SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Matter of JOSEPH AGNEW, ANTHONY GANG, TYRONE GREENE and KAMER REID,

On behalf of themselves and all others similarly situated,

Petitioners,

For a judgment under Article 78 of the Civil Practice Law and Rules

--against--

NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondent

Index No. 813431/2021E
(Taylor, J.)

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR CONTEMPT AND FOR FURTHER EQUITABLE RELIEF

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PRELIMINARY STATEMENT

Two and a half years ago, this Court ordered Respondent, New York City Department of Correction ("DOC" or "the Department"), to comply with its statutory duty to provide every person in its custody with access to health care without delay. DOC has failed to abide by this obligation, and the crisis of inaccessible health care in its jails continues unabated. As a result, incarcerated people continue to miss thousands of health care appointments every month, delaying or outright denying their care. Ripple effects abound; delays and denials beget more infections, more sickness, and more pain for Petitioners, resulting in chronic illness, permanent disability, and, in some cases, death.

The past few weeks alone have proven that "prohibiting [and] delaying incarcerated persons' access to care, appropriate treatment, or medical [] services" [1] are not only violations of this Court's December 3, 2021 Mandamus Order, but can also lead to tragic (and predictable) results. Look no further than former class member Charizma Jones, who died about three weeks ago at the age of 23. Her medical records "showed correction officers repeatedly prevented nurses from entering her cell to check on her on May 5 and 6 even though she had a rash covering much of her body."[2] According to the medical entries made by clinicians, "[s]everal attempts were made to do vitals," but the "DOC officer on duty refused to open [her] cell"[3] despite the fact that Ms. Jones had a fever and had started vomiting. Ms. Jones's condition worsened, and she was hospitalized hours after DOC's last interference with Correctional Health Services ("CHS") clinicians' attempts to assess her condition.[4] She later died in the hospital,

[1] Mandamus Order, NYSCEF Doc. No. 81, ¶ 2(b) ("Mandamus Order").
[2] Affirmation of Veronica Vela in Support of Contempt (Vela Aff.), Ex. 1 (Graham Rayman, *Two NYC jail oversight agencies open probes into death of woman inmate on Rikers*, N.Y. DAILY NEWS (July 23, 2024)).
[3] Vela Aff., Ex. 1; Affirmation of Robert M. Quackenbush Aff., ¶¶ 8-27.
[4] CHS is the entity that delivers health care services to people in DOC custody.

shortly after DOC released her from custody.[5] While the Medical Examiner has not yet determined Ms. Jones' cause of death, medical records clearly show that CHS determined Ms. Jones needed urgent medical care, and DOC stopped Ms. Jones from receiving it.

DOC's extensive and chronic noncompliance must be ended. Petitioners therefore return to this Court to yet again request that DOC be held in contempt for its continued failure to comply with this Court's original Mandamus Order, which merely required the agency to fulfill its pre-existing statutory duty to provide access to care without delay. Petitioners also ask this Court to fine DOC for its contempt in the amount of $250 per health care appointment missed due to DOC's operational failures, payable to the Petitioner class, and to order DOC to pay attorneys' fees. If the finding of contempt and attendant financial penalties prove insufficient to compel DOC's compliance with the Mandamus Order, Petitioners request that this Court appoint a monitor to advise DOC and this Court on how the Department can comply with its duty to provide access to health care.

PROCEDURAL HISTORY

Petitioners filed this lawsuit in October 2021. Joseph Agnew, Anthony Gang, Tyrone Greene, and Kamer Reid, on behalf of a class of people in DOC custody, challenged DOC's failure to provide them with access to medical care while in custody, as required by state law.[6] Petitioners cited their own experiences being denied access to medication and to scheduled appointments primarily because DOC required correctional officer escorts for those appointments but did not provide them. They also relied on public data published by DOC and the New York City Board of Correction ("BOC"), with emphasis on the number of scheduled appointments that were missed each month due to DOC's failure to provide an escort. This Court

[5] Vela Aff., Ex. 1; Quackenbush Aff., ¶ 27.
[6] *See* NYSCEF Doc. No. 1, petition.

found DOC was in violation of its statutory duties to provide access to care and issued the Mandamus Order on December 3, 2021, directing DOC to:

> a. Provide Petitioners with access to sick call on weekdays, excluding holidays, and to make sick call available at each facility to all persons in DOC custody a minimum of five days per week within 24 hours of a request, or at the next regularly scheduled call, whichever is first;
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> b. Safely keep in the New York City jails each person lawfully committed to its custody by providing sufficient security for the movement of incarcerated persons to and from health services, and by not prohibiting or delaying incarcerated persons' access to care, appropriate treatment, or medical or dental services.[7]

The Mandamus Order directed DOC to provide proof of substantial compliance with the Court's mandate to provide access to sick call and not prohibit or delay access to medical care. DOC did not appeal the Mandamus Order, but neither did the Department comply with it. Instead, DOC submitted papers and two affidavits from then-Bureau Chief of Facility Operations Ada Pressley admitting its noncompliance and asserting that it was impossible for it to comply with the December Order, mostly due to staff absenteeism it attributed to the COVID-19 pandemic. DOC also argued that it was engaged in efforts to achieve compliance, which were heavily focused on increasing the availability of escort officers to take class members to their scheduled appointments.

On February 1, 2022, Petitioners moved for contempt.[8] Petitioners' motion substantially relied on the then-available evidence to support contempt: (1) the affirmations DOC submitted in response to the Court's Mandamus Order in which it admitted noncompliance with its duty to provide class members access to their scheduled appointments, and (2) DOC's statistics concerning the number of scheduled appointments missed due to DOC's failure to provide an

[7] Mandamus Order, ¶ 2.
[8] NYSCEF Doc. No. 105, petitioners' memorandum of law in support of their order to show cause for contempt.

escort, *i.e.* "no escort non-productions."[9] This Court held an evidentiary hearing in March 2022 during which DOC presented testimony from Ms. Pressley and Rabiah Gaynor, then-Executive Director of DOC's Health Affairs Division. Through this testimony and in pre-hearing filings, DOC again admitted that it denied people in custody access to care almost 2,000 times in December 2021 and January 2022, that "no escort" non-productions were attributable to DOC's failures, and that these "no escort" non-productions constituted evidence of noncompliance.[10]

On May 17, 2022, the Court rejected DOC's impossibility defense and found DOC in contempt of court (the "First Contempt Order") insofar as it "failed to meet its heavy burden to demonstrate that it [wa]s impossible to comply with the [Mandamus Order]" and that the record was "devoid of any evidence of [DOC's] factual impossibility to comply with the [Order]."[11] The Mandamus Order "expressed an unequivocal mandate for [DOC] to comply with its duties to provide inmates with access to sick call and not prohibit or delay them from health services;" accordingly, "[DOC's] failure to provide or delay inmates access to health services constitutes disobedience of the [Order]."[12] The Court based its finding on DOC's admission of noncompliance, the 1,061 "no escort" non-productions in December 2021, and the 848 "no escort" non-productions in January 2022, citing each no escort non-production as an "instance[] of noncompliance."[13] The Court ordered compensatory fines "of $100.00 for each missed escort to the infirmary [for the period] December 11, 2021 through January 2022" as well as an award of attorneys' fees incurred in connection with the motion.[14] Finally, the Court directed that DOC could purge itself of contempt if it submitted proof of substantial compliance with the Mandamus

[9] *Id.*
[10] NYSCEF Doc. No. 126, first contempt order, at 3-5 ("First Contempt Order").
[11] *Id.* at 5.
[12] *Id.*
[13] *Id.*at 4.
[14] *Id.* at 6-7.

Order within 30 days of May 17, 2022, the date of entry of the First Contempt Order.[15] DOC did not appeal from the First Contempt Order.

On June 16, 2022, DOC submitted the affidavit of then-Chief of Staff Kathleen Thomson in support of its contention that it had purged itself of contempt. The Thomson affidavit addressed DOC's "no escort" non-productions, the primary evidence on which Petitioners relied in making its First Contempt Motion and the sole basis on which this Court had based its contempt finding. Ms. Thomson asserted that from May 17, 2022 to June 12, 2022, 186 appointments were missed due to DOC failing to provide an escort.[16]

By order dated August 11, 2022 (the "Purge Order"), this Court found that DOC had failed to purge its contempt.[17] Though Petitioners had argued that DOC's contempt lay not just in its failure to provide escorts to scheduled appointments, but also in a host of other instances of non-production in categories attributable to DOC mismanagement, the Purge Order did not cite to these additional non-productions. Instead, the Court appeared to fault DOC for failing to show it had provided access to the sick call phone line during weekdays and that it had not prevented the scheduling of appointments in the first place due to a lack of escorts—an issue that Petitioners did not raise in the First Contempt Motion.[18] The Court ordered DOC to pay Petitioners "$100.00 for each missed escort to the infirmary, from December 11, 2021 through January 2022" and reasonable attorneys' fees in connection with the contempt proceeding.[19]

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[15] *Id.*at 6.
[16] NYSCEF Doc. No. 129, affidavit of Kathleen Thomson, ¶ 5.
[17] *See generally* NYSCEF Doc. No. 147, Purge Order ("Purge Order").
[18] The Purge Order stated that the no escort numbers DOC provided would have constituted substantial compliance "[i]f the [Mandamus] order directed respondent to provide escorts for the number of scheduled appointments. However, the December 3, 2021 order directed respondent to provide proof of substantial compliance with, among other things, access to sick call on weekdays. . . . This court cannot assume that the '42,177 clinic appointments [] scheduled' equals the number of sick calls for the period referred to by Ms. Thomas. At a minimum, respondent did not allege or submit evidence, for the purge period, of how many inmate requests for sick call services were made and, of that number, how many of those requests were denied due to lack of escorts." *Id*. at 4-5 (emphasis omitted).
[19] *Id.* at 5.

DOC appealed from the Purge Order, and on June 28, 2023, the Appellate Division, First Department, reversed and vacated this Court's Purge Order and declared that DOC's contempt had been purged. *See* 217 AD3d 490 [1st Dep't 2023]. In relevant part, the First Department reasoned:

> In the August 2022 order on appeal, the court found that "[t]he only evidence submitted regarding access to the infirmary during the purge period is [evidence] that respondent only failed to produce inmates, due to lack of escort availability, for 186 out of 42,177 clinic appointments that were scheduled." Thus, the court held that DOC failed to purge its contempt because it failed to address whether any appointments were not scheduled in the first place due to escort shortages. We find that this was an improvident exercise of discretion, since DOC "did not violate any clear and unequivocal mandate" set forth in the December 3, 2021 mandamus order. We note that DOC is specifically prohibited from "screen[ing] sick-call requests." **This issue was not raised by the parties before Supreme Court**, and the court should not have *sua sponte* based its contempt finding on DOC's failure to address this matter in the absence of a "clearly express[ed]" and "unequivocal mandate."

Id. at 491-92 [1st Dept 2023] (citations omitted) (emphasis added). Essentially, the First Department held that the Court erred because the Purge Order was based on an issue—whether DOC was preventing class members from scheduling appointments via sick call—that was not raised by the parties in the first contempt motion. This Court's First Contempt Order did not rely on any evidence that DOC was preventing appointments from being scheduled. Therefore, it was deemed error for this Court to require DOC to produce evidence about appointments not scheduled due to a lack of escorts in order to purge that contempt.

Petitioners sought leave to appeal to the Court of Appeals, which DOC opposed. In its briefing to the Court of Appeals, DOC admitted that the First Department's decision only dealt with what DOC had to show to purge contempt; it did not affect this Court's order entering contempt in the first instance.[20] On December 19, 2023, the Court of Appeals dismissed

[20] *See* Vela Aff., Ex. 2 (Dep't of Correction Memorandum in Opposition to Motion for Leave to Appeal, dated August 4, 2023), at 2 ("[T]he Appellate Division did not improperly pass judgment on prior unappealed orders"); *id*.

Petitioners' motion on the ground that the purge order Petitioners sought to appeal did "not finally determine the proceeding within the meaning of the Constitution."[21]

This contempt motion—which is based on far more than DOC's "no escort" non-production statistics and sets forth numerous independent bases to show DOC's noncompliance with the Mandamus Order—follows.

STATEMENT OF FACTS

I. DOC Regularly Cuts Off Phone Access and Fails to Replace Tablets, Preventing Incarcerated People From Accessing Sick Call.

The Mandamus Order demands that DOC "[p]rovide Petitioners' [] with access to sick call on weekdays, excluding holidays."[22] DOC has repeatedly failed to do so.

"Sick call" is the process by which an incarcerated individual can request medical care by calling the health triage phone line ("HTL").[23] While CHS answers the HTL, it is DOC's responsibility to provide *access* to the HTL.[24] Incarcerated people can only access the HTL via the phones in common areas or the phone function on their DOC-issued tablets.[25] CHS nurses answer calls to the HTL and determine whether the reported issue merits a CHS appointment; if so, CHS makes the appointment for the patient (deemed a "sick call appointment").[26] But during

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at 8 (noting that the Mandamus Order "is not itself presented for review"); *id*. at 13 (asserting that the Appellate Division "did not … cast doubt on the finality of Supreme Court's unappealed mandamus and contempt orders"); *see also id.* at 13 ("[S]ince Supreme Court retains continuing jurisdiction to enforce its mandamus order[,] . . . DOC's compliance will continue to be subject to judicial review").

[21] 40 NY3d 1061 [2023].

[22] Mandamus Order, ¶ 2a.

[23] Vela Aff., Ex. 5 (THE SICK CALL PROCESS AND ACCESS TO CARE, Presentation by DOC Deputy Commissioner of Health Affairs James Saunders during New York City Board of Correction, November 14, 2023 public hearing).

[24] Vela Aff., Ex. 3 (NYC HEALTH + HOSPITALS/CORRECTIONAL HEALTH SERVICES UPDATE: PATIENT ACCESS TO CLINICAL CARE, Presentation at NYC Board of Correction public meeting, October 17, 2023), at 5.

[25] Vela Aff., Ex. 4 (OPERATIONS ORDER 11/20, § III).

[26] NYSCEF Doc. No. 202, hearing on March 25, 2022, at 30:24-31:6 (testimony of Chief Ada Pressley that "CHS will determine whether that person, in custody, requires further attention, bringing them or producing them to the clinic."). CHS reports that as of October 2023, about 56% of calls to the HTL resulted in "scheduled appointments for in-person encounters." Vela Aff., Ex. 3, at 4.

housing area or facility-level security lockdowns, which can last days or over a week at a time,[27] DOC cuts off access to the HTL (and therefore to sick call) on both tablets and common area phones.[28]

Class members' evidence illustrates the problem.[29] David Kelly affirms that lockdowns are a frequent occurrence in his housing area and that during lockdowns, DOC allows no one out of their cells to make a phone call, including calls to the HTL.[30] He further states that during lockdowns, the phone application on class members' tablets is disabled and they are unable to make any calls, including to the HTL.[31] Michael Saintume reports that there was a lockdown that lasted eight or nine days in his housing area in OBCC, during which DOC allowed no one—except certain people friendly with the officers—out of their cells to use the housing area phone to call CHS.[32] He affirms that during the same period, DOC cut off access to CHS through tablets for at least two consecutive weekdays, leaving people in custody with no way to request medical attention during that time.[33]

Class member David Gorham and Rebecca Kinsella, the Director of Social Work at Brooklyn Defender Services, explain that DOC also shuts down the phones outside of official

[27] Vela Aff., Ex. 6 (testimony of Deputy Monitor, *Mark Nuñez, et al. v. City of New York*, 11-CV-5845 [S.D.N.Y. Dec. 14, 2023]), at 19:4-12 (describing lockdown lasting "five or so days")); Affidavit of Michael Saintume, ¶ 13 (describing a lockdown lasting "about eight or nine days" during which class members were confined to their cells for 23 ½ hours per day)); Vela Aff., Ex. 7 (BOC Lockdowns Report (October 24, 2022), at 3 n.5 ("Board staff's review of the 84 reported emergency lock-ins at RNDC in September 2022 revealed that 62% of reported emergency lock-ins involved a single housing area and lasted an average of 5 hours and 15 minutes.")); Vela Aff., Ex. 8 (BOC EMERGENCY LOCK-IN REPORT, CY 2023 (December 31, 2023), at ¶ 51 (stating that 51 lockdowns in preceding three months exceeded 24 hours)).

