
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

**VERIFIED PETITION –
MANDAMUS TO COMPEL**

Matter of Marcus Reid, Eric Leon, Tyrell Scott, Lillian
Nelson, and Samiyah De Freitas,

Index No. _____/2024

On behalf of themselves and all others similarly situated,

Petitioners,

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

--against--

NEW YORK CITY DEPARTMENT OF
CORRECTION,

Respondent.

TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| PRELIMINARY STATEMENT | 1 |
| PARTIES | 3 |
| STATEMENT OF FACTS | 5 |
| I. The Universal Recording Of Phone Calls In DOC Jails Is A Recent Change To DOC Standards..... | 5 |
| II. DOC Entered Into Contracts With Securus Despite Red Flags That Indicated Securus Would Not Comply With Applicable Laws | 8 |
| III. DOC, Through Securus, Is Recording Privileged Telephone Calls And Gathering Personal, Highly Sensitive Data From Anyone Who Uses Their Phone Systems | 15 |
| IV. Evidence Of Serious Breaches Emerged In 2018 And 2019, But DOC Failed To Take Remedial Action..... | 18 |
| V. DOC Claimed To Be “Unaware” Of Unlawful Recordings Despite Extensive Evidence That The Issue Was Widespread..... | 23 |
| VI. DOC Conducted Belated And Partial Audits Despite Repeated Requests For Comprehensive Reviews..... | 30 |
| VII. DOC Minimized Its Violations And Announced Ineffective Remedial Measures | 34 |
| VIII. DOC Has Not Been Held Accountable For Its Violations Or Lack Of Remediation..... | 38 |
| IX. Incarcerated People Need To Communicate With Their Lawyers By Telephone To Defend Their Criminal Cases..... | 42 |
| X. DOC’s Surveillance System And Violations Of Privilege Have Led To Concrete Harm | 45 |
| XI. DOC’s Surveillance System Invades The Privacy Of People Attempting To Communicate With Family Members In DOC Custody And Further Isolates Incarcerated People..... | 50 |
| XII. DOC’s Surveillance System Has Not Made Rikers Island Safer | 54 |

| | <u>Page</u> |
|--|-------------|
| XIII. DOC Violated Its Own Procurement Rules By Renewing And Expanding Its Contract With Securus..... | 57 |
| CLASS ACTION ALLEGATIONS | 60 |
| JURISDICTION AND VENUE | 62 |
| CAUSES OF ACTION..... | 62 |
| REQUEST FOR RELIEF | 70 |

Petitioners Marcus Reid, Eric Leon, Tyrell Scott, Lillian Nelson, and Samiyah De Freitas (collectively, “Petitioners”), by their attorneys, for their Verified Petition for judgment pursuant to Article 78 of the New York Civil Practice Laws and Rules, allege upon information and belief as follows:

PRELIMINARY STATEMENT

1. The New York City Department of Correction (“DOC”) is operating a massive surveillance system throughout its jails that violates DOC’s own rules, state and federal law, and the constitutional rights of people in custody and community members with whom they communicate. Through this surveillance, DOC has collected information that it should not have—including privileged phone conversations with attorneys and sensitive personal, financial, and biometric data from community members—and has shared that information with law enforcement. Petitioners bring this Article 78 Petition to seek the Court’s assistance in putting an end to DOC’s abuses, which threaten the fundamental rights of New Yorkers, both inside and outside of New York City jails.

2. DOC records and monitors nearly every call made by people in custody. Constitutional protections as well as DOC’s own rules prohibit the recording of telephone conversations between people in custody and their defense teams, but DOC has been breaching these privileged communications for years. As early as 2018, New York City public defenders began receiving recordings of their privileged calls with clients in discovery from district attorney’s offices, demonstrating that DOC is not only recording privileged phone calls, but also sharing that data with law enforcement.

3. For years, DOC ignored mounting evidence of its illegal recordings and repeated inquiries from public defender organizations. Once DOC began to review the defects in its surveillance system and to share limited information, DOC produced audits that were incomplete

and unreliable. But even DOC's own deficient and limited audits showed that DOC had improperly recorded thousands of privileged legal calls and disseminated them to prosecutors and law enforcement, violating the constitutional rights of those in DOC custody.

4. Instead of conducting a comprehensive review and fixing these problems, DOC has continued to minimize the violations, even in the face of governmental inquiries. Most recently, in response to an inquiry from the New York City Department of Investigations ("DOI"), DOC provided the same incomplete audit information described above and erroneously claimed that it promptly identified and remediated all issues.

5. At the same time, DOC has continued to renew—and even expand—its contract with Securus Technologies ("Securus"), the private technology company who maintains DOC's surveillance systems, without conducting performance reviews or public hearings, as required under the New York City Procurement Policy Board Rules. Notably, Securus has a history of similar unlawful surveillance practices in other jurisdictions around the country.

6. The unlawful practice of recording and disseminating privileged calls is just one unconstitutional and harmful element of DOC's project of mass surveillance of New York City communities. DOC's recording of nearly all telephone calls made by people held in DOC jails, means that through its surveillance system DOC collects and shares the personal and biometric data of people in custody and those who communicate with them, along with the substance of those communications. This includes data from family members, friends, clergy, or others who wish to speak with anyone in DOC custody by phone. DOC's surveillance system also includes people who send money to a commissary account or visit people in custody by video. The risks posed by DOC's massive surveillance program are serious: for example, the data DOC collects is housed in Securus's database and includes "voiceprint" data that can be used to track and identify

community members and invade their privacy. The harms stemming from DOC's surveillance practices disproportionately impact Black and brown New Yorkers and the families of people who lack the resources to pay bail.

7. DOC's massive surveillance program exacts too high a cost. It compromises the confidentiality that is at the core of the attorney-client relationship and, as a result, undermines the integrity of the criminal legal system. It further isolates people in custody, whose family and friends do not feel comfortable having their intimate conversations recorded and provided to law enforcement. And it illegally sweeps up personal and biometric information from community members, predominantly Black and brown New Yorkers, without notice, legitimate justification, or consent. People with family or a community member in pre-trial detention have fewer constitutional protections than others.

