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SCPW-_____

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF INDIVIDUALS IN)	ORIGINAL PROCEEDINGS
CUSTODY OF THE STATE OF HAWAI‘I AT)	
RISK OF CONTRACTING COVID-19)	
_____)	
)	
STATE OF HAWAI‘I OFFICE OF THE)	
PUBLIC DEFENDER,)	
)	
Petitioner,)	
)	
vs.)	
)	
DAVID Y. IGE, Governor, State of Hawai‘i;)	
NOLAN P. ESPINDA, Director, State of)	
Hawai‘i Department of Public Safety;)	
EDMUND (FRED) K.B. HYUN, Chairperson,)	
Hawai‘i Paroling Authority;)	
)	
Respondents.)	
_____)	

**PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6)
AND/OR FOR WRIT OF MANDAMUS**

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ATTORNEYS FOR PETITIONER

**PETITION FOR EXTRAORDINARY WRIT
PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6)
AND/OR FOR WRIT OF MANDAMUS**

Petitioner STATE OF HAWAI‘I OFFICE OF THE PUBLIC DEFENDER (“Petitioner”), by and through counsel, hereby petitions this Honorable Court for an Order granting an Extraordinary Writ and/or a Writ of Mandamus, directing Respondents DAVID Y. IGE, Governor, State of Hawai‘i, NOLAN P. ESPINDA, Director, State of Hawai‘i Department of Public Safety (“PSD”), and EDMUND (FRED) HYUN, Chairperson, Hawai‘i Paroling Authority (“Respondents”), to take immediate steps to significantly reduce the population of its Correctional Centers and Correctional Facilities to prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities.

This Petition is made pursuant to §§ 602-4, 602-5(5), 602-5(6), and 602-5(3) of the Hawai‘i Revised Statutes (“HRS”); Rule 21 of the Hawai‘i Rules of Appellate Procedure (“HRAP”); the Eighth and Fourteenth Amendments to the U.S. Constitution; and article I, sections 5 and 12 to the Hawai‘i Constitution, and is supported by the Statement of Reasons herein.

I.

STATEMENT OF FACTS

A. COVID-19

On March 11, 2020, the World Health Organization declared a global COVID-19 pandemic.¹ Citing “deep[] concern[] both by the alarming levels of spread and severity, and by the alarming levels of inaction,” it called for countries to take “urgent and aggressive action.”²

¹ See World Health Organization, *WHO Director-General’s Opening Remarks* (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

As of March 26, 2020, the State of Hawai‘i has 106 confirmed cases of COVID-19, up nearly seven times from 16 cases just a week ago.³ The governor and all four county mayors have issued orders and rules dramatically restricting the activities of all residents, identifying COVID-19 as an imminent threat to the health and safety of the community, and requiring emergency protective actions.⁴ Since then, normal life has ceased. Businesses, restaurants, schools, government offices, and churches are closed. People who have control over their bodies are self-isolating to prevent contracting or spreading this deadly disease. And “[s]tate health

² *Id.*; see also Bill Chappell, *Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says*, NPR (March 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/COVID-19-covid-19-is-now-officially-a-pandemic-who-says>.

³ State of Hawai‘i Dep’t of Health, *Latest Cases in Hawai‘i*, Dep’t of Health (last accessed Mar. 26, 2020), <https://health.hawaii.gov/coronavirusdisease2019>; see also Star-Advertiser Staff, *Hawaii Confirmed Coronavirus Cases Rise To 106*, Honolulu Star-Advertiser (Mar. 26, 2020), <https://www.staradvertiser.com/2020/03/26/breaking-news/hawaii-confirmed-coronavirus-cases-rise-to-106>.

⁴ See, e.g., COVID-19 Emergency Proclamation, Office of the Governor, State of Hawai‘i (Mar. 4, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf; Supplementary Proclamation, Office of the Governor, State of Hawaii (Mar. 16, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003109-ATG_COVID-19-Supplementary-Proclamation-signed.pdf; Second Supplementary Proclamation, Office of the Governor, State of Hawaii (Mar. 21, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003152-ATG_Second-Supplementary-Proclamation-for-COVID-19-signed.pdf; Third Supplementary Proclamation, Office of the Governor, State of Hawaii (Mar. 23, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003162-ATG_Third-Supplementary-Proclamation-for-COVID-19-signed.pdf; Public Health Emergency Rules, Amended March 22, 2020, Office of the Mayor, County of Maui (Mar. 22, 2020), <https://www.mauicounty.gov/DocumentCenter/View/121462/Amended-2020-3-22-Mayors-Public-Health-Emergency-Rules>; Mayor’s Emergency Rule #5, Office of the Mayor, County of Kaua‘i (Mar. 24, 2020), http://www.kauai.gov/Portals/0/Civil_Defense/Emergency%20Proclamations/Mayor%27s%20Emergency%20Rule%20%235_20200324.pdf; Mayors COVID-19 Second Supplementary Emergency Proclamation, Office of the Mayor, County of Hawai‘i (Mar. 24, 2020), <http://records.hawaiicounty.gov/WebLink/PDF/pfhqbtbqdexu2nzhtx1gt2nn/77/Mayors%20COVID-19%20Second%20Supplementary%20Emergency%20Proclamation.pdf>.

