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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RIZZA JANE GUANAO AGANAN, *et al.*, Petitioners-Plaintiffs, v. ORLANDO RODRIGUEZ, *et al.*, Respondents-Defendants.	Case No. 2:20-cv-5922 (ES) **NOTICE OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE***

PLEASE TAKE NOTICE that Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash Shah (hereinafter, "*Amici*") hereby move for leave to participate in the above captioned matter as *amici curiae* by filing a brief (submitted herewith) and, if the Court should wish it, presenting oral argument with regard to Plaintiffs-Petitioners' pending Motion for Preliminary Injunction in the above-captioned matter.

PLEASE TAKE FURTHER NOTICE that in support of this Motion, prospective *Amici* rely upon their Brief in Support their Motion for Leave to Participate and the certification of Lawrence S. Lustberg, Esq., both filed herewith.

Respectfully submitted,

Date: June 15, 2020

s/ Lawrence S. Lustberg
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RIZZA JANE GUANAO AGANAN, *et al.*, Petitioners-Plaintiffs, v. ORLANDO RODRIGUEZ, *et al.*, Respondents-Defendants.	Case No. 2:20-cv-5922 (ES)

BRIEF OF MOUNT SINAI HUMAN RIGHTS PROGRAM, STEERING COMMITTEE FOR THE NYLPI'S MEDICAL PROVIDERS NETWORK, WHITE COATS FOR BLACK LIVES, AND INDIVIDUAL HEALTH CARE PROFESSIONALS IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

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Proposed *Amici Curiae* Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, and individual health care professionals, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash Shah (hereinafter, "*Amici*") respectfully move this Court for leave to participate as *amici curiae* and submit a brief, filed herewith, in support of Petitioners-Plaintiffs' Motion for Preliminary Injunction. Petitioners-Plaintiffs consent to *Amici*'s Motion for Leave to Participate and Respondents-Defendants, with whom the undersigned counsel have been in contact, take no position on it. Certification of Lawrence S. Lustberg ("Lustberg Cert.," filed herewith) ¶ 3. For the reasons set forth below, namely that (1) as medical professionals committed to stemming the progression of the ongoing Covid-19 pandemic, *Amici* have a 'special interest' in this particular case; (2) their interest is not fully represented; (3) the proffered information is timely and useful; and (4) *Amici* are not partial to a particular outcome in the case, *see Dwelling Place Network v. Murphy*, No. CV 20-6281, 2020 WL 3056305, at *1 (D.N.J. June 9, 2020), this Court should grant *Amici*'s motion.

I. *AMICI* AND THEIR BRIEF

Amici seek leave to file the attached *amicus* brief in order to assist the Court as it considers Petitioners-Plaintiffs' pending Motion for Preliminary Injunction. Specifically, *Amici* wish to provide additional information and analysis that addresses whether granting preliminary relief in this matter is in the public interest. *See, e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 115 (3d Cir. 2018) (reciting four-factor standard for obtaining a preliminary injunction, including "whether granting relief would serve the public interest").

To that end, *Amici*'s brief provides the Court with information on the impact that additional Covid-19 cases in the Elizabeth Detention Center ("EDC"), where the Petitioners-Plaintiffs and the class they seek to represent are or were detained, would have on local health systems and the public health. While the public discourse around the Covid-19 pandemic has often centered on the ability of hospitals to treat large numbers of people infected with the disease, *Amici* seek to shine a light on additional effects that the pandemic has had on the provision of medical care in New Jersey and the nation, including a documented decrease in patients seeking emergency medical care, and in organ transplant surgeries, preventative cancer screenings, pediatric vaccinations, and primary care visits during the pandemic. *Amici* argue that, the longer the pandemic persists—and along with it, the public's fear of contracting Covid-19 in health care facilities—the more these effects will compound, causing long-term damage to our health care system and the public health.

Amici are three organizations made up of health care professionals and nine individual physicians and have the relevant expertise and experience necessary to elucidate these issues for the Court. Specifically:

Proposed *Amicus Curiae* Mount Sinai Human Rights Program (MSHRP) seeks to advance health, dignity, and justice by providing pro-bono, trauma-informed clinical and social services, including medical assessments and mental health evaluations, to U.S. asylum seekers in the New York metropolitan area who are survivors of torture and human rights abuses. The program also aims to inspire and educate healthcare professionals, students, and the broader community about the protection and advocacy of health and human rights. MSHRP clinicians frequently work with asylum seekers who are detained. MSHRP firmly believes that health within detention centers and correctional facilities is public health and recognizes that protecting the health of detainees and of

those who work for these facilities is vital to protecting the greater community's health.

Proposed *Amicus Curiae* Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network (MPN) represents a volunteer network of more than 125 health care professionals, including doctors, medical residents, nurse practitioners, and mental health care providers, who use their expertise to support immigrants in detention, including by advocating for improvements to their medical care and conducting in-person medical interviews and consultations in support of their efforts to be released from detention. The MPN volunteers include specialists in internal medicine, family medicine, obstetrics and gynecology, and mental health, among other areas, many of whom maintain practices at medical centers in the New York metropolitan area. Many of MPN's volunteers have treated Covid-19 patients during the pandemic or otherwise seen their practices impacted by the pandemic's effects; the Steering Committee, therefore, has a strong interest in informing this Court about the pandemic's impact on health both inside and outside of detention centers, as the two are inextricably linked.

Proposed *Amicus Curiae* White Coats For Black Lives (WC4BL) is a national nonprofit organization of medical students and doctors founded in 2015. WC4BL is dedicated to dismantling racism in medicine and promoting the health, well-being, and self-determination of people of color. It has dozens of chapters around the country, in addition to members who are completing medical residencies across the country as well. WC4BL regularly participates in advocacy activities aimed at drawing attention to and ending systemic racism in and out of healthcare institutions, including producing an annual Racial Justice Report Card in an effort to hold academic medical institutions accountable on specific metrics related to racism. WC4BL resident members have been on the frontlines of the pandemic, caring for Covid-19 patients in emergency and intensive care settings. As an organization of future and practicing doctors, WC4BL has an interest

in informing this Court about the public health consequences of the pandemic, which has had a disproportionate impact on Black communities and other communities of color.

The proposed individual *Amici*, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash Shah, are all active physicians with various specialties, including infectious diseases, internal medicine, organ transplant surgery, family medicine, and emergency medicine. In addition to his or her typical practice, each physician has experience treating Covid-19 patients, researching the disease, clinically evaluating immigrants detained by Immigration and Customs Enforcement, or a combination thereof. As a result of the Covid-19 pandemic, many of the individual *Amici* have treated or are treating Covid-19 patients, including in New Jersey and the New York metropolitan area, and have experienced disruption of their regular medical practices. The individual *Amici* also include a physician, Dr. Martin Blaser, who has been awarded grant funding to study the disease and another, Dr. Aakash Shah, who diagnosed the first case of the disease in a New Jersey correctional facility. Each of the *Amici* recognizes the devastating impact that the Covid-19 impact has had on medical patients—including those who are infected with Covid-19 and those who are not—as well as the broader health of New Jersey's, and the nation's, communities. Each, therefore, is committed to stopping or, short of that formidable goal, slowing the ongoing transmission of the disease and preventing future outbreaks.

