IN THE SUPREME COURT OF THE STATE OF KANSAS

JAMES HADLEY, JOHN EDWARD TETERS, MONICA BURCH, TIFFANY TROTTER, KARENA WILSON, ABRAHAM ORR, DAVID BROOKS, SASHADA MAKTHEPHARAK through his next friend KAYLA NGUYEN; *on their own and on behalf of a class of similarly situated persons*; *Petitioners*, v. JEFFREY ZMUDA, in his official capacity as the Secretary of Corrections for the State of Kansas, SHANNON MEYER, in her official capacity as the Warden of Lansing Correctional Facility, DONALD LONGFORD, in his official capacity as the Warden of Ellsworth Correctional Facility, and GLORIA GEITHER, in her official capacity as the Warden of Topeka Correctional Facility, *Respondents.*	Original Action No. 122,760 **Class Action** **IMMEDIATE RELIEF SOUGHT**

REPLY MEMORANDUM IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF HABEAS CORPUS

Petitioners in this action ask this Court to order Respondents to de-populate prison facilities in which meaningful social distancing and other pandemic precautionary measures are impossible. The Petitioners themselves have highlighted their own experiences being forced to interact with dozens, if not hundreds, of other individuals incarcerated in their facilities on a daily basis notwithstanding COVID-19. Overpopulation, and its attendant risks of COVID-19 contraction for all KDOC residents, is itself the

constituional violation. Notwithstanding Respondents' claims that Petitioners seek carte blanche release of individuals in Respondents' custody, depopulation is not synonomous with unencumbered release. It can be achieved through parole supervision, processing clemency applications, authorizing parental home confinement, or any other number of alternatives to incarceration available to Respondents. Petitioners' present conditions of confinement prove the Eighth Amendment violation. It is for the Respondents—with the support of a special master—to craft the appropriate plan to remedy those violations.

I. Petitioners Have Demonstrated that their Continued Risk of Exposure to COVID-19 Amounts to Cruel and Unusual Punishment Under the Eighth Amendment.

A. COVID-19 Poses An Objectively Unreasonable Risk of Harm in KDOC Facilities.

Respondents assert that "prisoner[s] must show that the risk of which [they] complain[] is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Petitioners agree. But our communities have established social distancing as a mandatory procedure to avoid the risk of COVID-19 contraction. Petitioners have repeatedly identified that—regardless of whatever procedures Respondents have put in place during the pandemic—they are still required to sleep within a couple feet of up to a dozen other individuals, and to congregate in groups of a hundred or more people in order to exercise, leave their cells, or eat their meals. Ex. F ¶ 4; Ex. H ¶¶ 4, 6; Ex. I ¶¶ 3, 4; Ex. J ¶¶ 3, 4; Ex. K ¶ 5 ; Ex. L ¶ 4; Ex. M ¶ 5. These gatherings would be blatantly unlawful under Governor Kelly's stay-at-home order if Petitioners were in the community. Executive Order 20-18(1)(a)(banning mass gatherings "likely to bring

together more than 10 people in a confined or enclosed space at the same time"). Furthermore, Petitioners are still not guaranteed access to soap and proper cleaning supplies to protect against the virus. Ex. F ¶ 5; Ex. H ¶ 6; Ex. L ¶ 5. Respondents then effectively expose Petitioners to a risk that "today's society chooses not to tolerate." *Helling*, 509 U.S. at 36.

Respondents also rightly identify that conditions of confinement must "raise[] the risk of exposure substantially above the risk experienced by surrounding communities." *Hines v. Youssef*, No. 13-cv-00357-AWI-JL, 2015 WL 164215, at *4 (E.D. Cal. Jan. 12, 2015). Petitioners have demonstrated that they do. In fact, Petitioners have identified that correctional institutions are *particularly* susceptible to COVID-19 outbreaks. *See* Ex. A ¶ 12; Ex. B ¶ 5 (CDC guidelines and social distancing are "simply not able to be followed in a crowded correctional setting"); Ex. B-1 ¶ 48 ("the public health recommendation is to release high-risk people from detention"); *see also* Exhibit N (Apr. 7, 2020 Testimony of Dr. Ramaswamy), at 13:3-8 ("And, you know, the danger and the risk for transmission is so high inside a correctional facility that we do not consider those kinds of places. I look at a correctional facility just like I would as a cruise ship, and none of us would get on a cruise ship right now because the rate of transmission would be so high in such a setting"); Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 HEALTHCARE EPIDEMIOLOGY 1047 (2007), https://academic.oup.com/cid/article/45/8/1047/344842 ("the probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and

clean laundry, insufficient infection-control expertise, and prohibitions against the use of proven harm-reduction tools").

Last week only one KDOC facility had confirmed COVID-19 cases. Ex. D. This weekend that became two facilities. The experiences of other jurisdictions show that more cases are inevitable. Ex. N 15:13-16 ("A. It will happen. It's happening one by one at every facility. Q. Do you have any doubt about that? A. No doubt."); *see also* Ex. A ¶ 15 (citing Sam Kelly, *134 inmates at Cook County Jail confirmed positive for COVID-19,* CHICAGO SUN-TIMES (Mar. 30, 2020), https://cutt.ly/6tYTqi5). Despite the increased risks for those who are incarcerated generally, the conditions of confinement to which Petitioners and other class members are subject produce yet another dramatically increased risk of viral contraction that our community at large has protected itself against—and for which Respondents are directly responsible.

B. Deliberate Indifference is Established By the Petitioners' Ongoing Conditions of Confinement Themselves.

Respondents' "extensive efforts" in light of the pandemic crisis are not the measure of their constitutional obligations to Petitioners. Deliberate indifference is not a test of good intentions. It demands results. Where purported remedial measures do not eliminate the substantial risk posed by ongoing conditions of confinement, deliberate indifference is nonetheless established. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (courts "may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious"); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996) ("even where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail

practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices"). In other words, the Eighth Amendment's subjective requirement merely demands an awareness of the ongoing risk of substantial harm— which Respondents have clearly demonstrated.

