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As you know, the opioid epidemic is devastating communities throughout the country. On average, 130 Americans die every day from an opioid overdose.<sup>1</sup> This public health crisis has hit Massachusetts particularly hard. The opioid-related death rate in Massachusetts has surpassed the national average: according to the Massachusetts Department of Public Health, there were an average of almost six opioid-related overdose deaths per day in 2017.<sup>2</sup> Opioid use disorder is especially dangerous for people who are or have been incarcerated. A recent study by the Massachusetts Department of Public Health found that “[t]he opioid overdose death rate is 120 times higher for those recently released from incarceration compared to the rest of the adult population.”<sup>3</sup>

To help reduce these stark numbers, the ACLU of Massachusetts is sending this letter to every Sheriff’s Office in the Commonwealth to ensure you are all aware that the Americans with Disabilities Act (ADA) and the Eighth Amendment of the U.S. Constitution require you to provide medication for addiction treatment (MAT) to those in your custody who are suffering from opioid use disorder (OUD).

We are encouraged to hear that some of you may already be moving toward providing access to all three forms of FDA-approved MAT in your facilities. This positive development is both required by the law and likely to save lives. For those Sheriffs who are not yet making such changes, this letter notifies you that if your facility fails to provide MAT, it is putting its people at a severe risk of physical suffering and an increased risk of death, in violation of federal law and constitutional protections. We strongly encourage you to amend your policies to comply with the law and to avoid any more needless deaths.

### **MAT is the Medical Standard of Care for Treatment of OUD**

MAT is the medical standard of care for treatment of OUD. There are three FDA-approved opioid dependency medications that constitute MAT: methadone, buprenorphine, and naltrexone. The Substance Abuse and Mental

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<sup>1</sup> *Opioid Overdose*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2018), <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited Apr 18, 2019).

<sup>2</sup> Massachusetts Department of Public Health, Number of Opioid-Related Overdose Deaths, All Intents by County, MA Residents: 2000-2017 (August 2018), available at [https://www.mass.gov/files/documents/2018/08/24/Opioidrelated%20Overdose%20Deaths%20by%20County%20-%20August%202018\\_0.pdf](https://www.mass.gov/files/documents/2018/08/24/Opioidrelated%20Overdose%20Deaths%20by%20County%20-%20August%202018_0.pdf).

<sup>3</sup> Massachusetts Department of Public Health, An Assessment of Fatal and Nonfatal Opioid Overdoses in Massachusetts 2011-2015 (August 2017), available at <https://www.mass.gov/files/documents/2017/08/31/legislative-report-chapter-55-aug-2017.pdf>.

Health Services Administration (SAMHSA) has concluded that “just as it is inadvisable to deny people with diabetes the medication they need to help manage their illness, it is also not sound medical practice to deny people with OUD access to FDA-approved medications for their illness.”<sup>4</sup> Cutting off access to MAT results in extremely painful and unnecessary physical suffering, causing complications including severe nausea, diarrhea, tremors, body aches, chills, hot flashes, insomnia, anxiety, depression, suicidal thoughts and death.<sup>5</sup> As with any prescription medication, patients’ responses to these medications are individualized—for some patients, only one of these medications may provide effective treatment. Therefore, it is important that facilities provide access to all three FDA-approved medications.

### **Courts Have Held that Withholding MAT Likely Violates Federal Constitutional and Statutory Law**

Not only is MAT for OUD medically necessary, courts have required facilities to provide this treatment. In the only cases to consider the question, the federal courts have required facilities to provide MAT to inmates with OUD. *Pesce v. Coppinger*, 355 F. Supp. 3d 35 (D. Mass., 2018); *Smith v. Aroostook County*, No. 1:18-cv-00352-NT (D. Me. Mar. 27, 2019), *aff’d* 922 F.3d 41 (1st Cir. 2019).

