



April 14, 2020

His Excellency the Governor  
Charles D. Baker  
Commonwealth of Massachusetts  
The State House  
Boston, MA 02133

*Re: Coronavirus Emergency Responses To Help Protect People Who Are Currently Incarcerated and Those Returning To The Community*

Dear Governor Baker:

Thank you for your work to keep residents of the Commonwealth safe in these difficult times. We applaud your leadership, and continue to offer our help as partners, in crafting a response that protects populations most vulnerable to harm. We acknowledge that we are one voice in a growing chorus of people advocating for significant reductions in the incarcerated population to lessen the impact of this virus. We stand with organizations like Families for Justice as Healing, Prisoners' Legal Services, Greater Boston Interfaith Organization, and others who have been leading, organizing and advocating on behalf of, and with, formerly incarcerated people, incarcerated people, and their loved ones.

Time is of the essence; the residents of the Commonwealth need your action now. By March 22, 2020, the first confirmed COVID-19 cases—three prisoners and one officer—were diagnosed inside the Massachusetts prison system.<sup>1</sup> On March 24, 2020, the ACLU of Massachusetts filed an emergency petition with the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers asking the Supreme Judicial Court to take immediate action to limit the spread of COVID-19 by reducing the number of people incarcerated in the state.<sup>2</sup> By the time we filed our reply brief six days later, the virus had surfaced in four

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<sup>1</sup> Associated Press, *3 Inmates, 1 Officer at Mass. Prison Test Positive for Coronavirus*, 7 News Boston (March 22, 2020), <https://whdh.com/news/3-inmates-1-officer-at-mass-prison-test-positive-for-coronavirus/>.

<sup>2</sup> Pet'rs' Br., *CPCS. v. Trial Ct.*, No. SJC-12926 (Mass. March 24, 2020), [https://www.aclum.org/sites/default/files/field\\_documents/cpcs\\_macdl\\_v.\\_chief\\_justice\\_of\\_the\\_trial\\_court\\_-\\_211\\_3\\_petition.pdf](https://www.aclum.org/sites/default/files/field_documents/cpcs_macdl_v._chief_justice_of_the_trial_court_-_211_3_petition.pdf); see also Prisoners' Legal Services of Massachusetts, *COVID-19*, [plasma.org/covid-19-in-ma-prisons-and-jails/](https://plasma.org/covid-19-in-ma-prisons-and-jails/) (last visited April 14, 2020).

correctional facilities;<sup>3</sup> at oral argument the next day, the Department of Correction revealed that 17 prisoners had been diagnosed with the virus;<sup>4</sup> and by the time the SJC issued its decision

on April 3, two prisoners had died.<sup>5</sup> At the time we sent this letter, the Department of Correction and Sheriffs' reports to the SJC's Special Master reflected that 255 prisoners and staff had been diagnosed with the virus and four prisoners have died.<sup>6</sup>

As you know, there is a consensus among public health officials that the SARS-CoV-2 pandemic and the transmission of COVID-19 pose an enormous and potentially catastrophic risk to people and staff in correctional facilities, and, by extension, to the families and communities of staff as they cycle through the facilities.<sup>7</sup> Moreover, an outbreak at a jail or prison "would likely require numerous transfers to a community hospital," thereby "increasing the pressure on our already taxed community hospital."<sup>8</sup> Confronted by this reality, at least nine governors<sup>9</sup> and the federal Department of Justice<sup>10</sup> have issued orders to reduce the number of people incarcerated in their jurisdictions.

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<sup>3</sup> Pet'rs' Reply Br., *CPCS. v. Trial Ct.*, No. SJC-12926 \*6 (Mass. Mar. 30, 2020), [aclum.org/sites/default/files/field\\_documents/reply\\_in\\_support\\_final\\_0.pdf](https://aclum.org/sites/default/files/field_documents/reply_in_support_final_0.pdf).

<sup>4</sup> Oral Arg. *CPCS. v. Trial Ct.*, No. SJC-12926 (Mass. Mar. 30, 2020), [boston.suffolk.edu/sjc/pop.php?csnum=SJC\\_12926](https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_12926).