As noted above, Respondents—while aware of the need to implement social distancing protocols—have done nothing to prevent dozens or at times hundreds of incarcerated individuals and staff members from interacting with one another on a daily basis. These daily conditions will easily foster pandemic spread at the moment of a COVID-19 outbreak. Ex. B ¶ 5. But Respondents' deliberate indifference to the medical needs of its residents goes further. Specifically, Respondents have not articulated a plan to provide potentially hundreds of individuals with underlying medical conditions access to a ventilator or ICU care in the event of an urgent COVID-19 case. Ex. N 16:12-16, 17:4-7 ("And you think about those one-day doubling rates, right? You're going to start getting a lot of people. And there are going to be a portion of those people that not only need hospital beds, but are going to need ventilators […] As of last week there had not been, to my knowledge, and I did a little bit of digging around this, negotiations with any state prison facilities or local jails to make accommodations for a patient surge in the case of a jail or prison outbreak"); *see also* Ex. A ¶ 30; Ex. F ¶ 7; Ex. G ¶ 6; Ex. H ¶ 8; Ex. J ¶ 6; Ex. L ¶ 7 (identifying concerning lack of responsiveness and unavailability of medical staff resources).

Respondents have many populations vulnerable to COVID-19 confined in their facitities. See Celila Llopis-Jepsen, *Many Kansas Inmates Will Wait For Hepatitis C*

Treatment Despite Recent Legal Settlement, KCUR 89.3 (Jun. 11, 2019), available at https://www.kcur.org/post/many-kansas-inmates-will-wait-hepatitis-c-treatment-despite-recent-legal-settlement#stream/0 (identifying that over 700 individuals had gone untreated for Hepatitis C as of last year). Emergency medical resources will need to be available to vulnerable KDOC residents in a matter of hours to save their lives. Ex. N. 12:7-9 ("Q. Are we talking weeks, days, hours? A. Hours"). Under these circumstances, KDOC does not have the resources to provide adequate care to Petitioners and other members of the class. This substantial risk of future harm is an actionable Eighth Amendment violation in and of itself. *Helling*, 509 U.S. at 33 ("a remedy for unsafe conditions need not await a tragic event").

II. Separation of Powers Cannot Insulate Respondents from this Court's Authority to Remedy Constitutional Violations.

As a general matter, contrary to Respondents' suggestion, penal authorities are not exempt from judicial review. *Turner v. Safley*, 402 U.S. 78, 84 (1989)("prison walls do not form a barrier separating prison inmates from the protections of the constitution."); *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)(noting standard of review for agency decisions "is not toothless"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("deference does not imply abandonment or abdication of judicial review"). As with any other government action, prison administrative decisions are subject to review for compliance with the Constitution. *Wares v. vanBebber*, 319 F. Supp. 2d 1237, 1248-50 (D. Kan. 2004). In particular, courts have held that the medical decisions of prison officials do not warrant reflexive deference, but rather must be evaluated by reference to the relevant professional

consensus to ensure that the decision under consideration is "prudent." *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989)("[i]n deciding whether there has been deliberate indifference to an inmate's serious medical needs, [a court] need not defer to the judgment of prison doctors or administrators.").

The Supreme Court has held that the complexities of remedying constitutional violations in carceral settings are not a reason to cede the rights of inmates to the executive branch. *Brown v. Plata*, 563 U.S. 493, 511 (2011). Indeed, in *Brown v. Plata* the Court held that "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* The Court further outlined possible procedural mechanisms for providing sweeping relief—in that case, prison depopulation—to remedy unconstitutional prison conditions "including appointment of special masters or receivers and the possibility of consent decrees." *Id.*

This Court need not defer to KDOC's cursory claims that "they are giving their all." Instead, it should seek to employ the broad range of mechanisms necessary to remedy the ongoing constitutional violations Petitioners and those similarly situated are facing in KDOC facilities. Specifically, this Court should use its broad equitable powers to appoint a special master pursuant to K.S.A. 60-253. Petitioners acknowledge that depopulating prisons is not a simple task. However, it is not as prohibitively difficult as Respondents suggest and would certainly be manageable if done under the supervision of a court-appointed public health expert.

III. This Court Should Exercise Jurisdiction of This Matter.

A. Relief is Not Available at the District Court Because A Statewide Case and Controversy Exists.

Respondents argue that no statewide case and controversy exists based on their misapprehension of Eighth Amendment jurisprudence and a fundamental misunderstanding of the threat COVID-19 presents in KDOC facilities. Petitioners have addressed Respondents' flawed interpretation of the Eighth Amendment's protections in the first section of this brief and now turn to the factual risks that Respondents have failed to acknowledge. Individuals incarcerated in facilities where there are no confirmed cases of coronavirus infection are subject to a heightened, known risk of exposure. First, as Dr. Ramaswamy has noted, the nature of prisons— particularly those as crowded as KDOC facilities— makes pandemic spread inevitable. *See* Ex. N 15:13-16. Moreover, Respondents' assertion that there is no risk at other facilities because there are no confirmed cases assumes universally accessible and accurate testing. Given the limitations on adequate health care in all of KDOC facilities and the documented high number of false negatives, such testing does not exist. Finally, Respondents' assertion that no cases exist in other facilities fails to acknowledge the likely presence of asymptomatic residents and staff. The number of cases in Lansing exploded over the course of a week. When Petitioners filed their brief, there had been no confirmed cases at the Wichita work release facility. Today the outbreak has necessitated transferring over 100 inmates away from their jobs and back to prison. By the time the Court reviews this brief there is no telling where another confirmed case will have surfaced.