8. In short, DOC's surveillance subjects incarcerated people, their family members, and friends to increased government monitoring, data collection, and scrutiny in violation of their constitutional and privacy rights under federal and state law. DOC's history of downplaying and failing to correct the well-documented breaches in the past while steadily increasing its surveillance capabilities makes clear that DOC will not fix the problems in its unlawful surveillance system without judicial intervention.

PARTIES

Petitioners

9. Named Petitioners Marcus Reid, Eric Leon, and Tyrell Scott are people who have been incarcerated in DOC jails and who have had or fear that they have had their privileged calls recorded and disseminated to prosecutors and law enforcement. Named Petitioners Mr. Reid, Mr. Leon, and Mr. Scott bring this action individually and on behalf of the proposed class of similarly situated individuals consisting of all past, current, and future people incarcerated in DOC facilities

who have had or fear they will have their phone calls recorded, including their privileged attorney-client phone calls, in violation of their state and federal constitutional rights (the “Incarcerated Petitioners Class”).

- a. **Petitioner Marcus Reid** is thirty years old. He was recently incarcerated pretrial for approximately fifteen months in DOC custody. He was also in DOC custody for several months in 2020.¹
- b. **Petitioner Eric Leon** is forty years old and was in DOC custody from December 16, 2020 through April 2023.²
- c. **Petitioner Tyrell Scott** is thirty-one years old. He was held in DOC custody at Rikers Island from June 8, 2022 to January 8, 2024.³

10. Named Petitioners Lillian Nelson and Samiyah De Freitas are community members who have had calls with people in DOC custody recorded and their private information collected. Named Petitioners Ms. Nelson and Ms. De Freitas bring this action individually and on behalf of the proposed class of similarly situated individuals, including the relatives, friends, clergy, and other loved ones of people incarcerated in DOC facilities, who have communicated or will communicate with people in custody using the DOC call platform (the “Community Members Class”).

- a. **Petitioner Lillian Nelson** is the mother of a woman who has been incarcerated at Rikers Island multiple times since December 2020.⁴
- b. **Petitioner Samiyah De Freitas** is the niece of a woman who has been incarcerated at Rikers Island multiple times since December 2020.⁵

Respondent

11. Respondent the New York City Department of Correction (“DOC”) is the agency within New York City’s municipal government that is responsible for the care and custody of

¹ CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶¶ 3-4.

² CGSH Decl. Ex. 3, Eric Leon Affidavit ¶¶ 2,4.

³ CGSH Decl. Ex. 5, Tyrell Scott Affidavit ¶ 1.

⁴ CGSH Decl. Ex. 7, Lillian Nelson Affidavit ¶ 3.

⁵ CGSH Decl. Ex. 9, Samiyah De Freitas Affidavit ¶ 3.

people ordered to be held by the courts and awaiting trial, who are convicted and sentenced to one year or less of jail time, or are detained pursuant to a parole warrant or sustained violation. DOC operates several jail facilities in New York City, including on Rikers Island.

STATEMENT OF FACTS

I. The Universal Recording Of Phone Calls In DOC Jails Is A Recent Change To DOC Standards

12. Before 2008, under the Board of Correction's ("BOC's") Minimum Standards and consistent with New York's eavesdropping laws, DOC could only record or disseminate the contents of phone calls made by people in custody by obtaining an eavesdropping warrant from the courts.

13. To obtain an eavesdropping warrant, DOC or another law enforcement entity had to demonstrate to a court that there was individualized suspicion that the contents of that person's communications would concern the commission of a particular crime, and that normal investigative procedures had been tried and had failed.

14. In November 2007, BOC amended the Minimum Standards,⁶ to allow for the universal recording and monitoring of phone calls made by people in DOC custody.⁷

15. BOC had previously rejected a similar request from DOC in 2003, pointing specifically to both privacy concerns and the issue of attorney-client privilege.⁸

16. The changes to the Minimum Standards were the subject of extensive public hearings where the proposal to shift from a legally regulated surveillance structure to a system of

⁶ The Minimum Standards are codified in Title 40 of the Rules of the City of New York.

⁷ NYC BOARD OF CORRECTIONS, *Amendment Process* (June 16, 2008), <https://www.nyc.gov/html/boc/html/regulations/amendment.shtml>; see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 18-22.

⁸ NYC BOARD OF CORRECTIONS, *Board of Correction Meeting Minutes* (Oct. 9, 2003), <https://www.nyc.gov/assets/boc/downloads/pdf/Meetings/2003/Oct-2003.pdf>; see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 17.

universal recording was hotly debated. At a June 14, 2007 hearing,⁹ BOC specifically considered the question of confidential calls, and discussed what procedural protections would need to be put in place in the Minimum Standards and what safeguards would be necessary for privileged communications. Members of the public raised concerns about the chilling effect universal recording would have on people in custody's communications, placing particular emphasis on communications with lawyers, medical professionals, mental health professionals, and clergy.¹⁰ On the other side, district attorneys suggested to BOC that universal recording should be implemented because it would enhance public safety.¹¹

17. Emphasizing the importance of protecting privileged communications but crediting law enforcement's claims that recording would strengthen security in the jails, BOC voted to implement the standards change.¹² The amendments became effective on June 16, 2008.¹³

18. BOC's rule change meant that if a person was in DOC custody—even when held pre-trial and presumed innocent—they would automatically have all communication recorded without the government having to show any individualized suspicion about the contents of those communications. If that same person could afford bail, however, they would retain their right to private communication with their family members, friends, and social networks.

⁹ NYC BOARD OF CORRECTIONS, *Board of Correction Meeting Minutes* (June 14, 2007), <https://www.nyc.gov/html/boc/downloads/pdf/Minutes/2007-Jun-14.pdf>.

¹⁰ CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 84-85.

¹¹ CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 18.

¹² “The Board voted to amend subdivision (h), authorizing the Department, upon implementation of appropriate procedures and legally sufficient notice to prisoners, to listen to and monitor prisoner telephone calls, except for telephone calls to the Board of Correction, Inspector General, other monitoring and investigative bodies, treating physicians and clinicians, attorneys and clergy.” NYC BOARD OF CORRECTIONS, *Minimum Standards* § 1-10 “Telephone Calls” (Jan. 19, 2007), https://www.nyc.gov/assets/boc/downloads/pdf/minimum_standards_amendments.pdf.

