

No. 20-3447

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

**CRAIG WILSON, on behalf of themselves and all others similarly situated;
ERIC BELLAMY, on behalf of themselves and all others similarly situated;
KENDAL NELSON, on behalf of themselves and all others similarly situated;
MAXIMINO NIEVES, on behalf of themselves and all others similarly
situated,**

Petitioners-Appellees,

v.

**MARK WILLIAMS, in his official capacity as Warden of Elkton Federal
Correctional Institution; and MICHAEL CARAVAL, in his official capacity as
the Federal Bureau of Prisons Director,**

Respondents-Appellants

On Appeal from the United States District Court
for the Northern District of Ohio

**BRIEF OF AMICI CURIAE CURRENT AND FORMER ELECTED LOCAL PROSECUTORS,
ATTORNEYS GENERAL, UNITED STATES ATTORNEYS, POLICE CHIEFS, SHERIFFS, AND LAW
ENFORCEMENT LEADERS**

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IDENTITY AND INTEREST OF AMICI

Amici Current and Former Elected Local Prosecutors, Attorneys General, United States Attorneys, Police Chiefs, Sheriffs, and Law Enforcement Leaders file this brief as *Amici Curiae* in support of Petitioner/Appellees.¹ Amici are criminal justice leaders with decades of expertise in law enforcement, prosecution, and cooperative federal-state law enforcement activities. They are intimately familiar with the challenges of performing critical law enforcement, criminal justice, and governance functions in their communities. Amici represent jurisdictions from across the country that understand the challenges of protecting local community needs and public safety. Amici have a strong interest in this case because the conditions at FCI Elkton and the ongoing failure to reduce that facility's custodial population has put the many people housed in, and working at, that correctional institution at grave risk in the face of the COVID-19 pandemic. The Respondent/Appellants' ongoing refusal to address this dire situation presents an ongoing public safety risk to the entire community.

A full list of amici is attached as Exhibit A.

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

COVID-19 poses a once-in-a-generation risk to our nation. Across the country, elected officials have taken dramatic steps to protect the public's health and safety, effectively shutting down cities and rural towns alike to ensure that people remain healthy and that the nation's hospital system is not overrun. People have stayed home, away from their work colleagues and loved ones, to make sure they do not spread the disease and that the curve is flattened.

But far too many federal and state leaders have failed to act in one critical area—they have not done enough to bring people home safely from our nation's state and federal prisons. When COVID-19 began spreading across the United States, public health officials warned that the virus would explode in correctional facilities, and that this spread would impact not only those behind bars, but also those who work in these facilities and the broader community. That threat is no longer theoretical, especially in Ohio.

Amici bring decades of experience as current and former criminal justice leaders charged with promoting the safety of our communities. And with that starting point in mind, Amici believe that this Court must support requests for immediate relief to protect the health and safety of all members of the community, which include people behind bars and those who work in these facilities. The threat posed by the spread of the virus requires an immediate and significant reduction in

jail and prison populations by prioritizing public health and ordering the swift release of every person who can safely return to the community. This is a large category of people, especially at a low-security facility such as Elkton. Delaying or undermining this necessary reduction of the dense population behind bars will put even more lives at risk.

ARGUMENT

Amici, as current and former elected state and local prosecutors and law enforcement leaders, file this brief in support of the Petitioners, individuals incarcerated at Elkton Federal Correctional Institution (FCI) who are seeking release or transfer due to the outbreak of COVID-19 within that facility. Amici recognize that large-scale and fast-moving depopulation of our prisons is critical to keeping all members of our communities safe during this pandemic. Amici submit this brief to set forth their position as criminal justice leaders, underscore the public safety interest at stake, and urge the Court to affirm the District Court's decisions to take dramatic action to contain the spread of this deadly virus.²