B. This Court Should Exercise Jurisdiction Even if A Statewide Case and Controversy Does Not Exist.

This Court has concurrent jurisdiction over Petitioners' habeas action under Article III, Section 3 of the Kansas Constitution and K.S.A. 60-1503. While Supreme Court Rule 9.01(a) provides that it "will not ordinarily" exercise jurisdiction where relief is available at the district court, this Court's permissive approach is well-established. *Comprehensive Health PP v Kline*, 287 Kan. 372, 405; *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (Kan. 2016) ("[T]his court has traditionally been somewhat lenient on enforcement of that general rule"). Further, there are a number of situations in which the Court has noted that it will exercise original jurisdiction even if relief is available at the district court level. *Landrum v. Goering*, 306 Kan. 867 (Kan. 2017). In particular, "judicial economy, the need for speedy adjudication of an issue, and avoidance of needless appeals" all factor into whether the Court will exercise discretion. *Id.* Here, each of these situations are present. The adjudication of separate actions in multiple district courts will potentially produce conflicting outcomes which will ultimately result in an appeal. Moreover, and as Petitioners have stressed, given the danger of the disease and lives at risk, time is of the essence.

IV. Respondents Do Not Address This Court's Exceptions to Administrative Exhaustion—Which Petitioners Clearly Satisfy.

Respondents argue at length that Petitioners have not exhausted their administrative remedies. Response at 8-9. But Petitioners have never suggested otherwise. Instead, Petitioners catalogue the applicability of this Court's futility exception to administrative exhaustion in detail in their opening brief— demonstrating that the forms of relief sought

by Petitioners are unavailable through the disciplinary grievance process. *In re Pierpoint*, 271 Kan. 620, Syl. ¶ 2, 21 P.3d 964 (Kan. 2001); *Beaver v. Chaffee*, 2 Kan. App. 2d 364, 370, 579 P.2d 1217 (Kan. App. 1978)). Respondents have argued the general rule and its justification, but have ignored the clear exception. Petitioners doubt that even Respondents' "emergency grievance" procedure could have addressed Petitioners' constitutional harms with any degree of timeliness. Regardless, the availability of an "emergency grievance" procedure is irrelevant where release, de-population, and other relief sought is simply unavailable through the grievance process. *Pierpoint*, 271 Kan. aat 625 ("the unique nature of the inmates' complaints did not lend itself to the ordinary disciplinary procedures available at the jail").

IV. Kayla Nguyen Has Standing to Pursue Relief as a "Next Friend."

Ms. Nguyen has submitted a sworn declaration that she has a close personal relationship with Petitioner Makthepharak, and that she will act in his best interests. Petition Ex. M ¶¶ 3-4, 10. His incarceration also increases the practical difficulties of securing confidential means of communication with counsel and filing emergency litigation absent the opportunity for in-person visitation— including verifying the petition in this case— the purposes for which Ms. Nguyen agreed to serve as a next friend. *See, e.g., Whitmore v. Arkansas,* 495 U.S. 149, 162 (1990) ("next friend" standing "has long been an accepted basis for jurisdiction in certain circumstances," usually "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves"); *Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (finding next friend standing met where petitioner "could not sign and verify

the petition because the prison was locked down") (internal quotation marks omitted); *McCraney v. Boyd*, No. 95-0383-BH-M, 1995 U.S. Dist. LEXIS 9111, at *3 (S.D. Ala. May 30, 1995) (noting on habeas review that "[a]n action under either statute can be maintained by 'someone acting in [an incarcerated person's] behalf,' as a 'next friend'") (internal citations omitted). These unusual circumstances therefore satisfy the incapacity requirements of K.S.A. 60-1501.

V. Petitioners Have Properly Served All Respondents and Petitioners' Exhibits are Proper.

Petitioners have properly served all named Respondents in this action. Proof of service for Respondents is attached to this reply brief. *See* Exhibits O-R. Due to the emergency nature of this proceeding, Petitioners did not provide proof of service prior to filing. But Respondents are correct to look to the example set by Governor Kelly in her recent emergency original action before this Court—in which she indicated that she served the respondents via email and personal service, but did not include any proof of service along with the original petition. Nevertheless, to the extent that Respondents believe service was defective after Petitioners followed a similar procedure, Petitioners note that Respondents clearly have notice of this suit sufficient to cure any minute procedural deficiency. *See* K.S.A. 60-204 ("Substantial compliance with any method of serving process effects valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that an action or proceeding was pending in a specified court"). Finally, Petitioners note Respondents' objections to their

exhibits but find these objections curious in light of Respondents' own submissions to the Court.