¹³ *Id.*

19. The Rules of the City of New York and DOC policy expressly prohibit the recording or monitoring of legal communications.¹⁴

- Rule 1-10(h) states: “Telephone calls to . . . attorneys . . . shall not be listened to or monitored.” 40 R.C.N.Y. § 1-10(h).
- Rule 1-08(c)(5) provides: “[t]elephone communications between people in custody and attorneys shall be kept confidential and protected, in accordance with the provisions of 40 RCNY § 1-10.” 40 R.C.N.Y. § 1-08(c)(5).
- Additionally, the DOC Inmate Handbook states: “All calls, except for calls with your attorney or other privileged calls, may be monitored and/or recorded by the Department for security purposes.” (emphasis added)¹⁵

20. Initially responding to the Board’s clear concerns around privileged calls and protecting civil liberties, from 2008 through 2016, DOC’s Operations Order on phone recording emphasized stringent protocols to establish a list of numbers associated with privileged communications that the Department termed the “Do Not Record List” and to regulate accessing or listening to call recordings more broadly.¹⁶

21. While DOC’s policy was to record all nonprivileged calls, initially a higher level of scrutiny was required before any call recording could be accessed or listened to. The 2008 and 2009 versions of the Order laid out “Procedures” for the recording and monitoring program that delineated, among other things, “Authorization to Record and Monitor Inmate Telephone Calls,”

¹⁴ Importantly, the attorney-client privilege encompasses not just the attorney, but all members of the defense team, including social workers, investigators, paralegals, and others.

¹⁵ CGSH Decl. Ex. 11, NEW YORK CITY DEPARTMENT OF CORRECTION, *Inmate Handbook* at 43 (last revised Dec. 2007), https://www.nyc.gov/assets/doc/downloads/pdf/inmate_hand_book_english.pdf.

¹⁶ CGSH Decl. Ex. 13, NEW YORK CITY DEPARTMENT OF CORRECTION, Operations Order: *Inmate Telephone Recording & Monitoring* (June 26, 2008); CGSH Decl. Ex. 14, NEW YORK CITY DEPARTMENT OF CORRECTION, Operations Order: *Inmate Telephone Recording & Monitoring* (Mar. 9, 2009); CGSH Decl. Ex. 15, NEW YORK CITY DEPARTMENT OF CORRECTION, Operations Order: *Inmate Telephone Recording & Monitoring* (June 10, 2016); see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 21, 26-28.

which required executive level approval from one of six high level staff to access or listen to a call recording.¹⁷ This is no longer necessary.

22. Less than ten years after the Board did away with the warrant requirement for recording and monitoring phone calls made by people in DOC custody, DOC fundamentally changed the call recording program again. This time, DOC used the narrow permission it had received to listen to phone calls to transform an internal security program into a broad intelligence-gathering surveillance regime that targets communities far outside the walls of its jails.

II. DOC Entered Into Contracts With Securus Despite Red Flags That Indicated Securus Would Not Comply With Applicable Laws

23. In the spring of 2013, DOC issued a Notice of Solicitation Request for Proposal (“RFP”) “seeking a qualified vendor to establish a contract for furnishing, installation, operation, and maintenance of a new Inmate Phone System (IPS) together with associated phones and cabling.”¹⁸

24. Among the key requirements outlined in the RFP was that the new system “[a]uthenticate[s] inmates in a reliable manner by using advanced biometric[s],” such as voiceprint, fingerprint, iris scan, or RFID wristband.¹⁹ DOC also outlined several minimum requirements, including that the system “should, by default, record all telephone calls.”²⁰

25. While emphasizing its desire for advanced biometrics, the latest technologies, and enhanced investigative functions, the RFP did not include among its requirements protections for confidential communications or guaranteed access for those detained in DOC facilities to legally privileged calls that were not recorded. The RFP only mentioned a “Do Not Record” List five

¹⁷ *Id.*

¹⁸ CGSH Decl. Ex. 16, NEW YORK CITY DEPARTMENT OF CORRECTION, *Request for Proposal (RFP) for the Inmate Phone System*, PIN: 072201315MIS, Notice of Solicitation (May 13, 2013).

¹⁹ *Id.* at 6.

²⁰ *Id.* at 9.

times in its more than 200 pages. Despite the BOC's emphasis on the need for unrecorded telephone access to lawyers, medical professionals, clergy, and the BOC itself, the RFP did not mention protections of these phone calls at all.

26. Securus was one of three companies invited to present the Best and Final Offer ("BAFO"). In its BAFO, Securus emphasized the intelligence options it was providing to DOC, including "voice biometric identification," "2 full time site administrators/technicians," "1 full time investigative specialist for staff support, analysis and data integration . . .," and the "Threads Data Analytics Program currently used by NYPD including integration capabilities with Palantir."²¹ THREADS is an analytic tool used by law enforcement for finding relationships and patterns among large amounts of biometric and other personal data.

27. In 2014, DOC entered into a contract with Securus (the "DOC-Securus Contract") to build a surveillance net on the back of a telephone system.²² The contract was for a five-year term, with five subsequent one-year renewal options.²³

28. Important provisions of the DOC-Securus Contract include the following:

- Section 10.01 establishes that DOC has the right to terminate the contract with Securus without cause.
- Section 13.04 of the DOC-Securus Contract requires Securus to "perform all services under this Agreement in accordance with all applicable Laws as are in effect at the time such services are performed,"²⁴ including the express prohibitions on recording attorney-client communications.
- Section 7.3 provides that DOC has sole ownership rights in the data, including call records and recordings, provided to or created by Securus, and that should DOC terminate its contract with Securus or let it expire,

²¹ CGSH Decl. Ex. 17, Securus, Best and Final Offer, at 2-3 (2013).

²² CGSH Decl. Ex. 12, NEW YORK CITY DEPARTMENT OF CORRECTION, Agreement for the Installation, Configuration and Maintenance of an Inmate Telephone System, with contractor Securus Technologies, Inc., § 2.1 (July 16, 2014).

²³ *Id.*

²⁴ *Id.* at 34.

Securus must return the data to DOC and destroy it on its own systems within thirty days.