officials are projecting the coronavirus will be a serious threat to Hawai‘i for up to five months with the peak of the outbreak yet to come.”⁵

COVID-19 can cause “severe respiratory illness, as well as damage to other major organs.⁶ Treating serious cases therefore “requires significant advanced support, including ventilator assistance for respiration and intensive care support.”⁷ For high-risk patients who survive, the effect of contracting this virus can be permanent and debilitating, and can include “profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity.”⁸

The numbers of people diagnosed reflect only a portion of those infected;⁹ very few people have been tested, and many are asymptomatic transmitters.¹⁰ Thousands of people are carrying a potentially fatal disease that is easily transmitted—and few are aware of it. The

⁵ Kristen Consillo, *State Health Officials Projecting The Effects of COVID-19 in Hawaii Could Last Months*, Honolulu Star-Advertiser (March 26, 2020), <https://www.staradvertiser.com/2020/03/26/hawaii-news/state-health-officials-projecting-the-effects-of-covid-19-in-hawaii-could-last-months>.

⁶ Declaration of Dr. Marc Stern, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), at ¶ 6, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

⁷ *Id.*

⁸ Declaration of Dr. Jonathan Louis Golob, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), at ¶ 4, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob>.

⁹ Melissa Healy, *True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say*, Los Angeles Times (Mar. 10, 2020), <https://www.msn.com/en-us/health/medical/true-number-of-us-COVID-19-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

¹⁰ Roni Caryn Rabin, *They Were Infected with the Coronavirus. They Never Showed Signs*, N.Y. Times (updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, *A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm*, Business Insider (Feb. 24, 2020), <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

current estimated incubation period is between 2 and 14 days.¹¹ Approximately 20% of people infected experience life-threatening complications requiring hospitalization, and between 1% and 3.4% die.¹²

Experts believe the virus spread through respiratory droplets or by touching a surface or object that has the virus on it.¹³ The virus is also estimated to last on surfaces for a period of a few hours to several days.¹⁴ Thus, infected people—who may be asymptomatic and not even know they are infected—can spread the disease even through indirect contact with others. Accordingly, officials and experts urge “social distancing”—isolating oneself from other people as much as possible.¹⁵ Other federally recommended precautions include frequent hand-washing, alcohol-based hand sanitizers, and frequent cleaning *and* disinfecting of any surfaces touched by any person.¹⁶

¹¹ Centers for Disease Control, *Symptoms of Coronavirus*, Centers for Disease Control (updated Mar. 20 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

¹² Brian Resnick and Christina Animashaun, *Why COVID-19 Is Worse Than The Flu, In One Chart*, Vox (Mar. 18, 2020), <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

¹³ Centers for Disease Control, *What You Need To Know About Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

¹⁴ World Health Organization, *Q&A on coronaviruses (COVID-19)* (last accessed March 26, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>

¹⁵ Rob Shikina, *Social Distancing Is Crucial, Ige Says*, Honolulu Star-Advertiser (Mar. 16, 2020), <https://www.staradvertiser.com/2020/03/16/hawaii-news/social-distancing-is-crucial-ige-says>; Stephanie Salmons, *DOH Emphasizes Social Distancing*, Hawaii Tribune-Herald (Mar. 20, 2020), <https://www.hawaiitribune-herald.com/2020/03/20/hawaii-news/doh-emphasizes-social-distancing>.

¹⁶ Centers for Disease Control, *How To Protect Yourself*, Centers for Disease Control (updated Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

COVID-19 is highly infectious. Both symptomatic and asymptomatic people can spread COVID-19,¹⁷ and scientists estimate that the average infected person then spreads the disease to between two and four others.¹⁸ Indeed, under certain conditions, a single person can infect hundreds more.¹⁹ Given this exponential spread, time is of the essence.

B. Coronavirus in Correctional Facilities Generally

During this pandemic, correctional facilities are at particularly high risk for the spread of COVID-19. This is due to several factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness.²⁰ Moreover, the

¹⁷ Centers for Disease Control, *How Coronavirus Spreads*, Centers for Disease Control (updated Mar. 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

¹⁸ See Jenny Gross and Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glossary*, N.Y. Times (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-terms-glossary.html>.

¹⁹ See, e.g., Marco Hernandez, Simon Scarr & Manas Sharma, *The Korean Clusters*, Reuters Graphics (Mar. 20, 2020), <https://graphics.reuters.com/CHINA-HEALTH-SOUTHKOREA-CLUSTERS/0100B5G33SB/index.html> (explaining how a single patient in South Korea potentially infected 1,160 people).

