyer, MD, MPH, Professor of Epidemiology, Johns Hopkins Bloomberg School of Public Health, Baltimore, MD as filed in *United States v. Toro*, E.D. CA. Case No. 19-cr-256, Dkt. 145, filed March 23, 2020.

<sup>5</sup> See Ohio Department of Health, "COVID-19 Portal" (April 1, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/>; Ohio Department of Health, "COVID-19 Dashboard" (April 1, 2020) available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/dashboard>.

<sup>6</sup> University of Washington Institute for Health Metrics and Evaluation, "COVID-19 Projections: Ohio" (March 31, 2020), available at <https://covid19.healthdata.org/projections>.

<sup>7</sup> Ohio Department of Health, "COVID-19 Dashboard: Forecast Model" (April 1, 2020) available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/dashboard>.

quicker testing, noting that the private labs are days behind in reporting. This lag in reporting dictates that confirmed COVID-19 cases are invariably low. Although testing is only being conducted on the sickest individuals and health care workers, the number of confirmed cases continues to rise rapidly.

The State of Ohio is on notice of the massive health risk facing all people in Ohio. The State has already recognized that the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern, that the World Health Organization has declared COVID-19 a pandemic, and that that the United States' Health and Human Services Secretary declared on public health emergency for the U.S. to aid the nation's healthcare community in responding to COVID-19.<sup>8</sup>

The State of Ohio, through Governor Mike DeWine's Executive Order, also declared a state of emergency "for the entire State" in order "to protect the well-being of the citizens of the [sic] Ohio from the dangerous effects of COVID-19." In that declaration, the State of Ohio makes clear that it is on notice that COVID-19 is a respiratory disease that can result in serious illness or death.<sup>9</sup> The State of Ohio has further acknowledged that COVID-19 constitutes the presence of "a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio."<sup>10</sup>

Likewise, the State is aware that "[t]he virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes," and that "[i]t may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes."<sup>11</sup> Dr. Amy Acton, Director of the State of Ohio's Department of Health, has issued orders demonstrating the State's knowledge that COVID-19 "can easily spread from person to person."<sup>12</sup>

The State has also acknowledged that "people are most contagious [with COVID-19] when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms." (Ohio Department of Health, Director's Order to Close Facilities Providing Child Care Services (March 24, 2020).) The State also acknowledges that "community spread" of COVID-19—meaning "transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to

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<sup>8</sup> Ohio Exec. Order, No. 2020-01D (March 9, 2020); Ohio Department of Health, Director's Order In Re: Order to Limit Access to Ohio's Jails and Detention Facilities (March 15, 2020); Ohio Exec. Order, No. 2020-02D (March 13, 2020).

<sup>9</sup> Ohio Exec. Order, No. 2020-01D (March 9, 2020).

<sup>10</sup> Ohio Exec. Order, No. 2020-02D (March 13, 2020).

<sup>11</sup> Ohio Exec. Order, No. 2020-01D (March 9, 2020).

<sup>12</sup> (Ohio Department of Health, Director's Order to Close Facilities Providing Child Care Services (March 24, 2020).

control spread”—has occurred in the U.S.<sup>13</sup> Of course, community spread will also happen in Ohio and in Ohio prisons.

The Ohio Department of Health also states that “a large number of people in the general population, including the elderly and people with weakened immune symptoms and chronic medical conditions,” face a “significant risk of substantial harm” due to “high probability of widespread exposure to COVID-19.”<sup>14</sup>

The State further acknowledges that gatherings of large numbers of people “increase[]s the risk of transmission of COVID-19.”<sup>15</sup> The State has cited the “significant risk of substantial harm” due to “high probability of widespread exposure to COVID-19” as the reason for closure of all schools, polling stations, childcare facilities, and adult day care facilities and senior centers.<sup>16</sup> As of the date of this Application, school closures have now been extended until at least May 1, 2020.<sup>17</sup>

As a necessary precaution against rapid spread of COVID-19, the State of Ohio has ordered all persons to “Stay at Home Unless Engaged in Essential Work or Activity”—and has ordered that:

1. “All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited,” and “[a]ny gathering of more than ten people is prohibited,” except as specifically permitted by the order.
2. “To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, maintain social distancing of at least six feet from any person.”
3. “Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands,” and required measures include, *inter alia*:

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<sup>13</sup> Ohio Department of Health, Director’s Order to Close Facilities Providing Child Care Services (March 24, 2020).

<sup>14</sup> Ohio Department of Health, Director’s Order to Close Facilities Providing Child Care Services (March 24, 2020).

<sup>15</sup> Ohio Department of Health, Director’s Order In Re: Closure of the Polling Locations in the State of Ohio (March 16, 2020).

<sup>16</sup> Ohio Department of Health, Director’s Order In Re: Order the Closure of All K-12 Schools in the State of Ohio (March 14, 2020); Ohio Department of Health, Director’s Order In Re: Closure of the Polling Locations in the State of Ohio (March 16, 2020); Ohio Department of Health, Director’s Order to Close Facilities Providing Child Care Services (March 24, 2020); Ohio Department of Health, Director’s Order Re: Amended Director’s Order to Close Facilities Providing Older Adult Day Care Services and Senior Centers (March 24, 2020).

<sup>17</sup> R. Ludlow, “Coronavirus in Ohio: DeWine extends school closings until at least May,” *The Columbus Dispatch* (March 30, 2020), available at <https://www.dispatch.com/news/20200330/coronavirus-in-ohio-dewine-extends-school-closings-until-at-least-may>.

- a. “Designate six-foot distances. Designating with signage, tape, or by other means six-foot spacing ...”
- b. “Having hand sanitizer and sanitizing products readily available....”
- c. “Separate operating hours for vulnerable populations,” for “elderly and vulnerable” people.
- d. Organizations must “separate employees who appear to have acute respiratory illness symptoms from other employees and send them home immediately,” and “[b]e prepared to change business practices.”

Despite these known risks and the ordering of necessary actions, the State’s “Stay at Home Order” specifically exempted incarcerated individuals.<sup>18</sup>

### **C. COVID-19 Poses Acute Risks to Prisoners and Correctional Staff.**

Up to one in four people who contract COVID-19 remain asymptomatic, and contagion begins up to 48 hours before symptoms appear.<sup>19</sup> Transmission does not require coughing, and COVID-19 can be spread through merely breathing in the same area.<sup>20</sup> It is impossible to determine whether asymptomatic prisoners have COVID-19 and pose a risk to other prisoners unless or until they show symptoms of the virus.

