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

Certification of Conferral: Defendant's counsel opposes the relief requested herein.

I. INTRODUCTION AND FACTUAL BACKGROUND

Nearly nine months into a deadly global pandemic, Colorado's prisons remain too overcrowded to keep their residents, staff, and communities safe. They are so densely populated that it is impossible to keep those who are contagious separate from those who have tested negative, and physical distancing is simply impossible. CDOC has agreed to various safety protocols designed to protect its medically vulnerable population, and according to CDOC, "many of the provisions of this Consent Decree were already implemented . . ." Consent Decree, filed November 13, 2020, p. 2.[1] Despite these efforts, as of November 30, seven of Colorado's ten largest outbreaks are at CDOC facilities, with over 1,500 active positive cases. Sixteen of twenty-three prisons are on "Phase III" operations – the strictest precautionary level. Despite attempts of adequate staffing, prisons are now so understaffed that prisoners do not receive timely or adequate

[1] CDOC contends it had already implemented "a large scale prevalence testing program; providing all inmates and staff with masks and replacing those masks as needed; increasing the already robust cleaning protocols and providing additional cleaning supplies to the inmate population; engaging in extensive medical records review to assess vulnerable populations and prioritize their access to single cells; conducting audits of facilities to ensure compliance with COVID-19 prevention policy and protocols and creating a parole pilot program to increase efficiencies." *Id.*

medical care, or even meals. Eleven people have died, four of whom died in a 24-hour window while undersigned counsel was drafting this motion.

Clearly, the adopted precautionary measures cannot prevent widespread transmission given the current population. As Executive Director Williams predicted, "I know that reducing prison density is the only tool left to us." Amended Compl. ¶8. The rash of positive cases despite safety measures has proven Mr. Williams right. Courts have ordered depopulation in similar circumstances where "in spite of precautionary efforts made, the number of cases continued to increase." *Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 5646138, at *7 (S.D. Tex. Sept. 21, 2020) ("Defendants had protective measures in place … [a]t first blush, the measures seem extensive. However, they are severely undermined by the fact that such practices were implemented in May, and yet MPC suffered a massive outbreak in June and July under those practices. It appears that MPC … could not take sufficient steps to prevent an outbreak. . ."). As the Ninth Circuit held:

> Because no other relief would cure the violations, the Court agreed that an order limiting the prison population to a specific percentage of design capacity, which may have required state officials to release some prisoners, was an appropriate remedy. Similarly, Plaintiffs here argued that changes in sanitation conditions at Adelanto are necessary, but not sufficient...As in *Brown*, the district court in this case was permitted to order the reduction of Adelanto's population, which may have required the release of some detainees. . .

Roman v. Wolf, 977 F.3d 935 (9th Cir. 2020) (internal citations omitted).

Dr. Brian Montague, an expert from University of Colorado, visited three prisons with Plaintiffs' counsel, talked to prisoners and reviewed informal discovery. He agrees with Mr. Williams – "the only way to help mitigate the rapidly rising outbreaks in Colorado's prisons is to reduce the prison population such that high risk persons can be appropriately distanced and housed and fewer people are at risk to contract the virus." **Exhibit 1**, Declaration of Dr. Montague. Further,

as Governor Polis warns, Colorado is now experiencing "an exponential growth curve that we must stop to save lives and avoid overflowing our hospitals."[2] This will only get worse as prisoners are sent from prisons to hospitals. Simply, "epidemiologically, the only way to meaningfully reduce the risks posed to the entire population—inmates, staff, and public—is to drastically reduce the prison population." Amended Compl. ¶¶ 82-89.