[28] *See* Vela Aff., Ex. 9 (DOC Directive 4009R-C, *Lock-In / Lock-Out*), § IV(A) (setting forth forms of lock-ins of varying size and scope)); *id.* § V(h)(10)(i)-(ii) (during lock ins, no telephone activities are permitted.); Saintume Aff., ¶¶ 13-14 (describing a lockdown in OBCC lasting "about eight or nine days" during which class members in his housing unit were confined to their cells for 23 ½ hours per day); Affidavit of Rebecca Kinsella, ¶ 11; Affidavit of David Gorham, ¶¶ 25, 26.

[29] Kinsella Aff., ¶¶ 11, 12.

[30] Affirmation of David Kelly, ¶¶ 10-11.

[31] *Id*. at ¶¶ 12-13.

[32] Saintume Aff., ¶¶ 15-16.

[33] *Id*.

lockdowns "as a disciplinary tactic" and a means of control. For example, when someone on the unit is refusing to leave to go to court, all phones on the unit would be turned off.[34] DOC's practice of using class members' need to request medical care (and their desire to have contact with their loved ones and legal teams) to coerce them into certain behaviors clearly violates Paragraph 2(a) of the Mandamus Order.

New York City's Board of Correction ("BOC" or "the Board"), which oversees DOC's compliance with minimum health care standards, confirms that DOC's practices during lockdowns threaten access to care. A Board report issued in October 2022 noted that "lockdowns impede the ability of DOC and [CHS] to provide people in custody with . . . mandated services, such as access to health and mental health services…"[35] The report also explained that lockdowns at that time persisted "for longer durations and with greater frequency" than in prior years, exacerbating their impact on access to care.[36] More recently, the court-appointed monitor in the *Nuñez* civil rights case noted that lockdowns following an act of violence often last well beyond what is reasonably necessary, again prolonging class members' inability to access necessary medical care.[37]

DOC also prevents class members from accessing the HTL when it fails to maintain their DOC-issued tablets—for example, by not repairing broken tablets,[38] not replacing lost or stolen tablets, and not ensuring that tablets are charged.[39] At least one class member has been waiting over a year for a replacement for his broken tablet, even though he was placed in a unit without a

[34] Kinsella Aff., ¶ 13; Gorham Aff., ¶ 24.
[35] Vela Aff., Ex. 7, at 2,7.
[36] *Id.* at 2.
[37] Vela Aff., Ex. 6, at 19:4-15 (noting "an extended lockdown of five or so days" and "rais[ing] a question as to whether the extended duration was necessary. Facility leadership could not articulate a clear basis for such a protracted lockdown when asked by the Monitoring Team").
[38] *See* Affirmation of George Gary, ¶¶ 15-16 (stating that a DOC officer told him that about 300 tablets "do not work and require replacement").
[39] Kinsella Aff., ¶ 15.

common area phone for some of that time.[40] This meant he did not have reliable access to the HTL to request help for ongoing health concerns.[41] Despite his legal team contacting DOC several times about this situation, DOC never responded.[42] Finally, people in custody do not have access to chargers and rely on correction officers to charge their tablets for them, so when tablets are not collected, charged, and returned, access to sick call is curtailed.[43]

Further, even when class members have physical access to the HTL, because DOC fails to provide interpreters, non-English speakers are denied full access to the HTL.[44] Class member Jose Farias-Soberanis describes being unable to make appointments via the HTL due to this language barrier, forcing him to rely on others in custody to help him talk to a CHS nurse and make appointments if necessary.[45]

Without access to the HTL, class members can only access "emergency" health care, which corrections officers often inappropriately restrict. DOC policy outlines a number of conditions (ranging from a bruise to a seizure) that require prison officials to escort the person to the clinic for medical attention.[46] But class members report that outside of a near-death emergency—and sometimes even during near-death emergencies—DOC staff does not send or escort a person in custody to a clinician without a preexisting appointment.[47]

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[40] Kinsella Aff., ¶ 17.
[41] *Id.*
[42] *Id.*; *see also id.* ¶ 18 (when a person reported that their tablet had been broken by another person in custody, a correction officer refused to help and called them a snitch).
[43] Kinsella Aff., ¶ 15; Gorham Aff., ¶ 27.
[44] N.Y.C. Admin. Code §§ 9-108(c), § 23-1102(a)(2).
[45] *See* Affidavit of José Farías Soberanis, ¶¶ 20-27.
[46] Vela Aff., Ex. 10 (DOC Directive 4516R-D, *Injury to Inmate Reports*), § IV(B)(1).
[47] *See* Affidavit of Samuel Foster, ¶ 8 (explaining that officers "ignored or dismissed" complaints about "sharp upper abdominal pain, which got worse over time," which soon caused vomiting, hospitalization, and emergency surgery to remove his gall bladder); Affidavit of Stephanie Grabowski Aff., ¶¶ 3-12 (after suffering injury reasonably believe to be a dislocated shoulder, DOC officers ignored requests for immediately medical attention, forcing the class member to get officers' attention by pouring a bucket of water into the 'A' officer station and, when that failed, blocking surveillance cameras with maxi pads to get the officers' attention); Gorham Aff., ¶ 22 ("I was telling the correction officer in my housing area that I need to get to a cardiologist appointment after my

II. DOC Prevents People in Custody From Attending Their Scheduled Medical Appointments.

A. *DOC's and CHS's Statistics Reveal Staggering Failures to Provide Access to Medical Appointments.*

The Mandamus Order requires DOC to "[s]afely keep in the New York City jails each person lawfully committed to [its] custody . . . by not prohibiting or delaying incarcerated persons' access to care, appropriate treatment, or medical or dental services."[48] Yet DOC's own data shows it routinely prevents and delays large numbers of people in custody from attending their scheduled clinic appointments due to factors within DOC's control.

DOC's responsibilities under the Mandamus Order do not end once a person calls the HTL and CHS schedules their medical appointment. People in custody can only attend their scheduled healthcare appointments if they are "produced" by DOC staff—that is, DOC staff must accompany the person to and from their scheduled medical appointments (or allow them to go to the clinic without an escort, a practice that DOC generally eschews).[49] The process works as follows:

First, once CHS makes an appointment for a person in custody—whether initiated by the patient or CHS (*e.g.*, for chronic care needs or supervised medication)—CHS adds the patient to the "call down" list for that day, which "may contain 'priority' indicator or specific time for

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fainting episodes, he refused to help and made fun of me, saying something like, 'why do you need to see a cardiologist, are you pregnant?'); Kinsella Aff., ¶ 31 ("DOC staff also regularly do not help clients access emergency medical care, sometimes inappropriately deciding their symptoms are not serious enough to warrant a trip to the clinic and other times ignoring or mocking these requests.")

[48] Mandamus Order, at 2.b.

[49] Vela Aff., Ex. 3, at 4. Although DOC has told this Court that it would attempt to improve clinic production by allowing some class members to walk to the clinic without an escort, NYSCEF Doc. No 109, affidavit of Ada Pressley, at ¶ 5; NYSCEF Doc. No. 111, respondents' memorandum of law in opposition to petitioners' motion for a finding of contempt and monetary sanctions, at 7; NYSCEF Doc. No. 129, affidavit of Kathleen Thomson, ¶ 10, it is not clear if that is currently happening in any DOC facilities. *See* Kelly Aff., ¶ 9 ("If DOC allowed me to walk to the medication window without an escort, I would do so."); Gary Aff., ¶ 12 ("If DOC had taken me to meet with the nurses who give me my prescribed injections or allowed me to go there by myself, I would be compliant with my medications."); Affidavit of Johnny Basnight, ¶ 16 ("If I could safely get to and from my appointments in a wheelchair without relying on a DOC escort, I would do so.").

production."[50] CHS then shares the call down list with DOC, and a DOC officer provides the list to DOC escort officers, who then should go to the housing areas to notify people of their appointments.[51] If the person is present and agrees to go to the appointment,[52] the officer escorts the person to the clinic or other specialty care facility, where they are placed in a holding area to await the provider. The DOC escorting officer then notifies CHS that the patient has been "produced" for their appointment.[53]

In DOC reporting, a "non-production" means a person was not "produced" for their appointment to see a medical provider, whatever the underlying reason.[54] DOC's data shows monthly non-productions have risen at an alarming pace since the Petition was filed, from 7,671 in October 2021 to 12,224 in May 2024. Total non-productions for every month of the contempt period have been significantly higher than December 2021 (7,070) and January 2022 (6,792), the prior period for which this Court found DOC in contempt of the Mandamus Order.[55] And although the jail population has increased by approximately 16% since January 2022,[56] this growth cannot explain the almost 80% rise in total non-productions over the same period.[57]

Further, DOC conceded in a sworn affidavit that its rate of medical production in

[50] Vela Aff., Ex. 11 (N.Y.C. DEP'T OF CORRECTION, HEALTH AFFAIRS DIVISION, CLINIC PRODUCTIVITY TRACKING AND REPORTING PROCEDURE 1-PAGER), at 3; *see also* NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 121:21-122:20.
[51] NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 121:21–122:3; Vela Aff., Ex. 3, at 2.
[52] If a person decides not to go to a scheduled appointment, this is considered a "refusal." NYSCEF Doc. No. 190, affidavit of Rabiah Gaynor, at ¶ 7. When detainees refuse an appointment, "DOC attempts to document the refusal." NYSCEF Doc No 121, Resp't Post Hearing Memorandum of Law, at 4. "DOC is looking into providing better documentation, including recording refusals on bodycam cameras." *Id.*
[53] NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 127:1-16; 125:15-24.
[54] N.Y.C. Admin. Code § 9-108(a). DOC is required by local law to publish data on medical non-productions online, including the reasons for non-production. *Id* at § 9-108(d).
[55] First Contempt Order.
[56] The New York City jail population was 5,708 on August 1, 2022; it was 6,263 in May 2024. Vela Aff., Ex. 12 (NYC COMPTROLLER BRAD LANDER, STATE OF NEW YORK CITY JAILS (August 9, 2023)), at 2; Vela Aff., Ex. 13 (DIVISION OF CRIMINAL JUSTICE SERVICES, MONTHLY JAIL POPULATION TRENDS (April 2, 2024)), at 2.
[57] There were 6,792 total non-productions in January 2022. Vela Aff., Ex. 14 (N.Y.C. DEP'T OF CORRECTION, MONTHLY REPORT ON MEDICAL APPOINTMENT NON-PRODUCTION (January 2022)). There were 12, 224 total non-productions in May 2024. Vela Aff., Ex. 15 (N.Y.C. DEP'T OF CORRECTION, MONTHLY REPORT ON MEDICAL APPOINTMENT NON-PRODUCTION (May 2024)).

December 2021—72% for "overall clinic production"—"[did] not constitute substantial compliance with the pertinent directives to provide timely access to the clinics."[58] DOC data from the contempt period shows that the rate of non-productions has only increased. Over the course of this case, according to DOC data, people in custody have gone from missing 16%[59] to missing 25% of appointments—a 50% increase.[60] Recent CHS data reflects similar rates of non-production, with patients not produced to 28% of their scheduled appointments in March 2024.[61]

DOC fails to produce patients even after CHS implores DOC to deliver certain high-needs patients to their scheduled appointments,[62] as well as after counsel specifically raises such failures with DOC personnel and counsel for DOC in this case.[63] In ignoring these requests, DOC flouts the processes that are in place specifically "to monitor and escalate non-production to DOC, including escalating requests for production in urgent situations."[64]

Class members' affidavits illustrate the human impact and scale of these statistics. During the first 6 ½ months of 2023, DOC failed to produce Kevin Gamble to 212 appointments, most for twice-daily fingerstick blood tests and insulin injections to manage his Type 1 diabetes. For Larry Anderson, also dealing with diabetes in addition to wound care and medication

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[58] NYSCEF Doc. No. 91, sworn monthly compliance report by Ada Pressley, ¶ 16.
[59] NYSCEF Doc. No. 190, affidavit of Rabiah Gaynor, at ¶ 3 (stating that the total scheduled appointments for December 2021 was 43,090); Vela Aff., Ex. 16 (N.Y.C. DEP'T OF CORRECTION, MONTHLY REPORT ON MEDICAL APPOINTMENT NON-PRODUCTION (December 2021) (listing the total number of non- productions for December 2021 as 7,070).
[60] DOC represented in January 2023 that scheduled appointments range from 40,000 to 50,000 monthly, and Petitioners have no reason to believe these numbers have changed since that date. NYSCEF Doc. No. 188, Affirmation of Chlarens Orsland, at ¶ 3. *See also* Vela Aff., Ex. 17 (disaggregated non-production data from July 2022 – May 2024), at 1 (the total number of scheduled appointments as 46,108); NYSCEF Doc. No. 190, Gaynor Aff., at 3 (monthly scheduled appointments ranged between 41,919 to 52,593 in 2022).
[61] Vela Aff., Ex. 18 (N.Y.C. HEALTH AND HOSPITALS, CORRECTIONAL HEALTH SERVICES, ACCESS TO HEALTH SERVICES REPORT (MARCH 2024)), at 4.
[62] Affidavit of Kevin Gamble, ¶ 11; Affidavit of Larry Anderson, ¶¶ 10-16; Saintume Aff., ¶ 8; Affidavit of Aliou Sow, ¶¶ 7-10; Affidavit of Keith Ellis, ¶¶ 18-23; First Affidavit of Alexander Franco (July 31, 2023), ¶ 8; Gorham Aff., ¶¶ 9-10; Kinsella Aff., ¶ 30; Second Affidavit of Alexander Franco (November 1, 2023), ¶¶ 3-4.
[63] Franco First Aff., ¶ 8; First Affidavit of Tywaine Suber, ¶¶ 6-8.
[64] Vela Aff., Ex. 19 (N.Y.C. BOARD OF CORRECTIONS, SECOND REPORT AND RECOMMENDATIONS ON 2023 DEATHS IN NEW YORK CITY DEPARTMENT OF CORRECTION CUSTODY (February 9, 2024)), at § IV; *see also* N.Y.C. Admin. Code § 9-108(e).