Dated: April 14, 2020

Respectfully Submitted,

ACLU FOUNDATION OF KANSAS

/s/ Lauren Bonds_____

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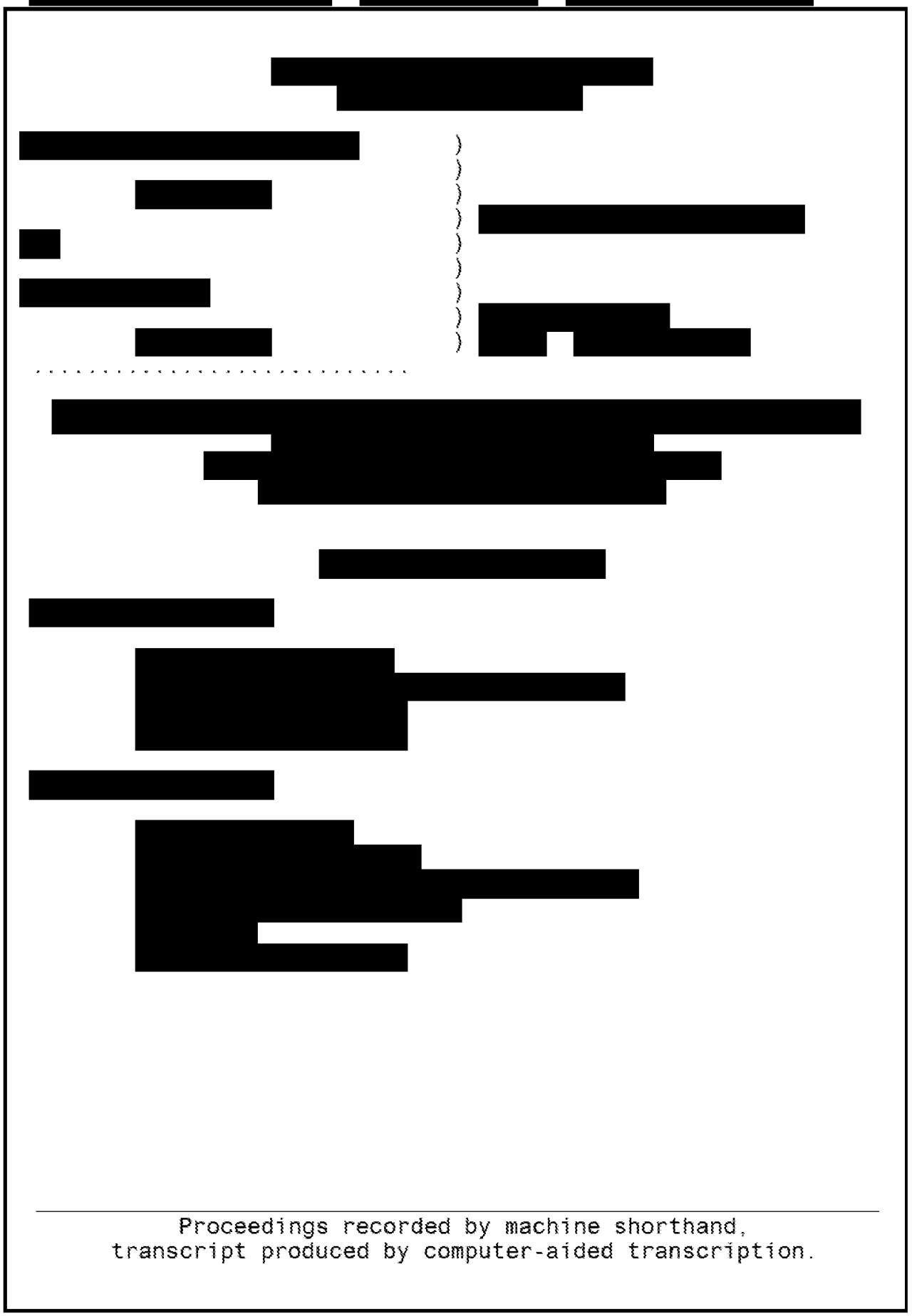
CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2020, I electronically filed the foregoing with the Clark of the Appellate Court's electronic filing system which will serve all registered participants and a copy was also served by email, addressed to Jeff Cowger (jeff.cowger@doc.ks.gov), Natasha Marie Carter (natasha.carter@ag.ks.gov), Kristafer Ailslieger (Kris.Ailslieger@ag.ks.gov), and Fred W. Phelps, Jr (Fred.PhelpsJr@ks.gov), Counsel for Respondents.

/s/ Lauren Bonds_____
Lauren Bonds

Exhibit N



Proceedings recorded by machine shorthand,
transcript produced by computer-aided transcription.

DANIELLE R. MURRAY, RMR, CRR

U.S. District Court, 500 State Avenue, Kansas City, Kansas 66101
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I N D E X

(Excerpt of video conference detention hearing, testimony of Megha Ramaswamy.)

MS. BRANNON: Your Honor, we call Dr. Megha Ramaswamy. Doctor, are you prepared?

THE WITNESS: Uh-huh.

COURTROOM DEPUTY: Doctor, can you please raise your right hand?

MEGHA RAMASWAMY,

called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

COURTROOM DEPUTY: Thank you.

THE COURT: Okay, Ms. Brannon.

DIRECT EXAMINATION

BY MS. BRANNON:

Q. State your name for the record.

A. Yes, Megha Ramaswamy.

Q. For the court reporter, could you spell that, please.

A. If you need to, you can look at my Zoom account here; it's spelled out. But it's M-E-G-H-A. Last name R-A-M-A-S-W-A-M-Y.

Q. And, Doctor, what do you do for a living?

A. I am professor of population health at the University of Kansas School of Medicine. I've been there for ten years.

Q. And can you describe your educational background, please?

A. Yeah. First, I also want to say thank you to the Court for having me. I know it's a very difficult time, and I appreciate

everyone being willing to roll with these unusual circumstances. So thank you.

So I am a public health researcher and professor. I teach public health. My research for the last 15 years has been with people who are incarcerated or leaving jails. I spent five years working in New York City and the last ten working in Kansas City in the Wyandotte County Jail, Jackson County Jail, and Johnson County Jail.

Q. And what is the focus of your research?

A. So I have about a $10 million research portfolio funded by the National Institutes of Health to develop public health interventions for women who are incarcerated and leaving jail. I'm officially a cancer researcher, but I broadly work on women's health issues.

Q. Can you tell the Court how you came to be involved in this case?

A. Yeah. Mr. Redmond sent me an e-mail asking, given my expertise and background, if I might be willing to consult on this case.

Q. And, Doctor, are you -- the time and research that you've devoted to this so far, are you doing that for free?

A. Yes.

Q. Why are you doing that?

A. I mean, this is -- from the public defender's office, I don't feel like those resources should be spent on me and I

view this as part of my work.

Q. We've already referred on the record to the COVID-19 pandemic. Can you explain how that pandemic relates to the work that you do?

A. Yeah, so COVID-19, of course, is affecting all of us on this call, in the world. There's no way to escape it. You know, it's changing the way certainly I teach my public health courses. It's changing the way we do research.

I've had e-mail exchanges with the wardens in three counties just this morning, spent the weekend talking to the state health department official in Kansas. We're doing everything we can as public health faculty to work with local health department officials and state health officials.