<sup>5</sup> Prisoners' Legal Services, *supra* note 2.

<sup>6</sup> ACLU of Massachusetts, *Tracking COVID-19 in Massachusetts Prison & Jails: Total Positive Tests*, [data.aclum.org/sjc-12926-tracker/](https://data.aclum.org/sjc-12926-tracker/) (last visited April 14, 2020).

<sup>7</sup> Matthew J. Akiyama, M.D., Anne C. Spaulding, M.D., & Josiah D. Rich, M.D., *Flattening the Curve for Incarcerated Populations - COVID-19 in Jails and Prisons*, *New Eng. J. of Medicine*, (Apr. 2, 2020), [nejm.org/doi/full/10.1056/NEJMp2005687](https://nejm.org/doi/full/10.1056/NEJMp2005687).

<sup>8</sup> Aff. of Dr. Jonathan Giftos, ¶¶ 8-9 (Mar. 30, 2020), [aclum.org/sites/default/files/field\\_documents/reply\\_brief\\_exhibits\\_-\\_combined\\_0.pdf](https://aclum.org/sites/default/files/field_documents/reply_brief_exhibits_-_combined_0.pdf).

<sup>9</sup> California, Exec. Order No. N-36-20 (Mar. 24, 2020), [gov.ca.gov/wp-content/uploads/2020/03/3.24.20-EO-N-36-20-text.pdf](https://gov.ca.gov/wp-content/uploads/2020/03/3.24.20-EO-N-36-20-text.pdf); Colorado, Exec. Order No. D 2020 16 (Mar. 25, 2020); Illinois COVID-19 Exec. No. 11 (Mar. 26, 2020); Kentucky, Exec. Order No. 2020-267 (Apr. 2, 2020), [colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice\\_0.pdf](https://colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice_0.pdf); Michigan, Exec. Order No. 2020-29 (Mar. 29, 2020), [michigan.gov/whitmer/0,9309,7-387-90499\\_90705-523422--,00.html](https://michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html); New Mexico, Exec. Order No. 2020-021 (Apr. 6, 2020), [governor.state.nm.us/wp-content/uploads/2020/04/EO\\_2020\\_021.pdf](https://governor.state.nm.us/wp-content/uploads/2020/04/EO_2020_021.pdf); Pennsylvania, *Order of the Governor of Pennsylvania Regarding Individuals Incarcerated in State Correctional Institutions* (Apr. 10, 2020), [famm.org/wp-content/uploads/2020.4.10-TWW-SCI-reprieve-release-order-COVID-19.pdf](https://famm.org/wp-content/uploads/2020.4.10-TWW-SCI-reprieve-release-order-COVID-19.pdf); Washington, Proclamation No. 20-35 (Mar. 30, 2020), [governor.wa.gov/sites/default/files/proclamations/20-35%20COVID-19%20DOC%20Community%20Custody%20Violations%20%28tmp%29.pdf](https://governor.wa.gov/sites/default/files/proclamations/20-35%20COVID-19%20DOC%20Community%20Custody%20Violations%20%28tmp%29.pdf); and Wisconsin, Emer. Order No. 9 (Mar. 20, 2020), [evers.wi.gov/Documents/COVID19/EMO09-DOC.pdf](https://evers.wi.gov/Documents/COVID19/EMO09-DOC.pdf).

<sup>10</sup> Memorandum from Att'y Gen. William Barr (Mar. 26, 2020), [bop.gov/resources/news/pdfs/20200405\\_covid-19\\_home\\_confinement.pdf](https://bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf).

Here in Massachusetts, COVID-19 is rapidly spreading in our correctional facilities,<sup>11</sup> as well as among those who depend on traditional shelters for housing.<sup>12</sup> In large part, this is due to an inability to practice physical distancing in these spaces due to a lack of sufficient space. As Governor, you are uniquely positioned to exercise moral and practical leadership to save lives. As described in detail below, we write now to ask you to swiftly take the following concrete steps:

1. Implement strategies to decrease the number of people currently incarcerated. This should include ordering the Parole Board to expedite previously-made parole decisions, amending the Executive Clemency Guidelines in light of the pandemic, and swiftly issuing new parole and commutation decisions for currently incarcerated individuals.
2. Appoint an independent medical expert to recommend and oversee mitigation efforts to protect the health of persons who remain incarcerated, as well as correctional staff.
3. Use your statutory and emergency powers to induce or compel cooperation from public and private educational institutions and hotel and motel owners to increase available living space for those who are in need of places to quarantine and engage in physical distancing, including some of those released from carceral settings and others experiencing housing insecurity or homelessness.