In the *Smith* case, a federal district court judge heard five days of expert testimony from the medical and correctional fields, and ultimately held that the jail’s decision to withhold MAT from the plaintiff likely violated the ADA and ordered the facility to provide MAT. The court first carefully examined the current state of the science and stated: “A body of evidence has emerged that permitting MAT in correctional facilities offers substantial, and possibly essential, benefits to incarcerated people.” The court then considered the individual’s medical situation and concluded: “I find that forcing Ms. Smith to withdraw from her buprenorphine would cause her to suffer painful physical consequences and would increase her risk of relapse, overdose, and death.” After “carefully consider[ing] the record and the parties’ brief,” the First Circuit affirmed the preliminary injunction. *Smith v. Aroostook County*, -- F.3d --, 2019 WL 1922847 (1st Cir Apr. 30, 2019).

*Pesce* similarly found that the facility’s decision to deny MAT to the plaintiff based on its blanket policy likely violated the ADA and ordered the facility to provide continued access throughout the course of the plaintiff’s incarceration. The Court went on to hold that the facility’s decision also likely violated the Eight Amendment, emphasizing that the jail’s “course of treatment ignores and contradicts [Mr. Pesce’s] physician’s recommendations,” and “allegations that prison officials denied or delayed recommended treatment by medical professionals may be sufficient to satisfy the deliberate indifference standard.”

Consistent with the legal obligations set forth in *Pesce* and *Smith*, federal and local correctional facilities have agreed to settle legal claims to provide MAT in their facilities.

For example, a jail in Whatcom County, Washington recently entered into a landmark settlement agreement to provide people in the jail with medications necessary to treat opioid use disorder. *Kortlever v. Whatcom*, Case No. 2:18-cv-00823, ECF Nos. 34, 35-1 (W.D Wash., Apr. 29, 2019).<sup>6</sup> The agreement, which is before a judge for final approval, would require the jail to provide MAT to medically appropriate inmates with opioid use disorder, including providing medication to inmates already receiving MAT in the community, as well as starting qualifying people on the medication in the jail before release. Importantly, the jail also agreed to provide linkages to care in the community before release. Most recently, the Federal Bureau of Prisons entered a final settlement agreement to provide a Massachusetts woman diagnosed with OUD with her prescribed

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<sup>4</sup> SAMHSA, *Medications for Opioid Use Disorder for Healthcare and Addiction Professionals, Patients, and Families, Treatment Improvement Protocol Tip 63*, at ES-2.

<sup>5</sup> Shane Darke, Sarah Larney & Michael Farrell, Yes, people can die from opiate withdrawal, 112 *Addiction* 199–200 (2016).

<sup>6</sup> Documents available at <https://www.aclu-wa.org/cases/kortlever-et-al-v-whatcom-county>.

methadone treatment throughout the course of her incarceration. *DiPierro v. Hurwitz*, Case No. 1:19-cv-10495, ECF No. 39 (D. Mass., June 11, 2019).<sup>7</sup>

These settlement agreements reflect yet more examples of the nationwide shift towards jails recognizing their legal and moral obligation to provide lifesaving medical care to people with opioid use disorder.

### **The Federal Government Has Encouraged Making MAT Available in Jails and Prisons**

The U.S. Department of Justice, the White House, and other arms of the federal government have encouraged the availability of MAT in jails and prisons. The U.S. Attorney for Massachusetts is investigating several county facilities and the Massachusetts Department of Corrections for failing to provide MAT to inmates suffering from OUD, stating that “all individuals in treatment for OUD, regardless of whether they are inmates or detainees, are already protected by the ADA, and [] the DOC has existing obligations to accommodate this disability.”<sup>8</sup> Additionally, the U.S. Attorney for the Southern District of New York wrote a letter to the New York Attorney General which stated that “MAT is a safe and widely accepted strategy for treating opioid disorders,” with “broad support [] among medical and substance use experts.”<sup>9</sup> The letter went on to instruct that “the Sullivan (County) family court and Sullivan (County) surrogate’s court should ensure that their policies and practices with respect to individuals participating in MAT . . . are consistent with ADA requirements.”<sup>10</sup> The President’s Commission on Combating Drug Addiction and the Opioid Crisis, led by Governor Chris Christie, noted a study finding that “individuals receiving MAT were 75% less likely to die of any cause and 85% less likely to die of drug poisoning in the first month after release.”<sup>11</sup> The Commission recommended providing MAT for pre-trial detainees and continuing treatment upon release. Additionally, the Trump administration has recently identified “increasing the availability of MAT for incarcerated individuals” as a priority initiative.<sup>12</sup>