As of the time of this Application, the first official case in an Ohio prison has been identified: a staff member at Marion Correctional Institution (“Marion CI”) was diagnosed with COVID-19 on Sunday, March, 29, 2020. This person is a member of the operational custody staff and was in contact with prisoners at Marion CI, which houses more than 2,100 men.<sup>21</sup>

ODRC daily statistics on COVID-19 presence and testing are posted on the State’s COVID-19 Dashboard website, including the number of tests performed, the test results, how many people are in isolation and how many are under quarantine, and in which

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<sup>18</sup> Ohio Department of Health, Director’s Stay at Home Order (March 22, 2020).

<sup>19</sup> S. Whitehead, “CDC Director On Models For The Months To Come: ‘This Virus Is Going To Be With Us,’” *NPR* (April 2, 2020), available at <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>.

<sup>20</sup> E. Cohen, “Experts tell White House coronavirus can spread through talking or even just breathing,” *CNN* (April 2, 2020), available at <https://www.cnn.com/2020/04/02/health/aerosol-coronavirus-spread-white-house-letter/index.html>.

<sup>21</sup> J. Pelzer, “First Ohio prison coronavirus case found in staffer,” *Cleveland.com*, March 30, 2020, available at <https://www.cleveland.com/coronavirus/2020/03/first-ohio-prison-coronavirus-case-found-in-staffer.html>.

prisons they are located.<sup>22</sup> Based on those reports, ODRC does not appear to be following the federal government’s best practices to prevent the spread of coronavirus.<sup>23</sup>

In spite of the presence of confirmed COVID-19 at Marion CI, only one additional COVID-19 test was administered to an Ohio prisoner between March 29 and March 30, 2020—and as of the date of this Application, Marion Correctional Institution is not listed as an institution with pending test results.<sup>24</sup> The pending tests on Sunday, March 29 into Monday, March 30, were from Grafton, Warren, and Richland Correctional Institutions. According to the State of Ohio’s publicly-posted data available on April 1, 2020, 27 prisoners in Ohio have shown serious enough symptoms to be tested.<sup>25</sup>

ODRC is reportedly only testing prisoners for COVID-19 when symptomatic, and only “when deemed appropriate by the treating clinician in accordance with guidance provided by DRC’s health authority,” which is allegedly “working in collaboration with the Ohio Department of Health.”<sup>26</sup> Chris Mabe, president of the Ohio Civil Service Employees Association which represents state corrections officers, states that other prison employees have come down with coronavirus-like symptoms but have not been tested. Mabe has further stated that “[s]ome doctors in Ohio have just told [prison employees that they have] COVID-like symptoms, wrote them a doctor slip and told them to self-quarantine and would not test.” Further, ODRC does not provide staff testing for COVID-19.<sup>27</sup>

In spite of the widespread presence of COVID-19 in the State of Ohio and the obvious “significant risk of substantial harm” to prisoners in Ohio prisons—just as is the case for the general public—due to “high probability of widespread exposure to COVID-19” to “a large number of people ... , including the elderly and people with weakened immune symptoms and chronic medical conditions,” the State of Ohio has merely limited access to Ohio’s adult and juvenile prisons by prohibiting visitation and by limiting entrance to

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<sup>22</sup> M. Richmond, “Ohio Prisons’ Coronavirus Policies Fall Short of CDC Guidelines,” *Ideastream* (March 30, 2020), available at <https://www.ideastream.org/news/ohio-prisons-coronavirus-policies-fall-short-of-cdc-guidelines>.

<sup>23</sup> J. Pelzer, “First Ohio prison coronavirus case found in staffer,” *Cleveland.com*, March 30, 2020, available at <https://www.cleveland.com/coronavirus/2020/03/first-ohio-prison-coronavirus-case-found-in-staffer.html>.

<sup>24</sup> Ohio Department of Health, “Rehabilitation and Correction COVID-19 Information” (April 1, 2020), available at <https://coronavirus.ohio.gov/static/DRCCOVID-19Information.pdf>; J. Pelzer, “First Ohio prison coronavirus case found in staffer,” *Cleveland.com*, March 30, 2020, available at <https://www.cleveland.com/coronavirus/2020/03/first-ohio-prison-coronavirus-case-found-in-staffer.html>.

<sup>25</sup> Ohio Department of Health, “Rehabilitation and Correction COVID-19 Information” (April 1, 2020), available at <https://coronavirus.ohio.gov/static/DRCCOVID-19Information.pdf>.

<sup>26</sup> S. Allard, “First Positive COVID-19 Test at an Ohio Prison is Worse Than it Seems,” *Scene Magazine* (March 30, 2020), available at <https://www.clevescene.com/scene-and-heard/archives/2020/03/30/first-positive-covid-19-test-at-an-ohio-prison-is-worse-than-it-seems?fbclid=IwAR1-Pf8qGrzAw7t4zHKmkqMoxmcsOA8WJf64pzNXGeeHOzA1z-8qjD9HxTg>.

<sup>27</sup> *Id.*



prisons to those who are “critical to the workings of the facility” or new prisoners after screening for temperature and symptoms.<sup>28</sup>

However, the lack of hospital space for highly infected areas and the anticipated problems here in Ohio have been widely reported. It is for this reason the “social distancing” requirement has been pushed by Governor DeWine and Ohio Health Director Amy Acton. Social distancing, however, is difficult or impossible in ODRC’s institutional setting. ODRC prisoners are not permitted and are not able to stay six feet apart, or to avoid touching surfaces which have not been sanitized between users. Prisoners’ beds are in shared spaces and are closer than 6 feet apart. In Ohio’s lowest security facilities, prisoners are housed in dormitory-style units. In these units, bunk beds are placed less than three feet apart. At any given moment, a prisoner housed in a dormitory is within six feet of five other bunks and their inhabitants. Further, bathroom and shower facilities are not six feet apart. Phones—prisoners’ connection to the outside world—are not six feet apart. Frequent enough handwashing and sanitation are not available. The list goes on. ODRC prison facilities and operations, along with the number of prisoners in any individual facility, preclude prisoners from engaging in appropriate conduct to avoid COVID-19 transmission.

The only precautions in place to prevent COVID-19 transmission at ODRC prisons include no visitors or volunteers and staff screening. Due to the nationwide shortage of personal protective equipment, Ohio prisons have not been provided with adequate protective gear to mitigate risk of exposure to staff and prisoners. The housing and work conditions violate all available CDC and ODH recommendation available. Some prisons—but not all—are serving meals in smaller groups. Some prisons have cordoned off elderly prisoners into housing pods together. But other precautions are not being taken. Ohio prisoners presently report that, despite the temporary suspension of restrictions, no additional sanitation or cleaning measures appear to have been implemented. Some prisoners report that soap, cleaners, and hand sanitizer are rationed and sometimes hoarded by correctional officers or only provided to correctional officers’ favorite prisoners. Prisoners in other facilities report that hand sanitizer is not available at all. Many prisons are not taking precautions to protect people while eating en masse in the prison chow halls. Some prisons are only encouraging handwashing three times per day as the means to prevent COVID-19 spread. At least one prisoner has reported being punished for reporting a correctional officer to his superiors for coughing repeatedly around prisoners—in retaliation for his report, a supervising officer sentenced the prisoner to solitary confinement. Prisoners are afraid to go to the medical unit for COVID-19-like symptoms because of the retaliatory treatment meted out for those placed on “quarantine” in the solitary confinement areas of the prison.