**1. Implement strategies to decrease the number of people who are currently incarcerated.**

Given the fatal implications of a deadly COVID-19 outbreak in a Massachusetts correctional facility, for both the incarcerated population and the broader community, we urge you to implement a reduction plan that lowers the carceral population enough to substantially limit the spread of infection. To have the necessary positive impact on public health, a combination of reductions and reforms must, at a minimum: (1) end all multiple bunking in cells, including the use of bunk beds; (2) ensure that dorms only use single beds that are six feet apart in all directions; and (3) stagger dayroom, recreation, and meal service in dining halls so that social distance guidelines can be met.

You have the authority to do this. In addition to the general power of the executive branch, including the Parole Board, to facilitate prompt release of inmates at risk of infection due to COVID-19, and your constitutional authority to grant clemency, extensive powers have been conferred on the Governor through the Civil Defense Act of 1950, St. 1950, c. 639, as amended by

St. 1958, c. 425 and St. 1968, c. 579 (“the Civil Defense Act”) to respond during a public health crisis. Potential application of these powers was triggered when you declared a public health

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<sup>11</sup> Christine Willmsen, *Coronavirus Cases More than Double Overnight at Essex County Jail*, WBUR (Apr. 9, 2020), [wbur.org/news/2020/04/09/covid-19-sheriff-essex-county-jail-soars](http://wbur.org/news/2020/04/09/covid-19-sheriff-essex-county-jail-soars).

<sup>12</sup> Vernal Coleman & Danny McDonald, *Number of Homeless People in Boston Who Have Tested Positive for Coronavirus Skyrockets*, Boston Globe (Apr. 7, 2020), [bostonglobe.com/2020/04/07/metro/number-homeless-people-boston-who-have-tested-positive-coronavirus-skyrockets/](http://bostonglobe.com/2020/04/07/metro/number-homeless-people-boston-who-have-tested-positive-coronavirus-skyrockets/).

emergency on March 10, 2020,<sup>13</sup> including the power to protect the “[h]ealth and safety of inmates of all institutions.” *See* Section 7(A) of the Civil Defense Act.<sup>14</sup>

We urge you to use these powers to take the following actions immediately to reduce the number of people in each carceral facility enough to prevent an outbreak:

- Order the Parole Board to immediately issue parole permits for the hundreds of individuals who have already been granted parole but have not yet been released;<sup>15</sup>
- Amend your Executive Clemency Guidelines, last issued on February 21, to direct the Advisory Board of Pardons to consider clemency applications in light of the threat that COVID-19 poses in jails and prisons; and
- Direct the Advisory Board of Pardons to take steps to expedite the processing of all clemency petitions that are currently pending before the Board.<sup>16</sup>

Infections and deaths will disproportionately impact people of color who are overrepresented in jails and prisons. People of color, particularly Black people, are also disproportionately represented among vulnerable populations with diabetes, heart disease, respiratory disease, and other conditions with COVID-19 comorbidity.<sup>17</sup> Other states are already seeing alarming racial disparities in COVID-19 cases and deaths, and similar disparities are coming to light in Massachusetts.<sup>18</sup> These disparities will be compounded when there is an outbreak in a correctional facility.

You must do everything in your power to ensure that prison and jail sentences do not become de facto death sentences as a result of a COVID-19 outbreak. Such an outbreak cannot be contained

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<sup>13</sup> Massachusetts Exec. Order, No. 591, (Mar. 10, 2020), [mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19](https://mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19).

<sup>14</sup> We generally encourage you to use the powers of the Civil Defense Act on a limited basis.