²⁰ See Josiah Rich, Scott Allen & Mavis Nimoh, *We Must Release Prisoners to Lessen the Spread of Coronavirus*, Wash. Post (Mar. 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>; The Justice Collaborative, *Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks* (Mar. 2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

ability of inmates to disinfect their own living area and to practice frequent hand hygiene may be affected by the fact that each inmate must purchase their own hygiene products.

In this respect, the Centers for Disease Control and Prevention (“CDC”) has explained:

Incarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced

There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members. Some settings, particularly jails and detention centers, have high turnover, admitting new entrants daily who may have been exposed to COVID-19 in the surrounding community or other regions. . . .

Options for medical isolation of COVID-19 cases are limited and vary depending on the type and size of facility, as well as the current level of available capacity, which is partly based on medical isolation needs for other conditions.

Adequate levels of custody and healthcare staffing must be maintained to ensure safe operation of the facility, and options to practice social distancing through work alternatives such as working from home or reduced/alternate schedules are limited for many staff roles. . . .

Incarcerated/detained persons and staff may have medical conditions that increase their risk of severe disease from COVID-19.

Because limited outside information is available to many incarcerated/detained persons, unease and misinformation regarding the potential for COVID-19 spread may be high, potentially creating security and morale challenges.

The ability of incarcerated/detained persons to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations. Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants.

Incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation.²¹

Given these concerns and realities, many state and local officials have recognized the need for drastic action to reduce the risk of a massive outbreak. Thirty-one elected prosecutors—including Justin Kollar from Kaua‘i—recently signed on to a letter calling for leaders in the criminal justice system “to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks” of COVID-19 in prisons.²² Similarly, the Chief Justice of the Montana Supreme Court recently urged judges to “review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”²³ The Chief Justice of the South Carolina Supreme Court ordered that everyone held on bond in a non-capital case be released, unless there exists an “unreasonable danger” or “extreme flight risk.”²⁴ And in New Jersey, after the Supreme Court ordered briefing and argument on why it should not order the immediate release of individuals serving county jail

²¹ Centers for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Mar. 23, 2019), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

²² Fair and Just Prosecution, *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody* (updated Mar. 25, 2020) [hereinafter Fair and Just Letter], <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

²³ Letter from Mike McGrath, Chief Justice of Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>.

²⁴ Memorandum from Donald W. Beatty, Chief Justice of the Supreme Court of South Carolina, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020), <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

sentences, the Attorney General and County Prosecutors agreed to create an immediate presumption of release for every person serving a county jail sentence in New Jersey.²⁵ Many other courts and other government officials have taken similar steps, recognizing that public safety means ensuring the public's health.²⁶

C. Coronavirus in Hawai'i Correctional Facilities

Even before COVID-19, public officials routinely acknowledged that Hawai'i correctional facilities were so overcrowded as to invite lawsuits alleging constitutional violations. Just three months ago, in a Star-Advertiser op-ed entitled "Dispelling Myths About Prison Overcrowding," State of Hawai'i Department of Public Safety Director Nolan P. Espinda wrote:

Unfortunately, the critical overcrowding situation must be addressed right now. Since the 1990s, Hawaii's prison and jail population has grown well beyond capacity, during which time no new facilities were added. We are forced to triple-bunk single cells, add beds to crowded dorms and convert spaces normally used

²⁵ See *In re Request to Commute or Suspend County Jail Sentences*, No. 084230, Consent Order (N.J., Mar. 22, 2020), https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf; *In re Request to Commute or Suspend Certain County Jail Sentences*, No. 084230, Order to Show Cause, (N.J., Mar. 20, 2020), <https://www.njcourts.gov/public/assets/COVIDproposedOTSC.pdf?c=Pkd>.

²⁶ For example, New York City jails released some vulnerable inmates. See BBC News, *US Jails Begin Releasing Prisoners to Stem Covid-19 Infections*, BBC News (Mar. 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802>. The Harris County District Court ordered the immediate release of people arrested and charged with certain non-violent state jail felony offenses. See *General Order Bond for Certain Offenses*, Harris Cty. Crim. Dist. Ct. Trial Div. (Mar. 21, 2020), <https://twitter.com/theappeal/status/1242135268179628033/photo/2>. The Chief Justice of the Ohio Supreme Court pressed for the release of vulnerable incarcerated individuals. See WLWT Digital Staff, *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges*, WLWT News (Mar. 19, 2020), <https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560>; see also Justin Carissimo, *1,700 Inmates Released from Los Angeles County in Response to Coronavirus Outbreak*, CBS News (Mar. 24, 2020), <https://www.cbsnews.com/news/inmates-released-los-angeles-county-coronavirus-response-2020-03-24>.

for rehabilitative programs to housing. Overcrowding and inefficient infrastructure create safety and security risks to staff, inmates and the public. If you have visited an incarcerated loved one or know someone working in our facilities, then you know how outdated and rundown the correctional facilities are.²⁷

Other sources, including many public officials, confirm the extent of the crisis:

