

**CASE NO. 22-15302**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**JEFFREY NIELSEN, et al.,**

*Plaintiffs / Appellants*

**v.**

**DAVID SHINN, Director, Arizona Department of Corrections,  
Rehabilitation & Reentry, in his Official Capacity,**

*Defendant / Appellee*

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**On Appeal from the United States District  
Court for the District of Arizona  
Case No. 2:20-CV-1182-DLR-JZB  
Hon. Douglas L. Rayes**

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***AMICUS CURIAE BRIEF OF THE DAY 1 ALLIANCE IN  
SUPPORT OF APPELLEE AND AFFIRMANCE***

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## **STATEMENT OF INTEREST**

*Amicus Curiae* 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 bringing its members’ real-world perspectives to the important and complex policy debate surrounding private sector contractors. Day 1’s interest in this case arises from its members’ responsibility to provide safe and dignified care to individuals housed in privately-managed facilities. Appellants and their amici challenge the constitutionality of allowing private sector contractors to provide that care. The purpose of this *Amicus Curiae* Brief is to inform the Court about the undeniable fact that, contrary to the unfounded assertions of Appellants and their amici, the private sector operation of



correctional facilities is beneficial both for the inmates incarcerated in those facilities and society in general.<sup>1</sup>

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<sup>1</sup> All parties have been notified of Day 1's intent to file this *Amicus Curiae* Brief and have consented to its filing.

**STATEMENT PURSUANT TO F.R.A.P. 29(a)(4)(E)**

No party's counsel authored this *Amicus Curiae* Brief in whole or in part. No party or party's counsel, and no person or entity other than Day 1, its members, or its counsel, contributed money that was used for or intended to fund the preparation or submission of this *Amicus Curiae* Brief.

## **INTRODUCTION**

In his Motion to Dismiss filings at the trial court level and in his Answering Brief filed in this Court, Appellee Director David Shinn (“Director Shinn”) has set forth the multiple legal fallacies that underpin all of Appellants’ arguments regarding the alleged unconstitutionality of inmates in federal and state systems being detained in facilities that are operated by private sector contractors. Day 1 fully supports Director Shinn in this regard. Beyond the issue of constitutionality, Day 1 submits this *Amicus Curiae* Brief to inform the Court about the small but extremely important role that the private sector plays in addressing corrections challenges in the United States. As set forth herein, private sector contractors – which have been involved in corrections throughout our nation’s history and which are subject to tremendous oversight – provide cost-effective solutions, innovative programs, and operational efficiencies and play a critical and effective role in our criminal justice system.

## **ARGUMENT**

### **A. The History of Private Sector Contractors.**

Although the practice has seen a resurgence in recent years, government delegation of correctional responsibilities to private sector contractors is deeply-rooted in American history. Indeed, private contractors have contributed to the management and operation of correctional facilities in the United States for many

years, some even managing entire states' prison systems. *Richardson v. McKnight*, 521 U.S. 399, 405 (1997); David J. DelFiandra, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 Duq. L. Rev. 591, 595 (2000). The first major push toward reliance on private sector contractors was driven by a desire to reduce government expenditures and ease prison overpopulation. DelFiandra, *supra* at 595; Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. Rev. 2209, 2215 (1998).

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

The Department of Justice reported in 1996 that both state and federal prisons were, on average, operating at more than one-hundred percent capacity. Duitsman, *supra* at 2211. This overpopulation, combined with limited government funds, had

led to understaffing, poor living conditions, a decrease in rehabilitative programming, and an increase in violent incidents and disease in facilities. *Id.* These issues, in turn, required increased judicial oversight of prison operations and led to the early release of thousands of prisoners. *Id.* at 2210, 2212. Modern, private sector corrections contractors emerged to help the government in addressing these critical problems. Even so, at year end 2020, private sector contractors housed just 8.2% of the country's incarcerated population, making them a small but valued player within our correctional system. Bureau of Justice Statistics, *Prisoners in 2020 – Statistical Tables*, <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> (visited December 12, 2022); *see generally* John F. Pfaff, *The Incentives of Private Prisons*, 52 Ariz. St. L.J. 991, 995 (2020) (noting that, even at their peak, private facilities in the United States held under 10% of the individuals confined in correctional facilities).