This Court must act to save lives and protect the rights of Colorado citizens by ordering a reduction in the prison population. Substantial case law supports this request. Given that one "need not recount the death toll and devastation to make the point that the stakes are high, and Plaintiffs' position in a detention facility make their circumstances all the more precarious,"[3] many courts, including the District of Colorado, have granted injunctive relief on behalf of classes of prisoners. *See Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174 (D. Colo. May 11, 2020). Other courts have ordered a process for the release of medically vulnerable prisoners. *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411 (D. Conn. 2020) (ordering identification of high-risk prisoners and process for various release measures); *In re Von Staich*, ---Cal.Rptr.3d---, 2020 WL 6144780, at *16 (Cal. App. Oct. 20, 2020) (ordering a 50% population reduction).[4]

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[2] November 17, 2020 COVID Update at 1:05-1:24, 2:00-3:49, Available at: https://www.facebook.com/53481427529/videos/864646784073159.; *see also* Affidavit of Rachel Herlihy, attached as **Exhibit 2**; Governor Polis's November 24, 2020 COVID Update at 1:40-1:59, 11:05-11:58. *Available at*: https://www.facebook.com/53481427529/videos/435579261150255.

[3] *Barrera*, 2020 WL 5646138, at *8.

[4] *See also Savino v. Souza*, 453 F. Supp. 3d. 441, 454 (D. Mass., 2020) (explaining decision to consider bail for all immigration detainees held at two facilities in Massachusetts, given the "extraordinary circumstances" of "this nightmarish pandemic"); *Torres v. Milusnic*, No. CV-20-4450-CBM-PVC(x), 2020 WL 4197285, at *16, 18 (C.D. Cal. July 14, 2020); *Fraihat v. U.S. Immigration and Customs Enf't*, 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020) (ordering ICE to identify people with COVID-19 risk factors within 10 days, make timely custody determinations which "consider the willingness of detainees with Risk Factors to be released. . ."); *Gayle v. Meade,* No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553-

Indeed, while the executive branch has wide discretion to respond to emergencies, that discretion still must comply with the constitution: "If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."). The most deference should be afforded to "difficult choices made by our politically accountable officials who are assisted by public health experts." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (upholding state public health law to fight smallpox epidemic). Requiring the government to act to save lives in its custody, as it knows is required, does not amount to second guessing how to best do so. It is inaction that needs correction, not discretion. It is disregarding public health experts, not navigating their advice to vaccinate people that requires intervention. We are in "the throes of an incessant pandemic" and "measures that may be unusual but are safely within legal authority must be invoked." *Barrea*, 2020 WL 5646138, at *9.

This Court should join the chorus of judicial voices and direct the Governor to perform his legal duties under the Colorado Constitution by reducing the population density to allow for more physical distancing pursuant to C.R.C.P 65. Plaintiffs request an evidentiary hearing.

II. LEGAL STANDARD

To grant a preliminary injunction, the trial court must find that the moving party has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) lack of a plain, speedy, and

CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d. 36 (N.D. Cal. 2020) (ordering ICE to assess all detainees and implement a bail application system).

adequate remedy at law; (4) no disservice to the public interest; (5) balance of equities in favor of the injunction; and (6) preservation of the status quo or protection of a party's rights pending a final determination. *Rathke v. MacFarlane,* 648 P.2d 648, 653–54 (Colo. 1982); *City of Golden v. Simpson,* 83 P.3d 87, 96 (Colo. 2004).

III. PLAINTIFFS SATISFY THE INJUNCTIVE RELIEF STANDARD

Just as U.S. District Court Judge Brimmer concluded with respect to the Weld County Jail's response to COVID-19, Plaintiffs here can demonstrate "that they are likely to succeed on the merits of their claims, that they will suffer irreparable harm in the absence of a temporary restraining order, and that the balance of equities and public interest tips in their favor." *Carranza*, 2020 WL 2320174, at *11.

