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IN THE UTAH SUPREME COURT

ACLU OF UTAH, DISABILITY LAW CENTER, UTAH ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, ON BEHALF OF INDIVIDUALS IN CRIMINAL CUSTODY IN THE STATE OF UTAH AT RISK OF CONTRACTING COVID-19,

Plaintiffs-Petitioners,

v.

STATE OF UTAH; GARY R. HERBERT, Governor, State of Utah; MIKE HADDON, Executive Director, Utah Department of Corrections; CARRIE L. COCHRAN, Board Chair, Utah Board of Pardons and Parole, ALL COUNTIES in the State of Utah, ALL COUNTY SHERIFFS of the State of Utah, in capacity as County Jail Administrators.

Defendants-Respondents

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

Case No. _____

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I. INTRODUCTION

Plaintiffs filed this Petition for Extraordinary Writ (“Petition”) in light of the COVID-19 pandemic that is currently impacting the United States, including Utah, and has a substantial risk of reaching Utah correctional facilities if it has not already. This Petition is one of several efforts by Plaintiffs to reduce the number of incarcerated individuals in Utah’s prisons and jails to decrease the likelihood and severity of a health and medical crisis in Utah’s correctional facilities. These efforts include direct advocacy with law enforcement, sheriffs, prison administrators, parole board administrators, judges, prosecutors, and the governor’s office to change policies and practices to stem the spread of COVID-19 within the criminal justice system. Plaintiffs have also discussed and implemented litigation strategies with criminal defense attorneys to help incarcerated individuals on a case-by-case basis, especially for demographics with a heightened risk for serious complications from COVID-19 infections.

The aforementioned efforts have resulted in individuals being released from custody, but, as explained below, there needs to be faster and more significant action to depopulate correctional facilities and remove more vulnerable populations from correctional facilities to avoid potentially catastrophic outcomes for incarcerated individuals, facility staff, and the public at large. The relief sought from the Petition will allow currently incarcerated individuals to avoid unnecessarily heightened risks of serious harm from the COVID-19 pandemic while also ensuring safety for our communities outside of correctional facilities. The scale, scope, and timeliness of the requested remedy is only plausible through Extraordinary Relief granted by this Honorable Court.

II. FACTUAL BACKGROUND

On March 11, 2020, the World Health Organization declared COVID-19 a global

pandemic.¹ Severe cases of COVID-19 require hospitalization and oxygen support and may cause sepsis and septic shock, multiorgan failure, and death.² Older people, people with chronic medical conditions like diabetes or heart disease, and people who are immunocompromised are at the highest risk for severe cases of COVID-19 and death.³ Case study analysis indicates that the death rate nearly triples for people over 60 years of age.⁴ People who survive a severe case of COVID-19 may lose 20 to 30% of their lung function.⁵

Scientists have used data from Wuhan Province, where the virus originated in China, to conclude that “[e]ven under best-case assumptions, we estimate that screening will miss more than half of infected people.”⁶ The findings from another recent study of COVID-19 patients suggest that “SARS-CoV-2 can be transmitted easily, even when symptoms are relatively mild. This finding could account for the efficient person-to-person transmission noted in community

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

² *Clinical Management of Severe Acute Respiratory Infection (SARI) When COVID-19 Disease Is Suspected*, Interim Guidance, World Health Organization (March 13, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331446/WHO-2019-nCoV-clinical-2020.4-eng.pdf?sequence=1&isAllowed=y>.

³ *Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control and Prevention (March 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

⁴ See Robert Verity, et al., *Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis*, LANCET 5 (pub. Mar. 30, 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30243-7/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30243-7/fulltext) (calculating that the case fatality ratio jumps from 1.3% for persons ages 50-59 to 3.6% for persons ages 60-69 based on a review of reported deaths in mainland China).

⁵ Bill Bostock, *Some People Who Recover From the Coronavirus Might Be Left with ’20 to 30%’ Less Lung Function, and Gasping for Breath When They Walk Quickly, Hong Kong Doctors Said*, BUSINESS INSIDER (March 13, 2020), <https://www.businessinsider.com/coronavirus-recovery-damage-lung-function-gasping-air-hong-kong-doctors-2020-3>.

⁶ Katelyn Gostic et al., *Estimated Effectiveness of Symptom and Risk Screening to Prevent the Spread of COVID-19*, Research Advance, ELIFE (Feb. 24, 2020), <https://elifesciences.org/articles/55570>. See also Katelyn Gostic, *Can Airport Screenings Prevent the Spread of COVID-19?* UCHICAGO MEDICINE: THE FOREFRONT (Feb. 9, 2020), <https://www.uchicagomedicine.org/forefront/prevention-and-screening-articles/coronavirus-airport-screening> (predicting based on preliminary findings from Wuhan and research on past epidemics that traveler screening will miss more than half of exposed people).

and health-care settings. Clusters in families, workplaces, religious gatherings, and food premises have been widely reported.”⁷ The President of the United States, Donald Trump, recently estimated that at least 100,000 people will likely die from this infection.⁸ COVID-19 is spread through respiratory droplets or by touching a surface that has the virus on it. Scientists have estimated that the virus can last on surfaces for a few hours to several days.⁹ In light of these conditions and circumstances, public health officials and Governor Herbert have recommended frequent handwashing and disinfecting of surfaces that are touched by many people. Under some conditions, a single person can infect hundreds more.¹⁰

As of March 27, 2020, there have been 104,686 confirmed cases of COVID-19 in the United States, and the United States now has the highest number of cases in the world.¹¹ The number of cases has risen exponentially, both worldwide and in the United States. *Id.* There is no vaccine.