In terms of my research program, you know, we're thinking about what are new ways we can reach out to our women? What are the new questions to ask? What are the most pertinent issues related to people's lives as they navigate COVID-19?

Q. Let's talk for a moment just about COVID-19 in the general public. Looking at the KDHE website today there are 845 positive cases in the state of Kansas. How do you expect that trend to go?

A. So the best estimates right now say that Kansas is going to peak in COVID-19 cases around April 28th was the last time I looked at the numbers.

When you look at the U.S. as a whole, we look at what's

called a doubling rate. So that means if you have 800 cases today in Kansas, nationally we know that rate will double in five days. So five days from now, at the end of this week, for example, we would expect there to be 1600 positive cases. I'll also note that the doubling rate for deaths due to COVID is only three days, so while we're at about 22 deaths in Kansas today, three days from now we'll be at about 44 cases that are death cases.

Q. Can you tell us what that means for jails such as CoreCivic?

A. Yeah. So I think scientists like me who work both in public health and in the correctional system are extremely worried about places that are sort of closed facilities. So these are cruise ships, schools, mental health facilities, and jails and prisons are of course one that we're really concerned about.

So while I'm telling you that the doubling rate for COVID-19 cases is five days in America as a whole, it's only one day in jails and prisons, and that comes from Bureau of Prisons data.

So if you find at CoreCivic tomorrow that there are two positive cases, the very next day there will be four positive cases, and the day after that there will be eight positive cases because they're thinking about doubling rates.

The best measures that we have to prevent transmission of

COVID-19 is through social distancing because COVID-19 is passed through droplets when you breathe, coughing, sneezing. And in situations where there's confinement, it's very hard to escape that, and that accounts for the doubling rates.

Q. Doctor, you've reviewed the written policy of CoreCivic; is that right?

A. Yes.

Q. And I spoke with the assistant warden today. There are no positive COVID tests at CoreCivic among either the detainees or the staff. Do you have reason to think it will stay that way?

A. No, I don't. I mean, we're facing a national shortage of tests, and while tests are very difficult to get in the free community, I imagine they're even more difficult to get in prisons and jails. We're also sort of -- everyone is expecting a bad month this month in the state of Kansas and in our area in Kansas City. So the moment CoreCivic starts doing routine testing, if that's even possible, they'll start getting cases and those cases will multiply fast.

Q. You mentioned social distancing. Why is -- why is that an effective means of controlling?

A. So it's really the only measure for control that we have right now. So as I said, COVID-19 is spread through droplets when people breathe, coughing, and sneezing and spit. We say that 6 feet is enough, but the truth is that droplets of coughing and sneezing, that saliva can travel up to 27 feet.

And because COVID-19 is airborne, social distancing really provides the only measure to stop airborne transition and is a critical part of state policy, national policy, and global policy to reduce transmission of COVID-19.

Q. Can you talk about social distancing within a jail such as CoreCivic, which does not have single bed cells?

A. Yeah. I've been in a lot of jails and it's really hard to imagine what social distancing would look like in those pods that don't have single bed cells where people congregate in a small confined space. It's impossible to get away from one another.

I think what's even more concerning is the volume of correctional staff and health care workers and vendors that come into these -- and lawyers that come into these facilities every day from the outside, not only are they at risk for getting COVID-19, but they could also be the ones who are bringing it into facilities.

The challenge with correctional settings is that people, whether they're correctional officers or inmates, they cannot control what they're coming into contact with in those settings.

I'd also like to say that, you know, if -- so the CDC is now recommending people wear masks and gloves when they go out in public, and if you do those two things, you can prevent 90 percent of transmissions. But we know that having gloves

and masks for everyone is going to be really difficult inside correctional settings, not to mention the challenges with not being able to have hand sanitizer and enough washing stations for people to use with soap.

Q. When we looked at the numbers in Exhibit 402, there are over 900 detainees at CoreCivic and about 200 staff that cycle through three shifts. In looking at those numbers and the written policy that talks about screening people coming in, did you find that that screening policy would be an effective means of preventing the disease from coming into the facility?

A. You know, in some ways it's the best that we can do, right, doing temperature scans of everyone who walks in. But as long as you're bringing in new people every day, there really is no great way to prevent transmission. People are going home. They're going grocery shopping. They may be taking loved ones to health care facilities or coming back in. As long as we're admitting new detainees into these facilities every day, those are also people who have had a lot of community involvement before they're coming in.

You know, the best screening that we're doing right now to my knowledge in jails and prisons is temperature scanning, but that only catches symptomatic people, and we know that COVID-19 is living in asymptomatic people who don't have fevers or sneezing. And they are also people who can transmit the disease.

Q. Someone who is infected and asymptomatic, how long could it be before they develop -- (inaudible due to technical problems).

THE REPORTER: I'm sorry. I'm sorry. Can you repeat that question? I didn't hear it.

MS. BRANNON: Certainly.

BY MS. BRANNON:

Q. For people who are infected and asymptomatic, how long would it be before there are detectable symptoms that appear?

A. There's a range, but what the public health community has sort of agreed on is if you monitor people for about 14 days, at the end of the 14 days if they have not shown symptoms, they probably won't and the chances of them transmitting the disease are low.

Q. Let's talk for a minute about people who are at a high health risk. Can you define what that means when we talk about a high risk in the COVID-19 atmosphere?

A. Yep. So there's two groups at high risk: People with chronic conditions and the elderly. When we think about chronic conditions in my own work, 72 percent of the people we work with in jails in Kansas City have at least one chronic condition. About a third of people have hepatitis C, a quarter of people with HIV disease pass through a jail or prison in this country. Diseases like diabetes, asthma, heart disease, these are all overrepresented in people who are incarcerated.

And it's not that those people are more likely to transmit COVID-19; it's just that they're more likely to get very sick very fast and require hospitalization outside of CoreCivic.