II. DISTRICT COURTS' AUTHORITY TO ACCEPT AMICUS BRIEFS

There is no rule or statute that prescribes a standard for participation as *amicus curiae* in this Court, in either civil or criminal matters, and so this and other Courts commonly look to Federal Rule of Appellate Procedure 29 for guidance in this regard. *See Dwelling Place Network v. Murphy*, No. CV 20-6281, 2020 WL 3056305, at *1 (D.N.J. June 9, 2020); *United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002). "Courts thus consider the following factors in

deciding whether to grant *amicus* status: whether (1) the *amicus curiae* has a 'special interest' in the particular case; (2) the *amicus curiae*'s interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) the petitioner is not partial to a particular outcome in the case." *Dwelling Place Network*, 2020 WL 3056305, at *1 (internal quotation omitted); *accord Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). *Amici* respectfully submit that each factor weighs in favor of granting their motion for leave to participate, for the reasons set forth below.

a. *Amici have a special interest in this case that is not fully represented by the parties.*

Amici's collective interest in this litigation is to inform the Court about the wide-ranging public health consequences of the pandemic, including those that have to-date received less attention in the public discourse, which has been understandably dominated by short-term, immediate concerns that hospitals would lack sufficient capacity and resources to treat the first waves of Covid-19 patients around the country. Given their experience as medical professionals, or organizations of medical professionals, practicing during Covid-19 pandemic, the *Amici* have a special interest in this case and their collective medical experience make them particularly able to both understand and explain the broad impact of the pandemic on the public health and the effect that failing to mitigate future cases, including in immigration detention centers such as the EDC, will have on New Jersey and the nation's communities. As *Amici*'s brief explains, this impact goes beyond infection rates and deaths attributed directly to the disease, and includes a documented decrease in patients seeking emergency medical care, and in organ transplant surgeries, preventative cancer screenings, pediatric vaccinations, and primary care visits. As medical professionals, *Amici* have a special interest in making their voices heard with respect to actions that will mitigate this impact.

Amici's interest in this case is not adequately addressed by the parties in this case, focused as they are on the conditions in EDC, jurisdictional issues, and the merits of Petitioners-Plaintiffs' claims. The *Amici*'s participation is particularly appropriate because their brief presents broader arguments about the public health effects of the pandemic, and therefore about the public interest prong of the preliminary injunction standard, than those presented by the parties. *See* Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J. App. Prac. & Process 279, 281 (1999) (*amicus* participation is especially appropriate where the prospective *amicus* has "particular expertise" or "argue points deemed too far-reaching for emphasis by a party.").

b. *Amici's participation as the Court considers Petitioners-Plaintiffs' Motion for Preliminary Injunction is both timely and useful.*

While there is no applicable timing provision, *Amici*'s proffered brief, filed concurrently with this motion for leave to participate, is timely and useful. *Amici* are submitting their brief on the day that the Petitioners-Plaintiffs' Reply Brief in Support of their Motion for a Preliminary Injunction is due and, therefore, their participation will not unduly delay the Court's ability to rule on the pending preliminary injunction motion, particularly as Petitioners-Plaintiffs consent to *Amici*'s Motion for Leave to Participate and Respondents-Defendants take no position on it. Lustberg Cert. ¶ 3. The information proffered in *Amici*'s brief is useful to the Court because it squarely addresses the public interest prong of the preliminary injunction and seeks to summarize for the Court the broad impact of the pandemic on the provision of health care and the public health, a topic which has, in large part, been relegated to the sidelines of the discussion of how to combat the pandemic's most urgent effects, such as large numbers of Covid-19 hospitalizations and deaths.

c. *As medical professionals during a global pandemic, Amici's foremost interest in and reason for participating in this case is to advance and protect the public health.*

"While the partiality of an *amicus* is a factor to be considered by a court in deciding whether to allow participation, there is no rule that *amici* must be totally disinterested." *Granillo v. FCA US LLC*, No. 16-cv-153, 2018 WL 4676057, at *8 (D.N.J. Sept. 28, 2018). *See also Alkaabi*, 223 F. Supp. 2d at 592 ("[T]here is no rule that amici must be totally disinterested."); *Dwelling Place Network*, 2020 WL 305630, at *3. Indeed the Third Circuit has made clear that any requirement of impartiality "became outdated long ago." *Neonatology Associates*, 293 F.3d at 131. *Amici* write in support of Petitioners-Plaintiffs' request for preliminary relief because they believe that such relief is essential to mitigating the spread of Covid-19 and its negative impact on the public health. While *Amici* are, in that sense, interested in the outcome of the pending Motion for Preliminary Injunction, their interest in participating as *amici curiae* is, at bottom, advancing and protecting the public health.

III. CONCLUSION

For these reasons, *Amici*'s motion to participate should be granted. *See United States v. Bayer Corp.*, No. 07-cv-00001, 2014 WL 12625934, at *1 ("District Courts may permit third parties to appear in court as *amicus curiae* where they 'can contribute to the court's understanding of the' issues being presented to the court." (quoting *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987))); *Commonwealth of the N. Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) ("The filing of an *amicus* brief should be permitted if it will assist the judge 'by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" (quoting *Voices for Choices v. Illinois Bell telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003))).

Respectfully submitted,

Dated: June 15, 2020

s/ Lawrence S. Lustberg
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RIZZA JANE GUANAO AGANAN, *et al.*, Petitioners-Plaintiffs, v. ORLANDO RODRIGUEZ, *et al.*, Respondents-Defendants.	Case No. 2:20-cv-5922 (ES) **CERTIFICATION OF LAWRENCE S. LUSTBERG, ESQ.**

I, Lawrence S. Lustberg, Esq., of full age, hereby certify:

1. I am an attorney-at-law of the States of New Jersey and New York and Director of the John J. Gibbons Fellowship in Public Interest and Constitutional Law and Co-Chair of the Commercial & Criminal Litigation Department at Gibbons P.C., attorneys for proposed *Amici Curiae* Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, and individual health care professionals, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash Shah (hereinafter, "*Amici*"). I respectfully submit this certification in

support of *Amici's* Motion for Leave to Participate as *Amici Curiae* in the above captioned matter.

2. The proposed *amicus* brief filed with this motion was not written in whole or in part by counsel for any party. No counsel, party, or person has made a monetary contribution to the preparation and submission of this brief.

3. Petitioners-Plaintiffs have consented to the filing of this proposed *amicus* brief and Respondents-Defendants have indicated that they take no position on *Amici*'s request to participate in this matter.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: June 15, 2020

s/ Lawrence S. Lustberg
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RIZZA JANE GUANAO AGANAN, *et al.*,

Petitioners-Plaintiffs,

v.

ORLANDO RODRIGUEZ, *et al.*,

Respondents-Defendants.

Case No. 2:20-cv-5922 (ES)

Brief of *Amici Curiae* Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, and Individual Health Care Professionals

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By: Lawrence S. Lustberg, Esq.
Jessica L. Hunter, Esq.

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INTEREST OF *AMICI*

Amici curiae are Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, and individual health care professionals, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash Shah.

Amicus Curiae **Mount Sinai Human Rights Program (MSHRP)** seeks to advance health, dignity, and justice by providing pro-bono, trauma-informed clinical and social services, including medical assessments and mental health evaluations, to U.S. asylum seekers in the New York metropolitan area who are survivors of torture and human rights abuses. The program also aims to inspire and educate healthcare professionals, students, and the broader community about the protection and advocacy of health and human rights. MSHRP clinicians frequently work with asylum seekers who are detained. To this end, MSHRP recognizes that asylum seekers and other immigrants confined in detention centers during the COVID-19 pandemic face significant challenges to their health and human rights. MSHRP firmly believes that health within detention centers and correctional facilities *is* public health and recognizes that protecting the health of detainees and of those who work for these facilities is vital to protecting the greater community's health.

Amicus Curiae **Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network (MPN)** represents a volunteer network of more than 125 health care professionals, including doctors, medical residents, nurse practitioners, and mental health care providers, who use their expertise to support immigrants in detention, including by advocating for improvements to their medical care and conducting in-person medical interviews and consultations in support of their efforts to be released from detention. The MPN volunteers include specialists in internal medicine, family medicine, obstetrics and gynecology, and mental

health, among other areas, many of whom maintain practices at medical centers in the New York metropolitan area. Many of MPN's volunteers have treated Covid-19 patients during the pandemic or otherwise seen their practices impacted by the pandemic's effects; the Steering Committee, therefore, has a strong interest in informing this Court about the pandemic's impact on health both inside and outside of detention centers, as the two are inextricably linked.

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The individual health care professional *amici* are active physicians who have expertise in the public health issues implicated in this case and who are deeply concerned about the public health consequences of the ongoing Covid-19 pandemic. Specifically:*

* Institutional affiliations are provided for identification purposes only; the position of the individual *amici* are not necessarily those of any institutions with which they are professionally affiliated.

