

<b>DISTRICT COURT, DENVER COUNTY</b> <b>STATE OF COLORADO</b> Denver City and County Building 1437 Bannock Street, Denver, CO 80202	
<b>Plaintiffs:</b>  GARY WINSTON; JOHN PECKHAM; MATTHEW ALDAZ; WILLIAM STEVENSON; and, DEAN CARBAJAL;  On behalf of themselves and all others similarly situated,  v.  <b>Defendants:</b>  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~  <hr/>
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**AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF OR, IN THE ALTERNATIVE, MANDAMUS RELIEF**

**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*, 140 S. Ct. 1598, 1601 (2020) (Sotomayor, J.). While there are many unknowns about what the future holds for society’s battle with COVID-19, it is nearly certain that without immediate, systemic change in the Department of Corrections, Colorado state prisons will be “cautionary tales.” *Id.*

2. This Court knows the gravity of COVID-19, which has vastly changed the way our society operates in unprecedented ways: schools and many professions are working entirely online, record numbers of people have lost their jobs, and over 241,000 people in the United States have lost their lives. All of us writing and reading this Amended 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 how particularly lethal COVID-19 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. Over 800 jails and prisons in the United States have experienced documented COVID-19 outbreaks with at least 50 positive cases, and at least 1,450 incarcerated people have died from the virus.<sup>4</sup> Fifteen of the twenty-two Colorado

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<sup>1</sup> \*Entry of Appearance Forthcoming.

<sup>2</sup> \*Entry of Appearance Forthcoming.

<sup>3</sup> \*Entry of Appearance Forthcoming.

<sup>4</sup> Coronavirus in the U.S.: Latest Map and Case Count, THE NEW YORK TIMES (Last Updated Oct. 29, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>.

prisons have experienced documented COVID-19 cases.<sup>5</sup> 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”<sup>6</sup>—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 vulnerable to COVID-19 who pose low public safety risks. This measure is necessary not only for the protection of the most vulnerable prisoners and correctional officers, but also to sufficiently reduce prison populations such that adequate physical distancing is possible.<sup>7</sup> 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 vulnerable prisoners face from COVID-19, evidenced through his public statements and emergency Executive Orders directing the reduction of Colorado’s jail and prison populations to mitigate the spread.<sup>8</sup> These 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

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<sup>5</sup> Colorado Dep’t of Public Health and Environment, *Outbreak Data* (last updated Nov. 11, 2020), <https://covid19.colorado.gov/covid19-outbreak-data>.

<sup>6</sup> Social Distancing, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

<sup>7</sup> 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).

<sup>8</sup> 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.”).

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. 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."<sup>9</sup>

8. Early in the pandemic, CDOC Executive Director Dean Williams knew that COVID-19 spreading into prisons "could have devastating results," conceding in April: "I know that reducing prison density is the only tool left to us."<sup>10</sup>

9. Unfortunately, Governor Polis' initial public commitments to reduce the prison population have proved little more than lip service. Despite his open recognition of the ongoing threat from COVID-19, despite knowing that the "only tool left" to mitigate the spread and "devastating results" was population reduction, and despite knowing that few people had been released pursuant to the Executive Orders,<sup>11</sup> he chose to not extend the Orders in May. Governor Polis thus effectively removed the CDOC's authority to consider nearly 7,000 prisoners for population reduction measures in response to the pandemic.<sup>12</sup>

10. In contrast to removing CDOC's authority to protect prisoners through release, over the last seven months Defendant Polis has continued to extend Executive Orders touching virtually every other area of public life in order to ensure proper physical distancing and to minimize the risks of COVID-19.<sup>13</sup>

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<sup>9</sup> *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](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**).

<sup>10</sup> See **Exhibit 5** at 3-4, April 21, 2020 email obtained through Open Records Request.

<sup>11</sup> See collection of Executive Orders, **Exhibit 10** at 1-6.

<sup>12</sup> Executive Order D 2020 078, *Colorado Governor Jared Polis 2020 Executive Orders* (May 22, 2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20078%20Department%20of%20Corrections.pdf>.

<sup>13</sup> See generally Executive Order D 2020 045, extending the statewide mask mandate due to the widespread community spread of COVID-19 throughout the state; Executive Order D 2020 236, extending the temporary suspension of certain regulatory statutes related to the Colorado Department of Human Services (CDHS) in order to "enable CDHS to respond to the pandemic and undertake efforts to prevent or contain the spread of COVID-19 in CDHS facilities"; Executive Order D 2020 207, stating "we must continue to protect and support people who are at increased

11. Since Defendant Polis rescinded his CDOC Executive Orders, CDOC has lacked the authority to broadly review incarcerated people for release and Colorado's prisons have remained so crowded that even many people acknowledged by the system as at high risk to death or serious illness are still unable to physically distance.

12. Sterling Correctional Facility is the site of the second largest COVID-19 outbreak in Colorado. Sterling is not an anomaly; it was simply the first Colorado prison to conduct widespread testing, and a harbinger of even greater infection. Recognizing the writing on the wall back in April, CDOC concluded that the "current outbreak at Sterling Prison is unfortunately going to be our first proving ground on what might be a longer journey."<sup>14</sup>

13. After a summer of slowed infection rates state-wide, on September 22, 2020, Defendant Polis warned of a "third wave" hitting Colorado as the number of COVID-19 cases has risen significantly among all age groups.<sup>15</sup>

14. Predictably, and as predicted, the pandemic has spread like wildfire in Colorado prisons. In September of 2020, CDOC and CDPHE reported multiple new cases of COVID-19 at Sterling, signaling a new outbreak. Arrowhead Correctional Facility, Centennial Correctional Facility, Denver Reception & Diagnostic Center, Fremont Correctional Facility, and La Vista Correctional Facility also reported new cases in September. On October 16, 297 incarcerated people tested positive for COVID-19 at Fremont. On October 21, CDOC reported a new outbreak at Buena Vista Correctional Facility with fifteen positive cases among prisoners and thirteen positive cases among staff. On October 22, Centennial Correctional Facility reported seven new active COVID-19 cases among incarcerated people. On October 23, the Youthful Offender System reported its first outbreak, and San Carlos Correctional Facility reported its first positive case. As

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risk for severe illness from COVID-19, including individuals at risk of severe illness from COVID-19 such as older adults and people with underlying medical conditions"; Executive Order D 2020 205, extending the disaster emergency declaration in Colorado because of the threat posed by COVID-19; Executive Order D 2020 190, requiring individuals to wear face coverings to reduce the spread of COVID-19; Executive Order D 2020 188, temporarily suspending childcare licensing statutes to facilitate learning pods in response to COVID-19; Executive Order D 2020 172, allowing "Coloradans to obtain marriage licenses while observing social distancing guidelines"; Executive Order D 2020 191, suspending certain statutes "to protect Medicaid enrollees from COVID-19 by reducing the need for in person visits"; Executive Order D 2020 154, stating that "evidence shows that Social Distancing. . .ha[s] helped to slow the rate of infection."

<sup>14</sup> 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.

<sup>15</sup> Matt Sebastian, *Polis warns of "third wave" as Colorado sees acceleration of COVID-19 spread across all age groups*, THE DENVER POST (Sept. 22, 2020), <https://www.denverpost.com/2020/09/22/colorado-covid-cases-increasing-all-ages/>.

of November 11, 2020, 620 prisoners and at least 89 staff members at Sterling have tested positive for the virus. Four prisoners from Sterling have died.<sup>16</sup>

15. Defendant Polis correctly forecasted the third wave of COVID-19 in Colorado, yet continued to take no action to protect prisons. In a matter of a week in October, nearly 300 people incarcerated at Fremont Correctional Facility tested positive for COVID-19. On October 16, 2020, the Fremont County Department of Public Health attributed 61% of Fremont County's total virus cases to the prison system.<sup>17</sup> Since then, the number of positive cases has continued to rise at an alarming rate, and as of November 10, 2020, the outbreak at Fremont became the largest outbreak at a prison in the entire state.<sup>18</sup>

16. The spike in positive cases at Fremont is representative of the spike occurring throughout Colorado. At a press conference on October 20, 2020, Defendant Polis stated that hospital capacity could be overwhelmed by mid-December as COVID-19 cases surge throughout the state. Colorado's COVID-19 positivity rates are increasing rapidly, and hospitalizations are on track to exceed the spring hospitalization peak without drastic intervention. As of October 20, COVID-19 patients occupied approximately one in four ICU hospital beds in Colorado.

17. Defendant Polis also stated during his October 20th press conference that, "The biggest single factor that affects the spread of the virus is the choices you make, it's your behavior, it's my behavior, it's our behavior."<sup>19</sup> Unfortunately, this conclusion is inaccurate for incarcerated people, who have no choice or control over their ability to physically distance from others in CDOC's facilities and no autonomy to comply with COVID-19 guidelines.

18. The people incarcerated at Fremont and all other CDOC facilities are not responsible for the outbreaks of COVID-19 in their prisons. The virus necessarily entered the prisons through an outside source, such as correctional staff. The outbreaks at Fremont, Buena Vista, Sterling, and Centennial show that the preventative measures taken by CDOC alone and those that will be implemented as part of the proposed Consent Decree, will not be sufficient on their own to mitigate the enormous spread of this illness in such densely populated environments.

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<sup>16</sup> Colorado Dep't of Public Health and Environment, *Outbreak Data* (last updated Nov. 11, 2020), <https://covid19.colorado.gov/covid19-outbreak-data>.

<sup>17</sup> Tracy Harmon, *Virus outbreak reported in state prison in Canon City*, THE PUEBLO CHIEFTAIN (Oct. 16, 2020), <https://www.chieftain.com/story/news/2020/10/16/state-prison-officials-report-virus-outbreak-canon-city/3679981001/>.

<sup>18</sup> Tracy Harmon, *Fremont County virus cases on the rise; stricter guidelines enacted Tuesday*, THE PUEBLO CHIEFTAIN (Nov. 10, 2020), <https://www.chieftain.com/story/news/2020/11/10/coronavirus-cases-rise-fremont-gatherings-limited/6234190002/>.

<sup>19</sup> Jennifer Campbell-Hicks & Allison Sylte, *The governor shared the latest projections amid what officials call Colorado's third wave of COVID-19*, NBC 9 NEWS (Oct. 20, 2020), <https://www.9news.com/article/news/health/coronavirus/colorado-coronavirus-update-governor-jared-polis/73-6a2f27fb-b9ae-4fda-95ce-5414989d63ff>.

Governor Polis knows that masks, cleaning, hand washing, and testing, are insufficient, and that the CDOC does not have the authority to substantially reduce the prison population unless Defendant Polis reauthorizes such authority under C.R.S. § 24-33.5-704(2). Further steps must be taken to substantially reduce the prison population in order to stop the spread of this highly contagious virus to allow more physical distancing and protect those at greatest risk.

19. The ongoing third wave of COVID-19, along with the incoming flu season, will make it even more difficult for prisons to manage outbreaks among prisoners and corrections staff. For the over 14,500 people currently incarcerated in the CDOC, and especially for those who are medically vulnerable, every day brings increasing panic and risk of serious illness or death.