management, it was 97 non-productions over 15 months during the contempt period, about one every five days.[65] Aliou Sow experienced 52 non-productions during a 76-day span in summer 2023, frequently missing twice-daily wound care ordered by CHS.[66] DOC failed to take Tywaine Suber to 28 appointments in August 2023 alone, causing him to miss mental health appointments as well as time-sensitive labs.[67] DOC caused Reginald Scott, who needed medical care for COPD, hypertension, seizure disorder, diabetes, asthma, and hernias, to miss 37 appointments during a five-month span of the contempt period.[68] DOC failed to take Carl Henegain to 35 appointments from November 2022 to June 2023—13 of which were for a "comprehensive mental health treatment plan."[69] David Kelly had 70 non-productions over about 8 months of the contempt period, about one every three days, and most for treatment of a hernia for which Bellevue scheduled him for surgery.[70] He candidly explained: "I have been in custody for the entire time that this *Agnew* case has been pending. My access to medical care has been atrocious throughout. It has never once improved during the pendency of this case. DOC should be embarrassed, but it probably isn't."[71] Ms. Kinsella, who has been visiting DOC's jails approximately weekly for nine years, reported that in her experience, lack of access to care due to DOC's failure to bring people to medical appointments is just as bad now as it was when Petitioners brought this action.[72]

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[65] Affidavit of Larry Anderson, ¶¶ 4-5.
[66] Sow Aff., ¶¶ 4-6.
[67] First Suber Aff., ¶ 3-15.
[68] Affirmation of Reginald Scott, ¶ 6.
[69] Affidavit of Carl Henegain, ¶¶ 6-8.
[70] Kelly Aff., ¶¶ 2-4.
[71] *Id.* ¶ 18. Examples of class members who missed numerous appointments are plentiful. *See, e.g.*, Franco First Aff., ¶¶ 5-7; Franco Second Aff., ¶ 5; Affidavit of Vincent Gibson Aff., ¶¶ 3-4; Affirmation of Jose De Sala-Garcia, ¶¶ 12-14; Affidavit of Dontae Bennett Aff., ¶¶ 3-4; Basnight Aff., ¶¶ 3-4; Affirmation of Shaquan Franks, ¶ 15; Affidavit of Jose Muniz, ¶¶ 19-20; Soberanis Aff., ¶ 5. Class members whose medical records have not been reviewed in detail may not know exactly how often DOC fails to take them to their scheduled appointments. Some class members only learn of missed appointments when CHS clinicians ask why they did not show up to previously scheduled appointments. *See* Soberanis Aff., ¶ 13; Ellis Aff., ¶ 11.
[72] Kinsella Aff., ¶¶ 1, 5, 19.

B. Thousands of DOC Non-Productions Are Due to Factors Within Its Control.

By its own admission, DOC has prevented thousands of people from accessing medical care every single month due to factors within its control, most notably a failure to provide staffing and ensure adequate and safe waiting space.

DOC has already admitted responsibility for all non-productions it categorizes as "no escort," which arise from not providing sufficient staff to escort class members to the clinic or other medical facilities.[73] The number of non-productions DOC reports in this category is significant and rising: from an average of 202 per month in the second half of 2022 to 328 per month in 2023, with a high of 625 in February 2023.[74] This year, no escort non-productions have risen from 221 and 211 in January and February 2024, respectively, to a high of 409 in March 2024. Though these most recent months' figures are less than those recorded during the prior contempt period, a closer examination of the data reveals administrative efforts to obscure reality by changing how DOC reports and categorizes its data.

After the May 2022 Contempt Order, DOC began reporting non-productions in three new categories: "Maximum Safe Capacity," "Priority Medical Emergency," and "Priority Mental Health Visit." These newly created categories include non-productions that were previously combined with the "no escort" non-productions in an "Other" category.[75] Though they have now been separated out, and DOC disclaims responsibility for them, these three categories still describe staffing and management issues that fall squarely within DOC's control. Non-productions in these categories are essentially different names for non-production due to "no escort."

[73] NYSCEF Doc. No. 75, Answer, at ¶¶ 28, 109; NYSCEF Doc. No. 111, respondents' memorandum of law in opposition to petitioners' motion for a finding of contempt and monetary sanctions, at 11-12.
[74] *See generally* Vela Aff., Ex. 17.
[75] *See* NYSCEF Doc. No. 178, petitioners' second motion for contempt, at 13 n.39.

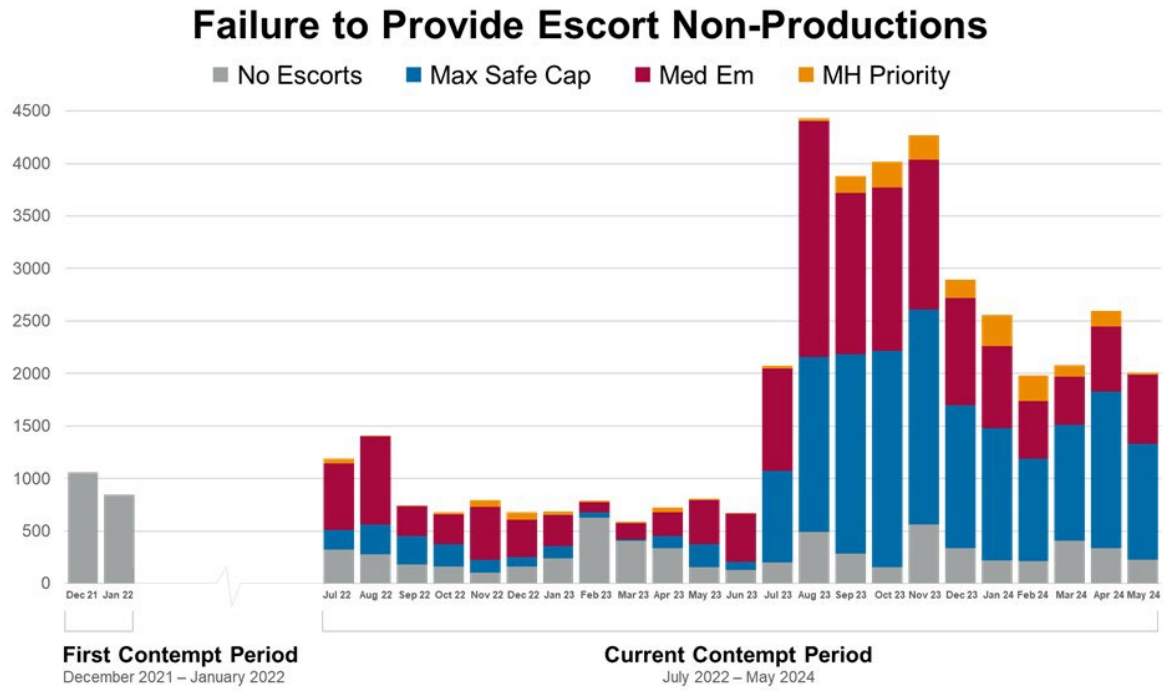
The "Priority Medical Emergency" non-production category, per DOC, "encompass[es] medical and mental health emergencies that preempt planned clinic production" and "reflect[s] instances where a scheduled appointment is preempted by others' need for emergency treatment."[76] In other words, DOC does not have enough escorts available to take people to both scheduled appointments and emergency medical care. DOC makes the same claim about "Priority Mental Health Visit" non-productions,[77] which it claims "encompass[] instances where individuals require a discharge plan appointment."[78]

DOC classifies non-productions as "Maximum Safe Capacity" when it claims there is insufficient space in clinic waiting areas or insufficient staff to ensure safety in waiting areas such that people in custody cannot wait there and must instead remain in their housing units.[79] Because the allotment and use of facility space, the deployment of staff, and managing the arrival of people in custody are solely within DOC's control, "Maximum Safe Capacity" is "simply another way in which pervasive mismanagement and dysfunction is contributing to the medical care crisis in DOC's facilities."[80] "Maximum Safe Capacity" accounts for 17,620 non-productions during the contempt period, with a steady increase over time. Starting in August 2023, over 1,000 non-productions each month have been attributed to Maximum Safe Capacity; in October and November 2023, that number was over 2,000.[81]

DOC admits that "Maximum Safe Capacity" is only an issue "[i]n the absence of having larger space."[82] But in truth, this category bespeaks a lack of effort. DOC's Director of Health Affairs, Rabiah Gaynor, asserted under oath that the medical and mental health waiting spaces

[76] NYSCEF Doc. No. 140, affidavit of Rabiah Gaynor, ¶ 23.
[77] *See id.* ¶¶ 18, 23-24.
[78] *Id.* ¶ 24.
[79] *Id.* ¶ 20; *see* NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 128:21-24.
[80] *See* NYSCEF Doc No. 141, Aff. of Petitioners in Sur-Reply to the Department of Correction Compliance, ¶ 10.
[81] *See* Vela Aff., Ex. 17, at 14–17.
[82] NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 130:2-4.

for RNDC combined hold only 4-5 people.[83] In June 2022, DOC identified additional holding space for clinic production patient overflow at RNDC, and DOC began to reduce non-productions at that facility due to "Maximum Safe Capacity"[84] DOC is clearly able to secure space when it wants to, but has chosen not to secure sufficient space for OBCC, which has been responsible for 12,577 "Maximum Safe Capacity" non-productions since it reopened in August 2023.[85] Neither has DOC implemented a plan that staggers the arrival of people from different housing units more effectively so that multiple groups do not arrive at the clinic at the same time.[86]



As the above chart demonstrates, non-productions due solely to DOC's mismanagement are now several times what they were when the Court previously entered contempt. In May

[83] *Id.* at 128:1-7.
[84] NYSCEF Doc. No. 190, Affidavit of Rabiah Gaynor, at 4-5; Vela Aff., Ex. 66.
[85] *See* Vela Aff., Ex. 17, at 15-24.
[86] DOC claimed previously that CHS had "developed a revised approach to scheduling groups of patients by service and blocks of time within a tour" to "spread production of incarcerated individuals over the course of a tour." NYSCEF Doc. No. 129, affidavit of Kathleen Thomson, at ¶ 14. This plan was said to have rolled out at AMKC. *Id.* There is no indication it was ever used in other facilities.

2022, DOC was held in contempt due to its "1,061 instances of non-compliance…in December 2021 and 848 instances of noncompliance in January 2022"[87]—an average of 954.5 contemptuous non-productions per month. By contrast, since July 2022, DOC has averaged 2,256 contemptuous non-productions per month.

A final category of non-productions also falls within DOC's direct control: security "emergencies." During alarms, tactical search operations ("TSOs") and lockdowns, DOC decides on an *ad hoc* basis whether to produce someone to their medical appointment, the result of which is that most people miss their appointments during these times.[88] As discussed above, the BOC has criticized DOC's use of lockdowns during security events as frequently longer and more widespread than necessary, citing specific concerns about their impact on health services.[89] Likewise, DOC's own policy on lock-ins states that the "Department shall affect lock-ins while minimizing disruption of mandated programs and services of the facility" and that during lock-ins, "out-of-house movement for medical reasons . . . shall be authorized."[90] Mayor Eric Adams concurs, recently opining that, "I don't know of a time when you should block someone's medical care."[91] Nonetheless, between July 2022 and May 2024, DOC reported 5,681 non-productions due to an "Alarm," 2,114 non-productions due to a "Lockdown," and 1,580 non-productions due to a "TSO."[92]

[87] First Contempt Order, at 4.
[88] Vela Aff., Ex. 9, §§ II(F), V(B)(10)(h)(i)-(ii); Kinsella Aff., ¶ 11 ("DOC also usually does not take people to their medical appointments during lockdowns.").
[89] Vela Aff., Ex. 7, at 2, 6-7.
[90] Vela Aff., Ex. 9, §§ II(F), V(B)(10)(h)(i)-(ii).
[91] Vela Aff., Ex. 20 (Transcript of Mayor Adams Statements, July 23, 2024), at 8.
[92] *See generally* Vela Aff., Ex. 17.

III. DOC's Conduct Obscures Its Noncompliance with the Mandamus Order.

A. DOC Overcounts "Refusals" and Wrongly Disclaims Responsibility for Non-Productions.

According to DOC, the greatest cause for non-productions[93] is the "refusal by an incarcerated individual to allow the department to produce such incarcerated individual to clinic for a medical appointment."[94] Petitioners have raised concerns regarding both the veracity of these numbers and DOC's responsibility for refusals since this lawsuit was filed. DOC's reported monthly refusals increased from about 1,700 in the summer months of 2020 to around 6,000 in August 2021.[95] Since the filing of this lawsuit, monthly refusal numbers reported by DOC have continued to rise to a high of 9,419 in August 2023—a number much higher than the *total* number of non-productions in December 2021 (7,070) or January 2022 (6,792).[96] Over the past year, there has been an average of 7,422 refusals reported per month.[97] Such a dramatic increase in DOC-reported refusals is inconsistent with class members' accounts and widespread reporting that people in custody are desperate for access to medical care.[98]

First, DOC incorrectly assumes that if a patient was not produced to the clinic, they "refused." As DOC's Bureau Chief of Facility Operations testified in this case, when DOC compiles non-production reports, "[i]f [people in custody] weren't produced at all, then we know they refused from the housing areas so that's already known."[99] This assumption lacks any logical underpinning or evidentiary support. In fact, sometimes the assumption requires only

[93] *See generally id.* For example, in March 2024, refusals made up 7,513 out of 12,122 reported non-productions. *Id.* at 21.
[94] N.Y.C. Admin. Code § 9-108(a); *see* NYSCEF Doc. No. 190, affidavit of Rabiah Gaynor, at ¶ 7 (a refusal is "when an individual decides not to go to a scheduled appointment").
[95] NYSCEF Doc. No. 1, petition, at ¶ 30; NYSCEF Doc. No. 75, Answer, ¶ 30 (admitting increase in refusals).
[96] *Compare* Vela Aff., Ex. 17, at 14 (August 2023), *with id.* at Vela Aff., Ex. 16, at 1 (Dec. 2021), *and* Vela Aff., Ex. 14, at 1 (Jan. 2022).
[97] *See* Vela Aff., Ex. 17, at 11–23.
[98] Petition, ¶ 30; *see supra* Sections I–II.
[99] NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 136:21-22.

minimal investigation to determine its falsity. Charizma Jones' medical records reflect missed *on-island* appointments on May 26 and May 27, 2024, which DOC reported to CHS as "pt. refused."[100] In fact, on those dates, Ms. Jones had already been confined in an *off-island* hospital for about three weeks.[101] Instances such as these not only violate DOC's responsibility to accurately categorize forms of non-production but evince outright abuse of the refusal category to hide its noncompliance with the Mandamus Order.