29. Securus is a private corporation that contracts with local and state governments to provide surveillance and monitoring services of incarcerated people’s interactions with the public. Securus is a private equity-owned company that has achieved its market position by participating in multiple successive debt-fueled purchases, between 2012 and 2018, to expand its reach to take over numerous carceral services companies—providing for video visitation, GPS monitoring, data analytics, voice biometric analysis, electronic medical recordkeeping, and government payment processing.²⁵

30. DOC utilizes Securus’s communications platform—known as the Next Generation Securus Call Platform (“NextGen SCP”)—to provide communications services to people in custody and record and monitor all calls made on that system. The NextGen SCP has embedded various datamining tools, including continuous voice verification that digitally captures and maps unique patterns in voice and speech, known as “voiceprints.”²⁶

31. Since at least early 2014 and through the present, there have been several red flags that raise serious questions about Securus’s legal compliance generally, and, more specifically, indicate that Securus has repeatedly engaged in illegal recordings of privileged legal communications. Federal Communications Commission (“FCC”) Commissioner Mignon Clyburn has described Securus as a company that, “has shown it is willing to operate on the bleeding edge of legality.”²⁷

²⁵ CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 11-12; *see generally id.* Section D.

²⁶ *See id.* at ¶¶ 49-58.

²⁷ FCC, *Joint Dissenting Statement of Commissions Mignon L. Clyburn and Jessica Rosenworcel*, FCC (Oct. 30, 2017), <https://docs.fcc.gov/public/attachments/FCC-17-140A3.pdf>.

32. *Red Flag 1: Lawsuits Expose Securus's Practice Of Illegally Recording Privileged Calls.* Before DOC engaged Securus in July 2014,²⁸ Securus had already been sued in federal court for a pattern of recording privileged calls and providing those calls to law enforcement and prosecutors.²⁹ Since then, Securus has been sued at least ten times in various jurisdictions across the country for the same behavior,³⁰ including most recently in Michigan in March 2024.³¹ At least four of these lawsuits have resulted in settlements.

33. The previous settlements on wiretapping and constitutional claims include:

- *Johnson*, where Securus and prison operator CoreCivic settled state and federal wiretapping claims, including claims that they had intentionally recorded in person attorney-client meetings and disseminated those recordings to prosecutors, for \$3,700,000.³²
- *Huff*, where Securus and CoreCivic were accused of intentionally recording privileged conversations. They agreed to settle state and federal wiretap claims by creating a settlement fund that totaled \$1,450,000.³³
- *Guild*, where Securus was accused of intentionally recording privileged conversations and providing those conversations to law enforcement and prosecutors. To settle wiretapping, Fourth Amendment, and Fifth Amendment claims, they paid \$20,000 in attorneys' fees; established an online system that would allow attorneys to place their phone numbers on a

²⁸ The DOC-Securus Contract was executed in July 2014, and was registered with the New York City Comptroller on October 1, 2014.

²⁹ *Austin Laws. Guild v. Securus Techs., Inc.*, No. 14-CV-366, 2014 WL 1689693 (W.D. Tex. Apr. 29, 2014).

³⁰ *See, e.g., Pratt v. Securus Techs., Inc.*, No. 20-cv-00295-JDL, 2021 WL 1725936, at *1 (D. Me. Apr. 30, 2021); *Hernandez v. Securus Techs., Inc.*, No. 16-12402-RGS, 2017 WL 826915, at *1 (D. Mass. Mar. 2, 2017); *Lieberman v. Portage Cnty*, No. 18-cv-450-jdp, 2020 WL 869232, at *1 (W.D. Wis. Feb. 21, 2020); *Mojica v. Securus Techs., Inc.*, No. 14-CV-5258, 2016 WL 7650654, at *2-3 (W.D. Ark. Nov. 29, 2016); *Hunt v. Securus Tech., Inc.*, No. 21-cv-2272-MMM, 2022 WL 468177, at *1 (C.D. Ill. Feb. 15, 2022).

³¹ The lawsuit filed in St. Clair County, Michigan on March 15, 2024, alleges that the county conspired with Securus by giving it lucrative contracts that exploit incarcerated people and their loved ones and that Securus then splits the profits with the county. Class Action Complaint, *M.M. McDonald et al v. Matt King*, No. 24000546CZ (31st Cir. St. Clair Cnty. Mich. Mar. 15, 2024).

³² Final Approval Order and Judgment Granting Plaintiffs' Motion and Suggestions in Support of Final Settlement Approval, *Johnson v. CoreCivic*, No. 4:16-CV-00947-SRB, 2018 WL 7918162 (W.D. Mo. Dec. 23, 2020), ECF No. 275; Douglas Ankney, *CoreCivic and Securus Technologies Agree to Pay \$3.7 Million to Settle Suit for Illegally Recording Attorney Client Conversations*, PRISON LEGAL NEWS (Jan. 1, 2021), <https://www.prisonlegalnews.org/news/2021/jan/1/corecivic-and-securus-technologies-agree-pay-37-million-settle-suit-illegally-recording-attorney-client-conversations/>.

³³ Order Granting Unopposed Motion to Certify Class and Preliminarily Approve Class Action Settlement at 14, *Huff v. Corecivic, Inc.*, No. 2:17-cv-02320-JAR (D. Kan. Sept. 26, 2019), ECF No. 146.

“Do Not Record” (DNR) list; and promised to provide written notification to defense attorneys of future breaches.³⁴

- *Romero*, where Securus was accused of recording privileged conversations. To settle claims of fraud, negligence, and breaching California’s privacy law, Securus provided people in custody with a private call option, and paid the named plaintiffs a service award as well as attorneys’ fees and costs. The total settlement amount was \$900,000.³⁵

34. These settlements clearly show that once Securus is caught violating federal and state laws in a certain jurisdiction, it enters into settlement agreements focused on making minor changes in that jurisdiction that are relevant solely to the lawsuit at hand. Securus is not adopting remediation across the jurisdictions that would definitively bring an end to its illegal practices. Instead, after entering into a settlement agreement in a given jurisdiction, Securus continues the same illegal practices unabated in other jurisdictions.

35. *Red Flag 2: Major Data Breach At Securus Shows That Securus Has Engaged In A Longstanding, Nationwide Practice of Illegal Recordings.* On November 11, 2015, *The Intercept* reported a major data breach of Securus’s data storage system, compromising 70 million stored phone call recordings, including over 14,000 confidential attorney-client phone calls in 37 states. This leak showed that Securus has been illegally recording privileged communications since at least 2011.³⁶ Additionally, that a hacker accessed tens of millions of Securus’s call

³⁴ *Guild*, 2014 WL 1689693 at *1; Jordan Smith, *Securus Settles Lawsuit Alleging Improper Recording of Privileged Inmate Calls*, THE INTERCEPT, (Mar. 16, 2016), <https://theintercept.com/2016/03/16/securus-settles-lawsuit-alleging-improper-recording-of-privileged-inmate-calls/>.

