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SCPW-21-0000483

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF INDIVIDUALS IN  
CUSTODY OF THE STATE OF HAWAI‘I

ORIGINAL PROCEEDING

HON. MARK E. RECKTENWALD, Chief  
Justice

HON. PAULA A. NAKAYAMA

HON. SABRINA S. MCKENNA

HON. MICHAEL D. WILSON

HON. TODD W. EDDINS

Associate Justices

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**[PROPOSED] BRIEF OF *AMICUS CURIAE* ACLU OF HAWAI‘I FOUNDATION**

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## I. INTRODUCTION

The American Civil Liberties Union of Hawai‘i Foundation (“ACLU of Hawai‘i”) respectfully submits this amicus brief in support of the Office of the Public Defender’s (“OPD”) “Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus” (“Petition”).

This Court should, at a minimum, grant the relief requested by OPD. The Petition asserts violations under four federal and state constitutional provisions. Under the relevant standard for each provision, DPS has plainly violated—and continues to violate—pretrial detainees’ and post-conviction prisoners’ rights to due process and to be free from cruel and unusual punishment. Thus, this Court’s intervention is both necessary and proper. Further, in any order granting relief this Court should explicitly hold that the present conditions inside DPS violate Article I, Sections 5 and 12 to the Hawai‘i Constitution.

This Court should also order relief beyond that requested by OPD. While no person—regardless of what crime they are accused or have been convicted of—deserves to be subjected to cruel and unusual punishment, or face almost-guaranteed exposure to a life-threatening virus, the ACLU of Hawai‘i submits that certain groups deserve an even stronger presumption of release than requested by the Petition: pretrial detainees, people who are currently incarcerated for technical violations of probation or parole, and kupuna. Further, the Court should order Respondents to reduce populations in DPS facilities so that they are below the “infectious disease emergency capacities” established by the Hawai‘i Correctional System Oversight Commission (“Oversight Commission”). Finally, to better safeguard against the further spread of

COVID-19 both inside and outside of DPS facilities, the Court should order DPS staff to fully comply, and expeditiously, with the State worker vaccination mandate.

Importantly, granting such relief will protect—and decidedly will not undermine—public safety. Data and practices from the Hawai‘i criminal legal system in the past year—including an empirical study of people released from Hawai‘i jails and prisons during the pandemic—demonstrate that releasing people has not undermined public safety. Moreover, any potential public safety concerns can be mitigated by taking reasonable, concerted measures in the release process, such as those implemented in past COVID-19 related orders handed down by this Court.

## **II. FACTUAL BACKGROUND**

In August of 2020, this Court issued a series of orders intended to reduce jail and prison populations in recognition of the fact that “[t]he COVID-19 pandemic has caused a public health emergency” in our community.<sup>1</sup> The Court stated that, given the “rising number of COVID-19 cases at OCCC and the difficulties with social distancing, there is urgent and immediate concern in reducing the inmate populations at OCCC to protect those who work at or are detained at OCCC, their families, and the community.”<sup>2</sup> It also stressed that rising numbers would “tax the limited resources of community health care providers,” pointing specifically to hospital beds, ventilators, and PPE.<sup>3</sup> The orders resulted in a reduction of populations at Hawaii correctional

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<sup>1</sup> SCPW-20-0000509, Dkt. 13 (*Interim Order* filed on Aug. 14, 2020) at 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

facilities.<sup>4</sup> But in April of 2021, the proceedings were concluded based on the Court's assessment that the COVID-19 crisis had subsided.<sup>5</sup>

Unfortunately, that assessment proved incorrect. Today, compared to the numbers at the time that this Court issued release orders in August 2020, rates of COVID-19 are exponentially worse. In the last month, Hawai'i as a state has seen an unprecedented rise in COVID-19 infections, with cases climbing to averages not previously seen at any point in the pandemic.<sup>6</sup> Over the last several weeks, Hawaii has steadily seen daily new case counts in the high triple digits, even reaching above a thousand on multiple days.<sup>7</sup> On September 1, Hawaii reported its largest, single-day loss of life yet, with 13 COVID-19 deaths in one day.<sup>8</sup> The 7-day average of new cases on September 2, 2021 was 910, an increase of approximately 304% from the 7-day average on August 17, 2020 (225 cases).<sup>9</sup> In fact, there have been more cases in the last fourteen days (11,265) than the statewide cumulative total (8,472 cases) in all of August 2020.<sup>10</sup>

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<sup>4</sup> Tom Helper, Stephanie Turrentine, and Isaiah Feldman-Schwartz, *Outbreak*, Lawyers for Equal Justice (Aug. 18, 2021), at 4, <https://www.hiequaljustice.org/reports/outbreak>.

<sup>5</sup> SCPW-20-0000509, Dkt. 164 (Order Concluding Proceeding, filed on Apr. 16, 2021) at 2.

<sup>6</sup> New York Times, Tracking Coronavirus in Hawaii: Latest Map and Case Count, (Sept. 7, 2021), <https://www.nytimes.com/interactive/2021/us/hawaii-covid-cases.html>.

<sup>7</sup> *Id.*

<sup>8</sup> *Hawaii reports 455 COVID-19 cases, 13 new deaths*, KHON2 (Sept. 1, 2021), <https://www.khon2.com/coronavirus/hawaii-reports-455-covid-19-cases-13-new-deaths/>; see also Press Release, UH, *State officials: Do not gather in large groups over Labor Day weekend*, University of Hawaii News (Sept. 1, 2021), <https://www.hawaii.edu/news/2021/09/01/do-not-gather-large-groups-labor-day-weekend/>.

<sup>9</sup> New York Times, Tracking Coronavirus in Hawaii: Latest Map and Case Count, (Sept. 7, 2021), <https://www.nytimes.com/interactive/2021/us/hawaii-covid-cases.html>.

<sup>10</sup> Hawai'i Department of Health, *Hawaii COVID-19 Data*, (updated Sept. 7, 2021), <https://health.hawaii.gov/coronavirusdisease2019/current-situation-in-hawaii/>.

Due to the intense explosion of cases, local hospitals are at or nearing full capacity.<sup>11</sup> As a result, Governor Ige recently discouraged tourists from visiting and returned to limiting indoor social gatherings to ten people, among other restrictions.<sup>12</sup> On August 30, 2021, Honolulu Mayor Blangiardi took the new step of issuing an order requiring that employees and customers of restaurants and other establishments show proof of vaccination or a negative COVID test to enter.<sup>13</sup> This “vaccine passport” program is slated to begin on September 13.<sup>14</sup>

In general, this statewide explosion of cases has been attributed to the “Delta” COVID-19 variant, comprising an estimated 93% of the recent infections.<sup>15</sup> This particular strain is known to be more contagious, can be spread even by fully vaccinated persons, and may cause more severe illness in unvaccinated individuals.<sup>16</sup> Further, although Hawaii’s state-wide full vaccination rate is hovering around 64% as of September 6, 2021,<sup>17</sup> and the last-available data showed over half

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<sup>11</sup> Jim Mendoza, *Going into Labor Day, nearly every Oahu hospital is now at or near ICU capacity*, Hawaii News Now (Sept. 3, 2021), <https://www.hawaiinewsnow.com/2021/09/04/healthcare-leaders-nearly-every-oahu-hospital-is-or-near-icu-capacity>. As of August 19, Straub Medical Center was operating at up to 125% of its capacity. Anita Hofschneider, *Hawaii Covid Hospitalizations Climb As Delta Variant Rages*, Honolulu Civil Beat (Aug. 19, 2021), <https://www.civilbeat.org/2021/08/hawaii-covid-hospitalizations-peak-as-delta-variant-rages>.