### **Leading Organizations Support the Use of MAT in Correctional Settings**

There is also growing support for providing MAT for incarcerated people amongst corrections and medical professionals. In a 2018 report, the National Sheriffs’ Association and the National Commission on Correctional Health Care explain that “correctional withdrawal alone actually increases the chances the person will overdose following community release due to loss of opioid tolerance” and “[f]or this reason, all individuals with OUD

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<sup>7</sup> Settlement available at [https://www.aclum.org/sites/default/files/20190607\\_dipierro\\_settlement.pdf](https://www.aclum.org/sites/default/files/20190607_dipierro_settlement.pdf).

<sup>8</sup> Letter from Andrew E. Lelling, United States Attorney, to David Solet, General Counsel, Executive Office of Public Safety and Security and Jesse Caplan, General Counsel, Executive Office of Health and Human Services, (March 16, 2018); see also Letter from Andrew E. Lelling, United States Attorney for the District of Massachusetts to Sheriff Kevin F. Coppinger (Essex County) (Dec. 4, 2018).

<sup>9</sup> Letter from the Department of Justice, United States Attorney for the Southern District of New York to New York State Office of the Attorney General regarding Medication-Assisted Treatment and the ADA (Oct. 3, 2017), <https://lac.org/wp-content/uploads/2018/02/DOJ-SDNY-ltr-to-OCA-10.3.17.pdf>.

<sup>10</sup> Letter from the Department of Justice, United States Attorney for the Southern District of New York to New York State Office of the Attorney General regarding Medication-Assisted Treatment and the ADA (Oct. 3, 2017), <https://lac.org/wp-content/uploads/2018/02/DOJ-SDNY-ltr-to-OCA-10.3.17.pdf>.

<sup>11</sup> *Letter from The President’s Commission on Combating Drug Addiction and the Opioid Crisis, to Donald J. Trump, President of the United States* 72-73 (Nov. 1, 2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final\\_Report\\_Draft\\_11-15-2017.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-15-2017.pdf).

<sup>12</sup> National Drug Control Strategy: January 2019, OFFICE OF NATIONAL DRUG CONTROL POLICY, at 12.

should be considered for MAT” while they are incarcerated.<sup>13</sup> The American Society of Addiction Medicine, the leading professional society in the country on addiction medicine, also recommends treatment with MAT for people with OUD in the criminal justice system.<sup>14</sup> Additionally, SAMSHA states that “making treatment available to criminal justice populations” is one of the “remaining challenges” in fighting the opioid public health crisis.<sup>15</sup>

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Long-standing medical standards and recent case developments underscore that the denial of MAT to inmates is not only dangerous for their health and wellbeing, it is also a violation of the Eighth Amendment and the Americans with Disabilities Act. Facilities within Massachusetts, as well as Rikers Island in New York, the Rhode Island Department of Corrections, and the Vermont Department of Corrections have proved that providing MAT in correctional facilities is feasible. For those Sheriffs who have not yet changed your policies, we hope that you will do so immediately to ensure that people receive their prescribed medications while in your custody as the law requires.

Sincerely,

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<sup>13</sup> National Sheriffs’ Association, Jail-Based Medication-Assisted Treatment Promising Practices, Guideline, and Resources for the Field, at 9 (Oct. 2018), available at <https://www.sheriffs.org/publications/Jail-Based-MAT-PPG.pdf>

<sup>14</sup> Kyle Kampman & Margaret Jarvis, *American Society of Addiction Medicine (ASAM) National Practice Guideline for the Use of Medications in the Treatment of Addiction Involving Opioid Use*, 9 J. ADDICTION MED. 1, 4-6 (2015), <https://www.asam.org/docs/default-source/practice-support/guidelines-and-consensus-docs/asam-national-practiceguideline-jam-article.pdf>.

<sup>15</sup> SAMHSA, Medication-Assisted Treatment For Opioid Addiction in Opioid Treatment Programs, A Treatment Improvement Protocol TIP 43, at 6-8 (2017).