Second, DOC falsely classifies non-productions as "refusals" when patients requested medical care but DOC never gave them the opportunity to attend the appointment or even informed them that an appointment was scheduled.[102] Class member affidavits collectively identify dozens of bogus refusals reported by DOC to CHS that are then documented as a refusal in CHS records. For example, DOC falsely reported to CHS that Kevin Gamble had refused access to a staggering 44 separate appointments in 28 weeks.[103] As David Kelly bluntly affirms:

> [L]et me be crystal clear: I have never refused to be taken to a medical appointment while in DOC custody – not once. I note that the medical record for the bogus refusal on May 24, 2023 reads: 'Pt refused to come to the clinic for [sick call] as per DOC Francis #15968.' I do not know who Officer Francis is, but I never refused a medical appointment to him or anyone else. If Officer Francis told CHS that I refused, he was lying and should be held accountable.[104]

In short, this practice is pervasive.[105]

Third, DOC repeatedly coerces class members into "refusing" to attend scheduled

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[100] Quackenbush Aff., ¶ 25.
[101] *Id*., ¶¶ 23-25.
[102] Kinsella Aff., ¶ 25.
[103] Gamble Aff., ¶ 9. The Legal Aid Society is currently suing DOC under the New York State Freedom of Information Law seeking *any* evidence that *any* of these alleged refusals were genuine. *See Legal Aid Soc. v. N.Y.C. Dep't of Corr*., Index No. 700377/2024 [Sup. Ct. Queens Cnty.].
[104] Kelly Aff., ¶ 5-6.
[105] *See* De Sala-Garcia Aff., ¶¶ 23-24; Franks Aff., ¶ 16; Muniz Aff., ¶¶ 15-16; Henegain Aff., ¶¶ 10-12; Ellis Aff., ¶ 8; First Affidavit of Keyion Cheairs, ¶¶ 5-6; Anderson Aff., ¶ 6 (Larry Anderson found in his medical records that DOC had falsely told CHS that he refused an appointment on November 2, 2023); Foster Aff., ¶7; Bennett Aff., ¶ 5 (Dontae Bennett denies refusing appointments on January 9 and February 13, 2023, but his medical records show DOC told CHS he refused care those days.).

medical appointments when the true reason a person cannot access care is within DOC's control, *e.g.*, lack of staffing for transportation. Take specialty appointments at Bellevue Hospital: DOC is responsible for transporting people in custody to those appointments but often fails to do so. Instead, DOC pressures people—with mixed results—into "refusing," as occurred with Clifford McClinton,[106] Matthew Claire,[107] and Theodore Gallo.[108] DOC staff members also pressure people in custody to sign refusal forms when staff simply do not want to take class members to their appointments.[109] Escort officers at Bellevue even tried to coerce James Clark into refusing his appointment while already at the hospital because the officers wanted to return to Rikers Island before 5:00 p.m.[110]

Fourth, DOC has classified missed appointments as "refusals" when it does not provide people in custody with medically necessary mobility aids. Johnny Basnight, for example, required a wheelchair to get to the medical clinic, as indicated in his CHS records. Nonetheless, DOC twice deemed Mr. Basnight to have refused his scheduled medical care because DOC would not permit him to access a wheelchair to get to the appointments.[111]

Fifth, evidence also shows that DOC deceptively documented non-productions for lockdowns and maximum safe capacity as "refusals." Class member Michael Saintume's entire unit was on lockdown on October 7, 2023, and no one from his unit was produced for medical appointments. Yet DOC told CHS that Mr. Saintume was not produced because he refused: "DOC made it up."[112] Mark Tortora was pressured to sign a refusal of treatment form after a

[106] Affidavit of Clifford McClinton, ¶ 6-7.
[107] Affidavit of Matthew Claire, ¶¶ 3-6.
[108] Affidavit of Theodore Gallo, ¶ 4.
[109] Kinsella Aff., ¶ 26; Gorham Aff., ¶ 20.
[110] Affidavit of James Clark, ¶¶ 2-8.
[111] Basnight Aff., ¶¶ 7-12.
[112] Saintume Aff., ¶ 19.

DOC officer concluded that the clinic waiting area was too crowded, which Tortora resisted.[113] Samuel Foster recalls nearly 20 occasions when DOC engaged in such a pressure campaign; he declined to sign each time.[114] DOC's practice of pressuring people in custody to cover up its production failures (often successfully) evinces the Department's contempt of its lawful obligations under both statutory law and this Court's order.

Sixth, in addition to this overwhelming firsthand evidence showing that DOC falsely characterizes non-productions attributable to its own mismanagement as refusals, DOC's refusal data is incredible on its face. For example, across jails DOC's data provides disparate refusal rates, suggesting staff at different facilities vary widely in their practice of designating non-productions as refusals. In May 2024, DOC claimed that refusals accounted for 43 percent of non-productions at RNDC and RMSC, while refusals accounted for 82 percent and 79 percent of non-productions at RESH and GRVC respectively. DOC also claimed that zero percent of non-productions at WF were refusals. When these numbers are considered in conjunction with the other evidence Petitioners have submitted, it is much more likely that these disparities are due to data falsification rather than people rejecting medical care at such disparate and inconsistent rates across jails. Importantly, CHS data on refusals further suggests that DOC refusal data is fabricated, as CHS reports verified refusal[115] rates that are generally consistent across facilities and months.[116]

[113] Affidavit of Mark Tortora, ¶¶ 9-10.
[114] Foster Aff., ¶ 7.
[115] "Verified refusals" are refusals that occur in the clinic in the presence of CHS staff. *See, e.g.,* Vela Aff., Ex. 11, at 2, 8 (using term "refusal verified" and "verified refusal").
[116] For example, in January 2024 CHS reported average verified refusal rates of 6 percent for all jails. Verified refusal rates from individual jails were: 6 percent from EMTC, 6 percent from GRVC, 7 percent from NIC, 1 percent from OBCC, 8 percent from RESH, 6 percent from RSMC, 5 percent from RNDC and 6 percent from WF. That same month DOC reported a refusal rate of 56 percent from EMTC, 86 percent from GRVC, 53 percent from NIC, 57 percent from OBCC, 90 percent from RESH, 75 percent from RMSC and 42 percent from RNDC. Vela Aff., Ex. 18, at 4–12; Vela Aff., Ex. 17, at 19.

Seventh, DOC is able to videotape refusals but does not, leaving the number of legitimate refusals completely unknowable. In an effort to convince this Court to purge DOC's contempt, Chief Pressley testified under oath that DOC "started filming [refusals], trying to film the refusal[s]" in March of 2022 because CHS requests proof of refusals rather than accepting DOC officers' statements that a patient refused medical care.[117] While Pressley's testimony is consistent with DOC's body worn camera policy,[118] in practice, DOC has never consistently recorded refusals that could corroborate its self-reported statistics.[119] In fact, as recently as May 3, 2024, BOC criticized DOC for its failure to do so.[120] DOC has known about its problem of falsified and overcounted refusals all the while and done nothing,[121] despite the fact that it has an established policy and practice of video recording refusals of production to disciplinary hearings[122] and to court,[123] and for anticipated uses of force.[124]

Eighth, DOC has conceded that legitimate refusals are largely driven by DOC's own failure to provide security in the hallways to and from medical appointments. As Chief Pressley testified, "most" refusals occur when "individuals in custody don't feel protected" in the hallways and corridors leading to CHS clinics, as well as in CHS intake and waiting areas, a

[117] NYSCEF Doc. No. 202, hearing on March 25, 2022, at 39:8-9 (testimony of Chief Ada Pressley).
[118] Policy provides that staff "shall activate their camera to record all interactions with individual(s) in custody" absent certain inapplicable conditions. Vela Aff., Ex. 21 (Operations Order 1/22, Body Worn Camera (BWC), eff. 5/13/2022), § III(J); *see also* Vela Aff., Ex. 22 (Teletype Order No. HQ-01500-0, *Obtaining Compliance with Body Worn Cameras*, dated June 24, 2022), at ¶ 2 (directing commanding officers to ensure that staff comply with Operations Order 1/22).
[119] *See, e.g.,* NYSCEF Doc. No. 89, letter, at p. 3-4.
[120] *See* Vela Aff., Ex. 23 (BOC Deaths Report, 5/3/2024), at 12 (Recommendation No. 7 citing DOC Operations Order #1/22 (Vela Aff., Ex. 21)).
[121] Petition, ¶ 30. In addition to Petitioners, Correctional Health Services brought to DOC's attention that the refusals DOC documents were not matching up to a patient's statements or medical record, and CHS was "absolutely accurate" in doing so. NYSCEF Doc. No. 203, testimony of Rabiah Gaynor, at 137:2-14.
[122] Vela Aff., Ex. 24 (Teletype Order No. HQ-00316-0, dated February 18, 2022).
[123] Vela Aff., Ex. 25 (Teletype Order No. HQ-01857-0, dated August 9, 2023), at ¶ 3-5.
[124] Vela Aff., Ex. 26 (Directive 5006R-D, Use of Force, Section VI(A)(3)(e)(i)).

failure DOC attributed at that time to "staffing issues."[125] Affidavits from class members similarly show how DOC's failed security measures cause refusals.[126] When DOC cannot ensure safe passage to and from appointments or safe waiting spaces, compelling people to refuse medical care because they are afraid to leave their cells, DOC is culpable for people's inability to access medical care.[127]

A misidentified refusal for any of the above-mentioned reasons is also likely to cause pernicious follow-on effects, as CHS could interpret a "refusal" as a sign that the medical need has resolved when such a need persists. CHS has a practice of cancelling sick call appointments after three consecutive non-productions,[128] and class members are aware of this possibility.[129] For example, Jose Muniz's records show that Officer Burke told CHS he had refused a mental health appointment when he did not, but he fears that his mental health clinicians will think he no longer needs or wants such care.[130] Matthew Claire attests to the same fears after he was pressured to sign a refusal form when DOC failed to provide transportation for his appointment.[131] As Vincent Gibson explained, CHS may "think that patients do not want

[125] NYSCEF Doc. No. 202, hearing on March 25, 2022, at 37:20-38:13 (testimony of Chief Ada Pressley). Corroborating this testimony is a recent report in the *Nuñez* litigation, in which the monitor found that the lack of security at RESH caused some residents to refuse to leave their cells. *See* Vela Aff., Ex. 27 (*Nuñez* Report, 11/8/23), at 4 ("The initial implementation of the Department's new restricted housing units for those who engage in serious violence while in custody has been exceedingly poor. Rife with leadership turnover, staffing shortages, inconsistent delivery of mandated services, and inexplicable security failures (including a steady flow of weapons and drugs into these high-security units), the RESH program has been plagued by violence such that some of the people in custody choose to remain in their cells throughout the day.").
[126] Second Affirmation of Tywaine Suber, ¶ 9 ("If DOC had made sure that I would be safe while walking to and from the clinic, I would have gone to the clinic. But DOC made me miss several medical appointments because it did not provide enough security for me to make that trip safely. It basically made me choose between my physical safety and my twice-daily wound care, and I usually chose my physical safety. DOC should not force me to make that choice.").
[127] *See* Mandamus Order, at ¶ 2(b) (requiring DOC to provide "sufficient security for the movement of incarcerated persons to and from health services").
[128] *See* Vela Aff., Ex. 28 (CHS Sick Call Nursing Protocol); Vela Aff., Ex. 19, at 8-9.
[129] *See* De Sala Garcia Aff., ¶ 8 ("When I complained to DOC staff about them not taking me to my appointments, DOC staff explained that my name falls off the CHS medical calldown list after three days and that I have to call the sick call line every three days or I won't be seen.").
[130] Muniz Aff., ¶ 16.
[131] Claire Aff., ¶¶ 3-7. Mr. Claire declined to sign the form. *Id*.

medical care if they don't show up to the clinic, even if it is DOC's fault. But I *do* want medical care. I just need DOC to take me to the appointments or let me go there on my own."[132] Other class members share these fears.[133]

B. CHS's Non-Production Data Reveals DOC's Data Is Deceptive.

CHS publishes quarterly Access to Health Services reports with monthly breakdowns of the outcomes of all scheduled CHS services.[134] This data, which, unlike DOC's data, is compiled using electronic records, calls into question the accuracy of DOC's reporting.[135] According to these CHS reports, DOC consistently undercounts overall non-productions to clinical appointments by several thousand missed appointments. For example, in December 2023, when DOC reported 11,930 total non-productions across all categories, CHS reported 16,652 total non-productions.[136] According to CHS data, in December 2023, people in DOC custody were not produced to almost a third of all scheduled CHS appointments.[137] For every month since the Petition was filed, CHS has documented thousands more missed medical appointments due to non-productions than DOC has acknowledged, showing that the access to care crisis is even graver than DOC's statistics suggest.

C. DOC's Self-Reported Data Likely Underestimates the Problem Due to Falsification and Inaccuracy.

DOC's self-reported medical non-production statistics likely underestimate the degree to which people in custody cannot access medical care. DOC's published data is largely aggregated

[132] Gibson Aff., ¶ 7 (emphasis in original).
[133] *See* Basnight Aff., ¶ 15; Gamble Aff., ¶ 15; Henegain Aff., ¶¶ 10-11.
[134] *See* N.Y.C. BOARD OF CORRECTION, *Correction Health Services Reports: Access to Health Services Reports*, https://www.nyc.gov/site/boc/reports/correctional-health-authority-reports.page. "This Court has discretion to take judicial notice of material derived from official government web sites[.]" *LaSonde v. Seabrook*, 89 AD3d 132, 137 [1st Dept 2011].
[135] *Id.* ("In April 2016, CHS started producing monthly access reports using data from its electronic health records.").
[136] *Compare* Vela Aff., Ex. 29 (N.Y.C. Dep't of Corrections, Medical Nonproduction Report (December 2023)), at 2, *with* Vela Aff., Ex. 30 (CHS Access to Health Services Report, October-December 2023), at 29.
[137] *See* Vela Aff., Ex. 30, at 29.

from data collected by hand.[138] But evidence shows that DOC officers routinely falsify written data records to cover up various DOC failures, leading to inaccurate aggregate data. BOC reports are replete with evidence of forged records, such as falsified logbooks[139] purportedly used to document housing tours and provision of medical assistance in situations that resulted in the deaths of people in custody.[140] As a result, BOC's too-frequent death reports regularly implore DOC to "timely document accurate information in logbooks and other agency databases" and swiftly transition to electronic recordkeeping.[141] DOC's documented practice of creating false or inaccurate records in combination with the evidence discussed above illustrates DOC's misinformation campaign to cover up the lack of access to medical care.

One class member's records illustrate the complete unreliability of DOC's non-production data. In February 2024, DOC reported only one no-escort non-production for all of RESH,[142] and zero for March 2024.[143] During this time, a person incarcerated in RESH tried to access care to treat an infected abscess on his face[144] as well as mental health care because he was struggling with serious depression and sleeplessness.[145] His medical records show that DOC failed to produce him to medical appointments *twenty times* in February 2024 and thirteen times

[138] Vela Aff., Ex. 11, at 9.
[139] Vela Aff., Ex. 19, at 17 (quoting DOC Directive #4514R-C ("[l]ogbook entries must be made without undue delay and must be recorded legibly, accurately, and concisely, in chronological order using military time.")).
[140] Vela Aff., Ex. 31 (N.Y.C. Board of Correction Deaths Report (April 12, 2023)), at 2 (finding "inaccurate or incomplete logbook entries in six [of the nineteen] cases" reviewed); Vela Aff., Ex. 32 (N.Y.C. Board of Correction Deaths Report (Nov. 16, 2022)), at 23 (finding "inaccurate or deficient logbook entries in at least three" deaths); Vela Aff., Ex. 33 (N.Y.C. Board of Correction Deaths Report (Nov. 9, 2023)), at 2 (concluding that "[i]naccurate or incomplete logbook entries" were an issue "in all four investigated deaths); *see also id*. 21-22; Vela Aff., Ex. 19, at 3 ("identif[ying] deficient or inaccurate logbook entries in three cases").
[141] Vela Aff., Ex. 32, at 29; *accord* Vela Aff., Ex. 19, at 22 (same recommendation). Other data issues flagged by the *Nuñez* monitor include electronic data systems that "could later be altered" and were thus "unreliable," Vela Aff., Ex. 34 (*Nuñez* Report, 2/3/23), at 13; failure of staff to consistently track data even when required by court order, Vela Aff., Ex. 35 (*Nuñez* Report, 4/24/23), at 11-12; and a "lack of internal vetting" of data, "cast[ing] doubt on [its] veracity," Vela Aff., Ex. 36 (*Nuñez* Report, 6/8/23), at 22.
[142] Vela Aff., Ex. 17, at 20.
[143] Vela Aff., Ex. 17, at 21.
[144] Kinsella Aff., ¶ 22.
[145] *Id*.

in March 2024.[146] During a two-week stretch in this time period, CHS scheduled an appointment every day, sometimes a second time the same day when he was not produced for the initial appointment. DOC did not produce him to a single appointment during these two weeks.[147] This person's records alone show 33 DOC non-productions during a time when DOC claims the facility had no more than one no-escort non-production.[148] In most cases, he was never told he had an appointment.[149]

This improper recordkeeping further obscures the extent of the Department's noncompliance, as the inaccurate data artificially lower DOC's medical non-production numbers.

