

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver City and County Building 1437 Bannock Street, Denver, CO 80202	
Plaintiffs: GARY WINSTON; JOHN PECKHAM; MATTHEW ALDAZ; WILLIAM STEVENSON; and, DEAN CARBAJAL; On behalf of themselves and all others similarly situated, v. Defendants: JARED POLIS, in his official capacity as Governor of Colorado; DEAN WILLIAMS, in his official capacity as Executive Director of the Colorado Department of Corrections.	▲ COURT USE ONLY ▲
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CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by and through undersigned counsel, in cooperation with the American Civil Liberties Union Foundation of Colorado, complain against Defendants as follows:

I. INTRODUCTION

1. “It has long been said that a society’s worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country’s facilities serve as models rather than cautionary tales.” *Valentine v. Collier*, No. 19A1034, 2020 WL 2497541, at *3 (U.S. May 14, 2020) (Sotomayor, J.). While there are many unknowns about what the future holds for society battling COVID-19, it is nearly certain that without immediate, systemic change in the Department of Corrections, Colorado state prisons will all be “cautionary tales.” *Id.*

2. This Court knows the gravity of COVID-19, which has brought society to a halt. All of us writing and reading this Complaint are able to isolate, engage in physical distancing, wash our hands constantly, disinfect surfaces, wear masks, and obtain medical care if we become life-threateningly sick. None of that is possible for people in prison.

3. This Court also no doubt knows the deadly toll of COVID-19, and how particularly lethal it is in densely populated settings. Medical experts’ warnings have been confirmed throughout the country and in Colorado: Jails and prisons are epicenters of COVID-19. Of the top

fifty clusters of cases in the United States, thirty-three are jails and prisons.¹ It is not difficult to understand why. People in prison sleep, work, eat, and live all day every day in extremely close quarters and in large, congregated populations. And in Colorado, densely populated prisons make physical distancing—“the best way to reduce the spread”²—all but impossible.

4. While no one is safe from transmission of the virus, it does not affect everyone equally. Medical consensus tells us that older people and those suffering from certain underlying medical conditions are significantly more vulnerable to serious illness or death from COVID-19. Prisons also disproportionately house substantially more people who are medically vulnerable to COVID-19 compared to society at large.

5. Given the obvious dangers to those held in prison during the pandemic, public health experts strongly recommend the reduction of prison populations and the immediate release of people most vulnerable to COVID-19 who pose low public safety risks. This measure is necessary not only for the protection of the most vulnerable prisoners (as well as correctional officers), but also to reduce prison populations sufficiently to allow for adequate physical distancing.³ Preventing widespread infection in prisons also ensures scarce health resources aren't overtaxed, improving the public health resources available to all.

6. Colorado Governor Jared Polis has long known the danger from COVID-19 facing vulnerable prisoners, evidenced through his public statements and emergency Executive Orders directing the reduction of Colorado's jail and prison populations to mitigate the spread.⁴ These

¹ Coronavirus in the U.S.: Latest Map and Case Count, THE NEW YORK TIMES (Last Updated May 19, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>.

² Social Distancing, CDC (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

³ See *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174 (D. Colo. May 11, 2020) at Doc. No. 1-1 (March 23, 2020) (Declaration of Dr. Jaimie Meyer, ¶35, **Exhibit 1**) (noting that population reduction in jails will be “crucially important to reducing the level of risk both for those within [jail] facilities and for the community at large,” and that stemming the flow of intakes is a part of the necessary intervention); *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 4, Declaration of Dr. Robert B. Greifinger, MD at ¶ 13, **Exhibit 2**, (“In my opinion, the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.”) and at Doc. No. 6, Declaration of Marc Stern at ¶¶ 9–10, **Exhibit 3**, (noting that release is “a critically important way to meaningfully mitigate” the risks of harm to persons who are at high risk of serious illness or death, as well as to support the broader community health infrastructure).

⁴ Available at <https://drive.google.com/file/d/1q7wkqi-NeU5nmuFcBQwn-6CryTKdYJ5P/view> (“Reducing the numbers of those arrested or incarcerated is vital to our efforts to limit and prevent the spread of COVID-19 in our communities, detention centers and prisons.”);

Executive Orders instructed the Colorado Department of Corrections (“CDOC”) to evaluate various prisoners for eligibility for release, transfer, or alternative placement. All told, the Orders authorized the CDOC to consider approximately 7,000 prisoners for such alternative measures, out of a total of 16,000 people in the system.

7. Likewise, as early as March 26, CDOC Executive Director Dean Williams feared that COVID-19 spreading into prisons “could have devastating results.”

8. Leaders in charge of the CDOC knew that infections in jails and prisons were only a matter of time, militating an immediate need to reduce populations to protect people. CDOC’s own modeling analysis showed that “[w]ithout a dramatic reduction in Colorado’s prison population, COVID-19 likely will spread throughout the state’s prisons ... killing between 150 to 170 inmates and 73 to 83 correctional officers” and “predict[ed] around 90% of the entire state prison population and its staff will eventually become infected without policy changes.”⁵

9. Defendant Williams has himself conceded: “I know that reducing prison density is the only tool left to us.”⁶

10. Unfortunately, Defendants’ public commitments to reduce the prison population have proved little more than lip service. Despite Defendant Polis’ Executive Orders authorizing the CDOC to consider whether nearly half of its population could be released or placed in alternative forms of custody, the CDOC released fewer than 300 of its approximately 16,000 prisoners.⁷ If the Governor and his agencies had done what they acknowledged was necessary to save lives, the Court would not be reading this Complaint.

11. Now, as predicted, the deadly pandemic has spread like wildfire in Colorado prisons. As of the date of this filing, Sterling Correctional Facility (“Sterling”) has been the site of the number one outbreak of confirmed COVID-19 cases in Colorado.⁸ Morgan and Logan counties, where those correctional officers who work at Sterling reside, have two of the highest rates of COVID-19 in Colorado. As of May 27, 2020, 530 prisoners and at least 27 staff members have tested positive for the virus. Two prisoners have died.⁹

12. Sterling is not an anomaly; it is simply the only prison where widespread testing has been conducted, and thus, a harbinger of even greater infection. Before widespread testing,

⁵ *Colorado corrections facilities see high rates of COVID infections; hundreds of prisoner deaths predicted*, by Christopher Osher and Evan Wyloge, The Gazette May 23, 2020, available at https://gazette.com/premium/colorado-corrections-facilities-see-high-rates-of-covid-infections-hundreds-of-prisoner-deaths-predicted/article_6eb6b288-9c8a-11ea-9527-8fff37da8c85.html analyzing CDOC data attached as **Exhibit 4**.

⁶ See **Exhibit 5**, p. 3-4, April 21, 2020 email obtained through Open Records Request.

⁷ See collection of Executive Orders, **Exhibit 10**, pages 1-6.

⁸ <https://covid19.colorado.gov/data/outbreak-data>.

⁹ <https://www.colorado.gov/pacific/cdoc/covid-19-faq-and-updates>.

officials thought Sterling had a mere 8 positive cases; afterward, it confirmed 530 cases. The same holds true for other CDOC prisons, where the true scope of the outbreak is vastly undercounted due to failure to test. Even without widespread testing, the Crowley County Correctional facility has 59 confirmed positive cases of COVID-19 as of May 27, 2020. Based on the experience in Sterling, if widespread testing is done throughout the prisons, we can expect the true number of positives to be far higher systemwide. Recognizing this truth, CDOC recently concluded that the “current outbreak at Sterling Prison is unfortunately going to be our first proving ground on what might be a longer journey.”¹⁰

13. Sterling is thus the proverbial canary in the mine shaft. While Colorado may be flattening the curve for those who are free, as Executive Director Williams has himself acknowledged, “[t]he wave for prisons is just coming upon us.”¹¹ For the over 16,000 prisoners in the CDOC, and especially for those who are medically vulnerable like the Named Plaintiffs, every day brings increasing panic and risk of serious illness or death.

