

March 19, 2020

**Sent via electronic mail attachment**

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**RE: 3:02-cv-00339-MO Oregon Advocacy Center et al v. Mink et al: Notice of  
Emergency Action**

Dear Carla,

We write to follow up on the meet and confer that occurred yesterday regarding the state's proposal to modify the 2002 *Mink* order in light of the COVID-19 pandemic.

As promised, below is a counterproposal that we sincerely appreciate you sharing with your clients and giving your due consideration to protect all Oregonians impacted by this virus. Following this counterproposal, you will also find a proposed court order that would give your client the authority and flexibility to provide a comprehensive response to this public health emergency.

**DRO & MPD Counterproposal**

The plaintiffs recognize the disruption and threat to the public health caused by the outbreak of the novel form of coronavirus known as COVID-19. Governor Brown has released a declaration of emergency for the state, and President Trump has declared a national emergency because of the severe impacts of both the virus and the disruption to daily life associated with prevention, quarantine, detection, and treatment of the virus. In response to these emergency declarations, the Supreme Court of Oregon's Chief Justice issued Order 20-006 limiting scheduling civil or criminal matters "to significantly limit the number of persons in our courthouses and places of work. Our goal is to do our part to help slow the spread of the COVID-19 virus and to minimize any health risks to court personnel, litigants, representatives, and others who come to our courthouses, while meeting our courts' obligations to the public." Notably, this order does not apply to "Other circumstances in which a Presiding Judge determines that a postponement or failure to schedule would violate a statutory or constitutional right." Order 20-006(4)(i).

We applaud the tremendous efforts the Oregon Health Authority (OHA) is undertaking to prevent spread of COVID-19 within our state and at the Oregon State Hospital, including by restricting admissions to individuals found guilty except for insanity and people found unable to

aid-and-assist who fit certain limited emergency admission criteria.<sup>1</sup> We are concerned with how this will impact individuals who remain in jail awaiting court ordered restoration services. The implication of the policy is that the vast majority of people deemed unable to aid and assist their attorneys would not be admitted to the state hospital, but would instead remain incarcerated at a local county jail. There is no definite end to how long this prolonged confinement would last, and no one is currently in a position to make predictions. Based on the Chief Justice's order, it is also unclear whether courts will be able to monitor these prolonged conditions and issue informed, timely orders. Further, if such cases are heard, there remains a concern that holding these hearings may present a public health risk to the courts, court personnel, and related parties.

Plaintiffs have a series of critical concerns, both legal and pragmatic, about the proposal to leave people in serious psychiatric crisis in jails indefinitely where they are particularly vulnerable both to the daily difficulties of living in a jail and to the COVID-19 infection. This risk is complicated by local courts trying to limit hearings due to public safety but being tasked with ensuring the constitutional rights of the defendant are maintained.

Under Oregon law, a court must designate the custody of a person unable to aid and assist who is determined to need a hospital level of care to the superintendent of the state hospital or another facility designated by OHA. ORS 161.370(2)(a). State statutory law does not grant the Oregon Health Authority (OHA) the discretion to decline the order or to opt out of it even in an emergency. The federal constitution also prohibits allowing individuals in psychiatric crisis to remain in a jail cell. While the proposed rule might make practical sense when one looks at the narrow confines of limiting the spread of the virus at OSH, it would leave many dozens of inmates who have been merely accused - not convicted - of a crime in vulnerable positions and could foster the spread of the virus in the local jails and in the community creating an even bigger public safety risk as a whole. Beyond the practical or public health implications, it is simply illegal.

The crux of the state's initial proposal assumes that there are two places for aid-and-assist detainees to go: the Oregon State Hospital or the local jails. A better approach would instead focus on the capability of OHA to designate other sites for housing people with serious mental illness. In light of the emergency powers granted by Governor Brown's declaration of emergency, OHA has broad authority to create, purchase, lease, or designate any number of sites outside the state hospital grounds as places for housing people in need of restoration. The president's declaration of a national emergency carried with it broadened abilities for providers to provide services including through telehealth. These combined actions provide OHA with options it did not have in the past. Among the options available for OHA to consider are rapidly expanding the existing community based restoration services, designating new or existing mental health beds for use by aid-and-assist patients, or discharge to community based settings with wraparound mental health services, if appropriate.