**B. Private Sector Contractors Are Subject to Tremendous Oversight.**

Contrary to the unfounded assertions of Appellants and their amici, private correctional contractors in the United States are subject to multiple levels of oversight. The first level begins at the contract proposal stage. Many states have enacted statutory requirements that private sector contractors must meet in order to be considered for and ultimately awarded a contract for adult incarceration. *See, e.g.*, ARIZ. REV. STAT. § 41-1609.01; ARK. CODE ANN. § 12-50-106; FLA. STAT. § 957.07; TENN. CODE ANN. § 41-24-104. Arizona, for example, requires that any

proposed contractor: (1) demonstrate that it has “[t]he qualifications, operations, and management experience and experienced personnel necessary to carry out the terms of the contract;” (2) demonstrate its “ability to comply with all applicable correctional standards and any specific court order, if required;” and (3) “agree that [the] state may cancel the contract at any time after the first year of operation, without penalty to this state,” following proper notice. ARIZ. REV. STAT. § 41-1609.01(B). State law further provides that no proposal will be accepted unless it offers “cost savings to” and “a level and quality of services that are at least functionally equal to those that would be provided by” the state. *Id.* at (G), (H). Private sector contractors must then meet various additional requirements before the state will accept the proposed contract for correctional services. *Id.* at (K).

Additional oversight is imposed by the contract itself. Government contract monitors are assigned to ensure that contractors and their facilities are meeting all performance requirements. *See* Richard P. Seiter, *Private Prisons: Myths, Realities & Educational Opportunities for Inmates*, 33 St. Louis U. Pub. L. Rev. 415, 421 (2014) (“In a review of accountability for private prisons, Abt Associates reviewed ninety-one contracts and found that all had monitors assigned, 52 percent of which conducted daily monitoring, 23 percent mandated monthly visits, and the remainder did quarterly visits or some other form of monitoring.”) (citing Douglas McDonald et al., *Private Prisons in the United States: An Assessment of Current Practice* 50

(1998)). There is no similar mechanism for federal and state facilities whereby compliance monitors station themselves within the facilities, actively oversee daily events within the facilities, and then promptly report or act to address any issues that may arise. Indeed, Day 1 is not aware of any other industry that has in place a similar contract monitoring mechanism. This additional level of oversight is unique to private sector facilities.

Government oversight organizations, such as the Office of the Inspector General, also conduct additional, periodic audits. *See* United States Department of Justice, Office of the Inspector General, *Federal Bureau of Prisons*, <https://oig.justice.gov/reports/bop.htm> (visited December 12, 2022). Noncompliance with statutory and contractual requirements can result in penalties and, in many cases, complete cancellation or nonrenewal of the contract. *See, e.g.*, TENN. CODE ANN. § 41-24-105 (requiring the establishment of performance criteria measuring “the quality of management, security and safety, personnel training, [and] inmate programs and treatment” and permitting contract renewal only if the contractor provides essentially the same or superior quality of services at the same or 5% lower cost than the state). These consequences incentivize private sector contractors to comply with all necessary standards, and market pressures – particularly the threat of lost business to the government or competing contractors – elicit not just compliance but high-level performance. *See* Alexander Volokh, *A*

*Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 Harv. L. Rev. 1868, 1883-84 (2002).

Independent organizations also scrutinize public and private facilities. The American Correctional Association (“ACA”) is a trade association and accrediting body that audits facilities, staff, and services using a performance-based model of accreditation, which often is required by contract. See American Correctional Association, *Manual of Accreditation Policy and Procedure* at 6, <https://aca.org/common/Uploaded%20files/Standards/ACA%20Manual%20of%20Accreditation%20Policy%20and%20Procedure%20-%20Aug%202020%20Final.pdf> (visited December 12, 2022). For a facility to maintain its ACA accreditation, it must meet all applicable mandatory standards and 90% of applicable non-mandatory standards, which range across all aspects of a facility’s operation. *Id.* at 14. The auditors are experienced corrections professionals who have been selected, trained, and certified by the ACA. *Id.* at 10. There also are other third-party organizations that provide an added layer of certification and/or monitoring in the corrections industry, such as the Florida Corrections Accreditation Commission, Inc., the Illinois Law Enforcement Training and Standards Board, the Joint Commission, the National Commission on Correctional Health Care (NCCHC) regarding the provision of custodial healthcare services, and the Tennessee Corrections Institute.