Amicus Curiae **Dr. Martin J. Blaser** graduated from New York University School of Medicine and subsequently trained in Internal Medicine and Infectious Diseases at the University of Colorado. He is a member of the National Academy of Medicine and the American Academy of Arts and Sciences, a past president of the Infectious Diseases Society of America, and winner of the Robert Koch Gold Medal, an international award for excellence in Infectious Disease research. During the Covid-19 pandemic, Dr. Blaser has cared for patients sickened with the illness and is working to develop standardized diagnostic testing criteria for the disease at Robert Wood Johnson University Hospital. He is also conducting research on the disease through grants from the National Institute of Allergy and Infectious Diseases and National Science Foundation.

Amicus Curiae **Dr. Simone Blaser** graduated from New York University School of Medicine. She is now an internist working in several hospitals in metropolitan New York. During the height of the Covid surge, she spent six weeks in intensive units at three hospitals caring for the most critically ill of Covid patients.

Amicus Curiae **Dr. Yaniv Fenig** graduated from the Sackler School of Medicine at the University of Tel Aviv in Israel and completed his residency in General Surgery at Monmouth Medical Center in Long Branch, New Jersey. He is currently an abdominal transplant surgery fellow at a major transplant center in the New York metropolitan area and is a candidate member of the American Society of Transplant Surgeons. Since the beginning of the pandemic, Dr. Fenig's transplant center has been one of few centers in the tristate area to continue performing transplants, giving him a unique perspective on the resulting challenges for transplant candidates, recipients, and providers. Additionally, during April 2020, Dr. Fenig completed a brief deployment at a Covid-19 emergency room in Queens, New York; he also regularly treats patients infected with Covid-19.

Amicus Curiae **Dr. Kim Strong Griswold** graduated from the Jacobs School of Medicine and Biomedical Sciences at the State University of New York at Buffalo (UB) and completed her residency at Buffalo General Hospital. She also received a Masters of Public Health from the Yale School of Public Health and a nursing degree from the Upstate Medical Center School of Nursing at the State University of New York at Syracuse. She is a board-certified physician in family medicine and was until 2019 the medical director of UB's Family Medicine at BestSelf Behavioral Health, an integrated primary care-psychiatric clinic in Buffalo, NY. In addition to her practice, Dr. Griswold also serves as a Professor of Family Medicine, Psychiatry and Public Health and the Health Professions at UB's Jacobs School of Medicine. At UB, Dr. Griswold is a faculty liaison for refugee communities at the University's Center for Global Health Equity, and the faculty leader of the Human Rights Initiative at UB, which serves the medical and legal needs of asylum seekers and refugees in Western New York, including detainees at the Batavia Detention Center. Dr. Griswold has lectured extensively domestically and internationally and is the North American representative to the World Organization of Family Doctors' Working Party on Mental Health.

Amicus Curiae **Dr. Laura Krinsky** graduated from the Icahn School of Medicine at Mount Sinai. She completed a family medicine residency at the Swedish Cherry Hill Family Medicine Residency in Seattle, Washington and is a board-certified physician in family medicine. Dr. Krinsky currently practices in community health centers and at Swedish Medical Center in Washington State, where she cares for a diverse and largely indigent population, including many refugees, immigrants, and people who have experienced incarceration. Dr. Krinsky also currently treats patients exposed to and suffering from Covid-19 infection and has knowledge regarding the epidemiology of the pandemic and its ability to spread rapidly through institutional settings.

Amicus Curiae **Dr. Susan Lerner** graduated from the University of Pennsylvania School of Medicine. After completing her residency in general surgery at the Hospital of the University of Pennsylvania, Dr. Lerner completed an abdominal transplant fellowship at the University of California Los Angeles Medical Center. She is currently a transplant surgeon at a major transplant center in the New York metropolitan area and is an associate professor of surgery and medical education. During the pandemic, Dr. Lerner has treated hospitalized patients with and without Covid-19 and has watched many patients die from Covid-19, in addition to seeing her patients on the organ transplant waiting list die from exposure in the community.

Amicus Curiae **Dr. Steven McDonald** graduated from the Columbia University College of Physicians and Surgeons and completed his residency in emergency medicine at Bellevue Hospital/New York University. He currently serves as Assistant Professor of Medicine at Columbia University in the emergency department and has treated hundreds of Covid-19 patients, from the healthiest to the sickest. Dr. McDonald firmly believes that the Covid-19 pandemic is a public health crisis that must be stemmed through every mechanism humanly available.

Amicus Curiae **Dr. Stephanie Mischell** graduated from Rutgers Robert Wood Johnson Medical School and recently completed her residency at Montefiore Medical Center in the Bronx, New York, where she worked on a Covid-19 floor beginning in March 2020. She is now a family medicine fellow at Rutgers Robert Wood Johnson Medical School.

Amicus Curiae **Dr. Aakash Shah** graduated from Harvard Medical School and completed his residency in emergency medicine at Rutgers Robert Wood Johnson University Hospital. He is currently an emergency room doctor in northern New Jersey, where he has treated hundreds of Covid-19 patients and observed a substantial decrease in the number of non-Covid patients presenting for emergency care. He was involved in the care of the first diagnosed cases of Covid-

19 in the state and diagnosed the first case of Covid-19 within a correctional facility (an ICE detainee) in the state. Dr. Shah is also the Medical Director of both Substance Use Disorder Program Development and the Hospital-Based Violence Intervention Program at his hospital, as well as the Clinical Director of New Jersey Reentry Corporation, where he works on initiatives to better meet the healthcare needs of the justice-involved population. An expert in health policy, Dr. Shah has advised numerous state and federal lawmakers, including working on responses to the Covid-19 pandemic. Dr. Shah holds a master of business administration and a master of science in social policy, earned at Oxford University as Rhodes Scholar, and is the author of several peer-reviewed publications, op-eds, and policy reports.

Amici's collective interest in this litigation is to inform the Court about the wide-ranging public health consequences of the pandemic, including those that have to-date received less attention in the public discourse, which has been understandably dominated by short-term, immediate concerns that hospitals would lack sufficient capacity and resources to treat the first waves of Covid-19 patients around the country. Accordingly, *Amici* submit this brief with a motion for leave to file, which is incorporated by reference as if fully set forth herein.

SUMMARY OF ARGUMENT

In just a few short months, the Covid-19 pandemic has had an enormous impact on public health; while there is much that scientists, medical professionals, and public health experts do not yet know about the disease and the pandemic's ripple effects, it is undeniable that Covid-19 will continue to grip our world well into the future. The first wave of coronavirus cases and deaths has crested in New Jersey, but, given the unfathomable amounts of suffering and death already experienced and lack of knowledge about the future course of the pandemic—including Covid-19's seasonality, the robustness of any post-infection immunity, and the efficacy and safety of

current vaccine candidates—it is imperative that action be taken now in order to prevent future cases from occurring. Such action can eliminate additional suffering and avoid putting pressure on hospital capacity to treat future patients whose infections were unable to prevented. Preventing additional cases will also limit the impact of the pandemic's downstream public health consequences, such as a documented decline in both emergency and non-emergency medical care domestically and internationally.

Given the demonstrated presence of Covid-19 in correctional facilities and other detention settings and the likelihood for future spread in those locations, ICE's continued detention of civil immigration detainees in the Elizabeth Detention Center ("EDC"), which has already seen 19 confirmed cases in detainees and at least 17 in employees, including one employee death, poses a real and concrete threat to the public health in New Jersey. But it also presents an opportunity to disrupt the disease's march through the state: by granting the relief the Plaintiff class requests, this Court can prevent future Covid-19 cases, to the long-term advantage of its communities. *Amici* respectfully submit that granting preliminary relief in this case will limit the far-reaching and deleterious health effects of the Covid-19 pandemic to the benefit of the public health, and that the public interest prong of the preliminary injunction standard is therefore overwhelming met.