20. Absent immediate intervention from this Court directing Defendant Polis to take action, devastating, deadly, irreparable harm will continue to befall vulnerable prisoners, prison staff, and the surrounding communities.<sup>20</sup> Indeed, 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 as early as March. For example, on March 23, the Governor of Illinois issued an executive order relaxing restrictions on early release for good behavior as a direct way to reduce the prison population.<sup>21</sup> In contrast, the Governor of Texas has refused to consider releases or extend the parole board's authority to review and grant broader releases; now, over 23,400 incarcerated people have tested positive for COVID-19, and 166 incarcerated people have died in Texas.<sup>22</sup> In one Texas prison, almost 6% of the incarcerated population has died from COVID-19.<sup>23</sup>

21. Defendant Polis has done virtually nothing to reduce the population density in Colorado prisons. By refusing to use his constitutional, statutory, or disaster emergency powers to reduce the risk of harm to medically vulnerable prisoners,<sup>24</sup> Defendant Polis is deliberately refusing to prevent needless suffering and death. Back in the spring, CDOC's modeling predicted that between 150 and 170 incarcerated people and 73 to 83 staff members will die from COVID-

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<sup>20</sup> 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*, POLITICO (March 14, 2020 7:00 a.m.), <https://cutt.ly/stYTDDk>.

<sup>21</sup> <https://www2.illinois.gov/sites/coronavirus/Resources/Pages/ExecutiveOrder2020-11.aspx>

<sup>22</sup> *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (updated Oct. 30, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

<sup>23</sup> Michele Dietch, Alycia Welch, William Bucknall and Destiny Moreno, *COVID and Corrections: A Profile of COVID Deaths in Custody in Texas*, Lyndon B. Johnson School of Public Affairs (Nov. 2020).

<sup>24</sup> Defendant Polis used his executive power to commute the sentences of only three people since the pandemic began in March. <https://www.colorado.gov/governor/2020-executive-orders>. If the Governor and his agencies had done what they acknowledged was necessary to save lives and mitigate the risk of suffering, the Court would not be reading this Amended Complaint.



19 without a dramatic reduction in the prison population. CDPHE's most recent modeling report predicts continued growth in COVID-19 cases and such increased demand on Colorado hospitals that the state is at risk of exceeding its ICU capacity as early as December "unless Coloradans continue to take and maintain prevention measures,"<sup>25</sup> including physical distancing.

22. Despite knowledge of this modeling, while the CDOC has engaged in collaborative efforts to mitigate the spread, Governor Polis has steadfastly refused to take action to protect medically vulnerable prisoners during this unprecedented public health crisis, essentially playing Russian roulette with the class members' lives. In the Governor's game unlucky prisoners face a death sentence via COVID-19. The latest unlucky person died on October 28, 2020, after contracting the virus at Fremont Correctional Facility.

23. Defendant Polis has not extended the same level concern to people in the custody of the State of Colorado that he has extended to all other people in the state. Instead, he has responded with essentially no systematic action at all, stating: "The pandemic is no excuse to let criminals out."<sup>26</sup>

24. To be sure, undersigned counsel realize that not all Medically Vulnerable Prisoners will be appropriate for release or alternative placement outside of CDOC facilities; the class does not seek an order that would usurp the executive function of ensuring public safety in the operation of the criminal justice system by requesting everyone within the class simply be let out. Surely, Governor Polis knows full well that not every person in prison is a "dangerous criminal."<sup>27</sup> And surely, he was not instructing CDOC to let out dangerous criminals in temporarily giving them authority to consider who was dangerous or not in releasing people. But Medically Vulnerable Prisoners must be prioritized for consideration for population reduction, and where not feasible, be afforded protective measures and safe housing such that their incarceration does not amount to a death sentence.

25. Since March, where jails or prisons have failed in their obligation to provide constitutional conditions related to the COVID-19 pandemic, many courts, including the United

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<sup>25</sup> *New COVID-19 modeling report shows increased hospitalizations, potential holiday bump in cases*, CDPHE (October 6, 2020), <https://covid19.colorado.gov/press-release/new-covid-19-modeling-report-shows-increased-hospitalizations-potential-holiday-bump?fbclid=IwAR3d5LXr9gvwj0-JTnVZ22fk23Wnl48PCz8afI5N2PutHQbJr1jhf0bBINM>.

<sup>26</sup> Mark Sallinger, *Families push governor to consider releasing non-violent inmates because of COVID-19*, NBC9 NEWS (Aug. 27, 2020), <https://www.9news.com/article/news/local/next/families-push-governor-to-consider-letting-non-violent-offenders-out-of-jail-because-of-covid-19/73-8639d6cd-e012-49d5-98b6-7263b047df29>.

<sup>27</sup> John Herrick, *Reformers want Polis to commute the sentences of more inmates during pandemic*, THE COLORADO INDEPENDENT (May 8, 2020), <https://www.coloradoindependent.com/2020/05/08/polis-commute-sentences-prisoners-pandemic/>.

States District Court for the District of Colorado, have granted injunctive relief on behalf of classes of incarcerated people who are at high risk of death or serious injury.<sup>28</sup>

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<sup>28</sup> See, e.g., *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174, at \*15 (D. Colo. May 11, 2020) (ordering identification of medically vulnerable incarcerated people, enactment of procedures to ensure to the maximum extent possible that such people are physically 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); *Clark v. Pritzker*, No. 20-cv-01133-SPM, 2020 WL 6391185, at \*5-6 (S.D. Ill. Nov. 2, 2020) (holding that incarcerated plaintiffs adequately stated claims for deliberate indifference by prison officials and unconstitutional conditions of confinement due to overcrowding and lack of access to adequate facilities in quarantine); *In re Von Staich*, ---Cal.Rptr.3d---, 2020 WL 6144780, at \*4 (Cal. App. Oct. 20, 2020) (“**We therefore recommend that the prison population at San Quentin be reduced to 50% of current capacity (even further reduction would be more beneficial) via decarceration**”) (emphasis in original); Order Granting Motion to Enforce, *Frailhat v. U.S. Immigration & Customs Enf’t*, No. 5:19-cv-01546-JGB-SHK, at 14 (C.D. Cal. Oct. 7, 2020), ECF No. 240, (“The Preliminary Injunction envisions the following two-step process: determine if one or more of the defined Risk Factors are present, and if so, timely evaluate or re-evaluate whether continued detention is appropriate, according significant weight to the presence of a Risk Factor and to public health”); *Hernandez Roman v. Wolf*, No. CV-20-00768, 2020 WL 6107069, at \*5 (C.D. Cal. Oct. 15, 2020) (ordering the government to reduce current detainee population of 772 people by at least 50 detainees each day until the detainee population is at or below 475 people); *Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 6040125, at \*5 (9th Cir. Oct. 13, 2020) (affirming that district court may require ICE to reduce the population of detained people to ensure detention center’s conditions do not put detainees at serious risk of serious illness or death); *Vasquez Barrera v. Wolf*, No. 4:20-cv-1241, 2020 WL 5646138, at \*9 (S.D. Tex. Sept. 21, 2020) (“while it may be true that a district court’s authority to grant bail pending a habeas petition seldom has been warranted, our society is seldom thrown into the throes of an incessant pandemic in which measures that may be unusual but are safely within legal authority must be invoked”); *Criswell v. Boudreaux*, No. 1:20-cv-01048-DAD-SAB, 2020 WL 5235675, at \*26 (E.D. Cal. Sept. 2, 2020) (ordering adoption and memorialization of policies to allow for physical distancing, to reduce contacts between incarcerated people in all common areas, and to provide masks to prisoners); *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, 2020 WL 4554646, at \*1 (N.D. Cal. Aug. 6, 2020) (ordering ICE to administer rapid-result COVID-19 testing to all detainees at least once a week, to maintain current practice of not admitting new class members to facility, and to provide daily updates about the status of COVID-19 in facility and defendants’ efforts to manage COVID-19 risk); *Torres v. Milusnic*, No. CV-20-4450-CBM-PVC(x), 2020 WL 4197285, at \*23-24 (C.D. Cal. July 14, 2020) (ordering federal prison to identify class members who requested compassionate release, to institute a process so those eligible for home confinement can communicate with their families and make a plan for release, and to give substantial weight to

26. Plaintiffs now ask this Court to do the same as other courts here in Colorado and across the country. Accordingly, Plaintiffs request that this Court require Defendant Polis to perform his legal duties under the Colorado Constitution by using his constitutional, statutory, and emergency powers to prioritize the safety of Medically Vulnerable Prisoners housed in CDOC facilities by sufficiently reducing the prison population.

## II. JURISDICTION AND VENUE

27. 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).

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

29. 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 a bar to any of the claims in this case.

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prisoners' risk factors for serious illness or death from COVID-10 when reviewing their applications for home confinement); *Banks v. Booth*, No. 20-849, 2020 WL 3303006, at \*18 (D.D.C. June 18, 2020) (ordering creation of plan to review DOC prisoners for possible release, as well as implementation of physical distancing and sanitation procedures); *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 3529664, at \*2 (D. Mass. June 18, 2020) (explaining decision to deny government's motion for reconsideration of preliminary injunction granted to ICE detainees, in part because of "the government's refusal voluntarily to work toward reducing the population of the facility to a density in which social distancing would be possible"); *Gayle v. Meade*, No. 20-21553-CIV-COOKE/GOODMAN, 2020 WL 4047334, at \*2 (S.D. Fla. July 17, 2020) (appointing special master to inspect ICE detention centers because "[a] continued failure to provide detainees with bare minimum necessities and supplies to survive the pandemic may be evidence of deliberate indifference to medical needs, tantamount to the infliction of cruel and unusual punishment because it increases the risk of exposure to a lethal and highly-contagious disease"); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 3041326, at \*23 (S.D. Fla. June 6, 2020) (ordering ICE to provide the court with frequent updates on housing and release of people in their custody, to provide detainees with unrestricted access to soap, hand sanitizer, and cleaning supplies, and to provide all detainees and staff members with masks); *Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 2813072, at \*3 (D. Conn. May 29, 2020) (finding that the "extraordinary circumstances, including the substantial risk to the health of these medically vulnerable inmates and the prevalence of COVID-19 at FCI Danbury. . . make bail necessary to make the habeas remedy effective").

### III. PARTIES

30. Plaintiff Gary Winston (“Mr. Winston”) was incarcerated at Sterling Correctional Facility at the start of the pandemic. Mr. Winston was paroled on October 6, 2020, but, as a parolee, he faces the possibility of returning to the state’s custody. While incarcerated, defendants’ actions and failures to act posed an unacceptable risk that he could have contracted COVID-19, to which he is especially vulnerable, and which posed an unreasonable risk of causing his death or substantial injury to his health.

31. Plaintiff John Peckham (“Mr. 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.

32. Plaintiff Matthew Aldaz (“Mr. Aldaz”) is incarcerated at Buena Vista 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.

33. Plaintiff William Stevenson (“Mr. 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.

34. Plaintiff Dean Carbajal (“Mr. 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.

35. The named Plaintiffs bring this action on behalf of themselves and a class of similarly situated prisoners who are at high risk of death or serious illness from COVID-19 (hereinafter “Medically Vulnerable Prisoners.”).