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

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

Appellants focus part of their challenge to the constitutionality of private prisons on the myth that private sector contractors care only about the “bottom line” and place their financial stability and success above all else. (*See* Appellants’ Brief at 11; Amended Class Action Complaint, ER-136 ¶¶ 59-61). In advancing their position, Appellants frame private sector contractors as willing to cut corners and costs in their operations as compared to publicly-operated facilities. (*See* Appellants’ Brief at 11; Amended Class Action Complaint, ER-139 ¶ 70). They are wrong. Private sector contractors have unique advantages that enable them to operate their facilities, at minimum, as efficiently and as effectively as publicly-operated facilities, allowing them to provide quality programs and services to inmates at reduced costs. *See generally* Alexander Tabarrok, *Private Prisons Have*

*Public Benefits*, <https://www.independent.org/news/article.asp?id=1411> (visited December 6, 2022) (“Private prisons not only have lower costs than public prisons: by introducing competition they encourage public prisons to also innovate and lower costs. States with a greater share of prisoners in private prisons have lower costs of housing . . . .”).

Appellants’ contention that private sector contractors employ wholesale cost-cutting measures in pursuit of corporate profits is wholly unfounded. Private sector contractors are able to maintain lower costs because their size and experience enable them to take advantage of economies of scale in their purchasing power for such essentials as clothing, food, healthcare services, hygiene items, and various other services and supplies. Private sector contractors acquire these critical materials and services in bulk and therefore can secure more competitive prices, thereby allowing them to lower their costs. Governments often pay more for these materials and services on a pro rata basis because they are not acquiring these materials and services in such large quantities, which then necessarily requires that they allocate fewer resources to beneficial programs and services for incarcerated individuals. Day 1 Alliance members CoreCivic and GEO both have touted the economies of scale they generate in public filings with the Securities and Exchange Commission. *See* CoreCivic, Inc. 2021 Form 10-K at 29, 62, <https://ir.corecivic.com/static-files/983f3a9e-b212-4261-bb4c-ffd26f849f90> (visited December 12, 2022); The

GEO Group, Inc. 2019 Form 10-K at 8, <https://www.sec.gov/ix?doc=/Archives/edgar/data/0000923796/000119312520049748/d841729d10k.htm> (visited December 12, 2022). Private sector contractors also are able to design, construct, and operate facilities that are newer and more updated in terms of design and technology. These facilities are equipped with housing units that that are designed to provide for 360-degree views for the correctional officers and video cameras installed at multiple points throughout the facilities, among other things. It is these modern designs and technological upgrades that enable private sector contractors to operate facilities with fewer personnel while still providing an incredibly high level of institutional safety and security.

Lowering the costs of obtaining materials and services does not come at the expense of quality. Indeed, “none of the more rigorous studies [on this issue] finds quality at private [facilities] lower than quality at public [facilities] on average . . . . This result belies statements in the prison literature that assume that cost reductions must come at the expense of quality.” Volokh, *A Tale of Two Systems*, *supra* at 1868, 1875-76. An article from the Saint Louis University Public Law Review explained:

Many studies have found that quality is not sacrificed for profit. [Geoffrey] Segal and [Adrian] Moore analyzed twenty-eight studies of the cost and quality associated with privatized facilities and found that “there is clear and significant evidence that private facilities provide at least the level of service that government-run facilities do.”

The authors go on to say that “[p]rivate correctional facilities have fared well against government-run facilities in almost all measures of quality.”

Seiter, *supra* at 421-22 (quoting Geoffrey F. Segal & Adrian T. Moore, *Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services: Part II: Reviewing the Literature on Cost and Quality Comparisons* (2002)). In fact, in February 2021, the Office of the Inspector General determined that United States Marshals Services facilities operated by private sector contractors actually were safer, more accountable, and more responsive in mitigating risk from COVID-19 than their government-run counterparts. *See* United States Department of Justice, Office of the Inspector General, *Review of the United States Marshals Service’s Response to the COVID-19 Pandemic*, <https://oig.justice.gov/sites/default/files/reports/21-034.pdf> (visited December 13, 2022). Similarly, in a scholarly article that was published in the Arizona State Law Journal, the author explained: “Collectively, the studies [comparing public facilities and private sector facilities] fail to paint any sort of clear picture. The results are muddy and seem to suggest, more than anything else, that there [is] little difference between the two types of prisons.” Pfaff, *The Incentives of Private Prisons*, *supra* at 1000.