<sup>12</sup> Kevin Dayton, *Ige Imposes New Restrictions On The Size Of Gatherings As Caseloads Mount*, Honolulu Civil Beat (Aug. 10, 2021), <https://www.civilbeat.org/2021/08/ige-imposes-new-restrictions-on-the-size-of-gatherings-as-caseloads-mount>.

<sup>13</sup> Office of the Mayor, City and County of Honolulu, Emergency Order No. 2021-11, (COVID-19 [Novel Coronavirus]), *Second Amendment to the Order Implementing Tier 5 of Honolulu’s Post COVID-19 Vaccine Framework*, (Aug. 30, 2021), [http://www.honolulu.gov/rep/site/may/may\\_docs/2108156-CCH\\_Second\\_Amendment\\_to\\_Order\\_Implementing\\_Tier\\_5\\_certified\\_-\\_signed.pdf](http://www.honolulu.gov/rep/site/may/may_docs/2108156-CCH_Second_Amendment_to_Order_Implementing_Tier_5_certified_-_signed.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Hawai`i Department of Health, *Hawaii sequencing and variants of SARS-Cov-2*, (rev. 8/18/21). [https://health.hawaii.gov/coronavirusdisease2019/files/2021/08/Variant\\_report\\_20210818.pdf](https://health.hawaii.gov/coronavirusdisease2019/files/2021/08/Variant_report_20210818.pdf).

<sup>16</sup> CDC, *Delta Variant: What We Know About the Science*, (updated Aug. 19, 2021). <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

<sup>17</sup> Hawai`i Department of Health, *Hawaii COVID-19 Vaccine Summary*, (updated Sept. 6, 2021), <https://health.hawaii.gov/coronavirusdisease2019/current-situation-in-hawaii/#vaccine>.

of the incarcerated population had been vaccinated,<sup>18</sup> these numbers still fall below what would be required to stop the virus from circulating.<sup>19</sup> Unfortunately, as long as the disease continues to spread and infect unvaccinated individuals, it will have the opportunity to mutate, including in ways that will evade the current vaccines.<sup>20</sup> For example, the Delta and newly-discovered “Mu” COVID-19 variants have already shown signs of their potential ability to overcome vaccination.<sup>21</sup> With scientists’ knowledge that many thousands of additional variants already exist globally, they continue to fear that the virus will evolve and further overcome the vaccines’

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<sup>18</sup> Kevin Dayton, *More Than Half Of Hawaii’s Inmates Have Been Vaccinated Against COVID-19*, Honolulu Civil Beat (June 25, 2021), <https://www.civilbeat.org/2021/06/more-than-half-of-hawaiis-inmates-have-been-vaccinated-against-covid-19> (noting, still, that the breakdown of individual facilities showed rates as low as 23% at the jail in Hilo, for example).

<sup>19</sup> Donald G. McNeil Jr., *How Much Herd Immunity Is Enough?* N.Y. Times (Dec. 24, 2020, updated April 2, 2021), <https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html> (Noting that while scientists initially estimated a 60-70% vaccination threshold was required to stop the virus, Dr. Anthony Fauci and others slowly shifted that number up to 90%); Apoorva Mandavilli, *Reaching ‘Herd Immunity’ Is Unlikely in the U.S., Experts Now Believe*, N.Y. Times (updated July 21, 2021), <https://www.nytimes.com/2021/05/03/health/covid-herd-immunity-vaccine.html> (discussing experts’ calculation that herd immunity would require at least 80%; also noting that the virus is “changing too quickly, new variants are spreading too easily and vaccination is proceeding too slowly for herd immunity to be within reach anytime soon.”).

<sup>20</sup> Bridget Balch, Association of American Medical Colleges, *The vaccines and the variants: Four keys to ending the pandemic*, (June 9, 2021), <https://www.aamc.org/news-insights/vaccines-and-variants-four-keys-ending-pandemic> (quoting infectious disease expert Dr. Steven Zeichner who explains, “The more transmission, the more opportunity you have for variants to evolve.”).

<sup>21</sup> Fowlkes, Gaglani, Groover, et. al, *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance — Eight U.S. Locations, December 2020–August 2021*, MMWR Morb Mortal Wkly Rep 2021, 70:1167-1169, [https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s\\_cid=mm7034e4\\_w#suggestedcitation](https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s_cid=mm7034e4_w#suggestedcitation) (study finding moderate reduction of effectiveness of COVID-19 vaccines in preventing infection after predominance of Delta variant); Berkeley Lovelace Jr., *WHO says it is monitoring a new Covid variant called ‘mu’* CNBC (Sept. 2, 2021), <https://www.cnbc.com/2021/09/01/who-says-it-is-monitoring-a-new-covid-variant-called-mu.html> (reporting that WHO is monitoring a new COVID variant, “mu,” which has mutations with the potential to evade the immunity provided by vaccination or a previous COVID-19 infection).

current level of protection.<sup>22</sup>

Most significantly, sources have also *specifically* attributed many of the current COVID-19 outbreaks in Hawaii to correctional facilities.<sup>23</sup> In fact, the state’s September 2 cluster report showed that “cases in correctional facilities made up 100% of all cluster investigations over the last two weeks on the Big Island.”<sup>24</sup> At a baseline level, the inability of individuals incarcerated in prisons and jails to social distance due to overcrowding—in addition to poor ventilation and a lack of sufficient sanitation and adequate health care—all contribute to a rate of coronavirus infections in correctional facilities that is more than five times higher than the overall national rate.<sup>25</sup> And in particular, conditions inside Hawaii’s jails and prisons are extremely bleak. Indeed, on September 1, 2021, the Prison Policy Initiative published a report in which they graded state corrections departments on their responses to the COVID-19 pandemic by looking at measures such as reduction of prison population, reduction of infection and death rates behind

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<sup>22</sup> Michelle Roberts, *South Africa coronavirus variant: What is the risk?*, BBC News (Feb. 23, 2021), <https://www.bbc.com/news/health-55534727>; Apoorva Mandavilli & Benjamin Mueller, *Virus Variants Threaten to Draw Out the Pandemic, Scientists Say*, N.Y. Times (April 3, 2021), <https://www.nytimes.com/2021/04/03/health/coronavirus-variants-vaccines.html>.

<sup>23</sup> Anita Hofschneider, *Hawaii Covid Hospitalizations Climb As Delta Variant Rages*, Honolulu Civil Beat Honolulu (Aug. 19, 2021), <https://www.civilbeat.org/2021/08/hawaii-covid-hospitalizations-peak-as-delta-variant-rages>; Anita Hofschneider, *Crowded Prisons And Poorly Ventilated Restaurant Kitchens Fuel Hawaii’s Pandemic*, Honolulu Civil Beat (Sept. 2, 2021), <https://www.civilbeat.org/2021/09/crowded-prisons-and-poorly-ventilated-restaurant-kitchens-fuel-hawaiis-pandemic>.

