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*\*Pro Hac Vice Application Pending*

TOBBY ANDERSON; BRYN ARNOLD;  
ANITA CARRILLO; AMANDA ELLER;  
SEAN GODKIN; PAMELA  
HOFFSCHNEIDER; HEIDI MACHACEK;  
COLIN O'KEEFE; CRYSTAL PENA;  
EDUARDO TRISTE; NEW MEXICO  
CRIMINAL DEFENSE LAWYERS  
ASSOCIATION; and AMERICAN CIVIL  
LIBERTIES UNION OF NEW MEXICO,

Plaintiffs,

vs.

STATE OF NEW MEXICO; MICHELLE  
LUJAN GRISHAM, Governor, State of New  
Mexico; ALISHA TAFOYA LUCERO,  
Secretary, New Mexico Corrections Department;  
and MELANIE MARTINEZ, Director, New  
Mexico Probation and Parole,

Defendants.

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: STATE OF NEW MEXICO  
: COUNTY OF SANTA FE  
: FIRST JUDICIAL DISTRICT COURT  
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:  
:  
: CASE NO.:D-101-CV-2020-01853  
: Case assigned to Wilson, Matthew Justin  
:  
:  
: **COMPLAINT**

## COMPLAINT

For their Complaint, Plaintiffs Toby Anderson, Bryn Arnold, Anita Carrillo, Amanda Eller, Sean Godkin, Pamela Hoffschneider, Heidi Machacek, Colin O’Keefe, Crystal Pena, Eduardo Triste, New Mexico Criminal Defense Lawyers Association, and American Civil Liberties Union of New Mexico and, by and through their attorneys of record, Ryan J. Villa, Esq., John P. Mandler, Esq. and Christopher J. Casolaro, Esq., state:

### NATURE OF THE ACTION

Amidst the COVID-19 pandemic, New Mexico has failed—and continues to fail—to protect the lives and constitutional rights of people who are incarcerated (hereinafter “Plaintiffs”) housed in the state’s prison system. New Mexico has refused to afford Plaintiffs even the most basic protections that state and federal authorities have acknowledged are *required* to protect people against the deadly threat of coronavirus disease 2019 (COVID-19). As a consequence of the state’s ongoing constitutional violations against Plaintiffs, they are being infected by COVID-19 in dramatic size and speed. Some inmates have already lost their lives and many more are at risk of losing theirs.

It was, and is, a preventable tragedy. But because New Mexico’s government refuses to enforce *its own mandate* for social distancing, heightened hygiene practices, and safe quarantine and treatment—among other mandates—prison conditions have become so intolerable as to constitute cruel and unusual punishment in violation of New Mexico’s Constitution. Plaintiffs therefore request immediate injunctive and declaratory relief to sufficiently protect their constitutional rights.

## **I. JURISDICTION AND VENUE**

1. Personal jurisdiction is proper because Plaintiffs and Defendants are all New Mexico residents.

2. Venue is proper pursuant to because Defendants are state officials. *See* NMSA 1978, § 38-3-1(G) (1978).

## **II. PARTIES**

3. Plaintiff Toby Anderson is a 40-year-old medically vulnerable person who is incarcerated at Southern New Mexico Correctional Facility (“SNMCF”). Mr. Anderson is medically vulnerable to COVID-19 because he has Hepatitis C, has a weakened liver, and is obese with a BMI greater than thirty (30). Mr. Anderson is incarcerated for nonviolent offenses. Mr. Anderson is a member of the Medically Vulnerable Subclass and the Nonviolent Offender Subclass.

4. Plaintiff Bryn Arnold is a 35-year-old medically vulnerable person who is incarcerated at Western New Mexico Correctional Facility (“WNMCF”). Ms. Arnold is medically vulnerable to COVID-19 because she only has one kidney. Additionally, Ms. Arnold is incarcerated because of an alleged probation violation, for which she has not been found guilty. Finally, Ms. Arnold is incarcerated for nonviolent offenses. Ms. Arnold is a member of the Medically Vulnerable Subclass, the Parole or Probation Revocation Subclass, and the Nonviolent Offender Subclass.

5. Plaintiff Anita Carrillo is a 35-year-old person who is incarcerated at WNMCF. Ms. Carrillo suffered from symptoms of COVID-19. Ms. Carrillo has been symptomatic of COVID-19. But, when Ms. Carrillo asked the prison for a test, she was told the prison had too much going on and could not take her to the medical unit for a test. Ms. Carrillo is incarcerated for nonviolent offenses. Ms. Carrillo is a member of the Nonviolent Offender Subclass.

6. Plaintiff Amanda Eller is a 37-year-old person who is incarcerated at WNMCF. Ms. Eller is incarcerated for nonviolent offenses. Ms. Eller is a member of the Nonviolent Offender Subclass.

7. Plaintiff Sean Godkin is a 50-year-old person who is incarcerated at Northeast New Mexico Detention Facility (“NENMDF”). This facility is also called Northeast New Mexico Correction Facility (“NENMCF”). Mr. Godkin is medically vulnerable to COVID-19 because he has asthma, epilepsy, Type 2 diabetes, and Hepatitis C. He is incarcerated for nonviolent offenses. Mr. Godkin is a member of the Medically Vulnerable Subclass and the Nonviolent Offender Subclass.

8. Plaintiff Pamela Hoffschneider is a 50-year-old person who is incarcerated at Springer Correctional Center. Ms. Hoffschneider is medically vulnerable to COVID-19 because she is obese. She is incarcerated on a probation violation and is incarcerated for nonviolent offenses. Ms. Hoffschneider is a member of the Medically Vulnerable Subclass, the Parole or Probation Revocation Subclass, and the Nonviolent Offender Subclass.

9. Plaintiff Heidi Machacek is a 49-year-old person who is incarcerated at WNMCF. Ms. Machacek is incarcerated because of a parole violation. Ms. Machacek is incarcerated for nonviolent offenses. Ms. Machacek is a member of the Parole or Probation Revocation Subclass and the Nonviolent Offender Subclass.

10. Plaintiff Colin O’Keefe is a 37-year-old person who is incarcerated at SNMCF. Mr. O’Keefe is medically vulnerable to COVID-19 because he has Type 1 diabetes and Hepatitis C. Mr. O’Keefe is a member of the Medically Vulnerable Subclass.

11. Plaintiff Crystal Pena is a 37-year-old person who is incarcerated at WNMCF. Ms. Pena has asthma and is medically vulnerable to COVID-19. Ms. Pena is a member of the Medically Vulnerable Subclass.

12. Plaintiff Eduardo Triste is an 80-year-old person who is incarcerated at SNMCF. Mr. Triste is a Type I diabetic who is insulin dependent and has high blood pressure. Mr. Triste is medically vulnerable because of both his age and his status as a diabetic. Mr. Triste is incarcerated for nonviolent offenses. Mr. Triste is a member of the Medically Vulnerable Subclass and the Nonviolent Offender Subclass.

13. Plaintiff New Mexico Criminal Defense Lawyers Association (“NMCDLA”) is a nonprofit organization that provides support, education, and training for attorneys who represent persons accused of crimes. The NMCDLA has an office in Santa Fe, New Mexico.

14. Plaintiff American Civil Liberties Union of New Mexico (“ACLU-NM”) is a regional affiliate of the American Civil Liberties Union, which is a national, non-profit, and non-partisan organization dedicated to protecting the civil liberties of all people and safeguarding the basic constitutional rights to privacy, free expression, and due process. The ACLU-NM is established under the laws of New Mexico and has its headquarters in Albuquerque, New Mexico.

15. Defendant State of New Mexico is the government entity responsible for the incarceration and release of people who are incarcerated.

16. Defendant Michelle Lujan Grisham is the Governor of New Mexico. She is sued in her official capacity.

17. Defendant Alisha Tafoya Lucero is the Secretary of the New Mexico Corrections Department. She is sued in her official capacity.

18. Defendant Melanie Martinez is the Director of New Mexico Probation and Parole. She is sued in her official capacity.

### III. FACTUAL ALLEGATIONS

#### A. COVID-19 Generally

##### COVID-19 History and Mechanism of Spread of COVID-19

19. In 2019, an international crisis arose in connection with the rapid transmission and infection of COVID-19. The World Health Organization (“WHO”) proclaimed the COVID-19 outbreak a global pandemic on March 11, 2020.<sup>1</sup>

20. COVID-19 spreads between people through both direct contact and indirect contact with contaminated surfaces and objects. The coronavirus also spreads through close contact with infected individuals via “saliva, respiratory secretions or secretion droplets,” which may be released when an infected person “coughs, sneezes, speaks, sings” near an uninfected person.<sup>2</sup>

21. To avoid infection, one must quarantine or self-isolate from those that are infected. The World Health Organization has advised implementation of social distancing, cleaning hands frequently, covering the mouth with a tissue or bent elbow when sneezing or coughing, and wearing a fabric mask to protect against transmission of the virus.<sup>3</sup>

22. Infected individuals may also leave droplets of the virus on objects and surfaces when they sneeze, cough on, or touch surfaces, such as bedframes, toilets, doorknobs, flooring surfaces, sinks, handrails, etc.<sup>4</sup> Once individuals touch a contaminated surface, and then their eyes,

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<sup>1</sup> See World Health Organization, Director-General Opening Remarks (Mar. 11, 2020), *available at* <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>2</sup> See Q&A: How is COVID-19 transmitted? (July 9, 2020), *available at* [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-how-is-covid-19-transmitted?gclid=EAJaiQobChMIrarW9sTs6gIVjobACh1-vQBmEAAYASAAEgIsiPD\\_BwE](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-how-is-covid-19-transmitted?gclid=EAJaiQobChMIrarW9sTs6gIVjobACh1-vQBmEAAYASAAEgIsiPD_BwE).

<sup>3</sup> *Id.*

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

nose, or mouth before properly cleaning their hands, they may become infected with COVID-19.<sup>5</sup> Within 2-14 days of exposure to the virus, people infected with COVID-19 may experience the following symptoms: fever or chills, persistent coughing, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headaches, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and/or diarrhea.<sup>6</sup>

#### Fast Moving Nature of the Virus

23. The fast moving infection rate of a virus is determined by its reproductive number, or “R0,” which is calculated by (a) counting the number of people an infected person comes into contact with, (b) the number of contacts is then multiplied by the percent chance that one of those contacts has been infected, and (c) then multiplying the “length of time individuals are able to contract the disease from the infected person.”<sup>7</sup>

24. The R0 of COVID-19 is projected to be between two (2) and three and five tenths (3.5); as such, if one individual contracts the virus, the next stage or round of infections could be two to three times as large as the previous one.<sup>8</sup> By way of example, in the United States (U.S.), the first case of COVID-19 was diagnosed on January 20, 2020.<sup>9</sup> On March 27, 2020, the total number of COVID-19 cases exceeded 100,000 and the death toll reached 1,706.<sup>10</sup> About a month later, on April 28, 2020, the number of infections within the U.S. exceeded 1 million and the

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<sup>5</sup> *Id.*

<sup>6</sup> Symptoms of Coronavirus (May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

<sup>7</sup> See [How coronavirus spreads so quickly and how you can slow it down](https://www.usatoday.com/pages/interactives/news/coronavirus-covid-spread-quickly-how-to-slow-it-down/), <https://www.usatoday.com/pages/interactives/news/coronavirus-covid-spread-quickly-how-to-slow-it-down/>.