Private sector contractors also leverage the economies of scale that they generate to offer a wide range of programs and services to individuals housed in private facilities. This helps them to develop innovative programming that is geared

toward reducing recidivism rates, such as drug and alcohol counseling, educational programs, and vocational training. *See* Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 Ohio St. L.J. 983, 1003 (2011) (describing the significant programming advantages available at private facilities). Day 1 member CoreCivic reports that its “correctional, detention, and residential reentry facilities offer a variety of rehabilitation and educational programs, including basic education, faith-based services, life skills and employment training, and substance abuse treatment.” *See* CoreCivic, Inc. 2021 Form 10-K at 7, <https://ir.corecivic.com/static-files/983f3a9e-b212-4261-bb4c-ffd26f849f90> (visited December 12, 2022). Such programs and services “are intended to help reduce recidivism and to prepare offenders for their successful reentry into society upon their release.” *Id.* GEO’s portfolio of programs is very similar, and includes GEO’s Continuum of Care Program, a recognized leader in the provision of post-release services to inmates designated to facilitate the successful return of released inmates to their communities and reduce the overall rate of recidivism. *See* The GEO Group, Inc. 2021 Form 10-K at 50, [https://www.sec.gov/Archives/edgar/data/923796/000156459022007652/geo-10k\\_20211231.htm](https://www.sec.gov/Archives/edgar/data/923796/000156459022007652/geo-10k_20211231.htm) (visited December 12, 2022); The GEO Group, Inc., GEO Continuum of Care Annual Report 2021, <https://www.geogroup.com/CoC-Annual-Report-2021> (visited December 21, 2022).

Utah State Senator Curt Bramble and former Georgia State Representative Vernon Jones authored a report on the performance of private sector contractors in operating correctional facilities in which they detail the extensive benefits that private sector contractors offer government agencies. See Curtis Bramble and Vernon Jones, *Why Contracting for Performance in Prison and Detention Management Is Worth a Closer Look*, <https://day1alliance.org/resource/about-the-private-sectors-role-in-corrections-detention/> (visited December 12, 2022). One benefit they discuss is the reality that “[c]ontracting for performance promotes the use of evidence-based programs to reduce recidivism and spurs innovations to improve the effectiveness of rehabilitative programs.” *Id.* By way of example, from 2007 to 2019, MTC helped the State of Texas reduce the number of crimes committed by parolees by 17%, the number of probationers returning to prison by 14.7%, the percentage of Texans who are incarcerated by 21%, and the rate of recidivism by 25%. Management & Training Corporation, *Texas Reduced Crime, Incarceration, and Recidivism Rates in Partnership with Private Organizations*, <https://www.mtctrains.com/wp-content/uploads/2020/10/Texas-MTC-Partnership.pdf> (visited December 12, 2022).

When private sector contractors achieve positive results in providing rehabilitative programs to incarcerated individuals, government agencies take notice and seek to replicate those outcomes in publicly-operated facilities. In 2018, the

privately-operated Otero County Prison Facility in New Mexico received the highest rating in the state in an audit on the effectiveness of its educational programs. Speaking to Otero County Prison Facility staff in 2018, former New Mexico Corrections Department Secretary David Jablonski praised the facility for their approach and their results: “This facility, I think, is the best facility in the country . . . . The programming here is above board. I can’t say enough about this facility. I wish I could duplicate it.” Management & Training Corporation, *Taking a Look at the Social Impact MTC Staff Made in 2018*, <https://www.mtctrains.com/corrections/taking-a-look-at-the-social-impact-mtc-staff-made-in-2018/> (visited December 12, 2022).

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

- graduate more than 1,653 inmates with high school equivalency certificates and award 4,712 industry-recognized certificates;
- strengthen addiction-treatment programs by providing treatment options at a 72% completion rate;
- guide 996 inmates to complete victim-impact programs, bringing the total to 2,078; and
- enroll 868 inmates in faith-based residential programs.