<sup>24</sup> Hofschneider, *Crowded Prisons*, *supra* n. 23.

<sup>25</sup> *Covid-19’s Impact on People in Prison*, Equal Justice Initiative (updated Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison/>.

bars, vaccination of incarcerated population, and efforts to address basic health (including mental health) needs through easy policy changes.<sup>26</sup> The state of Hawaii received a grade of “F.”<sup>27</sup>

The reality of the poor conditions inside Hawaii’s facilities recently spurred a group of plaintiffs to file a class action lawsuit in the U.S. District Court for the District of Hawaii, arguing that the State has failed to protect the incarcerated population from the virus.<sup>28</sup> The filings demonstrate that DPS has failed to prevent the spread of COVID-19 within the facilities and has violated its own COVID-19 policies, including by: housing up to 60 residents in a single room, failing to provide adequate water, sanitary living conditions, bathroom access, and proper hygiene, failing to separate inmates with positive test results, failing to properly quarantine new intakes, failing to communicate proper COVID-19 protocols to DPS staff and incarcerated persons, failure to protect older and immunocompromised individuals, and failure to allow adequate social distancing, enforce mask wearing, and adequately evaluate, monitor, and treat those who contract COVID-19.<sup>29</sup>

In one of the most notable examples of the poor conditions, plaintiffs demonstrated that at HCCC, 40–60 inmates were regularly housed in a single room, called “the fishbowl,” where they slept on mats three to six inches apart and were at times forced to urinate in cups due to a

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<sup>26</sup> Tiana Herring & Maanas Sharma, *States of emergency: The failure of prison system responses to COVID-19*, Prison Policy Initiative, (Sept. 1, 2021), [https://www.prisonpolicy.org/reports/states\\_of\\_emergency.html](https://www.prisonpolicy.org/reports/states_of_emergency.html).

<sup>27</sup> *Id.*

<sup>28</sup> *See Chatman v. Otani*, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at \*3 (D. Haw. July 13, 2021); *see also* Brennan Center for Justice, *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, (updated August 23, 2021), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

<sup>29</sup> *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at \*3 (D. Haw. July 13, 2021).

lack of regular access to a toilet.<sup>30</sup> After two people incarcerated in the “fishbowl” contracted COVID-19, within several days nearly every person detained in the room tested positive.<sup>31</sup> As a result of learning these facts—among many disturbing others—and in response to plaintiffs’ request for a preliminary injunction, U.S. District Judge Jill A. Otake ordered DPS to implement and adhere to its Pandemic Response Plan, finding a strong likelihood that plaintiffs would succeed on the merits of their claims that DPS had violated the Eighth and Fourteenth Amendments to the U.S. Constitution.<sup>32</sup> Judge Otake’s ruling and the additional facts revealed to the public about conditions inside DPS facilities only confirm what advocates have urgently requested since the beginning of the COVID-19 pandemic—and even before: Hawaii’s correctional facilities violate both state and federal constitutional requirements regarding conditions of confinement.

### III. ARGUMENT

#### A. **This Court Should, At Minimum, Grant the Relief Requested by OPD and, In Doing So, Should Explicitly Hold That Present Conditions Inside DPS Facilities Violate the Hawai‘i Constitution**

This Court should grant the relief sought by OPD. OPD asserts violations under four different federal and state provisions. No matter what relevant legal standard is applied to claims under those provisions, DPS has violated pretrial detainees’ and post-conviction prisoners’ rights to due process and to be free from cruel and unusual punishment. Relief is therefore warranted.

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<sup>30</sup> *Id.* at \*1, \*16.

<sup>31</sup> Motion for Preliminary Injunction and Temporary Restraining Order, Memorandum in Support of Motion at 3, *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, ECF No. 6 (D. Haw. 2021).

<sup>32</sup> *Chatman v. Otani*, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at \*13–19 (D. Haw. July 13, 2021).

Further, the ACLU of Hawai‘i respectfully submits that, in any order granting relief, this Court should explicitly hold that the present conditions inside DPS facilities violate Article I, Sections 5 and 12 to the Hawai‘i Constitution. The present case is a good vehicle for doing so, and both present and future litigants would benefit from a clear ruling from this Court about the relevant legal standards, and how they apply under the circumstances presented by OPD’s Petition.

**1. Under any relevant legal standard, DPS has violated—and continues to violate—both pretrial detainees’ and post-conviction prisoners’ rights to due process and to be free from cruel and unusual punishment**

OPD’s Petition asserts violations under four different federal and state constitutional provisions: the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5 and 12 to the Hawai‘i Constitution. *See* Petition 16, 20-22. As the ACLU of Hawai‘i has thoroughly explained in a prior related proceeding<sup>33</sup>—and contrary to past assertions by Respondents<sup>34</sup>—each such claim is governed by a different legal standard:

***Eighth Amendment to the U.S. Constitution:*** The Eighth Amendment’s Cruel and Unusual Punishments Clause applies to conditions-of-confinement claims brought by *post-conviction prisoners*, and the familiar “deliberate indifference” test applies.

***Fourteenth Amendment to the U.S. Constitution:*** *Pretrial detainees’* conditions-of-confinement claims are governed by the Fourteenth Amendment’s Due Process Clause. And under recent Supreme Court precedent and its progeny, such pretrial detainees’ claims are

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<sup>33</sup> *See* SCPW-20-0000509, Dkt. 94 (amicus brief of ACLU, ACLU of Hawai‘i, and Hawaii Disability Rights Center) at 11-23 (explaining that each of the “four asserted constitutional claims . . . has a different test”).

<sup>34</sup> *See, e.g.*, SCPW-20-0000509, Dkt. 9 (Aug. 14, 2020 Answer of Respondent Nolan P. Espinda ) at 5 (arguing that “a violation” of each of the four asserted constitutional claims “requires proof of deliberate indifference”); Dkt. 25 (Aug. 17, 2020 Answer of Respondent Dwight K. Nadamoto) at 4-6 (arguing that “deliberate indifference” is the only applicable test).

governed, not by the Eighth Amendment “deliberate indifference” test, but rather by an objective reasonableness test. *See Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015); *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1069-70 (9th Cir. 2016) (en banc), *cert denied*, 137 S. Ct. 831 (2017) (holding that *Kingsley* requires a “purely objective” standard for pretrial detainees’ conditions of confinement claims).<sup>35</sup>

**Article I, Section 12 of the Hawai‘i Constitution:** As to claims under the Cruel and Unusual Punishment Clause of Article I, Section 12 of the Hawai‘i Constitution, this Court has not yet announced what test applies. While Respondents have previously asked the Court to adopt the federal “deliberate indifference” standard, that would not only be doctrinally wrong,<sup>36</sup> but it would also fail to meaningfully protect incarcerated people from unjustified, state-imposed harm,<sup>37</sup> and permit arbitrary and unjust results.<sup>38</sup> The Court should instead interpret Article I, Section 12’s ban on “cruel and unusual punishment” to grant greater protection than its federal corollary. It can and should do this by adopting *Kingsley*’s objective reasonableness test.