Prisoners and correctional staff alike are at extreme risk. The harm of maintaining densely populated prisons extends beyond the walls of the of the institutions, putting all

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<sup>28</sup> Ohio Department of Health, Director’s Order to Close Facilities Providing Child Care Services (March 24, 2020); State of Ohio, Press Release: Governor DeWine Recommends Limiting Large Indoor Gatherings (March 10, 2020), available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home/news-releases-news-you-can-use/gov-dewine-recommends-limiting-large-indoor-gatherings>; Ohio Department of Health, Director’s Order In Re: Order to Require Health Screening for Admission to State Operated Psychiatric Hospitals or to Department of Youth Services Facilities (March 14, 2020).

Ohioans at risk. First, the close living quarters of correctional institutions puts non-incarcerated residents living and working in geographic proximity to those institutions at significantly heightened risk of community transfer. Of most notable concern, rural Ohio residents who work and reside in the small communities where state prisons are most frequently located must share already scarce medical resources with the imported prison population. Second, prisoners and employees inside Ohio prisons are exposed to conditions which facilitate rapid spread of highly contagious COVID-19. As of 2019, Ohio prisons are short-staffed by 289 corrections officers.<sup>29</sup> In the seemingly inevitable event of an institutional COVID-19 outbreak, corrections staff will be further diminished. Medical services also strain staffing issues as corrections officer are required for the transport and treatment of prisoners outside ODRC facilities. A significant shortage of corrections staff poses other safety and management risks to routine prison operations.

These are dire circumstances. COVID-19 will inevitably spread rapidly among prisoners in facilities where even one person enters carrying the virus and will likewise spread like wildfire among members of the surrounding communities.<sup>30</sup>

#### **D. ODRC Prisoners Face Serious Medical Risks Relating to COVID-19**

Nearly 50,000 people reside in Ohio's prisons.<sup>31</sup> The CDC states that, "[b]ased upon available information to date, those at high-risk for severe illness from COVID-19 include:

1. People aged 65 years and older;
2. People with chronic lung disease or moderate to severe asthma;
3. People who have serious heart conditions;
4. People who are immunocompromised including cancer treatment;
5. People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease might also be at risk;

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<sup>29</sup> Ohio Department of Rehabilitation and Correction 2019 Annual Report, available at <https://drc.ohio.gov/Portals/0/Annual%20report%20final%20ODRC.pdf>.

<sup>30</sup> See, e.g., S. Allard, "First Positive COVID-19 Test at an Ohio Prison is Worse Than it Seems," *Scene Magazine* (March 30, 2020), available at <https://www.clevescene.com/scene-and-heard/archives/2020/03/30/first-positive-covid-19-test-at-an-ohio-prison-is-worse-than-it-seems?fbclid=IwAR1-Pf8qGrzAw7t4zHKmkqMoxmcsOA8WJf64pzNXGeeHOzA1z-8qjD9HxTg>.

<sup>31</sup> Ohio Department of Rehabilitation and Correction 2019 Annual Report, available at <https://drc.ohio.gov/Portals/0/Annual%20report%20final%20ODRC.pdf>.

6. People who are pregnant should be monitored since they are known to be at risk with severe viral illness, however, to date data on COVID-19 has not shown increased risk.<sup>32</sup>

The CDC further states that “conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications.”<sup>33</sup>

Of the approximately 50,000 prisoners in ODRC facilities, 9,479 are over 50 years old, and qualify as at-risk for COVID-19 due to age-related factors.<sup>34</sup> It must be noted that the health profile of people who have been incarcerated typically demonstrates that prisoners appear to be about 10 years older than their chronological age.<sup>35</sup> Therefore, prisoners who are 55 and older present age-related health risks.

According to ODRC’s 2019 Annual Report, ODRC prisoners also include thousands of people with chronic medical conditions. Of those prisoners, thousands have chronic respiratory or lung disease, creating an especially acute risk for COVID-19, including:

1. 2,704 prisoners diagnosed with chronic medical issues categorized as “Asthma”;
2. 1,068 prisoners diagnosed with chronic medical issues categorized as “COPD”;
3. 23 prisoners diagnosed with chronic medical issues categorized as “ID-TB Disease”;
4. 276 prisoners diagnosed with chronic medical issues categorized as “ID-Latent TB Infection”; and
5. 140 prisoners diagnosed with chronic medical issues categorized as “ID-Latent TB Surveillance.”<sup>36</sup>

Of those 50,000, prisoners, thousands have serious heart conditions, creating an especially acute risk for COVID-19, including 9,036 prisoners diagnosed with chronic medical issues categorized as “Cardiac/HTN”.<sup>37</sup>

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<sup>32</sup> Center for Disease Control and Prevention, “People Who Are at the Highest Risk for Severe Illness,” CDC.gov (March 26, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Ohio Department of Rehabilitation and Correction 2019 Annual Report, available at <https://drc.ohio.gov/Portals/0/Annual%20report%20final%20ODRC.pdf>.

<sup>35</sup> B. Bradley Hagerty, “Innocent Prisoners Are Going to Die of the Coronavirus,” *The Atlantic* (March 31, 2020), available at [https://www.theatlantic.com/ideas/archive/2020/03/americas-innocent-prisoners-are-going-die-there/609133/?fbclid=IwAR1kpOM5CPQx5XmXMX\\_v9Lp6mXihs840CSr\\_ccIc6lnI859oG5DJpFinRY](https://www.theatlantic.com/ideas/archive/2020/03/americas-innocent-prisoners-are-going-die-there/609133/?fbclid=IwAR1kpOM5CPQx5XmXMX_v9Lp6mXihs840CSr_ccIc6lnI859oG5DJpFinRY).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Of those 50,000, prisoners, hundreds are or may become immunocompromised, creating an especially acute risk for COVID-19, including:

1. 396 prisoners diagnosed with chronic medical issues categorized as “ID-HIV”;
2. 148 prisoners diagnosed with chronic medical issues categorized as “Cancer Active”; and
3. 428 prisoners diagnosed with chronic medical issues categorized as “Cancer Remission.”<sup>38</sup>

Of those 50,000, prisoners, thousands have underlying medical conditions, particularly if not well controlled or treated—as is likely the case due to quality of prison medical care—create an especially acute risk for COVID-19, including:

1. 31 prisoners who are pregnant;
2. 6,339 prisoners diagnosed with chronic medical issues categorized as “Liver”;
3. 2,862 prisoners diagnosed with chronic medical issues categorized as “Diabetes”;
4. 5,574 prisoners diagnosed with chronic medical issues categorized as “Lipid”;
5. 4,076 prisoners diagnosed with chronic medical issues categorized as “Gen Med”;
6. 1,122 prisoners diagnosed with chronic medical issues categorized as “Seizure”; and
7. 275 prisoners diagnosed with chronic medical issues categorized as “Chronic Pain.”<sup>39</sup>

Likewise, Medicaid Pre-Release Enrollment Program demonstrates thousands of prisoners with high-risk chronic medical issues: in 2017 and 2018, 3,373 prisoners participated in the program while demonstrating “Critical risk indicators”—which include “HIV, HEPC, Pregnancy, MAT, Recovery Service Level 3, Chronic Medical Condition, Serious Mental Illness.”<sup>40</sup>

Likewise, prisoners who also work within the institutions are at high risk. ODRC’s manufacturing program, called “Ohio Penal Industries,” has 30 shops in operation, with 1,506 prisoners working in prison shops.<sup>41</sup> These workers are not afforded the benefits and protections set forth in the State’s Stay at Home Order and numerous other State orders governing workers and employers; instead they are at risk for likely COVID-19 infections and complications from that exposure.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Ohio Department of Rehabilitation and Correction 2019 Annual Report, available at <https://drc.ohio.gov/Portals/0/Annual%20report%20final%20ODRC.pdf>.

Finally, as of the end of 2019, ODRC employed 12,278 staff, including 6,674 correctional officers, who move between Ohio prisons and the broader community on a daily basis.<sup>42</sup> These staff members expose each other and prisoners to COVID-19 “community spread” from outside the prison walls on a daily basis, along with the likely COVID-19 infections and complications which result from that exposure.

To date, Ohio Department of Rehabilitation and Correction (ODRC) is not complying with CDC recommendations concerning COVID-19.<sup>43</sup> Further, ODRC is not complying with the requirements set forth in the orders of the Governor and the Director of the Department of Health.<sup>44</sup>

#### **E. Ohio Prisons Do Not Have Capacity to Provide Adequate Medical Care for Prisoners’ Serious Medical Risks and Needs and Many Will Die.**

Critically, ODRC does not have the capacity to provide constitutionally adequate medical care for all prisoners who may contract COVID-19. Overwhelmingly, Ohio prisons do not have adequate in-house health care facilities or medical staff to screen prisoners. The medical units of most ODRC prison facilities do not have ventilators or other medical equipment necessary to treat the number of people likely to contract COVID-19 and who will require treatment. In the case of an outbreak, Ohio prisons do not have the means to transport high volumes of prisoners for off-site care.

ODRC only has two specialized medical facilities: the Franklin Medical Center and the Frazier Health Center at Pickaway Correctional Institution.<sup>45</sup> These two facilities do not have enough ICU beds, ventilators, or other space and equipment necessary to service the entire population of ODRC prisoners who will contract COVID-19 and become seriously ill should no action be taken to decrease prisoner population.

Yet carceral settings are ideal for the spread of COVID-19. Prisons are places that are particularly susceptible to contagion and incarceration poses a grave public health threat during this crisis. It is well-known in the epidemiological community that such facilities are “associated with high transmission probabilities for infectious diseases.”<sup>46</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> M. Richmond, “Ohio Prisons’ Coronavirus Policies Fall Short of CDC Guidelines,” *Ideastream* (March 30, 2020), available at <https://www.ideastream.org/news/ohio-prisons-coronavirus-policies-fall-short-of-cdc-guidelines>.

<sup>44</sup> See Section I.B, *infra*.

<sup>45</sup> Ohio Department of Rehabilitation and Correction, “Office of Correctional Health Care,” available at <https://drc.ohio.gov/medical>.

<sup>46</sup> Declaration of Chris Breyer, MD, MPH, Professor of Epidemiology, Johns Hopkins Bloomberg School of Public Health, filed in *United States v. Toro*, E.D. CA Case No. 19-cr-256, Dkt.145 (filed March 23, 2020) at ¶ 11; see also J. A. Bick, “Infection Control in Jails and Prisons,” *Clinical Infectious Diseases* 45(8):1047-1055 (2007), available at <https://doi.org/10.1086/521910>; L. M. Maruschak, *et al.*, “Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12,” U.S. Dept. of Justice, Bureau of Justice Statistics, NCJ 248491 (2015), available at <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>.

Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.<sup>47</sup>

When outbreaks occur in custodial facilities, those illnesses lead directly to increased spread beyond those institutions.<sup>48</sup> As stated by Chris Breyer, MD, MPH, Professor of Epidemiology at Johns Hopkins Bloomberg School of Public Health, “[i]t is therefore an *urgent priority* in this time of national public health emergency to reduce the number of persons in detention as quickly as possible.”<sup>49</sup> ODRC prisons and other custodial facilities are not islands. People, including newly arrived prisoners, facility administrators, correctional officers, delivery personnel, maintenance workers, and kitchen staff do not live at the institution. They enter and leave on a daily basis. Each of their families have daily contact with others or surfaces contaminated by others. Prisoner infection with COVID-19 is imminent.

When outbreaks occur, prisoners inside prison walls have nowhere to shelter.<sup>50</sup> Unless large numbers of prisoners are released and are permitted to shelter in safer spaces with better access to sanitary supplies and environments, COVID-19 will overwhelm Ohio’s prisons and medical treatment capacity. If prisoners are not released, COVID-19 will spread like wildfire and people will die inside the prison walls due to lack of access to medical care.

The danger inherent in overcrowded jails and prisons was the basis for the State of Ohio’s order to reduce populations in jails across the state. But Ohio’s prisons present no less risk for public health and civil rights violations than Ohio’s jails. From the Cuyahoga County Court of Common Pleas, Chief Administrative Judge Brendan J. Sheehan stated that, had the county jail not released half the prisoner population, “we’d be crippled,” and the county “would be releasing people immediately because we couldn’t have a quarantine.”<sup>51</sup>

Throughout the world, governmental bodies are considering mass release as a viable option to keep COVID-19 from rampaging through prisons. Afghanistan released

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<sup>47</sup> N. Wetsman, “Prisons and Jails are Vulnerable to COVID-19 Outbreaks,” *The Verge* (Mar. 7, 2020), available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

<sup>48</sup> See Beyrer Dec. ¶ 12.

<sup>49</sup> Beyrer Dec. at ¶ 17 (emphasis added).