And the elderly, so we're looking at -- I think the CDC says 60 plus, but we think about, you know, starting at 50, 55. And I was just looking at data in terms of new cases. The burden of cases in COVID-19 is actually among 35- to 39-year-olds right now. So they may not get as sick, but certainly everyone is getting COVID-19.

Q. Our client, [redacted], is [redacted] years old. Does that mean he is more immune to the disease?

A. No. Immunity is a highly specific characteristic, one that we know very little bit about with COVID-19. He is just as likely as anyone else to get the disease.

What someone with asthma faces if they would get COVID-19 is an increased risk for, you know, not being able to breathe. What COVID-19 does is it restricts airways, causes inflammation, and damages the lungs. And so if an asthmatic couldn't breathe with that condition, that person might need oxygen as a first line of defense, but because COVID-19 progresses so rapidly, that person would likely need a ventilator, which I don't believe CoreCivic has the capacity to provide.

Q. How fast would that occur for an asthmatic to become infected and then progress to the point of needing to be on a

ventilator?
A. We don't know. Again, it varies. But what we sort of see in general with people with chronic conditions, especially underlying respiratory conditions, is it happens pretty fast. They get admitted, for example, to an emergency room and then get admitted to the ICU floor pretty fast.
Q. Are we talking weeks, days, hours?
A. Hours.
Q. Hours. Okay. For someone who is in a high-risk category like asthma, is the best means to avoid infection still social distancing?
A. Yes. So the best recommendation for a person -- and I hope that the defendant -- I'm not scaring the defendant here. I'm just trying to speak to the severity of COVID-19 for people with chronic conditions. But the best defense is really social isolation, staying away from people, lots of handwashing, following shelter-in-place orders that are in almost every state now, but certainly in the state of Illinois and Kansas, and really limiting contact with the outside world.
I do want to say, as I said, limiting contact with the outside world, some people might think, oh, a prison is an ideal place to do that, except for the problem of increased rates of transmission inside correctional facilities.
So we know from New York City that the COVID-19 rate is nine times that of the COVID-19 rate in the community in

general, and cases are split almost evenly among inmates and correctional staff; it's not just inmates that are at risk. And, you know, the danger and the risk for transmission is so high inside a correctional facility that we do not consider those kinds of places. I look at a correctional facility just like I would as a cruise ship, and none of us would get on a cruise ship right now because the rate of transmission would be so high in such a setting.

Q. Do you have any reason to think that either a jail like Rikers or Cook County or the Oakdale BOP are doing things differently than the precautions that CoreCivic is doing?

A. Well, I mean, it's all in negotiation right now. So, for example, the state of Kansas, the health director is right this weekend negotiating and implementing a national commission on correctional health care standards throughout the state of Kansas.

In Wyandotte County there have been multiple meetings between the sheriff, the public health department -- not very many among the hospital staff yet -- to try to come up with the right screening protocols. It's an evolving situation.

Right now as best that I could see that CoreCivic is doing is they have a set of screening questions, but I do not see any procedures for actually what would cause someone to be tested for COVID-19 if tests are available at CoreCivic and then, if someone tested positive, where they would send them.

One measure that I saw in CoreCivic policies was to create a high-risk pod for inmates, which, as I understand, it would be putting together all of those inmates that are either old or have chronic conditions. That to me is sort of a recipe for disaster because if one person gets COVID-19 in that high-risk pod, the likelihood of everyone getting it is very high and those are going to be your sickest patients who are going to need the most care.

In Johnson County, for example, they are moving their isolation units to a facility that doesn't have a lot of people in it down in Olathe. That to me is a reasonable way of handling this, that you take those people who are either positive for COVID-19 or those who you suspect might have COVID-19, cough, sneezing, fever, and you isolate them, not in a solitary confinement situation, but in a situation where they could get regular medical monitoring, which is what they'll need. Does that make sense?

Q. I believe so. When you say "isolate," can you tell us what you mean by isolate?

A. Yeah. So on the one hand, just like social distancing and, you know, people are not supposed to leave home when there's a shelter-in-place order, this is keeping someone away from other people at least 30 feet so that any droplets, saliva, spit can't go and infect other people.

We also know that COVID-19 lives on surfaces for about

72 hours, so that's three days. So you want to be able to have that place where the person is isolating cleaned regularly and all of the places around it cleaned. It's very difficult to maintain these procedures outside of a home. It's very hard for an institution to do this.

And then, of course, you can't just leave this person alone for days at a time, hours at a time. This person would need regular monitoring, temperature-taking, food, water, and to make sure they are not progressing to a higher disease state.

Q. I want to back up before we move to this next set of questions. Again, can you tell us how likely it is that there will be a COVID outbreak within CoreCivic?

A. It will happen. It's happening one by one at every facility.

Q. Do you have any doubt about that?

A. No doubt. I mean, the volume -- you said there are 200 correctional staff, and I imagine there are new inmates that are being admitted still every day. Is that true?

Q. There are about 40 admitted every day.

A. So 200 correctional staff, 40 new people coming in every day, people will bring COVID into the facility.

Q. Will there be a way to confine it to the facility so it does not spread back out into the public?

A. No, because you think about those 200 people that are going home every single day and you think about inmates are being

released. I don't know what those numbers are, but I'm sure people are being released.

Q. With this trend worsening within the jail, the medical facility that is described by CoreCivic, seven beds, double-celled, no ventilators, will they be able -- will that medical facility with one doctor and 20 nurses be able to handle an outbreak among a population of over 900?

A. No. I mean, not if you think about -- so, you know, about a week ago Rikers had 5 percent of the inmate population had COVID-19. So when you think about -- and our peak day is the end of April, so if you were to do testing right now, I believe you would get sort of that 5 percent. And you think about those one-day doubling rates, right? You're going to start getting a lot of people.