1. Plaintiffs Demonstrate a Reasonable Probability of Success on the Merits.

Colorado's constitution prohibits "cruel and unusual punishments." Colo. Const. Art. II, § 20. The Eighth Amendment is violated when: (1) prison conditions pose "an unreasonable risk," (2) the risk is of serious harm, and (3) officials have acted with deliberate indifference to that risk of serious harm. *Id.* at 33–35. Federal deliberate indifference requires "subjective knowledge" and disregard of a risk of serious harm. *Id.* "Courts have long recognized that prison officials have an Eighth Amendment duty to protect inmates from exposure to communicable disease." *Martinez-Brooks*, 459 F. Supp. 3d at 439; *Helling v. McKinney*, 509 U.S. 25, 33-5 (1993). While Plaintiffs meet this federal standard, this Court should conduct "an independent analysis of state constitutional principles in resolving a state constitutional question" and adopt a more protective,

objective standard in evaluating awareness of a risk.[5]

Governor Polis knows the risks of COVID-19 in prisons and will certainly concede this point, given his public statements and many actions taken to control the virus outside of the correctional setting.[6] *See* Amended Compl. ¶¶ 4-8, 21, 52-89, 102-153. Indeed, in his short-lived Executive Order, Governor Polis wrote the "spread of COVID-19 in facilities and prisons poses a significant threat to prisoners and staff who work in facilities and prisons, as well as the communities to which incarcerated persons will return." Ex. 10 to Amended Compl., p. 1. He expressly acknowledged that to "prevent the spread of COVID-19 in Colorado prisons" it is necessary to "safely facilitate the reduction of the State's incarcerated population." *Id.* at p. 2.[7]

Governor Polis knows serious injury and death will inevitably follow from his failure to depopulate, and yet he has refused to utilize his constitutionally granted authority at all. *See* Amended Compl. ¶¶ 52-89, 102-153. Given that "the risk of this pandemic is an unprecedented,

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[5] *People v. Young*, 814 P.2d 834, 842 (Colo. 1991). The Colorado Supreme Court has "determined that the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution," repeatedly recognizing "that the Colorado Constitution, written to address the concerns of our own citizens and tailored to our unique regional location, is a source of protection for individual rights that is independent of and supplemental to the" federal protections. *Id.* Specifically here, the Colorado test for awareness of the risk should be: 1) that Defendant knows about the risk; or 2) he is on constructive notice of the risk; or 3) the risk would be "obvious" to him given his position and the duties he and his subordinates perform. *See e.g. City of Canton v. Harris*, 489 U.S. 378, 390, n.10 (1989); *id.* at 396 (O'Connor, J., concurring in part and dissenting in part).

[6] *See, e.g.*, Governor Polis's November 17, 2020 COVID Update at 7:06-7:47. Available at: https://www.facebook.com/53481427529/videos/864646784073159; Executive Branch's Joint Resp. to Mot. for TRO, *Tavern League of Colo. v. Polis*, No. 2020 CV 32484 (D. Colo. July 28, 2020) (defending the Governor's restaurant closings in light of the public health emergency).

[7] CDOC internally recommends dropping the population to 80-85% based on internal modeling conclusively demonstrating that single-celling people is necessary to save lives. Amended Compl. ¶¶ 109-112. Yet, Defendant Polis has prevented such reductions and CDOC remains around 90% capacity with many individual prisons operating above 95% capacity. *Id*.

deadly threat to incarcerated individuals, correctional officers, and civilian staff," "extraordinary action is needed to address this rapidly-growing public health emergency expeditiously." *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court*, 484 Mass. 431, 443, *aff'd as modified,* 484 Mass. 1029, (2020). For these reasons, courts around the country have ordered injunctive relief to cure executive inaction in the face of the pandemic, as the "failure to immediately adopt and implement measures designed to eliminate double celling, dormitory style housing and other measures to permit physical distancing between inmates" is "morally indefensible and constitutionally untenable." *In re Von Staich*, 2020 WL 6144780, at *16.[8]

The same holds true here. While Governor Polis has taken expansive action to protect free citizens, he has adopted an unconstitutional "let nature take its course" approach to incarcerated citizens. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (when state officials "strip [prisoners] of virtually every means of self-protection and foreclose[] their access to outside aid, [they] are not free to let the state of nature take its course.") While committed to following public health guidance with respect to free people, Governor Polis defies public health wisdom with respect to prisoners, explaining that "the pandemic is no excuse to let criminals out," despite knowing CDOC already