14. Absent immediate intervention from this Court directing the CDOC to take action, devastating, deadly irreparable harm will befall vulnerable prisoners, prison staff, and the surrounding communities.¹² Courts and executive branch officials elsewhere in the country have accepted this reality and begun broad-based, categorical releases for those most at risk of serious illness or death from COVID-19.¹³ Although local jails have substantially decreased their populations in an effort to make physical distancing possible in these unprecedented circumstances,¹⁴ this state’s leadership has responded with essentially no systematic action at all, contrary to their own public statements.

15. Over these last few months, where jails or prisons have failed in their obligation to provide constitutional conditions related to the COVID-19 pandemic, many courts, including the United States District Court for the District of Colorado, have granted injunctive relief on behalf of classes of incarcerated people who are at high risk from death or serious injury. *See e.g., Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174 (D. Colo. May 11, 2020) (ordering identification of medically vulnerable inmates, enactment of procedures to ensure to the

¹⁰ Colorado’s DOC Population Management Plan COVID-19 (hereinafter, “COVID-19 Management Plan”), attached hereto as **Exhibit 6**, includes CDOC modeling projections. The analysis excluded projections for the two prisons in the state run by private prison provider CoreCivic.

¹¹ April 21, 2020 email obtained through Open Records Request, **Exhibit 5**, p. 3.

¹² Noam N. Levey, Jenny Jarvie, *Coronavirus Will Hit Health System Hard and Not All States are Prepared*, L.A. Times (March 12, 2020 4:00 a.m.), <https://cutt.ly/mtYTI3U>; Joanne Kenen, *Local Officials Alarmed by Dearth of Ventilators, Hospital Beds*, (March 14, 2020 7:00 a.m.), <https://cutt.ly/stYTDDk>.

¹³ *See, e.g.,* Memorandum and Order, *Thakker v. Doll*, No. 20-CV-0480 (M.D. Pa. Mar. 31, 2020) (categorically releasing petitioners who “suffer[] from chronic medical conditions and face[] an imminent risk of death or serious injury if exposed to COVID-19”).

¹⁴ <https://www.denverpost.com/2020/04/01/colorado-jails-inmate-release-coronavirus-covid/>.

maximum extent possible that such people are socially distanced from others, enhanced sanitation in the areas populated by medically vulnerable people, increased access to PPE, and adoption of a policy for their increased monitoring); *Cameron v. Bouchard*, No. 20-10949, 2020 WL 2569868 (E.D. Mich., May 21, 2020), Order Denying Stay of Preliminary Injunction, No. 20-1469, ECF 22-1 (6th Cir. May 26, 2020) (issuing a temporary injunction and finding that “in light of Defendants’ awareness of the deathly risk that COVID-19 poses to the medically-vulnerable population, Defendants’ failure to make prompter, broader, and more meaningful use of their authority to implement what appears to be the only solution capable of adequately protecting medically vulnerable inmates may constitute deliberate indifference under the Eighth Amendment.”); *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350 (D. Conn. May 12, 2020) (ordering identification of high risk inmates, their sentencing information, their consideration for compassionate release or home confinement, implementing a process to make full and speedy use of home confinement, and requiring elimination of certain barriers to consideration for release or transfer); *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020), *appeal docketed*, No. 20-3447 (6th Cir. Apr. 27, 2020), Order Denying Stay of Preliminary Injunction, (U.S. May 26, 2020) (ordering federal prison to identify all members of a high risk subclass within one day and to evaluate their eligibility for transfer out of the facility by any means); *Frailhat v. U.S. Immigration and Customs Enforcement*, 19-cv-01546-JGB-SHK, 2020 WL 1932570, (C.D. Cal., Apr. 20, 2020) (ordering ICE to identify people with COVID-19 risk factors within 10 days, make timely custody determinations which “consider the willingness of detainees with Risk Factors to be released,” regardless of whether detainees have petitioned for relief, and develop, monitor, and enforce performance standards defining the minimum acceptable conditions for detainees with risk factors); *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844, at *8–9 (D. Mass. Apr. 8, 2020) (explaining decision to consider bail for all immigration detainees held at two facilities in Massachusetts, given the “extraordinary circumstances” of “this nightmarish pandemic”); *Banks v. Booth*, No. CV 20-849(CKK), 2020 WL 1914896 (D.D.C. Apr. 19, 2020) (ordering sanitation and social distancing procedures as well as unmonitored legal calls); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020) (ordering ICE, *inter alia*, to evaluate each named detainee for release, to brief the court on a plan to accelerate its review of “Alternatives to Detention,” and to provide the court with frequent updates on housing and release of people in their custody); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1987007 (N.D. Ill. Apr. 27, 2020) (ordering testing of inmates and the establishment of hygiene, sanitation, and social distancing requirements); *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 2059848, (N.D. Cal. Apr. 29, 2020) (ordering ICE to identify all detainees at given facilities, including any health vulnerabilities and criminal case information, to ensure adequate access to counsel, and to facilitate implementation of a bail application system).

16. Plaintiffs now ask this Court to do the same as other courts here in Colorado and across the country. Accordingly, Plaintiffs bring this action against the Executive Director of CDOC and Governor Polis on behalf of themselves and a class of Medically Vulnerable Prisoners held in Colorado’s prisons. Plaintiffs request that this Court require the CDOC to perform its legal duties under the Colorado Constitution by identifying and prioritizing the safety, and release or transfer, of Medically Vulnerable Prisoners housed in CDOC facilities, as well as immediate

implementation of necessary physical distancing and hygiene measures.

17. To be sure, undersigned counsel realize that not all Medically Vulnerable Prisoners will be appropriate for safe release or transfer outside of the CDOC facilities; the class does not seek an injunction that would usurp the executive function of ensuring public safety in the operation of the criminal justice system by requesting everyone within the class be simply let out. But Medically Vulnerable Prisoners must be prioritized for consideration for release and transfer, and where not feasible, be afforded protective measures and safe housing such that their incarceration does not amount to a death sentence.

II. JURISDICTION AND VENUE

18. The jurisdiction of this Court arises under the Colorado Constitution, the Uniform Declaratory Judgments Law, Colo. Rev. Stat. §§ 13-51-101, *et seq.*, and Colorado Rules of Civil Procedure 57, 65, and 106(a)(2).

19. Venue is proper in Denver County, pursuant to Colorado Rule of Civil Procedure 98 and C.R.S. § 24-4-106(4).

20. All available administrative remedies have been exhausted to the extent required by C.R.S. § 13-17.5-102.3. There are no other administrative exhaustion requirements that would pose as a bar to any of the claims in this case.

III. PARTIES

21. Plaintiff Gary Winston is incarcerated at Sterling Correctional Facility. Defendants' actions and failures to act pose an unacceptable risk that he will contract COVID-19, to which he is especially vulnerable, and which poses an unreasonable risk of causing his death or substantial injury to his health.

22. Plaintiff John Peckham is incarcerated at Arrowhead Correctional Facility. Defendants' actions and failures to act pose an unacceptable risk that he will contract COVID-19, to which he is especially vulnerable, and which poses an unreasonable risk of causing his death or substantial injury to his health.

23. Plaintiff Matthew Aldaz is incarcerated at Buena Vista. Defendants' actions and failures to act pose an unacceptable risk that he will contract COVID-19, to which he is especially vulnerable, and which poses an unreasonable risk of causing his death or substantial injury to his health.

24. Plaintiff William Stevenson is incarcerated at Sterling Correctional Facility. Defendants' actions and failures to act pose an unacceptable risk that he will contract COVID-19, to which he is especially vulnerable, and which poses an unreasonable risk of causing his death or substantial injury to his health.

25. Plaintiff Dean Carbajal is incarcerated at Sterling Correctional Facility. Defendants' actions and failures to act pose an unacceptable risk that he will contract COVID-19, to which he is especially vulnerable, and which poses an unreasonable risk of causing his death or substantial injury to his health.