ARGUMENT

I. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Covid-19 pandemic has created an unprecedented public health crisis in the United States and in New Jersey in particular. As of June 15, New Jersey has suffered 12,659 of the more than 115,000 known Covid-19 deaths in the United States.[1] The state has also seen 166,881 lab-

[1] *Tracking The Pandemic: How Quickly Is The Coronavirus Spreading State by State*, NPR.org, https://n.pr/2MyBUuY (last accessed June 15, 2020) (hereinafter, "NPR Tracking").

confirmed cases of the disease,[2] though, due to a lack of comprehensive testing, particularly early in the crisis, all of these figures are likely undercounts.[3] In terms of both (1) absolute numbers of deaths and cases and (2) the rates of deaths and cases per capita, New Jersey is the second hardest-hit state in the nation, after neighboring New York.[4] Nearly three months after Governor Murphy's stay-at-home order went into effect on March 21, 2020, it goes practically without saying that the pandemic has altered daily life in ways that were incomprehensible even a few short days before that order was issued. Instead of welcoming spring and looking forward to school graduations, family weddings, or summer vacations, New Jerseyans found themselves relegated to their homes, as their schools, workplaces, and neighborhood stores and restaurants shuttered in an attempt to slow the spread of the virus. By staying home, New Jerseyans also gave hospitals time to build capacity to treat the thousands of New Jerseyans seriously sickened with Covid-19: in addition to the staggering death toll, there have been thousands of hospitalizations in New Jersey, with a peak of 8,000 people hospitalized at once in mid-April.[5]

The first wave of the pandemic has now crested in New Jersey, but the virus continues to spread in other parts of the country[6] and the risk of continuing transmission and future outbreaks in New Jersey remains. Though New Jersey and other states are in the process of a phased "reopening" of businesses that closed and services that were reduced earlier this year, there is still

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[2] *Id.*
[3] *See, e.g.*, Riley Yates, *N.J. coronavirus deaths could be undercounted by nearly 25%, new data suggests*, NJ.com, May 9, 2020, https://bit.ly/2MCKnxa.
[4] NPR Tracking, *supra* n.1.
[5] *New Jersey COVID-19 Dashboard: Hospital Capacity Census*, New Jersey Department of Health, https://bit.ly/37bZasd (last accessed June 15, 2020).
[6] *See, e.g.*, Samantha Pell, *et al.*, *Coronavirus hospitalizations rise sharply in several states following Memorial Day*, Washington Post, June 9, 2020, https://wapo.st/3dRHLYr; Joel Achenback, *et al.*, *Amid reopenings and street protests, coronavirus transmission remains high in much of the U.S.*, Washington Post, June 5, 2020, https://wapo.st/2Y3E2jK.

no vaccine, cure, or widely available treatment.[7] Meanwhile, widespread protests after the death of George Floyd have brought together large numbers of people, despite social distancing guidelines; though these protests appropriately draw attention to racism and police brutality, public health officials have expressed concerns that they may be "seeding event[s]" for future coronavirus transmission.[8] Effects of warmer weather on transmission of the novel coronavirus are not well understood, though statistical modeling suggests that the summer weather may not bring relief in New York City, particularly as social distancing wanes among a weary public.[9] And Robert Redfield, director of the Centers for Disease Control ("CDC"), has warned that "[t]here's a possibility that the assault of the virus on our nation next winter will actually be even more difficult than the one we just went through," as a result of the onset of "the flu epidemic and the coronavirus epidemic at the same time[.]"[10] Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, has likewise warned that it is "inevitable that the coronavirus will return next season. . . . When it does, how we handle it[] will determine our fate."[11]

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[7] The nation's stockpile of the Ebola drug Remdesivir, which received emergency use authorization from the Food and Drug Administration for treating Covid-19, was donated to the federal government by the pharmaceutical company that manufactures it, and is distributed "to hospitals based on determinations of need." Hal Dardick, *More positive results for antiviral drug remdesivir in battle against COVID-19*, Chicago Tribune, June 2, 2020, https://bit.ly/3dFH2tl; *see also* Brent Johnson, *Feds to send N.J. 4,400 vials of remdesivir, a drug to treat coronavirus*, NJ.com, May 9, 2020, https://bit.ly/2zZqNbX; Press Release, U.S. Health & Human Servs., *HHS announces shipments of donated remdesivir for hospitalized patients with COVID-19* (May 9, 2020), https://bit.ly/378NUg9.

[8] *See, e.g.*, Berkeley Lovelace Jr., *CDC warns George Floyd protests may be 'seeding event' for more coronavirus outbreaks*, CNBC.com, June 4, 2020, https://cnb.cx/3f1wIw2.

[9] Ran Xu, *et al.*, *The Modest Impact of Weather and Air Pollution on COVID-19 Transmission*, Preprint, Ver. 3 at 9, May 23, 2020, https://bit.ly/2BAHWJe ("[I]n New York City, . . . the impact of weather may . . . requir[e] significant social distancing policies to enable containment regardless of weather.").

[10] Lena H. Sun, *CDC director warns second wave of coronavirus is likely to be even more devastating*, Washington Post, Apr. 21, 2020, https://wapo.st/377vzQF.

[11] J. Edward Moreno, *Fauci: Second wave of coronavirus 'inevitable'*, The Hill, April 29, 2020, https://bit.ly/37a5tN6.

Indeed, it is not only what is done during the next large wave of Covid-19 cases, but the steps that are taken now and each day going forward that will determine the future health of New Jersey's, and the nation's, communities. When so much about the future contours of this pandemic—including whether it can be prevented or treated with vaccines and therapeutics or the length of any period of post-infection immunity—is unknown, it is essential that steps be taken now in order to limit the pandemic's damage later. For this reason, one of the six guiding principles in Governor Murphy's "Road Back" plan for re-opening the state is "resilience in New Jersey's health care system," a metric designed to account for the continued threat of a resurgence of Covid-19 cases.[12] There remains much to be done to shore up and expand the health care system's ability to meet future Covid-19 threats—for example, in his June 1, 2020 daily press conference, Governor Murphy cautioned that "we still today don't have enough PPE [personal protective equipment] as a state."[13] Thus, one of the best ways to support the health care system as it recovers from the first wave of cases and prepares for the next is to seize opportunities to further flatten, and keep flat, the epidemiological curve of this disease.

Because prisons and other detention settings are a known site of amplification for infectious disease in general and for Covid-19 in particular for the reasons detailed by Plaintiffs and their experts, *see, e.g.*, Petitioner-Pls.' Mem. of Law in Supp. of Mot. for TRO and/or Preliminary Inj., ECF No. 11-1 at 10-15 ("Pls. TRO Br."), EDC presents a prime opportunity to intervene now, not only for the immediate health benefits to the detainees and staff at that facility, but also for New Jersey's overall public health going forward. While the rate of new Covid-19 cases in New Jersey

[12] Press Release, Office of the New Jersey Governor (May 18, 2020), *Governor Murphy Unveils Multi-Stage Approach to Execute a Responsible and Strategic Restart of New Jersey's Economy*, https://bit.ly/3e0ABkB.

[13] *Governor Phil Murphy holds a coronavirus briefing in Trenton on June 1, 2020*, Youtube.com (June 1, 2020), https://youtu.be/GwR1KXUtNXI?t=3910.

is decreasing overall, it continues to grow in the state's correctional facilities: as of June 3, 2020, the case rate among the prison population in New Jersey was 113 per 1,000 inmates,[14] but by June 12, the case rate had increased to 137 per 1000.[15] Indeed the rate of known infections among prisoners in New Jersey is 630% greater than the rate for New Jersey overall.[16] In recognition of the continued risk of infection in Elizabeth Detention Center and the urgency of mitigating that risk, the plaintiff class has applied to this Court for relief in the form of release from custody or, in the alternative, bail hearings. The class's motion for a preliminary injunction is now pending.