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

<sup>9</sup> See [First Case of 2019 Novel Coronavirus in the United States](https://www.nejm.org/doi/full/10.1056/NEJMoa2001191) (March 5, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191>.

<sup>10</sup> [Coronavirus Realtime Updates](https://coronavirus.smartnews.com/us/?enableShareFromApp=true), <https://coronavirus.smartnews.com/us/?enableShareFromApp=true>.

number of deaths totaled 58,355.<sup>11</sup> Approximately seven months since the first diagnosis in the U.S., the number of COVID-19 cases has reached nearly 5.7 million with a death toll of 175,308.<sup>12</sup>

25. Transmission of COVID-19 can occur from people who exhibit symptoms, before people exhibit symptoms, and when someone never develops symptoms, especially when they are within six (6) feet of another person.<sup>13 14</sup>

#### Lifelong major physical and medical consequences

26. Although death of a patient due to COVID-19 is of the utmost concern, physicians have documented the long-term medical consequences of contracting the virus. Common long-term complications involve damage to the lungs, heart and kidneys, brain and nervous system, and blood clotting.<sup>15</sup>

27. “Physicians report that patients hospitalized for COVID-19 are experiencing high rates of blood clots that can cause strokes, heart attacks, lung blockages,” and other similar complications.<sup>16</sup> For example, there has been an increase in the number of strokes among young patients, and because blood clots can travel to other organs, physicians are finding that individuals can suffer from “functional limitations, such as fatigue, shortness of breath, heart palpitations, and discomfort when performing physical activity.”<sup>17</sup>

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<sup>11</sup> *Id.*

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

<sup>13</sup> See Q&A: How is COVID-19 transmitted? (July 9, 2020), available at [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-how-is-covid-19-transmitted?gclid=EAIaIQobChMIrarW9sTs6gIVjobACh1-vQBmEAAYASAAEgIsiPD\\_BwE](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-how-is-covid-19-transmitted?gclid=EAIaIQobChMIrarW9sTs6gIVjobACh1-vQBmEAAYASAAEgIsiPD_BwE).

<sup>14</sup> Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (July 22, 2020).

<sup>15</sup> COVID-19: What Are the Long-Term Risks to Your Health? (May 4, 2020), available at <https://www.adventhealth.com/blog/covid-19-what-are-long-term-risks-your-health>.

<sup>16</sup> See What we know (so far) about the long-term health effects of Covid-19 (June 2, 2020), available at <https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects>.

<sup>17</sup> *Id.*



28. In COVID-19 patients, “physicians have also reported an increase in inflammation of and damage to the heart muscle,” some of which can cause scarring, heart failure, and increase a patient’s risk for heart attacks and strokes.<sup>18</sup> In fact, some physicians warn that COVID-19 “could worsen existing heart problems.”<sup>19</sup>

29. In addition to long-term heart problems, “research shows some patients experience lung symptoms such as pain,” a dry cough, scarring to the lungs, reduced lung capacity, weeks after recovery and which do not always heal.<sup>20</sup> In fact, some physicians believe that “underlying diseases like asthma and hypertension may put patients at greater risk of these long-term effects” on the lungs.<sup>21</sup>

30. It is also clear that COVID-19 can have long-term effects on the central nervous system, such as continued “headaches, dizziness, loss of taste and smell, and impaired consciousness.”<sup>22</sup> Other neurological complications include “muscular weakness, numbness, burning or prickling, confusion, and remaining in a comatose state.”<sup>23</sup>

31. COVID-19 infection may result in lifelong complications to those who have recovered from the virus.

#### Heightened Risk Categories

32. The Centers for Disease Control and Prevention has identified individuals with increased risk of becoming infected with COVID-19 and individuals who require extra precautions to prevent infection.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See People at Risk (July 21, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

33. Adults over 50, and especially over age 65, are at higher risk for severe illness from COVID-19, which means the infected person may require hospitalization, intensive care, a ventilator to help them breathe, lifelong treatment and care for a debilitating ailment, or even die.<sup>25</sup>

34. Additionally, people of “any age with certain underlying medical conditions are at increased risk for severe illness” as a result of contracting COVID-19.<sup>26</sup>

35. Such underlying medical conditions include, but are not limited to: cancer, chronic kidney disease, chronic obstructive pulmonary disease, immunocompromised state (weakened immune system), obesity, serious heart conditions, sickle cell disease, type-2 diabetes mellitus, asthma, cerebrovascular disease, cystic fibrosis, hypertension or high blood pressure, neurologic conditions, liver disease, pregnancy, pulmonary fibrosis, smoking, thalassemia, or type-1 diabetes mellitus.<sup>27</sup>

36. In fact, certain individuals require extra precautions to prevent contracting COVID-19, due to long-standing systemic health and social inequities. Such individuals include racial and ethnic minority groups, people living in rural communities, people experiencing homelessness, people who are pregnant and/or breastfeeding, people with disabilities, and people with developmental and behavioral disorders.<sup>28</sup>

#### Prolific Spread of COVID-19 in the Prison Systems

37. The prolific spread of COVID-19 increases the risk of infection and death to vulnerable populations, including people who are incarcerated. This heightened risk can be

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<sup>25</sup> See Older Adults (June 25, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>26</sup> See People with Certain Medical Conditions (July 17, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>.

<sup>27</sup> *Id.*

<sup>28</sup> See Other People Who Need Extra Precautions (July 21, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/other-at-risk-populations.html>.

exacerbated when deprived of the opportunity for social distancing. Further, lack of basic sanitary supplies and high rates of chronic disease only heighten the risks even more.<sup>29</sup>

38. In fact, people who are incarcerated who are “diagnosed with COVID-19 are dying four times as often as prison staff who test positive.”<sup>30</sup> The difference in death rates between people who are incarcerated and prison staff may be attributed to age, severe medical illness, access to testing and timely treatment, and “prisoners may only get tested when they are at later stages of COVID-19” and much sicker.<sup>31</sup>

39. According to a New York Times correctional institutions database, the number of “known deaths in prisons, jails, immigration detention centers and other correctional facilities among prisoners and correctional officers has surpassed 1,000.”<sup>32</sup> In fact, the death rate has increased by about 40% over the past six weeks.<sup>33</sup>

40. And “[t]here have been nearly 160,000 infections among prisoners and guards.”<sup>34</sup>

41. A recent study found that “prisoners are infected at a rate more than five times the nation’s overall rate,” and the “death rate of inmates is also higher than the national rate—39 deaths per 100,000, compared to 29 deaths per 100,000.”<sup>35</sup> In fact, some believe “the actual number of deaths” is higher “because jails and prisons perform limited testing on inmates, including many

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<sup>29</sup> See [How COVID-19 in Jails and Prisons Threatens Nearby Communities](https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities) (July 1, 2020), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>.

<sup>30</sup> See [Tracking the Spread of Coronavirus in Prisons](https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons) (April 24, 2020), available at <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>.

<sup>31</sup> *Id.*

<sup>32</sup> [Deaths in American correctional facilities surpass 1,000, as cases rise to 160,000](https://www.nytimes.com/2020/08/18/world/coronavirus-covid.html?action=click&campaign_id=154&emc=edit_cb_20200818&instance_id=21398&module=Top+Stories&nl=coronavirus-briefing&pgtype=Homepage&regi_id=85701369&segment_id=36448&te=1&user_id=6e5beada82cd4a4fe4631e492eb9cb0c#link-46c4cd14) (August 18, 2020), available at [https://www.nytimes.com/2020/08/18/world/coronavirus-covid.html?action=click&campaign\\_id=154&emc=edit\\_cb\\_20200818&instance\\_id=21398&module=Top+Stories&nl=coronavirus-briefing&pgtype=Homepage&regi\\_id=85701369&segment\\_id=36448&te=1&user\\_id=6e5beada82cd4a4fe4631e492eb9cb0c#link-46c4cd14](https://www.nytimes.com/2020/08/18/world/coronavirus-covid.html?action=click&campaign_id=154&emc=edit_cb_20200818&instance_id=21398&module=Top+Stories&nl=coronavirus-briefing&pgtype=Homepage&regi_id=85701369&segment_id=36448&te=1&user_id=6e5beada82cd4a4fe4631e492eb9cb0c#link-46c4cd14).

<sup>33</sup> *Id.*

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

<sup>35</sup> *Id.*

facilities that decline to test people who are incarcerated who die after exhibiting symptoms consistent with the coronavirus.”<sup>36</sup>

42. Due to the increased spread of COVID-19 in prison, some states have begun to reduce the number of incarcerated individuals. For example, the California Department of Corrections and Rehabilitation (CDCR) has paroled approximately 3,500 nonviolent offenders with less than 180 days left on their sentence.<sup>37</sup> The CDCR recently announced that another 8,000 people who are incarcerated could be released by the end of August, including “people who were scheduled to be released soon and the medically vulnerable.”<sup>38</sup>

#### Federal Policy

43. To combat the spread of COVID-19, the Centers for Disease Control and Prevention (CDC) has issued certain guidance procedures for the management of COVID-19 in correctional and detention facilities.<sup>39</sup>

44. The procedures include posting signs throughout each facility, and thorough communication about protective measures of COVID-19, such as hand hygiene, face coverings, and emphasizing the importance of reporting symptoms to staff. Facilities should ensure that these measures are delivered in various methods due to any language or cognitive barriers.<sup>40</sup>

45. In order to reduce the risk of transmission, facilities should limit transfers of people who are incarcerated to and from other jurisdictions and facilities, which would include work release and other similar programs; minimize movement near housing units and other public areas

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

<sup>37</sup> Responses to the COVID-19 pandemic (July 28, 2020), available at <https://www.prisonpolicy.org/virus/virusresponse.html>.

<sup>38</sup> *Id.*

<sup>39</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (July 22, 2020).