<sup>50</sup> A. Sweeney and M. Crepeau, “Alarm grows as Cook County, state struggle with what to do with the incarcerated in the face of COVID-19,” *Chicago Tribune* (March 31, 2020), available at <https://www.chicagotribune.com/coronavirus/ct-inmate-release-coronavirus-concerns-20200331-ehuae5q2rfcihitehdx2wwruui-story.html>; K. Kindy, E. Brown, D. Bennett, “Disaster waiting to happen: Thousands of Inmates Released as Jails And Prisons Face Coronavirus Threat,” *Washington Post* (March 25, 2020), available at [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html).

<sup>51</sup> *Id.*

approximately 10,000 incarcerated individuals.<sup>52</sup> Iran had two waves of releases, resulting in approximately 85,000 people released from custody to combat the spread of COVID-19.<sup>53</sup> India has announced the furlough of 11,000 individuals from 60 different prisons.<sup>54</sup> Cyprus is planning the release of approximately 50 individuals from one facility currently housing 820 individuals.<sup>55</sup> One German state is releasing approximately 1,000 inmates. In Ethiopia, more than 4,000 prisoners are being released.<sup>56</sup>

Multiple countries have faced infections of inmates and correctional staff, some of which have resulted in fatalities. Although the numbers are expected to increase, to-date, at least one French inmate has died.<sup>57</sup> In the United Kingdom, at least 27 inmates in 14 different prisons have tested positive and approximately 75 correctional officers were unable to work due to illness or quarantine. Three prisoners have died.<sup>58</sup>

Both Rikers Island and the Cook County Jail are instructive examples in failures to act. Action happened too late and too little, and COVID-19 is spreading rapidly and positive test results are skyrocketing.<sup>59</sup> In Stateville, an Illinois prison, one inmate has died, while

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<sup>52</sup> Agence France-Presse, “Afghanistan to release up to 10,000 prisoners to slow coronavirus spread,” *The Jakarta Post* (March 27, 2020), available at <https://www.thejakartapost.com/news/2020/03/26/afghanistan-to-release-up-to-10000-prisoners-to-slow-coronavirus-spread.html>.

<sup>53</sup> “Hard-hit Iran Frees More Prisoners Amid Coronavirus Outbreak,” *Al Jazeera* (March 17, 2020) available at <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

<sup>54</sup> S. Srivastava, “Uttar Pradesh to release 11,000 jail inmates on bail or parole as Covid-19 cases surge,” *India Today* (March 29, 2020), available at <https://www.indiatoday.in/india/story/uttar-pradesh-to-release-11-000-jail-inmates-on-bail-or-parole-as-covid-19-cases-surge-1660910-2020-03-29>.

<sup>55</sup> N. Theodoulou, “Coronavirus: around 50 prisoners to be released – reports,” *Cyprus Mail* (March 27, 2020), available at <https://cyprus-mail.com/2020/03/27/coronavirus-around-50-prisoners-to-be-released-reports/>.

<sup>56</sup> “COVID-19: Germany, Ethiopia to release prisoners,” *Deccan Herald* (March 25, 2020), available at <https://www.deccanherald.com/international/covid-19-germany-ethiopia-to-release-prisoners-817636.html>.

<sup>57</sup> J. Gaubert, “Coronavirus: Inmates in France hit out over prison hygiene amid COVID-19 fears,” *EuroNews* (March 26, 2020), available at <https://www.euronews.com/2020/03/26/coronavirus-inmates-in-france-hit-out-over-prison-hygiene-amid-covid-19-fears>.

<sup>58</sup> M. Townsend, M. Sagage, J. Doward, “Prisons ‘could see 800 deaths’ from coronavirus without protective measures,” *The Guardian* (March 21, 2020), available at <https://www.theguardian.com/uk-news/2020/mar/21/prisons-could-see-800-deaths-from-coronavirus-without-protective-measures>; J. Jarvis, “Third British prisoner with coronavirus dies after contracting Covid-19 in custody,” *Evening Standard* (April 2, 2020), available at <https://www.standard.co.uk/news/uk/coronavirus-prison-third-dies-hmp-littlehey-a4404671.html>; “Coronavirus: First UK prison Covid-19 death confirmed,” BBC (March 26, 2020), available at <https://www.bbc.com/news/uk-england-cambridgeshire-52047003>.

<sup>59</sup> T. Williams, “Jails Are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars,” *New York Times* (March 30, 2020), available at <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

48 other inmates have tested positive to date.<sup>60</sup> Illinois Governor Pritzker has activated members of the National Guard to assist with the crisis at the prison.<sup>61</sup>

Prisoners all over the country are becoming more and more fearful every day about what will happen when COVID-19 hits their facilities. Prisoners in Alabama and in ICE facilities, among others, are becoming desperate and have threatened to commit suicide in the wake of this fear and facilities' failures to engage in protective action.<sup>62</sup> Eight prisoners from a minimum-security facility in South Dakota escaped from custody out of fear after another prisoner tested positive for COVID-19.<sup>63</sup>

Because of the danger of COVID-19's rapid and deadly spread among incarcerated people, many jurisdictions are releasing prisoners—both to protect the released people from potential exposure in the jail or prison, but also to allow for adequate space inside the detention facility to permit real and appropriate quarantine practices and access to medical care for those who may have COVID-19. For example, Los Angeles embarked on what appears to be the largest U.S. effort to release prisoners, freeing 1,700 people in March, or about 10 percent of the population of one of the nation's largest jail systems. New Jersey freed hundreds of people last week. In Illinois, nearly 300 inmates have been released already and the Department of Corrections is reviewing case files of low-risk offenders who may be<sup>64</sup> candidates for early release. Prosecutors across the country are likewise avoiding bringing cases that might otherwise land people in jail.<sup>65</sup>

Should ODRC fail to provide care for prisoners' serious medical needs, ODRC and its staff will have violated the civil rights of affected prisoners. It is also critical to note that, based solely on the demographics of Ohio's prison population, State inaction will disproportionately expose black prisoners and other minority groups to life-threatening pandemic illness. Inevitably, hospital staff will have to make difficult decisions about which

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<sup>60</sup> T. Sfondeles, C. Ballesteros, "Illinois National Guard medics headed to Stateville as inmate coronavirus cases rise," *Chicago Sun Times* (April 1 2020), available at <https://chicago.suntimes.com/coronavirus/2020/4/1/21202995/coronavirus-covid-19-illinois-prison-stateville-national-guard-field-hospital>.

<sup>61</sup> *Id.*

<sup>62</sup> K. Kindy, E. Brown, D. Bennett, "Disaster waiting to happen': Thousands of Inmates Released as Jails And Prisons Face Coronavirus Threat," *Washington Post* (March 25, 2020), available at [https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc\\_story.html](https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html).