And there are going to be a portion of those people that not only need hospital beds, but are going to need ventilators, so now CoreCivic becomes responsible for the secure transport of patients to a place like KU Med or Providence where people can sort of -- security staff can be with patients in those settings while they get treated. You know, and the concern there, of course, is the national shortage of ICU beds, ventilators.

Q. Let's talk about KU Med for just a moment. What is the status of their ability to deal with this right now?

A. So the best national -- the best statewide estimate showed

that there are 278 ICU beds in the state of Kansas for the 277 patients who we think will need them. To best of my knowledge, that does not include jail and prison outbreaks.

As of last week there had not been, to my knowledge, and I did a little bit of digging around this, negotiations with any state prison facilities or local jails to make accommodations for a patient surge in the case of a jail or prison outbreak. I believe those negotiations are going to start happening now. I'm trying to facilitate those negotiations locally for our local jails. But without that kind of preparation, the system is going to be unable to handle jail and prison outbreaks from COVID-19.

And I'll also say, you know, if you're watching the news, places like New York City are having to make decisions about who gets ventilators and who doesn't. This is a reality we're living in. So nationally we expect to use about 200,000 ventilators, which we have 200,000 ventilators, but we expect to need about 900,000. They're just not there. So there's a big question about, well, who is going to get put on a ventilator when the time comes to make those decisions. That is a big national ethical question.

Q. Do you know how likely it is for an asthmatic that contracts COVID-19 to need a ventilator?

A. I don't have, you know, a percentage of cases for you. I think that if an asthmatic were to develop COVID-19, they would

experience great difficulty breathing. The first line of defense would be to get that person oxygen, and when that fails, that person will have to be hooked up to a ventilator to breathe.

Q. In a case of someone like [redacted] who has proposed going to 14-day basically quarantine, is he going to be safer from risk of an infection than he would be within a congregate setting like CoreCivic?

A. Yes, because if you think about the rate of transmission in the one home with, you know, his great-aunt, this person, and maybe one or two other people, the risk of transmission in that confined setting is far less than in an institutional environment like a correctional facility where there's 900 people in close proximity and lots of new people coming in every day.

Q. Let's talk about the -- if this -- we have a scenario where he's removed and quarantined, will that affect the safety of the other detainees and staff at CoreCivic if someone is removed from that setting?

A. Yes. I mean, so every public health scientist that is working in the correctional health space is advocating for fewer people equals fewer transmission, so we're advocating for anyone who is not a great security threat or anyone who is in a high-risk group like has a chronic condition like asthma or is elderly to be released because the situation you want in a

correctional facility is to have enough space to truly be able to isolate folks that test positive for COVID-19 or are suspected to have COVID-19, and you can't have that when you're already at capacity in correctional facilities. So the quicker you get those people out, the better situation it's going to be inside a correctional facility.

Q. Along those same lines, if we have this setting where he is taken out and quarantined and no longer in that setting, can you talk about the effect of that on the public health care system?

A. Yeah. So social distancing and social isolation are the way right now. This is the best defense we have against COVID-19. By removing a person and putting them into an environment where they can shelter in place with a small family unit, that person is significantly less likely to (a) transmit the disease and (b) develop complex medical problems related to the disease that could result in his hospitalization.

It's all about the risk of transmission here. Right? The risk of transmission is high in a correctional facility. It's low at home. And if you have a low risk of transmission, you then have a low likelihood of needing to use community hospital resources.

Q. And just to sort of recap, as a high-risk individual, [redacted] is not more susceptible to actually contracting the disease in a normal setting, but he is more likely to become

more ill if he is infected?
A. Yes. The risk of transmission is the same for everybody. But the risk of morbidity -- so getting really sick -- and mortality -- death -- is much higher for an asthmatic.
Q. If someone is asthmatic like [redacted] and contracts it, even if he ends up in ICU and is on a ventilator, are there other long-term detrimental health effects as a result of that?
A. We don't know yet. It's a new disease. We just don't know.
Q. Doctor, you have not in this case actually either met [redacted] or looked at any of his medical records or anything of that nature, correct?
A. No. And, in fact, I can't even see his face.
Q. Of the things we have covered, is there anything that I've missed that we talked about before that you'd like to point out for the Court?
A. I would just like to highlight two realities: (1) in New York City the rate of COVID-19 inside Rikers Jail is nine times that of the city as a whole; and the second reality is this doubling rate, which is that in one day, no matter however many cases you've identified in the facility, it's going to be double the next day and the double the day after that.
The people at greatest risk are those with chronic conditions and old people. And the risk is getting very sick, needing a ventilator, and, of course, death.

MS. BRANNON: Thank you, Doctor. I don't have any further questions. Mr. Slinkard may, however.

THE COURT: Okay. Mr. Slinkard, any questions for the witness?

CROSS-EXAMINATION

BY MR. SLINKARD:

Q. I want to go back over what Melody asked. I think you covered most of it. I just want to be clear, Doctor, your basic thesis, as I understand it, tell me if it's fair to say, that because of the constricting nature, if you will, of prison populations, that the risk of transmission is higher than you perceive it to be in the general public?

A. That is correct.

Q. And you'd agree with me that isolation in the general public does require a certain degree of willingness on the part of the person to self-isolate?

A. Absolutely. You know, this is a decision we make as families, as communities, as individuals.

Q. So certainly if someone is in a large urban area, they would have an opportunity to potentially interact with a great many more individuals than they might encounter inside a facility; they just, in your opinion, would have a much greater opportunity to isolate should they choose to do so?

A. Yeah, that's true, but actually what we're seeing is that urban people doing are doing better at social isolation than

rural people are as a trend. So I think that, you know, the message has gotten across to communities, urban and rural, that isolation is the way to go.

Yes, a person could walk outside their door and encounter ten people, but it is on that person to sort of be responsible and say, hey, I'm going to stay inside as much as possible.

Q. And thank you; that's more or less what I was trying to achieve is just the idea that it's really going to be up to the person to avoid it?