<sup>15</sup> *CPCS v. Trial Ct*, No. SJC-12926 \*39 (Apr. 3, 2020) (Slip Op.), [aclum.org/sites/default/files/field\\_documents/sjc-12926\\_41\\_opinion.pdf](https://aclum.org/sites/default/files/field_documents/sjc-12926_41_opinion.pdf).

<sup>16</sup> While we do not have access to the exact number currently pending, it could reach into the hundreds. Parole Board Chair Gloriann Moroney testified at her confirmation hearing in January 2019 that 240-250 commutation and pardon petitions were pending before the Board and had not been acted upon. *See* [drive.google.com/file/d/1WXv6PVM2iiDTojNEHQ84V5S6m5AG3CM6/view](https://drive.google.com/file/d/1WXv6PVM2iiDTojNEHQ84V5S6m5AG3CM6/view) (at 27:30).

<sup>17</sup> *See, e.g.*, Fabiola Cineas, *COVID-19 is Disproportionately Taking Black Lives*, Vox (Apr. 8, 2020), [vox.com/identities/2020/4/7/21211849/coronavirus-black-americans](https://www.vox.com/identities/2020/4/7/21211849/coronavirus-black-americans); Associated Press, *Data Shows Black Americans are Disproportionately Impacted by Coronavirus*, MarketWatch, (Apr. 9, 2020), [marketwatch.com/story/coronavirus-is-hitting-americas-black-neighborhoods-the-hardest-2020-04-09](https://www.marketwatch.com/story/coronavirus-is-hitting-americas-black-neighborhoods-the-hardest-2020-04-09).

<sup>18</sup> *See, e.g.*, John Eligon, Audra D.S. Burch, Dionne Searcey, & Richard A. Oppel Jr., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. Times (Apr. 8, 2020), [nytimes.com/2020/04/07/us/coronavirus-race.html](https://www.nytimes.com/2020/04/07/us/coronavirus-race.html); Kay Lazar, *Boston Releases Coronavirus Data That Point to Stark Racial Disparities Among Those Infected*, Boston Globe (Apr. 9, 2020), [bostonglobe.com/2020/04/09/nation/boston-releases-coronavirus-data-that-point-stark-racial-disparities-among-those-infected/](https://www.bostonglobe.com/2020/04/09/nation/boston-releases-coronavirus-data-that-point-stark-racial-disparities-among-those-infected/).

within the four walls of the institution, which can significantly impact the health of surrounding communities and further strain the capacity of our hospitals.<sup>19</sup> You have an opportunity to mitigate these harms by acting quickly to reduce the number of people incarcerated in Massachusetts during this pandemic.

**2. Promptly appoint an independent and well-qualified public health expert to recommend and oversee implementation of steps within state and county carceral settings to mitigate the risk of COVID-19 transmission.**

Effective mitigation efforts will not be possible until we decrease the population in our jails and prisons such that the capacity allows for the physical distancing recommended by the CDC.<sup>20</sup> At the same time that individuals are released, however, additional steps must be taken to help protect those who remain within the facilities. We urge you to appoint a qualified independent public health expert to recommend mitigation efforts, in line with CDC and WHO guidelines, to best protect the health of corrections staff and individuals who remain incarcerated. This expert should also have the power to inspect facilities to ensure compliance. Any such expert should have experience with epidemiology, correctional settings, and public health.

**3. Use statutory and emergency powers to induce public and private educational institutions with available dormitory space and private hotel and motel providers to provide temporary living space for those most in need.**

Many people who will be released from prison and jail have loving families to return home to.<sup>21</sup> Others, however, will need housing support. Resources are vitally needed to house such individuals, as well as others who are experiencing homelessness. More capacity is needed to decrease the chance of spreading the virus in overcrowded shelter locations.

Under section 5(b)(1) of the Civil Defense Act, you have the power to temporarily take control of land or buildings to address a public health crisis, a power that complements the general power of eminent domain pursuant to G.L. c. 79, § 2. Moreover, pursuant to Section 8A of the Civil Defense Act, orders may be made by you pursuant to emergency declaration notwithstanding otherwise applicable provisions of law.

