

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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FEDERAL DEFENDERS OF NEW YORK, INC. on  
behalf of itself and its clients detained at the Metropolitan  
Detention Center-Brooklyn,

*Plaintiff,*

v.

FEDERAL BUREAU OF PRISONS, et al.,

*Defendants.*

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Docket No. 19-cv-660  
Hon. Margo K. Brodie  
Hon. Steven M. Gold

**BRIEF FOR AMICUS CURIAE THE STATE OF NEW YORK**

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
STATEMENT OF FACTS .....	2
A. Several State Agencies Are Involved in Operating, Monitoring, and Supervising Correctional Facilities in New York. ....	2
B. The State Operates Several Other Types of Secure Facilities. ....	4
ARGUMENT .....	5
A. The State’s Experience in Developing Protocols and Practices to Respond to Emergencies in a Timely Manner. ....	5
B. The State’s Experience with Oversight and Supervision of Correctional Facilities. ....	10
CONCLUSION.....	13

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Coniglio v. Thomas</i> , 657 F. Supp. 409 (S.D.N.Y. 1987).....	5
<i>Fermin-Rodriguez v. Westchester Cty. Jail Med. Pers.</i> , 191 F. Supp. 2d 358 (S.D.N.Y. 2002).....	9
<i>Toomer v. County of Nassau</i> , No. 07-cv-1495, 2009 WL 1269946 (E.D.N.Y. May 5, 2009).....	9
<i>Trammell v. Keane</i> , 338 F.3d 155 (2d Cir. 2003).....	5
<i>United States v. Sorrell</i> , 562 F.2d 227 (3d Cir. 1977).....	9
 <b>Laws</b>	
<u>Federal</u>	
18 U.S.C. § 4002.....	9
 <u>State</u>	
N.Y. Correction Law	
§ 40.....	3
§ 45.....	12
§ 46.....	11
§ 46.....	12
§ 121.....	2
§ 504.....	9
N.Y. Crim. P. Law § 330.20 .....	4
N.Y. Executive Law	
§ 51.....	3
§ 53.....	11
§ 54.....	11
§ 55.....	11
9 N.Y.C.R.R. pt. 7210.....	9
§ 7210.4.....	9
§ 7210.10.....	9

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
<i>Government Publications</i>	
<i>New York State Commission of Correction</i>	
N.Y. State Comm’n of Corr., <i>Annual Report for the Year 2016</i> (Aug. 23, 2017), <a href="https://scoc.ny.gov/pdffdocs/annualreport_2016.pdf">https://scoc.ny.gov/pdffdocs/annualreport_2016.pdf</a> .....	4, 6, 12
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N.Y. State Comm’n of Corr., <i>Reportable Incident Manual for County Jails and the New York City Department of Correction</i> (Jan. 2016), <a href="https://scoc.ny.gov/pdffdocs/2015_jail_ri_manual.pdf">https://scoc.ny.gov/pdffdocs/2015_jail_ri_manual.pdf</a> .....	6, 8
N.Y. State Comm’n of Corr., <i>The Worst Offenders Report: The Most Problematic Local Correctional Facilities of New York State</i> (Feb. 2018), <a href="https://scoc.ny.gov/pdffdocs/Problematic-Jails-Report-2-2018.pdf">https://scoc.ny.gov/pdffdocs/Problematic-Jails-Report-2-2018.pdf</a> .....	3,4, 12
<i>New York State Department of Corrections and Community Supervision</i>	
N.Y. State Dep’t of Corr. & Cmty. Supervision, <i>Under Custody Report: Profile of Under Custody Population as of January 1, 2016</i> , <a href="http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf">http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf</a> .....	2
N.Y. State Dep’t of Corr. & Cmty. Supervision, <i>Facility Listing</i> , <a href="http://www.doccs.ny.gov/faclist.html">http://www.doccs.ny.gov/faclist.html</a> .....	2
N.Y. State Dep’t of Corr. & Cmty. Supervision, <i>Fact Sheet</i> (Feb. 1, 2019), <a href="http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf">http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf</a> ; .....	2
N.Y. State Dep’t of Corr. & Cmty. Supervision, Directive No. 4004 .....	7
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N.Y. State Dep’t of Corr. & Cmty. Supervision, Directive No. 4060 .....	6
N.Y. State Dep’t of Corr. & Cmty. Supervision, Directive No. 77, <a href="http://www.doccs.ny.gov/Directives/0077.pdf">http://www.doccs.ny.gov/Directives/0077.pdf</a> .....	2-3