- “For inmates at the Maui Community Correctional Center, it’s not unusual to be crammed four to a cell, leaving two to sleep on the floor while trying to keep their head away from the toilet. Guards at the Wailuku jail say many of the inmates spend about 19 hours a day like that, locked in 92-square-foot cells with little room to move around.”²⁸
- “We’re overcrowded, our facilities are old and they’re poorly designed [. . .] This is a problem that’s been pushed back for decades now [. . .] We’ve never really approached this issue in a real comprehensive way. We’ve made efforts, but they all got stalled. Nothing has been built for years.” — former PSD Director Ted Sakai.²⁹

²⁷ Nolan P. Espinda, *Dispelling Myths About Prison Overcrowding*, Honolulu Star-Advertiser (Jan. 21, 2020), <https://www.staradvertiser.com/2020/01/21/editorial/island-voices/dispelling-myths-about-prison-overcrowding>.

²⁸ Sophia Cocke, *Hawaii Leaders Have Done Little to Fix Overcrowding At Jails*, Honolulu Star-Advertiser (May 19, 2019), <https://www.staradvertiser.com/2019/05/19/hawaii-news/hawaii-leaders-have-done-little-to-fix-issues-with-jail-facilities-on-maui>.

²⁹ Nick Grube, *Prison Builders: Hawaii’s Billion Dollar Problem*, Honolulu Civil Beat (Mar. 11, 2014), <https://www.civilbeat.org/2014/03/21432-prison-builders-hawaiis-billion-dollar-problem>.

- “It’s no secret that all of our jails are grossly overcrowded and have been overcrowded for several years.” — PSD Public Information Officer Toni Schwartz.³⁰
- Asked to identify OCCC’s biggest problem, OCCC Chief of Security Denise Johnston answered “overcrowding,” which she remarked “has been an issue for her entire 31-year career at OCCC.”³¹

The Department of Public Safety has repeatedly and candidly acknowledged the dangers and realities of overcrowded correctional facilities, including in Newsletters and on its website:

PSD is committed to providing a safe, secure, healthy, humane, social, and physical environment for inmates and staff. However, aging and crowded facilities have limited PSD’s ability to provide such environments. In particular, the persistent and severe overcrowding exacerbates basic physical plant operations, contributes to tension among inmates, and diminishes program opportunities. Overall, all jail facilities are operating well above their operational capacities and combined with declining physical plants, undertaking improvements and upgrades are important PSD priorities.³²

PSD is proposing to alleviate the persistent and significant overcrowded conditions at the Kauai, Maui and Hawaii jails by developing a new inmate housing unit at each of the Kauai, Maui and Hawaii jails.³³

[At a neighborhood board meeting l]ed by PSD Director Nolan P. Espinda, information concerning the necessity of building a new OCCC was provided and

³⁰ Eileen Chao, *Maui’s Only Jail Severely Overcrowded*, Hawai‘i Public Radio (Aug. 10, 2015), <https://www.hawaiipublicradio.org/post/mauis-only-jail-severely-overcrowded#stream/0>.

³¹ Hawaii News Now, *OCCC Gets Help From Feds to Ease Overcrowding*, Hawaii News Now (Dec. 18, 2015), <https://www.hawaiinewsnow.com/story/30789983/occc-gets-help-from-feds-to-ease-overcrowding>.

³² Department of Public Safety, *Future of the Oahu Community Correctional Center Vol. 23* at 1 (Jul. 2019).

³³ Department of Public Safety, *Neighbor Island Jails Project* (last accessed Mar. 26, 2020), <https://dps.hawaii.gov/neighbor-island-jails-project/>.

why, because of physical plant deterioration, overcrowding, and lack of essential programs, replacement is crucial at this time.³⁴

OCCC is severely outdated and overcrowded and the possibility of federal oversight is always looming over us because of this.³⁵

And just this week, a correctional officer with 30 years of experience at OCCC stated that “the facility seems ill-equipped to handle the possibility that an inmate will be admitted with coronavirus, and the virus will quickly spread,” adding:

We’re all wondering why they wouldn’t prepare, because it’s going to happen,” the corrections officer said. “You can see (the infections) climbing every day. Why wouldn’t it climb here? We’re on the island. And the close quarters of jail is ridiculous. You’ve got three, four people in a cell that’s made for one, basically.³⁶

The most recent statistics confirm that Hawai‘i jails and prisons are overcrowded beyond capacity:

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³⁴ Department of Public Safety, *Future of the Oahu Community Correctional Center Vol. 22* at 2 (Dec. 2018), https://dps.hawaii.gov/wp-content/uploads/2018/12/Hawaii-OCCC_newsletter_Vol22.pdf.

³⁵ *Id.* at 2.

³⁶ Kevin Dayton, *Chief Justice Wants Jail Populations Reduced To Limit COVID-19 Infections*, Honolulu Star-Advertiser (Mar. 26, 2020), <https://www.staradvertiser.com/2020/03/26/hawaii-news/chief-justice-wants-jail-populations-reduced-to-limit-covid-19-infections>.