CoreCivic, Inc., *2018 Environmental, Societal, and Governance Report*, [https://www.corecivic.com/hubfs/\\_files/2018-ESGReport.pdf](https://www.corecivic.com/hubfs/_files/2018-ESGReport.pdf) (visited December 12, 2022). On a typical day, Day 1 Alliance member GEO has more than 30,000 participants enrolled in offender rehabilitation programming, resulting in 6.7 million programming hours completed during 2018. In 2018 alone, GEO helped men and women in their care attain:

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

The GEO Group, Inc., *2018 Human Rights and Environmental, Societal, and Governance Report*, <https://www.geogroup.com/Portals/0/HumanRightsESG2018.pdf> (visited December 12, 2022). Along with this, Day 1 Alliance member MTC provides vital services to more than 28,000 incarcerated men and women and to approximately 2,700 individuals in detention. In 2018, MTC helped the men and women in its care achieve the following results:

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



The Day 1 Alliance, *Myth vs. Fact: The Private Sector's 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 December 12, 2022). Private sector contractors provide great benefits at reduced costs. Any contention that private sectors contractors primarily are motivated by the “bottom line” is unfounded and supported by baseless supposition, not actual evidence.

**D. Private Sector Facilities Provide Taxpayer Benefits Without Sacrificing Quality.**

Appellants also contend that private sector facilities run contrary to the public interest in lower taxes. (Amended Class Action Complaint, ER-159-60 ¶ 170(c)). Their contention, however, completely misses the mark and is simply inaccurate. Allowing private sector contractors to operate correctional facilities actually eases the burden on the government and helps to alleviate some of the costs that are passed along to taxpayers in housing individuals convicted of crimes.

Appellants' position is contradicted by the plain language of Arizona's statute that allows private sector contractors to operate correctional facilities. This statutory scheme *requires* private sector facilities to offer cost savings. A.R.S. § 41-1609.01(G). It specifically provides: “A proposal shall not be accepted until the proposal offers cost savings to this state.” *Id.* These cost savings cannot come at the expense of services available to the individuals incarcerated therein, as private sector contractors must offer “a level and quality of services that are at least

functionally equal to those that would be provided by [the State].” *Id.* at (H). This detailed statutory scheme mandates cost savings while maintaining service quality, which benefits the taxpayer while causing no detriment to incarcerated individuals.

The required costs savings that are realized through utilizing private sector contractors are designed to combat the enormous strain placed on government budgets by increases in the number of incarcerated individuals. From 1990 through 2019, annual state spending on corrections increased from \$16.9 billion to \$56.6 billion in the United States – a 235% increase. The Sentencing Project, *Trends in U.S. Corrections*, <http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (visited December 12, 2022). Add to this legacy costs for compensation packages that the government must pay through pensions and other benefits that are unique to the government and inapplicable to the private sector. The taxpayer bears the expense of paying employees of government agencies, while private sector contractors bear the expense of paying their own employees.

The savings realized by the involvement of private sector contractors in providing correctional services are evident in budget documents generated by the Federal Bureau of Prisons (“BOP”). According to data for fiscal year 2015 released by the BOP, low security contractor-operated facilities cost \$63.65 per inmate per day, whereas low security public facilities cost \$80.20 per inmate per day. Taxpayer

savings only have increased with the continued presence of private sector contractors in providing correctional services. According to data for fiscal year 2018 released by the BOP, the average daily cost to house an inmate in a low-security BOP facility was \$92.46, while the average cost in in a private sector facility was \$66.63 -- a difference of approximately 28% or \$25.83 per inmate per day. The Day 1 Alliance, *Letter to the Honorable William P. Barr*, <https://day1alliance.org/wp-content/uploads/2019/11/11.25.19-D1A-Board-Letter-AG-Barr1-1.pdf> (visited December 12, 2022). The American taxpayer thus saved approximately \$413,000 per day, or \$150 million per year, by housing 16,000 incarcerated individuals in contractor-operated facilities rather than those operated by the Bureau of Prisons. *Id.* This represents real savings to the taxpayer, while delivering safe, humane, and respectful treatment to individuals who are incarcerated in private sector facilities.