² In separate orders, the District Court granted Petitioners' motion for a preliminary injunction, *Wilson v. Williams*, No. 4:20-cv-00794-JG, Doc. 22 (N.D. Ohio Apr. 22, 2020) (the "Preliminary Injunction Order"), and their Motion to Enforce the Preliminary Injunction, *Wilson v. Williams*, No. 4:20-cv-00794-JG, Doc. 85 (N.D. Ohio May 19, 2020) (the "May 19, 2020 Order"). On May 20, 2020, Respondents filed an emergency application in the United States Supreme Court to stay the Preliminary Injunction order. *Williams v. Wilson*, No. 19A1041 (U.S.). Noting the procedural posture and the second May 19, 2020 order, the Supreme Court

It is now beyond dispute that our prisons and jails are hotbeds for the spread of COVID-19. The crowded conditions, lack of opportunity for hygiene, and poor medical care within many facilities essentially guarantee that the virus will spread, unimpeded, within confined custodial walls. The effects of these conditions on the transmission of the novel coronavirus are no longer theoretical. What public health professionals warned about several months ago has now come to pass, with numerous federal and state prison and detention facilities experiencing massive outbreaks—outbreaks that impact not only the incarcerated population, but also prison staff and the surrounding community. *See Sarah Volpenhein, Marion prison coronavirus outbreak seeping into larger community, MARION STAR (2020).* Indeed, according to The Marshall Project, as of May 13 there have been 28 documented deaths of corrections staff and 373 people held in custody, with another 6,700 staff testing positive and over 25,000 inmates testing positive. And even these tragedies may underrepresent the scope of the problem because testing

“decline[d] to stay the District Court’s April 22 preliminary injunction without prejudice to the Government seeking a new stay if circumstances warrant.” Order in Pending Case, *Williams v. Wilson*, No. 19A1041 (U.S. May 26, 2020). Amici join together in their view that the district court’s orders are necessary to save lives—both behind bars and in the broader community—and are an appropriate and timely response to the current, dire, public-health emergency. As such, any future request by the Respondents for emergency review by the Supreme Court—an unfortunate attempt to circumvent the appellate court and undermine the district court’s efforts to avoid putting more lives at risk—is, in Amici’s view, unfounded and ill advised.

is limited and few states release information about staff members tested. *See* The Marshall Project, *A State-by-State Look at Coronavirus In Prisons* (May 15, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>. A recent report from the ACLU underscored the dire nature of this situation, projecting that absent immediate and decisive action an additional 100,000 people could die in our nation's jails as a result of the spread of this disease. Udi Ofer and Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, AMERICAN CIVIL LIBERTIES UNION (2020), <https://www.aclu.org/news/smart-justice/new-model-shows-reducing-jail-population-will-lower-covid-19-death-toll-for-all-of-us/>.

The Centers for Disease Control and Prevention has repeatedly emphasized that the most effective way to reduce the spread of COVID-19 is by “limiting face-to-face contact with others,” i.e., social distancing. *See* CDC, *Social Distancing: Keep Your Distance to Slow the Spread*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 17, 2020).

Conditions in many prisons, however, make social distancing impossible. There are simply too many people, packed into too small a space, to limit transmission of the virus. To make social distancing a reality in custodial facilities, therefore, the number of people incarcerated in the facility must dramatically and quickly decline.

COVID-19 demands that we view our criminal justice system through a new lens—one that expands our focus beyond retribution and prioritizes public health and safety concerns. Maintaining current incarceration practices will have a terrifying and deadly impact on all parts of our communities. Against this backdrop, dramatically depopulating facilities like Elkton, which exclusively house low-security inmates, promotes public safety. The imminent threat posed by the coronavirus far exceeds any danger that could result from the release of these low-risk prisoners.

Thus far, at least one-in-four people tested at Elkton is positive for COVID-19, and that number is almost certainly an underestimate, given the number of tests that remain outstanding. *See* May 19, 2020 Order at 2–3. But even if these figures accurately measure the extent of the outbreak at Elkton, every incarcerated human there faces a grave risk unless substantial depopulation of the prison occurs.