Table 1: Overcrowded Correctional Centers Owned and Operated by the State of Hawai‘i as of February 29, 2020

Location	Design Bed Capacity	Head Count	% Over-crowded	Sent. Felony	Sent. Fel. Prob.	Sent. Misd.	Pretrial Fel.	Pretrial Misd.	Other Juris.	Par. Viol.	Prb. Viol.
HCCC	206	408	198%	41	96	21	150	25	3	20	52
SNF	90	87	97%	87	0	0	0	0	0	0	0
HMSF	496	840	169%	267	6	30	14	0	0	523	0
KCCC	110	143	130%	33	36	13	43	9	1	2	6
KCF	200	161	81%	161	0	0	0	0	0	0	0
MCCC	209	450	215%	68	36	16	206	17	0	10	97
OSCC	628	1177	187%	85	15	10	394	259	2	0	412
WCCC	258	239	93%	171	4	1	2	0	0	58	3
WCF	294	194	66%	128	0	0	0	0	0	66	0
Red Rock CC	0	0	0%	0	0	0	0	0	0	0	0
Saguaro CC	N/A	1226	N/A	1155	0	0	0	0	0	71	0
Fed. Det. Ctr.	N/A	125	N/A	0	14	7	6	4	0	0	94
Total	2491	5050	148.49%*		207	98	815	314	6	750	664

Data obtained from Corrections Division, State of Hawai‘i Dep’t of Public Safety, “End of Month Population Reports – 02-29-2020,” (Feb. 29, 2020) [hereinafter *End of Month Report*], available at <https://dps.hawaii.gov/wp-content/uploads/2020/03/Pop-Reports-EOM-2020-02-29.pdf>.³⁷

*For in-state locations only

³⁷ People incarcerated in Arizona and other facilities not run by the Department of Public Safety are included in these figures, because those people are nonetheless under the supervision and care of said Department. In the past, Hawai‘i prisoners held at the Saguaro Correctional Center in Arizona have been infected with valley fever and CoreCivic (then Corrections Corporation of America) failed to reports such cases to the Department of Public Safety. See Rui Kaneya, *Arizona Prison Is Not Reporting Disease Cases To Health Agency*, Honolulu Civil Beat (Aug. 3, 2016), <https://www.civilbeat.org/2016/08/arizona-prison-is-not-reporting-disease-cases-to-health-agency>.

Overcrowding created significant health risks, even prior to the spread of COVID-19. According to a recent ACLU report, “overcrowding has taxed the aging plumbing and infrastructure of several of Hawai‘i’s correctional facilities, which has presented acute health risks for inmates required to sleep on the floor underneath or near leaking toilets.”³⁸ The report also stated, “Medical and mental health treatment in all of Hawai‘i’s correctional centers is inadequate, and inmates frequently find it impossible to receive treatment from a doctor or other licensed medical professional.”³⁹ In the report, the former Medical Director of the Department of Public Safety’s Health Division informed the ACLU that staffing shortages “translated into extremely poor quality of care for Hawai‘i’s inmates.”⁴⁰

On March 23, 2020, the Hawai‘i Correctional Systems Oversight Commission—the official body created to oversee the State’s correctional system and to establish maximum inmate population limits for each facility⁴¹—wrote a letter to Governor Ige summarizing its concerns that the Department of Public Safety would not be able to cope with a COVID-19 outbreak in correctional facilities as follows:

In our view, the Department of Public Safety will be unable by itself to effect any effective responses to this impending crisis. It has no control over who gets admitted into the facilities, and it has limited control over who can be released. Given the level of the current overcrowding, it cannot reduce the population to manageable levels even if it utilized its authority to release to its maximum extent. Therefore, we believe that if something is not done immediately, the correctional

³⁸ ACLU of Hawai‘i, *Complaint Against the State of Hawai‘i Concerning Unconstitutional Prison Conditions and Overcrowding*, at 11 (Jan. 6, 2017), available at <https://acluhawaii.files.wordpress.com/2017/01/acluhidojcomplaintprisonovercrowding.pdf>.

³⁹ *Id.* at 14.

⁴⁰ *Id.*

⁴¹ Act 179, Sess. Laws of Haw. of 2019.

system may soon be faced with a very serious crisis which will directly impact our community at large.⁴²

II.

STATEMENT OF JURISDICTION

This Petition seeks extraordinary relief under extraordinary circumstances. While the U.S. and Hawai'i Constitutions demand safe and sanitary conditions of confinement under normal circumstances, this petition respectfully requests this Honorable Court to exercise directly its fundamental judicial power,⁴³ its supervisory power over the judicial system,⁴⁴ and/or its mandamus power over respondent judges and public officials⁴⁵ to reduce the number of people who are now in Hawai'i jails and prisons to prevent massive and unnecessary harm and loss of life during this once-in-a-lifetime COVID-19 pandemic.