IV. DOC Routinely Prohibits and Delays Access to Medical Care Outside of the Context of Scheduled Medical Appointments.

A. DOC Staff Fails to Provide Emergency Medical Aid, or Access Thereto In Response to Medical Emergencies.

Consistent with its ministerial duties to "safely keep" people committed to its custody, DOC policy requires staff to provide emergency medical aid when necessary to prevent serious injury or death.[150] Yet evidence shows that DOC staff often fail to provide emergency aid to people in custody in immediate medical distress.[151]

BOC noted in its November 16, 2022 deaths report that "[c]orrectional staff failed to

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[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See* Vela Aff., Ex. 37 (Directive 4517R (eff. 06/18/14), *Inmate Count Procedures*), App. A, 7.05.060 (DOC staff "shall render emergency first-aid as appropriate" to people encountered during the institutional count who require immediate medical attention); Vela Aff., Ex. 38 (Directive 4521R-A (eff. 2/2/21), *Suicide Prevention and Intervention*), § V(C)(1)(a)(iii) (directing DOC staff to "take immediate action to stop the individual from harming themselves"). *See also* Vela Aff., Ex. 39 (DOC Operations Order 5/17 (eff. 4/28/17), *Emergency Health Care Log*), § I ("It is the policy of the Department to ensure that all inmates are afforded prompt medical attention when required.").
[151] Kinsella Aff., ¶ 31; Gorham Aff., ¶¶ 5, 11, 22 ("I became lightheaded, could not breathe and nearly fainted several times. I asked correction officers in my unit to get me to the clinic, but they did not take me until hours after my initial request.").

render immediate first aid to people in custody on multiple occasions."[152] Similarly, the *Nuñez* monitor noted multiple instances in which people experiencing medical emergencies did not receive care for substantial periods of time. Some of these reports are harrowing. In one instance, DOC waited 18 hours to provide medical care to a victim of sexual assault with serious, obvious injuries to his face.[153] In another, DOC officers left a "visibly bloody" man who had just been assaulted "naked and alone for at least three hours"; even though "multiple staff pass[ed] by him during this time, none provided assistance."[154]

DOC's failure to provide emergency medical care or allow CHS to provide care has also led to several deaths. In BOC's report concerning 19 deaths in custody in 2022, it explained that "correction officers failed to render immediate first aid to unresponsive individuals in five instances."[155] In one particularly egregious incident, on August 25, 2022, three DOC officers failed to render aid after Michael Nieves slit his own throat, standing by for at least ten minutes as Mr. Nieves bled from his lethal wound on the floor.[156] And as mentioned above, in July 2024, DOC staff repeatedly—about 5 or 6 times over a two-day period—blocked CHS from assessing Charizma Jones' condition, refusing to open her cell door for clinicians as her condition visibly

[152] Vela Aff., Ex. 32, at 29. It added that "DOC should reevaluate and strengthen its CPR and first aid training for staff as several officers. Training should focus specifically on how to aid a person hanging from a ligature and people who show signs of overdose, such as bleeding or foaming from the nose or mouth." *Id*. Even before this report, BOC had previously noted that "DOC and CHS do not seem to have an acceptably functioning system for providing emergency care to persons in life-threatening situations." Vela Aff., Ex. 40 (N.Y.C. Board of Corrections Deaths Report (May 9, 2022)), at 7.
[153] Vela Aff., Ex. 41 (*Nuñez* Report, July 10, 2023), at 53-54. In another instance, DOC staff left a person "experiencing severe seizures . . . unattended for a substantial period of time before he was escorted for medical attention. Vela Aff., Ex. 35, at 16.
[154] Vela Aff., Ex. 42 (*Nuñez* Report, May 26, 2023), at 6.
[155] Vela Aff., Ex. 31, at 2.
[156] *Id.* at 11-12, at 27; Vela Aff., Ex. 43 (Jan Ransom, *Man Held at Rikers Dies from Razor Wound After Guards Fail to Intervene*, N.Y. TIMES, Aug. 30, 2022)).

worsened.[157] Sadly, other examples abound.[158]

B. DOC Regularly Fails to Conduct Tours and Complete the Institutional Count.

DOC policy requires officers to conduct regular institutional counts and regular touring to identify people in need of medical care and ensure "that medical care is initiated promptly when needed."[159] Each command must conduct at least six scheduled counts per day as well as emergency counts and regular unscheduled counts,[160] and an officer must conduct rounds of each housing area every 30 minutes (or every 15 minutes for suicide prevention aids in specialized units, to be supervised by 'B' officers).[161] Consistent with DOC's ministerial obligations, reflected in its policies, correction officers are also expected to immediately seek medical attention when they learn that a person is in medical distress, without waiting for a request from the person.[162] In other words, this is a form of medical care that *must* be provided to incarcerated individuals.

DOC staff, however, routinely fail to comply with these obligations, sometimes with

[157] Quackenbush Aff., ¶¶ 8-24; Vela Aff., Ex. 1; Vela Aff., Ex. 44 (Graham Rayman, *NYC Correction Staff Blocked Medical Staff from Treating Rikers Island Prisoner Who Later Died*, N.Y. DAILY NEWS, July 23, 2024).
[158] Chima Williams died after DOC officers found him unconscious and failed to administer CPR or Narcan even after they discovered he had a pulse. Vela Aff., Ex. 45 (N.Y.C. Board of Correction 5-day Death Report Regarding Chima Williams), at 4-5; *see also* Vela Aff., Ex. 23, at 4. DaShawn Carter died after the "B" officer who was alerted that Mr. Carter was unresponsive "did not render first aid or CPR, instead pacing the corridor where he was confronted by a person in custody, before going to the 'A' station." Vela Aff., Ex. 32, at 22. The same thing happened to Ricardo Cruciani. When officers cut the ligature from which he was hanging, "the 'A' post officer failed to render any immediate first aid or CPR." *Id.* Felix Taveras died from an overdose when DOC officers failed to initiate an emergency medical response despite knowing that Mr. Taveras was ill. Vela Aff., Ex. 33, at 20-21. Gilberto Garcia died after "[u]niformed staff waited four minutes before going inside [his] cell after discovering him unresponsive." Vela Aff., Ex. 31, at 27.
[159] Vela Aff., Ex. 37, at §§ II.E, VI (referring to DOC Rules and Regulations § 7.05.060); *see also, e.g.*, Vela Aff., Ex. 46 (testimony of DOC Correction Officer Ladale Cadogan in *People v. Hillman* [Sup. Ct. N.Y. Cty. 2023]), at 276:24-277:19; Vela Aff., Ex. 47 (testimony of DOC Correction Officer Oscar Rojo in *People v. Hillman* [Sup. Ct. N.Y. 2023]), at 362:9-14, 480:12-18.
[160] Vela Aff., Ex. 37, § V.
[161] Vela Aff., Ex. 19, at 23.
[162] *See, e.g.*, Vela Aff., Ex. 37, at App. A, 7.05.060 ("If the officer reaches a point in these efforts where the officer feels the inmate may be in need of medical attention/assistance, the officer will alert the officer on post to notify the Control Room Captain and request medical assistance. The officer conducting the count shall remain in close proximity of the inmate or the inmate's cell, in order to keep the inmate under close observation, and shall render emergency first-aid as appropriate.").

disastrous consequences, as evidenced by post-mortem reports on deaths in custody.[163] The BOC identified this failure when reporting on the 19 deaths that occurred in DOC custody in 2022: "Correction officers did not tour or supervise people in accordance with Department policy in 13 of the [19] deaths."[164] The *Nuñez* monitor likewise noted that "[s]taff seemingly fail to recognize the resulting safety risks or the ways in which these practices elevate the likelihood of a tragic outcome."[165] A *Nuñez* compliance audit found that captains made only about half of their required tours, and those they did make were incomplete or failed to address obvious issues in the unit.[166] Thus, the *Nuñez* Action Plan of June 2022 includes a requirement that the Department conduct routine tours and immediately institute improved practices to ensure routine touring happens.[167] Class members also report that correction officers are regularly missing from the floor of housing units and fail to conduct rounds, limiting access to emergency medical care.[168]

DOC is aware of the catastrophic impact of failing to perform such checks, and the BOC has stated that DOC staff's failure to regularly check on the status of every person on the schedule required by the housing unit "is a chronic and life-threatening issue."[169] Last year, a

[163] *See* Vela Aff., Ex. 19, at 21-22 (naming Recommendation to DOC No. 1: "DOC should use these cases of lapses and serious outcomes when reinforcing and retraining staff on basic supervision, touring, and logbook entry practices, including but not limited to, correction officers' responsibility to be vigilant, remain on post, and to document personal breaks, meals, and details regarding unusual incidents accurately and legibly."); Vela Aff., Ex. 33, at 27-28 (listing an analogous recommendation to DOC); Vela Aff., Ex. 31, at 33 (same); Vela Aff., Ex. 32, at 28 ("DOC must ensure that correction officers and captains conduct regular tours and directly supervise people in custody, in accordance with DOC's own policies.").
[164] Vela Aff., Ex. 31, at 2, 26.
[165] Vela Aff., Ex. 67 (*Nuñez* Report, Aug. 7, 2023), at 7.
[166] Vela Aff., Ex. 27, at 13; *see also* Vela Aff., Ex. 49 (*Nuñez* Report, Apr. 18, 2024), at 14.
[167] Vela Aff., Ex. 50 (*Nuñez* Action Plan, Dkt. No. 465), at § A(1)(d) ("The Department shall conduct routine tours, including, but not limited to, tours of the housing units every 30 minutes. The Department shall immediately institute improved practices to ensure that routine touring is occurring, including the use of the 'tour' wand by Correction Officers during each tour conducted.").
[168] *See, e.g.* Gorham Aff., ¶ 21.
[169] Vela Aff., Ex. 40, at 7. Another example of touring failures found during a BOC death investigation is that of Mary Yehudah, who did not leave her cell for three days before she died in custody of ketoacidosis (a complication

DOC captain was convicted of criminally negligent homicide for her inaction when faced with a suicidal person in custody in 2020.[170] Indeed, there are numerous instances in which a person's death would have been prevented had officers complied with their obligations, correctly toured the facilities, and provided emergency health care services upon discovering a person in medical distress.[171]

V. DOC's Failure to Provide Access to Medical Care Has Caused Class Members Serious and Even Deadly Harm.

Since the Mandamus Order was entered in this case, class members have died after DOC staff failed to take them to their scheduled medical appointments, failed to safely keep them in custody by not conducting rounds and counts, and otherwise delayed or prevented access to care. For example, CHS records show that DOC failed to produce Curtis Davis for several psychiatric appointments in the weeks before his death. Having been denied prescribed psychiatric appointments, Mr. Davis died by suicide on July 23, 2023; he hanged himself with bed linens.[172] William Johnstone died only a week before Mr. Davis.[173] CHS records note that DOC failed to produce Mr. Johnstone to over 50 EKG and chest x-ray appointments in the weeks before his

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of diabetes). When she was found unresponsive on the floor of her cell at 8:55 a.m. on May 17, 2022, corrections officers had looked into her cell only once (at 7:32am) between 2:20 a.m. and 9 a.m. Vela Aff., Ex. 51 (N.Y. ATTY GEN., OFFICE OF SPECIAL INVESTIGATION, THIRD ANNUAL REPORT (Oct. 1, 2023)), at 34.

[170] Vela Aff., Ex. 52 (Maria Cramer & Wesley Parnell, *Jail Captain Convicted of Negligent Homicide in Hanging Death of Inmate*, N.Y. TIMES (March 14, 2023)).

[171] Vela Aff., Ex. 53 (N.Y.C. Board of Correction 5-day Death Report Regarding William Johnstone), at 4-5; Vela Aff., Ex. 19 at 5, 7, 10, 15-17; Muniz Aff., ¶¶ 2-7; Vela Aff., Ex. 55 (N.Y.C. Board of Correction 5-day Death Report Regarding Curtis Davis), at 4; Vela Aff., Ex. 56 (N.Y.C. Board of Correction 5-day Death Report re Manish Kunwar), at 1, 4-5; Vela Aff., Ex. 51, at 38; Vela Aff., Ex. 31, at 22, 26; Vela Aff., Ex. 32 , at 16, 18, 21, (noting "the 'B' post officer remained in the bubble for extended periods of time in contravention of departmental policy;" additionally, "people in custody reported no tours conducted by a captain" between 4:00 p.m. and 9:45 p.m., when Mr. Muhammad was found unresponsive); *cf.* Vela Aff., Ex. 54 (*Nuñez* report, 10/28/22), at 21 (noting that several deaths "were at least partly attributable to . . . inadequate touring by staff").

[172] Vela Aff., Ex. 19, at 8-9. DOC also failed to produce Mr. Davis to non-psychiatric appointments in the weeks before his death, including six scheduled HTL appointments from July 6 through July 14, 2023. *Id*. at 8-9, 18. In two separate instances, CHS staff closed the requests after Mr. Davis missed three consecutive appointments per CHS triage protocol. *Id*.