26. The named Plaintiffs bring this action on behalf of themselves and a class of similarly situated inmates who are at high risk of death or serious illness from COVID-19 (hereinafter "Medically Vulnerable Prisoners."). Plaintiffs seek to represent a class defined as: All current and future persons held by the Colorado Department of Corrections, whether in a public or private facility, who are at high risk of serious illness or death from COVID-19 because they:

(a) are age fifty-five or older;

(b) have one of the following chronic health conditions: cancer; autoimmune disease requiring immunosuppressive therapies; chronic lung disease (including asthma, chronic obstructive pulmonary disease, bronchiectasis, idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function); history of cardiovascular disease; chronic liver or kidney disease; diabetes; serious heart conditions (including hypertension; congestive heart failure, or history of a heart attack); HIV or other chronic immune deficiencies; obesity; on chronic steroids or other immunosuppressant medications for chronic conditions; or

(c) are pregnant.

27. Defendant Jared Polis is the Governor of the State of Colorado. Governor Polis is responsible for appointing the Executive Director of the Colorado Department of Corrections according to C.R.S. § 17-1-101 and is responsible for the overall administration of the laws of the State. Governor Polis had and continues to have the authority to direct CDOC Executive Director Williams in his management, supervision and control of CDOC facilities, and to manage the prison population consistent with the requirements of the Colorado Constitution. Governor Polis is sued in his official capacity for declaratory and injunctive relief.

28. Defendant Dean Williams is the Executive Director of the Colorado Department of Corrections. Mr. Williams, at all relevant times, was and is responsible for the overall management, supervision, and control of all Colorado Department of Corrections facilities. *See* C.R.S. §§ 17-1-101 and 17-1-103. Mr. Williams' acted and continues to act in accordance with his authority as Executive Director of the CDOC, and in accordance with the custom, policy and practice of CDOC and the State of Colorado. Defendant Polis specifically empowered and mandated Mr. Williams to take action to address the COVID-19 emergency through the authority granted in Executive Orders D 2020 016 and D 2020 043¹⁵, but Mr. Williams recklessly failed to act in conscious disregard of the risk posed to Named Plaintiffs and the class. This lawsuit seeks

¹⁵ **Executive Order D 2020 16, Exhibit 10; Executive Order D 2020 43, Exhibit 10**

to compel full performance of the legal duties owed to prisoners and the general public. Mr. Williams is sued in his official capacity for declaratory and injunctive relief.

IV. STATEMENT OF FACTS

COVID-19 Poses a Significant Risk of Illness, Injury, or Death to the Class Members

29. The novel coronavirus that causes COVID-19 has led to a global pandemic.¹⁶ The virus is spreading exponentially; as of May 27, 2020, there were more than a 1.6 million confirmed cases in the United States alone and almost 100,000 deaths.¹⁷

30. The available data from the Centers for Disease Control (“CDC”) to date shows that, in total, 20.7 to 31.4 percent of people who tested positive for COVID-19 require hospitalization, 4.9 to 11.5 percent require admission to the Intensive Care Unit, and 1.8 to 3.4 percent die.¹⁸ The World Health Organization estimates that one in five people who become infected require hospitalization.¹⁹ As of March 26, 2020, the United States led the world in confirmed cases of COVID-19.²⁰ Projections indicate that as many as 240,000 people in the U.S. will die from COVID-19, accounting for existing interventions – interventions, such as physical distancing, that are not available in prisons to flatten the infection curve.²¹

31. Colorado is considered a hot spot for spread of the disease, with over 24,000 confirmed cases, and over 1,100 confirmed deaths.²²

32. The virus is known to spread from person to person through respiratory droplets,

¹⁶ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://cutt.ly/UtEuSLC>.

¹⁷ Centers for Disease Control and Prevention, *Coronavirus Cases in the U.S.*, available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>; see also Brittany Shammass, et al., *Trump says Quarantine for New York Area “Will not be Necessary;” U.S. Coronavirus-related Deaths Double in Two Days*, Wash. Post (March 28, 2020, 11:27 p.m.), <https://cutt.ly/ktRo8u0>.

¹⁸ CDC Table: Hospitalization, ICU admission, and case-fatality percentages reported for COVID-19 cases, by age group – United States February 12 – March 16, 2020. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

¹⁹ World Health Organization, *Q&A on Coronaviruses (COVID-19)*, “Should I Worry About COVID-19?” <https://cutt.ly/YtEyrxl>.

²⁰ Donald G. McNeil, Jr., *The U.S. Now Leads the World in Confirmed Coronavirus Cases*, New York Times (March 26, 2020), <https://cutt.ly/QtQ7zz6>.

²¹ Rick Noack, et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts*, Wash. Post. (April 1, 2020, 12:02 a.m.), <https://cutt.ly/5tYT7uo>.

²² See <https://covid19.colorado.gov/case-data>.

close personal contact, fecal matter, and from contact with contaminated surfaces and objects.²³ Studies have also shown that the virus might be transmitted via aerosol particles that can linger in the air for hours, raising transmission concerns related to crowded indoor environments such as prisons.²⁴ There is no vaccine against COVID-19, and there is no known medication to prevent or effectively treat infection. According to public health experts, the only course of action to slow and prevent transmission is primarily through a practice known as “physical distancing,” which requires all people to stay at least six feet away from other people.²⁵ Indeed, the only assured way to curb the pandemic is through dramatically reducing contact for all.²⁶ Consequently, every institution—from schools²⁷ to places of worship,²⁸ from businesses²⁹ to legislatures³⁰—has been required or exhorted to reduce the number of people in close quarters, if not empty entirely.

33. COVID-19 can cause intense pain, and severe damage to lung tissue, including a permanent loss of respiratory capacity. It can also damage tissue in other vital organs, such as the heart and liver.³¹

34. People who suffer from certain underlying medical conditions face elevated risks of becoming infected, passing on infection, and becoming seriously ill or dying from the virus.

²³ Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings*, <https://cutt.ly/ztRAo0X>.

²⁴ Joel Achenbach and Carolyn Y. Johnson, *Studies Leave Question of ‘Airborne’ Coronavirus Transmission Unanswered*, Wash. Post (April 29, 2020), <https://www.washingtonpost.com/health/2020/04/29/studies-leave-question-airborne-coronavirus-transmission-unanswered/>.

²⁵ World Health Organization, *Coronavirus*, <https://cutt.ly/ztWYf7e> (“At this time, there are no specific vaccines or treatments for COVID-19.”); *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 4, Declaration of Dr. Robert B. Greifinger, MD, ¶ 8, **Exhibit 2**, (“Social distancing and hand hygiene are the only known ways to prevent the rapid spread of COVID-19.”).

²⁶ Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and how to “Flatten the Curve,”* Wash. Post. (March 14, 2020), <https://cutt.ly/etYRnkz>.

²⁷ Centers for Disease Control, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, <https://cutt.ly/ItRPq5n>.

²⁸ Centers for Disease Control, *Interim Guidance for Administrators and Leaders of Community- and Faith-Based Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://cutt.ly/KtRPk1k>.

²⁹ Centers for Disease Control, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://cutt.ly/stRPvg4>.

³⁰ Nat’l Conf. of State Legislatures, *Coronavirus and State Legislatures in the News*, <https://cutt.ly/4tRPQne>.

³¹ *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 5, Declaration of Dr. Jonathan Louis Golob at ¶ 4, **Exhibit 7**; see also Centers for Disease Control, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, <https://cutt.ly/etRPVRI>.

Such conditions include chronic lung disease, moderate to severe asthma, serious heart conditions, hypertension, chronic kidney disease, liver disease, diabetes, compromised immune systems (such as from cancer treatment, HIV, autoimmune disease, or use of immunosuppressing medication for other conditions), and severe obesity.³² Recent data from the CDC has shown that 78% of patients in the United States who have required treatment in an intensive care unit due to COVID-19 have had at least one underlying health condition.³³ One analysis found mortality rates of 13.2% for patients with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.³⁴

35. The CDC has noted that individuals with asthma may be at a higher risk of complications from contracting COVID-19, including by developing pneumonia and acute respiratory disease.³⁵ The CDC reports that of the laboratory-confirmed COVID-19 cases and deaths reported (with accompanying data as of March 28, 2020), approximately 9.2% had underlying chronic lung disease, which includes asthma and COPD.³⁶

36. People over the age of fifty also face greater risk of serious illness or death from COVID-19.³⁷ In a February 29, 2020, preliminary report, individuals age 50-59 had an overall mortality rate of 1.3%; 60-69-year-olds had an overall 3.6% mortality rate, and those 70-79 years old had an 8% mortality rate—compared to a less than 0.5% mortality rate for individuals under the age of 50.³⁸

³² According to the CDC, those at high risk for severe illness from COVID-19 include people who are 65 years and older, have chronic lung disease or moderate to severe asthma, have serious heart conditions, are immunocompromised, are severely obese, have diabetes, have chronic kidney disease and are undergoing dialysis, or have liver disease. *Groups at Higher Risk for Severe illness*, CDC (May 14, 2020),

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

³³ Centers for Disease Control and Prevention, Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019—United States, February 12–March 28, 2020 (March 31, 2020).