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<i>New York State Office of the State Comptroller</i>	
N.Y. Office of the State Comptroller, Report 2017-S-2, <i>State Commission of Correction, Facility Oversight and Timeliness of Response to Complaints and Inmate Grievances</i> (Jan. 2018), <a href="https://osc.state.ny.us/audits/allaudits/093018/sga-2018-17s2.pdf">https://osc.state.ny.us/audits/allaudits/093018/sga-2018-17s2.pdf</a> .....	3
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<i>Other Government Agencies</i>	
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Press Release, Cortland Cty. Sherriff’s Office, Cortland County Jail Evacuated (Jan. 24, 2019), <a href="https://whcuradio.com/news/025520-cortland-county-jail-evacuated/">https://whcuradio.com/news/025520-cortland-county-jail- evacuated/</a> .....	10
<u>Other Publications</u>	
Catherine Wilde, <i>Jail repairs await state</i> , Cortland Standard (Feb. 2, 2019), <a href="https://cortlandstandard.net/2019/02/02/jail-repairs-await-state/">https://cortlandstandard.net/2019/02/02/jail-repairs-await-state/</a> .....	10
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Nicholas Graziano, *60 inmates evacuated from jail*, Cortland Standard (Jan. 25, 2019), <https://cortlandstandard.net/2019/01/25/60-inmates-evacuated-from-jail/> .....10

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### INTEREST OF AMICUS CURIAE

The State of New York submits this *amicus curiae* brief to provide the Court with its own experiences (a) handling emergencies (including power and heating failures) in correctional and other secure facilities; and (b) exercising oversight over particular state or locally operated facilities. The State's experience may inform this Court's evaluation of the claims in this proceeding that arise from the federal government's response to power and heating failures at the Metropolitan Detention Center (MDC), and aid the Court's assessment of plaintiff's request for the appointment of a special master to monitor the MDC.

The State maintains a criminal correctional system that houses approximately 47,100 individuals across 54 state-operated facilities. State agencies also operate secure facilities for juvenile offenders, individuals with severe developmental disabilities, and persons requiring intensive mental health treatment. The State maintains active oversight over these facilities, as well as over approximately 500 local jails and lockups operated by municipal and county governments.

Among other responsibilities, the State has developed protocols to respond effectively to major disruptions in the facilities that it operates and oversees. In particular, state agencies have promulgated numerous policies and guidelines for responding to natural disasters, weather-related emergencies, maintenance and service failures, fires, and other unexpected occurrences that affect facility operations. These policies and guidelines reflect the State's strong interest in the health, welfare, and dignity of all of its residents, including incarcerated individuals, pretrial detainees, and others who are involuntarily held at government-operated secure facilities. At the same time, these policies and guidelines reflect the State's interest in maintaining facility security during major disruptions—an important consideration that itself helps to effectively protect the safety and well-being of all individuals located in a facility, including staff members, inmates, and visitors.

The State is therefore committed to promoting policies and practices that both safeguard the rights of all New Yorkers and ensure institutional safety.

## STATEMENT OF FACTS

### A. Several State Agencies Are Involved in Operating, Monitoring, and Supervising Correctional Facilities in New York.

New York State’s criminal correctional system consists of two primary components—state-operated prisons and locally operated jails.<sup>1</sup> The New York State Department of Corrections and Community Supervision (DOCCS) operates the state prison system, which is primarily responsible for the long-term institutionalization and rehabilitation of offenders who have been convicted and have received prison sentences of longer than one year. Municipal and county governments operate local jails or lockups, which primarily house individuals awaiting an initial appearance, trial, or sentencing, as well as convicted offenders who were sentenced to one year or less of imprisonment.

DOCCS currently houses approximately 47,100 individuals in 54 facilities statewide.<sup>2</sup> *See* DOCCS, *Fact Sheet* at 1 (Feb. 1, 2019), <http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf>; DOCCS, *Facility Listing*, <http://www.doccs.ny.gov/faclist.html>. DOCCS operates three facilities in New York City, the largest of which is the Queensboro Correctional Facility, a 416-bed minimum-security prison located in Long Island City, Queens. *See* DOCCS Directive No.