A preliminary injunction should issue in this case because enjoining Defendants from continuing to detain the plaintiff class will not only protect the class members' health and lives in the face of a deadly pandemic, but will also benefit the public health overall in New Jersey. As Plaintiffs acknowledge, *see* Pls. Mot. for TRO at 18 (ECF No. 11-1), the party seeking a preliminary injunction bears the burden of demonstrating that it is warranted. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). Plaintiffs must, as a threshold matter, establish that they are (1) likely to succeed on the merits of their claims, and (2) likely to suffer irreparable harm in the absence of preliminary relief. *See, e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 115 (3d Cir. 2018). "If these two threshold showings are made," as *Amici* submit they are here for the reasons explained in Plaintiffs' briefing, Pls.' TRO Br. at 19-34, the court then considers "(3) whether an injunction would harm the defendants more than denying relief would harm the [Plaintiffs] and (4) whether granting relief would serve

[14] Erin McCauley, *COVID Case Watch June 3, 2020*, The COVID Prison Project, June 4, 2020, https://covidprisonproject.com/blog/.
[15] *Data by System: New Jersey*, The COVID Prison Project, https://bit.ly/2YD2Lfb (last updated June 12, 2020 and last accessed June 15, 2020).
[16] *A State-by-State Look at Coronavirus in Prisons: New Jersey*, The Marshall Project, https://bit.ly/2YuNYD4 (last accessed June 15, 2020).

the public interest," *id*. (original alteration omitted), and determines "if all four factors, taken together, balance in favor of granting the requested preliminary relief," *Reilly*, 858 F.3d at 179.

The public health benefits of granting relief here, as *Amici* describe below, fundamentally alter the Court's preliminary injunction inquiry, bearing, as they do, on the critical fourth factor of the public interest. While "it is always in the public interest to prevent the violation of a party's constitutional rights," *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994), the public health benefits to be gained from preventing the spread of Covid-19 in EDC provide further reason to grant preliminary relief. Effects on public health are appropriate considerations in the preliminary injunction context. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) ("[T]he public interest in this case lies with safeguarding public health rather than with assuaging [the state]'s budgetary woes."); *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754, 766 (9th Cir. 2004) (weighing public health concerns when deciding a motion for preliminary injunction); *Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 739 (M.D. Tenn. 2012) (same); *Saladworks, Inc. v. Ho No*, No. 05-CV-1928, 2005 WL 1417096, at *7 (E.D. Pa. June 15, 2005) (considering the "threat to public health" in deciding a motion for preliminary injunction); *Syntex (U.S.A.), Inc. v. Interpharm, Inc.*, No. 92-CV-03 (HTW), 1993 WL 643372, at *7 (N.D. Ga. Mar. 19, 1993) ("Given the threat to public health, a balancing of the equities decidedly tips in favor of plaintiffs."); *see also Brown v. Plata*, 563 U.S. 493 (2011) (considering medical and mental health care when ruling on request for injunctive relief). Indeed, as the Third Circuit has made clear, the strength of the claim necessary to prevail on motion for preliminary relief "depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Reilly*, 858 F.3d at 179. Given the sweeping scope of this pandemic,

the amount of harm to the public health that a preliminary injunction in this case could prevent is too great to be discounted.

Specifically, granting relief in this case is in the public interest because it will stop current and future spread of Covid-19 in EDC. And preventing these additional Covid-19 cases will safeguard and advance public health in the state by (1) reducing the burden of Covid-19 cases shouldered by New Jersey's hospital system and specifically preventing hospitals from exceeding their capacity of Intensive Care Unit bed and life support equipment; and (2) allowing the provision of the full spectrum of medical services, from primary care to acute and emergent care, to be maintained at as close to their pre-pandemic operational levels as possible. The pandemic has forced society to confront life and death stakes on a massive scale, and the damage to health, to communities, and to our way of living is growing each day; this Court is certainly empowered to mitigate that damage. *See United States v. First Nat. City Bank*, 379 U.S. 378, 383 (1965) ("Courts of equity may, and frequently do, go much farther both to give . . . relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."). For the reasons set forth below—chiefly, that the relief requested here will advance the public health in New Jersey during a deadly pandemic—*Amici* respectfully submit that a preliminary injunction is in the public interest and should be granted.

A. Preventing Further Covid-19 Cases in EDC will Advance the Public Health in a State Hard Hit by the Coronavirus Pandemic by Reducing Future Strain on New Jersey Hospitals.

It is undisputed that EDC has already been profoundly affected by Covid-19: 19 detainees, 17 EDC employees,[17] and two ICE employees[18] have tested positive for the disease as of June 12,

[17] Declaration of Warden Orlando Rodriguez, dated June 8, 2020 ("Rodriguez Decl."), ¶¶ 55, 67-68 (ECF No. 43-5).

[18] ICE Guidance on COVID-19, https://www.ice.gov/coronavirus (last updated and last accessed June 12, 2020). *Amici* note that ICE reports eighteen confirmed cases in detainees, in contrast to

2020; one employee subsequently died.[19] However, given the known potential for asymptomatic, pre-symptomatic, and paucisymptomatic,[20] but still contagious, cases and the lack of comprehensive testing both in the facility and for ICE detainees more generally, these cases likely do not represent the full extent of EDC's outbreak. Indeed, a forthcoming analysis by the Vera Institute of Justice suggests that "ICE is severely underreporting the prevalence of COVID-19 in detention," and that the number of cases among people in detention has not yet peaked.[21] The Vera Institute's conclusions appear to comport with the results of a University of British Columbia and Brown University analysis modeling the transmission of Covid-19 in 111 ICE detention facilities around the country. That analysis predicts that in a facility of 100 people, about the current population size of EDC,[22] 80 detainees will have become infected with the coronavirus by 90 days after a first initial outbreak of five cases, even under the most optimistic scenario modeled; under the most pessimistic, 95 detainees will have become infected by that time.[23]

Of course, social distancing is "extremely challenging" in a detention setting like EDC; moreover, half of all incarcerated persons in the United States have at least one chronic disease, a factor which increases the risk of poor outcomes from Covid-19 infections.[24] It follows inexorably

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the nineteen cases reported in the Rodriguez Declaration submitted by Respondents. Additionally, ICE reports two cases in ICE employees, while the Rodriguez Declaration appears to reference only one, *see* Rodriguez Decl. ¶ 54.

[19] Rodriguez Decl. ¶ 55.

[20] "Paucisymptomatic" cases are those that present few symptoms.

[21] Nina Siulc, *Vera's New Prevalence Model Suggests COVID-19 is Spreading through ICE Detention at Much Higher Rates than Publicized*, Think Justice Blog, Vera Institute of Justice, June 4, 2020, https://bit.ly/2zinA6O.

[22] Rodriguez Decl. ¶ 18.

[23] Michael Irvine, *et al.*, *Modeling COVID-19 and impacts on U.S. Immigration and Enforcement (ICE) detention facilities, 2020*, J. of Urban Health (2020), https://doi.org/10.1007/s11524-020-00441-x (hereinafter, "Irvine Analysis").

[24] Matthew J. Akiyama, *et al.*, *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, 382 New England J. of Med. 2075, May 28, 2020, https://bit.ly/2UDmidY; *see*

from these foundational facts that further cases are likely to occur in the facility and may have devastating health consequences, including death, for the members of the Plaintiff class, as the plaintiffs and their experts have explained. Some members of the plaintiff class who develop severe cases of Covid-19 will inevitably require hospitalization in area hospitals, including nearby Trinitas Regional Medical Center, with which EDC reports having an "agreement."[25] And even moderate Covid-19 disease can result in a prolonged illness which requires expensive hospital resources, supplemental oxygen support, intravenous fluids, antibiotics, the care of emergency medicine physicians, intensivists, and respiratory therapists. Moreover, because EDC has no infirmary, Pls.' Amended Verified Pet. for Writ of Habeas Corpus and Compl. for Declaratory or Inj. Relief, ECF No. 34, ¶ 14; *see also* Declaration of Captain Abelardo Montalvo, M.D., dated April 27, 2020 ("Montalvo Decl."), ¶ 15 (ECF No. 24-1), it will likely be unable to provide sufficient levels of supportive care and monitoring for moderate cases of the disease. Nor will the walls of EDC keep the virus contained: just as it was necessarily introduced to the facility's vulnerable population by an infected person or persons entering it, so too will the virus inevitably find ways to leave the facility, including through those who work, and may become infected there. As it has been said, "the boundaries between communities and correctional institutions are porous."[26]

also Laura Hawks, *et al*., *COVID-19 in Prisons and Jails in the United States*, JAMA Internal Medicine, April 28, 2020, https://bit.ly/2AYakVq.