**E. Private Sector Contractors Efficiently Build Tailored Correctional Facilities.**

Another advantage of private sector contractors is that they often build their own facilities and undisputedly do so more quickly and more efficiently than their public counterparts. Indeed, private contractors “are able to build much faster than the government because of the arcane, complicated, and lengthy procedures that the government has to endure to get funding approved.” Michael G. Anderson, *If You’ve Got the Money, I’ve Got the Time: The Benefits of Incentive Contracts with Private Prisons*, 34 Buff. Pub. Int. L.J. 43, 58 (2016). Even critics of private sector

contractors recognize the challenges government agencies face in the construction of correctional facilities. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437, 546 n.63 (2005). Typically, when a state or locality seeks to build a new jail or prison, it must ask voters to approve a bond issue to finance the project. *Id.* However, voter approval for the financing of new facilities frequently is withheld. *Id.* Even in cases where voter approval is secured, the process of seeing a publicly-funded capital project come to fruition can be a lengthy one, with many separately sequenced and completed procedural steps combined and contemporaneously performed when building projects are privately-financed. *Id.* A private company can build a correctional facility within twelve to eighteen months, compared to the forty-eight to sixty months that it takes a state government. This reduced timetable provides private sector contractors many advantages, not the least of which is less costly development borrowing costs.

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

[e]fficiency in the construction of prison facilities encompasses both gains in the speed with which facilities can be built or renovated, as well as cost savings. The private sector often has the resources to finance major

construction projects that local, state, and federal governments are either unable or unwilling to finance due to budget constraints . . . . Improved construction quality allows the private sector greater flexibility in choosing 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.

DeFiandra, *supra* at 596-97 (citing Gary W. Bowman, et al., *Privatizing the United States Justice System, Police, Adjudication, and Corrections Services from the Private Sector* 256 (1992)). The ability to build customized facilities thus represents a distinct advantage that private sector contractors have over their public counterparts and further demonstrates the value that private sector contractors can offer governmental agencies in providing correctional services to incarcerated individuals.

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

The legal system provides another mechanism of accountability for private sector contractors in this industry. Government officials, including public correctional officers, enjoy qualified immunity from civil lawsuits, effectively shielding them from personal liability for constitutional violations in all but the most egregious cases. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). The same is not true for employees of private sector contractors. In *Richardson v. McKnight*, the Supreme Court examined the

history and purpose of government immunity and determined that neither justified granting private sector employees qualified immunity from lawsuits under 42 U.S.C. § 1983 (“Section 1983”). 521 U.S. at 405-12. In so doing, the Court recognized that private firms are affected by “marketplace pressures” in a way that the government is not. *Id.* at 410. The Court’s decision, as one scholar recognized, “bifurcates the treatment of public and private prisons in a way that makes private prisons more, not less, accountable.” Volokh, *A Tale of Two Systems*, *supra* at 1881.

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

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

**G. Housing Offenders in Private Sector Facilities Does Not Drive Incarceration Rates.**

Appellants also contend that the purported “profit motive” of private sector contractors drives increased incarceration rates. (Appellants’ Brief at 36; Amended Class Action Complaint, ER-124 ¶¶ 1-2). They are wrong. Their position is contradicted by a comparison of the number of individuals housed in private sector facilities to the number of individuals housed in public sector facilities. Only approximately 8% of offenders are housed in private sector facilities, compared to approximately 92% in public sector facilities. Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, Prison Policy Initiative, <https://www.prisonpolicy.org/reports/pie2022.html> (visited December 13, 2022) (debunking the “myth” that private sector contractors are responsible for mass incarceration in America). In fact, half of all people housed in private sector facilities are housed in just five states, and there is no evidence that prison populations grew any faster in those states than in states that relied less on private sector facilities or did not use them at all. John F. Pfaff, *A Second Step Act for States (And Counties, and Cities)*, 41 *Cardozo L. Rev.* 151, 175-76 (2019); see also John F. Pfaff, *The Complicated Economics of Prison Reform*, 144 *Mich. L. Rev.* 951, 969 (2016) (critiquing the claim that privatization has contributed to higher incarceration

rates where “only 8.4% of the prison population was in private prisons in 2014 – and at the state level, only 6.8%, with over half of those in just five states” and noting that the concern that the 2008 recession would lead to increased use of private facilities to mitigate capacity constraints “appears to have not been realized”).

Private sector contractors also do not contribute to increased incarceration rates because they play no role in arresting individuals, charging individuals with crimes, convicting individuals of crimes, or determining sentences. In Arizona, issues that relate to the length of an offender’s sentence are the exclusive province of the Arizona Department of Corrections, Rehabilitation, and Reentry, including when a private sector contractor operates a particular facility. *See* A.R.S. § 41-1609.01(M) (prohibiting a contract for providing correctional services from delegating to a private sector contractor authority or responsibility for “[d]eveloping and implementing procedures for calculating and awarding sentence credits[,] . . . [a]pproving the type of work inmates may perform and the wages or sentence credits that may be given to inmates engaging in the work[,] [or] . . . [g]ranting, denying or revoking sentence credits . . . .”). Such statutes make the states, and not private sector contractors, responsible for the amount of time that an individual remains incarcerated.