Despite this now-materialized risk, the Warden has failed to act. Notwithstanding the recognition by the DOJ of the authority the Warden has to take immediate steps to release individuals to home confinement or through compassionate release, *see* Attorney General William P. Barr, *Memorandum for Director of Bureau of Prisons, Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, Office of the Attorney General (Apr. 3, 2020),

https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf,

and despite the District Court’s Preliminary Injunction Order requiring prompt action, Respondents—in the District Court’s fact-finding—“have made poor progress.” May 19, 2020 Order at 3. Of the 837 people over the age of 65 held at Elkton, all of whom are likely safe to release owing to their age and their BOP classification, the Respondents have identified just five who are eligible for release to home confinement, and six more who may qualify. *Id.* at 4. None have actually been released. *Id.*

Given these developments, this Court simply cannot operate under the illusion that, if left to their own devices, Respondents will protect the health and safety of those held in Elkton, those who work there, and the surrounding community. If it does nothing and allows a business-as-usual approach to persist, the virus will continue to spread and people will die, both inside and outside of prison walls.

I. COVID-19 is a public safety concern—it presents a dire threat to incarcerated populations, those who work in these facilities, and our community at large

Decades of increasingly wide-ranging and punitive criminal justice policies—which have made the U.S. an international outlier in its rate of incarceration—have also created the circumstances that render an infectious-disease outbreak in our correctional facilities catastrophic. With nearly 2.3 million

people currently behind bars, the United States incarcerates more than five times as many people as it did in the 1970s, and facilities are routinely strained beyond their capacity. See Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2020*, <https://www.prisonpolicy.org/reports/pie2020.html>; The Sentencing Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited May 18, 2020). As of 2017, 35 states were operating above 85 percent of their prison capacity, with 10 above 100 percent, Bureau of Justice Statistics, *Prisoners in 2017* (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>, while violence and other crises stemming from the overcrowding of local jails have made headlines in urban and rural jurisdictions alike. See Richard A. Oppel, Jr. 'A Cesspool of a Dungeon': *The Surging Population in Rural Jails*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/us/rural-jails.html>; Michael Winerip and Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES (July 14, 2014), <https://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html>. Although the Supreme Court established over four decades ago that people who are incarcerated are constitutionally entitled to adequate healthcare, *Estelle v. Gamble*, 429 U.S. 97 (1976), incarcerating beyond capacity has undermined correctional departments' ability to provide even basic medical care: in 2011, the Supreme Court concluded in *Brown v. Plata* that

overcrowding in California’s prison system was the primary cause of the “severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.” 563 U.S. 493, 502 (2011).

Compounding the problem is the reality that prisons and jails serve a population with particularly stark healthcare needs: incarcerated people experience infectious disease, mental illness, substance use disorders, and violence at substantially higher rates than the general population. *See* The Vera Institute of Justice, *On Life Support: Public Health in the Age of Mass Incarceration* (2014), <https://www.vera.org/publications/on-life-support-public-health-in-the-age-of-mass-incarceration>. The prevalence within this population of underlying medical conditions make COVID-19 especially dangerous. *See* The Justice Collaborative, *Explainer: Prisons and Jails Are Particularly Vulnerable to COVID-19 Outbreaks* (2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>. Meanwhile, providing adequate care in correctional settings has become more challenging in recent years, as local jails grapple with the opioid epidemic, Steve Coll, *The Jail Health Care Crisis*, THE NEW YORKER (2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis>, and prisons confront costs associated with a rapidly growing elderly population. Between 2000 and 2016, the proportion of people age 55 and older in state

correctional facilities nearly tripled, to 12 percent of the incarcerated population.

Weihua Li and Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, THE MARSHALL PROJECT (2020),

<https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>. And studies have shown that people in

prison manifest physical symptoms beyond their chronological age—those over the age of 50 experience health issues that would be expected of people 10–15 years

older—meaning that they are at high risk of developing severe complications from

COVID-19. See Maurice Chammah, *Do You Age Faster In Prison?* THE

MARSHALL PROJECT (2015), [https://www.themarshallproject.org/2015/08/24/do-](https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison)

[you-age-faster-in-prison](https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison); Centers for Disease Control and Prevention, *Coronavirus*

Disease 2019: Older Adults (2020), [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html)

[ncov/need-extra-precautions/older-adults.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html).