³⁴ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at page 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.

³⁵ People with Moderate to Severe Asthma, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html>.

³⁶ See U.S. Dept. of Health and Human Services/Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report, Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019—United States, February 12–March 28, 2020* (April 3, 2020), available at: <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6913e2-H.pdf>.

³⁷ Xianxian Zhao, et al., *Incidence, clinical characteristics and prognostic factor of patients with COVID-19: a systematic review and meta-analysis* (March 20, 2020), <https://cutt.ly/etRAkmt>.

³⁸ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://cutt.ly/ytEimUQ> (data analysis based on WHOChina Joint Mission Report).

37. While the CDC lists the age for serious risk of illness or death as 65 in the population at large, CDC also recognizes in its specific correctional institution recommendations that “incarcerated/detained populations have higher prevalence of infections and chronic diseases and are in poorer health than the general population, even at younger ages.”³⁹ As a result, public health experts have identified inmates as medically vulnerable based on age beginning at age 50.

38. In many people, COVID-19 causes fever, cough, and shortness of breath. However, for people over the age of fifty or with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe.⁴⁰ Most people in higher risk categories who develop serious illness will need advanced medical support. This requires highly specialized equipment like ventilators that are in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians.⁴¹

39. In serious cases, COVID-19 causes acute respiratory disease syndrome (“ARDS”), which is life-threatening; those who receive ideal medical care with ARDS still have a 30% mortality rate.⁴² Even in non-ARDS cases, COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, cause permanent loss of breathing capacity.⁴³ COVID-19 may also target the heart, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can reduce the heart’s ability to pump.⁴⁴ This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work.

40. COVID-19 can also trigger an over-response of the immune system and result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.⁴⁵ These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.⁴⁶

41. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly

³⁹ Interim Guidance on Management of Corona Virus Disease 2019 in Correctional and Detention Facilities, CDC, available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

⁴⁰ Golob Dec, **Exhibit 7**, *supra* note 31 at ¶ 3; Zhao, *supra* note 37.

⁴¹ Golob Dec., **Exhibit 7**, *supra* note 31 at ¶ 6.

⁴² Letter from Faculty at Johns Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon. Larry Hogan, Gov. of Maryland, March 25, 2020, <https://cutt.ly/stERiXk>.

⁴³ Golob Dec., **Exhibit 7**, *supra* note 31 at ¶ 7.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ CDC, *Interim Clinical Guidance*, *supra* note 39.

effective health care systems.⁴⁷ For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent.⁴⁸

42. Patients who do not die from serious cases of COVID-19 may nevertheless face prolonged recovery periods, including extensive rehabilitation from neurologic damage, loss of digits, and loss of respiratory capacity.⁴⁹

People Who Are Incarcerated Face Significantly Heightened Danger From COVID-19

43. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.⁵⁰ Nearly every single one of the top fifty clusters of COVID-19 cases in the United States involves a congregate facility. As in prisons, the virus has spread rapidly in cruise ships⁵¹ and nursing homes.⁵²

44. Predictably, jails and prisons are “hot spots” all over the country. Sterling Correctional Facility has joined the list of dramatic jail outbreaks such as those in the Cook County Jail,⁵³ Elkton Prison⁵⁴, and Rikers Island in New York City, where the transmission rate for COVID-19 is estimated to be the highest in the world.⁵⁵

⁴⁷ Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, WALL ST. J. (Mar. 10, 2020, 12:49 PM), <https://cutt.ly/itEmi8j>.

⁴⁸ Golob Dec., **Exhibit 7**, *supra* note 31 at ¶ 4.

⁴⁹ *Id.*

⁵⁰ “Detention facilities are congregate environments, i.e places where people live and sleep in close proximity. In such environments, infectious diseases that are transmitted via the air or touch are more likely to spread. This therefore presents an increased danger for the spread of COVID-19 if and when it is introduced into the facility. To the extent that detainees are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, the risks of spread are greatly, if not exponentially, increased.” **Exhibit 3**, Stern Decl. ¶ 7.

⁵¹ The CDC is currently recommending that travelers defer cruise ship travel worldwide. “Cruise ship passengers are at increased risk of person-to-person spread of infectious diseases, including COVID-19.” *COVID-19 and Cruise Ship Travel*, Centers for Disease Control and Prevention, <https://cutt.ly/7tEEQvT>.

⁵² The CDC notes that long-term care facilities and nursing homes pose a particular risk because of “their congregate nature” and the residents served. *Preparing for COVID-19: Long-term Care Facilities, Nursing Homes*, Centers for Disease Control and Prevention, <https://cutt.ly/7tEEITH>.

⁵³ *See supra* note 1.

⁵⁴ Jen Steer, *Judge orders expedited inmate release at Elkton prison during coronavirus outbreak*, (May 19, 2020), <https://fox8.com/news/coronavirus/judge-orders-expedited-inmate-release-at-elkton-prison-during-coronavirus-outbreak>.

⁵⁵ Asher Stockler, *More than 700 People Have Tested Positive For Coronavirus on Rikers Island, Including Over 440 Staff*, <https://www.newsweek.com/rikers-island-covid-19-new-york-city-1496872>.

45. People who are incarcerated face a particularly acute threat of illness, permanent injury, and death because they are unable to engage in the necessary physical distancing and hygiene required to mitigate the risk of transmission. Correctional facilities house large groups of people together, and move people in groups to eat, recreate, and obtain medications.⁵⁶ Hot water, soap, and paper towels are often in limited supply. Prisoners, rather than professional cleaners, are responsible for cleaning the facilities⁵⁷ and often are not given appropriate or adequate supplies.

46. It is well-established, and known by Defendants, that correctional settings increase the risk of COVID-19 due to the high numbers of people with chronic, often untreated, illnesses with limited access to medical care.⁵⁸ This means there are more people who are susceptible to infection all congregated together in a location where, due to crowded conditions, fighting the spread of an infection is nearly impossible.⁵⁹

47. The CDC has issued guidance urging prison administrators to take action to prevent overcrowding of correctional and detention facilities during this outbreak. The CDC guidance emphasizes that physical distancing is “a cornerstone of reducing transmission of respiratory disease such as COVID-19.”⁶⁰

48. A resounding consensus of public health experts, including Dr. Gregg Gonsalves,⁶¹

⁵⁶ See, e.g., Nathalie Baptiste, *Correctional Facilities are the Perfect Incubators for the Coronavirus*, (March 6, 2020), <https://cutt.ly/GtRSi3e>.

⁵⁷ See, e.g., Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative, (April 10, 2017), <https://cutt.ly/qtER2bh> (noting that “custodial, maintenance, laundry” and “grounds keeping” are among the most common jobs for incarcerated people); North Carolina Dept. of Corrections, *North Carolina Prison Inmates at Work*, <https://cutt.ly/jtERCbb> (noting that cleaning the grounds and facilities is one of the jobs of incarcerated persons in North Carolina).

⁵⁸ Letter from Johns Hopkins Faculty, *supra* note 42; Meyer Dec., *supra* note, **Exhibit 1**, (noting, *inter alia*, that jails environments have reduced prevention opportunities, increased susceptibility, and are often poorly equipped to diagnose and manage outbreaks of infection disease); Steve Coll, *the Jail Health-Care Crisis*, *The New Yorker* (Feb. 25, 2019), <https://cutt.ly/ftERHNg>.