[173] Vela Aff., Ex. 22, at 3-7.

death.[174] The preliminary causes of Mr. Johnstone's death were a clot in his heart and a pulmonary embolism.[175]

Many other class members suffer myriad negative consequences, in particular people who have chronic care needs. Ms. Kinsella's team works with a person with diabetes who is frequently not produced for his daily diabetic care appointments.[176] His blood sugar is consistently uncontrolled and he is now reporting signs of diabetic neurological disease, numbness in his toes that causes him to have difficulty walking. Kevin Gamble is also frequently not produced for his twice-daily blood glucose tests and daily insulin injections to manage his diabetes. DOC failed to take him to 212 scheduled medical appointments in a span of 195 days, the overwhelming majority of which were for his daily diabetes tests and injections. During this time, Gamble's diabetic condition deteriorated significantly. When DOC did manage to take him to his appointments, his blood glucose levels regularly exceeded 200, exceeded 300 on 33 occasions, and exceeded 400 on 6 occasions, reaching as high as 470.[177] Another class member regularly misses medical appointments while his seizure disorder has worsened, resulting in in-court seizures and a lengthy hospitalization.[178]

Many class members experience unnecessary pain and suffering while they wait to finally receive their medication or to be seen by medical staff, "all the while knowing they could have

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[174] *Id.* at 4.
[175] *Id.* at 6.
[176] Kinsella Aff., ¶ 30.
[177] Gamble Aff., 5-8 ¶¶ 5-8 and medical records attached to affidavit (*see* Gamble0001, 0010, 0019, 0023-0028, 0030, 0035-0036, 0040, 0042, 0044-0046, 0049-0051, 0055, 0057, 0059, 0061-0064, 0066, 0071, 0073-0075, 0077, 0082, 0086, 0088, 0090, 0093, 0105, 0108, 0112, 0114, 0123, 0127, 0130, 0133, 0139, 0141-0142, 0147, 0152, 0155, 0159, 0166, 0171-0172, 0177, 0181-0182, 0193, and 0206). Levels above 180 are considered hyperglycemic and can lead to serious complications over time including stroke or coma. *See* Vela Aff., Ex. 57 (Andrea E. Duncan, *Hyperglycemia and Perioperative Glucose Management*, CURRENT PHARMACEUTICAL DESIGN (2012)), at 8 (defining "persistent hyperglycemia" as "glucose greater than 180 mg/dL"); Vela Aff., Ex. 58 (Jeffrey L. Schnipper, et al., *Inpatient Management of Diabetes and Hyperglycemia Among General Medicine Patients at a Large Teaching Hospital*, 1 J. OF HOSPITAL MED. 145 (2006)), at 1-2 (summarizing adverse effects).
[178] Kinsella Aff., ¶ 32.

easily received care to ameliorate their pain but those responsible for their safety were unwilling to relieve their suffering."[179] For example, after several dozens of missed appointments, during which time Samuel Foster was experiencing "sharp upper abdominal pain, which got worse over time," on January 11, 2023, he complained directly to officers in his unit about his pain and their failure to produce him to the clinic. The officers ignored Mr. Foster and declined to take him to his January 11 appointment. As a result, he was left in pain and without treatment. "That night, [he] woke up in such horrible pain that [he] vomited, then passed out." Only then did officers see fit to take him to the clinic. He was then taken to Bellevue Hospital, where he underwent emergency surgery to remove his gallbladder.[180] In another example, David Kelly was prescribed twice-daily medication to treat an opiate use disorder (which causes withdrawal-like symptoms when missed), as well as pain medication for his hernia and nerve pain in his ankle. DOC regularly fails to escort him to the medication window, causing him unnecessary pain.[181]

DOC's obstruction of access to medical care often exacerbates small injuries or causes routine issues to turn into larger problems. Class members miss scheduled dental appointments, sometimes resulting in months-long delays while cavities become infections, leading to serious pain and sometimes the loss of several teeth.[182] Mark Tortora was burned three times by water dripping from a radiator and a faulty hotpot in his housing area. DOC did not produce him for many of the wound care appointments CHS scheduled for him, making what would have a been

[179] *Id.*, ¶ 29.
[180] Foster Aff., ¶ 8.
[181] Kelly Aff., ¶ 8. In yet another example, when Dontae Bennett was on suicide watch in January 2023, CHS could not complete its cell-side tours – and therefore had no contact with Bennett – on several days due to unspecified security events, but Mr. Bennett "d[id] not know what the alarm was about or why DOC could not handle multiple responsibilities simultaneously." Bennett Aff., ¶ 8. *See also* Muniz Aff., ¶¶ 3-18 (after Jose Muniz both witnessed the death of Curtis Davis in his housing unit and grieved the recent death of his brother, he was not produced for a single mental health appointment despite receiving a "stat referral" to be seen within 24 hours after his brother's death. Mr. Muniz received no treatment for these traumas that "[shook him] to [his] core."); Vela Aff., Ex. 59 (N.Y.C. Board of Correction Public Meeting Minutes, May 8, 2018), at 6.
[182] Kinsella Aff., ¶¶ 28-29.

a minor injury "disgusting and painful."[183] Jose Farias Soberanis injured his knee in a slip-and-fall accident while in DOC custody. CHS doctors told him he needed an MRI at Bellevue, but DOC did not take him to his appointments for four months straight. After a six-and-a-half-month treatment delay, imaging showed Mr. Farias Soberanis had "multifocal deep cartilage fissuring" in his knee. In his words: "I can no longer do my daily activities. I have pain and my knee swells up when walking, standing, or anything that requires being on my feet for more 20 or 30 minutes. I can no longer exercise because of this injury, which is something very important to my mental health and keeping my mind busy."[184] Tywaine Suber waits in fear to find out why he has been having bloody stools,[185] which can be a symptom of a number of intestinal diseases including colon cancer.[186] After he reported his symptoms to CHS, DOC failed to bring him to several appointments to provide a stool sample; as of the date of his affidavit nearly two months later, he still had not been seen for that evaluation.[187]

[183] Tortora Aff., ¶¶ 2-7.
[184] Soberanis Aff., ¶¶ 8-10, 14-19. In another example, Jose De Sala-Garcia was injured in custody and started having recurrent symptoms in November 2023. DOC failed to take him to 15 appointments over six weeks before finally producing him to CHS. "As a result of my untreated shoulder injury and the pain and limited mobility associated with it," Mr. De Sala-Garcia states, "I have become physically inactive and sedentary. It is simply too painful to lift anything or engage in much physical activity, given the fragility of my left shoulder. In fact, I gained about 60 pounds while I was in DOC custody, almost all of which I blame on my shoulder injury and the lack of medical care for it." De Sala Garcia Aff., ¶ 20. In yet another example, David Kelly has a long-term painful hernia for which Bellevue clinicians have scheduled surgery. But while Mr. Kelly waited for surgery, DOC failed to bring him to a number of treatment appointments. Mr. Kelly states that "As a result of my hernia going untreated for so long, I have been forced to stay physically inactive in order to avoid pain, … This means that I cannot exercise or stay in shape, and I fear that because I have physically weakened since entering DOC custody, I may be unable to defend myself against physical assault from other people in custody or correction officers." Kelly Aff., ¶ 7. And in yet another example, after Terrence Wilkerson suffered a head injury in a car crash allegedly caused by a DOC staffer, he was not taken to scheduled medical appointments on 19 different occasions, denying him essential care and exacerbating his injuries. Wilkerson has since been released from custody, but he "still suffers from ongoing and worsened neck, back, and head pain [and] he is not able to move or exercise as he did prior to the bus accident." Verified Complaint, *Wilkerson v. City of NY*, No. 700170/2024 [Queens Sup. Ct.], ¶¶ 35-52, 54-55.
[185] First Suber Aff., ¶ 5.
[186] Vela Aff., Ex. 60 (Sang Hyun Park, et al., *Clinicopathological Characteristics of Colon Cancer Diagnosed at Primary Health Care Institutions*, INTESTINAL RESECTION (Apr. 2014)), at 131-138 (indicating that bloody stools are the most common symptom of colon cancer).
[187] First Suber Aff., ¶¶ 5-13.

CHS schedules regular Psych Medication Reevaluations to "assess whether [a patient is] on the appropriate medications at the appropriate dosages."[188] When someone misses those appointments, CHS attempts to mitigate the harm from DOC's non-production by "bridging" the person's prescription, which "means that CHS will renew the prescription without having the opportunity [to] assess whether the medications and their doses are appropriate."[189] Records show that DOC failed to take Keyion Cheairs to at least ten consecutive Psych Medication Reevaluation appointments between July 11 and October 31, 2023. During that time when DOC prevented CHS from evaluating Cheairs' medications and their doses, he was "feeling on edge" and he believed that "[he] need[ed] new medications or different doses," but he was unable to convey this information to psychiatric staff.[190] Tywaine Suber's records also show multiple "bridges" of psychiatric medication.[191]

The suffering that results from lack of access to medical care falls disproportionately on class members in more vulnerable positions, namely those: (i) in segregated housing; (ii) with a higher security classification; or (iii) in protective custody.[192]

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[188] Second Affidavit of Keyion Cheairs, ¶ 9.
[189] *Id.* ¶ 11.
[190] *Id.* ¶ 8.
[191] First Suber Aff., ¶¶ 14-16. Sometimes records show people as noncompliant with medication when in reality the problem is they are not being taken to medication. DOC failed to take George Gary to so many appointments that his October 10, 2023 medical record stated he was 0% compliant with his injection psychiatric medication. Gary Aff., ¶¶ 11-12. Mr. Gary stated any noncompliance was "because DOC prevented me from taking them. If DOC had taken me to meet with the nurses who give me my prescribed injections or allowed me to go there by myself, I would be compliant with my medications." *Id.* ¶ 12.
[192] Class members at Rose M. Singer Enhanced Supervision Housing (RESH) have substantially worse access to medical appointments. In fourteen days, a BDS client in RESH missed twenty-six scheduled CHS appointments. Kinsella Aff., ¶ 22. For example, Kevin Gamble missed 11 appointments in the first 13 days he was confined at RESH. Gamble Aff., ¶ 16. Given the extraordinary level of violence there, Vela Aff., Ex. 48 (*Nuñez* Report, Oct. 5, 2023), at 6 (finding RESH had the highest use-of-force rate and highest number of stabbings and slashings of any command in July and August 2023), it is no wonder people at RESH refuse to leave their cells, Vela Aff., Ex. 27, at 4 ("The initial implementation of the Department's new restricted housing units for those who engage in serious violence while in custody has been exceedingly poor. Rife with leadership turnover, staffing shortages, inconsistent delivery of mandated services, and inexplicable security failures (including a steady flow of weapons and drugs into these high-security units), the RESH program has been plagued by violence such that some of the people in custody choose to remain in their cells throughout the day."). Further, in recent months, "RESH leadership reports that they

National standards hold that "[a]ny practice of segregation should not adversely affect an inmate's health," and people in segregation still require "triage, examination, and treatment in an appropriate clinical setting."[193] Yet such class members miss more appointments because of their segregation status.[194] Similarly, for some high-classification people, like those on Centrally Monitored Case ("CMC") status, DOC requires that they have several escorts, including a captain, to go to medical appointments.[195] These onerous procedures have caused Samuel Foster to miss over 150 appointments while on CMC status, for example.[196] David Gorham affirmed that "[f]requently correction officers tell [him] that they cannot take [him] to a medical appointment because there is no captain available," and that this occurs even more frequently for specialty care.[197] Correction officers told Mr. Gorham they could not bring him to a cardiology appointment after several fainting episodes because of the captain escort requirement, even when CHS "told DOC leadership that delays to care could result in poor health outcomes."[198] Even patients who are in protective custody for their own safety are more likely to miss appointments. Class member Keith Ellis is one of many such individuals, as he was not produced for any of the medical appointments scheduled for him the week that he was in protective custody.[199]

ARGUMENT

Petitioners seek an order holding DOC in civil contempt for disobeying the Mandamus Order, which requires DOC to "immediately comply" with its ministerial duty to provide each

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do not have enough staff to sustain the required staffing complement of four B-officers on a consistent basis," meaning it lacks sufficient staffing to ensure inmates' access to medical care. Vela Aff., Ex. 49, at 47.
[193] Vela Aff., Ex. 61 (National Commission on Correctional Health Care, Standards for Health Services in Jails, Standard J-G-02, Segregated Inmates).
[194] Kinsella Aff., ¶ 20.
[195] NYSCEF Doc. No. 202, hearing on March 25, 2022, at 35:24-36:14 (testimony of Chief Ada Pressley); Kinsella Aff., ¶ 23; *see also generally* Vela Aff., Ex. 62 (Directive 4505R, Centrally Monitored Cases (eff. 1/10/92)).
[196] Foster Aff., ¶ 2, 5.
[197] Gorham Aff., ¶ 7.
[198] *Id.* ¶¶ 9-11.
[199] Ellis Aff., ¶¶ 12-13.

and every person in its custody with access to medical care, during the period July 2022 through May 2024.[200] DOC has continuously disobeyed this Court since it issued its Mandamus Order nearly three years ago. As a result, class members have suffered—and continue to suffer—grievous harm, including death, and prejudice to their rights.

Given DOC's most recent 23-month failure to comply with the Mandamus Order, Petitioners request the maximum fines available under the Judiciary Law to incentivize compliance. If DOC still fails to comply after a contempt finding and an award of fines, this Court should exercise its inherent plenary and equitable powers by appointing a monitor to advise DOC and the Court about steps DOC should take to comply with the Mandamus Order.

I. The Court Should Hold DOC in Contempt for the Period of July 2022 Through May 2024.

Civil contempt is justified when: (1) there is "a lawful judicial order expressing an unequivocal mandate" in effect; (2) the party to be held in contempt knows about the order; (3) the party disobeys the order; and (4) prejudice to the rights or remedies of "a party to the litigation" is shown.[201]

On a motion for contempt, Petitioners must establish entitlement to relief by clear and convincing evidence.[202] "[O]nce the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense."[203] A "good faith attempt[ ] to comply with a court's

[200] *See* NYSCEF Doc. No. 81, at 6-7; *see also* Judiciary Law § 753 (authorizing courts to hold a party in civil contempt for a "violation of duty" and "for disobedience to a lawful mandate of the court" where "a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced").
[201] *McCain v Dinkins*, 84 NY2d 216, 226 [1994].
[202] First Contempt Order at 2-3 (citing *El-Dehdan v El-Dehdan*, 114 AD3d 4 [2d Dept 2013], *aff'd*, 26 N.Y.3d 19 [2015]).
[203] *Id.* at 3 (quoting *El-Dehdan*, 114 AD3d at 17)

order is not a recognizable defense to a motion for contempt."[204] Similarly, an inability to comply with an order is not a defense to contempt unless "the respondent was not at fault in creating the inability."[205] In other words, noncompliance is inexcusable where a party has the "authority or control to find a way to comply with the order."[206]

In its May 2022 Contempt Order, this Court found that: (1) the Mandamus Order is a lawful order expressing an unequivocal mandate; and (2) DOC has knowledge of the Mandamus Order.[207] Those findings—now the law of the case—are not in dispute and cannot be collaterally attacked.[208] Furthermore, the Court found that Petitioners suffered prejudice from DOC's failure to comply with its duties to provide access to medical care during the period December 2021 to January 2022. The prejudice caused by DOC's current contempt is indistinguishable from that suffered by Petitioners during the earlier contempt period, meaning the final factor is also beyond dispute. This motion therefore turns on whether DOC disobeyed the Mandamus Order.