**Article I, Section 5 of the Hawai‘i Constitution:** As to due process claims under Article I, Section 5 of the Hawai‘i Constitution, this Court recently adopted the *Bell v. Wolfish* standard.

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<sup>35</sup> *See* SCPW-20-0000509, Dkt. 94 at 13-17 (analyzing *Kingsley*’s objective reasonableness test).

<sup>36</sup> *See* SCPW-20-0000509, Dkt. 94 at 18-19 (arguing that “the prevailing federal standard is wrong” because it “incorrectly and impermissibly ignores actions that have the *effect* of punishment”).

<sup>37</sup> *See* SCPW-20-0000509, Dkt. 94 at 19-20 (arguing that “the federal standard does not meaningfully protect people who are incarcerated in correctional facilities from unjustified, state-created harm” in part because claims that “depend on proof of what was inside the mind of specific prison officials . . . are exceptionally hard to prove” and providing examples where “even the most objectively shocking and inhumane conditions of confinement have . . . been found to not violate the Eighth Amendment because the requisite *mens rea* was not proven”).

<sup>38</sup> *See* SCPW-20-0000509, Dkt. 94 at 21 (arguing that “the federal standard leads to arbitrary and unjust results” since “constitutional[] accountab[ility] will depend on the hidden whims of specific prison officials—what they knew and did not know, and what they did and did not do”).

*See Gordon v. Maesaka-Hirata*, 143 Haw. 335, 358, 431 P.3d 708, 731 (2018) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). Because the precise test that this Court adopted preserves litigants’ ability to show a violation of Article I, Section 5 using “only objective evidence,” *id.* at 722 n.19 (quoting *Kingsley*, 576 U.S. at 398), the ACLU of Hawai‘i does not argue against the continued application of the *Bell* standard. But the ACLU of Hawai‘i submits that this Court should develop a jurisprudence apart from that developed by federal courts—in which qualified immunity, the Prison Litigation Reform Act (“PLRA”), and other doctrines skew application of the law—in deciding what constitutes unconstitutional punishment under Article I, Section 5.<sup>39</sup>

No matter what legal standard the Court applies, however, Respondents have violated the U.S. and Hawai‘i constitutions by allowing overcrowding to continue during the ongoing pandemic and failing to take reasonable preventive measures.<sup>40</sup> This conclusion is bolstered by the findings made by the U.S. district court in *Chatman v. Otani*. No. CV 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). In that lawsuit, the Honorable Jill A. Otake received and heard substantial and wide-ranging evidence and testimony regarding recent conditions within DPS facilities. Based on the record, the district court concluded that there was a strong likelihood that DPS had violated at least the Eighth and Fourteenth Amendments to the U.S. Constitution.<sup>41</sup> In then granting a preliminary injunction in favor of incarcerated people, the district court observed, among other things, that DPS “ha[d] not taken reasonable available

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<sup>39</sup> *See* SCPW-20-0000509, Dkt. 94 at 22-23 (arguing that “this Court should explicitly reject some federal Fourteenth Amendment (and Eighth Amendment) jurisprudence” and instead “clarify that state courts in Hawai‘i are free to develop their own jurisprudence separate from that created by federal courts”).

<sup>40</sup> *See also* SCPW-20-0000509, Dkt. 94 at 23-28.

<sup>41</sup> *See Chatman v. Otani*, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at \*13-19 (D. Haw. July 13, 2021).

measures to abate the risks caused by the foregoing conditions, knowing full well—based on multiple prior outbreaks—that serious consequences and harm would result” to incarcerated people.”<sup>42</sup> The findings made by the district court are both highly relevant and persuasive here.

**2. In any relief order, the Court should explicitly hold that present conditions in DPS facilities violate Article I, Sections 5 and 12 to the Hawai‘i Constitution**

The present Petition is but the latest in a series of proceedings initiated by OPD to reduce the dangerously high levels of overcrowding within DPS facilities during the pandemic. OPD first initiated a similar proceeding in March 2020 (*i.e.*, SCPW-20-0000200 & SCPW-20-0000213), based on the then-present threat of COVID-19 “spread[ing] into [DPS] jails and prison facilities.”<sup>43</sup> The Court terminated this proceeding in June 2020. OPD then initiated a new proceeding in August 2020 (*i.e.*, SCPW-20-0000509), based on then-occurring outbreaks in many DPS facilities statewide. The Court also terminated this proceeding in April 2021.

While this Court correctly entered a variety of relief orders to mitigate and prevent the threatened and actual harm presented by the dangerous combination of correctional facility overcrowding and COVID-19, none of its orders explicitly provided a ruling on or analysis of the merits of the constitutional claims asserted by OPD. For example, in its April 2, 2020 “Order of Consolidation and for Appointment of Special Master,” the Court acknowledged that “[t]he COVID-19 pandemic has caused a public health emergency that is impacting Hawai‘i’s community correctional centers and facilities,” and ordered relief.<sup>44</sup> But it did not say one way or another whether conditions inside DPS violated any of the asserted constitutional provisions. As

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<sup>42</sup> *Id.* at \*18.

<sup>43</sup> SCPW-20-0000200, Dkt. 1 (OPD’s Mar. 24, 2020 petition letter) at 1.

<sup>44</sup> SCPW-20-0000213, Dkt. 22 at 2.

another example, in its August 16, 2020 “Order re: Petty Misdemeanor and Misdemeanor Defendants” (the Court’s first substantive release order in the second proceeding), the Court again “recognize[d] the impact of COVID-19 on Hawai‘i’s community correctional centers and facilities,” noting the “COVID-19 outbreak at OCCC” and how it had “the potential to not only place the inmates at risk of death or serious illness, but also endanger the lives and well-being” of others in the broader community.<sup>45</sup> But again, the Court did not explicitly find or hold that these conditions violated constitutional standards.

Presumably, in ordering substantive relief, the Court found—or believed there was a high likelihood of finding—at least one constitutional violation. It just did not say so openly. This Court should now make the implicit explicit: it should hold that present conditions in DPS facilities violate Article I, Sections 5 and 12 to the Hawai‘i Constitution.

Such an explicit ruling is needed. It would provide clarity to future litigants by resolving what legal standards apply for conditions-of-confinement claims brought under the Hawai‘i Constitution, as well as how they apply in the context of a particular prison conditions dispute. This is all the more important given that this Court is “free to give”—and has on many occasions given—“broader protection under the Hawai‘i Constitution than that given by the federal constitution.” *State v. Viglielmo*, 105 Haw. 197, 211, 95 P.3d 952, 966 (2004) (collecting cases). This Court now has the opportunity to clarify what standard applies to conditions-of-confinement claims under Article I, Section 12. Because the present case involves four related-but-distinct constitutional claims, it is also a good vehicle for outlining how the standards relate to each other (if at all), and how they differ. In sum, this Court should explicitly decide whether and how the

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<sup>45</sup> SCPW-20-0000509, Dkt. 17 at 2.

claims brought under the Hawai‘i Constitution have been violated by Respondents’ conduct.

## **B. This Court Should Also Grant Additional Relief**

The ACLU of Hawai‘i respectfully submits that this Court should grant relief beyond that sought by OPD’s Petition. While no person—regardless of what crime they are accused or convicted of—deserves to be subjected to cruel or unusual punishment, or face almost-guaranteed exposure to a life-threatening disease, the ACLU of Hawai‘i submits that certain groups deserve an even stronger presumption of release than contemplated by the Petition.