⁵⁹ See *Wragg v. Ortiz*, 20-cv-05496 (D.N.J.) at Doc. 1-1 Declaration of Dr. Joe Goldenson, M.D. ¶ 36, **Exhibit 8**; *Id* at Doc. 1-2, Declaration of Nina Fefferman, Ph.D., ¶ 22, **Exhibit 9**.

⁶⁰ U.S. Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (CDC Guidance) (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁶¹ Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, *Connecticut Mirror* (March 11, 2020), <https://cutt.ly/BtRSxCF>.

Ross MacDonald,⁶² Dr. Marc Stern,⁶³ Dr. Oluwadamilola T. Oladeru and Adam Beckman,⁶⁴ Dr. Anne Spaulding,⁶⁵ Dr. Homer Venters,⁶⁶ Jaimie Meyer,⁶⁷ the faculty at Johns Hopkins schools of nursing, medicine, and public health,⁶⁸ and Dr. Josiah Rich,⁶⁹ have all strongly cautioned that people held in jails and prisons are likely to face serious, even grave, harm due to the outbreak of COVID-19. These experts are universal in their view that the only way to stem the tide of illness and death in crowded prisons is by substantially decreasing the population so that physical distancing is possible.

49. For these reasons, correctional public health experts have recommended the release or transfer of people most vulnerable to COVID-19 whenever possible. Release or transferring helps protect the people with the greatest vulnerability to COVID-19, and also allows for greater risk mitigation for people held or working in a correctional facility and the broader community.⁷⁰ Release reduces the burden on the region's health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. As leading pandemic-preparedness expert Professor Nina Fefferman observed, "Epidemiologically, the only way to meaningfully reduce the risks posed to the entire population— inmates, staff, and public—is to drastically reduce the prison population."⁷¹

50. Absent release and physical distancing, transmission will not only endanger the incarcerated, but also correctional staff and their families, and thus burden local hospitals and endanger the broader community. Correctional facilities lack adequate medical facilities to treat serious COVID-19 cases, so an outbreak in a prison could overwhelm local hospitals. And as correctional staff enter and leave the facility, they will carry the virus with them. Like prisoners, correctional officers face an increased risk of COVID-19 exposure because they are less able to engage in physical distancing. For example, as of May 4, 2020, the Federal Bureau of Prisons

⁶² Craig McCarthy and Natalie Musumeci, *Top Rikers Doctor: Coronavirus 'Storm is Coming,'* New York Post (March 19, 2020), <https://cutt.ly/ptRSnVo>.

⁶³ Marc F. Stern, MD, MPH, *Washington State Jails Coronavirus Management Suggestions in 3 "Buckets,"* Washington Assoc. of Sheriffs & Police Chiefs (March 5, 2020), <https://cutt.ly/EtRSm4R>.

⁶⁴ Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America's Incarcerated Population – and How to Ensure It's Not Left Behind*, (March 10, 2020), <https://cutt.ly/QtRSYNA>.

⁶⁵ Anne C. Spaulding, MD MPH, *Coronavirus COVID-19 and the Correctional Jail*, Emory Center for the Health of Incarcerated Persons (March 9, 2020).

⁶⁶ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (March 12, 2020), <https://cutt.ly/jtRSPnk>.

⁶⁷ Meyer Dec., *supra* note 3.

⁶⁸ *See, supra* note 42.

⁶⁹ Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, The Guardian (March 13, 2020 3:00 p.m.), <https://cutt.ly/itRSDNH>.

⁷⁰ *Id.*

⁷¹ *See supra* note 58, Fefferman Decl. ¶ 25; *see generally id.* ¶¶ 17–26, **Exhibit 9**.

(“BOP”) confirmed 498 past and present infections among its staff.⁷²

51. The relief sought by Plaintiffs mirrors that granted by courts across the country. In recognition of the profound public health crisis posed by the COVID-19 pandemic, on an accelerating basis since mid-March of this year, courts across the country have ordered the release of prisoners and detainees, and ordered correctional facilities to take remedial action.

Plaintiffs Are at Substantial Risk of Serious Injury or Death

52. Plaintiff Gary Winston is a 58-year-old man incarcerated at Sterling with serious respiratory medical conditions. He has chronic obstructive pulmonary disease (“COPD”), frequently requires oxygen, and has high blood pressure. He is not able to socially distance in the prison despite clearly being at high risk of serious illness or death from the virus.

53. Mr. Winston is serving a one-year sentence for drug possession while his wife of 22 years is at home struggling with colon cancer. They are both terrified that he is going to contract COVID-19 in Sterling and die or become seriously ill. Mr. Winston has previously needed oxygen to keep up his oxygen saturations, and is terrified to be living in a place raging with infection, particularly because he can’t engage in physical distancing in his cell, while eating, or while in his unit. Mr. Winston has masks and he cleans them himself, but he often sees other prisoners and correction officers refusing to wear masks. He recently asked a correctional officer to put on his mask, which only led to the correctional officer callously making fun of him, acting like he was being silly in trying to protect himself with the very limited methods at his disposal. To make matters worse, units are not cleaned frequently enough to combat COVID-19 at Sterling. Some prisoners are employed as “porters” to clean the area, but many units are without porters at all. The best-case scenario is that a unit is cleaned twice a day, but it is often once a day. Showers, phones, tables, toilets, and other surfaces are not cleaned between use.

54. Plaintiff John Peckham, who is incarcerated at Arrowhead Correctional Facility, is at high risk of severe complications from COVID-19 as a result of multiple medical conditions, including COPD, chronic bronchitis, and diabetes. A pulmonologist also recently diagnosed him as likely suffering from congestive heart failure. Mr. Peckham’s chronic lung conditions often drop his oxygenation levels dangerously low. He requires breathing treatments multiple times a day.

55. Mr. Peckham’s greatest fear is dying in prison. His medical conditions would be difficult to manage while incarcerated in normal times, but during a pandemic, it’s impossible. He frequently does not get his prescribed breathing treatments because of lock-downs or restricted movements. Mr. Peckham is not able to physically distance in his cell and throughout Arrowhead despite clearly being at high risk of serious illness or death from the virus. At Arrowhead, units are supposed to be separated from each other, but this is a mere pretense. When Mr. Peckham’s

⁷² See Fed. Bureau of Prisons, *COVID- 19*, <https://www.bop.gov/coronavirus/> (last accessed May 4, 2020).

unit goes to eat, they all have to sit close to each other, the tables are usually dirty and uncleaned from the unit before, and the kitchen staff who serves the food comes from all over the prison.

56. Mr. Peckham's Arrowhead Case Manager has told him that he is not eligible for special needs release, despite having conditions that obviously put him in an extremely vulnerable risk group to COVID-19, and despite his prior case manager concluding his likelihood of recidivism to be "virtually zero."

57. Plaintiff Matthew Aldaz is incarcerated at Buena Vista and is confined to a wheelchair as he is paralyzed from the T4 vertebrae down. Mr. Aldaz is at high risk of serious complications or death from COVID-19 because of his severe disability, as his paralysis affects his ability to cough, as well as his lung function. Mr. Aldaz can't sneeze or blow his nose. His body and immune system are not able to fight off infections. He needs help with activities of daily living, like using the bathroom and is dependent on an "Offender Care Aid" – another prisoner who provides him assistance.

58. Mr. Aldaz is not able to engage in physical distancing at Buena Vista despite his obvious vulnerabilities. He has a cell mate and has to be in very close proximity to him, his care aid, and other prisoners routinely. Buena Vista will not allow Mr. Aldaz to be housed in a solo cell and he cannot physically distance himself from his cell mate or others throughout the facility. While each floor of his unit has its own toilets and showers, any prisoner can use any bathroom. Because he requires a wheelchair accessible cell, his cell is on the ground floor, closest to the day room. This means that the facilities to which he has access have the heaviest traffic of any of the bathrooms. They are not cleaned between use and he does not have access to cleaning materials to wipe surfaces down before using them. Mr. Aldaz lives in fear every minute, knowing that he will not be able to cough if he contracts the virus, and is likely to suffer extraordinarily.