As of March 31, 2020, there have been 887 confirmed cases of COVID-19 in Utah spread across several counties, including Salt Lake, Summit, Davis, Tooele, Wasatch, Utah, and Weber

⁷ See Kelvin Kai-Wang To et al., *Temporal Profiles of Viral Load in Posterior Oropharyngeal Saliva Samples and Serum Antibody Responses During Infection by SARS-CoV-2: An Observational Cohort*, LANCET 6 (pub. Mar. 23, 2020), <https://www.thelancet.com/action/showPdf?pii=S1473-3099%2820%2930196-1>. The researchers found that COVID-19 had a high viral load when patients first began to present symptoms, and stated that this could account for ease of transmission.

⁸ Associated Press, *Trump Extends Virus Guidelines, Braces US for Big Death Toll*, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/aponline/2020/03/29/us/politics/ap-us-virus-outbreak-washington.html>

⁹ World Health Organization, Q&A on coronaviruses (COVID-19) (last accessed March 26, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

¹⁰ See, e.g., Marco Hernandez, Simon Scarr & Manas Sharma, *The Korean Clusters*, Reuters Graphics (Mar. 20, 2020), <https://graphics.reuters.com/CHINA-HEALTH-SOUTHKOREACLUSTERS/0100B5G33SB/index.html> (explaining how a single patient in South Korea potentially infected 1,160 people).

¹¹ See *Coronavirus COVID-19 Global Cases*, CTR. FOR SYSTEMS SCI. & ENGINEERING AT JOHNS HOPKINS UNIV. (last updated March 27, 2020), <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (displaying exponential growth charts for the United States and comparative confirmed case tracking).

Counties.¹² The actual number of infected people is much higher than the number of confirmed cases due to limited test availability.¹³ Utah's case count increased by 19% in a single day between March 26 and March 27, 2020.¹⁴ Summit County's Public Health Director has said that Summit County's per capita infection rate is similar to Italy's and New York City's.¹⁵ Salt Lake City and Summit County residents have been ordered to stay at home except for essential travel, while Governor Herbert has directed residents to do the same statewide.¹⁶ Among other directions, Governor Herbert has recommended that individuals maintain "a 6-foot distance at all times from other individuals" and that they not attend "any gathering of any number of people" outside of their household.¹⁷

Additionally, the Utah Supreme Court issued an order halting all non-essential court functions.¹⁸ The Order directs that all District Court and Justice Court trials be continued until after June 1, 2020. *Id.* Moreover, "If a defendant is in-custody on class B or C misdemeanor offenses(s), the assigned judge must reconsider the defendant's custody status and is encouraged

¹² *Live Coronavirus Updates for Tuesday, March 31*, SALT LAKE TRIB. (Mar. 31, 2020), <https://www.sltrib.com/news/2020/03/31/live-coronavirus-updates/>.

¹³ See Larry D. Curtis, *Monday Numbers: A Week After Restrictions, Utah Confirms 257 Cases*, KUTV (March 23, 2020), <https://kutv.com/news/coronavirus/monday-numbers> ("With limited tests available, national and local health officials have stated repeatedly that confirmed cases of coronavirus do not match the actual cases.").

¹⁴ *Live Coronavirus Updates for Friday, March 27*, SALT LAKE TRIB. (March 27, 2020), <https://www.sltrib.com/news/2020/03/27/live-coronavirus-updates/>.

¹⁵ Larry D. Curtis, *Thursday Numbers: As Summit County Stays Home, Utah COVID-19 Cases Climb to 402*, KUTV (March 26, 2020), <https://kutv.com/news/coronavirus/thursday-numbers-as-summit-county-is-ordered-to-stay-utah-covid-19-cases-climb-to>.

¹⁶ Taylor Stevens & Paighen Harkins, *Utah Governor Asks, Salt Lake City Mayor Orders Residents to Stay Home to Slow the Spread of the Coronavirus*, SALT LAKE TRIB. (March 27, 2020), <https://www.sltrib.com/news/2020/03/27/utah-governor-issue-new/>.

¹⁷ *Id.*

¹⁸ Matthew Durrant, *Administrative Order for Court Operations During Pandemic*, Utah Supreme Court (March 21, 2020), <https://www.utcourts.gov/alerts/docs/20200320%20-%20Pandemic%20Administrative%20Order.pdf>.

to release the defendant subject to appropriate conditions.”¹⁹ The Order states that District Courts and Justice Courts “shall continue to perform all mission-critical functions for in-custody defendants,” which includes hearings that determine whether a defendant remains in-custody in county jails, such as probable cause review hearings, bail hearings, bench warrant hearings, and sentencing hearings.²⁰

Nationally, doctors and health experts are concerned that the spread of COVID-19 is almost inevitable in correctional facilities and that county jail facilities are not capable of adequately managing an outbreak.²¹ According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe” where “infection control is challenging in these settings.”²² COVID-19 is being transmitted by people who have few or no symptoms, and infected persons can be asymptomatic for up to 14 days, rendering screening tools inadequate to control the spread of COVID-19 into correctional facilities.²³ As of March 29, 2020, it has been reported that COVID-19 has spread to 36 correctional facilities across 13 states and the District of Columbia.²⁴ Notably, in 8 of those states and the Federal Bureau of

¹⁹ *Id.*

²⁰ *Id.*

²¹ Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES, (March 16, 2020), available at <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

²² *Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States*, (March 2, 2020), available at https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf.