Private sector contractors do not lobby for or against legislation, policies, or regulations that impact the basis for or duration of an individual’s detention or



incarceration.<sup>2</sup> 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 December 12, 2022); CoreCivic, Inc., *Statement from CoreCivic President and CEO Damon Hininger on the First Step Act*, <https://www.corecivic.com/news-releases/statement-from-corecivic-on-the-first-step-act> (visited December 12, 2022); 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-on-prison-reform-the-first-step-act/> (visited December 12, 2022); Management & Training Corporation, *MTC Applauds Congress for Passing Bi-Partisan Criminal Justice Reform Legislation*, <https://www.mtctrains.com/corrections/mtc-applauds->

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<sup>2</sup> Day 1 also does not advocate on legislation policies or regulations that impact the basis for or duration of an individual's incarceration.

senate-for-passing-bi-partisan-criminal-justice-reform-legislation/ (visited December 12, 2022).

In fact, private sector contractors may actually decrease the total amount of pro-incarceration advocacy. *See* Alexander Volokh, *Privatization, Free Riding, and Industry-Expanding Lobbying*, 30 Int’l Rev. L. & Econ. 62, 64-65 (2009) (seeking to debunk the myth that private sector contractors necessarily drive increased incarceration rates by lobbying for pro-incarceration policies). A 2008 study “found virtually no pro-incarceration advocacy from the private sector . . . .” *Id.* at 65. And, since the public sector continues to operate the vast majority of correctional facilities, privatization necessarily reduces the public sector’s lobbying efforts “because [the public sector] will receive a smaller share of the total benefit to the industry; but the private-sector actor’s advocacy will remain zero, since they will completely free-ride off the public sector.” *Id.* at 64.

Appellants also contend that the privatization of prisons is “tainted by racial animus,” and their amici seek to support them in that respect. (Appellants’ Brief at 43; *see* Docket Entries 20, 21, 23, 29). They are wrong. Day 1 members’ commitment to maintaining diverse, dedicated workforces demonstrates that there is no racial animus among private sector contractors. Approximately 56% of CoreCivic’s new hires in 2021 were underrepresented minorities. CoreCivic, Inc., *2021 ESG Report* at 26, <https://www.corecivic.com/hubfs/2021-ESGReport.pdf>

(visited December 13, 2022). Underrepresented minorities account for approximately 61% of GEO's U.S. employees. The GEO Group, Inc., *Human Rights and ESG Report 2020*, <https://www.geogroup.com/2020-Human-Rights-ESG-Report> (visited December 13, 2022). Of MTC's nearly 9,000 employees, approximately 60% are racial minorities. Alexandra Wilkes, *Celebrating the Diversity and Dedication of Correctional Employees*, <https://theopinionpages.com/2022/05/celebrating-the-diversity-and-dedication-of-correctional-employees/> (visited December 13, 2022). The diversity of MTC's staff extends to leadership, as 44.8% of MTC's wardens are nonwhite. *Id.*

Any increases in incarceration in the United States result from forces outside of the control of private sector contractors. *See generally* John F. Pfaff, *The Micro and Macro Reasons of Prison Growth*, 28 Ga. St. U. L. Rev. 1239 (2012). The largest increases in prison numbers have come about as the result of laws and regulations that were outside the influence of private sector contractors. Seiter, *supra* at 424 (identifying the war on drugs and the "tough on crime" attitude that has led to reduced percentages of releases on parole and increased rates of parole revocation as examples of external forces driving increased incarceration rate). The members of Day 1 do not lobby for increased sentences or take measures to increase the overall incarcerated population, as Appellants and their amici contend. Instead, these private sector contractors play a small but valued role within the realm of

correctional services offered in the United States by constantly working to deliver safe, humane, and respectful treatment to incarcerated individuals.

### **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 at the trial court level and in his Answering Brief in this Court of Appeals, 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. Appellants and their amici 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.

Respectfully submitted,

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I hereby certify that on December 23, 2022, I filed the this *Amicus Curiae* Brief with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Erin Palmer Polly

Erin Palmer Polly