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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ARIZONA**

10 **JEFFREY NIELSEN, ET AL.,**

11 **Plaintiffs,**

12 **v.**

13 **DAVID SHINN,**

14 **Defendant.**

**NO. 2:20-CV-01182-GMS-JZB**

***AMICUS CURIAE BRIEF***

15  
16 **I. INTRODUCTION**

17 In his Motion to Dismiss filings, Director David Shinn (“Director Shinn”) has set  
18 forth the multiple legal fallacies that underpin all of the arguments that Plaintiffs have made  
19 regarding the constitutionality of inmates in federal and state systems being detained in  
20 facilities that are operated by private sector contractors. The Day 1 Alliance (“Day 1”)  
21 supports Director Shinn in this regard. Beyond the issue of constitutionality, the purpose  
22 of this *Amicus Curiae* Brief is to inform the Court about the undeniable fact that the private  
23 sector operation of correctional facilities is beneficial for both the inmates incarcerated in  
24 those facilities and society in general. As set forth below, private sector contractors -- who  
25 have been involved in corrections throughout our nation’s history and who are subject to  
26 tremendous oversight -- provide cost-effective solutions, innovative programs, and  
27 operational efficiencies and play a critical and effective role in our criminal justice system.  
28

## II. BACKGROUND

### A. The Day 1 Alliance.

Day 1 is a trade and advocacy organization that is dedicated to educating Americans on the small but important role that the private sector plays in addressing corrections challenges in the United States. Day 1's members -- CoreCivic, Inc. ("CoreCivic"), The GEO Group, Inc. ("GEO"), LaSalle Corrections, and Management & Training Corporation ("MTC") -- have decades of experience working with local, state, and federal governments to help meet urgent public safety needs and to effectively and responsibly relieve overcrowded facilities and corrections systems. Their experience includes providing substantive programming to promote rehabilitation and reduce recidivism by preparing incarcerated individuals for post-release success. Day 1 assists in this endeavor by encouraging fact-based discussion and by bringing its members' real-world perspectives to the important and complex policy debate surrounding private sector contractors.

Day 1 does not advocate on legislation, policies, or regulations that impact the basis for or duration of an individual's incarceration. In fact, Day 1's members have long-standing, zero-tolerance policies against lobbying for or against such policies. Instead, Day 1's members have played a significant role in advocating for policies that will place individuals on the path to becoming productive members of society upon release. Recent examples include support provided for Ban the Box legislation, which expands employment opportunities by allowing former inmates to apply for jobs without disclosing their record of incarceration, and the bipartisan First Step Act, a landmark prison reform and recidivism reduction bill. See CoreCivic, Inc., *Position Paper: Ban the Box*, [https://www.corecivic.com/hubfs/\\_files/CoreCivic%20Policy%20Papers%202017\\_FINAL.pdf](https://www.corecivic.com/hubfs/_files/CoreCivic%20Policy%20Papers%202017_FINAL.pdf) (visited October 13, 2020); CoreCivic, Inc., *Statement from CoreCivic President and CEO Damon Hininger on the First Step Act*, <https://www.corecivic.com/statement-first-step-act> (visited October 13, 2020); The GEO Group, Inc., *GEO Group Statement of Federal Legislation on Prison Reform (The First Step Act)*, <https://wearegeo.com/2018/11/19/geo-group-statement-on-federal-legislation->

1 on-prison-reform-the-first-step-act/ (visited October 29, 2020); Management & Training  
2 Corporation, *MTC Applauds Congress for Passing Bi-Partisan Criminal Justice Reform*  
3 *Legislation*, [https://www.mtctrains.com/corrections/mtc-applauds-senate-for-passing-bi-](https://www.mtctrains.com/corrections/mtc-applauds-senate-for-passing-bi-partisan-criminal-justice-reform-legislation/)  
4 [partisan-criminal-justice-reform-legislation/](https://www.mtctrains.com/corrections/mtc-applauds-senate-for-passing-bi-partisan-criminal-justice-reform-legislation/) (visited October 28, 2020).

5 Day 1 recognizes the responsibility to provide safe and dignified care to those in  
6 publicly- and privately-managed facilities. Day 1 strives to provide the resources necessary  
7 to ensure that leaders can make the best, most informed decisions for our country's future.