²³ See Elizabeth Cohen, *Infected People Without Symptoms Might Be Driving the Spread of Coronavirus More Than We Realized*, CNN (March 19, 2020), <https://www.cnn.com/2020/03/14/health/coronavirus-asymptomatic-spread/index.html> (reporting that a large recent outbreak in Massachusetts and “more than half a dozen studies have shown that people without symptoms are causing substantial amounts of infection.”).

²⁴ See **Florida (5)**, Kavitha Surana et al., *Seven Florida Prison System Employees Have Tested Positive for Coronavirus*, TAMPA BAY TIMES (Mar. 28, 2020), <https://www.tampabay.com/news/health/2020/03/28/seven->

Prisons,²⁵ corrections departments stated that they were implementing screening protocols. For example, the Federal Bureau of Prisons was using screening protocols that mirror the protocols currently being implemented in Utah before multiple federal prisons suffered subsequent outbreaks.

Similarly, it has been reported that an inmate at the Oxbow Jail in Salt Lake County tested positive for COVID-19 within a day of his release,²⁶ even though the County had proactively implemented screening measures and had already lowered the jail's population

[florida-prison-system-employees-have-tested-positive-for-coronavirus/](#); **Georgia (6)**, Joshua Sharpe & Christian Boone, *Ga. Inmate Dies from COVID-19 as Virus Hits More Prisons*, ATLANTA J.-CONST. (Mar. 27, 2020), <https://www.ajc.com/news/local/breaking-inmate-dies-from-covid-outbreak-worsens-prison/TzQZL4uXfK4GzH9ebSFNQN/>; **Illinois (1)**, Lorraine Swanson, *Coronavirus Outbreak Grows at Cook County Jail*, PATCH (Mar. 25, 2020), <https://patch.com/illinois/chicago/coronavirus-outbreak-grows-cook-county-jail>; **Louisiana (3)**, Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples a Federal Prison in Louisiana*, WASH. POST (Mar. 29, 2020), Melinda Deslatte, *Coronavirus Reaches 2 Louisiana Prisons as Cases Increase*, U.S. NEWS (Mar. 27, 2020), <https://www.usnews.com/news/best-states/louisiana/articles/2020-03-27/coronavirus-reaches-2-louisiana-prisons-as-cases-increase>; **Michigan (8)**, Ted Roelofs, *Coronavirus Cases Surge in Michigan's Crowded Prisons*, BRIDGE MICH. (Mar. 27, 2020), <https://www.bridgemi.com/michigan-government/coronavirus-cases-surge-michigans-crowded-prisons>; **Mississippi (1)**, Michael Balsamo & Michael Sisak, *Federal Prisons Struggle to Combat Growing COVID-19 Fears*, NBC (Mar. 27, 2020), <https://nbcmontana.com/news/nation-world/federal-prisons-struggle-to-combat-growing-covid-19-fears>; **Missouri (1)**, Angie Ricono & Clare Otto, *Missouri State Public Defender's Office Calls for Some Inmates to be Released to Control Outbreaks*, KCTV (Mar. 26, 2020), https://www.kctv5.com/coronavirus/missouri-state-public-defender-s-office-calls-for-some-inmates/article_469dda14-6fc7-11ea-9b1d-a70499a95006.html; **Nevada (1)**, Michelle Rindels, *Fears of Coronavirus in Prisons Grow as Nevada Confirms First COVID-19 Case Behind Bars*, NEV. INDEP. (Mar. 27, 2020), <https://thenevadaindependent.com/article/fears-of-coronavirus-in-prisons-grow-as-nevada-confirms-first-covid-19-case-behind-bars>; **New York (3)**, Andrew Denney, *New Coronavirus Cases in NYC Jails Outpacing Rest of the City*, N.Y. POST (Mar. 25, 2020), <https://nypost.com/2020/03/25/new-coronavirus-cases-in-nyc-jails-outpacing-rest-of-the-city/>; **Texas (2)**, Jolie McCullough, *Coronavirus Is Officially in Texas Prisons and Jails*, TEXAS TRIB. (Mar. 25, 2020), <https://www.texastribune.org/2020/03/25/coronavirus-texas-prisons-jails-containment/>; **Wisconsin (2)**, Emily Hamer, *Wis. Dept. of Corrections Confirms 3rd Employee Infected with COVID-19*, WIS. STATE J. (Mar. 26, 2020), https://madison.com/wsj/news/local/crime-and-courts/wisconsin-department-of-corrections-confirms-rd-employee-infected-with-covid/article_a8a0e2d5-e4f7-56fe-b6a7-2cc83b96d878.html; **District of Columbia (1)**, Justin Jouvenal, *Fatalities Double in Md. and State Sees Record Surge in Positive Tests, Including at Nursing Home in Carroll County*, WASH. POST (Mar. 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/28/coronavirus-dc-maryland-virginia-updates/>.