All of these factors—overcrowding, inadequate healthcare, medically vulnerable and elderly populations—already create public health concerns for the millions of people behind bars, 175,000 of whom are in Bureau of Prisons facilities. But the onset of COVID-19 has exacerbated the problematic health conditions in many jails and prisons, making it impossible to follow CDC guidance on proper virus-prevention practices. Too many prisons and jails are inherently unhygienic places: hand sanitizer is often considered contraband, and even soap

and sink water may be restricted or available only for purchase. Keri Blakinger and Beth Schwartzapel, *When Purell is Contraband, How Do You Contain Coronavirus?*, THE MARSHALL PROJECT (2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>. Even if hygiene in prisons and jails improves, people who are incarcerated are in almost constant close proximity, with large numbers of people sharing open dormitories or double-bunked cells and common eating areas, and with very limited infirmary beds or rooms for medical isolation. Maria Morris, *Are Our Prisons And Jails Ready for COVID-19?*, AMERICAN CIVIL LIBERTIES UNION (2020), <https://www.aclu.org/news/prisoners-rights/are-our-prisons-and-jails-ready-for-covid-19/>. In short, overcrowding means that the disease control measures crucial to containing COVID-19, such as social distancing and quarantining of sick individuals, are extremely difficult to implement in prisons and jails. See Daniel A. Gross, *“It Spreads Like Wildfire”*: *The Coronavirus Comes To New York’s Prisons*, THE NEW YORKER (2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.

The heightened threat that COVID-19 presents in a custodial setting is clear. By late April, about one in four confirmed cases in Ohio was connected to the state’s prison system, and the state’s Marion Correctional Facility was the nation’s

largest known cluster, with at least 2,439 cases associated with the facility and nearly 80 percent of incarcerated people testing positive. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage&action=click&module=Spotlight&pgtype=Homepage#states>; Mohammed Syed and Jareen Imam, *Inmates fear death as Ohio prison is overwhelmed by coronavirus*, NBC (2020), <https://www.nbcnews.com/news/us-news/inmates-fear-death-ohio-prison-overwhelmed-coronavirus-n1194786>. In New York City's Rikers Island jail complex, the number of cases increased from one to 200 in just 12 days, and the infection rate in New York City jails generally was nearly eight-fold that of New York City. Miranda Bryant, *Coronavirus spread at Rikers is a 'public health disaster,' says jails' top doctor*, THE GUARDIAN (2020), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster>. Moreover, the rate of infection among correctional staff was even higher, with 441 staff testing positive at the same time as 287 incarcerated people, underscoring the public health connection between people who live and work in facilities and the communities to which staff return at the end of each shift. Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot As Virus Spreads Behind Bars*, N.Y. TIMES (2020),

<https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>.

The current crisis creates a need to implement a plan to dramatically reduce the number of incarcerated individuals and address the threat—and, sadly, the current reality in too many places—of disastrous outbreaks. Too often, the corrections and detention system is a breeding ground for an infectious outbreak. And because they are not closed environments, introducing just one carrier of the virus (often individuals who are asymptomatic) impacts not just everyone inside a facility but anyone leaving the facility—whether it is a person who is released, staff returning back to their homes, or a vendor—who then interacts with the outside community. Amici are well aware—and are seeing in facilities and communities around the nation—that a COVID-19 outbreak behind bars puts our *entire* community at risk. As such, it impacts the safety of the communities Amici are, and have been, charged with protecting.

II. Addressing the risks posed by COVID-19 necessitates a fresh look at past decisions prosecutors and judges made at sentencing

To adequately reduce the prison population in response to COVID-19, we must reconsider past sentencing decisions that prosecutors and judges made before the virus invaded our facilities. None of these sentences, once deemed appropriate, contemplated COVID-19 and the potential for a term of imprisonment becoming a *de facto* death sentence. Instead, prosecutors and judges sought and imposed

carceral sentences they viewed as appropriate and just in a world where public safety would arguably be promoted by these sentences or, at the very least, not harmed by them. In some cases, these sentences may have had largely retributive purposes. There was little chance or consideration that an individual would be punished with a painful, debilitating disease.