36. 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 sixty (60) years or older; or
- b. have one or more of the underlying medical conditions recognized by the CDC or WHO as causing a person to be at moderate to high risk of death or serious illness from COVID-19, which as of the date of this order include the following:
  - i. Obesity - BMI 30 kg/m<sup>2</sup> or higher; cancer; chronic kidney disease; Immunocompromised state due to solid organ transplant; chronic lung disease; chronic obstructive pulmonary disease (COPD); emphysema; chronic bronchitis; Diabetes - Type I or II;

Cardiovascular disease - including Heart Failure, Coronary Artery Disease, Cardiomyopathies, Pulmonary Hypertension; Sickle Cell Disease; or

- ii. Asthma (moderate to severe); Cerebrovascular Disease; Cystic fibrosis; Hypertension; Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids or other immune weakening medicines; Neurologic conditions such as dementia; Liver disease; Thalassemia; Idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function; or

c. are pregnant.<sup>29</sup>

37. Defendant Jared Polis (“Governor Polis”) is the Governor of the State of Colorado. Governor Polis is responsible for meeting dangers to the state and its people presented by disasters such as the COVID-19 pandemic. He has the authority to do so through the issuance of executive orders, proclamations, regulations, and suspension of regulatory statutes which prevent, hinder, or delay necessary action to cope with the disaster, pursuant to C.R.S. § 24-33.5-704(1)-(2), (7)(a). Governor Polis is the only government officer among all three branches of government who has the authority to suspend regulatory statutes and to grant commutations and clemency requests. C.R.S. § 23-33.5-704; Colo. Const. art. IV, § 7. Under C.R.S. § 17-22.5-403(4), Governor Polis has the authority to grant parole to persons when extraordinary mitigating circumstances exist, and the person’s release from institutional custody is compatible with the safety and welfare of society. 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 has a duty to uphold the Colorado Constitution, including Article II, § 20’s prohibition on cruel and unusual punishment, even during a pandemic. Governor Polis is sued in his official capacity for declaratory and injunctive relief, or, in the alternative, mandamus relief.

38. 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. The original Complaint sought 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. Since the filing of the suit, Plaintiffs and the CDOC have entered into an agreement reflected in the proposed Consent Decree. Mr. Williams is named here as a Defendant until the Consent Decree can be reviewed by the Court at a fairness hearing. If and when the Consent Decree is entered, Defendant Williams will be dismissed.

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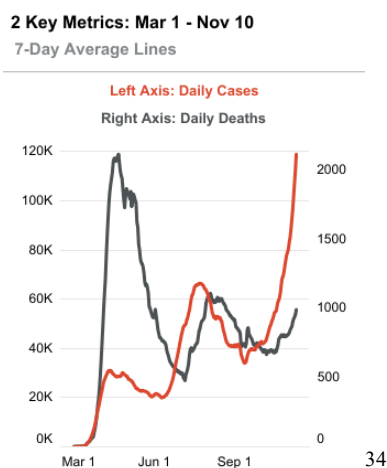
<sup>29</sup> This is the same proposed class definition as agreed to by the CDOC and Plaintiffs for the Settlement Class as part of the Proposed Consent Decree.

## IV. STATEMENT OF FACTS

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

39. The novel coronavirus that causes COVID-19 has led to a global pandemic.<sup>30</sup> The virus is spreading exponentially; as of November 12, there were 10,314,254 confirmed cases in the United States alone and 241,069 deaths.<sup>31</sup> Currently, the United States led the world in confirmed cases of COVID-19.<sup>32</sup>

40. The U.S. has been breaking COVID-19 records for the past few weeks. The COVID-19 peak in the summer was a 7-day average of 66,713 cases per day on July 23. That number declined to 34,210 cases on September 12 but has rapidly increased; the U.S. saw a new 7-day average high of 76,302 cases on October 29, and on November 12 the new 7-day average has soared to 129,773 cases.<sup>33</sup> There is also a correlated uptick in deaths. When cases rise, deaths rise with them; there is typically a 3-week lag. A visualization of COVID-19 data for the U.S. is shown below:



<sup>30</sup> Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://cutt.ly/UtEuSLC>.

<sup>31</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, United States COVID-19 Cases and Deaths by State, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesinlast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days) (last visited Nov. 12, 2020).

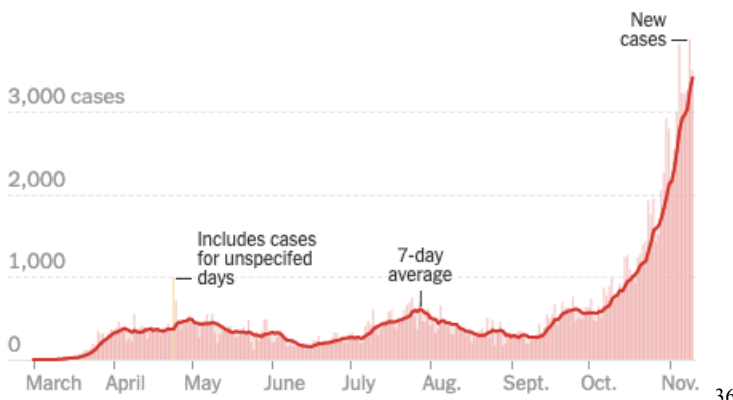
<sup>32</sup> Kate Sheehy, *World Coronavirus Cases Top 25 Million with US Leading the Way*, NEW YORK POST (August 30, 2020 2:18 pm), <https://nypost.com/2020/08/30/world-coronavirus-cases-top-25-million-with-us-leading-the-way/>.

<sup>33</sup> THE COVID TRACKING PROJECT, 2 Metrics 7-Day Average Curves, <https://covidtracking.com/data/charts/2-metrics-7-day-average-curves> (last visited Nov. 12, 2020).

<sup>34</sup> *Id.*

42. Cases have been spiking in Colorado as well. From March to October, Colorado was averaging between 156 and 610 cases daily.<sup>35</sup> Cases began exponentially increasing at the beginning of October; as of November 12, the new 7-day average was 3,600. A data visualization for cases in Colorado is below:

**Daily reported new cases**



43.

44. Hospitalizations have also reached new highs. The U.S. broke a hospitalization record on November 10, with 61,964 people incarcerated due to COVID-19.<sup>37</sup> In Colorado, there were 1,322 people hospitalized due to COVID-19, and 85% of the total ICU beds in the state were in use as of November 12, 2020.<sup>38</sup> Additionally, 25% of facilities are anticipating staff shortages by next week, 1% are anticipating PPE shortages, and 11% are anticipating ICU bed shortages.<sup>39</sup>

45. The virus is known to spread from person to person through respiratory droplets from coughing, sneezing, or talking, close personal contact, fecal matter, and from contact with contaminated surfaces and objects.<sup>40</sup>

<sup>35</sup> Colorado Covid Map and Case Count, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/us/colorado-coronavirus-cases.html> (last visited November 12, 2020).

<sup>36</sup> *Id.*

<sup>37</sup> *U.S. COVID-19 Hospitalizations Set New Record*, THE WALL STREET JOURNAL, <https://www.wsj.com/livecoverage/covid-2020-11-10> (last visited Nov. 11, 2020).

<sup>38</sup> Colorado COVID-19 Data: Hospital Data, <https://covid19.colorado.gov/data> (last visited November 12, 2020).

<sup>39</sup> *Id.*

<sup>40</sup> 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://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html> (last visited Nov. 12, 2020).

46. On October 21, 2020, the Centers for Disease Control and Prevention (“CDC”) released a new study modifying its definition of “close contact.” Six asymptomatic prisoners were awaiting their COVID-19 results in a Vermont correctional facility; when their tests came back positive, the facility conducted contact tracing using video surveillance footage. A corrections officer came into contact with the prisoners, but the facility determined it did not meet their definition of close contact (being within six feet of infectious persons for more than fifteen minutes), and therefore allowed the officer to continue working. A week later, the officer began exhibiting symptoms and tested positive for COVID-19 a few days later. Subsequently, the CDC changed its definition of “close contact” to include anyone who was within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period.<sup>41</sup>

47. Studies have also shown that the virus is transmitted via aerosolized particles that can linger in the air for hours, raising transmission concerns related to crowded indoor environments such as prisons.<sup>42</sup> There is growing evidence that droplets and airborne particles can remain suspended in the air and travel distances beyond 6 feet.<sup>43</sup> These particles may land on surfaces and be transferred by touch.<sup>44</sup> COVID-19 can survive up to four hours on copper, up to 24 hours on cardboard, and up to two or three days on plastic and stainless steel.<sup>45</sup> Many high-touch prison surfaces are made of stainless steel.

48. We are still learning about how COVID-19 spreads. It is still unclear if the virus can be spread through food, how it is affected by exposure to heat or cold, or if it can spread through air conditioning.<sup>46</sup>

49. We do know, however, that COVID-19 can be spread by people who are asymptomatic or pre-symptomatic.<sup>47</sup> Individuals who are not showing symptoms but are

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<sup>41</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Morbidity and Mortality Weekly Report, *COVID-19 in a Correctional Facility Employee Following Multiple Brief Exposures to Persons with COVID-19 – Vermont, July – August 2020*, [https://www.cdc.gov/mmwr/volumes/69/wr/mm6943e1.htm?s\\_cid=mm6943e1\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6943e1.htm?s_cid=mm6943e1_w).

<sup>42</sup> Joel Achenbach and Carolyn Y. Johnson, *Studies Leave Question of ‘Airborne’ Coronavirus Transmission Unanswered*, WASH. POST (April 29, 2020).

<sup>43</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Frequently asked Questions (last visited Nov. 11, 2020).

<sup>44</sup> *Id.*

<sup>45</sup> *COVID-19 Basics*, HARVARD HEALTH PUBLISHING, HARVARD MEDICAL SCHOOL (Nov. 11, 2020), <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics>.

<sup>46</sup> *Id.*

<sup>47</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Frequently Asked Questions, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited Nov. 12, 2020).



contagious with the disease do not realize they are spreading the virus. A report from the CDC estimated that 40% of COVID-19 infections occur through asymptomatic carriers.<sup>48</sup>

50. It has been reported that an American man became the first confirmed case of reinfection in the U.S. The patient tested positive on April 18, 2020 and began quarantining. After his symptoms fully cleared, he tested negative twice, on May 9 and May 26. He began experiencing symptoms again and tested positive for COVID-19 a second time on June 5. Scientists stated the patient caught COVID-19 on two different occasions, due to the significant differences in the genetic codes of the infections. His condition was much more severe the second time, and he required hospitalization. There are similar reinfection reports in Hong Kong, the Netherlands, Ecuador, and Belgium.<sup>49</sup>

51. There is no vaccine against COVID-19, and there is no known medication to prevent or cure the infection. According to public health experts, the primary course of action to slow and prevent transmission is through “physical distancing,” which requires all people to stay at least six feet away from other people.<sup>50</sup> Indeed, the only assured way to curb the pandemic is through dramatically reducing contact for all.<sup>51</sup> Consequently, every institution—from schools<sup>52</sup> to places of worship, from businesses<sup>53</sup> to legislatures<sup>54</sup>—have been required or exhorted to reduce the number of people in close quarters, if not empty entirely.