²⁵ See, e.g., Florida, Tess Sheets & Monivette Cordeiro, *Central Florida Jails Ready Coronavirus Plans as State Prisons Cut Visitation, Add Screening*, ORLANDO SENTINEL (Mar. 13, 2020), <https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-jails-prisons-florida-20200312-m675t3zssjhaf13j5nud7gzbuq-story.html>; Fed. Bureau of Prisons COVID-19 Action Plan, FED. BOP (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

²⁶ Jessica Miller, *Utah Attorney Says Her Client Got the Coronavirus While Locked Up at the Salt Lake County Jail*, SALT LAKE TRIB. (Mar. 30, 2020), <https://www.sltrib.com/news/2020/03/30/utah-attorney-says-her/>. (reporting that a released inmate tested positive for COVID-19 shortly after release).

substantially.²⁷ In Davis County, an employee in the Sheriff’s Office tested positive for COVID-19.²⁸ There is a severe risk that COVID-19 will spread. While incarcerated, individuals are in close proximity to dozens of individuals on a daily basis, which includes other inmates and jail personnel. A recent article reports that prisoners are not allowed to have alcohol-based hand sanitizers, and staff are not wearing gloves or masks,²⁹ and some facilities in the state have continued to charge inmates for soap. The crowded living conditions inherent to correctional facilities put incarcerated Utahns at an extremely high risk of infection. They cannot protect themselves through social distancing and there is a severe lack of freely accessible hygiene supplies. It is very difficult to quarantine large numbers of individuals who become ill or are exposed in prisons and jails. Moreover, in the event of a COVID-19 outbreak in a jail or prison, there will likely be staffing shortages and jails and prisons will have to rely heavily on outside hospitals for oxygen support and ventilators—hospitals that are likely to become overwhelmed as the pandemic spreads. Reporting suggests that COVID-19 has reached a Utah correctional facility, and that it may have already infected an additional Utah correctional facility. That is, it was reported that a confirmed case of COVID-19 in Uintah County was a man who had been incarcerated at the Uintah County Jail 9 days before seeking medical care for symptoms.³⁰

Plaintiffs are filing this Petition on behalf of every person in Utah who is presently in

²⁷ See Pat Reavy, *Coronavirus Prevention: Utah Prisons Suspend Visitation, Volunteer Work*, DESERET NEWS (Mar. 13, 2020), <https://www.deseret.com/utah/2020/3/13/21178353/jails-prison-preparing-for-covid19-coronavirus-inmates-corrections-incarcerated-visits>.

²⁸ *Live Coronavirus Updates for Tuesday, March 31*, SALT LAKE TRIB. (Mar. 31, 2020), <https://www.sltrib.com/news/2020/03/31/live-coronavirus-updates/>.

²⁹ See Jessica Miller, *Here’s What It’s Like to Be in Utah Prisons During the Coronavirus Pandemic*, SALT LAKE TRIB. (March 29, 2020), <https://www.sltrib.com/news/2020/03/29/heres-what-its-like-be/>.

³⁰ *TriCounty COVID-19 Patient Was Recent Uintah County Jail Inmate*, GEPHARDT DAILY (Mar. 27, 2020), <https://gephardtaily.com/local/tricounty-covid-19-patient-was-recent-uintah-county-jail-inmate/> (the Uintah County Sheriff’s Office has noted that the individual was asymptomatic upon release).

criminal custody at any correctional facility of any sort in Utah, including prisons, jails, and community correctional facilities. Petitioners include both those held pre-trial (the “Pre-Trial Petitioners”) and post-conviction (the “Post-Conviction Petitioners”). Petitioners of both categories are being deprived of their liberty in the custody of the Utah Department of Corrections at the prisons in Draper and Gunnison, and in County Jails administered by County Sheriffs in Beaver, Box Elder, Cache, Carbon, Davis, Duchesne, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Salt Lake, San Juan, Sanpete, Sevier, Summit, Tooele, Uintah, Utah, Wasatch, Washington and Weber Counties. The causes of such restraints include pretrial detention and post-conviction incarceration as part of a jail, probation, or prison sentence.

The global COVID-19 pandemic has put incarcerated people in Utah in severely increased risk of serious injury or death while incarcerated.

III. ARGUMENT

Petitioners Must Be Granted Extraordinary Relief and Released From Incarceration Because Their Confinement Conditions During The COVID-19 Pandemic Violate Their Due Process Rights and Their Right to be Free From Cruel And Unusual Punishment and Unnecessary Rigor Under The Utah Constitution.

A. This Court is the Proper Venue for this Petition

Petitioners acknowledge that UTAH R. CIV. P. 65B(b)(2) instructs that extraordinary writs should commence in the district courts. Bypassing the district courts and seeking extraordinary relief granted by this Court, however, is necessary in this urgent and unprecedented situation. There is no other adequate and speedy way to remedy the imminent danger to thousands of incarcerated individuals in every judicial district in Utah. COVID-19 is spreading exponentially, rapidly overwhelming healthcare systems around the world and in the United States. As stated in

the Petition for Extraordinary Relief, to require petitioners to file individual petitions in every district court, which are currently operating at limited capacity, would waste critical time and judicial resources when the risk of the virus spreading into Utah's correctional facilities is substantial and concrete. Indeed, as explained above, it appears likely that it has entered at least one jail despite all preventive measures to try to avoid that outcome. Multiple filings would create a significantly greater risk that many of those represented by this Petition would become infected and suffer irreparable injury or death in the meantime. The United States has not been threatened with a pandemic like COVID-19 in over a century. The extraordinary circumstance of the current COVID-19 pandemic warrants the extraordinary relief of habeas corpus guaranteed by the Utah Constitution.