<sup>40</sup> *Id.*

of the facilities; clean and disinfect surfaces and objects that are frequently touched, especially in common areas, several times a day; and clean any shared equipment between staff (radios, service weapons, keys handcuffs) or people who are incarcerated (meal trays, fitness equipment, books, entertainment products) several times per day.<sup>41</sup>

46. Proper hygiene and treatment are critical. As such, facilities should continually restock hygiene supplies throughout the facility, and in addition to implementing social distancing strategies, provide people who are incarcerated and staff access to soap, running water and hand-drying machines or disposable paper towels, alcohol-based hand sanitizer with at least 60% alcohol tissues (based on security restrictions), temperature screening, and cloth face coverings at no costs.<sup>42</sup>

47. When an individual develops COVID-19 symptoms, the CDC recommends that they should be given a cloth face covering, immediately placed under medical isolation, and medically evaluated. And those who have been in close contact with someone infected with or suspected to have COVID-19 should be placed under quarantine for 14 days, provided personal protective equipment, and tested for the virus (whether or not they have symptoms).<sup>43</sup>

#### Treatment Cost & Burden

48. COVID-19 continues to spread across the U.S., and many individuals have suggested the potential burden to the health care system will be significant because of those requiring treatment. Over the last few decades, medical costs were already of concern within the

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

U.S., “particularly for people without insurance, those with high deductibles, and those in worse health.”<sup>44</sup>

49. In regard to COVID-19, medical costs are of even more concern due to high out-of-pocket costs and a recession.<sup>45</sup> Although most research is tailored toward the general population, prison facilities are also experiencing a strain on internal health care systems and inflating costs due to the virus.

50. The increase in costs depends on “how many people are infected and how many become seriously ill.” With the exponential infection rates at prison facilities, these numbers are bound to be higher than the general population.<sup>46</sup>

51. The average cost for those with private insurance who become seriously ill could amount to \$1,300, while the cost of hospital admission for “pneumonia with major complications and comorbidities” ranges from \$11,533 to \$24,178.<sup>47</sup> Due to medical staff shortages, prison facilities are finding that people who are incarcerated will need to be transferred offsite for treatment, adding additional costs to medical treatment fund allocations.

52. For those individuals who require “ventilator support, the combination of longer stays and higher intensity treatments results in higher average spending.”<sup>48</sup> For example, the median total costs of admission for a respiratory condition requiring 96 hours or more of ventilation is \$88,114, compared to \$34,225 for admission requiring less than 96 hours of ventilation.<sup>49</sup>

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<sup>44</sup> Potential costs of COVID-19 treatment for people with employer coverage (March 13, 2020), available at <https://www.healthsystemtracker.org/brief/potential-costs-of-coronavirus-treatment-for-people-with-employer-coverage/>.

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

53. Because a number of states are required to provide health care services to people who are incarcerated, such increased costs are impacting and will continue to impact medical budgets at prison facilities.

#### Other Facilities are Changing to Address COVID-19

54. Prevention of COVID-19 may also impact the structure and layout of real property, including prison facilities. Scientists have established that COVID-19 is highly contagious and can be transmitted via air.<sup>50</sup> Recently, the WHO has updated its guidelines to confirm that “airborne transmission of the coronavirus may be possible indoors, especially for people who spend extended periods in crowded, poorly ventilated rooms.”<sup>51</sup>

55. Many public-health officials have amended building codes to limit the risk of future transmission of COVID-19, which includes modifications to heating, ventilation, and air-conditioning (HVAC) systems by purifying air, improving ventilation, and managing airflow systems; increasing occupied square footage per person; and improvement to enclosed spaces.<sup>52</sup>

56. Commercial offices are changing their space to address recommendations from the CDC, such as social distanced workspaces, technology, routine cleaning, new personal protective equipment, installation of partitions and shields, and temperature check stations.<sup>53</sup> As such, prison facilities will need to incur additional costs in order to comply with the CDC’s recommendations in regards to revamping space or close quarters.

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<sup>50</sup> Can HVAC systems help prevent transmission of COVID-19? (July 9, 2020), available at <https://www.mckinsey.com/industries/advanced-electronics/our-insights/can-hvac-systems-help-prevent-transmission-of-covid-19#>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> COVID-19 Employer Information for Office Buildings (July 9, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

**B. COVID-19 in New Mexico’s Correctional Facilities**

New Mexico’s Prison System – By the Numbers

57. Over 6,500 individuals are currently estimated to be imprisoned in New Mexico Prisons.<sup>54</sup>

58. At various times throughout 2020, there have been over 7,000 individuals incarcerated in New Mexico prisons, including as many as 742 females and 6,331 males.<sup>55</sup>

59. On June 24, 2020, the New Mexico Corrections Department (“NMCD”) and the New Mexico Department of Health (“NMDOH”) estimated that these individuals were spread amongst seven publicly operated state facilities and four privately operated state contracted facilities<sup>56</sup> as follows:

Publicly Owned		Privately Operated	
Central NM Correctional Facility – Los Lunas	761	Guadalupe County Correctional Facility – Santa Rosa	550
Northeast NM Correctional Facility – Clayton	427	Lea County Correctional Facility – Hobbs	1212
Penitentiary of NM – Santa Fe	711	Northwest NM Correctional Facility - Grants	482
Roswell Correctional Center – Hagerman	263	Otero County Prison Facility – Chaparral	539
Southern NM Correctional Facility – Las Cruces	633		
Springer Correctional Center – Springer	269		

<sup>54</sup> <https://www.sentencingproject.org/the-facts/#map>; <https://www.youtube.com/watch?v=PqmUaz-4vI>

<sup>55</sup> <https://nmsc.unm.edu/reports/2020/new-mexico-prison-population-forecast-fy2021---fy2030.pdf>

<sup>56</sup> Alisha Tafoya Lucero, NMCD Cabinet Secretary, Kathy Kunkel, NMDOH Cabinet Secretary, and Dr. Chad Smelser, COVID-19 Epidemiologist, NMCD NMDOH Virtual Press Conference, 2:11-3:11 (Jun. 24, 2020), available at <https://www.youtube.com/watch?v=PqmUaz-4vI>.



Western Correctional Facility – Grants	NM	356		
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60. In 2019, approximately 33% of the male population in New Mexico prisons were incarcerated for nonviolent offenses.<sup>57</sup>

61. In 2019, approximately 63% of the female population in New Mexico prisons were incarcerated for nonviolent offenses.<sup>58</sup>

62. In 2019, approximately 12% of the male population in New Mexico prisons were over the age of 55.<sup>59</sup>

63. In 2019, approximately 9% of the female population in New Mexico prisons were over the age of 55.<sup>60</sup>

64. As of August 21, 2020, seven different NMCD facilities had at least one case of confirmed COVID-19, including: Central NM Correctional Facility – Los Lunas (“Los Lunas”) (25 cases); Lea County Correctional Facility – Hobbs (“LCCF”) (4 cases); Northeast NM Correctional Facility – Clayton (“Clayton”) (1 case); Northwest New Mexico Correctional Facility – Grants (“NWNM – Grants”) (1 case); Otero County Prison Facility – Chaparral (“Otero”) (472 cases); Penitentiary of New Mexico – Santa Fe (“Santa Fe”) (1 case); Western New Mexico Correctional Facility – Grants (“WNM Grants”) (4 cases).<sup>61</sup>

65. Federal prisons in New Mexico have also seen significant COVID-19 outbreaks, including at Cibola County Correctional Center (323 cases); Otero County Prison Facility (280

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<sup>57</sup> New Mexico Sentencing Commission, *New Mexico Prison Population Forecast: FY 2021-FY2030* (June 2020), available at <https://nmsc.unm.edu/reports/2020/new-mexico-prison-population-forecast-fy2021---fy2030.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> New Mexico Department of Health, *Updated New Mexico COVID-10 Cases: Now at 19,042* (Jul. 26, 2020), available at <https://cv.nmhealth.org/2020/07/26/updated-new-mexico-covid-19-cases-now-at-19042/>.

cases); Otero County Processing Center (159 cases); and Torrance County Detention Facility (44 cases).<sup>62</sup>

66. Due to the nature of the COVID-19 virus, including the prevalence of asymptomatic individuals carrying and spreading the virus, the number of incarcerated individuals carrying and spreading COVID-19 is significantly higher.

67. The number of confirmed cases in the NMCD prisons increase every week, suggesting an imminent break out in New Mexico prison facilities similar to that seen at Otero prison in New Mexico and other prison facilities across the United States.

68. As of June 24, 2020, at least 12 prison staff members have tested positive for COVID-19.<sup>63</sup>

#### New Mexico's Prison Facilities Encourage the Spread of COVID-19

69. "Congregate settings," like New Mexico prison facilities, are where individuals cannot separate into their own room and their own spaces.<sup>64</sup>

70. Controlling the spread of COVID-19 in congregate settings is difficult because COVID-19 is "a very sneaky virus," "efficient at moving around in populations," and is "particularly good in the congregate setting" such as in New Mexico's prisons.<sup>65</sup>

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<sup>62</sup> New Mexico Department of Health, Updated New Mexico COVID-10 Cases: Now at 24,095 (Aug. 21, 2020), available at <https://cv.nmhealth.org/2020/08/21/updated-new-mexico-covid-19-cases-now-at-24095/>.

<sup>63</sup> Alisha Tafoya Lucero, NMCD Cabinet Secretary, Kathy Kunkel, NMDOH Cabinet Secretary, and Dr. Chad Smelser, COVID-19 Epidemiologist, NMCD NMDOH Virtual Press Conference (Jun. 24, 2020), available at <https://www.youtube.com/watch?v=PqmUaz-4vI>.

<sup>64</sup> Alisha Tafoya Lucero, NMCD Cabinet Secretary, Kathy Kunkel, NMDOH Cabinet Secretary, and Dr. Chad Smelser, COVID-19 Epidemiologist, NMCD NMDOH Virtual Press Conference, 44:29-44:48 (Jun. 24, 2020), available at <https://www.youtube.com/watch?v=PqmUaz-4vI>.

<sup>65</sup> Alisha Tafoya Lucero, NMCD Cabinet Secretary, Kathy Kunkel, NMDOH Cabinet Secretary, and Dr. Chad Smelser, COVID-19 Epidemiologist, NMCD NMDOH Virtual Press Conference, 44:35-45:05 (Jun. 24, 2020), available at <https://www.youtube.com/watch?v=PqmUaz-4vI>.