First, because the vast majority of pretrial detainees in DPS custody are currently incarcerated because they are too poor to afford money bail, the Court should apply a stronger presumption of release as to them. Second, the Court should consider a stronger presumption of release for people who are currently incarcerated by DPS for technical violations of probation or parole. As opposed to being accused of committing a criminal offense, these individuals are currently incarcerated merely because they failed to follow conditions such as attending a meeting or obeying a curfew. Third, kupuna—who are both most at risk of succumbing to COVID-19 and also least likely to commit crimes after reentering the community—should receive a stronger presumption of release.

Beyond imposing stronger release presumptions as to those groups, the Court should also order Respondents to reduce populations in DPS facilities so that they comply with the “infectious disease emergency capacities” established by the Oversight Commission, and order DPS to require staff to fully comply—expeditiously—with the State worker vaccine mandate.

### **1. The Court should apply a stronger presumption of release as to pretrial detainees**

Under current pretrial practices in Hawai‘i’s criminal legal system, the vast majority of

criminal defendants—who under the law are “presumed innocent until proven guilty”<sup>46</sup>—end up incarcerated simply because they are too poor to afford to pay for their liberty, in the form of money bail, while they await trial. Specifically, a comprehensive 2018 study conducted by the ACLU of Hawai‘i revealed both that circuit courts imposed money bail as a condition of pretrial release in practically all (*i.e.*, 88%) criminal cases statewide, and 56% of defendants subject to money bail as a condition of release were unable to post the bail amount set by the court.<sup>47</sup> The end result is a Hawai‘i criminal legal system that incarcerates people pretrial at an alarmingly high rate *because they are poor*—not because they are a flight risk or a danger to the community.

Currently, there are about 817 pretrial detainees in DPS custody, constituting 28.2% of the entire incarcerated population in DPS custody.<sup>48</sup> The vast majority of these 817 people are very likely incarcerated because they are unable to post money bail. Continuing to detain these people simply because they do not have enough money to post an often-arbitrary bail amount is both improper and constitutionally impermissible under normal circumstances.<sup>49</sup> But it is

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<sup>46</sup> *State v. Rothman*, 70 Haw. 546, 548-61, 779 P.2d 1, 3 (1989); *see also Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

<sup>47</sup> *See* ACLU of Hawai‘i, *As Much Justice As You Can Afford: Hawaii’s Accused Face an Unequal Bail System*, at 4, 23 (Jan. 2018), <https://www.acluhi.org/sites/default/files/2018/01/aclu-of-hawaii-bail-report.pdf>.

<sup>48</sup> *See* Dep’t of Public Safety, Weekly Population Report (Aug. 16 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/08/Pop-Reports-Weekly-2021-08-16.pdf> (listing 721 male pretrial felony defendants, 72 female pretrial felony defendants, 105 male pretrial misdemeanor defendants, and 19 female pretrial misdemeanor defendants in DPS custody).

<sup>49</sup> Indeed, as the California Supreme Court recently held, “[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional.” *In re Humphrey*, 482 P.3d 1008, 1012 (Cal. 2021); *see also ODonnell v. Harris County*, 892 F.3d 147, 162 (5th Cir. 2018) (affirming district court’s holding that Harris County’s bail practices result in the “absolute deprivation of [indigent misdemeanor arrestees’] most basic liberty interests—freedom from incarceration” and thereby violate

unconscionable during the pandemic. In recognition of the unjust reality of Hawai‘i’s bail system, the Court should apply a stronger presumption of release as to pretrial detainees.

**2. The Court should apply a stronger presumption of release to people who are currently incarcerated for technical violations of probation or parole**

Another group who should receive a stronger presumption of release are the many people who are currently incarcerated because of “technical” violations of probation or parole.

The criminal legal system, both in Hawai‘i and nationally, has had a longstanding practice of reincarcerating people when they violate “technical” conditions of release on parole and probation. Under Hawai‘i’s parole system, for example, technical violations can exist for minor things like forgetting to inform a parole officer about a new address, failing to retain employment, missing a curfew, hitchhiking, or showing up to a meeting late—just some of the 50 different technical parole conditions regularly employed by the Hawaii Paroling Authority.<sup>50</sup> Such technical violations have fueled mass incarceration nationally<sup>51</sup> as well as in Hawai‘i.<sup>52</sup>

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equal protection).

This Court has also invalidated certain Hawai‘i bail practices on state constitutional grounds. *See Huihui v. Shimoda*, 64 Haw. 527, 539, 644 P.2d 968, 976 (1982) (“[W]e hold that article I, section 12 of the Hawaii Constitution, prohibiting excessive bail, also protects persons accused of crimes from the unreasonable or arbitrary denial of bail.”); *Sakamoto v. Won Bae Chang*, 56 Haw. 447, 451, 539 P.2d 1197, 1200 (1975) (stating that “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act” and holding that “ of \$300,000 is so excessive as to violate Article I, Section 9 of the State Constitution”).

<sup>50</sup> Janet Davidson-Coronado, *Technically Disposed: Parole Violators and Prison Crowding in Hawaii*, Justice Policy Journal (Aug. 2001), at 101, <http://www.cjcj.org/uploads/cjcj/documents/jpv1n1.pdf>.

<sup>51</sup> TCR Staff, *Recidivism’s Hidden Drivers: ‘Technical Violations’ of Probation or Parole*, The Crime Report (Mar. 5, 2020), <https://thecrimereport.org/2020/03/05/the-hidden-driver-of-recidivism-technical-violations-of-probation-or-parole> (“More than a quarter of the 600,000 Americans who are reincarcerated each year are sent back to prison because they have committed ‘technical violations’ of their terms of probation or parole—not because they have committed new crime.”).

<sup>52</sup> *See, e.g.*, Janet Davidson-Coronado, *supra* n. 50 at 97 (finding that Hawai‘i’s “numbers of technical violators of parole have risen dramatically over the past 25 years”).

These technical conditions of probation and parole have always been difficult to comply with; indeed, “in Hawaii, as in the rest of the nation, many of the conditions of parole are unrealistic” such that people are destined to fail under even the best of circumstances.<sup>53</sup> But—as with so many other obligations during the ongoing crisis—they have become even harder to comply with during the pandemic.

Currently, there are about 933 people who are incarcerated either due to probation or parole violations.<sup>54</sup> If past practice is any indication, a very substantial portion of this population are incarcerated for technical violations. At least with respect to the Hawai‘i parole process, the most recent statistics show that, of the 321 people who had their parole revoked during the Hawai‘i Paroling Authority’s 2019-2020 fiscal year, 100% of such parole revocations were the result of technical violations of parole, meaning zero parole revocations were due to allegations of new criminal offenses.<sup>55</sup> On the probation front, a report by the Office of Hawaiian Affairs confirms that “[m]ost admissions to prison from probation are not for new offenses, but from failure to meet the terms of probation.”<sup>56</sup> Very likely, then, hundreds of people are sitting in prison cells, vulnerable to a life-threatening virus, because they were, for example, unable to find

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<sup>53</sup> *Id.* at 101. Accordingly, technical conditions should, as a matter of policy, be drastically reduced or outright banned. *See, e.g.,* Nikki Trautman Baszynski, *States Should Abolish Technical Violations of Probation and Parole*, *The Appeal* (Apr. 9, 2021), <https://theappeal.org/the-point/states-should-abolish-technical-violations-of-probation-and-parole> (arguing that “State lawmakers should ban incarceration for technical violations of probation and parole”).