52. 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. 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 immune-weakening medications for other conditions), and obesity.

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<sup>48</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Pandemic Planning Scenarios, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited Sept. 23, 2020).

<sup>49</sup> Sam Meredith, *A 25-Year-Old Man Becomes First in the U.S. to Contract Coronavirus Twice, with Second Infection ‘More Severe’*, CNBC (OCT. 13, 2020).

<sup>50</sup> 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.”).

<sup>51</sup> Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and how to “Flatten the Curve,”* WASH. POST. (March 14, 2020), <https://cutt.ly/etYRnkz>.

<sup>52</sup> CENTERS FOR DISEASE CONTROL, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, <https://cutt.ly/ItRPq5n>.

<sup>53</sup> CENTERS FOR DISEASE CONTROL, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://cutt.ly/stRPvg4>.

<sup>54</sup> Nat’l Conf. of State Legislatures, Coronavirus and State Legislatures in the News, <https://cutt.ly/4tRPQne>.

53. Public health organizations widely acknowledge that risk of serious illness or death increases with age, with the World Health Organization considering people over 60 as being at high risk. The CDC also recognizes in its specific recommendations for correctional institutions 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.” As a result, public health experts have identified prisoners as medically vulnerable if they are 50 years old or older.

54. In many people, COVID-19 causes fever, cough, and shortness of breath. However, for older people or those with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe. 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.

55. According to CDC data, those with asthma have a 1.5x higher risk for hospitalization after contracting COVID-19 than those without the condition; those with hypertension have a 3x higher risk; those with obesity have a 3x higher risk; those with diabetes have a 3x higher risk; those with chronic kidney disease have a 4x higher risk; those with 2 conditions have a 4.5x higher risk; and those with three or more conditions have a 5x higher risk.<sup>55</sup>

56. According to CDC health data, compared to persons aged 18–29, people aged 50–64 have a 4x greater risk of hospitalization due to COVID-19; those aged 65–74 have a 5x greater risk; those aged 74–84 have an 8x greater risk; and those aged 85 and older have a 13x greater risk.<sup>56</sup>

57. Compared to persons aged 18–29, people aged 50–64 years old have a 30x greater risk of death; those aged 65–74 had a 90x greater risk; those aged 75–84 had a 220x greater risk; and those aged 85 and older have a 630x greater risk.<sup>57</sup>

58. 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.

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<sup>55</sup> CENTER FOR DISEASE CONTROL AND PREVENTION, Underlying Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-underlying-medical-conditions.html> (last visited Sept. 23, 2020).

<sup>56</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Hospitalization and Death by Age, [tps://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html) (last visited Sept. 23, 2020).

<sup>57</sup> *Id.*

59. Symptoms of COVID-19 can persist for months and cause permanent damage. COVID-19 can cause long-term tissue damage to vital organs, such as the heart, brain, lungs, and liver.<sup>58</sup>

60. 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.<sup>59</sup> Even in non-ARDS cases, COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, causes permanent loss of breathing capacity.<sup>60</sup>

61. 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.<sup>61</sup> 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.

62. 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.<sup>62</sup> 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 five days or less.

63. A new study shows that COVID-19 may cause serious brain disorders and neurological conditions.<sup>63</sup> In the study, researchers looked at the experience of forty COVID-19 patients in the United Kingdom with neurological problems. A dozen patients had inflammation of the central nervous system, ten had brain disease with delirium or psychosis, eight had strokes, and eight others had peripheral nerve problems.

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<sup>58</sup> 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/etRPVRL>.

<sup>59</sup> 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>.

<sup>60</sup> Golob Dec., **Exhibit 7**, *supra* note 58 at ¶ 7.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Ian Sample, *Warning of Serious Brain Disorders in People with Mild Coronavirus Symptoms*, THE GUARDIAN (July 8, 2020), <https://www.theguardian.com/world/2020/jul/08/warning-of-serious-brain-disorders-in-people-with-mild-covid-symptoms>.

64. 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 fingers and toes, and loss of respiratory capacity.<sup>64</sup>

65. Many long-term effects of COVID-19 are still unknown.<sup>65</sup> Experts are continuing to try to understand the consequences of the disease; new studies are being conducted weekly to determine the long-term health issues those that have contracted COVID-19 will face. It is unclear just how dire these findings will be, but it is already obvious that COVID-19 will affect some of those who have contracted it for the rest of their lives.

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

66. As of November 12, 2020, COVID-19 infections have been reported in 1,327 prisons, jails, and facilities in the U.S.<sup>66</sup>

67. Predictably, jails and prisons are “hot spots” all over the country. The CDC reports 210,792 total cases and 1,350 total deaths in such facilities.<sup>67</sup> This includes 173,774 total resident case, 37,018 staff cases, 1,272 total resident deaths, and 78 total staff deaths.<sup>68</sup>

68. In Colorado, the CDOC reports 2,387 total positive cases and 4 deaths as of November 12. Arkansas Valley Correctional Facility, Arrowhead Correctional Center, Buena Vista Correctional Facility, Centennial Correctional Facility, Colorado State Penitentiary, Colorado Territorial Correctional Facility, Crowley County Correctional Facility, the Denver Reception & Diagnostic Center, the Denver Women’s Correctional Facility, Four Mile Correctional Facility, Fremont Correctional Facility, La Vista Correctional Facility, San Carlos Correctional Facility, Sterling Correctional Facility, and the Youthful Offender System have all experienced or are currently experiencing outbreaks.<sup>69</sup>

69. Several CDOC facilities have reported outbreaks in the last two weeks:

- a. Fremont Correctional Facility reported a new outbreak on October 13, 2020 with 83 new cases in the facility. As of November 12, that figure has climbed

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<sup>64</sup> Golob Dec., **Exhibit 7**, *supra* note 58 at ¶ 4.

<sup>65</sup> MAYO CLINIC, COVID-19 (coronavirus): Long-term effects, <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>. (last visited Sept. 23, 2020).

<sup>66</sup> CENTER FOR DISEASE CONTROL, View Data For: Correctional Facilities, <https://covid.cdc.gov/covid-data-tracker/#correctional-facilities>. (last visited Nov. 12, 2020).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> COLORADO DEPARTMENT OF CORRECTIONS, CDOC COVID-19 Dashboard, <https://www.colorado.gov/pacific/cdoc/covid-19-faq-and-updates> (Last visited Nov. 12, 2020.)

to 699 cases. There are still 212 active cases in the facility. Fremont reported its first death on October 29.<sup>70</sup>

- b. On October 21, 2020, Buena Vista Correctional Complex reported a new outbreak. They have reported 231 total positives. As of November 12, they have 13 active COVID-19 cases.<sup>71</sup>
- c. On October 22, 2020 Centennial Correctional Facility reported a new outbreak with 7 new COVID-19 cases. They had a total of 30 positive cases.<sup>72</sup>
- d. On October 23, 2020 the Youthful Offender System reported 2 new cases. As of November 12, they have 21 active cases. The facility has reported a total number of 138 positive cases.<sup>73</sup>
- e. Crowley County Correctional Facility has had 168 total positive cases. As of November 12, they are still reporting an outbreak with 4 active cases.<sup>74</sup>
- f. Four Mile Correctional Facility is currently experiencing an outbreak. They have reported 85 total positive cases. As of November 12, they have 82 active cases.<sup>75</sup>
- g. Sterling Correctional Facility is still reporting an outbreak. They have had 591 total positive cases and as of November 12, they have 5 active cases.<sup>76</sup>
- h. Arkansas Valley Correctional Facility is also reporting an outbreak; as of November 12, they had 302 active cases.<sup>77</sup>
- i. Colorado Territorial Correctional Facility has had a total of 89 positive case; as of November 12, there had 78 active cases.<sup>78</sup>
- j. Arrowhead Correctional Facility is reporting an outbreak; as of November 12, they had 2 active cases.<sup>79</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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

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

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

- k. Denver Women's Correctional Facility is currently reporting an outbreak; as of November 12, they had 6 active cases.<sup>80</sup>

70. There are still ten facilities that have performed fewer than 1,000 tests since the pandemic began in March. Two of these facilities, Rifle Correctional Center, and Skyline Correctional Center, have each done fewer than 100 COVID-19 tests.<sup>81</sup> The true extent of infections is thus unknown.

71. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19. As in prisons, the virus has spread rapidly in cruise ships, nursing homes, and college dorms.

72. One study shows that incarcerated persons are 5.5 times more likely to contract COVID-19 and three times more likely to die from the infection than the general population.<sup>82</sup>

73. Research has demonstrated that individuals with underlying health conditions are at a higher risk for hospitalization and death from COVID-19. Incarcerated persons are more likely to suffer from chronic health conditions than the general population.<sup>83</sup> An estimated 40% of individuals incarcerated in state and federal facilities report having a current chronic medical condition compared with 31% of the general population.<sup>84</sup> In the U.S., 30.2% of incarcerated persons report having hypertension compared to 18.1% of the general population; 9.8% of incarcerated persons report having heart related problems compared with 2.9% of the general population; 14.9% of incarcerated persons report having asthma compared to 10.2% of the general population; and 6% of incarcerated persons report having been infected with tuberculosis compared to .5% of the general population. Nearly 75% of incarcerated persons are considered overweight (46%), obese (26%), or morbidly obese (2%).<sup>85</sup>

74. In May 2020, the CDC requested data from fifteen jurisdictions to identify the number of cases found during symptom-based testing before they mass tested facilities. Fifteen of the sixteen jurisdictions identified at least one COVID-19 case, and the sixteen facilities had a total of 642 known cases. The CDC tested the 16,161 incarcerated persons who consented to testing. They found that 7,597 individuals had COVID-19, a positivity rate of 47.4%. Two unidentified

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

<sup>81</sup> *Id.*

<sup>82</sup> Alexandra Sternlicht, *Prisoners 550% More Likely to Get COVID-19, 300% More Likely to Die, New Study Shows*, FORBES (July 8, 2020, 5:35 pm EDT), <https://www.forbes.com/sites/alexandrasternlicht/2020/07/08/prisoners-550-more-likely-to-get-covid-19-300-more-likely-to-die-new-study-shows/#154749643a72>.

<sup>83</sup> U.S. DEPARTMENT OF JUSTICE: MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12 (2016).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Colorado prisons were included in the study. In the first prison, 2,295 individuals received tests, with 375 testing positive for COVID-19. 299 individuals received tests in the second prison, with 35 testing positive.<sup>86</sup>

75. In November 2020, a report was published profiling the COVID-19 deaths of persons incarcerated in Texas. Data reveals that in one facility alone, the Duncan Unit, almost 6% of the incarcerated population has died from COVID-19. In prison facilities across Texas, 21 persons who died from COVID-19 had served 90% of their sentences; 73% of people that died did not have a life sentence; 58% of people that died were eligible for parole; and nine people that died from COVID-19 had been approved for parole, but were not yet released. This shocking data was collected over a month ago, on October 4, 2020. With COVID-19 breaking previous records all of the U.S., the toll on the lives of incarcerated persons is unimaginable.