71. As one court found, “[J]ails and prison are powder kegs for infection . . . [because] the COVID-19 virus spreads with uncommon and frightening speed in carceral settings.”<sup>66</sup>

72. As identified by Dr. Chad Smelser, an epidemiologist working with the NMCD and the NMDOH, it is highly doubtful that a COVID-19 outbreak could be controlled in a congregate setting, such as what is found in the New Mexico prison facilities, where people who are incarcerated cannot separate themselves fully from the rest of the population.<sup>67</sup>

73. Four NMCD prison facilities, including Otero, NWNM - Grants, WNM - Grants, and Springer Correction Center - Springer (“Springer”) house incarcerated individuals in open-bay dormitory areas.

74. These dormitories are separated into “pods,” where incarcerated individuals sleep and share a “day room”—where incarcerated individuals socialize, watch TV, play games, and spend most of their days.

75. Incarcerated individuals in the dormitory pods sleep in bunks that are approximately three (3) feet apart.

76. In Otero, each pod houses approximately 72 incarcerated individuals.

77. In NWNM - Grants, each pod houses 66, 64, or 36 incarcerated individuals.

78. In WNM - Grants, pods the size of classrooms house 12 incarcerated individuals; pods the size of a gym house 20 incarcerated individuals; and pods the size of a hotel room house 5 incarcerated individuals.

79. At Springer, each pod houses approximately 48 incarcerated individuals.

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<sup>66</sup> *United States v. Pompey*, No. CR 97-9638 RB, 2020 WL 3972735, at \*3 (D. New Mex. Jul. 14, 2020) (quoting *States v. Skelos*, 15-CR-317(KRV), 2020 WL 1847558, at \*1 (S.D.N.Y. Apr. 12, 2020)).

<sup>67</sup> Alisha Tafoya Lucero, NMCD Cabinet Secretary, Kathy Kunkel, NMDOH Cabinet Secretary, and Dr. Chad Smelser, COVID-19 Epidemiologist, NMCD NMDOH Virtual Press Conference, 44:50-45:17 (Jun. 24, 2020), available at <https://www.youtube.com/watch?v=PqmUaz-4vI>.

80. Other New Mexico prison facilities house incarcerated individuals in single or double cells that are organized into pods.

81. Even in single or double cell facilities, incarcerated individuals in a pod spend significant time in a congregated “day rooms.”

82. Incarcerated individuals at NMCD facilities eat meals in the usual congregated chow halls, sitting at communal tables in close proximity to each other.

83. Incarcerated individuals in all New Mexico prison facilities are in congregated areas during periods of work. For example, incarcerated individuals work in close proximity with other incarcerated individuals in the kitchens or on prison repair teams.

84. During periods of work, incarcerated individuals in the prison facilities interact with other individuals in different prison pods, allowing for the spread of COVID-19 between pods.

85. Incarcerated individuals in the facilities are released for recreation along with all other members of their pod and, at times, with incarcerated individuals from other pods as well. This allows for the spread of COVID-19 within a pod and between different pods within the prison.

86. Because of the high populations of people, NMCD prison facilities are unable to implement appropriate 6-foot social distancing in their congregate setting.

87. NMCD recognizes that the most immediate risk to the incarcerated population is exposure by staff who enter the prison from the larger outside community.

88. Prison staff enter from the “outside world,” are not tested every time they enter the facility, and move throughout the facility during the course of a shift.

89. Even staff members that do not work in the same locations within the prison socialize with one another, are sometimes roommates, and carpool to work together. This allows

the COVID-19 virus to move from the outside world into the prison and to be shared between staff members and between different pods at the prison facility.

90. Due to the nature of the COVID-19 virus and the failure to enforce protective measures, asymptomatic prison staff have transmitted—for example, at Otero facility—and continue to transmit the virus to inmates, even if not exhibiting symptoms.

91. NMDOH and NMCD lack the personnel to provide COVID-19 care for incarcerated individuals in New Mexico.

92. Even before the COVID-19 pandemic, NMCD was not able to adequately meet the healthcare needs of its incarcerated population.

93. Some New Mexico prison facilities—for example Guadalupe County Correctional Facility – Santa Rosa (“GCCF”) and Clayton—have a vacancy rate of over 50%, meaning that several prisons do not employ even half of the staff that is budgeted for by the State of New Mexico.

94. In May 2016, Centurion Correctional Healthcare of New Mexico (“Centurion”) was contracted to, in-part, provide for the healthcare staffing needs of the New Mexico prisons.

95. Under the terms of the Centurion contract, Centurion was required to pay a penalty to New Mexico for non-performance, including filling vacancies in healthcare staffing needs.

96. As of November 2019, Centurion had accumulated approximately \$3,880,719.60 in staffing penalties owed to the State of New Mexico for failure to meet healthcare staffing requirements of the New Mexico prison facilities.

97. In October 2019, NMCD hired Wexford Health Sources, Inc. (“Wexford”) to take over the responsibilities for medical care for New Mexico’s prison facilities.

98. Based on information and belief, Wexford has not filled the vacancies in healthcare staffing in New Mexico prisons.

99. Several of the prisons, including the Springer prison, do not have a nearby medical facility. For example, the Springer prison's nearest medical facility is forty (40) minutes away.

100. Nurses, nurse practitioners, and other health care providers have resigned from their employment with the NMCD, including at the Springer prison leading to an even further decreased ability to care for individuals infected by COVID-19.

101. The healthcare needs of the New Mexico prison facilities have significantly expanded in light of the COVID-19 pandemic.

102. NMCD prison facilities and medical staff are not equipped to treat patients who contract severe cases of COVID-19.

103. When NMCD identifies an incarcerated individual that is exhibiting COVID-19 symptoms, the individual is deprived of their privilege to use the telephone.

104. NMCD is intentionally preventing incarcerated individuals from reporting COVID-19 infections so as to reduce the amount of infections that are being reported in the New Mexico prison system.

105. By depriving incarcerated individuals telephone privileges after they are diagnosed with COVID-19, NMCD is intentionally frustrating and denying incarcerated individuals access to the legal system.

106. NMCD and the NMDOH do not have sufficient testing to meet the needs of the State of New Mexico.

107. NMDOH preferentially allocates the resources they have to non-incarcerated individuals in New Mexico over incarcerated individuals in New Mexico.

108. NMCD and NMDOH have neglected their responsibility to test and care for the incarcerated individuals in the New Mexico prison system.

109. NMCD staff are not providing incarcerated individuals adequate access to hygiene supplies, including hand sanitizer and disinfecting wipes.

110. Sixty medical professionals in New Mexico wrote a letter urging state officials to release people convicted of nonviolent crimes in order to avoid a COVID-19 outbreak in the prisons and jails. The authors agreed with experts around the country that “[t]he safest way to ensure that a jail or prison does not become a site for COVID-19 to spread is to reduce the number of people who are incarcerated.”<sup>68</sup>

112. As the Governor has acknowledged, “[t]he only real way to attack this virus is to stay away from it.”<sup>69</sup>

113. Public health officials and correctional oversight boards around the country are urging correctional institutions to use any means available to immediately reduce the prison and jail populations.

#### The Otero Experience

114. The COVID-19 outbreak at Otero Prison facility provides a warning, and a lesson as to what can be expected in other New Mexico prison facilities.

115. The Otero facility is a hybrid one-half federal and one-half state prison and is one of the New Mexico prison facilities that are privately-operated under the supervision of NMCD.

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<sup>68</sup> Phaedra Haywood, Medical providers ask state to release inmates, Santa Fe New Mexican (Mar. 30, 2020), available at [https://www.santafenewmexican.com/news/coronavirus/medical-providers-ask-state-to-releaseinmates/article\\_28ec48ee-7089-11ea-8873-5b52a107906d.html](https://www.santafenewmexican.com/news/coronavirus/medical-providers-ask-state-to-releaseinmates/article_28ec48ee-7089-11ea-8873-5b52a107906d.html).

<sup>69</sup> See Gabrielle Burkhart, What could coronavirus caseload look like at its peak in New Mexico?, KRQE (Apr. 8, 2020), available at <https://www.krqe.com/health/coronavirus-new-mexico/what-could-coronavirus-caseload-look-like-at-itspeak-in-new-mexico/>.

116. On May 12, 2020, NMCD became aware that a staff member working at Otero prison had tested positive for COVID-19.

117. The staff member that tested positive for COVID-19 was working at the facility on the day NMCD learned of the positive test and was removed from work.

118. By May 15, 2020, Otero's first incarcerated individual began displaying symptoms of COVID-19 and tested positive for COVID-19.

119. On May 18, 2020, NMCD announced that 21 inmates at Otero had tested positive.

120. On June 1, 2020, NMCD announced that the first Otero inmate had died from COVID-19, three more were hospitalized, and there were 46 total positive cases.

121. On June 2, 2020, NMCD announced that there were 116 new positive cases and the NMCD ceased providing press releases regarding COVID-19 in their facilities.

122. On June 3, 2020, the NMDOH announced there were 162 positive cases at Otero.

123. On June 4, 2020, that number had risen to 206. By June 8, it was 219.

124. On June 11, 2020, NMDOH announced that there were 239 positive cases at Otero, by June 15, there were 295.

125. On June 18, 2020, there were 307 positive cases at Otero, on June 20, there were 362.

126. On June 21, 2020, there were 403 individuals with COVID-19.

127. As of July 24, 2020, 467 (86.6%) of individuals incarcerated at Otero Prison have confirmed cases of COVID-19.

128. Over the course of several short weeks, Otero prison went from its first COVID-19 case to nearly the entire prison population being infected with COVID-19.



129. On the federal side of Otero prison, there have been at least 277 positive cases and at least one additional death.

130. At least three (3) individuals at Otero prison have died from COVID-19.

131. During its investigation, NMCD discovered that, although staff members may not work in the same locations, they socialize with one another, are roommates, and carpool to work with one another, contributing to additional staff members and incarcerated individuals at the Otero facility testing positive for COVID-19.

### Los Lunas

132. The state-run Los Lunas facility has become an important fixture in the New Mexico prison system's preventative action against COVID-19.

133. As of June 24, 2020, Los Lunas acts as the intake and processing center for all male individuals entering the prison population.

134. Upon arrival, newly incarcerated individuals are assessed by medical providers, tested for COVID-19, and placed in medical isolation for 14-days.

135. Newly incarcerated individuals are then transported throughout New Mexico to other prisons in the State.

136. Despite the preventative measures taken at Los Lunas, in approximately one month, the number of confirmed COVID-19 cases has spiked from 1 reported case to 24 reported cases, an early indication of an outbreak at New Mexico's primary processing facility for the newly incarcerated.