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<sup>1</sup> New York law generally prohibits “the private operation or management” of correctional facilities. N.Y. Correction Law § 121.

<sup>2</sup> The inmate population in New York’s state-operated prisons has drastically declined in recent years. The current population represents a nearly 10% decrease from January 1, 2016, when approximately 52,300 individuals were incarcerated in the same 54 facilities. *See* DOCCS, *Under Custody Report: Profile of Under Custody Population as of January 1, 2016* at ii, [http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody\\_Report\\_2016.pdf](http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf).



77, <http://www.doccs.ny.gov/Directives/0077.pdf>. DOCCS also operates several much larger prisons in neighboring counties, including the Sing Sing Correctional Facility in Westchester County and the Green Haven Correctional Facility in Dutchess County. As a state agency, DOCCS is subject to the oversight of the New York State Inspector General. *See* N.Y. Executive Law § 51.

As of March 2017, municipal and local county governments operated approximately 500 facilities across the State. *See* N.Y. Office of the State Comptroller, Report 2017-S-2, *State Commission of Correction, Facility Oversight and Timeliness of Response to Complaints and Inmate Grievances* at 1 (Jan. 2018), <https://osc.state.ny.us/audits/allaudits/093018/sga-2018-17s2.pdf>. Among these local facilities are the twelve jails operated by the New York City Department of Correction, most of which are located on Rikers Island. *See* N.Y. State Comm'n of Corr., *The Worst Offenders Report: The Most Problematic Local Correctional Facilities of New York State* at 3-44 (Feb. 2018), <https://scoc.ny.gov/pdfdocs/Problematic-Jails-Report-2-2018.pdf>.

Although the State is not involved in the day-to-day operation and maintenance of local correctional facilities, the New York State Commission of Correction, an independent state agency tasked with monitoring all correctional facilities in the state, focuses its oversight efforts primarily on local and county institutions.<sup>3</sup> *See* Comptroller Report 2017-S-2, *supra*, at 7. Among other responsibilities, the Commission “regulates the construction and improvement of local facilities, the care, custody, correction, treatment, supervision, discipline, health standards,” and other aspects of facility operation. *Worst Offenders Report, supra*, at 1. To fulfill these duties, the

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<sup>3</sup> Since 1996, the Commission has also had authority to monitor secure juvenile detention facilities operated by the New York State Office of Children and Family Services (OCFS). *See* N.Y. Correction Law § 40(2). As of December 2018, OCFS operates eight secure juvenile detention facilities, the largest of which are located in Brooklyn and the Bronx. OCFS, *Secure and Specialized Secure Detention Facilities* (Dec. 14, 2018), <https://ocfs.ny.gov/main/rehab/facilities/SD-SSDcontactinfo.pdf>.

Commission performs scheduled and unannounced on-site inspections and investigations of local facilities, receives and reviews complaints from inmates, staff, and community members, and is authorized to issue directives and seek court orders to compel compliance with its rules and regulations. *See id.* at 1-2; *see also* N.Y. State Comm'n of Corr., *Annual Report for the Year 2016* at 1-4, 6-7 (Aug. 23, 2017), [https://scoc.ny.gov/pdfdocs/annualreport\\_2016.pdf](https://scoc.ny.gov/pdfdocs/annualreport_2016.pdf).

**B. The State Operates Several Other Types of Secure Facilities.**

The State also operates several other types of secure facilities. For example, the New York State Office of Mental Health (OMH) operates numerous facilities for individuals requiring intensive inpatient mental health services, including two secure treatment facilities for dangerous sex offenders requiring civil confinement and several others for individuals requiring forensic evaluations and related services. *See* OMH, Div. of Forensic Servs., <https://www.omh.ny.gov/omhweb/forensic/bfs.htm>. The New York State Office for People With Developmental Disabilities (OPWDD) likewise operates several secure facilities for severely developmentally disabled individuals requiring intensive active treatment. *See* N.Y. Office of the State Comptroller, Report 2017-S-50, *Office for People With Developmental Disabilities, Oversight of Passenger Safety* at ii (Oct. 2018), <https://osc.state.ny.us/audits/allaudits/093019/sga-2018-17s50.pdf>.