This Court has jurisdiction to provide the relief sought in this Petition, which includes taking necessary steps to avoid or mitigate impending catastrophe. The Court has broad powers to supervise the judicial system, including the power to both “make or issue any order or writ necessary or appropriate in aid of its jurisdiction,” HRS § 602-5(5), and “make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before

⁴² Hawai'i Correctional Systems Oversight Commission, March 23, 2020 Letter to Governor David Ige, available at <https://www.documentcloud.org/documents/6819160-Hawaii-Correctional-Systems-Oversight-Commission.html>.

⁴³ Haw. Const. Art. VI, § 1.

⁴⁴ Haw. Const. Art. VI, § 7; HRS § 602-4; HRS. § 602-5(5); HRS § 602-5(6).

⁴⁵ HRS § 602-5(3).

it.” HRS § 602-5(6). Separately, the Court “shall have the general superintendence of all courts of inferior jurisdiction.” HRS § 602-4. This Court has stated that “public safety is always an important consideration for any judicial determination” that “invoke[s] our supervisory power.” *State v. Moniz*, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987). This Court has also stated that exercise of such power is proper “where it ‘would not be in the public interest’ to compel the issue ‘to wend its way through the appellate process[.]’” *State v. Baxley*, 102 Hawai‘i 130, 141, 73 P.3d 668, 679 (2003) (quoting *State v. Fields*, 67 Haw. 268, 275-77, 686 P.2d 1379, 1386-87 (1984)). As explained below, the ongoing public emergency warrants the Court’s direct and immediate intervention here.

Separately, the Court may exercise its mandamus power over Respondent judges and public officials to effectuate the requested relief. Mandamus relief is proper where the petitioner demonstrates (1) a clear and indisputable right to relief; and (2) a lack of other means to adequately redress the alleged wrong or obtain the required action. *Kema v. Gaddis*, 91 Hawai‘i 200, 204, 982 P.2d 334, 338 (1999); *Barnett v. Broderick*, 84 Hawai‘i 109, 111, 929 P.2d 1359, 1361 (1996). No adequate means exist to redress the impending danger to public safety posed by the COVID-19 crisis. While some detainees and prisoners may have the ability to file individual motions seeking release, that would be inadequate here given the dramatic pace at which the crisis is unfolding, and the increased exposure that detainees and prisoners face with each passing day. Further, as explained below, both pretrial detainees and prisoners in Hawai‘i jails and prisons have an indisputable right to relief under both the U.S. and Hawai‘i Constitutions.

Accordingly, the Court has power to—and should—issue an extraordinary writ, a writ of mandamus, or both, here.

III.

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

This Petition presents the following issue:

Whether present detention and incarceration practices for people currently detained or incarcerated in Hawai'i jails and prisons during the ongoing COVID-19 crisis raise serious due process concerns under the Eighth and Fourteenth Amendments to the U.S. Constitution, and article I, sections 5 and 12 of the Hawai'i Constitution, justifying immediate extraordinary relief.

To mitigate the harm that the COVID-19 pandemic will inflict upon people incarcerated and detained in prison and jail, correctional staff, and the people of Hawai'i, Petitioner respectfully requests the following relief:

1. Appoint a special master⁴⁶ with full authority to reduce the population of its Correctional Centers and Correctional Facilities to allow for the social separation and other measures recommended by the CDC to prevent the spread of COVID-19, including by taking the following actions:
 - a. At a minimum, reduce the population of its Correctional Centers and Correctional Facilities to their design capacity within 10 days.
 - b. Release, with or without conditions, the following categories of individuals currently held pretrial or sentenced to a period of incarceration of one year or less:
 - i. individuals held on unaffordable bail;

⁴⁶ The special master should (1) ensure that the appropriate agencies consult and coordinate with the Office of the Public Defender; (2) report to this Court every 48 hours on progress, including the numbers of individuals released; and (3) report immediately to this Court any recalcitrant or unreasonable conduct by any state official in light of the exigent circumstances.

- ii. individuals who are at increased risk of serious illness from COVID-19, including but not limited to individuals who meet the CDC’s high-risk criteria⁴⁷;
 - iii. individuals charged with but not convicted of a misdemeanor or lesser offense or offenses; and
 - iv. individuals sentenced to a term of imprisonment of one year or less, including individuals who have been convicted of, or pled guilty to, a felony offense or offenses and has been sentenced to probation with a term of incarceration of one year or less.
- c. Release, with or without conditions, all individuals who were sentenced to probation (including those in the HOPE⁴⁸ probation program) and are incarcerated solely for a technical violation of the probation rules.
- d. Release, with or without conditions, the following categories of individuals serving sentences of incarceration of one year or more:

⁴⁷ Other high-risk individuals that should be considered for release include: (1) individuals aged 55 years and older; (2) individuals with chronic lung disease or moderate to severe asthma; (3) individual who have serious heart conditions; (4) individuals who are immunocompromised due to cancer treatment, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications; and (5) individuals of any age with severe obesity (body mass index [BMI] ≥ 40) or underlying medical conditions, particularly if not well controlled, such as diabetes, renal failure, or liver disease.).

