

April 6, 2020

**The Honorable Governors of the fifty states**

Re: Governors' Executive Authority to Release Vulnerable People Who Pose No Risk to Public Safety from Incarceration

To the Honorable Governors of the fifty states:

We recognize that these are unprecedented times and that all of you are at the front lines dealing with the greatest public health crisis of our generation. As of today, the United States has reported that over 200,000 people have tested positive for Covid-19, with over 4,000 deaths nationwide.<sup>1</sup> In fact, the United States currently has the highest number of reported Covid-19 infections in the world, with many cases still undetected. Based on our current inability to treat this novel virus and its extremely contagious nature, state and local leaders across the nation have made difficult policy decisions to protect the public to the best of their ability: issuing stay-at-home and shelter-in-place orders, closing doors to non-essential businesses, and providing guidance about social distancing — all in the interest of public safety.

However, the almost 2 million people behind bars at the county and state level, plus the thousands of employees who work in correctional institutions, face an even greater risk of illness and death than the general public. We write today to urge you to use your full authority as Governors to release as many people as possible from incarceration, provided they do not pose serious public safety threats, for the duration of the pandemic. This effort should focus on people who are especially vulnerable to infection. Specifically, we recommend you take the following steps, which we explain in depth below:

- Make full use of your clemency authority to commute the sentences of vulnerable people to time served, allowing their immediate release, or fashion other appropriate relief;
- Expand your States' "good time credit" or equivalent programs to reduce overall incarceration;

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<sup>1</sup> "COVID-19 Map: Coronavirus COVID-19 Global Cases," Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, last accessed April 1, 2020, <https://coronavirus.jhu.edu/map.html>.

- Work with state prosecutors to keep people who have been convicted of crimes, but not yet sentenced, out of prison for the duration of this health crisis; and
- Take steps to limit the damaging impact of criminal justice debt, including but not limited to court fees and fines.

### **The Need for Swift Action**

The United States leads the world in incarceration. With over 5,000 jails and prisons across the country, those in our correctional facilities suffer cramped and unsanitary conditions, increasing the spread of contagious diseases behind bars. As of 2017, there were roughly 170,000 people age 55 or older serving time in the nation’s prisons.<sup>2</sup> According to the Centers for Disease Control, the novel coronavirus presents a far greater threat to older populations, and “older adults, 65 years and older, are at higher risk for severe illness.”<sup>3</sup> Roughly 40,000 imprisoned people fit into that category.<sup>4</sup>

Unfortunately, behind correctional walls, social distancing is not an option and hand sanitizer is, in many cases, a prohibited item.<sup>5</sup> Worse, incarcerated people often live in dormitory-style rooms with dozens of beds placed only a few feet apart, and share cells with one toilet, sink, and soap (if they have access to it).<sup>6</sup> Cramped in close quarters, our nation’s correctional facilities are essentially petri dishes for disease transmission. These conditions present grave dangers to both incarcerated people and the public servants who work in the facilities as guards, counselors, and medical staff.

Prisons and jails nationwide are already experiencing outbreaks of Covid-19. In Chicago’s Cook County Jail, the number of positive Covid-19 cases tripled from 33 to 134 within the span of 7 days. One of the people that contracted the virus described the jail as “Disneyland for coronavirus.”<sup>7</sup> Across the New York City jail system, 231 incarcerated people, 114 correctional officers, and 23 health care workers tested positive.<sup>8</sup>

<sup>2</sup> Jennifer Bronson and E. Ann Carson, *Prisoners in 2017*, Bureau of Justice Statistics, 2019, 17, at tbl. 8, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6546>.

<sup>3</sup> Centers for Disease Control & Prevention, “Coronavirus Disease 2019: Older Adults,” accessed April 1, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>4</sup> Bronson and Carson, 17, at tbl.8.

<sup>5</sup> Keri Blakinger and Beth Schwartzapfel, “When Purell is Contraband, How Do You Contain Coronavirus?,” *The Marshall Project*, March 6, 2020, <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

<sup>6</sup> See Lauren-Brooke Eisen, “How Coronavirus Could Affect U.S. Jails and Prisons,” *Brennan Center for Justice*, March 13, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons>; Nathalie Baptiste, “Correctional Facilities Are the Perfect Incubators for the Coronavirus,” *Mother Jones*, March 6, 2020, <https://www.motherjones.com/politics/2020/03/correctional-facilities-are-the-perfect-incubators-for-the-coronavirus/>.