B. This Court has Authority to Grant Extraordinary Relief

The Utah Supreme Court has jurisdiction to grant extraordinary writs under the Utah Constitution, which has been codified in Utah statute. *See* UTAH CONST. ART. VIII, § 3; UTAH CODE ANN. § 78A-3-102(2). “This court has broad discretion to grant or deny extraordinary relief.” *Gilbert v. Maughan*, 379 P.3d 1263, 1267 (Utah 2016). In determining whether to grant extraordinary relief, the Court may consider, *inter alia*, “the significance of the legal issue presented by the petition” and “additional factors.” *Id.* at 1268 (citing *State v. Barrett*, 127 P.3d 682, 688 (Utah 2005)).

Extraordinary relief is the proper here because this Petition seeks habeas corpus relief under Rule 65B, and the exigent circumstances of a deadly global pandemic warrant extraordinary measures. Under Rule 65B of the Utah Rules of Civil Procedure, a person may petition the court for extraordinary relief where “no other plain, speedy and adequate remedy is available.” UTAH R. CIV. P. 65B(a). Rule 65B incorporates the prior rule for writs of habeas

corpus and is therefore the appropriate avenue for a petition for habeas relief. *See* UTAH R. CIV. P. 65B ADV. COMM. NOTES (“[Rule 65B] revises parts of the former rule dealing with habeas corpus and post-conviction remedies.”). Rule 65B(b) applies to all petitions challenging wrongful restraints on personal liberty except for those governed by Rule 65C. Rule 65C governs proceedings for petitions for post-conviction relief under the Post-Conviction Remedies Act. UTAH R. CIV. P. 65C(a). This Act does not apply to this action because it does not apply to habeas corpus petitions that do not challenge a criminal conviction or sentence. UTAH CODE ANN. § 78B-9-102(2)(a), (c). As explained below, Petitioners are seeking habeas relief to challenge the conditions of their confinement, not the legality of their conviction or sentence.

The Utah Constitution states that “The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.” UTAH CONST. ART. I, § 5. The Utah Supreme Court has held that habeas petitions may be used to challenge conditions of confinement, not just to challenge the legality of custody. *Wickham v. Fisher*, 629 P.2d 896, 900 (Utah 1981), *see also Termunde v. Cook*, 786 P.2d 1341, 1342 (Utah 1990). In *Wickham*, the Court found that the record of conditions “inimical to the maintenance of the health of the detainees” raised constitutional issues regarding conditions of confinement. *Id.* at 900-01. The severe health risks to Petitioners raise significant constitutional issues warranting habeas relief.

Although the sentencing decisions of Utah State Board of Pardons and Parole are generally only subject to judicial review based on fairness of process, the judiciary may review the result of Board decisions based on constitutional claims such as cruel and unusual punishment. *See Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994) (“we do not sit as a panel of review on the result [of Board sentencing decisions], absent some other

constitutional claim, such as cruel and unusual punishment.”). In fact, UTAH R. CIV. P. 65B(d)(2) expressly allows the Court to act when the Board has “failed to perform an act required by constitutional... law.” UTAH R. CIV. P. 65B(d)(2). In this case, Post-Conviction Petitioners assert that the Board is failing to act by continuing to incarcerate them in conditions that amount to violations of their constitutional rights.

C. Conditions of Confinement for Prisoners Serving Sentences Violate Their Utah Constitutional Right to be Free From Cruel and Unusual Punishment and Excessive Rigor

1. Cruel and unusual punishment

Post-Conviction Petitioners are being held in violation of their rights to be free from cruel and unusual punishment and excessive rigor under the Utah Constitution.

The Utah Constitution, like the United States Constitution, forbids “cruel and unusual punishment.” UTAH CONST. ART. I, § 9. The Utah Supreme Court has held that the Utah Constitution’s prohibition against cruel and unusual punishment protects prisoners from deliberate indifference to their medical needs. *See Bott v. DeLand*, 922 P.2d 732, 740 (Utah 1996) (abrogated by *Spackman v. Bd. of Educ. of Box Elder Cty Sch. Dist.*, 16 P.3d 533 (Utah 2000) on other grounds)). In *Bott*, the Court held that it violated Article 1, Section 9 of the Utah Constitution for the Department of Corrections to fail to examine a prisoner’s medical condition despite warnings that his condition was worsening until the plaintiff ultimately suffered renal failure. *Id.* at 734.

Post-Conviction Petitioners’ right to be free from cruel and unusual punishment are being violated because, although Respondents are taking some affirmative steps to address the dangers posed by the pandemic, their failure to enact measures of a scope that matches the seriousness of

the risks amounts to deliberate indifference. The Utah Supreme Court looks to federal case law examining the deliberate indifference standard under the Eighth Amendment of the United States Constitution to define deliberate indifference under the Utah Constitution's cruel and unusual punishment clause. *See id.* at 740 (citing *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)).

Citing to *Estelle*, the Utah Supreme Court held that refusing to treat or address known dangers to prisoners would create liability under the Utah Constitution. *Id.* Here, those represented by this Petition are being subjected to the known and highly publicized dangers of crowded living quarters during a lethal pandemic without even the ability to use adequate preventative strategies such as social distancing, increased hygiene, and increased disinfecting.