<sup>54</sup> *See* Dep’t of Public Safety, *Weekly Population Report* (Aug. 16 2021), <https://dps.hawaii.gov/wp-content/uploads/2021/08/Pop-Reports-Weekly-2021-08-16.pdf> (listing 537 male parole violators, 71 female parole violators, 266 male probation violators, and 59 female probation violators in DPS custody).

<sup>55</sup> Hawaii Paroling Authority, *2020 Annual Statistical Report: Fiscal Year 2020: July 1, 2019 to June 30, 2020*, at 9 <https://dps.hawaii.gov/hpa/files/2020/10/2020-Annual-Report.pdf>.

<sup>56</sup> Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), at 34, <https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/native-hawaiians-criminal-justice-system.pdf>.

or keep jobs during the pandemic, or because they missed meetings with their parole or probation officers. People incarcerated under these circumstances do not belong in cells. The Court should apply a stronger presumption of release as to people who are currently incarcerated for technical violations of probation or parole.

### **3. The Court should apply a stronger presumption of release as to kupuna**

Another group of people who should receive a stronger presumption of release are kupuna. The elderly are at greater risk of contracting or succumbing to COVID-19.<sup>57</sup> At the same time, they also present the lowest risk to public safety. That is because elderly people “age out” of crime. Indeed, ample social science research has shown that almost all people who commit crimes, “even violent ones, mature out of lawbreaking before middle age.”<sup>58</sup> Older people have more fully developed brain function (and can gauge risk and reward better), are more likely to be less poor, and are often physically unable to commit certain crimes.<sup>59</sup>

At any given point in time, over 650 people incarcerated in Hawai‘i prisons are 55 years of age or older.<sup>60</sup> These people have very likely aged out of committing new crimes—thereby presenting no threat to public safety—and are more vulnerable to the dangers of COVID-19. The

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<sup>57</sup> See, e.g., Lisa Armstrong, *Old People in Prison Were Left to Die From COVID. It Didn't Have to Be That Way*, Mother Jones (June 30, 2021), <https://www.motherjones.com/politics/2021/06/old-people-in-prison-were-left-to-die-from-covid-it-didnt-have-to-be-that-way>; Natalie Keyssar, *Covid's Most Vulnerable Population: Elderly Prisoners*, Rolling Stone (May 18, 2021), <https://www.rollingstone.com/covids-most-vulnerable-population-elderly-prisoners>.

<sup>58</sup> Dana Goldstein, *Too Old to Commit Crime?*, The Marshall Project (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.

<sup>59</sup> *Id.*

<sup>60</sup> Report, *Creating Better Outcomes, Safer Communities*, HCR 85 Task Force (Dec. 2018), at 7, [https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform\\_Final-Report\\_12.28.18.pdf](https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform_Final-Report_12.28.18.pdf).

Court should apply a stronger presumption of release as to people over the age of 55.

**4. The Court should order Respondents to reduce populations in DPS facilities so that they comply with the mandatory “infectious disease emergency capacities” established by the Hawai‘i Correctional System Oversight Commission**

OPD asks the Court to order Respondents to “tak[e] immediate steps to reduce the population [of DPS] facilities to their *design capacity* and/or Infectious Disease Emergency Capacity as recommended by the Hawai‘i Correctional System Oversight Commission.” Petition 18 (emphasis in original). The ACLU of Hawai‘i makes two points regarding this request.

First, reaching design capacity alone would be insufficient; the Court should order that DPS facilities reach the “infectious disease emergency capacities” established by the Oversight Commission. As the Oversight Commission observed in its September 2020 report publishing such capacities, the capacities for DPS facilities originally set by the Corrections Population Management Commission in 2001—which “capacities are still in use today”—simply “did not anticipate an infectious disease epidemic that might reach into our correctional facilities.”<sup>61</sup> Thus, relying on its considerable experience and expertise in correctional management,<sup>62</sup> and analyzing and incorporating the Centers for Disease Control and Prevention (“CDC”) guidelines regarding “Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,” the Oversight Commission established new “infectious disease emergency capacity” limits for each DPS facility tailored to the ongoing public health emergency. The Court

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<sup>61</sup> See Oversight Commission, *Hawai‘i Correctional Facilities: Infectious Disease Emergency Capacities*, at 3 (Sept. 2020), <https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL-REPORT-091120.pdf>.

<sup>62</sup> The Oversight Commission is currently composed of 5 members, who together bring extensive and substantial experience in criminal justice and correctional matters: Chair Mark Patterson is a former warden of WCCC, Ted Sakai is a former DPS Director, Martha Torney is a former DPS Deputy Director for Administration, Ronald Ibarra is a former state court judge, and Mike Town is former state court judge and former member of the Hawai‘i Paroling Authority.

should require Respondents to reduce populations to meet these—and not any other—limits.

Second, the Oversight Commission’s “infectious disease emergency capacities” are not simply recommendations; they are mandatory limits. While the Oversight Commission did make a passing reference to “present[ing its] recommendations,” it also stated unambiguously that “[t]he Commission’s intent is to *designate* maximum capacities for each living unit” in each DPS facility.<sup>63</sup> In so “designat[ing] maximum capacities,” the Oversight Commission was plainly exercising its statutory mandate and authority under Act 179, Session Laws of Hawai‘i 2019, which provides that, among its express “powers and duties,” the Oversight Commission “*shall . . . [e]stablish* maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility.”<sup>64</sup> Thus, the Court should order Respondents to comply with the Oversight Commission’s express limits. Anything short of that would, in effect, inappropriately displace the judgment, expertise, and authority of the Oversight Commission.

**5. The Court should order DPS to require its correctional staff to comply fully, and in an expeditious manner, with the State worker vaccination mandate**

This Court should also order relief relating to another high-risk population within DPS for getting infected with and spreading COVID-19: correctional staff. Specific and stronger measures regarding DPS correctional staff must be implemented. That is because, as correctional

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<sup>63</sup> See Oversight Commission, *Hawai‘i Correctional Facilities: Infectious Disease Emergency Capacities*, at 3 (Sept. 2020), <https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL-REPORT-091120.pdf> (emphasis added).

<sup>64</sup> Act 179, SLH 2019, § 2 (codified at HRS § 353L-3(b)(2)).

health care expert Dr. Pablo Stewart<sup>65</sup> testified in an earlier proceeding, “[c]orrectional staff are a major vector” for COVID-19.<sup>66</sup> Dr. Stewart’s conclusion is supported by science. For example, a study published in the American Journal of Preventive Medicine found both that (1) “[w]ithin the prison environment, COVID-19 case burden was initially higher among staff than among prisoners in 89% of jurisdictions” and (2) “[p]rison staff experienced substantially higher COVID-19 case prevalence than the U.S. population overall”—at a “persistently 3-5 times higher [rate] than the U.S. population.”<sup>67</sup> As another example, a recent study published in an American Medical Association medical journal emphasized how “[t]he more than 220,000 staff who move in and out of jails on a daily basis are likely to contribute to jail-community spread of airborne pathogens, such as SARS-CoV-2.”<sup>68</sup> And as other medical experts have argued, law enforcement and correctional workers’ “choice not to get vaccinated has direct and deadly consequences for countless people, including their own household members as well as vulnerable incarcerated people and highly policed Black, Latino, and unhoused communities, in

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<sup>65</sup> See SCPW-20-0000213, Dkt. 80 (Apr. 13, 2020 Declaration of Pablo Stewart, M.D.) at PDF 11 (curriculum vitae).