8 **B. The History of Private Sector Contractors.**

9 Although the practice has seen a resurgence, government delegation of correctional  
10 responsibilities to private sector contractors is deeply-rooted in American history. Indeed,  
11 private individuals have contributed to the management and operation of correctional  
12 facilities in the United States for many years, some even managing entire states' prison  
13 systems. *Richardson v. McKnight*, 521 U.S. 399, 405 (1997); David J. DelFiandra, *The*  
14 *Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 Duq. L.  
15 Rev. 591, 595 (2000). The first major push toward reliance on private sector contractors  
16 was driven by a desire to reduce government expenditures and ease prison overpopulation.  
17 DelFiandra, *supra* at 595; Peter J. Duitsman, *The Private Prison Experiment: A Private*  
18 *Sector Solution to Prison Overcrowding*, 76 N.C. L. Rev. 2209, 2215 (1998).

19 By the 1980s, similar desires spurred a renewed interest in directing a range of public  
20 functions toward private sector contractors. DelFiandra, *supra* at 592; Duitsman, *supra* at  
21 2217. In search of a means to reduce taxpayer costs while improving quality and  
22 efficiency, federal and state governments increasingly considered transitioning (or actually  
23 transitioned) responsibilities from the government to the private sector in several  
24 industries, including air traffic control, education, government-funded healthcare,  
25 governmental housing, liquor sales, and postal services. DelFiandra, *supra* at 594.  
26 Following an exponential increase in incarceration rates, governments turned to private  
27 sector contractors to address the challenges posed by overcrowded prisons. Duitsman,  
28 *supra* at 2210, 2217.

1           The Department of Justice reported in 1996 that both state and federal prisons were,  
2 on average, operating at more than one-hundred percent capacity. Duitsman, *supra* at  
3 2211. This overpopulation, combined with limited government funds, had led to  
4 understaffing, poor living conditions, a decrease in rehabilitative programming, and an  
5 increase in violent incidents and disease in facilities. *Id.* These issues, in turn, required  
6 increased judicial oversight of prison operations and led to the early release of thousands  
7 of prisoners. *Id.* at 2210, 2212. The modern, private sector corrections industry emerged  
8 to help the government in addressing these critical problems. Even so, private sector  
9 contractors house just 8.1% of the country’s incarcerated population, making them a small  
10 but valued player within our correctional system. Bureau of Justice Statistics, *Prisoners in*  
11 *2019, Summary*, <https://www.bjs.gov/content/pub/pdf/p19.pdf> (visited October 28, 2020).

### 12                           **III. PRIVATE SECTOR CONTRACTORS**

#### 13           **A. Private Sector Contractors Are Subject to Tremendous Oversight.**

14           Contrary to Plaintiffs’ allusions, private correctional contractors in the United States  
15 are subject to multiple levels of oversight. The first level begins at the contract proposal  
16 stage. Many states have enacted statutory requirements that private sector contractors must  
17 meet in order to be considered for and ultimately awarded a contract for adult incarceration.  
18 *See, e.g.*, ARIZ. REV. STAT. § 41-1609.01; ARK. CODE ANN. § 12-50-106; FLA. STAT. §  
19 957.07; TENN. CODE ANN. § 41-24-104. Arizona, for example, requires that any proposed  
20 contractor: (1) demonstrate that it has “[t]he qualifications, operations, and management  
21 experience and experienced personnel necessary to carry out the terms of the contract;” (2)  
22 demonstrate its “ability to comply with all applicable correctional standards and any  
23 specific court order, if required;” and (3) “agree that [the] state may cancel the contract at  
24 any time after the first year of operation, without penalty to this state,” given proper notice.  
25 ARIZ. REV. STAT. § 41-1609.01(B). State law further provides that no proposal will be  
26 accepted unless it offers “cost savings to” and “a level and quality of services that are at  
27 least functionally equal to those that would be provided by” the state. *Id.* at G, H. Private  
28 sector contractors must then meet various additional requirements before the state will

1 accept the proposed contract for correctional services. *Id.* at K.