Of note, one of the major casualties of the current disease outbreak has been the tourism industry. Area hotels have laid off vast numbers of staff as travel halts and demand for hotel

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<sup>1</sup> These protocols have been in place since early 2019. Since that time very few people found unable to aid and assist have been admitted to OSH on this limited expedited basis.

rooms plummet.<sup>2</sup> OHA has power under the emergency declaration to lease, purchase, or requisition any number of rooms to meet the larger volume of patients in need of housing. It has the authority to bypass state requisitioning laws and other bureaucratic hurdles that would typically stand in the way of such endeavors. Aid-and-assist patients could utilize these rooms in lieu of going to the state hospital, with wraparound mental health services provided by the Community Mental Health Program or Assertive Community Treatment teams, if appropriate. The rooms could also be used to facilitate discharge of current patients from OSH who have been determined not to need a hospital level of care. For those patients with stable and supportive places to live, OHA could designate their own homes as a temporary placement, and provide necessary restorative services remotely.

To the extent any element of state law stands in the way of OHA finding non-jail placements for aid-and-assist detainees, the plaintiffs suggest asking Judge Mossman to enter an order permitting OHA to disregard those requirements for at least 90 days so that it has the authority and responses to take emergency action for all Oregonians including those in vulnerable aggregate settings. A proposed order is featured below. Defendants conceded that the federal court has this authority and we eagerly join them in seeking the court's guidance.

The plaintiffs' counterproposal seeks to expand the authority, resources, and good protection against the intrusion of COVID-19 into the state hospital and beyond. The plaintiffs' proposal would also give OHA an additional means to respond to the virus and get a jump start on long-standing barriers to treatment and housing for a challenging-to-serve population, which was recognized in SB 973 and the resulting \$10.6 million to expand community services for people with mental illness who commonly end up incarcerated.

While the plaintiffs' proposal presents its own administrative challenges, these challenges pale in comparison to the risk of harm of prolonged incarceration in a setting known to poorly control contagions and is consistent with the state's ongoing efforts to protect all of the public in its response to the COVID-19. Moreover, the plaintiffs' proposal respects the human and constitutional rights of the most vulnerable people in our community.

Proposed order:

*In light of the current emergency related to the novel COVID-19 strain, COVID-19, the Oregon Health Authority shall have authority to house detainees committed to its authority under ORS 161.370(2) in any clinical placement suitable to the purpose, without need for any showing or justification to any party. If the authority is unable to find such a clinical placement, it may place any individual committed to its custody under ORS 161.370(2) in any suitable housing placement, even if no treatment is not currently offered at that site.*

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<sup>2</sup> Amber Jamieson, *A Hospitality Union Said 90% of Its Members Might Lose Work Because of the COVID-19*, BuzzFeed News, March 18, 2020 (a major hospitality union reported that 4,000 of its 5,500 members in the Seattle and Portland areas had been laid off due to reduced demand for hotel rooms related to the COVID-19), available at <https://www.buzzfeednews.com/article/amberjamieson/COVID-19-unemployment-laid-off-hotel-service-casino>; Kyle Iboshi, *Portland Hotels See Significant Room Cancellations; Travel Conference Cancelled*, KGW-TV, March 6, 2020, (discussing cancellations and drops in room reservations in area hotels following COVID-19 crisis) available at <https://www.kgw.com/article/news/health/COVID-19/portland-hotels-see-significant-room-cancellations-travel-conference-postponed/283-6d3b08c3-7a8a-4b56-a65c-bac4919cd73d>.

*To the extent that any state or local law would restrict the authority from finding a more appropriate placement than a jail cell in a short time period, and to the extent that law was not already superseded by the emergency declaration, this court hereby authorizes the authority to disregard any state acquisition law, local zoning ordinance, or other state or local law that would significantly delay or impede the creation or acquisition of appropriate housing to meet the requirements of the orders of this case.*

*This order shall remain in effect from ninety days from the date it was entered, and shall be renewed on good cause shown during the pendency of the emergency. During that time period, the defendants shall make their best efforts to comply with the order in this case. The Court, however, shall consider strongly the circumstances associated with the current emergency and the likelihood of delays in prompt discharge of detainees to OHA custody, stemming from circumstances associated with the emergency.*

*The defendants shall file a written report in 60 days describing the current status of efforts to comply with the orders in this case and how the current emergency affects those efforts.*

#### Conclusion

Thanks again for reaching out and being receptive to coming up with a creative solution to comprehensively reduce the exposure to COVID-19 and to slow the spread of the disease in our communities and in our institutions. We look forward to hearing back from you soon.

Sincerely,

A handwritten signature in black ink, appearing to read 'Emily Cooper', with a decorative flourish at the end.

Emily Cooper  
Legal Director