59. Plaintiff William Stevenson is a fifty-eight-year-old man incarcerated at Sterling, who is at high risk of severe complications or death from COVID-19 because of hypertension, a history of tuberculosis, and because of his age. Mr. Stevenson is not able to physically distance in his cell or throughout the prison despite being medically vulnerable. Mr. Stevenson is a shower porter and is usually only able to clean the showers once a day. There are not adequate cleaning supplies and high touch surfaces are not cleaned between use. In Mr. Stevenson's unit, two bottles of cleaning supplies are put out in the morning, and it is a "mad dash" for the supplies. Once they are gone, that is it, there is no more until the next day. Mr. Stevenson is acutely aware of the danger that surrounds him, and very concerned about his inability to take even basic steps such as cleaning and physically distancing to protect himself.

60. Plaintiff Dean Carbajal is incarcerated at Sterling and is at high risk of severe complications or death from COVID-19 because of asthma. Mr. Carbajal has had asthma since he was a child and needs inhalers regularly. However, Mr. Carbajal has had trouble obtaining his medications during the pandemic. Mr. Carbajal is understandably very afraid about the high infection rates at Sterling, and contracting a deadly respiratory virus at a time where he can't even get his necessary medications for his chronic respiratory condition.

61. Mr. Carbajal is not able to physically distance in the prison despite his medical conditions. He has a cellmate and is unable to physically distance himself from others while eating and while sleeping. Phones and tables in his unit are not cleaned between use and there is not enough access to cleaning materials.

62. Both Dean Carbajal and William Stevenson have the impression that Sterling has given up on prevention. Mr. Carbajal has heard staff tell other prisoners “not to worry” about COVID-19 because “we all probably had it already.” Staff and prisoners aren’t wearing masks or even trying to distance themselves much of the time. Even during the mass testing that went on at Sterling, prisoners were all brought from many different units into one room together. There was no ability to physically distance while waiting for testing; everyone had to touch the door handles and tables without disinfecting between use.

Defendants Know They Must Take Immediate Action to Protect and Reduce the Prisoner Population to Fulfill Their Duties Under the Colorado Constitution

63. The Colorado Constitution vests the “supreme executive power of the state” in the governor, “who shall take care that the laws be faithfully executed.” Colo. Const. Art. IV, §2. The governor is responsible for meeting the dangers to the state and people presented by disasters. C.R.S. § 24-33.5-704(1). Pursuant to this responsibility, the governor may issue “executive orders, proclamations, and regulations and amend or rescind them.” These “[e]xecutive orders, proclamations, and regulations have the force and effect of law.” C.R.S. § 24-33.5-704(2).

64. Governor Polis clearly understands the severity of this crisis: on March 10, 2020, he verbally declared a disaster emergency due to the presence of COVID-19 and issued a written Executive Order titled, “Declaring a Disaster Emergency Due to the Presence of Coronavirus Disease 2019 in Colorado” the next day. A week later, on March 18, 2020, he suspended in-person interaction at public schools, and on March 25, 2020, he issued an Executive Order requiring Coloradans to stay at home and engage in physical distancing.

65. Governor Polis also clearly understands that members of the Plaintiff class are at serious risk from this virus, stating in his Executive Order that “[c]urrent guidance from CDPHE and CDC indicates that older adults and people who have serious chronic medical conditions such as heart disease, diabetes, and lung disease are most at risk of getting very sick from COVID-19.” Executive Order D 2020 003.

66. Governor Polis and CDOC Executive Director Dean Williams are also well aware of the dire risk of the spread of COVID-19 through prisons if there are no substantial changes to the prison environment. Thus, on March 25, 2020, Governor Polis issued Executive Order D 2020 016, which stated: “Temporarily Suspending Certain Regulatory Statutes Concerning Criminal Justice.” This Order explicitly recognized that “[t]he potential spread of COVID-19 in facilities and prisons poses a significant threat to prisoners and staff who work in facilities and prisons, as well as the communities to which incarcerated persons will return.”

67. With the express purpose of reducing the population, Governor Polis gave Mr. Williams and CDOC broad authority to release and/or transfer individuals in its custody by:

- a. suspending the duty to receive prisoners pursuant to C.R.S. § 16-11-301 & 308;
- b. suspending the caps and criteria on awards of earned time credits set forth in C.R.S. § 17-22.5-405, such that DOC can “make awards of earned time credits as it deems necessary and appropriate to safely facilitate the reduction of the population of incarcerated persons and parolees to prevent an outbreak in prisons;”
- c. suspending the criteria for release to Special Needs Parole set forth in C.R.S. § 17-22.5-403.5 and C.R.S. § 17-1-102(7.5)(a) and giving the CDOC discretion to identify “interim criteria for Special Needs Parole and refer persons who meet those criteria to the Parole Board;”
- d. suspending portions of C.R.S. § 17-27.5-101(1)(a) such that DOC “has the authority to establish and directly operate an intensive supervision program,” and;
- e. suspending the provisions of C.R.S. § 17-1-104.3(1)(b.5) addressing the custody level of offenders and duration of time to house people at Centennial Correctional Facility-South, giving more flexibility in housing related to the outbreak.

68. On April 23, 2020, Governor Polis Amended and Extended Executive Order D2020 016 by Executive Order D 2020 043, recognizing that despite various operational changes, “COVID-19 remains a significant health threat to offenders and staff, and DOC must take additional measures to prevent its spread.”

69. Governor Polis ordered the CDOC to take “further action to prevent the spread of COVID-19 in Colorado prisons” by reducing the population. Executive Order D 2020 043 thus granted additional discretion to the DOC, and Defendant Williams, to effectuate releases, paroles, and transfers to alternative detention for CDOC prisoners by:

- a. Suspending the provisions of C.R.S. § 17-27.5-102(2) and (4) and “direct[ing] the Executive Director of DOC to develop alternative standards and criteria for intensive supervision programs with the goal of expediting release of offenders pursuant to Executive Order D 2020 016;”
- b. Suspending the provisions related to time credit deductions for offenders sentenced to a community corrections program in C.R.S. § 18-1.3-301(1)(i) such that administrators of the programs can “make awards of time credit deductions to offenders as he or she deems necessary and appropriate to safely facilitate the reduction of the State’s incarcerated population.”

70. Executive Director Dean Williams unequivocally recognizes that COVID-19 in the corrections system “could have devastating results.”⁷³ Defendant Williams understands that “prisons are a hotbed of transmission in an ideal setting, let alone double bunking and congregate living.”⁷⁴

71. Dr. Carlos Franco-Paredes, an Infectious Disease doctor at the University of Colorado, has been advising the CDOC on infection protocols and how to react to the spread of this pandemic. On March 22, 2020, Dr. Franco-Paredes wrote to the CDOC advising of his concerns that the precise group of people identified in this complaint as the Plaintiff class are at “high risk of severe illness and death should they be infected.” Dr. Franco-Paredes made clear that “[t]he prompt release of individuals with medical conditions at risk of severe disease and death due to coronavirus infection, and prompt reduction in incarcerated populations overall, is necessary to reduce the impact of this outbreak.”

72. Given the undeniable spread and knowledge that this crisis has only just begun at CDOC facilities, Dean Williams has conceded: **“I know that reducing prison density is the only tool left to us.”**⁷⁵

73. On April 21, 2020, CDOC obtained modeling to predict the likely extent of COVID-19 in the CDOC system when Sterling had only 8 positives tests among the prison population and 2 positives test among the staff. Even with those early low numbers, the CDOC’s internal modeling clearly shows that the failure to reduce the prison population will cause significantly more deaths, predicting 170 prisoner and 83 staff deaths if the rate of spread is “moderate,” which requires that “some steps” are taken to reduce contact. Even if the rate of spread were reduced to “low,” which requires quarantining of “at-risk groups,” CDOC modeling predicts 150 prisoner and 73 staff deaths. This modeling concedes that “the actual rate of spread will depend on the actions taken.”⁷⁶

74. CDOC’s modeling also showed that reducing Sterling’s prison population to single cells would decrease the number of prisoner infections by 77% at the peak and decrease the number of deaths among the incarcerated by 65%. It would also decrease staff infections by 61% and staff deaths by 38%. *Id.*

75. Defendant Williams knows that failure to release people will cause a substantial risk of suffering and deaths. The CDOC has candidly stated “we knew that an outbreak in a prison would not only risk the lives of inmates and staff, but prisons could become hotbeds of spread to the local community as essential staff moved in and out of prisons back to their homes.” The agency further conceded that “[t]he reduction of the overall prison population with individuals

⁷³ March 26, 2020 CDOC Press Release, <https://drive.google.com/file/d/1CRNKVcdx8xNBDD8wy-8Qgq6fPVc1Xb21/view>.