2 Additional oversight is imposed by the contract itself. Government contract  
3 monitors are assigned to ensure that contractors and their facilities are meeting all  
4 performance requirements. *See* Richard P. Seiter, *Private Prisons: Myths, Realities &*  
5 *Educational Opportunities for Inmates*, 33 St. Louis U. Pub. L. Rev. 415, 421 (2014) (“In  
6 a review of accountability for private prisons, Abt Associates reviewed ninety-one  
7 contracts and found that all had monitors assigned, 52 percent of which conducted daily  
8 monitoring, 23 percent mandated monthly visits, and the remainder did quarterly visits or  
9 some other form of monitoring.”) (citing Douglas McDonald et al., *Private Prisons in the*  
10 *United States: An Assessment of Current Practice* 50 (1998)). There is not a similar  
11 mechanism for federal and state facilities whereby compliance monitors station themselves  
12 within the facilities, actively oversee daily events within the facilities, and then promptly  
13 report or act to address any issues that may arise. This is unique to private sector facilities.  
14 Government oversight organizations, such as the Office of the Inspector General, also  
15 conduct additional, periodic audits. *See* United States Department of Justice, Office of the  
16 Inspector General, *Federal Bureau of Prisons*, <https://oig.justice.gov/reports/bop.htm>  
17 (visited October 15, 2020). Noncompliance with statutory and contractual requirements  
18 can result in penalties and, in many cases, complete cancellation or nonrenewal of the  
19 contract. *See, e.g.*, TENN. CODE ANN. § 41-24-105 (requiring the establishment of  
20 performance criteria measuring “the quality of management, security and safety, personnel  
21 training, [and] inmate programs and treatment” and permitting contract renewal only if the  
22 contractor provides essentially the same or superior quality of services at the same or 5%  
23 lower cost than the state). These consequences incentivize private sector contractors to  
24 comply with all necessary standards, and market pressures -- particularly the threat of lost  
25 business to the government or competing contractors -- elicit not just compliance but high-  
26 level performance. *See* Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and*  
27 *Accountability in Private Prisons*, 115 Harv. L. Rev. 1868, 1883-84 (2002).

28 Independent organizations also scrutinize public and private facilities. The

1 American Correctional Association (“ACA”) is a trade association and accrediting body  
2 that audits facilities, staff, and services using a performance-based model of accreditation,  
3 which often is required by contract. *See* American Correctional Association, *Standards*,  
4 [http://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Standards\\_\\_\\_Accreditation/Standards/ACA\\_Member/Standards\\_and\\_Accreditation/StandardsInfo\\_Home.aspx?hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad](http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/Standards/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?hkey=7c1b31e5-95cf-4bde-b400-8b5bb32a2bad) (visited October 15, 2020). For a facility to maintain  
5 its ACA accreditation, it must meet all applicable mandatory standards and 90% of  
6 applicable non-mandatory standards, which range across all aspects of a facility’s  
7 operation. *Id.* The auditors are experienced corrections professionals who have been  
8 selected and trained by the ACA. *See* American Correctional Association, *Auditors*,  
9 [http://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/Standards\\_\\_\\_Accreditation/Auditors/ACA\\_Member/Standards\\_and\\_Accreditation/SAC\\_AuditorsHome.aspx?hkey=8823f5b6-2454-4c78-a7ba-aefea296da83](http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/Auditors/ACA_Member/Standards_and_Accreditation/SAC_AuditorsHome.aspx?hkey=8823f5b6-2454-4c78-a7ba-aefea296da83) (visited October 15, 2020).

14 Private contractors also are subject to intense scrutiny by the media, activist and  
15 civil rights groups, and insurers, among others. Duitsman, *supra* at 2264. This attention,  
16 particularly from the media and activist groups, keeps the public informed about how  
17 private sector contractors are operating and spurs corrective action when necessary. *See*  
18 Volokh, *A Tale of Two Systems*, *supra* at 1883-84. Each of these factors combine to create  
19 a system of checks and balances over private sector contractors in the corrections industry.

20 **B. Private Sector Contractors Operate Efficiently and Effectively, Allowing**  
21 **Them to Provide Quality Programs to Offenders at Reduced Costs.**

22 Plaintiffs focus their argument on the myth that private sector contractors care only  
23 about the “bottom line” and place their financial stability and success above all else. (*See*,  
24 *e.g.*, Docket Entry 1 at ¶¶ 32, 34; Docket Entry 17 at 5-6). In advancing their position,  
25 Plaintiffs frame private sector contractors as being willing to cut corners and costs in their  
26 operations as compared to publicly-operated facilities. They are wrong. Private sector  
27 contractors have unique advantages that enable them to operate their facilities, at minimum,  
28 as efficiently and as effectively as publicly-operated facilities, allowing them to provide

1 quality programs and services to incarcerated individuals at reduced costs.