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<sup>19</sup> See, e.g., Sandhya Kajeepeta & Seth J. Prins, *Why Coronavirus in Jails Should Concern All of Us*, The Appeal (Mar. 24, 2020), [theappeal.org/coronavirus-jails-public-health/](https://theappeal.org/coronavirus-jails-public-health/); Aff. of Dr. Jonathan Giftos, ¶¶ 9-10 (Mar. 30, 2020), [aclum.org/sites/default/files/field\\_documents/reply\\_brief\\_exhibits\\_-\\_combined\\_0.pdf](https://aclum.org/sites/default/files/field_documents/reply_brief_exhibits_-_combined_0.pdf).

<sup>20</sup> For example, as of April 2, 2020, the Department of Correction reported that 72% of its prisoners slept within six feet of another prisoner, 70% ate within six feet of another prisoner, and 100% could recreate within six feet of another prisoner. See Dep't of Correct. Post Arg. Letter, *CPCS v. Trial Court*, No. SJC-12926, (Apr. 2, 2020), [mass.gov/doc/sjc-12926-post-argument-letter-of-the-massachusetts-department-of-correction-0/download](https://mass.gov/doc/sjc-12926-post-argument-letter-of-the-massachusetts-department-of-correction-0/download).

<sup>21</sup> See, e.g., Amicus Letter of Families of Incarcerated Loved Ones, *CPCS v. Trial Court*, No. SJC-12926, (Mar. 27, 2020), [mass.gov/doc/sjc-12926-amicus-letter-of-families-of-incarcerated-loved-ones/download](https://mass.gov/doc/sjc-12926-amicus-letter-of-families-of-incarcerated-loved-ones/download).

Massachusetts is home to a large number of educational facilities with substantial dormitory space. These include both public and private colleges and universities and elementary and secondary boarding schools. Most of these dormitories are now empty due to the closure of the schools in the face of the pandemic.

In addition, Massachusetts has many hotels, motels, and some casinos that are now largely empty due to the public health crisis. The occupancy rate for the approximately 39,000 hotel rooms in the Greater Boston area was 11.4% during the first week of this month.<sup>22</sup> Yet, we understand that many of these businesses are not voluntarily renting space to house those in need due to the virus.

While we are aware that a few of these institutions and businesses have made their space available for first responders, individuals experiencing homelessness or others coping with the effects of the crisis,<sup>23</sup> we are unaware of any broad-based effort to ensure all of these resources promptly are brought to bear. Other states and municipalities -- including California, Miami, New York, Seattle, and New Orleans -- have used their authority to rent hotel and motel rooms to provide additional housing for those experiencing housing instability in the midst of the pandemic.<sup>24</sup>

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<sup>22</sup> See Adrian Ma, *New Data Show a "Devastating" Month for Greater Boston Hotels*, WBUR (Apr. 13, 2020), [wbur.org/bostonmix/2020/04/13/new-data-devastating-for-regions-hotels](http://wbur.org/bostonmix/2020/04/13/new-data-devastating-for-regions-hotels).

<sup>23</sup> See Alexi Cohan, *Cornovirus: Charlie Baker Announces Support for Hard-Hit Hot Spot Chelsea*, Boston Herald (Apr. 13, 2020), (noting that command center is setting up an isolation hotel at the Quality Inn for individuals experiencing homelessness who test positive for COVID-19), <https://www.bostonherald.com/2020/04/13/gov-charlie-baker-announces-supports-for-hard-hit-coronavirus-hot-spot-chelsea/>.