<sup>66</sup> SCPW-20-0000509, Dkt. 162 (ACLU of Hawai‘i amicus brief) at PDF 34 (¶ 25 of Apr. 6, 2021 Declaration of Pablo Stewart, M.D.).

<sup>67</sup> Julia A. Ward, RN, et al., *COVID-19 Cases Among Employees of U.S. Federal and State Prisons*, American Journal of Preventive Medicine (Feb. 22, 2021), [https://www.ajpmonline.org/article/S0749-3797\(21\)00118-5/fulltext](https://www.ajpmonline.org/article/S0749-3797(21)00118-5/fulltext).

<sup>68</sup> Eric Reinhart, MD & Daniel L. Chen, JD, PhD, *Association of Jail Decarceration and Anticontagion Policies With COVID-19 Case Growth Rates in US Counties*, JAMA Network Open (Sept. 2, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680> (concluding that “anticontagion policies, including jail decarceration to minimize carceral outbreaks and their spillover to surrounding communities, appear to be necessary for epidemic control, public health, and mitigation of racial health disparities”).

which people have no choice but to interact with unvaccinated officers.”<sup>69</sup> Given that DPS correctional staff can and do move frequently between the community and DPS facilities, the measures DPS implements as to this group must be bolstered.

And that means vaccines. In April 2021, Dr. Stewart warned that correctional staff vaccination “data needs to be part of the decision-making calculus—and we just do not have that [data].”<sup>70</sup> But since April 2021, the public *has* obtained correctional staff vaccination data. That data is alarming: “[DPS] currently has the *lowest rate of vaccinated employees of any state department* at 77.1% of its 2,285 employees, despite the Aug. 5 vaccination and testing order for state and county employees issued by Gov. David Ige.”<sup>71</sup>

The bottom line is that DPS is not doing enough to ensure correctional staff are vaccinated. Remarkably, in a recent press release—issued *after* the Governor imposed a state-wide vaccination mandate for State employees<sup>72</sup>—DPS stated only that it “continues to *encourage* all staff and inmates to voluntarily get tested and receive the COVID-19

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<sup>69</sup> Eric Reinhart & Amanda Klonsky, *Get Police Vaccinated-And Prison Guards, and Jail Workers, and Anyone Else Charged With Protecting the Public’s Safety*, The Atlantic (Aug. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/08/public-safety-police-prisons-vaccination-mandates/619879>.

<sup>70</sup> SCPW-20-0000509, Dkt. 162 (ACLU of Hawai‘i amicus brief) at PDF 34 (¶ 25 of Apr. 6, 2021 Declaration of Pablo Steward, M.D.).

<sup>71</sup> Peter Boylan, *Public defender seeks release of certain inmates to curb COVID-19*, Honolulu Star-Advertiser (Aug. 31, 2021), <https://www.staradvertiser.com/2021/08/31/hawaii-news/public-defender-seeks-release-of-certain-inmates-to-curb-covid-19> (emphasis added).

<sup>72</sup> Office of the Governor, *Office of the Governor News Release: Governor Ige Signs Emergency Proclamation Establishing Vaccination and Testing Policy for State and County Employees* (Aug. 5, 2021), <https://governor.hawaii.gov/newsroom/office-of-the-governor-news-release-governor-ige-signs-emergency-proclamation-establishing-vaccination-and-testing-policy-for-state-and-county-employees>.

vaccination.”<sup>73</sup> Mere encouragement falls short of what is needed. All State and county employees must be vaccinated for COVID-19 or otherwise submit to regular testing.

Because DPS correctional staff are a major vector for transmitting and spreading COVID-19, and because DPS’s current effort to “encourage” staff vaccination has proved ineffective, the Court should order DPS to require its correctional staff to comply fully, and in an expeditious manner, with the State worker vaccination mandate.<sup>74</sup>

### **C. Granting The Foregoing Relief Will Protect—Not Undermine—Public Safety**

OPD has asked that this Court “[o]rder the Circuit, Family and District courts that when adjudicating motions for release” of incarcerated individuals, among other things, “release shall be presumed unless the court finds that the release of the individual would pose a significant risk to the safety of the individual or the public.” Petition 17. The ACLU of Hawai‘i emphasizes that the courts can fully and adequately protect public safety while this matter is ongoing and its related orders are in effect. Data and practices from the Hawai‘i criminal legal system in the past year—including an empirical study of people released from Hawai‘i jails and prisons during the pandemic—demonstrate that releasing people has not undermined public safety. Moreover, any potential public safety concerns can be mitigated by taking reasonable, concerted measures in the release process, such as those implemented in past COVID-related orders issued by this Court.

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<sup>73</sup> Dep’t of Public Safety, *PSD News Release: Department of Public Safety COVID-19 Update* (Aug. 30, 2021), <https://governor.hawaii.gov/newsroom/psd-news-release-department-of-public-safety-covid-19-update-19> (emphasis added).

<sup>74</sup> To the extent the Court considers a vaccination mandate that is stronger than that recently imposed by the Governor, such a mandate could be consistent with civil liberties principles, especially when imposed to “avoid[] a deadly threat to the public health.” David Cole & Daniel Mach, *We Work at the A.C.L.U. Here’s What We Think About Vaccine Mandates*, *New York Times* (Sept. 2, 2021), <https://www.nytimes.com/2021/09/02/opinion/covid-vaccine-mandates-civil-liberties.html>.

**1. Research shows that the expedited release process initiated by this Court in spring 2020 did not negatively impact public safety**

In its April 15, 2020 order, this Court mandated that Respondents initiate a process to reduce the population of each DPS facility to comply with their design capacities and limit the spread of COVID-19, while ensuring that public safety was protected.<sup>75</sup> As a result of this Court’s initiative, the population of Hawai‘i jails and prisons fell by about 800 people,<sup>76</sup> thus mitigating the risk to public health by helping to curb the spread of COVID-19 within and outside of correctional facilities. Importantly, an empirical study conducted by the non-profit law firm Lawyers for Equal Justice (“LEJ”) regarding this release process reveals that—contrary to popular belief, and the media-stoked portrayals of crime sprees—the release of these persons did not threaten public safety: the vast majority of people who were released did not commit new crimes and, if they did, they committed non-violent or technical offenses.<sup>77</sup>

Indeed, the vast majority of about 300 people identified by the Honolulu Police Department as having been released in Oahu pursuant to the Court’s April 15, 2020 order did not commit new crimes or get re-arrested.<sup>78</sup> Specifically, 261 of those people—or 87% of all people allegedly released pursuant to the April 15, 2020 order—had not committed any new offenses as of August 2020.<sup>79</sup>

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<sup>75</sup> SCPW-20-0000200, Dkt. 78 at 3.