⁷⁴ April 21 Open Records email, **Exhibit 5**.

⁷⁵ April 21 Open Records email, **Exhibit 5**.

⁷⁶ COVID-19 Management Plan, **Exhibit 6**.

close to release or who have significant medical conditions is the strongest strategy in existence to not only save the lives of inmates and staff, but also those population centers around the prison.” *Id.*

76. Based on its modeling, the CDOC has stated that its “target occupancy for the pandemic should be 80-85%.” *Id.* The COVID-19 Management Plan admits that even if the population were reduced further to 75%-80% occupancy, “we cannot get single cell occupancy, but at least we can have margins to reduce double bunking in cells and reduce overall spread and mortality.” To get to 75% to 80% occupancy, somewhere between 2500 and 3200 prisoners must be released. Instead, the CDOC remains at nearly 90% capacity, with many individual prisons operating above 95% capacity. *Id.*

Defendants Have Not Sufficiently Reduced the Population or Implemented Adequate Procedures to Ensure the Safety of the Plaintiffs, the Class Members or the General Public

77. On April 26, 2020, Dr. Franco-Paredes told Defendant Williams that based on his visits to jails around the country, he has learned three lessons:

- Lesson 1: The best approach to achieve meaningful social distancing in a correctional facility is by reduction of population density.
- Lesson 2: If a meaningful reduction of the population that allows for social distancing is not feasible, protecting the most vulnerable from a medical perspective is the cornerstone to lessening the overall impact of an outbreak. This includes preventing any deaths (i.e. identifying those at the highest risk of severe disease, single cell housing, and other interventions.)
- Lesson 3: When there are symptomatic cases of COVID-19, broad testing (prevalence testing) is the best approach to guide isolation and quarantine protocols.⁷⁷

78. Defendants have not heeded any of these lessons.

79. While the CDOC has made some operational changes relating to eliminating co-pays for sick people in its custody, as well as providing some soap and masks, the CDOC has not sufficiently reduced the population to provide more space for physical distancing, identified medically vulnerable people, prioritized their safe housing, or implemented widespread testing.

80. With respect to Lesson 1 – reduction in population - DOC has released fewer than 300 people due to COVID-19, despite broad authority to review up to 7000 prisoners for release under the Governor’s Executive Orders. The Department has kept so many people in its facilities

⁷⁷ April 26, 2020 letter from Carlos Franco-Paredes to Dean Williams, obtained through Open Records Act Request, **Exhibit 5**, p. 23.

that it is impossible to maintain six feet of space between them. The vast majority of prisoners, including those in Plaintiffs' class, are housed in small cells with one or more cellmates and no possibility of social distancing. In all CDOC facilities, prisoners sleep, eat, and use the bathroom less than six feet from their cellmates. There are so many people still in CDOC's custody that the dayrooms, recreation areas, dining rooms, and medical units remain crowded. Prisoners and staff members travel between units, potentially carrying the virus with them.

81. Defendant Williams is well-aware that his actions and inactions to date have been woefully insufficient to ensure the safety of medically vulnerable people in the custody of Colorado prisons, and were insufficient to carry out the Governor's order to reduce the prison population to mitigate the risks, illnesses, and deaths due to COVID-19.

82. Governor Polis knows that his Executive Orders were not carried out and that current measures have proved plainly inadequate to address the crisis, requiring further emergency action. Yet on May 22, 2020, he issued Executive Order D 2020 78, specifically deleting the substantive provisions of his previous Orders, and restricting the ability of the CDOC to reduce the prison population – the only thing that he knows will save the lives of prisoners, correctional staff, and the communities in which prisons are located.⁷⁸

83. Governor Polis must be required to take action so that the people in the custody of the state's prisons will not continue to be held in unconstitutional conditions.

84. Governors across the country are taking necessary action to save lives and release thousands of incarcerated people on an emergency basis to mitigate the worst outcomes of this crisis, including commuting sentences and prioritizing the release of the medically vulnerable. For example, the Governor of Michigan signed an executive order to release incarcerated people who are elderly, chronically ill, pregnant, have a behavioral health condition, are nearing their release date.⁷⁹ The Governor of Maryland signed an executive order to expedite the release of incarcerated people eligible for release within four months and to accelerate parole considerations for individuals convicted of nonviolent crimes who are older than 55. These actions will result in the release of almost 800 inmates in Maryland's correctional facilities.⁸⁰ The Governor of Arkansas suspended a parole requirement that made 1,233 incarcerated people eligible for early release.⁸¹

⁷⁸ See **Exhibit 10**, pages 7-8.

⁷⁹ *Governor Whitmer Signs Executive Order Protecting Jail, Juvenile Detention Center Populations*, OFFICE OF GOVERNOR GRETCHEN WHITMER (Mar. 29, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-523423--,00.html.

⁸⁰ Luke Broadwater, *With coronavirus spreading, Maryland Gov. Hogan signs order for expedited release of hundreds of prisoners*, BALTIMORE SUN (Apr. 19, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-pol-hogan-prisoners-20200419-7mzvooaoxfbyngowb2xdeucrme-story.html>.

⁸¹ Scott Carroll, *Arkansas suspends parole requirement, makes 1,244 inmates eligible for early release*, KATV (Apr. 24, 2020), <https://katv.com/news/local/arkansas-suspends-parole-rule-makes-1244-inmates-eligible-for-early-release>.

85. Governor Polis also has significant powers to reduce the prison population yet he refuses to use it. Article 4, Section 7 authorizes the governor “to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except in case of impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons.” Governor Polis has before him pending clemency applications on behalf of medically vulnerable inmates. He has failed to act on these applications at any time during this public health crisis. He has failed to establish any protocols to use his clemency and commutations powers in an expedited fashion to safely decrease the prison population and thereby prevent imminent, needless suffering and death, despite advocates calling upon him to do so.⁸² Governor Polis has consciously decided not to utilize this unfettered power to reduce the population of Colorado’s prisons, despite the clear consensus that decarceration is a necessary part of any state response to the pandemic.

86. With respect to Lesson 2 – identifying those who are at the highest risk (*i.e.* medically vulnerable), Defendant Williams has not implemented a system to identify medically vulnerable prisoners and prioritize their safe housing to “lessen the overall impact of an outbreak” and “prevent[] deaths.”⁸³ Medically Vulnerable Prisoners are not being identified and their safe housing is not being prioritized. Thus, at all CDOC facilities, Medically Vulnerable Prisoners are still being housed with people who are not medically vulnerable and who have not been tested for COVID-19, and they are thus not able to physically distance or even avoid those who have potentially been infected.

87. All of the Named Plaintiffs are medically vulnerable by virtue of their diagnoses or age. Yet the CDOC has failed to identify any of them as medically vulnerable or afforded them additional protections over the general population to “reduce overall spread and mortality.”⁸⁴

88. With respect to Lesson 3 – the need for prevalence testing, Defendant Williams still has not conducted adequate testing throughout the state’s prisons, despite substantially increased testing availability and knowing that widespread testing at Sterling revealed that 530 prisoners and at least 27 staff members tested positive for COVID-19 (which, again, is the largest confirmed outbreak in the state and has already caused two deaths). As of May 27, 2020, outside of Sterling, the CDOC has only tested around 1100 of the over 16,000 inmates who reside in Colorado’s prisons, and therefore cannot effectively isolate infected persons, quarantine those who have been exposed, or otherwise mitigate the spread of the virus within its facilities. Notably, not only are facilities failing to heed the known lessons regarding the necessity of widespread testing to mitigate the spread, it appears some prisons may even be intentionally *avoiding* testing altogether.