Today, however, our world has changed and those responsible for administering the justice system must change with it. Previously imposed terms of incarceration were never intended to be death sentences for elderly and medically vulnerable individuals, and certainly not for prison staffers or members of the surrounding communities. Because of COVID-19, incarceration now poses a serious, dangerous threat to all of us. And in light of this virus, there is no longer a public safety justification for keeping low-security inmates behind bars, where their concentration will exacerbate serious illness and preventable deaths and when their return to the community does not pose serious public safety concerns. In short, the balance of public safety considerations has dramatically shifted, and our policies and practices must allow for consideration of that changed landscape.

With these concerns in mind, retributive sentencing must yield to protecting public safety and public health. We cannot be distracted from our core public safety mission by focusing on whether releasing a particular individual will bestow an undeserved “benefit” or whether the criminal consequences that apply to certain

persons are being “unfairly lessened.” While these concerns may have previously factored into criminal justice decisions, we are dealing with a global pandemic that threatens us *all*. Protecting public health and safety is too urgent and too important to allow adherence to past ways of thinking to hamper our response to this virus and our responsibility to keep communities safe.

Fundamentally altering our approach to punishment is difficult, however, and the Respondents in this case have failed to adjust or to act with sufficient attention to the urgency of the current circumstances. As discussed above, even though they have extremely broad authority to release individuals to home confinement under the CARES Act, they have, for the most part, failed to do so. The District Court was correct to demand a more robust response that recognizes the serious threat the Petitioners face.

III. Respondents’ unwillingness to bend or evolve in light of the new threat posed by COVID-19 required the District Court to impose appropriate criteria for release

Because COVID-19 requires a dramatic change in confinement and release practices that Respondents have yet to embrace, the District Court determined it could not rely on the Respondents to respond to these new circumstances independently and adequately. *See* May 19, 2020 Order. Our new COVID-19-created reality requires transformed thinking about the necessity of incarceration. If we continue to apply old practices, assumptions, and approaches, people will die.

The Respondents have failed to rise to this challenge. After purportedly reviewing hundreds of low-security inmates for release to home confinement, they identified no more than 11 who *may* be eligible for release. *Id.* at 4. It is impossible to know what factors justified their hundreds of denials because the Respondents have been unwilling to disclose the eligibility criteria they use. In short, this response is inadequate.

The District Court was correct to take a more active role in these eligibility determinations and ensure that any denial of release is supported by a specific and serious concern about public safety, substantial enough to override the very real threat posed by the continued incarceration of these individuals. Now is not the time to apply a long list of criteria to release that are only marginally, if at all, relevant to public safety. We must do more to protect the incarcerated population, prison staff, and the public at large.

This is exactly the approach the court below employed, *see* May 19, 2020 Order at 7, as well as in the litigation concerning FCI Danbury, where the District Court for the District of Connecticut addressed a similar concern, *Martinez-Brooks v. Carvajal*, 3:20-cv-00569-MPS, Ruling on Motion for Temporary Restraining Order and Motion to Dismiss (D. Conn, May 12, 2020). In that case, the Warden of FCI Danbury identified its eligibility criteria for home confinement during the course of the litigation. Many of those criteria, when reviewed by the court, were

deemed “unrelated to medical vulnerability and, at best, only tangentially related to public safety.” *Id.* at 48. The prison had, for example, failed to include the individual’s risk factors for serious complications from COVID-19 in its criteria and instead limited release eligibility to persons who had served the majority of their sentences and had not had any incident report in the previous 12 months. *Id.* In its ruling granting the Petitioners a temporary restraining order, the court required FCI Danbury to make a number of changes to its criteria, including:

(a) prioritizing for review for home confinement all inmates [65 and over or medically vulnerable], (b) assigning substantial weight in that review to the inmate’s risk factors for COVID-19 based on CDC guidance, (c) eliminating all requirements that the inmate have served some portion of his or her sentence to be eligible for placement on home confinement, (d) eliminating the requirement that a “primary or prior offense” not be a violent offense; (e) eliminating the requirement that the inmate be “without incident reports in the past 12 months (regardless of severity level); (f) modifying any requirement that a person approved for home confinement be quarantined at the facility for 14 days to allow for immediate release to home confinement for those inmates as to whom Respondent verifies, after reasonable inquiry, that the inmate is not showing symptoms and is able to self-isolate for the same period in the home confinement setting.