76. 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.<sup>87</sup>

77. It is well-established, and known by Governor Polis, 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.<sup>88</sup> 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.<sup>89</sup>

78. 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.”<sup>90</sup>

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<sup>86</sup> *Morbidity and Mortality Weekly Report, Mass Testing for SARS-CoV-2 in 16 Prisons and Jails – Six Jurisdictions, United States, April-May 2020*, CENTER FOR DISEASE CONTROL AND PREVENTION (August 21, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm?s\\_cid=mm6933a3\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm?s_cid=mm6933a3_w).

<sup>87</sup> See, e.g., Nathalie Baptiste, *Correctional Facilities are the Perfect Incubators for the Coronavirus*, (March 6, 2020), <https://cutt.ly/GtRSi3e>.

<sup>88</sup> Letter from Johns Hopkins Faculty, *supra* note 59; Meyer Dec., *supra* note 7, **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>.

<sup>89</sup> 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**.

<sup>90</sup> 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)

79. A resounding consensus of public health experts, including Dr. Gregg Gonsalves,<sup>91</sup> Ross MacDonald,<sup>92</sup> Dr. Marc Stern,<sup>93</sup> Dr. Oluwadamilola T. Oladeru and Adam Beckman,<sup>94</sup> Dr. Anne Spaulding,<sup>95</sup> Dr. Homer Venters,<sup>96</sup> Dr. Jaimie Meyer,<sup>97</sup> the faculty at Johns Hopkins schools of nursing, medicine, and public health,<sup>98</sup> and Dr. Josiah Rich<sup>99</sup> 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.

80. In October 2020, the National Academies of Sciences, Engineering, and Medicine released a report calling for the decarceration of prisons as a mitigation response to COVID-19. This report offers recommendations that will help “to facilitate decarceration efforts, improve preparedness for future COVID-19 outbreaks and the next public health crisis,”<sup>100</sup> and to reduce the risks of exposure and transmission of COVID-19 within correctional facilities.

81. Likewise, on October 24, 2020, the American Public Health Association’s Governing Council formally adopted a policy statement titled “*Advancing Public Health Interventions to Address the Harms of the Carceral System*.”<sup>101</sup> In this statement, the American

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(Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>91</sup> Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, CONNECTICUT MIRROR (March 11, 2020), <https://cutt.ly/BtRSxCF>.

<sup>92</sup> Craig McCarthy and Natalie Musumeci, *Top Rikers Doctor: Coronavirus ‘Storm is Coming,’* NEW YORK POST (March 19, 2020), <https://cutt.ly/ptRSnVo>.

<sup>93</sup> 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>.

<sup>94</sup> 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>.

<sup>95</sup> Anne C. Spaulding, MD MPH, *Coronavirus COVID-19 and the Correctional Jail*, EMORY CENTER FOR THE HEALTH OF INCARCERATED PERSONS (March 9, 2020).

<sup>96</sup> Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (March 12, 2020), <https://cutt.ly/jtRSPnk>.

<sup>97</sup> Meyer Dec., *supra* note 7.

<sup>98</sup> *See supra* note 59.

<sup>99</sup> 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>.

<sup>100</sup> *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity, and Safety* THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE (October 2020), <https://www.nap.edu/resource/25945/Decarceration.pdf>.

<sup>101</sup> *Advancing Public Health Interventions to Address the Harms of the Carceral System*, AMERICAN PUBLIC HEALTH ASS’N (Oct. 24, 2020), <https://www.endingpoliceviolence.com>.



Public Health Association recognizes that prisons are “uniquely susceptible environments [that] place incarcerated individuals at increased risk of not only contracting COVID-19, but developing severe infections that require hospitalization or result in death, given their older age and disproportionately high burden of underlying conditions,” and it urges government officials to “immediately and urgently reduce the number of people incarcerated in jails, prisons, and detention centers, regardless of conviction, especially in light of pressing concerns related to COVID-19 transmission.”

82. For these reasons, correctional public health experts have recommended the reduction of prison populations or transfer of people most vulnerable to COVID-19 whenever possible. Reduction of the prison population 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 because it reduces the chances of exponential transmission. In turn, this reduction of population density in correctional facilities 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.”<sup>102</sup>

83. Absent significant reduction of prison density and increased physical distancing, transmission will not only endanger incarcerated people, but also correctional staff and their families, 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 easily overwhelm local hospitals.

84. As correctional staff enter and leave the facility, they will carry the virus with them. Correctional officers, nursing staff, and medical staff are being moved around in the East Canon Prison Complex from facility to facility. This includes the Fremont Correctional Facility, Arrowhead Correctional Facility, Centennial Correctional Facility, Colorado State Penitentiary, Four Mile Correctional Center, and Skyline Correctional Center.

85. 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 November 12, the Federal Bureau of Prisons (“BOP”) confirmed 2,589 past and present infections among its staff.<sup>103</sup> Two BOP staff members have died from COVID-19.

86. In CDOC facilities, there have been 466 total positive cases among staff members. As of November 12, 410 staff members have been placed on leave due to possible COVID-19 exposure or an active COVID-19 case; there are 131 active COVID-19 cases among staff

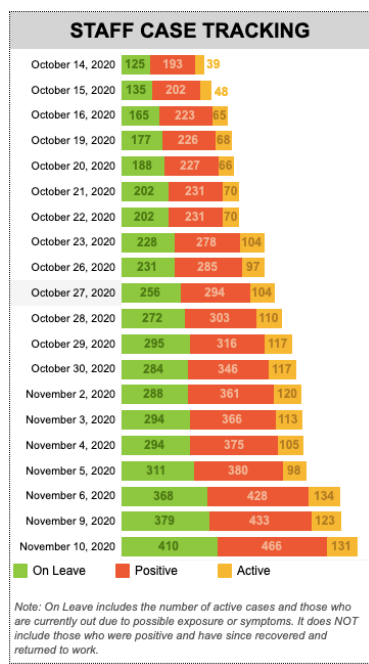
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<sup>102</sup> See *supra* note 90, Fefferman Decl. ¶ 25; see generally id. ¶¶ 17–26, **Exhibit 9**.

<sup>103</sup> Federal Bureau of Prisons, *Covid-19: Coronavirus* (last updated Nov. 12, 2020), <https://www.bop.gov/coronavirus/>.

members.<sup>104</sup> Data from 2019 indicates the CDOC employs 3,779 staff members;<sup>105</sup> therefore, approximately 11% of the CDOC's staff members are on leave due to COVID-19 exposure or infection.

87. COVID-19 cases among staff members jumped from 13 active cases on October 9 to 131 active cases on November 10.<sup>106</sup> This screenshot of the COVID-19 CDOC dashboard shows the following staff case tracking numbers:



88.

89. The exponential increase of COVID-19 infections in Colorado among the general population and staff members increases the risk of infection and death for class members. A reduction of the prison population would protect both persons incarcerated in these facilities, the staff members working in them, and the communities surrounding them.

### **Named Plaintiffs Are at Substantial Risk of Serious Injury or Death**

90. Plaintiff Gary Winston is a 58-year-old man who was incarcerated at Sterling with serious respiratory medical conditions. He has chronic obstructive pulmonary disease ("COPD"), frequently requires oxygen, and has high blood pressure. While incarcerated, he was not able to

<sup>104</sup> *Id.*

<sup>105</sup> COLO. DEP'T OF CORRECTIONS, *Reports: Corrections Officer Staffing Levels*, <https://www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics> (last visited Nov. 12, 2020).

<sup>106</sup> COLO. DEP'T OF CORRECTIONS, *Covid-19 FAQs and Updates* (last updated Nov. 12, 2020), <https://www.colorado.gov/pacific/cdoc/covid-19-faq-and-updates>.

physically distance in the prison despite clearly being at high risk of serious illness or death from the virus.

91. Mr. Winston was serving a one-year sentence for drug possession. He was released from CDOC on parole on October 6, 2020. While incarcerated, his wife of 22 years was at home struggling with colon cancer. They were both terrified that he was going to contract COVID-19 in Sterling and become seriously ill or die. Mr. Winston has previously needed oxygen to keep up his oxygen saturations, and he was terrified to be living in a place raging with infection, particularly because he could not engage in physical distancing in his cell, while eating, or while in his unit. While he was in the Sterling Correctional Facility, Mr. Winston was provided masks that he cleaned himself, but he often saw other prisoners and officers refusing to wear masks. He 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. Mr. Winston was tested for COVID-19 5 or 6 times, but only received his results 2 or 3 times.

92. Mr. Winston became increasingly worried while at the Sterling Correctional Facility. He wrote, “It’s really killing me. My wife is steadily deteriorating.” His parole date was originally set for April; it was then moved to July, and then to September. He was ultimately released on October 6, 2020.

93. 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.

94. 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 lockdowns 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 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.

95. 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.”

96. Plaintiff Matthew Aldaz is incarcerated at Buena Vista Correctional Complex and uses a wheelchair for mobility 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 Aide"—another prisoner who provides him assistance.

97. 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 aide, 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.

98. Plaintiff William Stevenson is a 58-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 uses. 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 are 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.

99. 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 about contracting a deadly respiratory virus at a time where he can't even get his necessary medications for his chronic respiratory condition.

100. 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.

101. 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.

**Governor Polis Knows He Has Stripped the DOC of Authority to Reduce the Population, Putting the Plaintiffs and Class Members at Risk of Substantial Harm**

102. At the start of the pandemic in Colorado, Defendant Polis clearly understood 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.

103. From the outset of the pandemic, Defendant Polis has also clearly understood that members of the Plaintiff class are at serious risk from this virus, and that prisons are a particularly dangerous place for medically vulnerable individuals.<sup>107</sup> In March, Executive Director Williams unequivocally recognized that COVID-19 in the corrections system “could have devastating results.”<sup>108</sup> Mr. Williams understands that “prisons are a hotbed of transmission in an ideal setting, let alone double bunking and congregate living.”<sup>109</sup>

104. 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.”<sup>110</sup>

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<sup>107</sup> Executive Order D 2020 003, **Exhibit 10** (“[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.”)

<sup>108</sup> March 26, 2020 CDOC Press Release, <https://drive.google.com/file/d/1CRNKVcdx8xNBDD8wy-8Qgq6fPVc1Xb21/view>.

<sup>109</sup> April 21 Open Records email, **Exhibit 5**.

<sup>110</sup> *Id.*

105. Defendant Polis is also well-aware of the dire risk that COVID-19 will continue to rapidly spread through prisons if there are no substantial changes to the prison environment. Defendant Polis knows that the measures within CDOC's control are insufficient to ensure the safety of medically vulnerable people in the custody of Colorado prisons.

106. It was this awareness that led to his March 25, 2020 Executive Order D 2020 016, entitled "Temporarily Suspending Certain Regulatory Statutes Concerning Criminal Justice."<sup>111</sup> 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."

107. Originally, Defendant Polis acted to protect prisoners just as he acted to protect free people, by giving the 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 incarcerated people and duration of time to house people at Centennial Correctional Facility-South, giving more flexibility in housing related to the outbreak.

108. On April 23, 2020, Defendant 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."<sup>112</sup> Defendant 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

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<sup>111</sup> Executive Order D 2020 16, **Exhibit 10**.

<sup>112</sup> Executive Order D 2020 43, **Exhibit 10**.