Federal case law analyzing risk of future harm in the Eighth Amendment context is instructive. The U.S. Supreme Court has held that corrections officials violate the Eighth Amendment when they are deliberately indifferent to future harm. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). In doing so, Court ruled that it is cruel and unusual punishment when prison authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Id.* at 33 (holding that an inmate had the right to be free from sustained exposure to secondhand smoke under the Eighth Amendment even if the inmate was not currently suffering from the effects of secondhand smoke). *See also Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (“There is no requirement that an inmate suffer serious medical problems before the condition is actionable.”). Of particular note to the present situation, *Helling* analogized to a case in which inmates were crowded in conditions that put them at risk of contracting infectious diseases to support the proposition that the Eighth Amendment protects against future harm, even though the inmates in question had not alleged that the likely harm from infection would not occur immediately nor would everyone

exposed inmate be harmed. *See* 509 U.S. at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). The Court explained, “We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33. Currently, it is reported that there have been COVID-19 outbreaks in 36 correctional facilities in 13 states and the District of Columbia. As explained in the Statement of Facts, there has already been a reported case of an inmate testing positive for COVID-19 shortly after release from a Utah jail. Just as the U.S. Supreme Court instructed that we should not wait for an attack of dysentery, the Court should not wait for the number of infected incarcerated persons to rise and it should not wait for Utah to join the growing ranks of states with active COVID-19 outbreaks in their correctional facilities.

The insufficient measures taken to screen and protect Petitioners are violating their constitutional right to be free from a serious risk of future harm. A risk of future harm is serious enough to be constitutionally unacceptable when that risk is “so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.” *Helling*, 509 U.S. at 36 (emphasis in original). Although there is presently only one confirmed case of someone testing positive for COVID-19 within a day of leaving a Utah correctional facility and one confirmed corrections employee who tested positive so far, the risk to inmates is cruel and unusual under both the Utah and federal constitutions because today’s society has chosen to not tolerate the risk of mass gatherings, communal living, or insufficient hygiene. This bar has extended to schools, parades, restaurants, and religious

services as public health and government officials have urged everyone to practice social distancing regardless of whether they have symptoms, particularly older and immunocompromised people. Hospitals, nursing homes, and assisted living facilities have implemented visiting restrictions to minimize the risk of exposure for vulnerable populations. In this context, mass gatherings, communal living, and daily influxes of new people at jails pose grave risks to all inmates, particularly vulnerable inmates, that would be otherwise unacceptable in the rest of society even with screening procedures.

The Tenth Circuit noted in *Shannon v. Graves* that while inmates need not wait to suffer serious injuries before a condition is actionable, courts must consider the “frequency and duration of the condition, as well as the measures employed to alleviate the condition.” *Shannon*, 257 F.3d at 1168. Here, inmates are exposed daily to potential COVID-19 infection, and this risk is ongoing. The Department of Corrections and at least some of jails have been screening entrants for symptoms of COVID-19 such as fever, cough, or shortness of breath. However, despite the screening protocols that Salt Lake County was using, it was reported on March 30, 2020 that an inmate in the Oxbow jail tested positive for COVID-19 and was hospitalized within a day after release and is now in the ICU. Similarly, a number of corrections agencies elsewhere in the United States implemented preventative measures similar to what Utah jails and prisons are implementing now, and COVID-19 still infected both inmates and staff. There is significant evidence that screening protocols are only somewhat effective at preventing the spread of COVID-19, mostly due to long incubation periods. In light of the fact that infected people may be asymptomatic for up to 14 days, society has determined that simply screening people for fevers or other symptoms instead of simply cancelling mass gatherings is insufficient and unsafe. Both private and public entities have taken steps to ensure that no vulnerable people are

inadvertently, let alone unwillingly, exposed to anything approaching the risk to which jail and prison inmates are currently being subjected. Therefore, continuing to expose vulnerable inmates to this socially unacceptable risk of serious harm violates their constitutional right to safety.

2. Unnecessary rigor

The Utah Constitution, like the United States Constitution, proscribes excessive bail and cruel and unusual punishment, but it additionally provides that the people who are “arrested and imprisoned shall not be treated with unnecessary rigor.” Utah Const. art. I, § 9.

“The unnecessary rigor clause of the Utah Constitution...is focused on the circumstances and nature of the process and conditions of confinement.” *Dexter v. Bosko*, 184 P.3d 592, 596 (Utah 2008). “A prisoner suffers from unnecessary rigor when subject to unreasonably harsh, strict, or severe treatment. This may include being unnecessarily exposed to an increased risk of serious harm.” *Id.* at 597. As explained directly above and in the Facts Section of this Petition, Petitioners are being exposed to an increased risk of serious harm by virtue of their continued incarceration in a time when COVID-19 is spreading, because it has both high transmission rates and the ability to evade screening protocols.

The Utah Supreme Court held in *Dexter* that the unnecessary rigor clause protects incarcerated persons “from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require.” *Dexter*, 184 P.3d at 596. *Dexter* determined that prison officials’ refusal to buckle the prisoner-plaintiff’s seatbelt during a transport could meet this burden. *See id.* at 594. Here, the government has determined that the risk of serious harm to society from COVID-19 is so great that the state government has closed all schools, banned dine-in service at restaurants, recommended that individuals who are immunocompromised or over the age of 60 avoid contact with others and that everyone avoid

gatherings with 10 or more people.

Despite the recognized extreme need to prevent the increased risk of serious harm caused by close contact between large groups of people that has led to these dramatic restrictions, the Respondents have continued to hold non-violent inmates, older inmates, and immunocompromised inmates in crowded facilities that have frequent new entrants. Currently incarcerated people are being exposed to an increased risk of serious harm, and this risk is so serious both for individuals and society at large that the government has effectively disrupted and in some instances shut down every-day life and major sectors of the economy. While the rest of society is being actively pushed to self-isolate to prevent the spread of COVID-19, inmates are being kept in close quarters that facilitate the spread of infectious disease, putting them at increased risk of serious illness, permanent organ damage, and death.