[25] Rodriguez Decl. ¶ 71. EDC also reports having such an agreement with University of Medicine and Dentistry of New Jersey (UMDNJ), *id*., but UMDNJ was dissolved in 2013 pursuant to the New Jersey Medical and Health Sciences Restructuring Act, N.J.S.A. 18A:64M-1, *et seq*.

[26] Akiyama, *supra* n.24; *see also* Written Statement of Dr. Scott Allen, *Examining Best Practices for Incarceration and Detention During COVID-19*, before the Senate Committee on the Judiciary, June 2, 2020, https://bit.ly/2Yc51cR at 2 (hereinafter, "Allen Statement").

Decreasing the number of hospitalizations arising out of EDC is, then, an important piece of both maintaining and advancing the progress that New Jersey has made in beating back this disease; as the former chief medical officer of New York City's jail system, Dr. Homer Venters, has noted, allowing coronavirus to take hold in detention settings "will dramatically increase the epidemic curve, not flatten it."[27] New Jersey can ill-afford such an outcome: as of June 1, 2020, New Jersey had more hospitalized Covid-19 patients on a per capita basis than any other state.[28] The public health and medical consensus on the importance of detention facilities to the battle against the pandemic is also clear; as Scott A. Allen, MD, FACP, a correctional health expert, medical school professor, and contractor with the Department of Homeland Security, recently wrote in a written statement to the U.S. Senate Judiciary Committee, "[c]orrectional health *is* public health, and failure to control outbreaks in detention, jails, and prisons will critically handicap our efforts to contain the spread of the virus in our communities."[29] According to Dr. Allen, "the silent spreading of this virus from these facilities to their surrounding communities" has already "likely resulted in many community infections and deaths."[30] Thus, reducing or eliminating new Covid-19 cases arising out of facilities like EDC is important to ensuring that hospitals (1) avoid an onslaught of additional Covid-19 cases and can provide the highest levels of care to the Covid patients they do have, and (2) are able to safely resume as close to their pre-pandemic operational levels as possible, to the benefit of the health of non-Covid-19 patients.

[27] Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times, March 16, 2020, https://nyti.ms/3ffjVGr.
[28] Murphy press conference, *supra* n.13 at https://youtu.be/GwR1KXUtNXI?t=1235.
[29] Allen Statement at 1, *supra* n.26.
[30] *Id*. at 1-2.

B. Additional Covid-19 Cases at EDC have the Potential to Impact the Provision of Non-Covid Medical Care—Already Depressed by the Pandemic—to the Detriment of the Public Health.

As of the evening of March 27, 2020, Governor Murphy suspended all elective surgeries and invasive procedures in New Jersey in order to "limit[] exposure of healthcare providers, patients, and staff to Covid-19," to "conserv[e] critical resources such as ventilators, respirators, anesthesia machines, and [PPE]," and to "preserve [the state's] health care system's capacity to treat those who require emergency or intensive care."[31] While a phased reopening of elective surgeries and invasive procedures began in New Jersey in late May, albeit under strict requirements for the protection of patients and hospital staff, this two-month pause in procedures that, by definition, could be put-off without "undue risk" to the patient, only scratches the surface of the true scope of the medical care that has been and is being delayed or avoided as a result the pandemic, and ignores the long-term health consequences of that loss of care. Governments and health care providers have been rightly focused on ensuring that no critical patient who presents at a hospital—Covid patient or otherwise—dies due to the lack of sufficient hospital resources, but, as a result, many of the secondary public health effects of the pandemic have been relegated to the sidelines of the public conversation. The reality remains, however, that the amount of non-Covid medical care sought and received, even for persons suffering emergencies such as heart attacks or strokes, has dropped off at startling rates: according to the Census Bureau, more than 90 million Americans have delayed medical care as a result of the pandemic.[32]

We are only just beginning to understand, investigate, and quantify the care that was delayed or avoided thus far as a result of the pandemic, and the full scope of any long-term damage

[31] Exec. Order No. 109 (2020), New Jersey Office of the Governor, https://bit.ly/2Udyz8X.
[32] *U.S. Cases Rise 1.5%; Americans Defer Medical Care: Virus Update*, Bloomberg News, May 21, 2020, https://bloom.bg/2UGqidG; *see also Household Pulse Survey: Delayed Medical Care*, United States Census Bureau, https://bit.ly/3h1jK37.

to our collective public health is unknowable at this stage. But what we do know is cause for serious concern: (1) patients are delaying or avoiding seeking emergency or time-sensitive treatment; (2) other specialties, such as primary care, have seen a drop in appointments and services provided, to the potential detriment of the long-term health of patients; and (3) future access to health care has been placed in jeopardy by the financial distress the pandemic has placed on hospitals and primary care systems. The longer the pandemic goes on, fueled in part by outbreaks in settings like EDC, the longer these secondary phenomena will continue and the greater the damage to the public health they will cause.

1. Emergency care and other time sensitive care

An analysis of excess deaths—that is, the number of deaths beyond those that would normally be expected to occur during that time of the year—in New York and New Jersey from March 15 through May 2, 2020 reflects about 44,000 more fatalities during that period than would be expected absent the pandemic. But only 68% of those excess deaths were specifically attributed to Covid-19; 15% of the excess deaths in these states were attributed to heart disease and diabetes, 5% to the flu and other respiratory disease, and 1% to Alzheimer's disease. [33] In New Jersey in particular, there were 800 excess deaths attributed to heart disease, 200 excess deaths attributed to diabetes, and 200 excess deaths attributed to Alzheimer's during this time period.[34] While some of the excess deaths from non-Covid-19 causes surely signals an undercount in the true number of fatal Covid-19 infections—for example, New Jersey had 400 excess deaths attributed to the flu and pneumonia during this time period—some portion of the excess deaths figures likely represent deaths that were not caused by Covid-19 complications, but were nonetheless indirectly linked to

[33] Denise Lu, *There Has Been an Increase in Other Causes of Deaths, Not Just Coronavirus*, N.Y. Times, June 1, 2020, https://nyti.ms/376COYY.
[34] *Id.*

the pandemic, such as those of persons who failed to seek emergency care for fear of contracting the coronavirus while obtaining treatment.[35] According to the medical literature, "[f]ear is a well-known determinant of medical care avoidance, which, in turn, has been associated with a high toll in terms of health outcomes as well as financial costs."[36] Indeed, hospital avoidance has been reported in past epidemics, and has been "associated with misconceptions regarding disease severity and modes of transmission."[37] It therefore comes as no surprise that, in a time where Covid-19—and the lack of firm guidance about its transmissibility and risks—has dominated our public discourse, people would avoid seeking even urgently-needed care, and that they would suffer negative health outcomes as a result.

The possibility that New Jersey has suffered excess deaths due to fear of coronavirus infection is supported by the observations of medical providers in the state. For example, Dr. Shereef Elnahal, former Commissioner of the New Jersey Department of Health and the current president and chief executive of University Hospital in Newark, reported "239 on-scene death pronouncements [at University Hospital] in April, a fourfold increase from April 2019."[38] According to Dr. Elnahal, "[f]ewer than half of those additional deaths could be attributed directly to Covid-19."[39] University Hospital's emergency department has further reported a 37% drop in heart attack and stroke cases, a trend also seen in other hospitals around the state.[40] Indeed, the

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[35] *Id*.
[36] Francesco Moroni, *et al., Collateral Damage: Medical Care Avoidance Behavior Among Patients with Myocardial Infarction During the COVID-19 Pandemic*, J. of the Am. Coll. Of Cardiology: Case Reports, April 23, 2020, https://bit.ly/37gAHSv (hereinafter, "Moroni Case Report").
[37] *Id*.
[38] Katie Hafner, *Fear of Covid-19 Leads Other Patients to Decline Critical Treatment*, N.Y. Times, May 25, 2020, https://nyti.ms/2Y98dWL.
[39] *Id*.
[40] Spencer Kent, *"Where are these patients?' Heart attack, stroke victims and kids vanish from N.J. ERs*, NJ.com, Apr. 28, 2020, https://bit.ly/3h6hoQC.