⁸² See <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/Coalition-letter-to-Governor-Polis-re-COVID-19-and-CO-Prisons-5-8-2020-FINAL-1.pdf>

⁸³ See **Exhibit 5**, p. 23. April 26, 2020 letter from Carlos Franco-Paredes to Dean Williams, obtained through Open Records Act Request.

⁸⁴ See **Exhibit 6**, COVID-19 Management Plan.

89. In addition to CDOC's minimal testing throughout the prisons, the facilities are plagued by endemic hygiene and sanitation issues. Prisoners do not have access to adequate sanitation supplies or protective equipment. Correctional officers are frequently refusing or failing to wear masks. The CDOC is moving prisoners around facilities from one unit to another, bringing with them new risks of infection. Staff move between units, increasing the chance of infection. Prisoner workers are combined with prisoners from other units to work in the kitchen or other locations, obliterating any benefit to separating the prison by units or pods.

90. Defendants are violating Plaintiffs' constitutional rights by continuing to incarcerate them in conditions where it is impossible to prevent transmission of an infectious disease and to protect themselves against serious illness that may prove deadly because of their conditions. The CDOC must respond to and manage the continued risk of harm posed by the COVID-19 outbreak by following CDC⁸⁵ and other public health guidelines.

91. Without this Court's intervention there will be many more preventable serious illnesses and deaths.

V. FACTS RELATED TO CLASS CERTIFICATION

92. This action is brought as a class action on behalf of prisoners held by CDOC who are at high risk of death or serious illness from COVID-19 (hereinafter "Medically Vulnerable Prisoners") pursuant to Rule 23(b)(2) of the Colorado Rules of Civil Procedure.

93. As explained more fully in Plaintiffs' forthcoming motion for class certification, Plaintiffs seek certification of the following class of Medically Vulnerable Prisoners: All current and future persons held by the Colorado Department of Corrections who are at high risk of serious illness or death from COVID-19 because they:

- (a) are age fifty-five or older;
- (b) have one of the following chronic health conditions: cancer; autoimmune disease requiring immunosuppressive therapies; chronic lung disease (including asthma, chronic obstructive pulmonary disease, bronchiectasis, idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function); history of cardiovascular disease; chronic liver or kidney disease; diabetes; serious heart conditions (including hypertension; congestive heart failure, or history of a heart attack); HIV or other chronic immune deficiencies; obesity; on chronic steroids or other immunosuppressant medications for chronic conditions; or
- (c) are pregnant.

⁸⁵ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

94. All class representatives are members of the class because they are at high-risk of serious illness or death from COVID-19 and being held in CDOC facilities.

95. The class is so numerous that joinder of all members is impracticable. According to CDOC, as of April 21, 2020, the Colorado incarcerated population includes approximately 2,000 people who are 55 and older and 5,724 who are described as having “medical needs.”

96. There are common questions of law and fact that relate to and affect the rights of each member of the proposed class. All class members are confined at a CDOC facility during a pandemic from which they are at high risk of severe illness or death. They have all been subjected to deliberately indifferent infection protocol procedures, including insufficient prevention techniques and inability to be housed in a facility where physical distancing is possible, and are without adequate protections to safeguard their health against COVID-19.

97. The claims of the class representatives are typical of the claims of the class in that they arise from the same, policies, procedures, conditions, and practices (or lack thereof) that provide the basis for all class members’ claims.

98. The representative parties will fairly and adequately protect the interests of the class. The interests of the proposed class representatives are consistent with those of the proposed class members, their claims are typical of the class claims, and their confinement—absent this Court’s intervention—is expected to continue throughout the duration of this action. The attorneys representing the class are capable and experienced in litigation involving civil rights claims, including class actions and, specifically, class actions involving prisoners within CDOC and class actions addressing the COVID-19 pandemic within correctional or detention facilities. Further, counsel for Plaintiffs and the proposed class know of no conflicts of interest among the proposed class members or between the attorneys and the proposed class members that would affect this litigation. The representative parties and their attorneys will prosecute this class action vigorously.

99. This action is properly maintained as a class action in accordance with C.R.C.P. 23(b)(2) in that Defendants have acted or refused to act on grounds generally applicable to all Medically Vulnerable Prisoners in the custody of the CDOC, thereby making final declaratory and injunctive relief appropriate for the class as a whole.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Colo. Const. Art. II, Sec. 20

Prohibition of Cruel and Unusual Punishment

100. Plaintiffs hereby incorporate all other paragraphs of this Complaint as if fully set forth in this claim.

101. The Colorado Constitution, Article II, Section 20 provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

102. These duties are informed by the statutory obligation that persons “in custody shall be treated humanely and provided with adequate food, shelter, and, if required, medical treatment.” C.R.S. § 16-3-401.

103. As detailed above, Plaintiffs and proposed class members are incarcerated under conditions that subject them to substantial risk of severe illness or death, amounting to cruel and unusual punishment.

104. This failure to protect Plaintiffs and class members has caused, and threatens to continue causing, substantial risk of harm to these class members.

105. Defendants know about the risk of harm to Plaintiffs and the proposed class members and have acted and continue to act with reckless disregard of the substantial risk of serious harm to them. Defendants’ conduct has been and continues to be deliberately indifferent, in violation of the Colorado Constitution.

106. Defendants have created a policy or custom under which unconstitutional and unlawful practices occurred, and are knowingly allowing such policies and practices to continue, despite knowing that it causes, and will continue to cause, imminent danger to class members.

107. Defendants are policymakers for the CDOC and, as such, their decisions have the force of law and are attributable to the CDOC and State of Colorado.

108. Plaintiffs and the proposed class members are suffering irreparable injury as a result of Defendants’ unconstitutional conduct, which puts them at risk of serious illness and death absent the requested relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all other persons similarly situated, who have been, are, and will be in the custody of the State of Colorado, request the following:

- A. Certification of this action as a Class Action;
- B. Order that an expert or group of experts be granted wide access to enter at least three of the CDOC facilities and report to the Court on the status of COVID-19 prevention and treatment within the CDOC;
- C. Issue a temporary restraining order, preliminary injunction, and/or permanent injunction requiring Defendants to:

- (1) Immediately implement an evidence-based process to identify all Medically Vulnerable Prisoners within 14 days;
- (2) For all Medically Vulnerable Prisoners, immediately prioritize their evaluation for release or transfer to other forms of detention, and where release or transfer is not possible, immediately prioritize their safe housing, protective measures, and conditions that allow for physical distancing;
- (3) Consistent with public safety, immediately implement a plan to release people, whether Medically Vulnerable or not, in sufficient numbers to allow for adequate social distancing for remaining Prisoners;
- (4) Implement widespread testing of all prisoners as well as staff;
- (5) Implement enhanced sanitation procedures in all areas of each CDOC facility;
- (6) Provide hygiene supplies, including supplies to wash hands (including, but not limited to, hand sanitizer) and disinfect common areas, to prisoners at all times and free of charge;
- (7) Provide personal protective equipment, including but not limited to masks, to all staff members and prisoners, including obtain a sufficient number or type of masks so that inmates do not need to wear them for more than their intended duration;
- (8) Impose meaningful corrective action to any member of correctional staff who fails to wear a mask at all times on duty;
- (9) Adopt a policy providing for increased monitoring of Medically Vulnerable Prisoners for symptoms of COVID-19;
- (10) Implement appropriate policies and protocols to identify prisoners who are possibly carrying COVID-19 and quarantine those inmates from other individuals;
- (11) Provide consistent and confidential means of communication between Named Plaintiffs and their counsel;
- (12) Implement a system of notifying prisoners of the spread of COVID-19 within the CDOC facility where they are housed; and
- (13) Appoint an independent monitor with medical/public health expertise to ensure compliance with these conditions, and provide the monitor with unfettered

access to CDOC facilities, confidential communication with putative class members, and surveillance video of the facilities.

D. Issue a declaration that CDOC's policies violate the Colorado Constitution Article II, Section 20; and

E. Any further relief this Court deems appropriate.

Respectfully submitted this 28th day of May, 2020.

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