D. Conditions of Pre-Trial Confinement Violate Prisoners' Utah Constitutional Due Process Rights to be Free From Harsh Conditions and Pre-Conviction Punishment

The Pre-Trial Petitioners are presently being held in conditions that violate their rights under the Due Process and Excessive Rigor Clauses of the Utah Constitution. The Utah Constitution mandates that, "No person shall be deprived of life, liberty or property, without due process of law." UTAH CONST. ART. I, § 7. Instructively, as the Pre-Trial Petitioners are only claiming under the Utah Constitution, the Fifth Amendment of the United States Constitution contains that, "No person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. AMEND. V.

This Court looks to federal precedent to assist in interpreting Utah's due process clause. The U.S. Supreme Court has delineated how the Fifth Amendment applies to pretrial detention in

several cases. In *Salerno*, the Court asserted that “liberty is the norm, and detention prior to trial or without trials is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). When analyzing whether pretrial detention runs afoul of due process, it is important to consider that “a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a ‘judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.’” *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)); (citations omitted). In *Bell*, the Court examined the constitutionality of conditions in pretrial detention to determine if they amounted to punishment. *Id.* at 535. The Court reasoned that a condition is not a punishment if it is “reasonably related to a legitimate governmental objective,” but if a condition is not reasonably related to a legitimate objective “a court may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Id.* at 539.

Emphatically, “pretrial detainees (unlike convicted prisoners) cannot be punished at all.” *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015). (discussing that an Eighth Amendment analysis is not needed to determine whether punishment during pretrial detention is unconstitutional). Even the Eighth Amendment proscribes more than “physically barbarous punishments,” but also takes into account, “dignity, civilized standards, humanity, and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (C.A.8 1968)). To that end, the *Estelle* Court observed that states codified the common-law axiom that “(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself” by statutorily requiring medical care for prisoners. *Id.*

at 194. (quoting *Spicer v. Williamson*, 191 N.C. 487, 490 (1926)).

The Utah Supreme Court’s application of due process considerations to pretrial detainees underscores that exposure to unhealthy conditions in county jails raises “serious constitutional issues” that implicate the “right of due process to be free from unduly harsh and rigorous treatment” under the U.S. and Utah Constitution. *Wickham v. Fisher*, 629 P.2d 896, 901 (Utah 1981). The *Wickham* Court noted, “But a jail door does not close off all protections of the United States or the Utah Constitutions” where incarceration does not justify undermining the due process protections for pretrial detainees to be free from pre-conviction punishment. *Id.* Although the federal and state constitutional issues discussed in *Wickham* were rooted in due process clauses, the Utah Constitution’s “necessary rigor” clause should also be considered in the pretrial detainee analysis where, “Persons arrested or imprisoned shall not be treated with unnecessary rigor.” UTAH CONST. ART. I, § 9. The unnecessary rigor clause “is focused on the circumstances and nature of the process and conditions of confinement.” *Dexter v. Bosko*, 184 P.3d 592, 596. As explained in Section III(C), the unnecessary rigor clause protects prisoners from increased risk of serious harm. *See id.* at 597.

In the context of the COVID-19 pandemic, Pre-Trial Petitioners face substantial risk of being unnecessarily exposed to serious harm, because, but for the inability to post bail, they could take proper precautions to reduce the risk of exposure and infection. At the behest of health experts and government officials, community members are directed to decrease social proximity and use best hygienic practices due to the highly contagious nature and risk of serious health issues from exposure to COVID-19. It is nearly impossible, however, for Petitioners to conduct recommended best hygienic practices and avoid close proximity to others in high-occupancy correctional facilities with limited access to sanitation supplies. There will be little

Petitioners can do to avoid exposure to COVID-19 if it makes its way through Utah’s jails.

Moreover, the high risk of serious harm to Pre-Trial Petitioners from exposure to unhealthy conditions contravenes Utah’s constitutional due process protections from harsh conditions and unnecessary rigor. The risks of exposure include severe illness, permanent disability, and death, especially for individuals with underlying health conditions. Pretrial detainees should not be exposed to conditions that would be considered punishment where the conditions serve no legitimate government objective, especially where the risk and type of harm would run afoul of even Eighth Amendment standards, as explained in Section III(C) of this Petition. Pretrial detention in this situation creates a scenario where Petitioners are presumed innocent but face serious harm—including lifelong disabilities and, in some cases, death—because they are otherwise unable to post bail to secure their release from custody.

The Utah Constitution and Utah Code provide that the accused has a fundamental right to bail. UTAH CONST. ART. I, § 8; UTAH CODE § 77-1-6(1)(h); *Scott v. Ryan*, 548 P.2d 235, 236 (Utah 1976). For certain enumerated felonies and domestic violence charges, however, bail is not a matter of right. *See* UTAH CODE § 77-20-1(2). A court may modify a person’s pretrial release eligibility “based on a material change in circumstances, or other good cause.” UTAH R. CRIM. P. 7(2). A motion to modify an initial bail order may be made, and the court may rely on information from a reliable record or source. UTAH CODE ANN. § 77-20-1(5)(d), (6)(a), (c). “Any person who may be admitted to bail may likewise be released on the person’s own recognizance in the discretion of the magistrate or court.” UTAH CODE ANN. § 77-20-3(1). Additionally, criminal defendants shall not be compelled to pay money or fees to secure their constitutional and statutory rights. UTAH CONST. ART. I, § 12; UTAH CODE § 77-1-6(2)(b).