Individuals in OPWDD and OMH secure facilities may also be committed as the result of a verdict or plea of not responsible by reason of mental disease or defect. *See* N.Y. Crim. P. Law § 330.20.

## ARGUMENT

The claims in this proceeding arise from the Federal Bureau of Prisons' response to certain facility failures at the MDC in Brooklyn, New York. In addition, plaintiff Federal Defenders of New York has requested that this Court appoint a special master to inspect the MDC and conduct fact-finding into current conditions of confinement.

The State's experience with correctional facilities and other secure facilities in New York City and elsewhere may provide relevant context for this Court's evaluation of plaintiff's claims and requested relief. In particular, the State has direct experience in developing responses to maintenance-related emergencies and other unexpected events, as well as experience in monitoring both state-run and locally operated correctional institutions. In exercising these functions, the State has recognized both the interests of detained individuals who are "entitled to safe conditions of confinement," *Coniglio v. Thomas*, 657 F. Supp. 409, 413 (S.D.N.Y. 1987) (citing *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982)), and the difficulty of making decisions that affect facility security and staff safety—especially in times of exigency—"in haste, under pressure, and frequently without the luxury of a second chance," *Trammell v. Keane*, 338 F.3d 155, 162 (2d Cir. 2003) (quotation marks omitted). The State thus offers its experiences as examples of the range of approaches undertaken by governmental agencies operating and overseeing secure facilities in New York.

### **A. The State's Experience in Developing Protocols and Practices to Respond to Emergencies in a Timely Manner.**

State agencies operating correctional and other secure facilities have developed robust written guidelines, procedures, and protocols for responding to emergencies, service failures, and

other critical incidents.<sup>4</sup> With respect to state prisons, DOCCS promulgates and regularly updates directives establishing general standards and procedures, and those directives are supplemented by detailed operations manuals created by each individual facility. For example, DOCCS Directive No. 4060 requires the agency's Fire and Safety Coordinator to "[d]raw up an uncomplicated, yet complete, plan for evacuation of inmates and personnel from each area [of a facility] in case of fire or other emergency." DOCCS Directive No. 4060 at 3. This plan must include procedures for reporting a fire or other emergency, life safety strategies for notifying, relocating, and evacuating staff members and inmates, and regularly scheduled training and drills. *Id.* at 3-4. Similarly, OMH requires each of its facilities to develop an Emergency Operations Plan "that is scalable to emergencies that may escalate in complexity, scope and duration." *See, e.g.*, OMH, Kirby Forensic Psychiatric Ctr., *Comprehensive Emergency Management Program* (Mar. 2015) at 3.

Timely reporting of emergencies and other unexpected incidents is critical to an effective response, especially in cases where the cooperation of multiple governmental organizations may be necessary. The State Commission of Correction therefore "requires that all local correctional facilities report incidents that endanger inmates or staff or disrupt facility operations," and further compels each such facility to notify the Commission immediately about especially serious incidents, including major maintenance and service disruptions, natural and civil emergencies, and fires. *2016 Annual Report, supra*, at 43; N.Y. State Comm'n of Corr., *Reportable Incident Manual for County Jails and the New York City Department of Correction* at 11, 14, 17 (Jan. 2016), [https://scoc.ny.gov/pdfdocs/2015\\_jail\\_ri\\_manual.pdf](https://scoc.ny.gov/pdfdocs/2015_jail_ri_manual.pdf). DOCCS Directive No. 4004 likewise

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<sup>4</sup> Because of security concerns, the agencies' emergency response protocols and individual facility operations manuals are generally not available to the public. Counsel can provide copies of any non-publicly available documents to the Court upon request.

establishes procedures for the reporting of unusual incidents, including a mandatory telephone report submitted immediately following major disruptions of facility services or a fire. DOCCS Directive No. 4004 at 2. Each DOCCS facility's superintendent is also required to notify outside agencies with whom the facility has mutual aid agreements, such as local fire departments and hospitals, as well as local law enforcement agencies, whenever an emergency has occurred that may require outside assistance. *See* DOCCS Directive No. 4010 at 5. OMH requires that its site-specific Maintenance Supervisor make staff available on a 24 hours per day/seven days per week basis to respond to emergencies including heating, electrical, and water failures. *See, e.g.,* Kirby Forensic Psychiatric Ctr., *Comprehensive Emergency Management Program, supra*, at 67, 72, 75. OMH further requires that the Maintenance Supervisor contact the facility's Executive Director as soon as it determines that services cannot be timely restored. *See id.* at 67-68, 72-73, 75.