³⁵ David Reutter, *\$900,000 Settlement in Class Action Lawsuit Alleging Securus Recorded California Prisoner-Attorney Calls*, PRISON LEGAL NEWS (Feb. 1, 2022), <https://www.prisonlegalnews.org/news/2022/feb/1/900000-settlement-class-action-lawsuit-alleging-securus-recorded-california-prisoner-attorney-calls/>.

³⁶ Jordan Smith & Micah Lee, *Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege*, THE INTERCEPT (Nov. 11, 2015), <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/> (Report of a major data breach by Securus of 70 million stored phone call recordings, including over 57,000 confidential attorney-client phone calls, as well as other personal information, in 37 states).

recordings and their accompanying data demonstrates the vulnerability of Securus's data protection system.

36. *Red Flag 3: Other Questionable Business Practices.* Securus has a history of engaging in questionable business practices, which have resulted in extensive investigation and public scrutiny.

- a. Securus has abused its dominant position in the prison telecommunications market³⁷ to charge exorbitant fees to people in custody.³⁸ In part due to its predatory business practices, the industry has been “widely condemned as a racket, given rates that can top a dollar a minute.”³⁹
- b. In 2018, the FCC blocked Securus's attempt at a leveraged buyout of ICSolutions,⁴⁰ the third largest prison telecom company at the time, because the transaction “posed significant competitive concerns and would not be in the public interest.”⁴¹
- c. In October 2019, Senator Elizabeth Warren and Representatives Mark Pocan and Alexandria Ocasio-Cortez sent letters to Securus's parent company, the private equity firm Platinum Equity, asking them to disclose information about their practices and explain their role in the “consolidation and deterioration of the prison services industry,” stating, “[t]hese companies, responsible for providing medical, food, and phone services to prisons, jails, and detention facilities housing over two million incarcerated people across the country, often

³⁷ Securus holds a dominant position in the prison telecommunications market, controlling 42% of that market. Peter Wagner & Wanda Bertram, *State of Phone Justice: The problem, the progress and what's next*, PRISON POLICY INITIATIVE (Dec. 2022), https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html; CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 12.

³⁸ See SECURUS TECHNOLOGIES, *Calling Accounts and Rates*, <https://securustech.net/tdcj/index.html#tdcj-accounts-and-rates>, (last visited Feb. 27, 2023) (Fees are as much as \$10 for a single text and \$15 dollars for a single phone.); see also SECURUS TECHNOLOGIES, *Why is there a maximum funding limit?*; <https://securushelp.com/why-is-there-a-maximum-funding-limit/> (last visited Feb. 27, 2023) (In 2014, Securus's credit card fee was \$9.95 for every transaction. Securus has since lowered the fee amount but has now capped deposit transactions at \$50.00 per transaction, increasing the number transactions on which such fees can be charged.).

³⁹ Laurence Darmiento, *Troubled companies made him billions. A prison phone investment made him enemies*, L.A. TIMES (Sep. 5, 2019), <https://www.latimes.com/business/story/2019-09-05/la-fi-tom-gores-securus-prison-phone-mass-incarceration>.

⁴⁰ David Shepardson, *Inmate calling services companies drop merger bid after U.S. regulatory opposition*, REUTERS (Apr. 2, 2019), <https://www.reuters.com/article/us-fccinmate-merger/inmate-calling-services-companies-drop-merger-bid-after-u-s-regulatoryopposition-idUSKCNIRE2L7>.

⁴¹ Press Release, *Chairman Pai Statement on Decision by Inmate Calling Service Provider to Withdraw Merger Application*, FEDERAL COMMUNICATION COMMISSION (Apr. 3, 2019), <https://www.justice.gov/opa/pr/securus-technologies-abandons-proposed-acquisition-inmate-calling-solutions-after-justice>.

deliver low-quality services to incarcerated individuals and their families at exorbitant cost.”⁴²

- d. Securus faced criticism for offering a lesser-known service to track people’s cellphones without warrants or other court orders, a practice the United States Supreme Court has determined is unconstitutional.⁴³ This cell-tracking service enabled correctional facilities and law enforcement to pinpoint the GPS coordinates of any cell phone an incarcerated person called.⁴⁴ This service was abused as early as 2014, by a Missouri sheriff who, without valid warrants, tracked the cell phones of a judge and police officers.⁴⁵ In 2018, Senator Wyden exposed this practice in a letter to the FCC, noting that Securus had admitted to not conducting any review of the surveillance requests.⁴⁶ Securus only stopped this practice once major telecom companies stopped selling user cellphone data to the third-party data brokers that Securus was depending on to create its platform.⁴⁷
- e. Securus’s varied product streams collect layers of personal data from everyone who interacts with those systems. For example, when a person adds money to their loved one’s commissary account, Securus is able to obtain confidential financial information about that person. And when a person receives a phone call from a loved one, even more troubling forms of data collection are triggered. *See infra* Section III.
- f. Finally, in 2017, Securus paid a \$1.7 million civil penalty to the FCC to resolve an investigation into whether Securus provided inaccurate and misleading information to the FCC.⁴⁸ The FCC’s order noted that Securus’s failure to accurately report on the status of state regulatory approvals was “troubling.”⁴⁹

⁴² Warren, Pocan, and Ocasio-Cortez Investigate Private Equity Firms Profiteering Off Incarcerated People and Their Families, CONGRESS OF THE UNITED STATES (Oct. 1, 2019),

<https://www.warren.senate.gov/imo/media/doc/2019-09-30%20Letters%20to%20PE%20Firms%20re%20Prison%20Services.pdf>.

⁴³ Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates’ Calls Could Track You, Too*, THE NEW YORK TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html>; *United States v. Carpenter*, 138 S. Ct. 2206, 2223 (2018).