2 Plaintiffs' contention that private sector contractors employ wholesale cost-cutting  
3 measures in pursuit of corporate profits is wholly unfounded. Private sector contractors  
4 are able to maintain lower costs because their size and experience enable them to take  
5 advantage of economies of scale in their purchasing power for such essentials as clothing,  
6 food, healthcare services, hygiene items, and various other services and supplies. Private  
7 sector contractors acquire these critical materials and services in bulk and therefore can  
8 secure more-competitive prices, thereby allowing them to lower their costs. Governments  
9 often pay more for these materials and services on a pro rata basis because they are not  
10 acquiring these materials and services in such large quantities, which then necessarily  
11 requires that they allocate fewer resources to beneficial programs and services for  
12 incarcerated individuals. Day 1 Alliance members CoreCivic and GEO both have touted  
13 the economies of scale they generate in public filings with the Securities and Exchange  
14 Commission. *See* CoreCivic, Inc. 2019 Form 10-K at 27, 62; The GEO Group, Inc. 2019  
15 Form 10-K at 8. Private sector contractors also are able to design, construct, and operate  
16 facilities that are newer and more updated in terms of design and technology. These  
17 facilities are equipped with housing units that that are designed to provide for 360-degree  
18 views for the correctional officers and video cameras installed at multiple points  
19 throughout the facilities, among other things. It is these modern designs and technological  
20 upgrades that enable private sector contractors to operate facilities with fewer correctional  
21 officers while still providing an incredibly high level of institutional safety and security.

22 Lowering the costs of obtaining materials and services does not come at the expense  
23 of quality. Indeed, "none of the more rigorous studies [on this issue] finds quality at private  
24 [facilities] lower than quality at public [facilities] on average . . . . This result belies  
25 statements in the prison literature that assume that cost reductions must come at the expense  
26 of quality." Volokh, *A Tale of Two Systems*, *supra* at 1868, 1875-76.

27 Many studies have found that quality is not sacrificed for  
28 profit. [Geoffrey] Segal and [Adrian] Moore analyzed twenty-

1 eight studies of the cost and quality associated with privatized  
2 facilities and found that “there is clear and significant evidence  
3 that private facilities provide at least the level of service that  
4 government-run facilities do.” The authors go on to say that  
5 “[p]rivate correctional facilities have fared well against  
6 government-run facilities in almost all measures of quality.”

7 Seiter, *supra* at 421-22 (quoting Geoffrey F. Segal & Adrian T. Moore, *Weighing the*  
8 *Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services: Part*  
9 *II: Reviewing the Literature on Cost and Quality Comparisons* (2002)).

10 Private sector contractors leverage the economies of scale that they generate to offer  
11 a wide range of programs and services to individuals housed in private facilities. This helps  
12 them to develop innovative programming that is geared toward reducing recidivism rates,  
13 such as drug and alcohol counseling, educational programs, and vocational training. *See*  
14 Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 Ohio St. L.J.  
15 983, 1003 (2011) (describing the significant programming advantages available at private  
16 facilities). Day 1 member CoreCivic reports that its “correctional, detention, and  
17 residential reentry facilities offer a variety of rehabilitation and educational programs,  
18 including basic education, faith-based services, life skills and employment training, and  
19 substance abuse treatment.” *See* CoreCivic, Inc. 2019 Form 10-K at 5. Such programs and  
20 services “are intended to help reduce recidivism and to prepare offenders for their  
21 successful reentry into society upon their release.” *Id.* Day 1 member GEO’s portfolio of  
22 programs is very similar. (*See* The Geo Group, Inc. 2019 Form 10-K at 48).

23 Utah State Senator Curt Bramble and Georgia State Representative Vernon Jones  
24 recently authored a report on the performance of private sector contractors in operating  
25 correctional facilities in which they detail the extensive benefits that private sector  
26 contractors offer government agencies. *See* Curtis Bramble and Vernon Jones, *Why*  
27 *Contracting for Performance in Prison and Detention Management Is Worth a Closer*  
28 *Look*, [https://day1alliance.org/resource/about-the-private-sectors-role-in-corrections-  
detention/](https://day1alliance.org/resource/about-the-private-sectors-role-in-corrections-detention/) (visited October 23, 2020). One benefit they discuss is the reality that



1 “[c]ontracting for performance promotes the use of evidence-based programs to reduce  
2 recidivism and spurs innovations to improve the effectiveness of rehabilitative programs.”  
3 *Id.* By way of example, MTC has helped the State of Texas reduce the number of crimes  
4 committed by parolees by 17%, the number of probationers returning to prison by 14.7%,  
5 the percentage of Texans who are incarcerated by 21%, and the rate of recidivism by 25%.  
6 Management & Training Corporation, *Texas Reduced Crime, Incarceration, and*  
7 *Recidivism Rates in Partnership with Private Organizations*,  
8 <https://www.mtctrains.com/wp-content/uploads/2020/10/Texas-MTC-Partnership.pdf>  
9 (visited October 29, 2020).