<sup>63</sup> J. Bates, "After a South Dakota Jail Confirmed a Coronavirus Case, 8 Inmates Escaped," *Time Magazine* (March 25, 2020), available at <https://time.com/5809913/south-dakota-jail-inmates-escape-coronavirus/>.

<sup>64</sup> T. Sfondeles, C. Ballesteros, "Illinois National Guard medics headed to Stateville as inmate coronavirus cases rise," *Chicago Sun Times* (April 1 2020), available at <https://chicago.suntimes.com/coronavirus/2020/4/1/21202995/coronavirus-covid-19-illinois-prison-stateville-national-guard-field-hospital>.

<sup>65</sup> *Id.*; see also K T. Williams, "Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars," *New York Times* (March 30, 2020), available at <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.



patients have access to ventilators and which do not. It is unclear how standard triage protocol may result in the de-prioritization of care for incarcerated citizens.

Given that the State of Ohio is on notice of the obvious and significant risks for Ohio prisoners, failure to act now to prevent these risks from causing serious injury or death is per se unconstitutional. Absent bold and immediate action, Ohio prisoners will fall ill and die in unprecedented numbers. Inaction in the face of this pandemic is tantamount to cruel and unusual punishment and violates the rights of all prisoners in the custody of ODRC.

A human rights and constitutional rights crisis is brewing inside ODRC prisons. While incarcerated people are serving a sentence for engaging in conduct prohibited by law, the State must act to protect basic human health and dignity. Prisoners who were not sentenced to death for their conduct are now held in Ohio prisons at the risk of death. For some prisoners, this risk will ripen into a death sentence without due process and in violation of fundamental human rights.

#### **F. Dense Prison Populations Must be Dispersed to Preserve Prisoners' Constitutional Rights and Wellbeing, to Reduce Burdens on Rural Health Care Facilities, and Ensure Safety of Surrounding Communities.**

Ohio must act rapidly to reduce the prison population and protect the lives and health of Ohioans inside and outside of Ohio's Correctional Institutions. Dense populations of prisoners in rural communities will immediately exhaust already-depleted medical resources when a COVID-19 outbreak incurs inside a prison. Ohio has already dispersed the personal protective equipment resources still on hand to medical facilities throughout the state. These distributions were described as being boxes of supplies—not truckloads. The federal government is working with private industry to accelerate the production of PPE supplies, but the timeline for receipt of these additional PPE supplies by Ohio has not yet been publicly established.

A brief look at the numbers indicates that through an executive grant of Emergency Categorical Reprieve, Ohio can meaningfully reduce the prison population to flatten the curve of COVID-19 infection statewide. Further, this action disperses dense populations artificially occupying rural communities, minimizing the burden on local health care systems.

With few exceptions, Ohio's prisons are located in rural areas. Cuyahoga County, Franklin County, and Hamilton County have the highest quality of health care facilities and the highest treatment capabilities in the state. Together, these three counties have nearly 1500 ICU beds. However, Cuyahoga displaces 11,167 county residents to rural prisons to serve their sentences; Franklin County displaces 4,706 county residents into rural prisons to serve their sentences; and Hamilton County displaces 5,235 county residents to rural prisons to serve their sentences.<sup>66</sup> On the other hand, Ross County, Richland County, Pickaway County, Marion County, Madison County each house well over 4,000 out-of-county prisoners.<sup>67</sup> Hospitals in these counties are woefully underprepared to

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<sup>66</sup> P. Wagner, R. Heyer, "Importing Constituents: Prisoners and Political Clout in Ohio," *Prison Policy Initiative* (2004), <https://www.prisonersofthecensus.org/ohio/importing.html>.

<sup>67</sup> *Id.*

handle institutional outbreaks. Richland county has only 37 ICU beds; Marion County has only 15 ICU beds; Madison County has only 13 ICU beds; Ross County has only 12 ICU beds; and Pickaway County has only 8 ICU beds.<sup>68</sup>

Importantly, this can be achieved without putting communities at heightened risk of repeat criminal conduct. According to ODRC's 2019 annual report, Ohio prisons house 48,988 prisoners. Of those 48,988 prisoners:

1. 16,056 are designated at the lowest security level;
2. 15,529 prisoners are serving sentences for non-violent crimes;
3. 1,591 prisoners in Ohio are over the age of fifty; and
4. 2,971 prisoners are serving sentences for fifth degree felonies.<sup>69</sup>

The most recent reports on three-year recidivism rates for all prisoners released after age forty-five establish that only one in ten commits another crime. Of the crimes committed by ten percent of released prisoners within three years, only 18 percent of those new crimes were crimes against persons.<sup>70</sup>

Health statistics indicate that beyond the risk factor of age, a significant number of Ohio prisoners are medically vulnerable. Medical vulnerabilities are reliable predictors of serious, life threatening, COVID-19 complications. As discussed in Section I.D, *supra*, thousands of prisoners have chronic respiratory or cardiac conditions or are immunocompromised. Even assuming, *arguendo*, that these prisoners with existing complications do not perish at the rates surging in, for example, Italy or Spain, the cost of incarcerating each prisoner will increase dramatically.

Relying only on the date of transmission, treatment, and mortality data related to COVID-19 in Ohio available at the time of the drafting of this Application, it can be determined to a reasonable degree of scientific certainty that the prison population will overrun the capabilities of local health care facilities. This diverts already scarce treatment and personal protective equipment resources away from residents and employees.

As indicated repeatedly by Director Acton, the only way to flatten the curve of transmission is to create social distance to slow the spread of infection. Substantial but thoughtful reduction of the prison population is a necessary exercise of executive authority that furthers justice and protects the wellbeing of society.

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<sup>68</sup> F. Schulte, E. Lucas, J. Rau, L. Szabo, J. Hancock, "Millions of Older Americans Live in Counties with No ICU Beds as Pandemic Intensifies," *Kaiser Health News* (March 20, 2020), available at <https://khn.org/news/as-coronavirus-spreads-widely-millions-of-older-americans-live-in-counties-with-no-icu-beds/>.

<sup>69</sup> Ohio Department of Rehabilitation and Correction 2019 Annual Report, available at <https://drc.ohio.gov/Portals/0/Annual%20report%20final%20ODRC.pdf>.

<sup>70</sup> Ohio Department of Rehabilitation and Correction 2018 Recidivism Update, available at <https://drc.ohio.gov/reports/recidivism>.

### III. ELIGIBILITY FOR RELEASE PURSUANT TO CATEGORICAL REPRIEVE

The purpose of establishing narrowly tailored categories of eligibility for Emergency Reprieve is to facilitate fast and efficient verification and release of Eligible Prisoners. In light of the rapid rate of growth of the COVID-19 pandemic, Reprieves must be handled with a sense of urgency to minimize the general health risk that densely populated prison populations present inside prison walls and to the public.