137. The outbreak at the Los Lunas facility is caused in part by the NMCD's staff's failure to adhere to its policies and procedures to prevent the spread of COVID-19.

138. NMCD staff members at Los Lunas are not required to wear masks.

139. Twenty-two staff members, including correctional officers, were exposed to COVID-19.

140. Three (3) newly incarcerated individuals made it through the Los Lunas entrance screening with COVID-19 and into the general population.

141. As of August 21, 2020, 25 incarcerated individuals have tested positive for coronavirus at Los Lunas.

142. The Los Lunas facility lacks sufficient bleaching wipes.

143. The Los Lunas facility lacks sufficient hand sanitizer.

144. The failure of the preventative measures to control the outbreak of COVID-19 in the Los Lunas prison population has and will continue to result in asymptomatic people who are incarcerated processed in Los Lunas carrying and spreading the COVID-19 virus to other prisons in New Mexico.

145. The situation at Los Lunas is a developing outbreak and similar results to the Otero facility are expected, including the preventable deaths of people who are incarcerated.

#### New Mexico Correctional Facilities are Not Capable of Adequately Protecting the Population

146. On March 11, 2020, the Governor of New Mexico declared that the spread of COVID-19 constitutes a public health emergency.

147. On July 31, 2020, the public health emergency was extended—to at least the end of August 2020—in response to a surge of coronavirus cases.<sup>70</sup> The July 31, 2020 Order also instructed New Mexicans to stay in their homes for all but the most essential activities and restricting “mass gatherings.”

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<sup>70</sup> Cedar Attanasio, New Mexico extends stay-at-home order as coronavirus surges, AP News (Jul. 30, 2020), available at <https://apnews.com/9d930b4e7512910321c2ae1e59639e10>.

148. The Governor instructed individuals that, when not in their homes, they must strictly adhere to social distancing protocols and that “social distancing and proper use of face coverings in public spaces are the most effective ways New Mexicans can minimize the spread of COVID-19.”

149. The Governor’s Order defined “mass gathering” as any gathering that brings together five (5) or more individuals in a single room or connected space, confined outdoor space, or an open outdoor space.

150. New Mexico prison facilities are, by definition, a mass gathering, but NMCD is incapable of providing the relief necessary to stop the spread of COVID-19 in the prison facilities.

151. The NMCD has implemented “proactive steps” in attempts to combat the spread of COVID-19. These policies and procedures for the prevention of COVID-19 include:

- Entry into institutions is limited to essential staff;
- All staff and inmates wear face coverings;
- Common areas and high touch surfaces are sanitized hourly;
- Specialty sanitization equipment is available and utilized at all locations;
- Information about COVID-19 and proper handwashing and hygiene is posted throughout facilities;
- Inmate sanitization and hygiene issuance was doubled;
- Social distancing in common areas is mandated (to the best of their abilities);
- All persons entering facilities are medically screened and temperature scanned in all locations;
- Staff working in medical isolation and medical quarantine units do not work in other areas.

152. NMCD facilities are seeing outbreaks of COVID-19, including at Otero and Los Lunas. The “proactive steps” are being ignored by the prisons.

153. NMCD prison staff are not uniformly wearing masks.

154. NMCD staff are not providing hand sanitizer and soap to the prison population.

155. NMCD is requiring incarcerated individuals to pay for hand soap.

156. In at least one instance, NMCD staff have confiscated and discarded a communal soap dispenser that the incarcerated individuals pooled together for a shared toilet.

157. NMCD and NMDOH are not adequately monitoring the prison staff.

158. Despite “mandating” social distancing in common areas, appropriate social distancing is not being enforced at NMCD prison facilities due to the population size and space available.

### The Private Prison System

159. Several of New Mexico’s prisons are run by private corporations, including GEO Group (“GEO”), which manages the GCCF and the LCCF, CoreCivic, which manages NWNM – Grants; and Management & Training Corporation (“MTC”), which operates Otero.

160. These private corporations are paid according to the numbers of people who are incarcerated are housed in the prisons. Under this system, the fewer individuals incarcerated in the privately-run prison facilities, the less revenue for GEO, CoreCivic, and MTC.

161. At these for-profit prison facilities, incarcerated individuals are considered “assets.”

162. GEO, CoreCivic, and MTC knowingly and intentionally encourage the State of New Mexico to increase the amount of people who are incarcerated in the privately run facilities.

163. GEO, CoreCivic, and MTC knowingly and intentionally organize the prisons they operate so as to maximize population and minimize building and maintenance costs.

164. GEO, CoreCivic, and MTC knowingly and intentionally discourage the State of New Mexico from considering decarceration, medical treatment programs, monitoring programs, and other preventative measures that could protect incarcerated individuals from COVID-19, but would hurt their “bottom line.”

165. Private prisons, including those operated by GEO, CoreCivic, and MTC hold a disproportionately large number of release eligible inmates.

166. As a result, GEO, CoreCivic, and MTC are making a profit on individuals who are eligible for release, and contribute to the overpopulation of the State of New Mexico's prisons.

167. GEO, CoreCivic, and MTC knowingly and intentionally act to prevent incarcerated individuals who are eligible for release from receiving parole in order to increase profits.

168. GEO, CoreCivic, and MTC intentionally and knowingly ignore or fail to enforce policies and procedures established by the State of New Mexico for the prevention of COVID-19 in order to increase profits.

169. GEO, CoreCivic, and MTC intentionally and knowingly ignore or fail to enforce policies and procedures established by the State of New Mexico for the treatment of COVID-19 in order to increase profits.

170. GEO, CoreCivic, and MTC are fully apprised of the required preventative procedures to protect incarcerated individuals from the spread of COVID-19, including decarceration.

171. GEO, CoreCivic, and MTC are fully apprised of the medical care necessary to treat incarcerated individuals who are positive for COVID-19.

172. GEO, CoreCivic, and MTC intentionally and knowingly fail to follow the necessary preventative procedures to protect incarcerated individuals from the spread of COVID-19.

173. GEO, CoreCivic, and MTC intentionally and knowingly fail to provide the necessary treatment for incarcerated individuals who are positive for COVID-19.

174. GEO, CoreCivic, and MTC intentionally and knowingly deprive incarcerated individuals who are exhibiting symptoms of COVID-19 from telephone privileges with the intent of concealing the true rate of infection in the prison facilities.

175. GEO, CoreCivic, and MTC's intentional and knowing revocation of the telephone privileges of incarcerated individuals after they are diagnosed with COVID-19, frustrates and denies the incarcerated individuals' access to the legal system.

#### Individualized Relief is Failing the Prison Population

176. On April 6, 2020, the Governor of the State of New Mexico issued Executive Order 2020-021, directing the NMCD to compile a list of people who are incarcerated who meet the criteria to receive a gubernatorial commutation of their sentence.

177. In order to be eligible for a gubernatorial commutation of sentence, a person who is incarcerated must meet the following conditions:

- Release date is no more than thirty (30) days away and the person has any necessary parole plan in place;
- The person is not serving a felony sentence for driving under the influence of intoxicating liquor or drugs;
- The person is not a sex offender;
- The person is not serving a sentence for domestic abuse;
- The person is not serving a sentence for assault on a peace officer;
- The person is not serving any enhanced term of the person's sentence pursuant to NMSA 1978, Section 31-18-16.

178. As of June 24, 2020, only approximately 71 incarcerated individuals received a gubernatorial commutation of their sentence.

179. Executive Order 2020-021 is not sufficient to provide the decrease in prison population required to effectively address the current pandemic crisis in the New Mexico prison system.

180. Many more individuals meet nearly all of the requirements of the gubernatorial commutation and should be released to allow the prison system to adequately address the spread of COVID-19.

181. For example, in October 2019, the New Mexico Sentencing Commission Staff identified 294 incarcerated individuals were eligible for controlled release.<sup>71</sup>

182. These individuals meet all of the gubernatorial commutation requirements, with the exception of a release date within thirty (30) days.

183. These individuals are within twelve (12) months of eligibility of parole in community-based settings.

184. NMCD has authority to release inmates absent a court order under the Adult Community Corrections Act, NMSA 1978, §§ 33-9-1 to -10, which provides that the NMCD “may also use the [community corrections] fund to place criminal offenders within twelve months of eligibility for parole in community-based settings; provided that the criminal offender has never been convicted of a felony offense involving the use of a firearm.”

185. To date, NMCD has not released a single inmate pursuant to the Adult Community Corrections Act.

186. Incarcerated individuals that are eligible for parole are not being released because NMCD is failing to place these individuals before the parole board on time.

187. Instead, NMCD has instituted a practice of “in-house parole” where incarcerated individuals who have served their time in prison and are eligible for parole remain incarcerated.

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<sup>71</sup> New Mexico Sentencing Commission Staff, Estimated Number of Offenders in New Mexico Corrections Facilities in October Eligible for Controlled Release (Oct. 2019), *available at*, <https://nmsc.unm.edu/reports/2019/estimated-number-of-offenders-in-new-mexico-corrections-facilities-in-october-eligible-for-controlled-release.pdf>.

188. These “release eligible inmates” are serving out parole inside prison facilities, largely due to poor re-entry planning and administration on the part of the NMCD and the corporations managing the privately-run prisons, including GEO, CoreCivic, and MTC. In doing so, those inmates’ lives are needlessly placed at heightened risk.

189. On April 10, 2020, the New Mexico Supreme Court adopted Order No. 20-8500-012, providing that the deadline for filing a motion to reduce a sentence under Rule 5-801(A) NMRA may be waived by the court upon a showing of an extraordinary change in circumstances caused by the current health emergency.

190. At oral argument, the Supreme Court indicated that its April 10th Order would effectively provide relief to incarcerated individuals in New Mexico.

191. Since the Supreme Court adopted Order No. 20-8500-012, as least 26 different individuals have petitioned for relief, including in the following cases: CR-2013-0606, *et al.*; CR-13-4585, *et al.*; CR-92-01185; CR-2006-536; CR-2012-00017; CR-2014-02284; CR-2015-002687; CR-2014-00228; CR-2018-00210; CR-17-1006; CR-2012-00112; CR-2017-00435-00455; CR-2017-00451; CR-2015-02841; CR-2000-487; CR-2018-06438; CR-2018-04962; CR-2018-02854; CR-2018-03520; CR-2014-00464; CR-2014-00140; CR-2019-00507; CR-2018-01095; CR-2014-0482; CR-2013-00006; CR-2012-2229; CR-2016-00454; CR-2010-00223; CR-2016-00381; CR-2009-00229.