[8] *Torres*, 2020 WL 4197285, at *16, 18 (ordering injunctive relief where Defendants "have ignored, and therefore have likely been deliberately indifferent, to the known urgency to consider inmates for home confinement, particularly those most vulnerable to severe illness or death if they contract COVID-19," and failed to "take reasonable measures to promptly review and grant requests for compassionate release."); *Fraihat,* 445 F. Supp. 3d at 745 (finding a "serious failure[] to act" including "promptly releasing individuals from detention to achieve greater spacing between medically vulnerable individuals and the general population."); *Clark v. Pritzker*, No. 20-CV-01133-SPM, 2020 WL 6391185, at *5 (S.D. Ill. Nov. 2, 2020) *Martinez-Brooks*, 459 F. Supp. 3d at 446 ("making only limited use" of release authority despite "extraordinary and compelling circumstances presented by COVID-19 in the prison setting" constituted deliberate indifference); *Savino*, 453 F. Supp. 3d at 454 ("[T]he situation is urgent and unprecedented. . . a reduction in the number of people who are held in custody is necessary. . .").

determined many of them do not to pose a threat to the public. Amended Compl. ¶¶22-4. Colorado recently announced a vaccine distribution plan that prioritizes vaccines to those living in congregate settings, including prisons. Governor Polis continues to favor anti prisoner bias over public health recommendations, contradicting Colorado's vaccine plan, insisting: "no way" will vaccines "go to prisoners before it goes to people who haven't committed any crime."[9] Not only does this show deliberate indifference to those in his custody, failing to vaccinate in congregate environments will prolong the pandemic – affecting hospital capacity, and the broader community.

2. Plaintiffs Will Suffer Irreparable Injury Absent Injunctive Relief.

"[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Carranza*, 2020 WL 2320174, at *10. Where the Court finds that Plaintiffs will likely succeed on the merits of a constitutional claim, plaintiffs "satisfy the irreparable harm requirement for issuing a preliminary injunction.[10] While violation of a constitutional right is, itself, an irreparable harm, class members here face the quintessential and more tangible harm of a deadly disease, lack of medical care, and no hospital bed. *Banks v. Booth*, 468 F. Supp. 3d 101, 123 (D.D.C. 2020) ("While the Court lauds the progress Defendants have made, such progress is not sufficient to negate Plaintiffs' risk of harm from contracting COVID-

[9] See December 1, 2020 Press Statement at 43:07 – 44:04, available at https://www.facebook.com/jaredpolis/videos/184205186673056 and COVID-19 Vaccine Development and Planning, November 20, 2020, CDPHE. *Available at*: https://covid19.colorado.gov/covid-19-vaccine-development-and-planning#PhasedApproach.

[10] *Criswell v Boudreaux,* No. 120CV01048DADSAB, 2020 WL 5235675, at *19 (E.D. Cal. Sept. 2, 2020)(internal citations omitted)("[i]t is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury"); *Mays v. Dart*, 453 F. Supp. 3d 1074, 1098 (N.D. Ill. 2020) (The risk of "severe health consequences, including death, if they contract coronavirus disease" constituted "irreparable harm."); *Basank v. Decker*, 449 F. Supp. 3d 205, 213 (S.D.N.Y. 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.").

19. . . Given the gravity of Plaintiffs' asserted injury, as well as the permanence of death, the Court finds that Plaintiffs have satisfied the requirement of facing irreparable harm.")

3. There is no Plain, Speedy and Adequate Remedy at Law.

Preventing irreparable harm from critical illness or death obviously cannot be achieved through damages, so the only adequate remedy at law is emergency injunctive relief. *Herstam v. Bd. of Dir. of Silvercreek Water & Sanitation Dist.*, 895 P.2d 1131, 1139 (Colo. App. 1995).