And it has. Indeed, there is overwhelming and unambiguous evidence that DOC is violating both prongs of the Mandamus Order: (i) to comply with its duty to provide Petitioners with access to sick call, and (ii) to "[s]afely keep … each person … by providing sufficient security for the movement of incarcerated persons to and from health services, and by not

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[204] *Id.* at 4-5 (quoting *Matter of McCain v Dinkins*, 192 AD2d 217 [1st Dept 1993], *aff'd as mod*, 84 NY2d 216 [1994]).
[205] *Matter of Benson Realty Corp. v Walsh*, 73 Misc.2d 889, 893 [Sup. Ct. N.Y. Cnty. 1973] (internal quotations omitted).
[206] First Contempt Order at 5 (citing *Badgley v Santacroce*, 800 F2d 33 [2d Cir 1986]).
[207] *Id.* The Appellate Division's decision in this case does not suggest otherwise. In fact, in briefing to the Court of Appeals, DOC conceded that the Mandamus Order was lawful, clear, and unequivocal, and that nothing in the Appellate Division's decision altered that status. *See* Vela Aff., Ex. 2, at 2 ("[T]he Appellate Division did not improperly pass judgment on prior unappealed orders"); *id*. at 8 (noting that the Mandamus Order "is not itself presented for review"); *id*. at 13 (asserting that the Appellate Division "did not … case doubt on the finality of Supreme Court's unappealed mandamus and contempt orders"); *see also id.* at 13 ("[S]ince Supreme Court retains continuing jurisdiction to enforce its mandamus order[,] DOC's compliance will continue to be subject to judicial review").
[208] *See, e.g.*, *People v. Evans*, 94 NY2d 499, 502-504 [2000] (facts established in prior decision as the law of the case and citing authority to demonstrate that the law of the case doctrine prevents relitigating issues that have already been determined).

prohibiting or delaying incarcerated persons' access to care, appropriate treatment, or medical or dental services."[209]

A. DOC Violates Paragraph 2(a) of the Mandamus Order by Barring Incarcerated People from Accessing Sick Call During Alarms, TSOs, and Other Lockdowns.

DOC violates the Mandamus order when it fails to "provide Petitioners with access to sick call on weekdays, excluding holidays" by intentionally prohibiting class members from calling the Health Triage Line ("HTL") during certain "security events" in which incarcerated people are locked in their cells, and separately as a punitive measure.

DOC's directive on access to the HTL during security events contradicts itself: Directive 4009R-C, *Lock-In/Lock-Out*, at Section II(F), provides that during lock-ins the Department must "minimiz[e] disruption of mandated programs and services of the facility, whenever applicable." Conversely, Section V(B)(10)(i)-ii of the same directive prohibits incarcerated people from accessing phones or making calls from tablets during alarms, TSOs, and other forms of lockdown, with no exception for the HTL.[210] This policy alone violates the Mandamus Order, Paragraph 2(a), by preventing people from accessing the HTL for extended periods, even as DOC publicly states that security events do not prevent medical services.[211]

Security events prompt DOC to cut off class members' access to the HTL for prolonged periods, sometimes days at a time.[212] DOC also shuts down the phone system on an *ad hoc* basis as a means of punishment and control.[213] Because the HTL only operates from 5:00 a.m. to noon daily, a lockdown of just a few hours can force a person in need to wait until the following day to

[209] Mandamus Order, ¶ 2(b).
[210] Vela Aff., Ex. 9, § V(B)(10)(i)-ii ("[I]ndividuals in cell housing area shall be locked into their cells with [a]ll services suspended for the duration of the lock-in; for individuals in dorms, [a]ll services shall be suspended for the duration of the lock-in and "no television or telephone activities shall be permitted.").
[211] *Supra* Statement of Fact Part I.
[212] *Supra* Statement of Fact Part I.
[213] Gorham Aff., ¶ 24.

call, delaying access to care.[214]

DOC's shutting down all access to the HTL during lockdowns and as punishment is an inexcusable violation of the Mandamus Order and clearly and convincingly supports a contempt finding.

B. DOC Violates Paragraph 2(b) of the Mandamus Order By Failing to Produce Incarcerated People for Medical Care and Treatment.

DOC's failure to bring incarcerated people to their medical appointments unambiguously violates the Mandamus Order.

Between July 2022 and May 2024, DOC failed to produce class members for reasons within its control a total of 51,908 times: because of "Maximum Safe Capacity" 17,620 times, "Priority Medical Emergency" 16,355 times, "Priority Mental Health Visit" 2,008 times, "Lockdown," "Alarm," or "TSO" ("tactical search operations") 9,375 times, and "No Escort" 6,550 times. In other words, an incarcerated person was denied access to medical care for one of these categories on average *once every 20 minutes* during the 23-month contempt period. DOC is at fault for creating the conditions that constitute these violations of the Mandamus Order and it has the authority to prevent such non-productions. Accordingly, every single one of these non-productions violates the Mandamus Order.

DOC's prior arguments that it is not responsible for non-productions based on "Maximum Safe Capacity," "Priority Medical Emergency," and "Priority Mental Health Visit" are illogical. Non-productions attributed to "priority medical emergencies" and "priority mental health visits"—which alone account for 18,363 of the missed appointments in the contempt period, an average of 798 per month—are simply "no escort" by another name, despite DOC's prior arguments that it is not responsible for providing people access to both scheduled and

[214] Vela Aff., Ex. 4, § III(A); Vela Aff., Ex. 5.

unscheduled medical care. The fact that multiple people need access to healthcare at the same time—and sometimes without a scheduled appointment—is a predictable fact that does not exempt DOC from the law, and DOC must manage its staffing and operations accordingly.

DOC is also solely responsible for (1) adequately allocating its staff in its facilities to safely escort people in custody to their appointments; (2) providing appropriate security (including both space and personnel) for incarcerated people to safely wait for their scheduled medical appointments; and (3) staggering arrival at clinics to minimize wait times. DOC cannot avoid responsibility for the 17,620 missed appointments "maximum safe capacity" non-productions (an average of 766 per month) over the contempt period because it failed to deploy adequate staff to waiting areas, allocate appropriate waiting space, or coordinate the arrival of multiple people in need of medical care to a medical facility.

DOC is likewise responsible for the 9,375 non-productions during the contempt period due to lockdowns, alarms, and TSOs.[215] DOC publicly states that security events "do not prevent medical services" and that "anyone with a medical need can still access the clinic" during these events.[216] Yet in this case, DOC takes the contrary position that its obligation to provide access to medical care is suspended during security events and that non-productions during these events "should not be counted as a non-production in violation of the Mandamus Order."[217] This is improper and incorrect. Neither the Mandamus Order nor the legislative enactments that underpin it include any such exception. To the extent DOC sought to absolve itself of these obligations because it "believed [its] actions were justified and, thus, were not willfully

[215] *See generally* Vela Aff., Ex. 17.
[216] Vela Aff., Ex. 63 (DOC Quarterly Emergency Lock-in Report, FY23 Quarter 1 (July 1-September 30)), at 8; *see also* Vela Aff., Ex. 9, at § II(F) ("The Department shall affect lock-ins while minimizing disruption of mandated programs and services of the facility, whenever applicable.").
[217] NYSCEF Doc. No. 191, respondent's memorandum of law in opposition to petitioners' second motion for a finding of contempt and monetary sanctions, at 2-3.

disobedient," "[n]o finding of willfulness or deliberate disregard is required to sustain a civil contempt determination." *Hush v. Taylor*, 121 AD3d 1363, 1365 [3rd Dept 2014] (citation omitted); *see also Matter of Bonnie H.*, 145 AD2d 830, 832 [3rd Dept 1988] ("It is not necessary that the disobedience be deliberate; the mere act of disobedience, regardless of motive, is sufficiently [*sic*] to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party.").

Therefore, DOC's failure to produce people to the medical clinic during security events—particularly when it continues producing people in custody for other services during lockdowns, including legal visits, work assignments, court production, and methadone maintenance programs[218]—reflects a choice not to do so in direct violation of its legal obligations.[219]

Finally, DOC admits that 6,550 medical appointments were missed—an average of 285 per month—because it did not provide escort officers to take people in custody to their appointments. The Department has already admitted responsibility for those non-productions it categorizes as No Escort,[220] and DOC remains solely responsible for making officers available to escort people in custody.

For each of the 51,908 times non-productions in the contempt period due to "Maximum Safe Capacity," "Priority Medical Emergency," "Priority Mental Health Visit," "No Escort,"

[218] *See* Second Franco Aff., ¶ 9 (legal visits, court production, and methadone maintenance programs continue during lockdowns); Saintume Aff., ¶¶ 17-18 (patients produced to methadone treatment, but not medical services, during 8-9 day lockdown); Gibson Aff., ¶ 9 (during 4-5 day lockdown, no medical access provided, but DOC continued court and methadone maintenance production).
[219] Exacerbating this issue, as recognized by both the BOC and the *Nuñez* monitor, there is reason to doubt the frequency, length, and legitimacy of DOC's lockdowns, undermining any misguided justification for such denial of access to medical care. Vela Aff., Ex. 7, at 2; Vela Aff., Ex. 6, at 19:4-15.
[220] NYSCEF Doc. No. 75, Answer, at ¶¶ 28, 109; NYSCEF Doc. No. 111, respondents' memorandum of law in opposition to petitioners' motion for a finding of contempt and monetary sanctions, at 11-12.

"Lockdown," "Alarm," and "TSO," DOC must be held in contempt of the Mandamus Order. [221]

C. The Record Contains Substantial Evidence That There Are Other Violations of the Mandamus Order That DOC Data Obscures.

The true number of violations of the Mandamus Order between July 2022 and May 2024 is higher than the numbers DOC publishes. As detailed above, Petitioners have presented clear and convincing evidence that DOC staff routinely falsifies refusals by (i) logging non-productions as refusals when an escort officer is unable or unwilling to bring people to their medical appointments, sometimes not even telling people they have a scheduled appointment; and (ii) by pressuring people in custody to refuse access to scheduled appointments when escort officers are unavailable or unwilling to take them to their appointments.[222] If DOC cannot verify these alleged refusals through video or other means, they should be counted as violations of the Mandamus Judgment. When DOC fabricates a class member's refusal, it prohibits or delays medically necessary access to care. *Cf. Jeffers v. City of New York*, No. 14-CV-6173, 2018 WL 904230, at *37 [E.D.N.Y. Feb. 13, 2018] (denying summary judgment on incarcerated person's Fourteenth Amendment claim arising out of allegedly deficient access to medical care on Rikers Island because "DOC staff may have lied on occasions to CHS staff to cover up their failure or refusal to escort patients," creating issue of fact regarding actual access).

Even when refusals are legitimately conveyed to DOC, many still constitute violations of the Mandamus Order. As discussed above and detailed at length in Class Members' affidavits, class members and DOC supervisory staff have confirmed that many refusals are due to incarcerated people's well-grounded fear that attending an appointment is not safe. Chief Pressley conceded that "most" refusals of medical care were caused by DOC's failure to provide

[221] *See* First Contempt Order, at 5 (citing *Badgley v Santacroce*, 800 F2d 33 [2d Cir. 1986] (finding that noncompliance is inexcusable where a party has the "authority or control to find a way to comply with the order")).
[222] *See* Statement of Facts, Part III(A).

security to bring patients to and from medical care safely.[223] But under the Mandamus Order, DOC is obligated to provide "sufficient security for the movement of incarcerated persons to and from health services."[224] Therefore, while they appear at first blush to avoid the scope of the Mandamus Order, many refusal non-productions are evidence of contempt.

Finally, the many instances where people are denied access to emergency care are additional violations of the Mandamus Order. Whenever correctional staff fail to render first aid to or seek medical attention for people in medical distress, they violate their duty to "safely keep" each person in DOC custody by neither prohibiting or delaying [their] access to care, appropriate treatment, or medical or dental services."[225] Numerous reports from the BOC and the *Nuñez* monitor reveal that there is a widespread practice among DOC staff of ignoring their legal and moral obligations to those in medical need.[226] Many such incidents were documented during the contempt period. Though the exact numbers are impossible to calculate, DOC's widespread practice of violating the duty to safely keep by withholding or delaying emergency medical care must be considered in evaluating its compliance with the Mandamus Order.

There are also many indications that in addition to mischaracterizing the nature of many non-productions, DOC is failing to report a significant number of non-productions altogether. Every month, CHS reports thousands more total non-productions than DOC concedes, and DOC has omitted whole jails' data from their monthly reports for several months during the contempt period.

* * * * *

[223] NYSCEF Doc. No. 202, hearing on Mar. 25, 2022, at 37:20-38:13 (testimony of Chief Ada Pressley); *see also* Vela Aff., Ex. 27, at 4; Second Suber Aff., at ¶ 9.
[224] Mandamus Order, ¶ 2(b).
[225] *Id.*
[226] Vela Aff., Ex. 32, at 29; Vela Aff., Ex. 41, at 53-54; Vela Aff., Ex. 42, at 6; Vela Aff., Ex. 31, at 2, 11-12, 27.

DOC's obligation to never "prohibit[] or delay[] incarcerated persons' access to care" is ministerial in nature, thereby requiring "direct adherence to a governing rule or standard with a compulsory result." *Tango v. Tulevech,* 61 NY2d 34, 41 [1983]; *see also Grisi v. Shainswit,* 119 AD2d 418, 420 [1st Dept 1986] (characterizing ministerial acts as "nondiscretionary and nonjudgmental"). Applied here, DOC lacks the discretion to deny access to medical care during lockdowns and security events, by falsifying refusals, failing to tour properly (or at all), and failing to provide access to emergency medical care. DOC is therefore in contempt. And what cannot be lost in the dispassionate legal discourse is the human toll such contempt exacts: DOC's noncompliance with the Mandamus Order is directly contributing to grave physical harms, including deaths, among members of the petitioner class.

II. Compensatory Fines Should Be Paid to Aggrieved Class Members For Each Violation.

This Court should award fines to class members for each instance that DOC failed to provide access to medical care during the period between July 2022 and May 2024. *See McCain v Dinkins*, 84 NY2d 216, 229 [1994] (ordering the City of New York to pay contempt fines to a class of homeless families for each night the City failed to provide adequate housing, as previously ordered); *see also New York City Coal. To End Lead Poisoning v. Giuliani*, 173 Misc.2d 235, 236-242 [Sup. Ct. N.Y. Cnty. 1997] (holding the City in civil contempt for ignoring "the mandates of both this court and the City Council," and imposing a fine that aggregates "until the City of New York is in compliance with that order").

In Petitioners' first contempt motion, Petitioners argued that the statutorily prescribed maximum fine of $250 per non-production due to lack of escort, plus costs and expenses for the

contempt motion, was the proper amount.[227] The Court, following the above-cited law, ordered a compensatory fine of "$100.00 for each missed escort to the infirmary, from December 11, 2021 through January 2022," plus costs and expenses.[228] Petitioners reaffirm that the maximum fine of $250 per instance of contemptuous conduct, plus costs and expenses, is warranted because Petitioners have again been forced to seek this Court's intervention to obtain DOC's compliance with the Mandamus Order.

The fine imposed against a civil contemnor is designed to compensate or indemnify the aggrieved party, rather than to punish the contemnor. *See Ellenberg v Brach*, 88 AD2d 899, 902 [2nd Dept 1982]. But Judiciary Law § 773 "undoubtedly support[s] the imposition of an additional penalty" for subsequent contemptuous conduct. *Commr of Cmty. Dev. of City of Rochester v Gray*, 186 AD2d 1076, 1076–77 [4th Dept 1992]. Courts therefore routinely award the statutory maximum of $250 in successive contempt fines. *See, e.g., Friendly Ice Cream Corp. v Great E. Mall, Inc.*, 51 AD2d 883, 883 [4th Dept 1976] (awarding statutory maximum fine of $250 for contempt where "the second proceeding is based upon acts by defendant's agents occurring after the first proceeding"); *Town of Ithaca v Franciamone*, 54 AD2d 776, 776 [3d Dept 1976] (finding petitioner in contempt for a second time and awarding statutory maximum of $250 for second violation).