⁴⁸ “HOPE” is an acronym for “Hawai‘i’s Opportunity Probation with Enforcement,” a high-intensity supervision program to reduce probation violations by drug offenders and others at high risk of recidivism. Probationers in HOPE Probation receive swift, predictable and immediate sanctions —typically resulting in several days in jail -- for each detected violation. *See* https://www.courts.state.hi.us/special_projects/hope/about_hope_probation.

- i. individuals who are at increased risk of serious illness from COVID 19, including but not limited to individuals who meet the CDC high risk criteria;
 - ii. individuals whose most serious offense is a class C felony, robbery in the second degree, theft in the first degree, a class B offense against property, or a class B drug offense;
 - iii. individuals who have one year or less on their maximum term of imprisonment;
 - iv. individuals who are incarcerated as a result of a finding of a violation of parole that does not include the allegation of a new criminal offense;
 - v. individuals who meet the Department of Public Safety's medical release criteria, COR.11.1G.11; and
 - vi. any other individual for whom a release is appropriate.⁴⁹
2. Order the Department of Public Safety to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in all Community Correctional Centers and Correctional Facilities.
3. Order District, Family and Circuit Courts to consider the serious health risk posed by detention to the defendant, other incarcerated individuals, and the community in bail determination hearings, probation and parole revocation hearings, and sentencing.
4. Order District, Family and Circuit Courts to vacate all bench warrants, and cease the issuance of new bench warrants for failing to appear.

⁴⁹ Any inmate, who does not wish—based on safety, health, or housing concerns—to be released from detention, would not be released without further instructions from the special master.

5. Order District, Family and Circuit Courts to suspend all probation or pretrial conditions—including drug testing, employment requirements, and housing requirements—whose adherence would require the individual to violate the CDC’s physical distancing instructions.

These requests for relief seek dramatic changes in the way our courts, correctional facilities, and other public agencies operate. The key goals of all our requests are, first, to reduce the population of our correctional facilities to allow individuals in our facilities at least a chance to pursue the social distancing any hygiene measures urgently recommended by public health experts; and second, to reduce the chance of a catastrophic and uncontrollable outbreak of COVID-19 in a correctional facility that could spread to the general public. At a minimum, the population in our facilities should be reduced as soon as practicable to the numbers for which those facilities were originally designed—for example, reducing the population at Oahu Community Correctional Center from 1177 to 628. The real and immediate threat to public health that flows from continued incarceration of these individuals far outweighs any possible threat to public safety that would flow from release.

IV.

STATEMENT OF REASONS FOR ISSUING THE WRIT

- A. **PRESENT DETENTION AND INCARCERATION PRACTICES FOR PEOPLE CURRENTLY DETAINED OR INCARCERATED IN HAWAI‘I JAILS AND PRISONS DURING THE ONGOING COVID-19 PANDEMIC RAISE SERIOUS DUE PROCESS CONCERNS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 5 AND 12 OF THE HAWAI‘I CONSTITUTION, JUSTIFYING IMMEDIATE EXTRAORDINARY RELIEF.**

Both pretrial detainees and people sentenced to a term in prison have a right to a sanitary and safe detention environment. For the 2,501 people sentenced to prison or jail in Hawai‘i and

the 1,414 people whose parole or probation was revoked,⁵⁰ the Eighth Amendment and article I, section 12 of the Hawai‘i Constitution impose on the government an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment[.]

DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989). Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet come to pass. Thus, the government cannot “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). For example, inmates cannot be commingled with others having infectious maladies such as hepatitis and venereal disease. *Hutto v. Finney*, 437 U.S. 678, 682 (1978); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). An Eighth Amendment violation is established even though the plaintiff cannot yet “prove that he is currently suffering serious medical problems caused by” the exposure. *Helling*, 509 U.S. at 32. Here, absent dramatic action by this Court and the government, 3,750 people are at high risk of contracting COVID-19 in the event of an outbreak by being held in overcrowded conditions in violation of their Eighth Amendment rights. *See Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981) (conditions of confinement must be analyzed in context, and courts must “consider the effect of each condition in the context of the

⁵⁰ *See End of Month Report*.

prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions.”); *Brown v Plata*, 563 U.S. 493, 131 S.Ct. 1910, 179 L.Ed.2d (2011) (upholding order from a three-judge panel requiring California to reduce its prison population to remedy unconstitutional conditions regarding mental health and medical care).