In this case, Pre-Trial Petitioners eligible for release on bail but unable to afford bail are

forced to advance money to secure their rights to be free from harsh conditions or unnecessary rigor. The quickly evolving COVID-19 pandemic is a unique and devastating change of circumstance for Petitioners in pretrial detention, and countless reliable sources, from the Center for Disease Control and Prevention to Utah's Governor Herbert, have directed the public to engage in best hygienic practices and practice social distancing in order to decrease the risk of spreading an incurable, dangerous, and highly contagious disease. In light of this situation, and to secure Petitioners' rights to be free from harsh conditions and unnecessary rigor, release from custody is an appropriate remedy and comports with Utah's bail statutes and Constitution.

IV. REQUEST FOR RELIEF

To mitigate the harm that the COVID-19 pandemic will inflict upon people who are incarcerated in prison and jail, correctional staff, and the people of Utah, all Petitioners request the following relief:

1. In light of the potential public safety concerns, all Petitioners request that the Court appoint a special master³¹ with full authority to reduce the population of Utah's community correctional centers and correctional facilities by taking the following actions:
 - i. Reduce the population of correctional facilities such that inmates can comply with recommended preventative social distancing measures.

³¹ The special master should (1) ensure that the appropriate agencies consult and coordinate with the relevant public defense agencies or defense counsel as well as counsel for Petitioners; (2) report to this Court every 48 hours on progress, including the numbers of individuals released, and (3) report immediately to this Court any recalcitrant or unreasonable conduct by any state official in light of the exigent circumstances.

- ii. Release, with or without conditions, the following categories of individuals currently held pre-trial or sentenced to a period of incarceration of one year or less:
- a. Individuals held on bail who do not pose an immediate threat to public safety.
 - b. Individuals who are at increased risk of serious illness from COVID-19, including but not limited to individuals aged 60 or older,³² individuals with diabetes, individuals with chronic lung disease or moderate to severe asthma, individuals who are immunocompromised, individuals who have cancer or have had cancer within the last 5 years, individuals who have cardiovascular disease, renal disease, or liver disease, or other underlying medical conditions, individuals with a history of smoking, or any other risk factors identified by the CDC.³³
 - c. Pregnant individuals.
 - d. Individuals charged with a misdemeanor or lesser offense or offenses.
 - e. Individuals charged with a nonviolent offense or offenses.
 - f. Individuals with 180 days or fewer to serve on a sentence.

³² Release efforts should account for the documented findings that people over 60 years of age have substantially lower recidivism rates. *See, e.g.,* Kim Steven Hunt & Bill Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. SENTENCING COMM'N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

³³ CDC COVID-19 Response Team, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019*, 69 CDC MMWR (Mar. 31, 2020); *People Who Are at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL (page last visited Mar. 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fpeople-at-higher-risk.html.

- iii. Release, with or without conditions, all individuals who were incarcerated solely for a finding of violation of probation or parole that does not include the allegation of a new criminal offense for which they would have been incarcerated if they had not been subject to probation or parole requirements.
- iv. Release, with or without conditions, the following categories of individuals serving sentences of incarceration of one year or more:
 - a. Individuals who are at increased risk of serious illness from COVID-19, including but not limited to individuals aged 60 or older, individuals with diabetes, individuals with chronic lung disease or moderate to severe asthma, individuals who are immunocompromised, individuals who have cancer or have had cancer in the last 5 years, individuals who have cardiovascular disease, renal disease, or liver disease, or other underlying medical conditions, or any other risk factors identified by the CDC.³⁴
 - b. Individuals who have one year or less on their maximum term of imprisonment.
 - c. Pregnant individuals.
 - d. Individuals incarcerated for a nonviolent offense or offenses.
 - e. Any other individual for whom release is appropriate.

³⁴ *Supra* note 33.

2. Order all correctional facilities to provide all inmates with ready access to free soap and hand sanitizer and other cleaning products proven effective in combating the spread of the COVID-19 virus.
3. Order all correctional facilities to waive medical copays for COVID-19 symptoms, tests, and treatment.
4. Order the Department of Corrections to ensure adequate medical personnel and equipment to provide care, including oxygen assistance equipment and ventilators for inmates in the event of an outbreak, using statistics on the incidence of severe cases of COVID-19.
5. Order courts to suspend all probation, parole, or pretrial conditions—including drug testing, employment requirements, and housing requirements—where adherence would require the individual to violate the CDC’s physical distancing instructions.
6. Order courts to temporarily vacate all bench warrants and cease issuance of new bench warrants for failing to appear.

In making a determination on this Petition, Petitioners urge this Court to consider the extraordinary circumstances of this pandemic, and the profound risks to inmates, corrections staff, and the broader community when hundreds of people are kept in extremely close quarters without the medical capacity to deal with mass illness during a pandemic. By continuing to incarcerate Petitioners, Respondents have rendered them helpless to protect themselves from extreme danger while simultaneously making it more difficult for them to receive medical care. As the U.S. Supreme Court has explained, “When the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care,

and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment.” *DeShaney v. Winnebago Cty Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Petitioners urge this Court to consider the dramatic and unprecedented efforts that the government and medical experts have made to slow and contain the spread of COVID-19, and the devastation and human suffering that will likely result if these efforts are not applied to incarcerated people.

Respectfully Submitted,

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