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;” and
- b. Suspending the provisions related to time credit deductions for people 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.**”

109. On April 21, 2020, when Sterling had only eight positive tests among the prison population and two positive tests among the staff, CDOC obtained modeling to predict the likely extent of COVID-19 in the CDOC system. Even with those early low numbers, CDOC’s internal modeling clearly showed that failure to reduce the prison population will result in widespread death; 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.”<sup>113</sup>

110. CDOC’s modeling also showed that reducing Sterling’s population to a level that allows for people to be single-celled 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%.<sup>114</sup>

111. Based on its modeling, the CDOC COVID-19 Management Plan shows that even if the population at Sterling was reduced 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.”<sup>115</sup> To get to 75% to 80% occupancy, somewhere between 2500 and 3200 prisoners must be released.<sup>116</sup>

112. CDOC’s COVID-19 Management Plan indicates that reducing prison population density is the “last lever to mitigate the pandemic and the only one not in play at this point.”<sup>117</sup> In

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<sup>113</sup> COVID-19 Management Plan, **Exhibit 6**.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Colorado Department of Corrections COVID-19 Dashboard, *Capacity vs. Vacancy Rate* (last visited Oct. 29, 2020).

<sup>117</sup> COVID-19 Management Plan, **Exhibit 6**.

order to reach the target occupancy limits and thus decrease the severity of COVID-19's impact on medically vulnerable prisoners like the Plaintiff class, the prison population density must be substantially reduced.

113. Likewise, on April 26, 2020, Dr. Franco-Paredes told the CDOC that, based on his visits to jails around the country, the number one lesson was that “[t]he best approach to achieve meaningful physical distancing in a correctional facility is by reduction of population density.”<sup>118</sup> The number two lesson was, “If a meaningful reduction of the population that allows for physical 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.)”

114. With respect to Lesson 1—reduction in population—nowhere near enough people were released from CDOC in the time they had authority to do so. So many people are housed in CDOC prisons, 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 physical 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.

115. With respect to Lesson 2—protecting those who are at the highest risk—CDOC has also be largely unable to accomplish this goal due to the sheer number of people in its facilities. Under the “high risk factor prioritization” system employed by the CDOC before entering into the Consent Decree, medically vulnerable prisoners were divided into five subcategories taking into account factors like age and multiple comorbidities. People in category 1 were considered highest priority for single occupant living arrangements and category 5 were considered lowest priority for single-celling amongst medically vulnerable prisoners.

116. By April 30, 2020 CDOC had identified 4,392 people in its custody as medically vulnerable. It determined that only 10 of 21 facilities<sup>119</sup> were even capable of single-celling every medically vulnerable person in its custody. Four facilities, Buena Vista Minimum Center, Fourmile Minimum Center, Crowley County Correctional Facility, and Bent County Correctional Facility could accommodate only those people in Category 1, and both Crowley and Bent would have to utilize restrictive housing cells to accomplish even that. Fremont Correctional Facility could not fully accommodate *any* high risk prioritization category within its existing available single occupancy housing.

117. As of May 28, 2020, a month later, CDOC had single celled fewer than 40% of the people it had identified as medically vulnerable.

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<sup>118</sup> April 26, 2020 letter from Carlos Franco-Paredes to Dean Williams, obtained through Open Records Act Request, **Exhibit 5** at 23.

<sup>119</sup> CDOC did not include YOS in its single cell prioritization analysis.



118. By early to mid-June the vast majority of medically vulnerable prisoners remained without a single occupancy housing arrangement. Out of the 79 Category 1 prisoners at Crowley County Correctional Facility, only 5 had a cell to themselves. In Fremont Correctional Facility only 23 of 118 Category 1 prisoners were single celled. And at Sterling Correctional Facility only 48 of 160 Category 1 prisoners were housed alone. System-wide CDOC had single-celled only 1,595 of the more than 4,300 people it had identified as medically vulnerable.

119. Given the undeniable spread and knowledge that this crisis has only just begun at CDOC facilities, Dean Williams conceded over six months ago that: **“I know that reducing prison density is the only tool left to us.”**<sup>120</sup>

120. Nevertheless, knowing the substantial threat faced by Colorado prisoners due to COVID-19, Defendant Polis baselessly rescinded his previous orders in Executive Order D 2020 078 in May 2020. This Order amended Executive Orders D 2020 016 and 043 by deleting all substantive provisions related to reducing the population density inside Colorado prisons. In issuing Executive Order D 2020 078, Defendant Polis removed the discretion he previously granted CDOC to review various prisoners for release, transfer, or alternative placement—despite knowing this is the only available option for saving lives of prisoners, correctional staff, and the communities in which prisons are located.<sup>121</sup>

121. When he rescinded the authority he gave to CDOC, Defendant Polis was well aware that there are far too many people in Colorado’s prisons to actually mitigate the risk. Everyone managing facilities and workplaces throughout the country and world has had to drastically pivot from business as usual. CDOC needs the time and authority Defendant Polis originally gave them to meaningfully respond to this crisis.

122. The threat COVID-19 poses has not subsided in Colorado as the summer progressed, and Defendant Polis has continued to use his executive powers to mitigate the pandemic in all areas of public life except in Colorado’s prisons. For example, Defendant Polis issued Executive Order D 2020 205 on October 1, extending the state of emergency in Colorado due to the continued presence of COVID-19. The CDPHE’s Fourth Amended Public Health Order 20-35, issued pursuant to Defendant Polis’s Executive Orders on October 27, states that counties in any of the three Safer at Home levels shall not gather in groups of more than 10 individuals from no more than two households.<sup>122</sup>

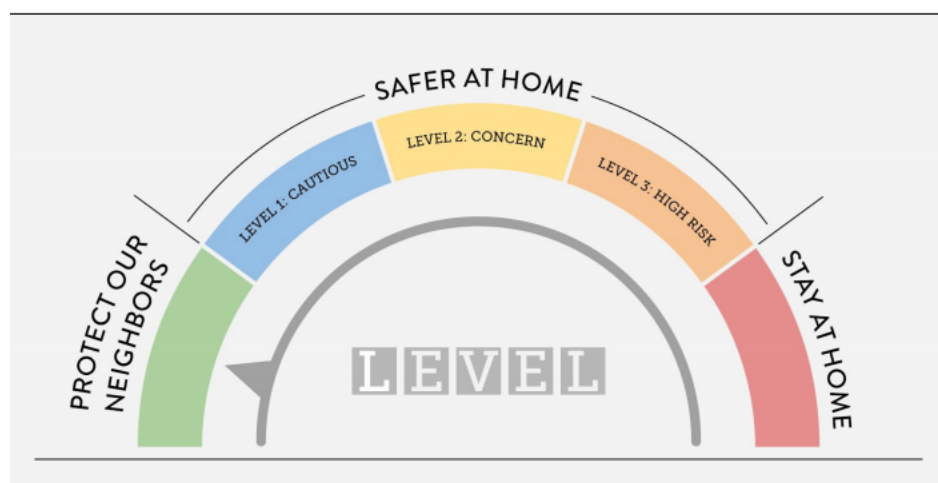
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<sup>120</sup> April 21 Open Records email, **Exhibit 5**.

<sup>121</sup> See **Exhibit 10**, pages 7-8.

<sup>122</sup> COLO. DEP’T OF PUBLIC HEALTH AND ENV’T, *Fourth Amended Public Health Order Safer at Home* *Dial*, *available at* [https://drive.google.com/file/d/14\\_GaVScXNeYPrT6ZmTw1MuU9\\_A1egOAd/view](https://drive.google.com/file/d/14_GaVScXNeYPrT6ZmTw1MuU9_A1egOAd/view) (last visited Oct. 30, 2020).

123. Colorado’s COVID Dial Framework provides five levels to guide county response to COVID-19 based on “the number of new cases, the percent positivity of COVID tests, and the impact on hospitals”:<sup>123</sup> Protect Our Neighbors, Safer at Home Level 1 (Cautious), Safer at Home Level 2 (Concern), Safer at Home Level 3 (High Risk), and Stay at Home. As of October 30, sixty of Colorado’s sixty-four counties are in one of the three Safer at Home levels, which indicates that the rate of COVID-19, and the threat faced by the plaintiff class, is increasing in the vast majority of the state.



124.

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125. According to a brief filed by Defendant Polis in another COVID-19 related case, Defendant Polis has known that physical distancing is the most effective means to prevent COVID-19 outbreaks from reoccurring until there is an approved vaccine or treatment, and failure to continue strong physical distancing will cause outbreaks to reoccur and spread exponentially.<sup>125</sup> In that document, Defendant Polis admits that, “Critically, a temporary decrease in the intensity of this first wave of COVID-19 does not mean that interventions are no longer necessary.”<sup>126</sup>

126. Defendant Polis also admits that “[t]he very real potential remains that if people resume close contact with one another, and if they do so too quickly, the virus will again begin to spread exponentially.”<sup>127</sup> In fact, Defendant Polis believes this point is so critical that he reiterated this exact statement multiple times in a single document.<sup>128</sup>

<sup>123</sup> COLO. DEP’T OF PUBLIC HEALTH AND ENV’T, *COVID-19 dial*, available at <https://covid19.colorado.gov/data/covid-19-dial> (last visited Oct. 30, 2020).

<sup>124</sup> *Id.*

<sup>125</sup> Executive Branch’s Joint Resp. to Mot. for TRO, *Tavern League of Colo. v. Polis*, No. 2020 CV 32484 (D. Colo. July 28, 2020) at 5.

<sup>126</sup> *Id.*

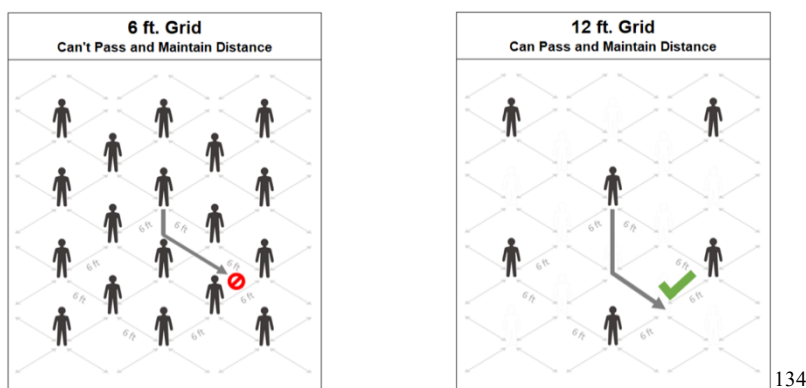
<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 12.

127. Defendant Polis knows and has explicitly recognized that “transmission of COVID-19 in closed, indoor environments is significantly more likely than in open-air environments” and that “respiratory droplets are more likely to linger on surfaces and/or be recirculated through an indoor space due to either poor ventilation or large numbers of people in such space.”<sup>129</sup>

128. It is well-established, and well-known by Defendant Polis, that incarcerated people are at higher risk of contracting COVID-19 because of the conditions within prisons: overcrowding, inability to engage in physical distancing, poor ventilation in indoor spaces, and limited access to cleaning supplies.<sup>130</sup>

129. The Colorado State Emergency Operations Center created a physical distancing calculator, which calculates how many patrons are allowed in restaurants under Defendant Polis’ current occupancy limits.<sup>131</sup> The physical distancing calculator “recognizes that if people in a space are six feet apart, they cannot move around without coming within a six-foot distance of other people. To compensate for this fact, the [physical] distancing calculator spaces people out on a twelve-foot grid.”<sup>132</sup> Under these restrictions, indoor restaurants may operate at 50% of their occupancy limit or 50 people, whichever is lower.<sup>133</sup>



130. Using Defendant Polis’ physical distancing calculator on the twelve-foot grid, each person requires 144 square feet of space to maintain a proper distance of six feet at all times.<sup>135</sup>

<sup>129</sup> *Id.* at 4.