Categorical parameters defining eligibility are based on empirical data. Eligible Prisoners are those prisoners who present statistically diminished risk of recidivism and those who present unique medical vulnerabilities.

These categories are narrowly tailored to reflect a balance, weighing the need to release a significant number of prisoners against an interest in protecting the community from crime.

As used in this Application:

1. A determination of a prisoner's eligibility for Emergency Reprieve is based on the highest-level felony conviction for which the prisoner is serving.
2. "Eligible Prisoners for Emergency Reprieve" include all of the following:
  - A. Prisoners serving a sentence for one or more convictions of a felony of the fifth degree or fourth degree are Eligible Prisoners for Emergency Reprieve.
  - B. Prisoners serving a sentence for one or more convictions of a felony of the third degree are Eligible Prisoners for Emergency Reprieve if either of the following apply:
    - i. The prisoner is serving a sentence on their first felony conviction; or
    - ii. The prisoner has served a minimum of half of their stated sentence.
  - C. Prisoners serving a sentence for one or more convictions of a felony of the first degree, a felony of the second degree, or a mandatory prison term for an offense of violence are Eligible Prisoners for Emergency Reprieve if both of the following apply:
    - i. The prisoner is fifty-five (55) years old or older; and
    - ii. The prisoner has served the greater of:
      - a. ten (10) years; or
      - b. two-thirds of their sentence.
  - D. Prisoners serving a sentence for aggravated murder, murder, or rape are Eligible Prisoners for Emergency Reprieve if all of the following apply:

- i. The prisoner is categorized at a security level not higher than Level Two;
  - ii. The prisoner is fifty-five (55) years old or older; and
  - iii. The prisoner has served the greater of:
    - a. The minimum term of their indefinite sentence; or
    - b. A term of at least twenty-five years of incarceration.
  
- E. Prisoners serving a sentence for any classified felony who have been determined a level one security level for a period of five or more years are Eligible Prisoners for Emergency Reprieve if all the following apply:
  - i. The prisoner is serving a non-mandatory term;
  - ii. The prisoner is forty-six (46) years old or older, and
  - iii. The prisoner has served the greater of eight (8) years or half of his or her sentence.
  
- F. Prisoners with a documented medical diagnosis which render them uniquely vulnerable to COVID-19 are Eligible Prisoners for Emergency Reprieve if:
  - i. The prisoner presents a certificate from a physician that the prisoner's condition or diagnosis renders the prisoner vulnerable to COVID-19; or
  - ii. The prisoner has a documented diagnosis of any of the following:
    - a. chronic lung disease or moderate to severe asthma;
    - b. Serious heart condition;
    - c. Diabetes;
    - d. Severe obesity;
    - e. Renal failure or liver disease;
    - f. Long-running Hepatitis C;
    - g. Any diagnosis stating that the prisoner is immunocompromised, including but not limited to diagnoses of HIV or AIDS or cancer treatment.
  
- 3. Notwithstanding the Eligibility Criteria stated in Sections 2.A through 2.F above, the following categories are not Eligible Prisoners:
  - A. A prisoner serving a death sentence, a sentence of life without parole, or a sentence under Chapter 2971 is not an Eligible Applicant for Emergency Reprieve.

- B. A prisoner who is categorized by the Ohio Department of Corrections as Security level four or higher is not an Eligible Applicant for Emergency Reprieve.

Any ambiguities in these categories should be construed broadly to permit the greatest number of prisoners to be released for the purposes of preserving public health and civil rights.

Granting of categorical reprieve should not be construed in any way to limit or affect the ability of individual prisoners who do not qualify under the above-stated categories from applying for reprieve and seeking consideration for reprieve based on individualized risks and need for reprieve during the COVID-19 pandemic.

#### **IV. CONDITIONS OF REPRIEVE**

Eligible Prisoners for Emergency Reprieve must accept the following conditions prior to release:

1. Prior to release, Eligible Prisoners must provide verifiable address of residence;
2. Prior to release, Eligible Prisoners must submit to health screenings upon request for COVID-19 indicators and/or diagnoses, including measure of body temperature;
3. Prior to release and if COVID-19 screening produces an indication that the Eligible Prisoner has COVID-19, the Eligible Prisoner must agree to follow all medical directives, including but not limited to hospitalization and quarantine;
4. Prior to release and if COVID-19 screening produces a negative result or COVID-19 screening is not performed, Eligible Prisoner must agree to follow all State of Ohio health directives;
5. Prior to release, Eligible Prisoners must agree that they are aware they are subject to reincarceration;
6. Prior to release, Eligible Prisoners must agree to file an Application for Commutation with the Adult Parole Authority within 180 days of Reprieve, and must agree that failure to file an Application may subject them to reincarceration;
7. Eligible Prisoners must provide transportation from their designated State Correctional Institution upon release and on date of release.

#### **V. EXECUTIVE LEGAL AUTHORITY FOR CATEGORICAL REPRIEVE**

The Supreme Court of Ohio has long held that “the General Assembly may not interfere with the discretion of the governor in exercising the clemency power.” *State ex Rel. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994). The Governor’s exercise of discretion in using the clemency power is also not subject to judicial review. *Id.* The Supreme Court has

also held that any regulation by the General Assembly that limits the Governor’s power to grant reprieves is a violation of the Ohio Constitution. *Id.*

Ohio Rev. Code § 2967 does not limit the Governor’s executive authority regarding reprieves. Section 2967.03 addresses the notice requirements as applied to commutations and pardons, but reprieves are explicitly not contained in the list of proceedings requiring notice and hearings.

Ohio Rev. Code § 2967.01(d), which defines reprieve under Ohio law, specifically clarifies that “the governor may grant a reprieve without the consent of and against the will of the convict.”

Because no consent by an individual prisoner is required, there is no authority which would mandate prisoners to apply individually. Likewise, because no advance notice or hearing requirements apply, reprieve may be granted immediately and categorically to all Eligible Prisoners as defined above. The Governor may exercise his powers of Reprieve on his own initiative—both for the individual Applicants listed here and for all Eligible Prisoners in the custody of Ohio prisons.

## **VI. COMPLIANCE WITH MARSY’S LAW**

Pursuant to *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994), the notice and hearing requirements of Ohio Revised Code Chapter 2967 are applicable only to Applications for Pardon and Commutation and are unconstitutional as applied to acts of Reprieve. Accordingly, the Governor’s constitutional executive power to grant reprieve supersedes legislative restraint on that authority.

However, Marsy’s law, Ohio Constitution Article I, Section 10(a), is a constitutional provision and compliance is required. Because there is no hearing required for the granting of a reprieve, the only applicable provision of Marsy’s law is Section 10(a)(5), which requires that, upon request, victims are given reasonable notice of release or escape. An executive grant of Reprieve is constitutionally compliant with Marsy’s law where victims are given notice of release.