The Due Process Clause of the Fourteenth Amendment and article I, section 5 of the Hawai‘i Constitution provide at least as much protection to the 1,129 pretrial detainees (which include 314 people held pretrial for misdemeanors).⁵¹ The “right to personal security constitutes a ‘historic liberty interest’ protected by the Due Process Clause.” *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (a person’s involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the person’s safe confinement). That “right is not extinguished by lawful confinement, even for penal purposes.” *Id.*

While the Eighth Amendment prohibits punishment that is “cruel and unusual,” the Fourteenth Amendment’s due process protections do not allow “punishment” at all. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”); *Gordon v. Maesaka-Hirata*, 143 Hawai‘i 335, 348, 431 P.3d 708, 721 (2018). The due process rights of a pretrial detainee “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).⁵² If placing an inmate in a situation creating an elevated risk of potentially lethal

⁵¹ *Id.*

⁵² *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070-73 (9th Cir. 2016) (*en banc*) (holding that objective deliberate indifference standard applies to detainee’s failure-to-protect claim under Fourteenth Amendment) (citing *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015) (suggesting that pretrial detainees need not satisfy deliberate indifference standard and holding that in excessive

infection constitutes “cruel and unusual punishment” in violation of the Eighth Amendment, as was found in *Hutto* and *Gates*, placing a pretrial detainee in a situation presenting a serious risk of lethal infection is certainly unconstitutional in violation of the Fourteenth Amendment.⁵³

force claim brought by pretrial detainee, detainee need not prove deliberate indifference; objective evidence that governmental action was not rationally related to a legitimate governmental objective (or that it is excessive in relation to that objective) is sufficient)).

⁵³ In addition, a significant number of people in Hawai‘i are being detained on cash bail they cannot afford in violation of their constitutional rights. An order requiring an unattainable financial condition of release is a *de facto* order of pretrial detention that violates procedural due process and improperly circumvents the procedures laid out in HRS § 804-3. See *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam) (“[O]nce a court finds itself in this situation—insisting on terms in a “release” order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order”); *ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018) (holding that Defendants’ practices result in the “absolute deprivation of [indigent misdemeanor arrestees’] most basic liberty interests—freedom from incarceration”); *United States v. Leisure*, 710 F.2d 422, 415 (8th Cir. 1983) (“[T]he amount of bail should not be used as an indirect, but effective, method of ensuring continued custody.”); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (“Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”). Any order of pretrial detention that is not narrowly tailored to advance a compelling government interest violates substantive due process, because the right to pretrial liberty is fundamental. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (“Supreme Court decisions . . . have confirmed that” *United States v. Salerno*, 481 U.S. 739 (1987), which evaluated the right to pretrial liberty, “involved a fundamental liberty interest and applied heightened scrutiny. . . .” (citing *Reno v. Flores*, 507 U.S. at 301)). And such *de facto* wealth-based detention orders also violates procedural due process and equal protection principles. *Bearden v. Georgia*, 461 U.S. 660, 671(1983); see also *Buffin v. City and Cty. of San Francisco*, 2019 WL 1017537, at *16 (N.D. Cal. Mar. 4, 2019) (applying strict scrutiny and finding constitutional violation where arrestees who could afford bail released 12.8 hours faster on average than those who could not). These principles apply under “normal circumstances,” and so the *de facto* wealth-based detention many people in Hawai‘i are currently subjected to most certainly violates these same protections during a public health crisis where the individual interest at issue is not only liberty but also life and bodily integrity. See, e.g., *ODonnell*, 892 F.3d at 161 (holding unequal treatment of wealthy and poor in pretrial wealth-based detention is unconstitutional); *Brangan*, 80 N.E. 3d at 964-65 (finding that, when financial conditions of release will likely result in an individual’s pretrial detention, the judge must provide “findings of fact and a statement of reasons for the bail decision,” including consideration of the individual’s financial resources, “explain how the bail amount was calculated,” and state why “the defendant’s risk of flight is so great that no alternative, less

Here, absent immediate action by this Court and the government, 1,129 pretrial detainees are also presently at high risk of contracting COVID-19 by being held in overcrowded conditions of confinement in violation of their due process rights.

Detention and imprisonment during the pandemic not only deprive individuals of their freedom, but also puts them at serious risk of loss of life or permanent injury. These significant risks, not accounted for in sentencing or determinations of pretrial detention, implicate substantive and procedural due process rights that demand coordinated, immediate, and comprehensive action by the government. Such action should be guided by both public safety and public health considerations,⁵⁴ including the correctional facilities' inability to adequately prepare, respond, and operate in the event of a COVID-19 outbreak due to limited resources and the overcrowded conditions in jails and prisons.⁵⁵ Given the stakes and the significant risks posed by COVID-19 to the 5,050 people held in jail and prison by the State of Hawai'i, it is clear that significant action to prevent massive and unnecessary harm and loss of life is both necessary and appropriate.

V.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner STATE OF HAWAI'I OFFICE OF THE PUBLIC DEFENDER respectfully requests that this Court grant the instant Petition and immediately issue an Extraordinary Writ and/or Writ of Mandamus ordering

restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings"); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018).

⁵⁴ See, e.g., Centers for Disease Control, *Interim Guidance*, *supra* note 20.

⁵⁵ See ACLU of Hawai'i, *Complaint*, *supra* note 37.

Respondents to take immediate steps to significantly reduce the population of its Correctional Centers and Correctional Facilities to prevent the massive loss of life and harm that the spread of COVID-19 would cause in such facilities.

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Respectfully submitted,

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