4. The Public Interest is Served by Injunctive Relief.

Granting relief will serve the public for several reasons. First, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Carranza*, 2020 WL 2320174, at *11 (*quoting Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)). Second, a huge outbreak affects not only prisoners but also staff, which increases community spread.

When the original Complaint was filed in late May, Sterling Correctional Facility was the site of the largest COVID-19 outbreak in the state. Since then, Colorado's prisons have continued to be the epicenters of infection. The outbreak at Sterling has grown to over 800 cases, and to more than 700 each at Fremont and Arkansas Valley. Clearly, despite all the precautionary measures, massive transmission cannot be prevented due to overcrowding. CDOC is now so full of COVID that infected people are being housed alongside those who are not yet infected. CDOC has averred that it has always been its policy "not to mingle people who have tested positive for COVID-19 until they are no longer considered contagious, with people who have not tested positive, *whenever possible*." Proposed Consent Decree at ¶ III(E)(2) (emphasis added). However, in just two weeks since the Consent Decree was filed, undersigned have received numerous credible reports that inmates who tested positive were being housed with people who tested negative, and in many cases

actually moved into virus free units. Given commitment to avoid mixing positives and negatives whenever possible, it is apparently impossible to isolate all contagious prisoners due to their sheer number. As hospitals fill up, controlling the spread and the associated pressure on hospitals advances the public's interest by conserving resources. *Id.*[11]

5. The Balance of Equities Favors Injunction.

Just as the public interest is served by the request for relief, the balance of equities favors injunction. Asserted public safety concerns do not shift this balance. Plaintiffs are not asking the Governor to simply release all medically vulnerable prisoners. Rather, Plaintiffs seek an Order compelling the Governor to use his authority to facilitate accelerated individualized determinations to release or transfer people who do not pose a threat to public safety, prioritizing medically vulnerable individuals for first look. As the Central District Court of California reasoned in *Torres*:

> The Court is mindful of public safety concerns if inmates are released or placed on home confinement. . . The Court does not order release of Petitioners here. Instead, the Court orders Respondents to make a prompt determination of the eligibility of home confinement and compassionate release as to Lompoc inmates who are at higher risk for severe illness or death from COVID-19.
> …
> Accordingly, the Court finds the balance of equities and public interest tip sharply in Petitioners' favor for issuance of an order expediting the process for determining inmates' eligibility for home confinement or compassionate release which takes into account inmates' age and medical condition in light of COVID-19.

2020 WL 4197285, at *19; *Martinez-Brooks*, 459 F.Supp.3d at 449 (public interest requires accelerated review of "individualized consideration of an inmate's suitability for release. . .").

[11] *Banks*, 468 F. Supp. 3d at 124 (injunction "is in the public interest because it supports public health. No man's health is an island. If Plaintiffs contract COVID-19, they risk infecting others inside the DOC facilities … DOC staff members … thus increasing the number of people vulnerable to infection in the community at large… they will be transported to community hospitals—thereby using scarce community resources. . ."); *Basank*, 449 F. Supp. 3d at 216.

6. Injunctive Relief Is Necessary to Preserve the Status Quo.

"A preliminary injunction is designed to preserve the status quo or protect rights pending the final determination of a cause." *City of Golden*, 83 P.3d at 96. "The last uncontested status between the parties which preceded the controversy" is to be preserved. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). Here the last uncontested status, and the right needing protection, is to be free from unreasonable risk from a serious, and potentially deadly, virus.

WHEREFORE, Plaintiffs request the Court issue relief consistent with the attached proposed order. Because Plaintiffs are indigent, and suing in the public interest, Plaintiffs also request that this Court waive bond. Rule 65(c); *Carranza*, 2020 WL 2320174, at *11.

Respectfully submitted this 2nd day of December, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020 I caused a true and correct copy of the foregoing to be served via Colorado Courts E-Filing on the following:

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