Although there is a range of potential maintenance and service failures that may occur within a given facility, state agencies have reached consensus about the types of disruptions that typically require immediate notification and responsive action. DOCCS, for example, requires immediate notification of any incident in which “the provision or maintenance of required facility services such as heat, light, water, power, [or] sewage is interrupted and results in a serious disruption of facility operations or poses a threat to security and order.” DOCCS Directive No. 4004 at 6. DOCCS Directive No. 4004 provides several illustrative examples of such events, including “loss of heat to housing units during cold weather,” “loss of electricity where backup generators do not provide adequate power,” and “[a]ny loss of water or sewage causing housing unit, medical or food service to shut down.” *Id.*

The State Commission of Correction likewise requires local correctional facilities to report immediately a maintenance failure that results in “physical injury requiring one or more inmates,

personnel or visitors to be admitted to a hospital” or “essential services or essential facility utilities or infrastructure interruptions extending beyond 8 hours in duration.” *Reportable Incident Manual, supra*, at 11 (emphasis omitted). The Commission further requires local facilities to report within 24 hours any less severe maintenance failure that “disrupts normal facility operations, or the delivery of inmate services.” *Id.*

The specific remedial steps that a facility may take in the event of major service disruptions or other emergencies depend on the underlying circumstances. For example, OMH’s emergency management plan provides that in cases of a loss of heat, a facility should distribute coats and extra blankets for staff members and residents. *See, e.g., Kirby Forensic Psychiatric Ctr., Comprehensive Emergency Management Program, supra*, at 30. However, the emergency plan makes clear that these are only temporary measures and that a partial or complete evacuation may be necessary if “heat cannot be restored in a reasonable period of time.” *See id.* at 67-68. Indeed, OMH acknowledges that although evacuations should be viewed as a last resort, partial or complete evacuations are required when the facility “cannot support patient care, treatment or basic life safety needs in place.” *Id.* at 31. Each facility’s emergency plan therefore identifies specific sites to which individuals in OMH custody may be transferred for up to 96 hours. *Id.* at 31-32. If habitable conditions are not restored in the primary facility after 96 hours, OMH’s central office is required to find alternative care sites. *Id.* at 32.

New York law likewise recognizes that partial or complete evacuations of correctional institutions may be warranted under certain circumstances. Correction Law § 504 expressly authorizes the transfer of inmates from a local correctional facility to a different local facility when the original jail “becomes unfit or unsafe for the confinement of some or all of the inmates,” including when the original jail is no longer able to provide medical or mental health services or

otherwise ensure the safety and welfare of some or all inmates. *See* N.Y. Correction Law § 504; 9 N.Y.C.R.R. pt. 7210. Section 504 also allows DOCCS to accept the transfer of inmates from local jails that are deemed “unfit or unsafe.”<sup>5</sup> N.Y. Correction Law § 504(2). The State Commission of Correction must issue an order approving the transfer of inmates between local jails, or the transfer of an inmate from a local jail to a DOCCS facility. *See* 9 N.Y.C.R.R. § 7210.4; *see also* N.Y. State Comm’n of Corr., Chairman’s Memorandum 4-2015, *Substitute Jail Orders—Procedures for Transferring Inmates From One County to Another* (Apr. 8, 2015), [https://scoc.ny.gov/pdfdocs/chair\\_2015\\_04.pdf](https://scoc.ny.gov/pdfdocs/chair_2015_04.pdf). Once the Commission has determined that such transfer “is no longer appropriate or necessary,” it may revoke the transfer order and restore custody to the original facility. 9 N.Y.C.R.R. § 7210.10.