<sup>130</sup> Dalia Singer, *In Colorado prisons and jails, a piecemeal approach to the threat of coronavirus*, THE COLO. SUN (Apr. 4, 2020), <https://coloradosun.com/2020/04/04/colorado-prisons-jails-coronavirus-covid-criminal-justice/>.

<sup>131</sup> Executive Branch’s Joint Resp. to Mot. For TRO, *Tavern League of Colo.*, at 7.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 8.

Only then can people always move around each other while still maintaining a safe six feet of distance.<sup>136</sup>

131. Colorado's prisons clearly violate these occupancy restrictions and guidelines. It is physically impossible for the members of the Plaintiff class to maintain a safe physical distance under Defendant Polis's twelve-foot grid system due to the high population density in the Colorado prisons.

132. For example, Sterling Correctional Facility houses many people in cells measuring 7 feet by 13.75 feet, which equates to 96.25 total square feet. Using Defendant Polis' physical distancing calculator, only one person can be housed in a cell this size in order to maintain a safe physical distance of six feet from others, even with zero percent of the floor space being occupied. As of this summer, most medically vulnerable prisoners were still being housed in cells of this size with cellmates.

Total square footage of the space

96.25 sqft

Estimate the percent of floor space occupied by items such as furniture, equipment, displays,

0 %

0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

Total number of people

**1 people**

Formula:

Square feet(1-(Percent of floor space/100))/144

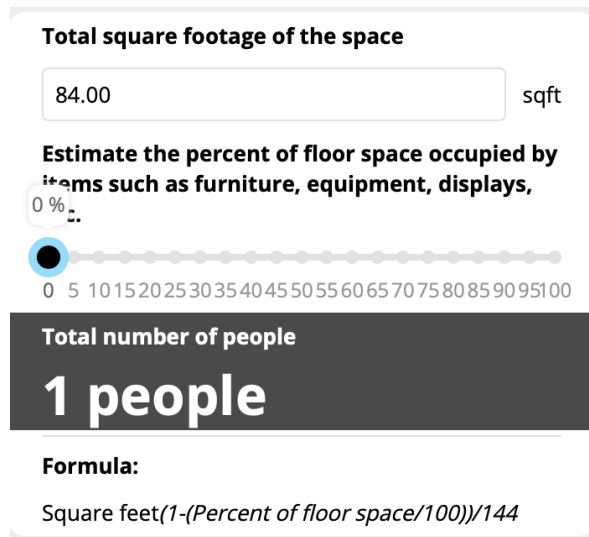
133.

137

134. Fremont Correctional Facility houses many people in cells estimated to be 7 feet by 12 feet, which equals 84 total square feet. Despite the current outbreak at Fremont, CDOC is still using cells of this size to house two people together. Using Defendant Polis' physical distancing calculator, it is impossible for two people in a cell this size to maintain any kind of safe physical distance from each other, as this space is not even large enough for one person to adequately fit on Defendant Polis' twelve-foot grid. As of October, medically vulnerable prisoners were still being housed in cells of this size with cellmates, despite their inability to physically distance from each other.

<sup>136</sup> *Id.* at 7.

<sup>137</sup> COLO. DEP'T OF PUBLIC HEALTH AND ENV'T, *Social distancing space calculator*, available at <https://covid19.colorado.gov/safer-at-home/social-distancing-calculator-for-indoor-and-outdoor-events> (last visited Nov. 12, 2020).



135.

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136. Defendant Polis has endorsed the CDC’s guidance on restaurant reopenings, which states that the risk of COVID-19 spread is highest for on-site dining with both indoor and outdoor seating, where “seating capacity [is] not reduced and tables not spaced at least 6 feet apart.”<sup>139</sup>

137. Members of the Plaintiff class are unable to physically distance themselves from others while eating and sleeping because occupancy capacity in the prisons has not been reduced.

138. Using the risk assessment tool published by the John Hopkins Bloomberg School of Public Health, prisons involve a high number of contacts with a high contact intensity and low modification potential.<sup>140</sup> This means that people in prisons have a large number of intense contacts with others, and there are very limited avenues to modify that behavior because the high population density prevents the implementation of effective physical distancing.

139. Defendant Polis concedes that gathering size limits “inherently help disrupt the chain of transmission,” which in turn “also help[s] make public health interventions more effective.”<sup>141</sup>

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 9.

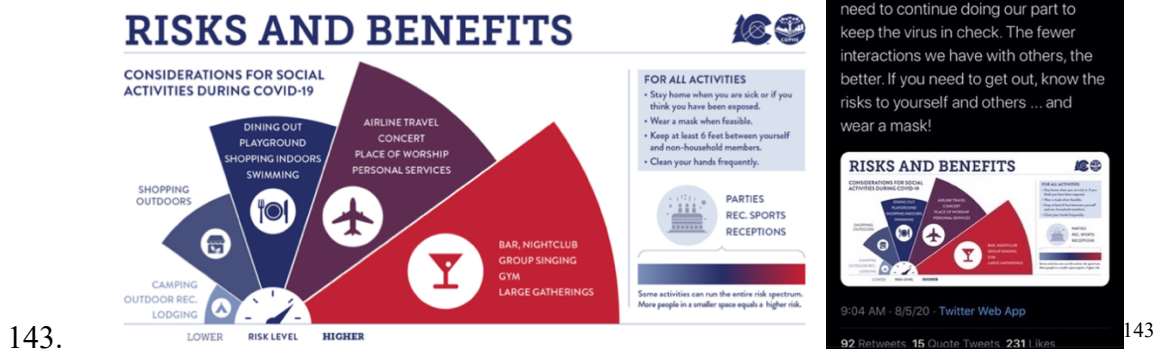
<sup>140</sup> *Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors*, JOHN HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (April 17, 2020), [https://www.centerforhealthsecurity.org/our-work/pubs\\_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf](https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200417-reopening-guidance-governors.pdf).

<sup>141</sup> Executive Branch’s Joint Resp. to Mot. for TRO, *Tavern League of Colo.*, at 11.

140. In *Tavern League of Colorado*, Defendant Polis relied on recent CDPHE modeling in stating that “new COVID-19 cases will continue to increase in Colorado through the summer and into early fall.”<sup>142</sup>

141. Unlike restaurants and leisure activities, which people can choose to engage in or avoid, in these facilities, people are confined to the custody of the state of Colorado and dependent on the state to protect their health and safety. Yet, despite knowing of rising case numbers and the effectiveness of gathering size limits, Defendant Polis has refused to implement any population limitations in prisons, and, in fact, purposely took away CDOC’s ability CDOC to limit its population.

142. Defendant Polis has made other public statements establishing his knowledge of the ongoing dangers of COVID-19. On August 5, 2020, Defendant Polis retweeted a post from the Colorado Department of Public Health and Environment, which stated, “The fewer interactions we have with others, the better.” The CDPHE’s tweet included a graphic of risks and benefits to consider for social activities during COVID-19. The CDPHE’s graphic also states, “More people in a smaller space equals a higher risk.”



144. On July 11, 2020, Defendant Polis retweeted a post from the City of Aspen, which included images of different wild animals, and stated, “If COVID-19 were a bear, you’d give it more than 6 feet.”<sup>144</sup>

<sup>142</sup> *Id.* at 12.

<sup>143</sup> Jared Polis (@GovofCO), TWITTER, (Aug. 5, 2020 9:04 AM), <https://twitter.com/CDPHE/status/1291027234803736579?s=20>.

<sup>144</sup> City of Aspen (@CityofAspen), Twitter (July 11, 2020, 8:01 AM), <https://twitter.com/cityofaspen/status/1281951667341135872>.



146. On June 29, 2020, Defendant Polis retweeted another post from the CDPHE, which listed the “BIG 3” ways to prevent the spread of COVID-19: wearing a face mask in public, washing hands frequently with soap and water, and staying six feet apart from others. While the Plaintiff class and the CDOC have agreed on provisions relating to the disbursement of masks and some cleaning products for incarcerated persons, the risk of transmitting COVID-19 within the prisons remains high due to prisoners’ inability to physically distance.<sup>146</sup>

<sup>145</sup> Jared Polis (@GovofCO), TWITTER, (July 11, 2020 8:01 AM), <https://twitter.com/cityofaspen/status/1281951667341135872?s=20>.

<sup>146</sup> Colorado Department of Public Health & Environment (@CDPHE), TWITTER (June 29, 2020, 10:06 AM), <https://twitter.com/CDPHE/status/1277634500860579840>.



147.



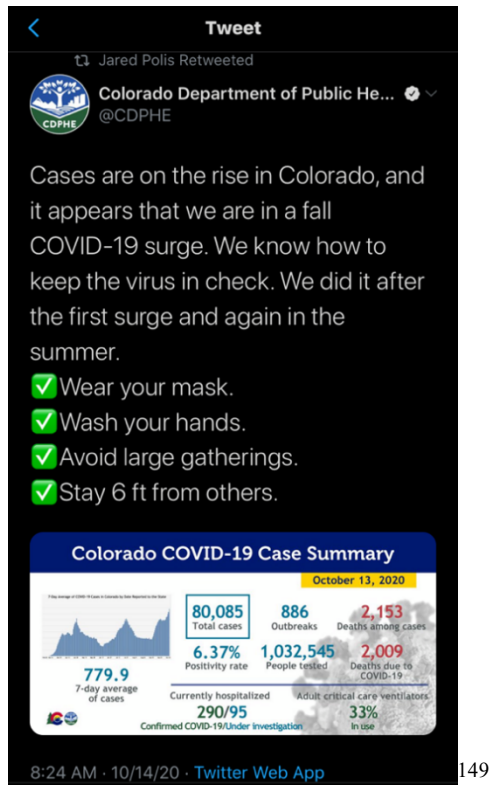
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148. On October 14, 2020, Defendant Polis retweeted CDPHE's post about the fall COVID-19 surge in Colorado. The tweet refers to the rising number of cases and lists four ways to keep the virus in check: wear your mask, wash your hands, avoid large gatherings, and stay six feet from others.<sup>148</sup>

<sup>147</sup> Jared Polis (@GovofCO), TWITTER, (June 29, 2020, 10:06 AM), <https://twitter.com/CDPHE/status/1277634500860579840?s=20>.

<sup>148</sup> Colorado Department of Public Health & Environment (@CDPHE), TWITTER (Oct. 14, 2020, 10:08 AM), <https://twitter.com/cdphe/status/1316461270514593793>.





149. On October 23, 2020, Defendant Polis posted on Facebook, candidly speaking about a friend in the hospital. He accurately described the cruelty of COVID-19 and the isolation experienced by those who test positive.