192. Many of the petitioners seeking relief pursuant to Order No. 20-500-012 were in high-risk categories for developing serious COVID-19 associated symptoms, including hepatitis C; HIV; deep vein thrombosis (DVT) and blood clotting; asthma; heart conditions; pulmonary distress; over 55 years of age; high blood pressure; enlargement of the heart; hypertension; diabetes; and liver disease.



193. To date, not a single petitioner has been granted relief under Rule 5-801(A) NMRA.

194. Individualized relief is failing to meet the needs of the incarcerated New Mexicans.

195. Yet it is the indisputable reality that reduction of the prison population is the most effective method of protecting incarcerated New Mexicans.

Exhaustion of the Corrections Department Grievance Procedure is Futile and Unavailable

196. The NMCD grievance procedure states that it may take up to “90 working days” from the time a grievance is filed until the final decision on appeal.

197. The process is lengthy and involves many decision-makers.

198. All grievances must provide the specific relief being requested and will not be processed without that information.

199. NMCD cannot grant release, the relief requested, on its own.

200. Even if NMCD could grant release, the process would take months—time that the incarcerated individuals may not have given the rapid spread of COVID-19 through prison systems.

201. Incarcerated individuals often face reprisal for submitting a grievance to the NMCD, and are therefore hesitant to do so.

202. Moreover, complaints on behalf of other people who are incarcerated are not grievable under the NMCD grievance procedure. Therefore, no administrative remedy is available for this class action.

**C. Named Plaintiffs’ Experience**

203. The named plaintiffs are people who are incarcerated at several facilities in New Mexico, including Northeast New Mexico Correctional Facility, Springer Correctional Center, Southern New Mexico Correctional Facility, and Western New Mexico Correctional Facility.

204. Because they are institutionalized at overcrowded institutions who cannot adequately protect the plaintiffs from COVID-19, the plaintiffs' health and lives are placed at a much heightened risk while incarcerated during the pandemic.

205. In some institutions, the plaintiffs reside in crowded bunkrooms where a safe six (6) foot distance between people who are incarcerated is impossible.

206. In some institutions, plaintiffs have to wash their own masks with soap the prison refuses to provide, yet there is no policy in place for how the plaintiffs should protect themselves when moving around while their only mask is drying.

207. In most institutions, the plaintiffs receive insufficient sanitization supplies. For example, for a while, entire units were receiving one (1) bottle of sanitizing solution a day. In other units, the unit receives two bottles of sanitizing solution a day but only one roll of paper towels every other week.

208. Across institutions, plaintiffs receive insufficient handwashing supplies. Often, people who are incarcerated must buy hand soap from the commissary out of their own bank accounts.

209. Across institutions, people who are incarcerated do not have ready access to COVID-19 tests upon request. One plaintiff was told that the prison was too busy to provide her a test even though she had symptoms of COVID-19.

210. Across the board, the defendants are failing to provide adequate care and protections to the plaintiffs against the COVID-19 pandemic.

#### **IV. CLASS ACTION ALLEGATIONS**

211. The named Petitioners/Plaintiffs bring this action on behalf of themselves and all others similarly situated as a class action under New Mexico Rule of Civil Procedure 1-023(B)(2).

212. The class that Petitioners/Plaintiffs seek to represent is defined as all current and future persons held in any New Mexico prison facility during the course of the COVID-19 pandemic (“Facility Class”), including the following subclasses:

a. The “Medically Vulnerable Subclass” is defined as “All current and future persons detained in any New Mexico prison facility during the course of the COVID-19 pandemic who are over the age of sixty-five, or who, regardless of age, experience an underlying medical condition that places them at particular risk of serious illness or death from COVID-19, including but not limited to (a) cancer; (b) chronic kidney disease; (c) chronic obstructive pulmonary disease; (d) immunocompromised state from solid organ transplant, blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune-weakening medicines; (e) obesity; (f) serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; (g) sickle cell disease; (h) type-1 or type-2 diabetes mellitus; (i) asthma; (j) cerebrovascular disease; (k) cystic fibrosis; (l) neurologic conditions, such as dementia; (m) liver disease; (n) pregnancy; (o) pulmonary fibrosis; (p) thalassemia; and (q) people with any condition specifically identified by the Center for Disease Control, currently or in the future, as increasing their risk of contracting, having severe illness, and/or dying from COVID-19.” *See* NMSA 1978, § 31-21-25.1 (1994) (medical or geriatric parole, including pregnant individuals).

b. The “Parole or Probation Revocation Subclass” is defined as “All current and future persons detained in any New Mexico prison facility during the

course of the COVID-19 pandemic who are serving a sentence solely for probation or parole revocation not predicated on the commission of a new criminal offense.”

c. The “Post-Parole Date Subclass” is defined as “All current and future persons detained in any New Mexico prison facility during the course of the COVID-19 pandemic who are in prison past their scheduled parole date.”

d. The “Nonviolent Offender Subclass” is defined as “All current and future persons detained in any New Mexico prison facility during the course of the COVID-19 pandemic who are currently incarcerated for a nonviolent offense or offenses.” *See* NMSA 1978, § 33-2A-7 (2002) (authorizing early release of nonviolent offenders via the now-defunct “corrections population control commission”); NMSA 1978, § 33-2A-7 (2002) (defining nonviolent offenders for the purposes of the corrections population control commission); NMSA 1978, § 33-2-34(L) (2015) (defining nonviolent offenses as any offense that is not a serious violent offense).

213. This action is brought and may properly be maintained as a class action pursuant to Rule 1-023 of the New Mexico Rules of Civil Procedure. This action satisfies the requirements of numerosity, commonality, typicality, and adequacy under Rule 1-023(A).

214. As of August 3, 2020, the New Mexico Corrections Department houses 6,222 inmates,<sup>72</sup> all of whom are eligible members of this class. Therefore, the class meets the numerosity requirement of New Mexico Rule of Civil Procedure 1-023(A)(1).

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<sup>72</sup> New Mexico Corrections Department Website (Aug. 3, 2020), available at <https://cd.nm.gov/>.

215. The subclasses are too numerous for joinder of all members to be practicable. Each subclass also meets the numerosity requirement of New Mexico Rule of Civil Procedure 1-023(A)(1).

216. Joinder is impractical because the class members are numerous; the class is fluid due to the nature of the Facility as a transfer station to other carceral facilities across New Mexico; and the class members are incarcerated and impoverished, which limits their ability to institute individual lawsuits. Certifying the class and subclasses, therefore, supports judicial economy.

217. Common questions of law and fact exist as to all members of the class. The named Plaintiffs seek common declarative and injunctive relief concerning whether Defendants' policies, practices, and procedures violate the constitutional rights of the class members. This satisfies the requirements of New Mexico Rule of Civil Procedure 1-023(A)(2). These common questions of fact and law include, but are not limited to the following:

- a. Whether the conditions of confinement at the Facility since the beginning of the COVID-19 pandemic amount to violations of the New Mexico Constitution;
- b. What measures Defendants implemented at their facilities in response to the COVID-19 crisis;
- c. Whether Defendants' practices during the COVID-19 pandemic exposed people confined at the facilities to a substantial risk of serious harm;
- d. Whether Defendants knew of and disregarded a substantial risk of serious harm to the safety and health of the class and subclasses; and
- e. Whether the Defendants' actions during the COVID-19 pandemic shock the conscience in violation of the New Mexico Constitution.

218. Plaintiffs' claims are typical of the class members' claims. *See* New Mexico Rule of Civil Procedure 1-023(A)(3). The injuries that Plaintiffs have suffered due to Defendants' unconstitutional course of conduct are typical of the injuries suffered by the class and subclasses. All class members seek the same declaratory and injunctive relief.

219. The Plaintiffs are adequate representatives of the class and subclasses because their interests in the vindication of the legal claims they raise are entirely aligned with the interests of the other class members, each of whom has the same constitutional claims. There are no known conflicts of interest among members of the proposed class, and the interests of the named Plaintiffs do not conflict with those of the other class members. Accordingly, Plaintiffs will fairly protect the interests of the class as required by New Mexico Rule of Civil Procedure 1-023(A)(4).

220. Plaintiffs are represented by counsel with experience in litigating complex civil rights matters. The interests of the members of the class and the subclasses will be fairly and adequately protected by the named Petitioners/Plaintiffs and their attorneys as required by New Mexico Rule of Civil Procedure 1-023(A)(4).

221. Because the punitive class challenges Defendants' system as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the class, certification under New Mexico Rule of Civil Procedure 1-023(B)(2) is appropriate and necessary.

222. A class action is the only practicable means by which the named Plaintiffs and class members can challenge the Defendants' unconstitutional actions and obtain the necessary immediate declaratory and injunctive relief sought for themselves and all other members of the class. The prosecution of separate actions by individual class members would create a risk of inconsistent and varying adjudications.

223. The questions of law and fact common to the members of the class, including but not limited to legal and factual questions relating to liability, predominate over any questions affecting only individual members.

224. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. The class and subclasses are readily definable and are ones for which the records should exist in the files of Defendants, and a class action will eliminate the possibility of repetitious litigation.

## V. CAUSES OF ACTION

### **COUNT ONE** **FOR A WRIT OF HABEAS CORPUS PURSUANT TO N.M. Stat. § 44-1-1 et seq. AND** **INJUNCTIVE AND DECLARATORY RELIEF**

#### **Cruel and Unusual Punishment in Violation of New Mexico Constitution Article II, Section 13**

225. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

226. Article II, Section 13 of the New Mexico Constitution prohibits the infliction of cruel and unusual punishments. Officials violate the prohibition against cruel and unusual punishment when they fail to protect people who are incarcerated from infectious diseases and expose people who are incarcerated to conditions of confinement that create a substantial risk of serious harm.

227. As alleged more specifically above, the conditions of Plaintiffs' confinement are objectively unreasonable and expose each and all of them to a substantial risk of serious harm, namely, infection with COVID-19.

228. Defendants know or should know that the conditions of Plaintiffs' confinement expose them to a substantial risk of infection with COVID-19.

229. As alleged more specifically above, Defendants have failed to act with reasonable care to mitigate this risk and protect Plaintiffs from infection with COVID-19.

230. Defendants have acted with deliberate indifference to the substantial risk Plaintiffs face of infection with COVID-19 due to the conditions of their confinement.

231. As the physical and legal custodians of Plaintiffs, Defendants may be subject to a writ of habeas corpus ordering Plaintiffs' release. Defendants may also be subject to an order of this Court issued in exercise of its inherent equitable powers, which requires Plaintiffs' release and implementation of health and safety measures as a remedy for the violation of the rights under Article II, Section 13 of the New Mexico Constitution.