Although evacuations and inmate transfers due to maintenance or service disruptions are not common in New York’s correctional system, they can and do occur. For example, in January 2019, the Cortland County jail evacuated more than 60 inmates following roof leaks caused by a heavy storm. According to news reports and statements from county officials, the leaks resulted in

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<sup>5</sup> A federal statute expressly authorizes intergovernmental agreements between federal, state, and local governments regarding the housing of federal inmates in state and local facilities “for a period not exceeding three years.” 18 U.S.C. § 4002. These agreements are not subject to the requirements of Correction Law § 504. The federal government has long entered into such arrangements with local governments in New York and elsewhere, especially in jurisdictions where state and local correctional facilities are operating below capacity. *See, e.g., United States v. Sorrell*, 562 F.2d 227, 229 n.3 (3d Cir. 1977); *Toomer v. County of Nassau*, No. 07-cv-1495, 2009 WL 1269946, at \*1 (E.D.N.Y. May 5, 2009); *Fermin-Rodriguez v. Westchester Cty. Jail Med. Pers.*, 191 F. Supp. 2d 358, 362 n. 4 (S.D.N.Y. 2002); Joseph Summerill, *Housing Federal Prisoners in Local Jails-How to Negotiate an “e-IGA” With the U.S. Marshals Service*, Cal. Sheriff at 19-21 (Oct. 2012), <https://josephsummerill.com/wp-content/uploads/2015/05/Housing-Federal-Prisoners-in-Local-Jails.compressed.pdf>; Cecilia Fox, *County to house federal inmates*, Troy Daily News (Apr. 19, 2018), <https://www.tdn-net.com/news/39781/county-to-house-federal-inmates>; Chauncey Ross, *County jail to house federal inmates*, The Indiana Gazette (Dec. 21, 2018), [https://www.indianagazette.com/news/county-jail-to-house-federal-inmates/article\\_ea4248ce-0535-11e9-9e79-e77fc9cc6999.html](https://www.indianagazette.com/news/county-jail-to-house-federal-inmates/article_ea4248ce-0535-11e9-9e79-e77fc9cc6999.html).

approximately 2 to 3 inches of water on the floor of the dormitory and affected the jail's electrical system, heating, and ventilation units. *See* Nicholas Graziano, *60 inmates evacuated from jail*, Cortland Standard (Jan. 25, 2019), <https://cortlandstandard.net/2019/01/25/60-inmates-evacuated-from-jail/>. As the local sheriff's office explained, the facility was evacuated on the same day because "[i]t got to the point where we couldn't provide mandatory services," such as medical treatment, visitation, or food. *Id.* In a press release issued on the same day, the sheriff's office confirmed that "[i]t was because of safety concerns for the inmates and staff that the majority of the inmates from the jail were evacuated." Press Release, Cortland Cty. Sheriff's Office, Cortland County Jail Evacuated (Jan. 24, 2019), <https://whcuradio.com/news/025520-cortland-county-jail-evacuated/>.

The Commission assisted Cortland County officials in transferring the inmates to other jails and is working with the county to evaluate the damage to the facility and plan for necessary repairs. *See* Catherine Wilde, *Jail repairs await state*, Cortland Standard (Feb. 2, 2019), <https://cortlandstandard.net/2019/02/02/jail-repairs-await-state/>. Likewise, in January 2018, the Commission was notified when approximately 60 inmates in two housing units on Rikers Island were evacuated to a different New York City facility after heating units failed during a cold snap. *See* Matthew Chayes, *Rikers Island inmates evacuated during cold snap after heating failed*, AM New York (Jan. 11, 2018), <https://www.amny.com/news/rikers-island-evacuated-heating-1.16128528>.

## **B. The State's Experience with Oversight and Supervision of Correctional Facilities.**

In addition to operating correctional facilities, the State has had extensive experience in monitoring, investigating, and overseeing the management of individual institutions and system-wide practices. The primary agency tasked with investigating state prisons is the New York State Office of the Inspector General, which has broad authority to "receive and investigate complaints from any source, or upon his or her own initiative" regarding corruption, abuse, or misconduct



within a state agency. N.Y. Executive Law § 53(1). Among other things, the Inspector General has authority to subpoena witnesses and documents, compel any officer or employee of an agency to testify, and monitor the implementation of its findings and recommendations. *Id.* § 54. In addition, the subject state agency is required to report to the Governor regarding its efforts to implement any remedial action recommended by the Inspector General. *Id.* § 55(2).