<sup>7</sup> Sam Kelly, “134 Inmates at Cook County Jail Confirmed Positive for COVID-19,” *Chicago Sun Times*, March 30, 2020), <https://chicago.suntimes.com/coronavirus/2020/3/29/21199171/cook-county-jail-coronavirus-positive-134-cases-covid-19>.

<sup>8</sup> For the 231 currently incarcerated people who tested positive, see “COVID-19 Infection Tracking in NYC Jails,” The Legal Aid Society, accessed April 3, 2020, <https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>; for the 114 correctional officers and 23 health care workers who tested positive, see Jan Ransom and Alan Feuer, “We’re

In Michigan, diagnosed cases are rising sharply, jumping from 80 to 158 over the course of a few days.<sup>9</sup>

### Early Steps Toward Relief

Already, some state leaders have acted to prevent the spread of Covid-19 in their correctional systems. For example, in Illinois, Governor J.B. Pritzker issued an executive order stopping the Illinois Department of Corrections from admitting new people into prison.<sup>10</sup> On March 22, Governor Jared Polis of Colorado signed an executive order ensuring detention centers reduce the number of people meeting in groups in “any confined indoor or outdoor space,” such as housing unit common areas.<sup>11</sup> In New York, Governor Andrew Cuomo issued an order on March 27th to release approximately 1,100 people from prisons and jails, specifically non-serious parole violators.<sup>12</sup> Iowa’s Department of Corrections is expediting the release of about 700 incarcerated people who have been determined eligible by the Iowa Board of Parole in addition to ensuring that those released have a safe place to stay.<sup>13</sup> And California is granting early release to 3,500 incarcerated individuals in an attempt to reduce overcrowding in state prisons during the COVID-19 pandemic. The accelerated prison discharges apply to those who were set to be released within the next 60 days.<sup>14</sup>

### Specific Recommendations

The actions listed above were taken by state leaders in the best interest of public safety and public health. Yet, we urge every governor in the United States to consider further

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Left for Dead’: Fears of Virus Catastrophe at Rikers Jail,” *New York Times*, March 30, 2020, <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>.

<sup>9</sup> Compare Emma Nicolas, “How Michigan’s Prison System is Addressing a Rising COVID-19 Case Count,” WZZM13, March 30, 2020, <https://www.wzzm13.com/article/news/health/coronavirus/how-michigans-prison-system-is-addressing-a-rising-covid-19-case-count/69-3da0144d-7571-49e5-81b6-af89815cefa7> (noting 80 cases); Michigan Department of Corrections, “MDOC Response to Coronavirus (COVID-19) and Preventative Measures,” *Medium*, March 12, 2020 (last updated Apr. 2, 2020), <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337>.

<sup>10</sup> Emmanuel Camarillo, “Illinois Prisons Halt Admissions From County Jails to Slow Spread of Coronavirus,” *Chicago Sun Times*, March 26, 2020, <https://chicago.suntimes.com/2020/3/26/21196581/illinois-prisons-coronavirus-halt-admissions>.

<sup>11</sup> Allison Sherry, “Colorado’s Justice System is Still Catching up to Coronavirus,” *CPR News*, March 24, 2020, <https://www.cpr.org/2020/03/24/colorados-justice-system-is-still-catching-up-to-coronavirus/>.

<sup>12</sup> Bernadette Hogan, “Cuomo Orders 1,100 Parole Violators Released from Jails over Coronavirus Concerns,” *N.Y. Post*, March 27, 2020, <https://nypost.com/2020/03/27/cuomo-orders-1100-parole-violators-released-from-jails-over-coronavirus-concerns/>.

<sup>13</sup> Linh Ta, “Iowa’s Prisons Will Accelerate Release of Approved Inmates to Mitigate COVID-19,” *Iowa Times-Republican*, March 23, 2020, <https://www.timesrepublican.com/news/todays-news/2020/03/iowas-prisons-will-accelerate-release-of-approved-inmates-to-mitigate-covid-19/>.

<sup>14</sup> Paige St. John, “California to release 3,500 inmates early as coronavirus spreads inside prisons,” *Los Angeles Times*, March 21, 2020, <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>.

action and to use the full authority available to you to further blunt the devastating impact Covid-19 will have on imprisoned people, and by extension, our communities.