**COUNT TWO**  
**FOR A WRIT OF HABEAS CORPUS PURSUANT TO N.M. Stat. § 44-1-1 et seq. AND**  
**INJUNCTIVE AND DECLARATORY RELIEF**

**Denial of Substantive Due Process**  
**in Violation of New Mexico Constitution Article II, Section 18**

232. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

233. Article II, Section 18 of the New Mexico Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Officials violate substantive due process rights when they engage in conduct that shocks the conscience.



234. As alleged more specifically above, the conditions of Plaintiffs' confinement shock the conscience. Defendants are aware that COVID-19 is an extremely infectious and dangerous disease, and that their failure to take sufficient steps to control the spread of COVID-19 among people who are incarcerated has created a highly probable risk that people who are incarcerated will suffer serious harm to their health or even death.

235. Defendants' conduct is unreasonable in light of the dire consequences that will follow if immediate actions are not taken to curb the spread of COVID-19 in New Mexico's prisons.

236. Defendants' conduct is unjustifiable by any legitimate governmental interest. For instance, Defendants have made arbitrary decisions as to what preventative measures must be taken to fight COVID-19 in prisons and regarding reductions to the size of the prison population through statutory release programs. Defendants cannot offer any legitimate justification for their failure to follow established policies and guidance concerning prevention of the spread of COVID-19 in prisons.

237. As the physical and legal custodians of Plaintiffs, Defendants may be subject to a writ of habeas corpus ordering Plaintiffs' release. Defendants may also be subject to an order of this Court issued in exercise of its inherent equitable powers, which requires Plaintiffs' release or implementation of health and safety measures as a remedy for the violation of the rights under Article II, Section 18 of the New Mexico Constitution.

**COUNT THREE**  
**FOR A WRIT OF HABEAS CORPUS PURSUANT TO N.M. Stat. § 44-1-1 et seq. AND**  
**INJUNCTIVE AND DECLARATORY RELIEF**

**Denial of Procedural Due Process**  
**in Violation of New Mexico Constitution Article II, Section 18**

238. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

239. Article II, Section 18 of the New Mexico Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Officials violate procedural due process rights when they fail to afford sufficient procedural protection prior to deprivation of constitutional rights.

240. First, as alleged more specifically above, Defendants have failed to establish comprehensive regulations concerning the treatment and prevention of COVID-19 infections and outbreaks within New Mexico prisons. As a result, Defendants have arbitrarily deprived Plaintiffs of their rights to life, health, and liberty.

241. Second, as alleged more specifically above, Defendants have failed to afford sufficient procedural protections to ensure Plaintiffs can obtain Rule 801 release. In particular, Defendants have failed to provide Plaintiffs with access to counsel to assist in obtaining Rule 801 release, have failed to define COVID-19 as an “extraordinary change in circumstance” under Rule 801, and have failed to extend the Rule 801 process to people who are incarcerated with mandatory minimum sentences. As a result, Defendants have arbitrarily deprived Plaintiffs of their rights to life, health, and liberty.

242. As the physical and legal custodians of Plaintiffs, Defendants may be subject to a writ of habeas corpus ordering Plaintiffs’ release. Defendants may also be subject to an order of this Court issued in exercise of its inherent equitable powers, which requires Plaintiffs’ release or implementation of health and safety measures as a remedy for the violation of the rights under Article II, Section 18 of the New Mexico Constitution.

**COUNT FOUR**  
**FOR A WRIT OF HABEAS CORPUS PURSUANT TO N.M. Stat. § 44-1-1 et seq. AND**  
**INJUNCTIVE AND DECLARATORY RELIEF**

**Denial of First Amendment Rights  
in Violation of New Mexico Constitution Article II, Section 17**

243. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

244. Article II, Section 17 of the New Mexico Constitution protects the freedom of speech for all persons. The freedom of speech includes the right of a people who are incarcerated to communicate with others outside of prison via telephone.

245. As alleged more specifically above, Defendants' have issued a blanket prohibition on Plaintiffs' rights to access the telephone that is not rationally related to any legitimate penological interest. Plaintiff cannot exercise the First Amendment rights under these restrictions.

246. The burden of providing telephone access is negligible, as Defendants' have provided telephone access in the past without difficulty, and simple precautions can be taken to ensure that exercise of the right does not pose an unnecessary health risk to people who are incarcerated.

247. As the physical and legal custodians of Plaintiffs, Defendants may be subject to a writ of habeas corpus ordering Plaintiffs' release. Defendants may also be subject to an order of this Court issued in exercise of its inherent equitable powers, which requires Plaintiffs' release or implementation of health and safety measures as a remedy for the violation of the rights under Article II, Section 17 of the New Mexico Constitution.

**COUNT FIVE**  
**FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF PURSUANT TO N.M.**  
**STAT. § 44-6-13**

**Cruel and Unusual Punishment  
in Violation of New Mexico Constitution Article II, Section 13**

248. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

249. Article II, Section 13 of the New Mexico Constitution prohibits the infliction of cruel and unusual punishments. Officials violate the prohibition against cruel and unusual punishment when they fail to protect people who are incarcerated from infectious diseases and expose people who are incarcerated to conditions of confinement that create a substantial risk of serious harm.

250. As alleged more specifically above, the conditions of Plaintiffs' confinement are objectively unreasonable and expose each and all of them to a substantial risk of serious harm, namely, infection with COVID-19.

251. Defendants know or should know that the conditions of Plaintiffs' confinement expose them to a substantial risk of infection with COVID-19.

252. As alleged more specifically above, Defendants have failed to act with reasonable care to mitigate this risk and protect Plaintiffs from infection with COVID-19.

253. Defendants have acted with deliberate indifference to the substantial risk Plaintiffs face of infection with COVID-19 due to the conditions of their confinement.

**COUNT SIX**  
**FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF PURSUANT TO N.M.**  
**STAT. § 44-6-13**

**Denial of Substantive Due Process  
in Violation of New Mexico Constitution Article II, Section 18**

254. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

255. Article II, Section 18 of the New Mexico Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Officials violate substantive due process rights when they engage in conduct that shocks the conscience.

256. As alleged more specifically above, the conditions of Plaintiffs' confinement shock the conscience. Defendants are aware that COVID-19 is an extremely infectious and dangerous disease, and that their failure to take sufficient steps to control the spread of COVID-19 among people who are incarcerated has created a highly probable risk that people who are incarcerated will suffer serious harm to their health or even death.

257. Defendants' conduct is unreasonable in light of the dire consequences that will almost certainly follow if immediate actions are not taken soon to curb the spread of COVID-19 in New Mexico's prisons.

258. Defendants' conduct is unjustifiable by any legitimate governmental interest. For instance, Defendants have made arbitrary decisions as to what preventative measures must be taken to fight COVID-19 in prisons and regarding reductions to the size of the prison population through statutory release programs. Defendants cannot offer any legitimate justification for their failure to follow established policies and guidance concerning prevention of the spread of COVID-19 in prisons.

**COUNT SEVEN**  
**FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF PURSUANT TO N.M.**  
**STAT. § 44-6-13**

**Denial of Procedural Due Process  
in Violation of New Mexico Constitution Article II, Section 18**

259. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

260. Article II, Section 18 of the New Mexico Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Officials violate procedural due process rights when they fail to afford sufficient procedural protection prior to deprivation of constitutional rights.

261. First, as alleged more specifically above, Defendants have failed to establish comprehensive regulations concerning the treatment and prevention of COVID-19 infections and outbreaks within New Mexico prisons. As a result, Defendants have arbitrarily deprived Plaintiffs of their rights to life, health, and liberty.

262. Second, as alleged more specifically above, Defendants have failed to afford sufficient procedural protections to ensure Plaintiffs can obtain Rule 801 release. In particular, Defendants have failed to provide Plaintiffs with access to counsel to assist in obtaining Rule 801 release, have failed to define COVID-19 as an “extraordinary change in circumstance” under Rule 801, and have failed to extend the Rule 801 process to people who are incarcerated with mandatory minimum sentences. As a result, Defendants have arbitrarily deprived Plaintiffs of their rights to life, health, and liberty.

**COUNT EIGHT**  
**FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF PURSUANT TO N.M.**  
**STAT. § 44-6-13**

**Denial of First Amendment Rights  
in Violation of New Mexico Constitution Article II, Section 17**

263. Plaintiffs incorporate the allegations in the foregoing paragraphs as though fully stated herein.

264. Article II, Section 17 of the New Mexico Constitution protects the freedom of speech for all persons. The freedom of speech includes the right of a people who are incarcerated to communicate with others outside of prison via telephone.

265. As alleged more specifically above, Defendants' have issued a blanket prohibition on Plaintiffs' rights to access the telephone that is not rationally related to any legitimate penological interest. Plaintiff cannot exercise the First Amendment rights under these restrictions.

266. The burden of providing telephone access is negligible, as Defendants' have provided telephone access in the past without difficulty, and relatively simple precautions can be taken to ensure that exercise of the right does not pose an unnecessary risk to people who are incarcerated safety and health.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs and Class Members respectfully request that the Court:

- A. Certify the proposed class and subclasses;
- B. Enter a declaratory judgment that
  1. Defendants are violating Named Plaintiffs' and Class Members' state constitutional rights by failing to adequately safeguard their health and safety in the midst of the COVID-19 pandemic;

2. The New Mexico Corrections Department's COVID-19-related policies which rely on extended periods of lockdown and/or solitary confinement and/or which unduly restrict incarcerated individuals' access to telephones violate incarcerated individuals' state constitutional rights;
3. Defendants must reduce the number of incarcerated individuals in New Mexico Corrections Department facilities to safeguard the health and safety of Named Plaintiffs and Class Members;
4. The current and ongoing COVID-19 pandemic constitutes an extraordinary change in circumstance for purposes of seeking a reduced sentence under Rule 5-801(A) for every currently-incarcerated individual in a New Mexico Corrections Department facility not serving a mandatory sentence;
5. Each incarcerated individual held in each New Mexico Corrections Department facility is at a disproportionate risk of contracting COVID-19 as compared to the general population, and as compared to other corrections facilities in other states, due to the New Mexico Corrections Department's inadequate response to the COVID-19 pandemic;
6. The individualized review processes currently available to the Named Plaintiffs and Class Members are insufficient in view of the rapid spread of COVID-19;
7. The State of New Mexico's Executive Order 2020-021 (the "Commutation Order") is arbitrary because it limits consideration of early release to persons whose release date is no more than thirty (30) days away, in contradiction to established New Mexico law (NMSA § 33-2A-6) providing for consideration for early release any person whose release date is 180 days or less;



8. The requirements for “any necessary parole plan” as referenced in the Commutation Order, New Mexico law, and/or all relevant policies of any Defendant, including that the “necessary parole plan” must be in place prior to release, are unduly burdensome and overly restrictive in view of the current pandemic;
  9. Any requirement that a parole plan must include a release location within a specified physical distance of a medical treatment facility is arbitrary and unduly restrictive given the widespread nature of telemedicine and the ability to receive treatment in a remote or virtual setting;
- C. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring NMCD to implement the following practices for SARS-CoV-2 testing and the reporting of test results:
1. Test all newly incarcerated individuals before they join the rest of the population in the facility;
  2. Test all staff and incarcerated individuals who are close contacts of someone with confirmed or suspected COVID-19.
  3. Test all staff and incarcerated individuals who develop one or multiple symptoms of COVID-19, including cough, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, new loss of taste or smell, nausea, or vomiting.
  4. Report the following information for each NMCD facility on a daily basis: (1) the number of tests performed on incarcerated individuals and staff respectively, (2) the number of positive tests among incarcerated individuals and staff respectively (3) the numbers of incarcerated individuals and staff, respectively, who are

quarantined or hospitalized due to suspected or confirmed COVID-19, and (4) any deaths of incarcerated individuals or staff due to COVID-19.