10 When private sector contractors achieve positive results in providing rehabilitative  
11 programs to incarcerated individuals, government agencies take notice and seek to replicate  
12 those outcomes in publicly-operated facilities. In 2018, the privately-operated Otero  
13 County Prison Facility in New Mexico received the highest rating in the state in an audit  
14 on the effectiveness of its educational programs. Speaking to Otero County Prison Facility  
15 staff in 2018, former New Mexico Corrections Department Secretary David Jablonski  
16 praised the facility for their approach and their results: “[T]he programming here is above  
17 board. I can’t say enough about this facility. I wish I could duplicate it.” Management &  
18 Training Corporation, *New Mexico Corrections Secretary Wants to “Duplicate” MTC’s*  
19 *Otero Facility*, [https://www.mtctrains.com/corrections/taking-a-look-at-the-social-](https://www.mtctrains.com/corrections/taking-a-look-at-the-social-impact-mtc-staff-made-in-2018/)  
20 [impact-mtc-staff-made-in-2018/](https://www.mtctrains.com/corrections/taking-a-look-at-the-social-impact-mtc-staff-made-in-2018/) (visited October 23, 2020).

21 Enabled in part by the economies of scale that private sector contractors leverage,  
22 the private sector has invested hundreds of millions of dollars to become a national  
23 leader in developing comprehensive and successful re-entry programs aimed at reducing  
24 recidivism rates. In 2018, Day 1 Alliance member CoreCivic helped to:

- 25 ● graduate more than 1,653 inmates with high school equivalency certificates  
26 and award 4,712 industry-recognized certificates;
- 27 ● strengthen addiction-treatment programs by providing treatment options at a  
28 72% completion rate;

- 1 ● guide 996 inmates to complete victim-impact programs, bringing the total to
- 2 2,078; and
- 3 ● enroll 868 inmates in faith-based residential programs.

4 CoreCivic, Inc., *2018 Environmental, Societal, and Governance Report*,  
5 [https://www.corecivic.com/hubfs/\\_files/2018-ESGReport.pdf](https://www.corecivic.com/hubfs/_files/2018-ESGReport.pdf) (visited October 23, 2020).

6 On a typical day, Day 1 Alliance member GEO has 30,000 participants enrolled in offender  
7 rehabilitation programming, resulting in 6.7 million programming hours completed during  
8 2018. In 2018 alone, GEO helped men and women in their care attain:

- 9 ● 2,779 high school equivalency diplomas;
- 10 ● 9,131 vocational certificates;
- 11 ● 8,842 substance abuse treatment certificates;
- 12 ● 44,518 programming completions; and
- 13 ● 32,419 behavioral program completions.

14 The GEO Group, Inc., *2018 Human Rights and Environmental, Societal, and Governance*  
15 *Report*, <https://www.geogroup.com/Portals/0/HumanRightsESG2018.pdf> (visited October  
16 23, 2020). Day 1 Alliance member MTC provides vital services to more than 28,000  
17 incarcerated men and women and to approximately 2,700 individuals in detention. In the  
18 last year, MTC helped the men and women in its care achieve the following results:

- 19 ● at least 20 hours of structured academic, recreational, and vocational
- 20 activities per inmate per week;
- 21 ● 5,662 substance abuse certificates;
- 22 ● 1,536 vocational certificates; and
- 23 ● 1,827 GEDs or equivalents.

24 *See* The Day 1 Alliance, *Myth vs. Fact*, [https://day1alliance.org/resource/myth-vs-fact-the-](https://day1alliance.org/resource/myth-vs-fact-the-private-sectors-small-but-valued-role-in-corrections-detention/)  
25 [private-sectors-small-but-valued-role-in-corrections-detention/](https://day1alliance.org/resource/myth-vs-fact-the-private-sectors-small-but-valued-role-in-corrections-detention/) (visited October 23, 2020).

26 Private sector contractors provide great benefits at reduced costs. Any contention that  
27 private sectors contractors primarily are motivated by the “bottom line” is unfounded.  
28

1           **C.     Private Sector Facilities Provide Taxpayer Benefits Without Sacrificing**  
2           **Quality.**

3           Plaintiffs contend that private sector facilities run contrary to the public interest in  
4 lower taxes. (Docket Entry 1 at ¶ 61). Their contention, however, completely misses the  
5 mark and is simply inaccurate. Allowing private sector contractors to operate correctional  
6 facilities actually eases the burden on the government and helps to alleviate some of the  
7 costs that are passed along to taxpayers in housing individuals convicted of crimes.