Id. at 71.

Elkton FCI would benefit from this type of guidance, which the lower court recently provided. May 19, 2020 Order at 7. If, like the Warden at FCI Danbury, the Respondents were using restrictive criteria contrary to the spirit of the preliminary injunction and blunting its effects, the District Court had no choice but to address these standards directly. The facility’s begrudging and limited release of

the low-security individuals incarcerated at Elkton to date certainly suggests their criteria likely include broad, disqualifying factors that may not be connected to genuine concerns about public safety. To ensure the order of relief is meaningful and sufficient, the facility's discretion to deny release must be closely tied to real and immediate threats to public safety comparable to or exceeding those that COVID-19 poses.

IV. Amici support further action to immediately and significantly reduce the prison population

In the preliminary injunction, the District Court ordered Respondents to identify subclass members who fall into two categories: those aged 65 and over, and those who are medically vulnerable. Preliminary Injunction Order at 12, 20. Under the order, these groups alone must be reviewed for release or transfer to another facility. *Id.* While Amici agree that releasing these individuals should be the top priority, they also support relief for others, who the District Court may eventually determine must also be released to effectively stem the spread of the virus.

A. Petitioners' proposed subclass of individuals aged 50 and over better identifies those to whom COVID-19 poses a serious risk

Numerous studies show that incarceration has a substantial negative effect on an individual's health. Incarceration "increases risks for a host of deleterious health outcomes, including infectious disease, chronic illness, depression, anxiety,

and premature physiological aging and mortality.” Meghan A. Novisky, *How Prisons are Exacerbating Health Inequalities – Especially for Aging Prisoners*, SCHOLARS STRATEGY NETWORK (2018), <https://scholars.org/brief/how-prisons-are-exacerbating-health-inequalities-especially-aging-prisoners>. Different researchers have concluded, for example, that every year of incarceration decreases life expectancy by two years, Emily Widra, *Incarceration Decreases Life Expectancy*, PRISON POLICY INITIATIVE (2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/, that males who have been incarcerated are more than twice as likely to die prematurely, William Alex Pridemore, *The Mortality Penalty of Incarceration: Evidence from a Population-based Case-control Study of Working-age Males*, 55 J. OF HEALTH AND SOCIAL BEHAVIOR 215, 221 (2014), <https://www.prisonlegalnews.org/media/publications/Prisoner%20Death%20Rates%20Study%20Pridemore%20J.%20of%20Health%20and%20Soc.%20Behavior%202014.pdf>, and that most inmates have mortality rates comparable to people in the community who are 10-to-15-years older, Fiona G. Kouyoumdjian, *et al.*, *Do people who experience incarceration age more quickly? Exploratory analyses using retrospective cohort data on mortality from Ontario, Canada*, PLOS ONE 12:4 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5391969/pdf/pone.0175837.pdf>.

Therefore, while the CDC has identified persons 65 and over as “high risk” in the general population, *see* CDC, *People Who are At Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed May 17, 2020), those same benchmarks should not apply to the incarcerated population, which is substantially less healthy than the surrounding community. Because research shows us that a typical 65-year-old in the community is as healthy as an incarcerated person who is between the ages of 50 and 59, *see* Kouyoumdjian, *et al.* (2017) at 6 (Table 2), our COVID-19 response must take those differences into account. Therefore, there are good reasons to conclude that the subclass considered for release should include all persons aged 50 and over.

There is little public safety risk associated with releasing people over age 50. Studies show that “the most important predictor of lower recidivism rates” is whether the person is over 50. Valeriya Metla, *Aging Inmates: A Prison Crisis*, LAW STREET (2015), <https://web.archive.org/web/20150302213537/http://lawstreetmedia.com:80/issues/law-and-politics/aging-inmates-prison-crisis/>. Only seven percent of those aged 50-64 and four percent of those over 65 are returned to prison for new convictions—the lowest rates among all incarcerated demographics—and these are generally for non-serious, non-violent offenses. *See* The Osborne Foundation, *The High Costs of*

Low Risk: The Crisis of America's Against Prison Population, (2014),

<http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/>. Moreover, “arrest rates among older adults decline to a

mere 2 percent by age 50 and are close to zero percent by age 65.” *Id.* These observations align with brain science and the age-crime curve, which show that rates of crime dramatically decrease as people get older and their brains develop.