⁴⁴ Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates’ Calls Could Track You, Too*, THE NEW YORK TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Joseph Cox, *US Marshal Charged for Using Cop Phone Location Tool to Track People He Knew*, MOTHER BOARD TECH BY VICE (June 14, 2022), <https://www.vice.com/en/article/k7bqew/us-marshal-securus-phone-location-tracked>.

⁴⁸ Order/Consent Decree, *Securus Tech., Inc.*, File No. EB-IDH-000225128 (Oct. 30, 2017), <https://www.fcc.gov/document/securus-agrees-pay-17-million-civil-penalty>

⁴⁹ *Id.*

37. Despite these red flags, DOC entered and has renewed its contractual relationship with Securus. DOC has expanded the services that Securus offers, which in turn has increased the types of sensitive data belonging to New Yorkers that Securus can access.

III. DOC, Through Securus, Is Recording Privileged Telephone Calls And Gathering Personal, Highly Sensitive Data From Anyone Who Uses Their Phone Systems

38. DOC, through Securus, has recorded thousands of privileged communications, many of which it subsequently provided to law enforcement and prosecutors, in violation of its own rules, the BOC Minimum Standards, the Fourth Amendment and the Sixth Amendment right to counsel. Evidence of DOC's widespread illegal practices has come to light over the course of several years, as detailed below. *See Infra* Sections IV and V.

39. Since Securus first contracted with DOC, the company's product offerings have expanded to cover virtually every mode of connection to the outside world: telephone calls, video visits, even electronic communication. Each time a person receives a phone call through Securus's system, invasive data collection takes place. Two of Securus's most intrusive data collection tools are (i) voiceprinting; and (ii) THREADS.

40. For each phone call, Securus creates a "Call Detail Record," which it organizes into NextGenSCP, which Securus describes as "a single interface that allows you to manage every inmate interaction and gain more intelligence than ever before."⁵⁰ This unified platform provides the user with easy access to the billing name and address associated with the phone number dialed, the call audio, and the voiceprint.⁵¹ The NextGen SCP indexes its records using a number of unique identifiers, such as PIN numbers assigned to people in custody or name and other facility-

⁵⁰ SECURUS TECHNOLOGIES, NextGen SCP Promotional Video, <https://vimeo.com/292980872> (uploaded Oct. 2, 2018).

⁵¹ CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 49.

entered information.⁵² But Securus’s major selling-point and key “innovation” was an additional indexing identifier that was quietly added to its system by leveraging the vast body of voice recordings at its disposal: the voiceprint.

41. The “voiceprint” is a visual representation of a person’s unique speech patterns; it is used as a biometric identifier. Any person who places or receives a call on Securus’s phone system has their voiceprint surreptitiously collected by Securus’s system. Securus captures biometric data from not only people in custody, but also from members of the community.⁵³

42. Securus has used its platform to scrape voice data from calls and create a voice database. Through Voice Recognition Technology (“VRT”), this database can track and identify the voices of people in custody and all of their callees.⁵⁴

43. Using VRT, Securus identifies and reports the names of all people in custody speaking on calls and continuously monitors calls to identify additional or different voices throughout the call. It compares called parties by voice and identifies potential matches for the recipients of all calls made by people in custody. The NextGen SCP permits DOC to take the voice sample of called parties and use those samples to search for other calls where that voice appeared.⁵⁵

44. Because the NextGen SCP records all parties to phone calls made by people in custody, it records family and friends, including minor children. The system retains samples of those voices, along with their voiceprints.⁵⁶ Further, there is no published or enforceable retention policy for this biometric data. It appears that Securus retains all information indefinitely, with no

⁵² CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 50.

⁵³ See CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 51-57.

⁵⁴ George Joseph & Debbie Nathan, *Prisons Across The U.S. Are Quietly Building Databases of Incarcerated People’s Voice Print*, THE INTERCEPT (Jan. 30, 2019), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/>.

⁵⁵ CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 56.

⁵⁶ CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 57.

carve-outs for vulnerable groups like minors. This collection occurs without any notice to the impacted parties. Accordingly, they do not even have the opportunity to consider consent.

45. The 2023 amendment to the contract included several new product offerings, including THREADS—Securus’s most expansive and intrusive surveillance tool.⁵⁷

46. THREADS is a program that allows law enforcement and corrections subscribers to view and analyze millions of datapoints collected from inmate call systems across the country and generates analytics from this data. As Securus has advertised, THREADS is “the most advanced, fully integrated ‘Big Data’ analytical tool in the U.S. corrections market.”⁵⁸ THREADS makes Securus’s NextGen SCP shareable across the carceral facilities and law enforcement clients that Securus services. All the data that DOC collects from both people in custody and community members they have some association with is uploaded to a database that is accessible by any THREADS customer nationwide.⁵⁹

47. Securus has advertised THREADS as “the most widely used investigative platform in the industry today, with approximately 2,200 facilities installed, over one million inmates served, literally petabytes of intelligence data, and over one million calls processed per day.”⁶⁰ Securus has promoted both the automation of corrections information that THREADS imports—including called party billing name and address, financial transaction metrics, and video visitation data—as well as THREADS’ ability to import information from external services, including confiscated cell phones, public phone records, and events or places of interest.⁶¹

⁵⁷ CGSH Decl. Ex. 18, DEPARTMENT OF CORRECTIONS & SECURUS, Amendment No. 5 to the Agreement Between The New York City Department of Correction and Securus Technologies, LLC (Jan. 17, 2023), Exhibit 1.

⁵⁸ CISION PR NEWSWIRE, *Securus Delivers the Most Advanced “Big Data” Analytical Tool in Corrections* (Dec. 21, 2015), <https://www.prnewswire.com/news-releases/securus-delivers-the-most-advanced-big-data-analytical-tool-in-corrections-300195882.html>.

⁵⁹ CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 68-71.

⁶⁰ CGSH Decl. Ex. 19, FCC Ex Parte Submission, WC Docket No. 17-126, ITC-T/C-20170511-00094, ITC-T/C-20170511-00095, at 30 (Aug. 2, 2017).

⁶¹ *Id.*; see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 72-77.

48. Securus purports to have a limited carveout that exempts private phone calls such as calls protected by attorney-client privilege, but as this Petition and other litigation against Securus illustrate, it routinely violates this carveout and feeds these privileged calls into its databases.