8           Plaintiffs' position is contradicted by the plain language of Arizona's statute  
9 allowing private sector contractors to operate correctional facilities. This statutory scheme  
10 *requires* private sector facilities to offer cost savings. A.R.S. § 41-1609.01(G). These cost  
11 savings cannot come at the expense of services available to incarcerated individuals, as  
12 private sector contractors must offer "a level and quality of services that are at least  
13 functionally equal to those that would be provided by [the State]." *Id.* at (H). This detailed  
14 statutory scheme mandates cost savings while maintaining service quality, which benefits  
15 the taxpayer while causing no detriment to incarcerated individuals.

16           The required costs savings that are realized through utilizing private sector  
17 contractors are designed to combat the enormous strain placed on government budgets by  
18 increases in the number of incarcerated individuals. From 1990 through 2015, annual state  
19 spending on corrections increased from \$16.9 billion to \$57.7 billion in the United States,  
20 which represents a 241% increase. The Sentencing Project, *Trends in U.S. Corrections*,  
21 [http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-](http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf)  
22 [Corrections.pdf](http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf) (visited October 23, 2020). Contributing to this increase are substantially  
23 higher wages for public sector correctional officers compared to those of their privately-  
24 employed counterparts. Alexander Volokh, *Privatization, Free Riding, and Industry-*  
25 *Expanding Lobbying*, 30 Int'l Rev. L. & Econ. 62, 66 (2009) (citing data from the 2000  
26 *Corrections Yearbook*, which documented that the average entry level salary for public  
27 sector correctional officers was 30% more than for private sector correctional officers and  
28 that the average maximum salary for public sector correctional officers was 65% more).

1 Add to this legacy costs for compensation packages that the government must pay through  
2 pensions and other benefits that are unique to the government and inapplicable to the  
3 private sector. The taxpayer bears the expense of paying employees of government  
4 agencies, while private sector contractors bear the expense of paying their own employees.

5 The savings realized by the involvement of private sector contractors in providing  
6 correctional services are evident in budget documents generated by the Federal Bureau of  
7 Prisons (“BOP”). According to data for fiscal year 2015 released by the BOP, low security  
8 contractor-operated facilities cost \$63.65 per inmate per day, whereas low security public  
9 facilities cost \$80.20 per inmate per day. Taxpayer savings only have increased with the  
10 continued presence of private sector contractors in providing correctional services.  
11 According to data for fiscal year 2018 released by the BOP, the average daily cost to house  
12 an inmate in a low-security BOP facility was \$92.46, while the average cost in in a private  
13 sector facility was \$66.63 -- a difference of approximately 28% or \$25.83 per inmate per  
14 day. The Day 1 Alliance, *Letter to the Honorable William P. Barr*,  
15 [https://day1alliance.org/wp-content/uploads/2019/11/11.25.19-D1A-Board-Letter-AG-](https://day1alliance.org/wp-content/uploads/2019/11/11.25.19-D1A-Board-Letter-AG-Barr1-1.pdf)  
16 [Barr1-1.pdf](https://day1alliance.org/wp-content/uploads/2019/11/11.25.19-D1A-Board-Letter-AG-Barr1-1.pdf) (visited October 28, 2020). The American taxpayer thus saves approximately  
17 \$413,000 per day, or \$150 million per year, by housing 16,000 incarcerated individuals in  
18 contractor-operated facilities rather than those operated by the Bureau of Prisons. *Id.* This  
19 represents real savings to the taxpayer, while delivering safe, humane, and respectful  
20 treatment to individuals who are incarcerated in private sector facilities.

21 **D. Private Sector Contractors Efficiently Build Tailored Correctional**  
22 **Facilities.**

23 Another advantage of private sector contractors is that they often build their own  
24 facilities and undisputedly do so more quickly and efficiently than their public  
25 counterparts. Indeed, private contractors “are able to build much faster than the  
26 government because of the arcane, complicated, and lengthy procedures that the  
27 government has to endure to get funding approved.” Michael G. Anderson, *If You’ve Got*  
28 *the Money, I’ve Got the Time: The Benefits of Incentive Contracts with Private Prisons*, 34

1 Buff. Pub. Int. L.J. 43, 58 (2016). Even critics of private sector contractors recognize the  
2 challenges government agencies face in the construction of correctional facilities. *See*  
3 Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437, 546 n.63  
4 (2005). Typically, when a state or locality seeks to build a new jail or prison, it must ask  
5 voters to approve a bond issue to finance the project. *Id.* However, voter approval for the  
6 financing of new facilities frequently is withheld. *Id.* Even in cases where voter approval  
7 is secured, the process of seeing a publicly-funded capital project come to fruition can be  
8 a lengthy one, with many procedural steps not required when building projects are  
9 privately-financed. *Id.* A private company can build a correctional facility within twelve  
10 to eighteen months, compared to the forty-eight to sixty months that it would take a state  
11 government. This reduced timetable allows private sector contractors to more easily  
12 respond to problems than their government clients.