Laurence Steinberg, Elizabeth Cauffman, and Kathryn C. Monahan, *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION BULLETIN, (March 2015) (available at <https://www.ojjdp.gov/pubs/248391.pdf>).

B. Additional releases will likely be necessary to control the spread of COVID-19 at Elkton and in the surrounding community

While Amici agree that the subclass of persons who are at high risk of serious COVID-19 complications should be released first, they would also support the District Court ordering even broader relief. Because significant depopulation is the only way to adequately control the spread of the virus, release must be granted to others as well who can be safely returned to the community if we are to achieve the needed reductions in the number of individuals crammed into a confined space where the virus has, and will continue to, easily spread. To protect the public, we need to release every person whose presence at home, rather than in a prison facility, does not pose a serious threat to the physical safety of other persons. There

is no question that *leaving* people in prison threatens the physical safety of all of us. Therefore, sending people home, particularly low-security inmates like those held at Elkton FCI, will advance our community's health and well-being.

C. The required 14-day in custody quarantine before an individual is released threatens, rather than protects, public health and safety

Amici would also support an end to the practice of subjecting people who are incarcerated to 14-day quarantines in custody before their release. *See* Preliminary Injunction Order at 21. Though we understand the facility and Court's concern about releasing individuals who are positive for COVID-19 into the community, these individuals can and should quarantine themselves and prevent the spread of the virus outside of prison walls—rather than spending that time in custody where they continue to be proximate to others and are significant vectors of infection.

There can be no actual and effective quarantine within a prison. Even if a COVID-19-positive individual is separated from other inmates who are not known to have the illness, he or she simply cannot be completely isolated. Unlike individuals at home, prisoners are not permitted to care for themselves. They must be monitored by prison staff, their every move controlled and supervised, even while in “quarantine.” When an inmate has the virus, staffers performing these duties may contract the virus and spread it to other inmates in their care, fellow prison employees, and—when they go home—their families and communities.

On the other hand, the virus will be better contained if individuals are released to home confinement immediately, with instructions and requirements on how to quarantine there for a 14-day period. Since individuals on home confinement are not permitted to leave their residences, enforcing a home quarantine should be relatively easy. More importantly, it will be significantly more effective than any attempts at quarantine that take place within the prison itself.³

V. Conclusion

In these unprecedented times, courts cannot be passive as our justice system, and indeed our entire community, navigates life-and-death decisions. The virus spreading through Elkton will, for some, be a death sentence. For others, it will bring a painful illness that causes hospitalization, difficulty breathing, and weeks, months, or a lifetime of anxiety and suffering. Not one inmate at Elkton received a sentence that involved physical torture or death. This Court would not stand by if the Warden permitted prison guards to endanger the lives of those behind bars. But that is what the COVID-19 virus will do if the courts do not compel the Warden to

³ Nor should a lack of release plan militate in favor of ongoing detention. Rather, for those few who do not have a place to go upon release, states and the federal government can provide hotel vouchers or work with housing facilities to secure housing, as has occurred in other jurisdictions. *See, e.g.,* Abbie Vansickle, *A New Tactic To Fight Coronavirus: Send the Homeless From Jails to Hotels*, THE MARSHALL PROJECT (2020). Likewise, reentry counselors can help secure transportation vouchers for those who need to travel to reach stable housing.

act. To protect those in prison, those who work there, and those who live in the surrounding community, this Court must uphold the lower court's ruling and permit the District Court to oversee FCI Elkton's immediate depopulation. Failing to do so will make all of us complicit in otherwise preventable deaths.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 28, 2020, my office filed the above document electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Under Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(5) and 32(a)(7)(B).

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