IV. Evidence Of Serious Breaches Emerged In 2018 And 2019, But DOC Failed To Take Remedial Action

49. People in custody and the legal teams who represent them in their criminal proceedings, utilize the DOC phone system to discuss substantive legal issues with an expectation that their privileged legal communications are confidential and will not be recorded or monitored.⁶² In 2018, public defender offices began to report concerns that DOC was improperly recording privileged legal calls. DOC ignored direct requests from defenders to outline the procedures for safeguarding privileged calls and failed to take corrective action and notify other defense attorneys of a potential systemic breach of legal privilege. In short, DOC did not take the ongoing harm seriously.

50. DOC maintains a list, known as the Do Not Record (“DNR”) List, that is meant to include the phone numbers of defense staff, physicians/clinicians, and clergy whose calls with people in custody are privileged and cannot be recorded, monitored, or shared. DOC has tasked Securus with managing and implementing the DNR List, despite Securus’s pattern of breaching privileged communications.

51. Public defender organizations provided DOC updated lists of staff phone numbers for inclusion on its DNR List, and expected and entrusted DOC and Securus to competently

⁶² CGSH Decl. Ex. 3, Eric Leon Affidavit ¶ 8; CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶¶ 6-7; *see also* CGSH Decl. Ex. 21, BDS Affirmation ¶¶ 6-7.

maintain the DNR List as a safeguard to prevent the unlawful recording of privileged legal calls between defense teams and their incarcerated clients.

52. In 2018 and 2019, public defender organizations affirmatively requested the procedure for including and updating defense staff phone numbers on the DNR List. Despite this, DOC failed to provide guidance around the DNR List, such as criteria for eligibility and where to submit requests—the process remained opaque and its efficacy dubious.

53. Brooklyn Defender Services

- a. Brooklyn Defender Services (“BDS”) is a full-service public defender organization based in Brooklyn, NY that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services.
- b. As early as 2015, BDS regularly sent DOC a list of staff phone numbers whose phone calls should not be recorded for DOC to include them on its DNR List.⁶³
- c. BDS has received inconsistent guidance from DOC staff on what policies or procedures, if any, DOC uses to update and manage the DNR List.
- d. For example, in April 2019, BDS sent an updated list by fax to DOC Legal, and copied Marcia Maxwell, then DOC Executive Director of Intergovernmental Affairs. DOC did not respond to the fax. BDS followed up with Ms. Maxwell by email, asking her to confirm receipt and to advise on the proper procedure for updating the DNR List with BDS phone numbers moving forward. Ms. Maxwell responded, “let me see who this should be sent to.” BDS did not receive a response.⁶⁴
- e. In a December 2019 call, Laura Mello, then Legal Division Senior Counsel and FOIL Officer at DOC, informed BDS that the April 2019 list needed to be sent to her directly, even though, despite follow-up, that was not explained at the time.⁶⁵

54. The Bronx Defenders

- a. The Bronx Defenders (“BxD”) is a public defense office based in the Bronx that represents individuals in criminal defense, family defense, civil, and immigration cases.

⁶³ CGSH Decl. Ex. 21, BDS Affirmation ¶ 10.

⁶⁴ *Id.* ¶ 12.

⁶⁵ *Id.* ¶ 13.

- b. In 2015, BxD sent DOC a list of staff phone numbers whose phone calls should not be recorded for DOC to include them on its DNR List. BxD sent updated lists of staff phone numbers to DOC starting in 2018 through the present for DOC to update its DNR List.⁶⁶
- c. On April 25, 2018, BxD emailed an updated list to Laura Mello and Lynelle Maginley-Liddie, then First Deputy Commissioner at DOC. In response, Ms. Mello requested that BxD make several edits to the list.⁶⁷ BxD immediately complied and emailed the revised document to Ms. Mello later that same day. BxD did not receive a confirmatory email from DOC.⁶⁸
- d. On May 10, 2019, BxD emailed an updated list to Ms. Mello and Ms. Maginley-Liddie. After a discussion about why certain employees were on the list, Ms. Mello indicated that she would submit the list to the IT department that day and advise when all additions were completed.⁶⁹
- e. On May 16, 2019, Ms. Mello informed BxD that “many of the numbers you provided are already on the DNR list. This is causing duplication and a significant amount of extra time/work.” Ms. Mello then requested that BxD provide a revised list containing only new numbers that BxD had not previously provided to DOC. BxD provided a revised list to Ms. Mello on June 6, 2019. Ms. Mello did not send a confirmatory email regarding this revised list.⁷⁰

55. New York County Defender Services

- a. New York County Defender Services (“NYCDS”) is a public defense office based in Manhattan representing individuals in criminal, civil, and immigration cases, as well as individuals in the mental health, veterans’ treatment, and integrated domestic violence courts.
- b. On their own initiative, NYCDS inquired with DOC about the DNR List in 2018.⁷¹
- c. On April 16, 2018, an NYCDS employee spoke with Bill Horan, an attorney with DOC’s Legal Department and asked how she could determine whether NYCDS staff phone numbers were on the DNR List. Mr. Horan did not know the answer. He assumed, he said, that NYCDS office numbers, as listed with the Office of Court Administration (“OCA”), were automatically put on a DNR List. But he was not certain.⁷²

⁶⁶ CGSH Decl. Ex. 23, BxD Affirmation ¶¶ 11-12, 16-18.

⁶⁷ *Id.* ¶ 12.

⁶⁸ *Id.*

⁶⁹ *Id.* ¶ 16.

⁷⁰ *Id.* ¶¶ 17-18.

⁷¹ CGSH Decl. Ex. 24, NYCDS Affirmation ¶ 10.

⁷² *Id.* ¶ 11.