New Jersey Hospital Association has reported that overall hospital admissions during the pandemic have been down 20 to 40%, raising concerns over, in the words of Cathleen Bennett, the organization's president and chief executive officer, "a second victim" of the pandemic—that is, victims "from non-COVID conditions that they put off seeking care for," who subsequently "reach[ed] a crisis point."[41]

The experience in New Jersey is corroborated by observations and studies both nationally and globally. For example, an analysis of nine high patient-volume cardiac catheterization laboratories in the United States showed a 38% reduction in the number of catheterization lab activations for ST-segment elevation myocardial infarction, or "STEMI", patients during March 2020, as compared to the prior 14 months, a result similar to a 40% reduction documented in Spain.[42,43] (STEMI refers to a particular type of heart attack that carries a substantial risk of death and disability and requires quick intervention.[44]) According to the study's authors, "[p]otential etiologies for the decrease in . . . activations include avoidance of medical care due to social

[41] Jon Hurdle, *Fear of COVID-19 Infection Is Keeping Many Other Patients Away from Hospitals, Officials Say*, NJSpotlight.com, May 4, 2020, https://bit.ly/2Y7BHnP.

[42] Santiago Garcia, *et al.*, *Reduction in ST-Segment Elevation Cardiac Catheterization Laboratory Activations in the United States During COVID-19 Pandemic*, 75 J. of the Am. Coll. of Cardiology 2871, https://bit.ly/37cjJVh (hereinafter "Garcia Analysis"); *see also* Oriol Rodriguez-Leor, *et al.*, *ST-Segment Elevation Myocardial Infarction Care During COVID-19*, J. of the Am. Coll. Of Cardiology: Case Reports, May 27, 2020, https://bit.ly/2z9IYLp (hereinafter, "Rodriguez-Leor Case Report").

[43] The decrease in catheterization laboratory volume has also impacted fellowship training in the field of interventional cardiology in the New York metropolitan area, with 95% of fellows who responded to a survey on the topic expressing concern that the pandemic will have either a moderate or severe adverse impact on their training. Tanush Gupta, *et al.*, *Impact of the COVID - 19 pandemic on interventional cardiology fellowship training in the New York metropolitan area: A perspective from the United States epicenter*, Catheterization and Cardiovascular Interventions (2020), https://bit.ly/3cJnlPO.

[44] *STEMI*, American Heart and Stroke Encyclopedia, American Heart Association, https://bit.ly/2UlWIdB.

distancing or concerns of contracting COVID-19 in the hospital,"[45] a hypothesis supported by an Italian case study in which patients experiencing clear heart attack symptoms delayed seeking emergency care for several days out of fear of exposure to Covid-19, to the point where they suffered serious complications, including death.[46] A global survey has also shown that hospital admissions for stroke and transient ischemic attack have been down a median of 50 to 70%; the president-elect of the World Stroke Organization has opined that "the most likely explanation [for this reduction in admissions] is that patients with mild symptoms are ignoring them and do not want to come to the hospital for evaluation because of fear of being exposed to COVID-19."[47]

Resource challenges and fear-based deterrence have also negatively impacted organ donation nationally and in the New Jersey and New York region. Joseph Roth, president and chief executive officer of New Jersey Organ and Tissue Sharing Network, reported that organ donations were down "about 65%" in the state in April, compared to 60% nationally.[48] Earlier in the pandemic, six out of seven hospitals in the state with transplant centers lacked capacity to operate them.[49] As of June 10, 2020, 537 fewer transplants have been performed in the Northeast region of the country, which includes New Jersey, than as of the same time last year.[50] Organs from infected or potentially infected donors have been discarded,[51] and transplant specialists around the nation have witnessed patients turn down organs out of fear of contracting Covid-19 while

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[45] Garcia Analysis, *supra* n.42.
[46] Moroni Case Report, *supra* n.36.
[47] *The Global Impact of COVID-19 on Stroke – Survey Report from Prof. Marc Fischer, WSO President-Elect*, World Stroke Organization, May 4, 2020, https://bit.ly/2ByrtVV.
[48] Joanna Gagis, *Organ donations in NJ down 65% in April*, NJTVonline.org, Apr. 29, 2020, https://bit.ly/2XF6No3.
[49] *Id*.
[50] *Year-to-date transplants in the northeastern US*, United Network for Organ Sharing, https://unos.org/covid/ (last accessed June 12, 2020).
[51] Denise Grady, *The Pandemic's Hidden Victims: Sick or Dying, but Not From the Virus*, N.Y. Times, Apr. 20, 2020, https://nyti.ms/3cHn1Bh.

hospitalized.[52] Because organ donations from deceased donors are time-sensitive procedures, the effects of the pandemic on organ transplantation have exacerbated the shortage of available organs for the more than 110,000 people in the United States currently awaiting organ transplants.[53] And that has certainly resulted in additional deaths: even prior to the pandemic, 7,600 people in the United States die annually while awaiting a transplant.[54]

2. Non-emergency care and primary care

The health care system has also seen a decline in non-emergency medical care sought during the course of the pandemic. This decrease in care, whether due to patient fears about contracting Covid-19, the re-directing of medical resources towards fighting Covid-19, or a general embracing of social distancing and stay-at-home efforts, will also have negative public health consequences as time goes on. While some of this drop-off in care may have been necessary on a short-term basis in order to stem the tide of Covid-19 cases, the longer the pandemic has a deterrent effect on would-be patients, the more likely there will be negative health outcomes in the future. For example, important cancer screenings have been put off during the pandemic: in March, breast and cervical cancer screenings dropped by 94% and colon cancer screenings by 86%.[55] While delaying tumor detection for a few weeks or months does not absolutely assure a worse outcome for any particular cancer patient, if these trends persist and the delays grow longer, decreases in cancer screenings "will likely reflect in a surge in late-stage cancer cases, and delay

[52] Hafner, *supra* n.38.
[53] *Organ Procurement and Transplantation Network: Data*, U.S. Dep't of Health & Human Services, https://optn.transplant.hrsa.gov/data/ (last accessed June 10, 2020); *Steep Decline in Organ Transplants Amid COVID-19 Outbreak*, Penn Medicine, May 11, 2020, https://bit.ly/2AORgIZ.
[54] Alexandre Loupy, *et al.*, *Organ procurement and transplantation during the COVID-19 pandemic*, 395 The Lancet E95 (2020), https://bit.ly/3haFdXj.
[55] *Preventive Cancer Screenings during COVID-19 Pandemic*, Epic Health Research Network, May 1, 2020, https://bit.ly/3cGXyI1.

of care for many patients," according to Dr. Arturo Loaiza-Bonilla, a medical oncologist at the Cancer Treatment Centers of America in Philadelphia.[56] Pediatric vaccination rates have also dropped during the pandemic: according to data and analysis from the CDC, doctors in the Vaccines for Children program, which provides federally purchased vaccines to approximately 50% of children in the United States, ordered about 2.5 million fewer doses of routine pediatric vaccines compared to the same period last year.[57] The data also showed a corresponding decline in administration of measles-containing vaccine doses, particularly to children greater than two years old.[58] The study's authors posit that "[p]arental concerns about potentially exposing their children to COVID-19 . . . might contribute to the declines observed," and emphasize "the vital need to protect [] children against serious vaccine-preventable diseases," lest "U.S. children and their communities face increased risks for outbreaks of vaccine-preventable diseases."[59]

Primary care visits have also decreased during the pandemic. Results from a survey of primary care providers conducted between May 22 and May 26, 2020 indicate that the practices of 70% of primary care clinicians have limited wellness and chronic care visits; another 84% say that their patients are independently delaying their visits.[60] These numbers are cause for concern: primary care clinicians are essential components of our health care system, who provide crucial services such as identifying risk factors for disease, screening for and treating mental health

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[56] Miriam A. Knoll, M.D., *Why You May Not Want to Delay Your Mammogram During the Coronavirus Pandemic*, Forbes, May 11, 2020, https://bit.ly/2ANU9tC.

[57] Jeanne M. Santoli, *et al.*, *Effects of the COVID-19 Pandemic on Routine Pediatric Vaccine Ordering and Administration – United States, 2020*, 69 MMWR Morbidity and Mortality Weekly Report 591, https://bit.ly/2UAmFWZ (hereinafter "CDC Vaccine Analysis"); Melissa Jenco, *AAP urges vaccination as rates drop due to COVID-19*, AAP News, May 8, 2020, https://bit.ly/3hk8H55.