"Where multiple contumacious acts are engaged in, each violation is a separate contempt that warrants a separate fine." *JKC v TWC*, 43 Misc.3d 1234(A), 2013 N.Y. Slip Op. 52319(U), at *1 [Sup. Ct. Monroe Cnty. 2013]. DOC's contemptuous conduct from July 2022 to May 2024 consists of violations separate from those in December 2021 and January 2022. This Court is

[227] NYSCEF Doc No. 105, petitioners' memorandum of law in support of their order to show cause for contempt, at 13. The statutory maximum fine of $250 is derived from the Code of Civil Procedure and "is nearly two centuries old." *B.F. v. S.R.*, 81 Misc.3d 1207(A), 199 N.Y.S.3d 439 (table), 2023 WL 8227987, at *5 [N.Y. Fam. Ct. 2023] (citations omitted).
[228] First Contempt Order, at 6-7.

therefore free to impose the maximum fine of $250 per violation, as provided by statute. *See Matter of Ferrante v Stanford*, 172 AD3d 31, 38-40 [2d Dept 2019] (awarding statutory maximum of $250); *Matter of Barclays Bank v Hughes*, 306 AD2d 406, 408 [2nd Dept 2003], *as amended* [2nd Dept Oct 15, 2003], *aff'd as modified sub nom. Barclays Bank, PLC v Hughes*, 761 NYS2d 493 [Sup. Ct. App. Div. 2d Dept 2003 mem.]; *Matter of Hanna v Turner*, 2001 N.Y. Slip Op. 50098(U), *14 [Sup. Ct. N.Y. Cnty. 2001] (same), *amended* 2001 N.Y. Slip Op. 50111(U) [Sup. Ct. N.Y. Cnty. 2001], *aff'd as modified*, 289 AD2d 182 [1st Dept 2001].

For ease of calculation and administration, Petitioners propose that the $250 fine apply to every non-production during the contempt period due to Maximum Safe Capacity (17,620), No Escort (6,550) and the other categories that are simply variations on No Escort, namely, Priority Medical Emergency and Priority Mental Health Visit (18,363 combined). Petitioners further request that DOC be fined for the 9,375 non-productions due to Alarm, TSO, and Lockdown. This formulation eliminates the need to conduct mini-trials that would require the Court to make fact-intensive inquiries about each non-production such as unverified refusals.

III. If Contempt Is Found, And If DOC Cannot Purge Such Contempt Within 90 Days, This Court Should Appoint a Monitor.

A. To Purge Contempt, DOC Must Provide Clear and Convincing Evidence that Bears Directly on Compliance with the Mandamus Order.

If the Court finds DOC to be in contempt, then it should direct DOC that it can purge its contempt only by submitting clear and convincing evidence that it provided consistent access to the sick call line on weekdays, excluding holidays, and that it did not prohibit or delay incarcerated people's access to care. The Court should also direct DOC that it can only be excused for non-production during the purge period for instances where it was prevented from producing patients to medical care by factors beyond its control.

"After a finding of contempt has been made, it is the contemnor's burden to demonstrate

by clear and convincing evidence that he or she has purged the contempt or that it is impossible for him or her to purge." *Agnew v. New York City Dep't of Corr.*, 217 AD3d 490, 491, *leave to appeal dismissed*, 40 NY3d 1061 [2023]. In this Court's May 17, 2022 Contempt Order, it held that DOC could "purge itself from [the previous] finding of contempt by complying with the [Mandamus Order]," which it could only do by "provid[ing] proof of substantial compliance" with the pre-existing legal obligations that were the subject of the Mandamus Order. (May 17, 2022 Order at 6.) DOC did not appeal from the May 17, 2022 Contempt Order. The Court's purge standard is both legally correct and the law of this case.[229]

If this Court finds DOC in contempt for this current period, it should direct DOC to purge its contempt by showing, through clear and convincing evidence that Petitioners would have an opportunity to rebut with their own evidence, that it has complied with every part of the Mandamus Order in the following ways:

First, that DOC has not prevented any class member from accessing the housing area phones or their own tablets at any point during the purge period, including during housing area

[229] The crux of the Appellate Division decision, which reversed the Purge Order, was that this Court applied the purge standard incorrectly and not that the purge standard itself was flawed. *See Agnew*, 217 AD3d at 491-92. In the Purge Order, this Court held that DOC failed to purge because, among other things, DOC "did not allege or submit evidence, for the purge period, of how many inmate requests for sick call services were made and, of that number, how many of those requests were denied due to lack of escorts." (August 11, 2022 Order, at 5) (emphasis added); *see also Agnew*, 217 AD3d at 491 ("[T]he court held that DOC failed to purge its contempt because it failed to address whether any appointments were not scheduled in the first place due to escort shortages"). The Appellate Division found that this requirement fell outside of the scope of the Mandamus Order.
Specifically, there is a difference between: (1) "sick call," the process by which people in custody make a request for medical care, to which DOC is required to provide access, *see* N.Y.C. Admin. Code § 9-108(a), and (2) CHS's subsequent clinical determination of whether a class member's request for medical care warrants an appointment. DOC can discharge its obligation to provide access to sick call (but not its other obligations in the Mandamus Order) by ensuring that class members can call CHS on their housing area phones or phone-enabled tablets to request medical care on weekdays, excluding holidays. Class members do not require an escort to access the phones in their housing unit or their own tablet; all that they need is for DOC to provide them with functional tablets or access to the housing area phones. DOC plays no role in CHS's determination that an appointment should or should not be scheduled. *See* 40 N.Y.C.R.R. 3–02[c][2][ii] (prohibiting DOC from "screen[ing] sick-call requests"). While DOC must allow class members to use the phone or tablet to call CHS, DOC's "lack of escorts" has no bearing on CHS's denial of a request for a clinical encounter.

lockdowns and lock-ins, events that DOC often uses as excuses to cut off access to sick call.[230]

Second, that DOC has provided interpreter services for non-English speaking class members who try to use DOC's sick call process during the purge period.

Third, that DOC has "provid[ed] sufficient security for the movement of incarcerated persons to and from health services," and has not "prohibit[ed] or delay[ed] incarcerated persons' access to care, appropriate treatment, or medical or dental services" during the purge period.[231] To do so, DOC must show that during the purge period, the events reflected in the non-production categories *actually prevented* DOC from producing patients to scheduled and unscheduled (or emergency) medical care, including evidence that:

- Alleged refusals of access to medical care were genuine, that is, that DOC *actually* communicated to class members that they had a scheduled medical appointment and the class member knowingly and voluntarily refused to attend;
- DOC significantly reduced "maximum safe capacity" non-productions numbers, particularly where "maximum safe capacity" is frequently invoked, including but not limited to EMTC and OBCC;
- DOC provided sufficient transportation and mobility aids (such as wheelchairs, canes, or walkers) for escort to medical appointments to every class member with a scheduled medical appointment who required them;
- DOC staff conducted required tours of housing units and the institutional count in a manner consistent with agency policy, to allow staff to identify class members who required immediate medical access;
- DOC staff promptly provided life-saving emergency aid to class members who required it; and
- Class members' *de facto* segregation status (*i.e.,* those who require a captain escort, those confined in RESH, and those in protective custody) did not impair their access to medical care.

[230] *See* Mandamus Order, ¶ 2(a); *see, e.g.,* Saintume Aff., ¶¶ 13-18; Kelly Aff., ¶¶ 10-13.
[231] Mandamus Order, ¶ 2(b).

B. If DOC Cannot Purge Contempt, a Monitor Should Be Appointed.

If DOC cannot purge its contempt within 90 days of the order resolving this contempt motion, the Court should appoint a monitor who can advise DOC and the Court about how DOC can reach substantial compliance with the Mandamus Order.

If statutory contempt fines fail to bring DOC into compliance, this Court has the inherent power to design "any remedy necessary for the proper administration of justice," including the appointment of an independent monitor. *Cane v Herman*, 209 AD2d 368, 368 [1st Dept 1994] (quoting *People ex rel. Doe v Beaudoin*, 102 AD2d 359, 363 [3d Dept 1984]); *see also State of New York v. Barone*, 74 NY2d 332, 336 [1989] ("The essence of equity jurisdiction has been the power . . . to [mold] each decree to the necessities of the particular case." (cleaned up)); *Cold Spring Light, Heat & Power Co. v Selleck*, 256 NY 451, 456 [1931] (explaining that "Courts of equity undoubtedly have power to make such orders as may be necessary to carry out and give effect to their decrees."); *Doe v Dinkins*, 192 AD2d 270, 275 [1st Dept 1993] (discussing the Supreme Court's "power, as a court of equity, to grant an injunction mandating conduct by municipal agencies"); *Kaminsky v. Kahn*, 23 AD2d 231, 237 [1st Dept 1965] ("The power of equity is as broad as equity and justice require." (citation omitted)).

The Appellate Division has consistently approved remedies issued under a Supreme Court's inherent plenary power. *See, e.g.*, *Copeland v. Salomon*, 56 NY2d 222, 227 [1982] (reaffirming court's inherent powers to order receivership in foreclosure action); *Triadou v. CF 135 Flat LLC*, 175 AD3d 1133 [1st Dept 2019] (noting lower court's appointment of monitor to oversee collection of judgment amounts from defendant and hold funds in escrow); *64 B Venture v Am. Realty Co.*, 194 AD2d 504, 504-505 [1st Dept 1993] (holding that "the Supreme Court properly exercised its equitable powers to appoint the receiver to operate the nursing home");

Doe, 192 AD2d at 270-271 (affirming that the "Supreme Court has the power, as a court of equity," to direct "the municipal defendants to reduce the population at two homeless shelters to 200 beds each, to cease the placement of individuals in certain areas of one of the shelters and to cure existing fire code violations"); *People v. Abbott Manor Nursing Home*, 70 AD2d 434, 438 [1st Dept 1979] ("[T]rial term properly assumed jurisdiction to exercise its equitable powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients."), *aff'd*, 52 NY2d 766 [1980]; *Pastrana v Cutler*, 115 AD3d 725, 726-728 [2d Dept 2014] (holding that "the Supreme Court acted appropriately pursuant to its inherent plenary power to enforce compliance with its prior orders and to fashion a remedy for the proper administration of justice" by deviating from the governing by-laws and authorizing plaintiffs to call for and conduct a special meeting).[232] These powers are consistent with the "remedial" nature of equitable relief. *Tracey Dev. Co. v. Becker*, 212 NY 488, 505 [1914].

When municipal agencies repeatedly violate court orders and obscure their noncompliance through opaque and unreliable statistics, courts have invoked their equitable powers to appoint court monitors empowered to review agency records and advise both the agency and the court about how the agency can comply. There are at least three monitors that courts have appointed to assist DOC in complying with court orders, and several other monitors for other City agencies.[233] Those monitors cover topic areas such as discharge planning for

[232] *See also Matter of Mark C.H.*, 28 Misc.3d 765 [Surr. Ct. N.Y. Cnty. 2010] (holding that due process requires state to monitor activities of court-appointed guardians for young people with developmental disabilities, setting forth the benefits of a monitor).

[233] Several other New York City agencies currently benefit or have benefitted in the past from court-ordered monitoring regimes. *See, e.g., Callahan v. Carey*, 12 NY3d 496, 498-502 [2009] (describing Supreme Court's appointment of a monitor to oversee compliance with court orders regarding provision of shelter for unhoused men); *San Gennaro Soc. v. Sabetta*, 264 AD2d 585 [1st Dept 1999] (noting Supreme Court's appointment of monitor to resolve disputes regarding issuance of permit for an annual New York City street festival); *United States v. City of New York*, 717 F3d 72, 97 [2d Cir. 2013] (affirming appointment of a monitor to assist the Fire Department in eliminating racial discrimination in hiring); *Floyd v. City of New York*, 959 F.Supp.2d 668, 676 [S.D.N.Y. 2013]

certain high-needs people leaving the jails;[234] environmental conditions, such as sanitation, ventilation, and fire safety;[235] and the use of excessive force by correction officers.[236]

If DOC does not purge its contempt, appointment of a monitor is imperative. With a monitor, both DOC and the Court can receive expert, independent guidance about how DOC can comply with the Mandamus Order. Without a monitor, DOC can continue to: inadequately deploy personnel such that Priority Medical Emergencies and Priority Mental Health Visits continue to preempt other people's medical needs; fabricate refusals and fail to video record legitimate refusals for auditing purposes; invoke "maximum safe capacity" to halt clinic production without objective assessment and verification; fail to provide a dedicated escort officer for each unit by diverting the assigned officers to other tasks; use alarms, TSOs, and lockdowns as improper excuses for non-production; prevent access to housing area phones and the phone function on people's tablets to contact CHS; and fail to maintain safe transit in hallways and corridors to attend clinic services without fear or consequence.

Unless DOC can purge itself of contempt in the 90 days following a second contempt order, appointment of a monitor is warranted in light "of the complexity of the reforms that will be required" to achieve compliance with the Mandamus Order such that "it would be impractical for this Court to engage in direct oversight of the reforms." *Floyd*, 959 F.Supp.2d at 676.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court: (a) find DOC in

(appointing monitor to oversee the Police Department's stop-and-frisk practices), *appeal dismissed* [2d Cir. 13-3524] (Sept. 25, 2013), *appeal withdrawn* [2d Circ. 13-3442] (Sept. 26, 2013); Vela Aff., Ex. 64 (Agreement between the U.S. Department of Housing and Urban Development, the New York City Housing Authority, and the City of New York, dated Jan. 31, 2019), at § IV, ¶¶ 16-32 (appointing monitor to oversee New York City Housing Authority's compliance with regulations governing lead paint, mold, pests, and related issues).

[234] *See generally Brad H. v. City of New York*, 7 Misc.3d 1015(A) [Sup. Ct. N.Y. Cnty. 2005].

[235] Vela Aff., Ex. 65 (Order, *Benjamin v. Malcolm*, No. 75-CV-3073 [S.D.N.Y. May 20, 1982]).

[236] Consent Judgment, *Nuñez v. City of New York*, No. 11-CV-5845 [S.D.N.Y. Oct. 21, 2015], ECF No. 249.

contempt for its past and ongoing violations of the Mandamus Order; (b) award a contempt fine to aggrieved class members in the sum of (i) $250 for each of the 51,908 instances of denial of access to medical care over the 23 months from July 2022 to May 2024 due to DOC's failure to provide sufficient escorts to bring class members to medical appointments and failure to provide adequate space and security at the clinics to permit people to safely wait for their scheduled medical appointments, and (ii) $250 for any other instance of disobedience with this Court's Mandamus Order in the months of July 2022 through May 2024 that this Court finds by clear and convincing evidence to exist; (c) order that DOC shall pay the awarded contempt fines to the aggrieved class members; (d) order that DOC may only be found to have purged itself of contempt through clear and convincing evidence that it has complied with every requirement of the Mandamus Order; (e) order that if DOC is unable to purge itself of contempt within 90 days of the entry of the contempt order, the Court should appoint a monitor who can advise DOC and the Court about how DOC can reach substantial compliance with the Mandamus Order; (f) award Petitioners attorneys' fees and expenses incurred in connection with this contempt motion; and (g) award any additional relief the Court finds to be just and appropriate.

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