13 A private sector contractor also can construct a facility for the specific intended use  
14 of that facility, whereas the government simply does not have the same level of flexibility.  
15 *See Rachel Christine Bailie Antonuccio, Prisons for Profit: Do The Social and Political*  
16 *Problems Have a Legal Solution?*, 33 J. Corp. L. 577, 591 (2008). Indeed,

17 [e]fficiency in the construction of prison facilities encompasses  
18 both gains in the speed with which facilities can be built or  
19 renovated, as well as cost savings. The private sector often has  
20 the resources to finance major construction projects that local,  
21 state, and federal governments are either unable or unwilling  
22 to finance due to budget constraints . . . . Improved construction  
23 quality allows the private sector greater flexibility in choosing  
24 sites, personnel, and material; it also allows the private sector  
to take advantage of the latest building technology, resulting in  
an improved capacity to respond to the specific needs of a very  
diverse prison population.

25 DelFiandra, *supra* at 596-97 (citing Gary W. Bowman, et al., *Privatizing the United States*  
26 *Justice System, Police, Adjudication, and Corrections Services from the Private Sector* 256  
27 (1992)). The ability to build their own customized facilities thus represents a distinct  
28 advantage that private sector contractors have over their public counterparts and further

1 demonstrates the value that private sector contractors can offer governmental agencies in  
2 providing correctional services to incarcerated individuals.

3 **E. Private Sector Contractors Potentially Are Subject to Lawsuits and**  
4 **Large Judgments if They Are Not Operating Properly.**

5 The legal system provides another mechanism of accountability for private sector  
6 contractors in this industry. Government officials, including public correctional officers,  
7 enjoy qualified immunity from civil lawsuits, effectively shielding them from personal  
8 liability for constitutional violations in all but the most egregious cases. *See Harlow v.*  
9 *Fitzgerald*, 457 U.S. 800, 818 (1982); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978).  
10 The same is not true for employees of private sector contractors. In *Richardson v.*  
11 *McKnight*, the Supreme Court examined the history and purpose of government immunity  
12 and determined that neither justified granting private sector employees qualified immunity  
13 from lawsuits under 42 U.S.C. § 1983 (“Section 1983”). 521 U.S. at 405-12. In so doing,  
14 the Court recognized that private firms are affected by “marketplace pressures” in a way  
15 that the government is not. *Id.* at 410. The Court’s decision, as one scholar recognized,  
16 “bifurcates the treatment of public and private prisons in a way that makes private prisons  
17 more, not less, accountable.” Volokh, *A Tale of Two Systems*, *supra* at 1881.

18 Without the qualified immunity of their government counterparts, private sector  
19 contractors and their employees are vulnerable to suit by individuals seeking monetary  
20 judgments, especially under the Prison Litigation Reform Act and Section 1983. This  
21 comparative vulnerability is not just in the abstract. Despite our legal system’s efforts to  
22 ensure juror impartiality, “[e]mpirical studies have found that juries are more likely to  
23 award large verdicts against corporations than against governments.” *Id.* at 1880. In fact,  
24 in some cases, this disparate effect is encouraged by statute, with damages caps or  
25 limitations the norm under state governmental tort liability acts. *See, e.g.*, A.R.S. § 12-  
26 820.04; TENN. CODE ANN. §§ 29-20-403, 404. The risk of higher jury verdicts, in turn,  
27 affects settlements, resulting in the potential for extraordinarily high settlement amounts in  
28 some cases. Volokh, *A Tale of Two Systems*, *supra* at 1880. Ultimately, these constraints

1 incentivize private sector contractors to responsibly carry out their government-delegated  
2 functions, penalize those who fail to do so, and provide relief to those negatively impacted.