<sup>76</sup> Tom Helper, Stephanie Turrentine, and Isaiah Feldman-Schwartz, *Outbreak*, Lawyers for Equal Justice (Aug. 18, 2021), at 4, <https://www.hiequaljustice.org/reports/outbreak>.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Id.* at 16.

And of the roughly 13% of those people who were re-arrested after release, the overwhelming majority—about 90%—were re-arrested for non-violent or technical offenses, not for actions that endanger the public.<sup>80</sup> Specifically, about 90% of the 39 people who were re-arrested after being released were charged with offenses relating directly to houselessness and poverty (*e.g.*, entering a closed public park, obstructing a public sidewalk), or technical violations of the terms of their release (*e.g.*, failing to call a probation or court officer), not because of violent activity or activity that would otherwise endanger the public.

The LEJ study proves that the first release process of persons from DPS facilities initiated by this Court did not harm public safety. Rarely did a released individual commit an offense upon release. Even if they did, it was almost never one that endangered or even involved the public. Thus, there is good reason to believe that, were the Court to order the relief requested by OPD, no massive uptick in crime would occur in the broader community.

If anything, the release of such persons will likely *improve* public safety by reducing community spread of COVID-19, as jails and prisons can be virulent vectors for such spread—not only throughout the correctional facilities themselves, but also through the community at large through inadvertent contagion from staff who frequent the facilities. Considering that, nationwide, 90 of the top 100 COVID-19 clusters in the U.S. have occurred in jails and prisons, and, as of August 2021, over 2,600 people incarcerated in DPS facilities and more than 350 correctional staff have contracted COVID-19 since the pandemic began, including nine deaths in

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<sup>80</sup> *Id.*

that group, the overcrowded, unsanitary conditions of correctional facilities are a larger threat to public safety than the measured release of certain incarcerated people.<sup>81</sup> Petition 12.

**2. Any additional public safety concerns can be managed or addressed even with new release orders entered by this Court**

At bottom, the spread of COVID-19 constitutes a greater threat to the public in Hawai‘i than the imposition of measures to reduce jail and prison overcrowding. Leaving correctional systems to operate unchecked will enable the virus to continue to fester, mutate, produce new strains, and explode when they inevitably leak into the broader community. The continued, constant transfer of individuals in and out of our facilities all but ensures this outcome. While the availability of a vaccine tempers some of these negative effects, if the disease continues to spread and infect unvaccinated individuals, the virus will continue to have the opportunity to mutate, including in ways that will evade the current vaccines.<sup>82</sup> We have already seen signs of this with the “Delta” and newly-discovered “Mu” variants.<sup>83</sup>

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<sup>81</sup> Savannah Harriman-Pote, *Public Defender’s Office Again Asks Court to Address Overcrowding Amid COVID-19 Outbreaks*, Hawaii Public Radio (Sep. 1, 2021), <https://www.hawaiipublicradio.org/the-conversation/2021-09-01/public-defenders-office-again-asks-court-to-address-overcrowding-amid-covid-19-outbreaks>; Eric Reinhart, MD & Daniel L. Chen, JD, PhD, *Association of Jail Decarceration and Anticontagion Policies With COVID-19 Case Growth Rates in US Counties*, JAMA Network Open (Sept. 2, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783680>.

<sup>82</sup> Bridget Balch, Association of American Medical Colleges, *The vaccines and the variants: Four keys to ending the pandemic*, (June 9, 2021), <https://www.aamc.org/news-insights/vaccines-and-variants-four-keys-ending-pandemic> (quoting infectious disease expert Dr. Steven Zeichner who explains, “The more transmission, the more opportunity you have for variants to evolve.”).

<sup>83</sup> Fowlkes, Gaglani, Groover, et. al, *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance — Eight U.S. Locations, December 2020–August 2021*, MMWR Morb Mortal Wkly Rep 2021, 70:1167-1169, [https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s\\_cid=mm7034e4\\_w#suggestedcitation](https://www.cdc.gov/mmwr/volumes/70/wr/mm7034e4.htm?s_cid=mm7034e4_w#suggestedcitation) (study finding moderate reduction of effectiveness of COVID-19 vaccines in preventing infection after predominance of Delta variant); Berkeley Lovelace Jr., *WHO says it is monitoring a new Covid variant called ‘mu’* CNBC (Sept. 2, 2021), <https://www.cnbc.com/2021/09/01/who-says-it-is-monitoring-a-new-covid-variant-called-mu.html> (reporting that WHO is monitoring a new COVID variant, “mu,” which has

Importantly, however, release orders themselves also pose a minimal threat to public safety, if any at all. This is shown not only by the data from the LEJ report and HPD’s statistics on the crime rate after the release of numerous individuals in 2020—but also considering the ability of this Court to include safeguards in its orders, as it has in past COVID-related rulings.

As the most notable example, OPD’s requested relief has included—and past orders have contained—exceptions to release for a number of the most violent or dangerous crimes under the criminal code, including high-level felony offenses, first or second-degree burglary and robbery, and various domestic violence and sexual assault offenses. While the ACLU of Hawai‘i does not believe that the commission of *any* crime justifies cruel and unusual punishment or exposure to a deadly virus, the inclusion of similar distinctions can alleviate concerns regarding any new release orders’ impact on public safety.

In addition, the proposed relief, which mirrors past relevant orders, suggests that courts will retain the discretion to deny release *even* to individuals covered by the orders if the judge believes it could pose a significant risk to the individual or the public. Judges will thus continue to evaluate motions by weighing considerations of public safety. As a result, the proposed “blanket” orders render courts far from helpless when faced with individuals who demonstrate signs of potentially violent or dangerous behavior. The courts will continue to oversee the release motion process, and the State will likewise continue to have the option to file individual motions seeking modification of release status when deemed necessary.

Finally, in this Court’s past orders preventing courts from setting bail in certain cases,

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mutations with the potential to evade immunity provided by vaccination or a previous COVID-19 infection).

judges were not precluded from continuing to impose conditions on defendants when released on their own recognizance or supervised release. HRS § 804-7.1 lists potentially available conditions, which are wide-ranging, and include the potential for home confinement and “any other condition reasonably necessary to ensure the appearance of the defendant as required and to ensure the safety of any other person or community.” Trial judges would thus have tools to ensure a defendant will not engage in criminal or dangerous behavior while on release. Trial judges would likewise be able to enforce conditions through sanctions under HRS § 804-7.3.

In sum, this Court’s past orders and the Petition’s requested relief both include numerous safeguards intended specifically to protect public safety. This Court has the full authority to impose similar conditions when devising a new system of release. In light of these various protections, the ACLU of Hawai‘i urges this Court to consider that the threat to public health caused by COVID-19’s spread in correctional facilities is exponentially more dire than any potential public safety concerns brought on by a new release order.

#### **IV. CONCLUSION**

The ACLU of Hawai‘i respectfully requests that the Court consider these facts and legal arguments as part of its disposition of the Office of the Public Defender’s Petition.

DATED: Honolulu, Hawai‘i, September 7, 2021.

Respectfully submitted,

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