### *Clemency: Pardons, Commutations, and Reprieves*

As Governors, many of you possess the power to grant clemency to people convicted and incarcerated under the laws of your State.<sup>15</sup> In many cases this authority is both broad and flexible, allowing you to delay punishment, cut a prison sentence short, or even pardon an offense outright.<sup>16</sup> Depending on state law, grants of clemency can also be ordered with conditions.<sup>17</sup>

The clemency power was created to extend mercy to those convicted of crimes rapidly, at the stroke of a pen. Drawing on colonial precedent and English law, Alexander Hamilton argued in *The Federalist* that the *federal* clemency power should be “as little fettered or embarrassed,” and used proactively in “critical moments” to defuse tension.<sup>18</sup>

In this crisis, the clemency power’s flexibility and simplicity make it a vital tool for fighting disease behind bars. Working with your State’s correctional officials, you can rapidly identify people vulnerable to the novel coronavirus and develop appropriate remedies to ensure their early release. In some states, grants of clemency may first require consultation with other officials; such action should be taken immediately to meet the urgency of this crisis.<sup>19</sup>

Ideally, people who are older, medically compromised, or nearing the end of their prison terms could have their sentences commuted to time served and be released outright. We urge you to grant the broadest relief to the largest group of people possible, but should this prove impracticable, we urge you to consider clemency relief in other forms, such as reprieves, which temporarily suspend a sentence, or conditional pardons.<sup>20</sup>

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<sup>15</sup> See Restoration of Rights Project, “Characteristics of Pardon Authorities,” accessed January 23, 2020,

<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/>.

<sup>16</sup> See Paul J. Larkin, “Revitalizing the Clemency Process,” *Harvard Journal of Law and Public Policy* 39 (2016): 833, 845–47 (discussing the types of clemency relief available to someone under American law).

<sup>17</sup> See, e.g., ALA. CONST. art. V, § 124 (“No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon.”).

<sup>18</sup> See James Madison, “Federalist No. 74,” in *The Federalist Papers* (referencing, specifically, “seasons of insurrection or rebellion”); Larkin, “Revitalizing the Clemency Process,” 844–48 (detailing the history of clemency in the American system).

<sup>19</sup> Compare N.Y. CONST., art. IV, § 4 (granting broad authority to New York State’s governor) with ARIZ. CONST. art. V, § 5 and ARIZ. REV. STAT. §§ 31-402(A), (C) (“No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.”).

<sup>20</sup> See, e.g., Rachel Barkow, “Our Leaders Have the Power to Release People in Prison. Now They Must Use It,” *The Appeal*, March 27, 2020, <https://theappeal.org/coronavirus-prison-commutations/> (“If leaders are concerned that they lack the time to make decisions whose effects are permanent, some can instead use their power to grant reprieves, a less-discussed mechanism for release . . . that would essentially pause a person’s sentence. The release could last only until the pandemic subsides.”).

Extending clemency to especially vulnerable people behind bars will not jeopardize public safety. Our own research has shown that state prison sentences are often too long to begin with, and that roughly 14 percent of imprisoned people have “served sufficiently long prison terms and could likely be released within the next year with little risk to public safety.”<sup>21</sup> Moreover, researchers have shown, time and time again, that the likelihood of recidivism plummets as people age. One seminal study by the U.S. Sentencing Commission found that “offenders over sixty years old at the time of release had a recidivism rate of 16.0 percent” — roughly a quarter the rate of people released before age 21.<sup>22</sup>

Reducing the incarcerated population is a public safety imperative. Starting with older individuals, people who are medically compromised, and people who are close to completing their sentences makes sense from both a public health and criminological perspective.

### *Expand Good Conduct Credits*

We also encourage you to use your other unique executive powers to further shrink the prison population as much as possible at this critical time. Specifically, in states that offer additional merit time or additional credits to reduce prison sentences above and beyond “good-time” reductions, we encourage you to issue an executive order expanding the criteria for sentence reductions under those programs.

The details of these programs vary widely by state, and executive intervention may not be possible in all cases.<sup>23</sup> We therefore encourage you to coordinate with your correctional administrators — and officials responsible for parole, probation, or similar functions in your State — to determine what executive action may be possible to protect as many imprisoned people as possible from serious illness.