3 **F. Housing Offenders in Private Sector Facilities Does Not Drive**  
4 **Incarceration Rates.**

5 Plaintiffs contend that the purported “profit motive” of private sector contractors  
6 drives increased incarceration rates. (Docket Entry 1 at ¶ 34; Docket Entry 17 at 6). Their  
7 position is contradicted by a comparison of the number of individuals housed in private  
8 sector facilities to the number of individuals housed in public sector facilities. Only  
9 approximately 8% of offenders are housed in private sector facilities, compared to  
10 approximately 92% in public sector facilities. In fact, half of all people housed in private  
11 sector facilities are housed in just five states, and there is no evidence that prison  
12 populations grew any faster in those states than in states that relied less on private sector  
13 facilities or did not use them at all. John F. Pfaff, *A Second Step Act for States (And*  
14 *Counties, and Cities)*, 41 *Cardozo L. Rev.* 151, 175-76 (2019); *see also* John F. Pfaff, *The*  
15 *Complicated Economics of Prison Reform*, 144 *Mich. L. Rev.* 951, 969 (2016) (critiquing  
16 the claim that privatization has contributed to higher incarceration rates where “only 8.4%  
17 of the prison population was in private prisons in 2014 -- and at the state level, only 6.8%,  
18 with over half of those in just five states” and noting that the concern that the 2008  
19 recession would lead to increased use of private facilities to mitigate capacity constraints  
20 “appears to have not been realized”).

21 Private sector contractors also do not contribute to increased incarceration rates  
22 because they play no role in charging individuals with crimes, convicting individuals of  
23 crimes, or determining sentences. In Arizona, issues that relate to the length of an  
24 offender’s sentence are the exclusive province of the Arizona Department of Corrections,  
25 Rehabilitation, and Reentry, including when a private sector contractor operates a  
26 particular facility. *See* A.R.S. § 41-1609.01(M) (prohibiting a contract for providing  
27 correctional services from delegating to a private sector contractor authority or  
28 responsibility for “[d]eveloping and implementing procedures for calculating and awarding

1 sentence credits[,] . . . [a]pproving the type of work inmates may perform and the wages or  
2 sentence credits that may be given to inmates engaging in the work[,] [or] . . . [g]ranting,  
3 denying or revoking sentence credits . . .”). Such statutes make the states, and not private  
4 sector contractors, responsible for the amount of time an individual remains incarcerated.

5 Private sector contractors also do not do not lobby for or against legislation, policies,  
6 or regulations that impact the basis for or duration of an individual’s detention or  
7 incarceration. Private sector contractors may actually decrease the total amount of pro-  
8 incarceration advocacy. *See* Volokh, *supra* at 64-65 (seeking to debunk the myth that  
9 private sector contractors necessarily drive increased incarceration rates by lobbying for  
10 pro-incarceration policies). A 2008 study “found virtually no pro-incarceration advocacy  
11 from the private sector . . .” *Id.* at 65. And, since the public sector continues to operate  
12 the vast majority of correctional facilities, privatization necessarily reduces the public  
13 sector’s lobbying efforts “because [the public sector] will receive a smaller share of the  
14 total benefit to the industry; but the private-sector actor’s advocacy will remain zero, since  
15 they will completely free-ride off the public sector.” *Id.* at 64.

16 Any increases in incarceration in the United States result from forces outside of the  
17 control of private sector contractors. *See generally* John F. Pfaff, *The Micro and Macro*  
18 *Reasons of Prison Growth*, 28 Ga. St. U. L. Rev. 1239 (2012). The largest increases in  
19 prison numbers have come about as the result of laws and regulations that were outside the  
20 influence of private sector contractors. Seiter, *supra* at 424 (identifying the war on drugs  
21 and the “tough on crime” attitude that has led to reduced percentages of releases on parole  
22 and increased rates of parole revocation as examples of external forces driving increased  
23 incarceration rate). The members of Day 1 do not lobby for increased sentences or take  
24 measures to increase the overall incarcerated population, as Plaintiffs contend. Instead,  
25 these private sector contractors play a small but valued role within the realm of correctional  
26 services offered in the United States by constantly working to deliver safe, humane, and  
27 respectful treatment to incarcerated individuals.

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**IV. CONCLUSION**

The Constitution does not prevent prisoners in the federal or state systems from being detained in facilities that are operated by private sector contractors. Director Shinn appropriately and thoroughly has addressed this reality in his Motion to Dismiss, and Day 1 supports Director Shinn in this regard. More importantly, Day 1 brings to the Court a unique perspective and breadth of knowledge regarding the substantial and innumerable benefits that private sector contractors bring to the inmates who are incarcerated in their facilities and to the country as a whole. Plaintiffs devote significant attention to hurling baseless insults at these private sector contractors, filled with hyperbole and fictitious assertions that are devoid of factual validity. The reality is that the efforts of these private sector contractors should be lauded and replicated, including their goal of improving the lives of the inmates who cross the thresholds of the facilities that they operate.

DATED this November 4, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 4, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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