## **VII. ELIGIBILITY OF APPLICANTS PATRICIA SHARP, SHILOH ISRAEL, MICHELLE JONES, AND JOHN TIEDJEN**

### **A. Patricia Sharp**

Patricia Sharp (W102339) was convicted in Sandusky County on November 7, 2018 of Tampering with Records at which time she was sentenced to a thirty-month term of incarceration. To date, Ms. Sharp has been in the custody of the Ohio Department of Corrections for approximately seventeen months and has used her time to actively engage in the rehabilitation programming available. Ms. Sharp has worked her way through the Military Program to become a leader. She has completed over 250 hours of community service in conjunction with Women of Worth and Life Tabernacle. She graduated from a six-month, 1,000-hour, community reintegration program, which provided her with restaurant training that she will take with her as she returns to her community and her family, who eagerly await her return.

Ms. Sharp is an eligible applicant pursuant to this Emergency Application for Categorical Reprieve as she is serving this sentence as a result of her first felony conviction. Not only has she taken full responsibility for her actions and worked tirelessly toward rehabilitation, but she has also served approximately seventeen months, which constitutes more than half of her ordered term. Her institutional record reflects that of an individual who has taken the consequences of her choices to heart and made every effort to grow into an individual who will not only be successful for herself, but also an asset to her community upon reintegration.

### **B. Shiloh Israel**

Shiloh Israel (A755022) is 22 years old and is in custody at Warren Correctional Institution. Mr. Israel was convicted of drug trafficking, a felony of the fifth degree, and weapons under disability, a felony of the third degree, which did not carry mandatory time. He was sentenced to serve 2 years. He has been in the custody of the Ohio Department of Corrections since January 4, 2019. His release date is September 11, 2020, however he was eligible for judicial release in September of 2019.

Mr. Shiloh is an Eligible Prisoner for Emergency Reprieve as he has served over half of his sentence. He has no violent disciplinary history during his present term of incarceration. He has supportive family on the outside who are concerned for his safety during this pandemic and who need his assistance at this time.

### **C. Michelle Jones**

Michelle Jones (W066618) is 57 years old and is in custody at ODRC's Northeast Reintegration Center, a minimum-security prison. The time Ms. Jones now serves stems from a conviction in 1986 for involuntary manslaughter and aggravated robbery. Under the old indeterminate sentencing laws, Ms. Jones was sentenced to a three-year specification followed by 15 to 50 years. She was released on parole on September 1, 2004, after serving eighteen years, nine months, and twenty-six days in prison, and had already exceeded her minimum term of years by nine months and twenty-six days.

Ms. Jones' parole was cut short when she was arrested and convicted for a new case in 2006. She was sentenced to nine more years. Ms. Jones's nine-year sentence expired in 2015. But in January 2015, the Ohio Parole Board chose to flop her on the remaining time left in her 1986 case, with a new hearing date set for March 1, 2022. To date, Ms. Jones has served an additional fourteen years on her old time, and Ms. Jones' total time served on the old case now stands at thirty-two and a half years—fourteen and a half years over her minimum term.

Ms. Jones is uniquely vulnerable to COVID-19 and is an Eligible Prisoner for Emergency Reprieve. She has a long-documented diagnosis of advanced Hepatitis C, which she contracted during a blood transfusion in approximately 1998 or 1999 while in ODRC custody. She is immunocompromised and has experienced severe decline in the past couple years, and has undergone intensive treatment to decrease the progress of her Stage IV liver fibrosis. She continues to suffer symptoms of this serious illness. She is at significant risk of substantial harm should she contract COVID-19 while in prison. Ms. Jones has engaged in

extensive volunteer work, counseling and mental health treatment, and job training to ensure that she can exit prison and contribute positively to her family and the community. Ms. Jones has supportive family on the outside who need her assistance and want her home, and are especially concerned about her wellbeing during the COVID-19 pandemic.

#### **D. John Tiedjen**

John Tiedjen (A211737) is fifty-six years old and is in custody at ODRC's Grafton Correctional Institution, a mixed facility of minimum and medium security inmates. Mr. Tiedjen is serving time for the 1989 conviction of murder with a firearm specification. Mr. Tiedjen was sentenced on June 02, 1989 to a three-year specification followed by a term of fifteen years to life. Mr Tiedjen has been incarcerated for approximately thirty-one consecutive years.

Mr. Tiedjen is particularly vulnerable to COVID-19 and is an Eligible Prisoner for Emergency Reprieve. Mr. Tiedjen is serving a sentence for murder. He is categorized at a security level not higher than Level Two. At age fifty-six, Mr. Tiedjen is older than fifty-five years old. Finally, Mr. Tiedjen has served the minimum term of his indefinite sentence, which is also greater than twenty-five years' incarceration. In addition, Mr. Tiedjen has long-diagnosed asthma and circulation issues. In recent years, Tiedjen has been monitored via EKG. Diminished heart and lung function puts Mr. Tiedjen at significant risk of substantial harm and serious illness should he contract COVID-19 while in prison.

Mr. Tiedjen has an immaculate behavioral record while incarcerated. He also has training and experience as a mechanic and is able to contribute to his community upon release. Tiedjen also owns a home, which was passed to him when his mother died during his incarceration. Further, Tiedjen has maintained his innocence throughout three decades of litigation. In early 2020, his case was remanded to the trial court for further consideration on his innocence claim based on newly discovered evidence. The family of the victim in this case supports Tiedjen's claim of innocence and advocates for his release. Reprieve is necessary to preserve Tiedjen's life and protect his health.

### **VIII. CONCLUSION**

Ohio's founders vested Governor DeWine with the authority to act with swiftness and urgency in a public emergency too immediate to be burdened by bureaucratic procedure. Ohio is faced with a public health pandemic which threatens to be greater in scale than anyone alive today has seen in their lifetime.

The executive power to grant clemency, the law as written by the General Assembly and interpreted by the Ohio Supreme Court, vests Ohio's duly elected Governor with the authority to exercise the power to grant reprieves for prisoners.

Governor DeWine, together with Dr. Amy Acton, have demonstrated responsible leadership for Ohio by going to great lengths to ensure Ohio has the most current data and are using the best professional and scientific opinions to interpret data about the risks and spread of COVID-19. In light of the vast medical expertise available to the Governor, no other person is better positioned to understand the potential impacts on the incarcerated population and surrounding communities.



Undersigned counsel, for all the reasons set forth in this application and based on the empirical data presented collectively by the scientific community, respectfully submit this Emergency Application for Categorical Reprieve for Applicants Patricia Sharp, Shiloh Israel, Michelle Jones, and John Tiedjen, and for all similarly-situated people in the custody of Ohio's prisons.

Respectfully Submitted,



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