[58] CDC Vaccine Analysis, *supra* n.57.

[59] *Id*.

[60] *Primary Care & Covid-19: Week 11 Surveys, Primary Care Collaborative*, May 27, 2020, https://bit.ly/3dLpqfp.

conditions, making referrals for specialist care, and providing chronic disease management.[61] Nor need one speculate about the negative, long-term effects of delay in this type of care; a study of the effects of the Manhattan Veteran Affairs Hospital's six-month closure in the wake of Hurricane Sandy showed an increase in uncontrolled hypertension among veterans who lost access to care as a result of the closure. That increase persisted more than a year after the facility had reopened.[62] Although the medical community has begun to expand and increase its utilization of telemedicine and to develop other innovative strategies to mitigate interruptions to care caused by the pandemic, these efforts are not sufficient replacements for in-person care for many medical services and are not able to counteract the sheer volume of care that has been lost already and that will continue to be avoided while the pandemic persists. Furthermore, the most vulnerable or under-served populations in our society, including the elderly, the homeless, those unable to afford the electronic devices and internet services necessary for telemedicine, those who live in rural areas without adequate access to broadband internet or cell phone service, and non-English-speaking patients, are among those least able to access these new forms of care.[63]

3. Long-term access to health care

The Covid-19 pandemic also threatens to cause long-term damage to the availability of quality health care in this country. As more than 90 million Americans have delayed care and elective surgeries and other procedures have been put on pause, both outpatient clinics, including

[61] *See, e.g.*, *The importance of a primary care provider*, Mayo Clinic Health System, April 7, 2015, https://mayocl.in/2YhEevV; Dana Neutze, *How a Primary Care Provider Can Help Improve Your Mental Health*, UNC Health Talk, Jan. 13, 2020, https://bit.ly/2XIGz3H.
[62] Aaron Baum, *et al.*, *Association Between a Temporary Reduction in Access to Health Care and Long-term Changes in Hypertension Control Among Veterans After a Natural Disaster*, 2 JAMA Network Open e1915111 (2019), https://bit.ly/2XCWbpC.
[63] *See, e.g.*, Maggie McCullough, *Can Telemedicine Help Us All?*, PolicyMap.com, April 1, 2020, https://bit.ly/2XVmO9i.

primary care providers, and hospitals have seen their revenues drop, pushing many to lay off or furlough workers: 135,000 jobs were lost at hospitals in April, 243,000 at physician offices, and another 503,000 at dental offices.[64] In a May 19, 2020 letter to Health and Human Services Secretary Alex Azar, the American Academy of Family Physicians, American Academy of Pediatrics, the American College of Physicians, and other four other institutional stakeholders warned that "wide-spread closures of community-based primary care practices" are "increasingly a likely consequence [of the pandemic] as primary care practices lose revenue and are not able or eligible to access much of the federal emergency funding."[65] As Governor Murphy has stated, in New Jersey "[m]any of our hospitals have taken quite simply a financial beating," cautioning that "[w]e cannot afford to lose one hospital or frankly even one nurse or doctor from one hospital," as the state prepares for a possible second wave of Covid-19 cases.[66] In sum, the Covid-19 pandemic's effect on health care revenues has caused health care providers severe financial distress. It follows that the longer the public's avoidance of medical services due to the pandemic continues, the more likely the structural damage to the health care system is to be permanent.

CONCLUSION

Amici respectfully submit that the ongoing Covid-19 pandemic is a once-in-a-lifetime public health crisis. In addition to the shocking—and still growing—number of lives lost to Covid-19 complications both in New Jersey and nationally, the true scope of the damage to the public health is only just beginning to be understood. Nonetheless, it is clear that, as evidenced by both

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[64] Ted Mellnik, *et al.*, *Americans are delaying medical care, and it's devastating health-care providers*, Washington Post, June 2, 2020, https://wapo.st/3cHnDXB.
[65] Letter from Alliance to Fight for Health Care, *et al.*, to Secretary Alex Azar, Health & Human Servs., May 19, 2020, https://bit.ly/3h1GX50.
[66] *Coronavirus News: New Jersey hospitals returning to normal, get $1.7B in federal funding*, ABC7NY.com, May 2, 2020, https://7ny.tv/2UluGil.

the observations of New Jersey health care providers and studies and surveys documenting a decrease in time-sensitive procedures such as cardiac catheterization and organ transplantation, non-Covid patients have undoubtedly been deterred, and in some cases prevented by closures and reductions in services, from obtaining care that they would otherwise have sought, to the detriment of their health and the public health more generally. There has also been a decrease in patients seeking less urgent, but still essential medical care, such as cancer screenings and primary care visits, including routine vaccines in pediatric populations. As a result, hospitals and primary care offices are suffering financially, and some are facing closure. The longer the pandemic persists—and along with it, the public's fear of contracting Covid-19 in health care facilities—the more these effects will compound, causing long-term damage to our health care system and the public health. In order to mitigate this damage, and to prepare for future waves of Covid-19 infections, it is imperative from a public health standpoint that all that can be done to prevent new Covid-19 infections is done. Because the conditions at EDC render it a prime setting for amplification of the disease, steps must be taken now to prevent further spread of the disease within the facility. For this reason, *Amici* most respectfully urge the Court to grant Plaintiffs' motion for a preliminary injunction.

Dated: June 15, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RIZZA JANE GUANAO AGANAN, *et al.*, Petitioners-Plaintiffs, v. ORLANDO RODRIGUEZ, *et al.*, Respondents-Defendants.	Case No. 2:20-cv-5922 (ES)

[PROPOSED] ORDER GRANTING LEAVE TO PARTICIPATE AS *AMICI CURIAE* TO MOUNT SINAI HUMAN RIGHTS PROGRAM, STEERING COMMITTEE FOR THE NEW YORK LAWYERS FOR THE PUBLIC INTEREST'S MEDICAL PROVIDERS NETWORK, WHITE COATS FOR BLACK LIVES, AND INDIVIDUAL HEALTH CARE PROFESSIONALS

This matter having come before the Court on the Motion to Participate as *Amici Curiae* of proposed *Amici Curiae* Mount Sinai Human Rights Program, Steering Committee for the New York Lawyers for the Public Interest's Medical Providers Network, White Coats For Black Lives, Dr. Martin Blaser, Dr. Simone Blaser, Dr. Yaniv Fenig, Dr. Kim Strong Griswold, Dr. Laura Krinsky, Dr. Susan Lerner, Dr. Steven McDonald, Dr. Stephanie Mischell, and Dr. Aakash

Shah ("*Amici*"), by Gibbons P.C. (Lawrence S. Lustberg and Jessica L. Hunter, appearing); and Petitioners-Plaintiffs having consented to and Respondents-Defendants having taken no position on *Amici*'s Motion; and the Court having considered the submissions of the parties, and for good cause shown:

IT IS on this _____ day of _____, 2020, hereby **ORDERED** that the motion of *Amici* for leave to participate as *Amici Curiae* be and it hereby is **GRANTED**; and it is further

ORDERED that *Amici*'s Brief herewith be and it hereby is accepted for filing.

_____
Honorable Esther Salas
United States District Judge

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UNITED STATES DISTRICT COURT
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RIZZA JANE GUANAO AGANAN, *et al.*, Petitioners-Plaintiffs, v. ORLANDO RODRIGUEZ, *et al.*, Respondents-Defendants.	Case No. 2:20-cv-5922 (ES) **CERTIFICATE OF SERVICE**

I certify that, on June 15, 2020, proposed *Amici Curiae*'s Notice of Motion for Leave to Participate as *Amici Curiae*, their brief in support thereof, the Certification of Lawrence S. Lustberg, Esq., their proposed *amicus* brief, a Proposed Order, and this Certificate of Service have been filed with the Court's ECF system, and that a copy of these documents has been served on all counsel of record in accordance with the Court's electronic filing rules.

Dated: June 15, 2020

Respectfully submitted,

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