The Inspector General's most notable recent investigation of DOCCS occurred in 2015, following the escape of two inmates from the Clinton Correctional Facility. *See generally* N.Y. State Office of the Inspector Gen., *Investigation of the June 5, 2015 Escape of Inmates David Sweat and Richard Matt from Clinton Correctional Facility* (June 2016), [https://ig.ny.gov/sites/default/files/pdfs/DOCCS%20Clinton%20Report%20FINAL\\_1.pdf](https://ig.ny.gov/sites/default/files/pdfs/DOCCS%20Clinton%20Report%20FINAL_1.pdf). The Inspector General's investigation involved sworn interviews with more than 175 individuals, including staff members, DOCCS officials, and inmates, on-site examinations, document review, and consultation with independent experts. *Id.* at 10-11. In June 2016, the Inspector General released a 150-page public report making extensive recommendations regarding improvements to, among other things, facility security and internal oversight. *See id.* at 140-50. DOCCS expressly agreed to implement the Inspector General's recommendations and further agreed to conduct regular audits to ensure that those recommendations were being fully executed. *Id.* at 141.

Independent of the Inspector General, the Commission of Correction likewise has statutory authority to monitor DOCCS, but typically focuses its oversight efforts on local correctional facilities. The Commission has broad investigative powers, including the right to subpoena documents and testimony and to review books and records. *See* N.Y. Correction Law § 46(1). The bulk of the agency's supervisory efforts include field investigations such as "local correctional facility compliance assessments, incident reviews and investigations, mortality investigations,

inmate grievance and complaint reviews, facility planning and a variety of technical assistance.” *2016 Annual Report, supra*, at 6. In 2016, the Commission instituted a four-year auditing schedule, with the goal of auditing every county jail for compliance with the agency’s minimum standards. *Id.* In addition to scheduled audits, the Commission “periodically conduct[s] unannounced site visits . . . to better assess a facility’s overall environment.” *Id.* at 7. The Commission also receives, evaluates, and responds to complaints from inmates, their families, advocates, elected officials, and other state and local agencies. *Id.* at 47.

The Commission also has substantial enforcement powers. Among other things, the agency is authorized to promulgate directives that compel a local facility to achieve compliance with state regulations, and the agency may seek a judicial order to force compliance with those directives upon penalty of contempt. N.Y. Correction Law § 46(4). For example, in 2016 and 2017, the Commission issued numerous directives to the Greene County jail regarding repeated compliance and safety failures.<sup>6</sup> *See Worst Offenders Report, supra*, at 45-52.

The Commission may also seek an order to close a local facility in whole or in part because it is unsafe, unsanitary, or otherwise inadequate under the law. N.Y. Correction Law § 45(8)(a). In December 2016, for example, the Commission ordered the North Infirmiry Command on Rikers Island to relocate all inmates housed in a specific dorm after the facility flooded with six inches of water. *Worst Offenders Report, supra*, at 10-11. The Commission’s ongoing oversight of the New York City Department of Correction’s facilities at Rikers Island has progressed alongside the work

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<sup>6</sup> In April 2018, the Greene County jail was permanently closed. *See* Steve Hughes & Robert Gavin, *Greene County sheriff: Crumbling jail must be replaced*, Albany Times-Union (Apr. 24, 2018), <https://www.timesunion.com/news/article/Greene-County-jail-closed-for-safety-reasons-12852660.php>.

of the independent court-appointed monitor required by the settlement in *Nunez v. New York City Dep't of Corr. et al.*, No. 11-cv-5845 (S.D.N.Y.).

### CONCLUSION

In evaluating events at the MDC, and plaintiffs' request for a monitor, the Court should consider the State's experience in promulgating standards for effective response to systems failures and in using monitors to assist facilities to comply with those standards.

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### CERTIFICATE OF COMPLIANCE

Barbara D. Underwood, Solicitor General in the Office of the Attorney General of the State of New York and counsel to amicus curiae State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,617 words (exclusive of the cover page, certificate of service, certificate of compliance, table of contents, and table of authorities), and complies with Local Civil Rule 11.1 of the Eastern District of New York, as well as with Individual Practice Rule 3.B of Judge Margo K. Brodie.

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