Creative thinking has already led to significant change in some states. Colorado’s Governor Polis recently issued an executive order suspending the criteria for issuance of earned time credits and the caps on earning them, directing the Colorado Department of Corrections “to make awards of earned time credits as it deems necessary and appropriate to safely facilitate the reduction of the population of incarcerated persons and parolees to

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<sup>21</sup> Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, 8, 35–41, <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

<sup>22</sup> U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, 2016, 5, 23, and 56, <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview>; see also Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005–2014)* Bureau of Justice Statistics, 2018, 8-9, and tbl.5, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>.

<sup>23</sup> See Prison Fellowship, “Earned Time Credit: Issue Overview,” accessed April 1, 2020, <https://www.prisonfellowship.org/resources/advocacy/release/earned-time-credit/>.

prevent an outbreak in prisons.”<sup>24</sup> A parallel action in your states, where possible, could likewise be used to safely reduce the size of the incarcerated population.

### ***Delay Sentencing and Incarceration***

We also urge you to confer with your State’s prosecutors, and encourage them — in consultation with the defense bar, judiciary, and appropriate public health officials — to delay sentencing for people who have been convicted of crimes but not yet remanded to prison. Where people are held in jail pending sentencing, their continued detention should also be reconsidered, and new, more lenient conditions for release set. If the law does not permit review of pre-sentencing detention, prosecutors can, at a minimum, encourage and consent to post-conviction bail applications and work with judges to set lenient conditions for release.<sup>25</sup> Postponing the imposition of sentence, and releasing people while they await sentencing, will ensure that justice is served while also keeping people out of prison and jail for the duration of the crisis.

### ***Limit the Damaging Impact of Criminal Justice Debt***

Lastly, we encourage you to use your executive powers to limit the damaging impact of criminal justice debt, including but not limited to court fees and fines. This past decade has seen a troubling and well-documented increase in fees and fines imposed on defendants by criminal courts.<sup>26</sup> This increase in fees and fines devastates people financially. In fact, indigent people may face hundreds or thousands of dollars in accumulated debt that they are unable to pay. With more than 9.9 million jobless claims filed in the last two weeks, the unemployment rate is likely to reach 10 percent over the coming days.<sup>27</sup> Given these high rates of unemployment in addition to the difficulty in your citizens accessing the courthouse amidst court shutdowns and stay-in-place orders, we urge courts and municipalities across the country to prioritize policies that lessen the burden of court-imposed fees and fines on our citizens.

Courts and municipalities should waive collection of all court-imposed criminal fees and fines until the end of this pandemic, without interest, and with no assessments of new debt. As state executives, you can also order private debt collectors to suspend collections until the end of the novel coronavirus pandemic, again without interest accrual. You can

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<sup>24</sup> Governor Jared Polis, Exec. Order No. D 2020 016 (March 25, 2020), <https://drive.google.com/file/d/18o0yWHzZleHJ87hmgLuBmXwpM8R74Q5x/view>.

<sup>25</sup> See, e.g., N.Y. CRIM. PROC. L. § 530.45(1) (permitting judges to, upon application of the defendant, set less restrictive release conditions “before sentencing” in certain cases and for certain offenses); ME. STAT. tit. 15, § 1051(1) (permitting someone convicted of a crime to apply for bail “pending imposition of sentence”).

<sup>26</sup> Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, Brennan Center for Justice, 2019, [https://www.brennancenter.org/FeesFines\\_Final5.pdf](https://www.brennancenter.org/FeesFines_Final5.pdf).

<sup>27</sup> Anneken Tappe, “A 3,000% jump in jobless claims has devastated the US job market,” *CNN Business*, April 2, 2020, <https://www.cnn.com/2020/04/02/economy/unemployment-benefits-coronavirus/index.html>.

also ensure that tax refunds and government relief checks are not garnished, that no liens are placed on housing, and that access to benefits is not denied during this time. And finally, you can encourage law enforcement officials to vacate warrants for all unpaid fees and fines.

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We thank you for the actions all of you have taken thus far to protect your communities and the most vulnerable among us. However, as an organization dedicated to improving our systems of justice, we also urge you to take these steps to safeguard the lives of those who are held and work in correctional facilities, many of whom are at grave risk of serious illness or death. We have put together a [resource page](#) with some guidance and examples of how different justice agencies across the nation have started to change practices and policies to reduce the harmful impact of COVID-19 on those most vulnerable in our society.

Respectfully,



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