D. Appoint a special master to oversee implementation of the relief set forth in the following sections E through L.

E. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the parole or home confinement of all members of the Medically Vulnerable Subclass, pursuant to the authority for medical and geriatric parole in NMSA 1978, § 31-21-25.1, according to the procedure below. All paroled members of the subclass must obtain approval for a parole plan within one year of being paroled or, at the end of one year, they may be required to return to a NMCD facility with credit for one year against any total parole requirement.

1. Within 2 days of the Court's order, counsel for plaintiffs and defendants shall confer with each other about how to promptly identify all incarcerated individuals who are members of the Medically Vulnerable Subclass;
2. Within 7 days of the Court's order, the NMCD shall prepare, file and serve a list of all incarcerated individuals who are members of the Medically Vulnerable Subclass as identified pursuant to subsection 1;
3. The listed incarcerated individuals shall be released on parole or to home confinement as soon as they complete the Quarantine Process described below;
4. The Parole Board shall review the parole plans of all members of the Medically Vulnerable Subclass within one year of the date of the Court's order, applying the statutes and policies governing medical and geriatric parole;

5. The Parole Board shall conduct remote hearings, with the assistance of video or telephone conference technology, if hearings are required to determine the terms and conditions of parole for members of the Medically Vulnerable Subclass; and
  6. The Parole Board shall set the monthly installment payments of the costs of parole services at twenty-five dollars for all members of the Medically Vulnerable Subclass;
- F. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the release on parole or probation of all members of the Parole or Probation Revocation Subclass, according to the procedure below, with reinstatement of their prior parole or probation plans.
1. Within 2 days of the Court's order, counsel for plaintiffs and defendants shall confer with each other about how to promptly identify all incarcerated individuals who are members of the Parole or Probation Revocation Subclass;
  2. Within 7 days of the Court's order, the NMCD shall prepare, file and serve a list of all incarcerated individuals who are members of the Parole or Probation Revocation Subclass as identified pursuant to subsection 1;
  3. The listed incarcerated individuals shall be released on parole or probation, whichever status was revoked, as soon as they complete the Quarantine Process described below;
  4. The Parole or Probation Revocation Subclass members' prior parole or probation plans shall be reinstated and they shall be allowed to return to their previously approved living quarters; and

5. The Parole Board shall set the monthly installment payments of the costs of parole services at twenty-five dollars for all members of the Parole or Probation Revocation Subclass who are paroled;
- G. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the defendants to review all members of the Nonviolent Offender Subclass for release to community-based settings, home confinement, or on parole, according to the following procedure:
1. Within 2 days of the Court's order, counsel for plaintiffs and defendants shall confer with each other about how to promptly identify all incarcerated individuals who are members of the Nonviolent Offender Subclass;
  2. Within 7 days of the Court's order, the defendants shall prepare, file and serve a list of all incarcerated individuals who are members of the Nonviolent Offender Subclass, as identified pursuant to subsection 1;
  3. Within 28 days of the Court's order, the defendants shall prepare, file and serve a list of all members of the Nonviolent Offender Subclass who can be released to community-based settings, home confinement or on parole consistent with protecting the public safety, applying a strong presumption that release is necessary to prevent exposing incarcerated individuals to substantial risk of serious harm and considering the existing statutory authority to release or transfer incarcerated individuals pursuant to NMSA 1978, §§ 33-2-29, 33-2A-6, and 33-3-15;
  4. The defendants shall ensure that the New Mexico District Attorney's Association receives notice of the potential release of Nonviolent Offender Subclass members;

5. The New Mexico District Attorney's Association may appear before the appointed special master, as addressed in subsection 7, regarding disputes between plaintiffs and defendants regarding the release and conditions of release of members of the Nonviolent Offender Subclass;
  6. The attorney of a Nonviolent Offender Subclass member may appear before the appointed special master, as addressed in subsection 7, regarding a dispute between plaintiffs and defendants regarding the release and conditions of release of the individual subclass member;
  7. The appointed special master shall promptly oversee any disputes between plaintiffs and defendants regarding the release and conditions of release of members of the Nonviolent Offender Subclass, holding an expedited hearing if necessary and applying a strong presumption that release is necessary to prevent exposing incarcerated individuals to substantial risk of serious harm and considering the existing statutory authority to release or transfer incarcerated individuals pursuant to NMSA 1978, §§ 33-2-29, 33-2A-6, and 33-3-15;
  8. For a Nonviolent Offender Subclass member who already has an approved parole plan, that approved parole plan shall provide the conditions of release;
  9. A Nonviolent Offender Subclass member shall be released, according to the conditions agreed upon by the parties or ordered by the special master, upon completing the Quarantine Process described below;
- H. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the defendants to provide information to district attorneys so that any victims can

receive notice of the potential release of class members or subclass members pursuant to NMSA 1978, § 31-26-12.

- I. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the NMCD to implement the following Quarantine Process for each class member or subclass member who will be released on parole, transferred to home confinement, or released to community-based settings:
  1. Fourteen days ahead of the incarcerated individual's scheduled release, the NMCD shall begin quarantine of the incarcerated individual, with SARS-CoV-2 testing at least once and evaluation for symptoms of COVID-19 at least once per day;
  2. During quarantine, each incarcerated individual will continue to have access to medical care, showers, mental health services, radio, TV, reading materials, personal property, telephone privileges, and communication with attorneys;
  3. The incarcerated individual shall be released when he or she tests negative for SARS-CoV-2 and has shown no symptoms for fourteen days or as soon as the CDC's criteria for discontinuing home-based isolation have been met.
- J. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the NMCD to provide suitable clothing and socially-distanced in-state transportation to each class member or subclass member who will be released on parole, transferred to home confinement, or released to community-based settings.
- K. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the defendants to provide one year of housing assistance, in the form of a place of residence or monetary benefits, to any class member or subclass member who is

otherwise eligible for release pursuant to the Court's order but does not have a suitable proposed residence. *See* 22.510.3.8(A)(2)(b) NMAC.

L. Enter a temporary restraining order, preliminary injunction, and permanent injunction requiring the NMCD to take the following measures during the COVID-19 pandemic:

1. Require all prison staff to wear face coverings at all times while on prison grounds, with the exception that a prison staff member who is working in a fully enclosed office may remove the face covering while in said office provided that the office door remains closed and said prison staff member is the sole occupant of said office the entire time the face covering is removed;
2. Ensure that each incarcerated individual receives, free of charge, cloth face coverings that are laundered routinely;
3. Ensure that each incarcerated individual receives, free of charge, access to running water, hand-drying machines or disposable paper towels, and an individual supply of hand soap sufficient to allow frequent hand washing and drying each day;
4. Ensure that each incarcerated individual has access, even during "lockdown," to medical care, showers, mental health services, radio, TV, reading materials, personal property, telephone privileges, and communication with attorneys;
5. Provide sufficient disinfectant wipes or other disinfectant products deemed effective by the CDC against the virus that causes COVID-19, free of charge, so incarcerated individuals can clean high-touch areas or items between each use;
6. Implement the following social distancing strategies:
  - i. Enforce six feet of space between individuals in holding cells, lines, and waiting areas such as intake,

- ii. Stagger time in recreation spaces or restrict recreation space usage to a single housing unit per space,
  - iii. Stagger meals in the dining hall (one housing unit at a time) or provide meals inside housing units or cells,
  - iv. Hold group activities in outdoor areas or other areas where individuals can be six feet apart,
  - v. Suspend group programs where participants are likely to be in closer contact than they are in their housing environment, and provide alternative forms of activity to support mental health,
  - vi. Reassign bunks to provide six feet or more of space between individuals in all directions,
  - vii. Designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit,
  - viii. Stage the pill line within individual housing units, and
  - ix. Designate a room near the intake area to evaluate new entrants who are flagged by the intake symptom screening process before they move to other parts of the facility;
7. Waive all medical co-pays for incarcerated individuals experiencing COVID-19-related symptoms;
8. Regularly communicate to all incarcerated individuals, including low literacy and non-English-speaking individuals, up-to-date information about COVID-19, including symptoms and health risks, measures taken to reduce the risk of



transmission, reminders to use cloth face coverings, the importance of reporting COVID-19-related symptoms to staff, and the waiver of medical co-pays for those experiencing COVID-19-related symptoms;

9. If an individual has symptoms of COVID-19, immediately place the individual under medical isolation and test for SARS-CoV-2;
  10. If an individual's SARS-CoV-2 test is positive, immediately place the individual in medical isolation at least until the CDC's criteria for discontinuing home-based isolation have been met;
  11. If an individual is an asymptomatic close contact (as defined by the CDC) of someone with COVID-19, test for SARS-CoV-2, quarantine the individual and monitor for symptoms at least once per day for 14 days;
  12. Respond to all emergency requests for medical attention within an hour; and
  13. Medical isolation and quarantine shall be in nonpunitive settings, with continued access to medical care, showers, mental health services, radio, TV, reading materials, personal property, telephone privileges, and communication with attorneys; and
- M. Grant Named Plaintiffs and Class Members such other and further relief as the Court deems just and proper.

Respectfully submitted,  
LAW OFFICE OF RYAN J. VILLA

By: /s/ Ryan J. Villa  
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Dated: August 24, 2020

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing was served upon all counsel of record via the Odyssey filing system on this 24th day of August, 2020.

By: /s/ Ryan J. Villa  
RYAN J. VILLA