150. For those who are incarcerated, the isolation and medical treatment are markedly worse. In correctional facilities like Fremont, which are currently under lockdown because of widespread COVID-19 outbreaks, incarcerated people who test positive for the virus are placed in a communal unit with no access to phones, no heat, broken and overflowing toilets, and standing water. They must then attempt to recover from this cruel virus in these abhorrent conditions. The experience is equally isolating for those who test negative; they must remain in their cells for 24 hours a day, they are only allowed to leave once every three days to shower, and they also have no access to phones to talk to their loved ones. There are often critical staffing shortages caused by infections among staff that make even the basic needs of this many prisoners (many who are sick) difficult to meet.

151. 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 close to release or

<sup>149</sup> *Id.*

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.”<sup>150</sup>

152. Defendant Polis’s frequent public statements about the necessity of physical distancing and other protective measures on his official social media accounts, demonstrates actual knowledge these measures are critical to preventing the spread of COVID-19, and that without them, outbreaks will continue, and people will die.

153. Simply put, Defendant Polis knows the only way to mitigate the spread of this virus through Colorado’s prisons and into Colorado’s communities is by “reducing the potential population a person can infect.”<sup>151</sup>

**Governor Polis Must Take Immediate Action to Protect and Reduce the Prisoner Population to Fulfill His Duties Under the Colorado Constitution**

154. 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).

155. Under the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq.*, the General Assembly explicitly provided that “[t]he governor is responsible for meeting the dangers to the state and people presented by disasters,” including an “epidemic” like COVID-19. C.R.S. § 24-33.5-704(1), -703(3) (2020).

156. CDOC does not have legal authority to suspend the regulatory statutes relating to parole and release/transfer of prisoners; only Defendant Polis can suspend such statutes under the Colorado Disaster Emergency Act. Colo. Rev. Stat. § 24-33.5-704(7)(a).

157. Defendant Polis has the power to grant parole to eligible incarcerated persons if, “in the governor’s opinion, extraordinary mitigating circumstances exist and such inmate’s release from institutional custody is compatible with the safety and welfare of society.” C.R.S. § 17-22.5-403(4).

158. In spite of expert consensus that slowing the spread of COVID-19 in prisons benefits public health at large, Defendant Polis has refused to utilize any of his statutory or constitutional authority to reduce the prison population in Colorado.

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 4.

159. While CDOC has agreed in the proposed Consent Decree to significant operational commitments intended to mitigate the spread of COVID-19 among those in its custody, it presently lacks the independent authority necessary to significantly reduce Colorado's incarcerated population. That power remains exclusively in Defendant Polis's hands.

160. 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 those who are medically vulnerable. In California, Governor Newsom will release approximately 8,000 prisoners by the end of August in an effort to save lives amid devastating coronavirus outbreaks at several facilities.<sup>152</sup> 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.<sup>153</sup> As of June 5, 2020, the Michigan Department of Corrections decreased their prison population by 1,958 incarcerated people; about 5.2% of the state's prison population.<sup>154</sup> The Governor of Maryland signed an executive order expediting the release of prisoners within four months of parole eligibility and accelerating parole considerations for individuals over the age of 55 who were convicted of nonviolent crimes. It is anticipated almost 800 people will be released from Maryland's correctional facilities.<sup>155</sup> The Governor of Arkansas suspended a parole requirement that made 1,233 incarcerated people eligible for early release.<sup>156</sup> The Governor of Washington signed an executive order that authorized commutations for over 1,100 incarcerated

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<sup>152</sup> John Myers, Phil Willon, *California to release 8,000 prisoners in hopes of easing coronavirus crisis*, LOS ANGELES TIMES (July 10, 2020), <https://www.latimes.com/california/story/2020-07-10/california-release-8000-prisoners-coronavirus-crisis-newsom>.

<sup>153</sup> *Governor Whitmer Signs Executive Order Protecting Jail, Juvenile Detention Center Populations*, OFF. OF GOV. GRETCHEN WHITMER (Mar. 29, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90640-523423--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-523423--,00.html).

<sup>154</sup> Michael Krafcik, *Michigan prison population sees record drop during COVID-19 pandemic*, WWMT (June 11, 2020), <https://wwmt.com/news/i-team/michigan-prison-population-sees-record-drop-during-covid-19-pandemic>.

<sup>155</sup> 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>.

<sup>156</sup> 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>.

individuals.<sup>157</sup> The Governor of Kentucky commuted sentences for 186 people in April,<sup>158</sup> and in August commuted sentences for 646 additional people who are considered medically vulnerable to COVID-19 because of age and/or medical conditions.<sup>159</sup> The Governor of New Jersey authorized the Department of Corrections to grant temporary emergency home medical confinement to high-risk prisoners, which has allowed 360 at-risk people to be released from prison.<sup>160</sup> Thousands more New Jersey prisoners will be released in the coming weeks and months under a bill the Governor signed into law last month—resulting in a roughly 35 percent reduction in New Jersey’s prison population since the pandemic began.<sup>161</sup>

161. Defendant Polis has significant powers to reduce the prison population, yet he refuses to use them. Article 4, Section 7 of the Colorado Constitution 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 prisoners. 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 commutation 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.<sup>162</sup> Defendant 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’s response to the pandemic.

162. Defendant Polis also has significant powers under Colo. Rev. Stat. § 24-33.5-704 to issue executive orders, proclamations, and regulations and amend or rescind them. He can suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with any would

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<sup>157</sup> Jim Brunner and Mary Hudetz, *Washington Department of Corrections names 1,100+ inmates to be released in coming days due to coronavirus concerns*, THE SEATTLE TIMES (April 16, 2020), <https://www.seattletimes.com/seattle-news/crime/washington-department-of-corrections-lists-names-of-hundreds-of-inmates-to-be-released-in-coming-days-due-to-coronavirus-concerns/>.

<sup>158</sup> *Conditional Commutation of Sentence*, OFF. OF GOV. ANDY BESHEAR (April 2, 2020), [https://governor.ky.gov/attachments/20200402\\_Executive-Order\\_2020-267\\_Conditional-Commutation-of-Sentence.pdf](https://governor.ky.gov/attachments/20200402_Executive-Order_2020-267_Conditional-Commutation-of-Sentence.pdf).

<sup>159</sup> *Conditional Commutation of Sentence*, OFF. OF GOV. ANDY BESHEAR (Aug. 25, 2020), [https://governor.ky.gov/attachments/20200825\\_Executive-Order\\_2020-699\\_Commutations.pdf](https://governor.ky.gov/attachments/20200825_Executive-Order_2020-699_Commutations.pdf).

<sup>160</sup> *COVID 19 Updates*, N.J. DEP’T OF CORRECTIONS (last updated Sept. 20, 2020), [https://www.state.nj.us/corrections/pages/COVID19Updates.shtml?\\_ga=2.101651713.1638616840.1599598262-1798878847.1599598262\\_](https://www.state.nj.us/corrections/pages/COVID19Updates.shtml?_ga=2.101651713.1638616840.1599598262-1798878847.1599598262_).

<sup>161</sup> Tracey Tully, 2,258 N.J. Prisoners Will Be Released in a Single Day, NEW YORK TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html>.

<sup>162</sup> See May 28, 2020 Letter to Gov. Polis, *available at* <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>.

in any way prevent or delay necessary action in coping with the emergency. He can utilize all available resources of the state government as reasonably necessary to cope with the disaster emergency. Finally, he can direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state, such as a prison, if he deems this action necessary for the preservation of life or other disaster mitigation. Defendant Polis has, again, decided not to utilize this substantial power to reduce the prison population or act in any meaningful way to protect Colorado's medically vulnerable prisoners.

163. Additionally, Defendant Polis has authority under C.R.S. § 17-22.5-403(4) to grant parole to certain incarcerated people if, "in the governor's opinion, extraordinary mitigating circumstances exist and such [prisoner]'s release from institutional custody is compatible with the safety and welfare of society." C.R.S. § 17-22.5-403(4). Defendant Polis has also refused to utilize this power to reduce the prison population or act in any meaningful way to protect Colorado's medically vulnerable incarcerated citizens, despite his knowledge that substantial reduction of the prison population is beneficial to public health and welfare at large because it reduces the strain on health providers and hospitals throughout the state.

164. Governor Polis has continuously violated 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.

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

## **V. FACTS RELATED TO CLASS CERTIFICATION**

166. 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 ("Medically Vulnerable Prisoners") pursuant to Rule 23(b)(2) of the Colorado Rules of Civil Procedure.

167. As explained more fully in Plaintiffs' 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 sixty (60) years or older; or
- b. have one or more of the underlying medical conditions recognized by the CDC or WHO as causing a person to be at moderate to high risk of death or serious illness from COVID-19, which as of the date of this order include the following:
  - i. Obesity - BMI 30 kg/m<sup>2</sup> or higher; cancer; chronic kidney disease; Immunocompromised state due to solid organ transplant; chronic lung disease; chronic obstructive pulmonary disease (COPD); emphysema; chronic bronchitis; Diabetes - Type I or II; Cardiovascular disease -

- including Heart Failure, Coronary Artery Disease, Cardiomyopathies, Pulmonary Hypertension; Sickle Cell Disease; or
- ii. Asthma (moderate to severe); Cerebrovascular Disease; Cystic fibrosis; Hypertension; Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids or other immune weakening medicines; Neurologic conditions such as dementia; Liver disease; Thalassemia; Idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function; or

c. are pregnant.

168. 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.

169. The class is so numerous that joinder of all members is impracticable. Before the Proposed Consent Decree expanding the Settlement Class, CDOC had already identified thousands of prisoners that it considers to be at high risk from COVID-19.

170. 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.

171. 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.

172. 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.

173. 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. CLAIM FOR RELIEF**  
Colo. Const. Art. II, Sec. 20  
*Prohibition of Cruel and Unusual Punishment*

174. Plaintiffs hereby incorporate all other paragraphs of this Complaint as if fully set forth in this claim.<sup>163</sup>

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

176. 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.

177. 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.

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

179. Governor Polis knows 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.

180. Governor Polis has 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. Governor Polis’ decisions have the force of law.

181. 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.

**VII. 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:

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<sup>163</sup> This claim is brought against both Defendants. However, if and when the Consent Decree is entered by this Court following a fairness hearing, Plaintiffs will dismiss Director Williams.

1. Certify this action as a Class Action;
2. Enter Consent Decree as to all claims against Defendant Williams;
3. Issue a preliminary and/or permanent injunction requiring Defendant Polis to:
  - a. Reduce the prison population across CDOC facilities; or
  - b. Take other measures to cure the Constitutional violations;
4. Issue a declaration that Defendant Polis' inaction violates the Colorado Constitution Article II, Section 20; in the alternative to the preliminary injunction or the declaration;
5. Issue a writ of mandamus ordering Defendant Polis to exercise his powers under Colo. Rev. Stat. § 24-33.5-704 to correct the unconstitutional conditions and fulfill his emergency response duties; and
6. Any further relief this Court deems appropriate.

Respectfully submitted this 13th day of November, 2020.

/s/ Anna Holland Edwards

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In cooperation with the ACLU  
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