<sup>24</sup> See e.g., Scott Rodd, *California Leasing Hotels For Homeless People During Coronavirus Crisis — And After Could Make Them Permanent Housing*, Capital Public Radio (Mar. 24, 2020), [capradio.org/articles/2020/03/24/california-leasing-hotels-for-homeless-people-during-coronavirus-crisis-and-after-could-make-them-permanent-housing/](http://capradio.org/articles/2020/03/24/california-leasing-hotels-for-homeless-people-during-coronavirus-crisis-and-after-could-make-them-permanent-housing/); Press Release, *Governor Newsom Takes Emergency Actions & Authorizes \$150 Million in Funding to Protect Homeless Californians from COVID-19* (Mar. 18, 2020), [gov.ca.gov/2020/03/18/governor-newsom-takes-emergency-actions-authorizes-150-million-in-funding-to-protect-homeless-californians-from-covid-19](http://gov.ca.gov/2020/03/18/governor-newsom-takes-emergency-actions-authorizes-150-million-in-funding-to-protect-homeless-californians-from-covid-19/); Joey Flechas & Alex Harris, *Coronavirus could push Miami's homeless into temporary shelter or isolation in hotels*, Miami Herald (Mar. 25, 2020), [miamiherald.com/news/coronavirus/article241463451.html#storylink=cpy](http://miamiherald.com/news/coronavirus/article241463451.html#storylink=cpy); Greg B. Smith, *City Shuttles Homeless and Other Virus Patients to Hotels*, *The City* (Mar. 25, 2020), [thecity.nyc/2020/03/nyc-sends-homeless-other-coronavirus-patients-to-hotels.html](http://thecity.nyc/2020/03/nyc-sends-homeless-other-coronavirus-patients-to-hotels.html); Marissa J. Lang, Justin Wm. Moyer, & Nitasha Tiku, *Cities struggle to protect vulnerable homeless populations as coronavirus spreads*, Wash. Post (Mar. 20, 2020), [washingtonpost.com/local/cities-struggle-to-protect-vulnerable-homeless-populations-as-coronavirus-spreads/2020/03/20/1144249c-67be-11ea-b5f1-a5a804158597\\_story.html](http://washingtonpost.com/local/cities-struggle-to-protect-vulnerable-homeless-populations-as-coronavirus-spreads/2020/03/20/1144249c-67be-11ea-b5f1-a5a804158597_story.html); Lauren Lindstrom & Alison Kuznitz, *County leases hotel for homeless people who may have COVID-19; More sites are planned*, Charlotte Observer (Mar. 19, 2020), [charlotteobserver.com/news/coronavirus/article241344441.html#storylink=cpy](http://charlotteobserver.com/news/coronavirus/article241344441.html#storylink=cpy); Danny Monteverde, *New Orleans homeless move into to hotel to slow coronavirus spread*, WWLTV (Mar.

In light of the great need for temporary housing during this crisis, and the many underutilized lodging facilities in the Commonwealth, we urge you to take bold action to provide shelter and protect public health. First, we urge you to direct that all state-owned dormitory facilities be made available as emergency housing. In addition, we encourage you to use your emergency powers to temporarily secure space at private educational institutions, hotels and motels -- with appropriate compensation to property owners -- to ensure the housing needs of Massachusetts residents are met.

**Conclusion**

Massachusetts can be a leader in protecting its people, especially its most vulnerable residents, from the worst of COVID-19. You are in the unique position to mandate a coordinated response that brings multiple system actors together by offering clarity, consistency, and vision with a plan rooted in guidance from public health experts and informed by the racial disparities rampant across our criminal legal and health care systems.

We respectfully request the opportunity to have a teleconference meeting with the appropriate members of your administration to discuss these recommendations as soon as practicable. If we can be of any assistance in providing more detail, we would be eager to do so.

Thank you for your continued vigilance and leadership in these challenging times.

Sincerely,



Carol Rose, Executive Director,  
 ACLU of Massachusetts



Carlene Pavlos, Executive Director,  
 Massachusetts Public Health Association

CC:

- Lt. Governor Karyn Polito
- Kristen Lepore, Chief of Staff for the Office of the Governor
- Bob Ross, Chief Legal Counsel for the Office of the Governor
- Secretary Marylou Sudders, Executive Office of Health and Human Services
- Commissioner Monica Bharel, Department of Public Health

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26, 2020), [ww1tv.com/article/news/health/coronavirus/new-orleans-homeless-move-into-to-hotel-to-slow-coronavirus-spread/289-ed4af8e2-5b4d-40e1-b468-32a706b3aca0](http://ww1tv.com/article/news/health/coronavirus/new-orleans-homeless-move-into-to-hotel-to-slow-coronavirus-spread/289-ed4af8e2-5b4d-40e1-b468-32a706b3aca0).