A. Absolutely. And, you know, a sense also of I have to look out for other people in my life, 101-year-old great-grandmother, a great-aunt, cousins, siblings, children. We're all making these decisions because of this feeling of, if we don't do this, somebody else is at risk.

MR. SLINKARD: I think those are all the questions I have at this time. Thank you.

THE COURT: Thank you, Mr. Slinkard.

Ms. Brannon, any follow-up questions?

MS. BRANNON: No, Your Honor. Thank you.

THE COURT: Okay. Thank you, Dr. Ramaswamy, and best of luck to you during this difficult time for everyone. Thank you for your time today.

(End of requested excerpt.)

C E R T I F I C A T E

I, Danielle R. Murray, a Certified Court Reporter and the regularly appointed, qualified, and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that the foregoing is a true and correct transcript from the stenographically reported proceedings in the above-entitled matter.

SIGNED 7th of April, 2020

/s/Danielle R. Murray
DANIELLE R. MURRAY, RMR, CRR
United States Court Reporter

Exhibit O

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NDA		
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SubTotal	$	36.22
Total	$	36.22
Visa Credit	$	36.22

ACCOUNT NUMBER * ************3495
Appr Code: 219074 (I) Sale

ENTRY METHOD: ChipRead
MODE: Issuer
AID: A0000000031010
TVR: 8080008000
TSI: 6800
AC: FF2EFBD6B26EA49E
ARC: 00

Receipt ID 83048383886920888946 001 Items
CSH: Lauren Tran: 8324 Reg: 001

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Shipment Receipt: Page #1 of 1

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THUR 9 APR 2020

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ACLU
14108 W 63RD
SHAWNEE KS 66216
(913) 484-6270

SHIP TO:
KANSAS DEPT OF CORRECTIONS
CHIEF LEGAL COUNSEL- JEFF COWGER
714 SW JACKSON ST
STE 300
TOPEKA KS 66603-3722
BUSINESS

SHIPPED THROUGH:
THE UPS STORE #4701
SHAWNEE,KS 66216-3800
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SHIPMENT INFORMATION:
UPS NEXT DAY AIR COM
0.00 lb actual wt
1.00 lb billable wt
CARRIER LETTER
SIG REQ (W/DELV CONFIRM)
E-MAIL NOTIFICATION: SHIP,DELIVER

TRACKING NUMBER: 1Z0R347V2465054017
SHIPMENT ID: MM3QX3NYWAT0F
SHIP REF 1: LC
SHIP REF 2: - -

DESCRIPTION OF GOODS:
DOC- LAWSUITE

SHIPMENT CHARGES:

NEXT DAY AIR COM	30.04
SERVICE OPTIONS	5.25
FUEL SURCHARGE	0.71
CMS PROCESSING FEE	0.22
TOTAL	$36.22

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Delivered On

04/10/2020 10:29 A.M.

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TOPEKA, KS, US

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MON 13 APR 2020 10:30 AM

SHIP FROM:
ACLU
1410B W 63RD
SHAWNEE KS 66216
(913) 484-6278

SHIP TO:
LANSING CORRECTIONAL FACILITY
WARDEN SHANNON MEYER
301 E KANSAS ST
399
LANSING KS 66043-1619
BUSINESS

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THE UPS STORE #4781
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1.00 lb billable wt
CARRIER LETTER
SIG REQ (W/DELV CONFIRM)

TRACKING NUMBER: 1Z6R347U2498442983
SHIPMENT ID: MM3QX3NU6A10N
SHIP REF 1: LC
SHIP REF 2: - -

DESCRIPTION OF GOODS:
DOC

SHIPMENT CHARGES:	
NEXT DAY AIR COM	30.04
SERVICE OPTIONS	5.25
FUEL SURCHARGE	0.71
CMS PROCESSING FEE	0.22
TOTAL	$36.22

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04/13/2020 10:02 A.M.

Delivered To
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LC, MM3QX3NV6A10N

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ACLU
14108 W 63RD
SHAWNEE KS 66216
(913) 484-6270

SHIP TO:
ELLSWORTH CORRECTIONAL FACILITY
WARDEN DONALD LONGFORD
1607 STATE ST
ELLSWORTH KS 67439-1620
BUSINESS

SHIPPED THROUGH:
THE UPS STORE #4701
SHAWNEE,KS 66216-3800
(913) 962-7788

SHIPMENT INFORMATION:
UPS NEXT DAY AIR COM
0.65 lb actual wt
1.00 lb billable wt
CARRIER LETTER
SIG REQ (W/DELV CONFIRM)

TRACKING NUMBER: 1Z0R347V2465116723
SHIPMENT ID: MM30X3N6130YF
SHIP REF 1: - -
SHIP REF 2: - -

DESCRIPTION OF GOODS:
DOC

SHIPMENT CHARGES:	
NEXT DAY AIR COM	30.04
SERVICE OPTIONS	5.25
FUEL SURCHARGE	0.83
DELIVERY AREA SURCHARGE	6.25
CMS PROCESSING FEE	0.22
TOTAL	$42.59

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SHIP FROM:
ACLU
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SHIP TO:
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WARDEN GLORIA GEITHER
815 SE RICE RD
TOPEKA KS 66607-2363
BUSINESS

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UPS NEXT DAY AIR COM
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CARRIER LETTER
SIG REQ (W/DELV CONFIRM)

TRACKING NUMBER: 1Z0R347V2465107513
SHIPMENT ID: MM3QX3N76E7MX
SHIP REF 1: LC
SHIP REF 2: - -

DESCRIPTION OF GOODS:
DOC

SHIPMENT CHARGES:

NEXT DAY AIR COM	30.04
SERVICE OPTIONS	5.25
FUEL SURCHARGE	0.71
CMS PROCESSING FEE	0.22
TOTAL	$36.22

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04/10/2020

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Delivered On

04/13/2020 9:20 A.M.

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TOPEKA, KS, US

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