- d. Since DOC was not even sure of its own procedures, every year thereafter, NYCDS proactively sent DOC Legal a list of staff phone numbers whose phone calls should not be recorded for inclusion on the DNR List.⁷³
- e. NYCDS sent its first list on April 27, 2018, by fax to Ms. Mello at DOC's Legal Department.⁷⁴ NYCDS received no response.
- f. On June 1, 2018, an NYCDS employee followed up with DOC's Legal Department to inquire about the faxed list. She was told to send it again by email to Ms. Mello, which the employee did that very day. Ms. Mello asked that the list be amended to provide the position of each person on the list. The NYCDS employee did so and emailed this updated list to Ms. Mello the following week. Ms. Mello never responded.⁷⁵
- g. Around March 2019, an NYCDS employee emailed a new list of staff phone numbers to Ms. Mello and to records.access@doc.nyc.gov. Importantly, the NYCDS employee also asked for confirmation of whether this was the appropriate and preferred procedure. Ms. Mello did not respond.⁷⁶
- h. Again, only upon further follow-up in May of 2019 did DOC respond. Susan Pang at DOC Legal acknowledged receipt of the NYCDS's list but ignored the question regarding proper procedure for updating the DNR List. The NYCDS employee emailed Ms. Pang to reiterate her inquiry.
- i. When Ms. Pang responded, she said that lists should be sent to recordsaccess@doc.nyc.gov, which was an invalid email address.⁷⁷

56. Neighborhood Defender Service of Harlem

- a. Neighborhood Defender Service of Harlem ("NDS") is a public defense office based in Manhattan that represents individuals in criminal and civil proceedings, as well as family defense.
- b. In Spring 2018, NDS sent DOC a list of staff phone numbers whose phone calls should not be recorded for inclusion on the DNR List.⁷⁸ This was in addition to other lists of staff phone numbers that NDS had sent well before 2018. NDS also sent an updated list in December 2020.⁷⁹

⁷³ *Id.* ¶ 12.

⁷⁴ *Id.*

⁷⁵ *Id.* ¶¶ 14-15.

⁷⁶ *Id.* ¶¶ 17-18.

⁷⁷ *Id.* ¶¶ 19-20.

⁷⁸ CGSH Decl. Ex. 25, NDS Affirmation ¶ 10.

⁷⁹ *Id.* ¶ 12.

57. In 2018, a BDS staffer who was on the list BDS had sent to DOC heard a pre-recorded message stating that her phone call with her client was being recorded.⁸⁰

58. BDS reported this incident to DOC Legal. They promised to look into the matter and follow up, but BDS did not receive an update.⁸¹

59. Several months after BDS raised its issue with DOC Legal, a prosecutor with the Bronx District Attorneys' Office informed a BxD attorney that DOC had provided him a DOC-recorded privileged phone calls between her and her incarcerated client. This BxD attorney was on the staff list that BxD had provided to DOC in 2018.

60. In response, a BxD employee called DOC Legal and sent a follow-up email to Ms. Mello and Ms. Maginley-Liddie. This email once again informed DOC Legal that privileged calls from their jails were being recorded and sent to prosecutors. BxD did not receive any response.⁸²

61. This client's case was transferred to a new BxD attorney and, in September 2019, the same prosecutor informed the new attorney that DOC had recorded her privileged calls with this same client and sent those calls to the Bronx District Attorneys' Office. This new BxD attorney had also been on BxD's staff list provided to DOC in 2019.

62. Subsequently, a BxD employee emailed Ms. Mello and Ms. Maginley-Liddie to inform them of this new breach and request information regarding DOC's procedures for safeguarding privileged calls. DOC did not respond to this email.⁸³

63. In December of 2019, two attorneys at BDS learned that DOC had recorded their privileged phone calls with incarcerated clients.⁸⁴ One of the attorneys received discovery from

⁸⁰ CGSH Decl. Ex. 21, BDS Affirmation ¶ 11.

⁸¹ *Id.*

⁸² CGSH Decl. Ex. 23, BxD Affirmation.

⁸³ *Id.*

⁸⁴ CGSH Decl. Ex. 21, BDS Affirmation ¶ 13.

the Brooklyn District Attorney's Office that contained her own calls with an incarcerated client. The other attorney heard the automated message advising that the call was being recorded when she spoke with her incarcerated client. BDS called Ms. Mello at DOC Legal to notify DOC of these violations. Ms. Mello confirmed that the phone numbers of these two attorneys were on DOC's DNR List.⁸⁵

64. Calls to these numbers continued to be unlawfully recorded even after Ms. Mello specifically identified them and assured BDS that they were on the DNR list.⁸⁶

V. DOC Claimed To Be "Unaware" Of Unlawful Recordings Despite Extensive Evidence That The Issue Was Widespread

65. Increased access to discovery in criminal cases following the implementation of new discovery rules in 2020 revealed that DOC's practice of illegally recording phone calls was even more widespread than previously known.

66. Prior to 2020, complete discovery was frequently not turned over until the eve of trial, but because most cases do not go to trial, defense attorneys rarely received complete discovery, including DOC phone call recordings of their clients. After January 1, 2020, when CPL § 245 went into effect,⁸⁷ defense attorneys across New York City began receiving more discovery earlier in the case, including digital folders containing numerous DOC-recorded phone calls that district attorneys' offices had obtained from DOC.

67. Following these changes to discovery procedures, many defense attorneys learned that their privileged phone calls had been recorded and disseminated to prosecutors. Defender organizations immediately notified DOC and other city officials of these violations.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 14.

⁸⁷ Requiring prosecutors to turn over discovery in every case within specific time frames. CPL §§ 245.10, 245.20.

68. A BxD attorney and social worker received through discovery numerous privileged conversations with their client that were recorded between June 2019 and January 2020.

69. In early 2020, several attorneys at BDS learned that DOC had improperly recorded their calls with incarcerated clients. Two of these attorneys were the same attorneys who had reported improper recordings in 2019, and whose phone numbers Ms. Mello had confirmed were on DOC's DNR list.⁸⁸ On March 2, 2020, BDS sent a letter to Heidi Grossman, then DOC General Counsel, and Brenda Cooke, then DOC Chief of Staff. This letter notified them that DOC was improperly recording privileged phone calls and providing them to law enforcement. It requested that DOC immediately cease this practice, update its DNR List, and delete any existing records of privileged phone calls. This letter was sent by FedEx, email, and fax.⁸⁹

70. In February 2020, an attorney at NYCDS discovered a recording of their own phone call with an incarcerated client while reviewing discovery provided by the prosecution.⁹⁰ After the revelation, a supervisor at NYCDS spoke on the phone with representatives from the Mayor's Office for Criminal Justice ("MOCJ") and OCA and complained of this breach.⁹¹

71. The Legal Aid Society ("LAS") is the oldest provider of legal services to low-income families and individuals, providing legal assistance in 200,000 legal matters involving civil, criminal, and juvenile rights problems annually.⁹² In 2020, LAS first learned of attorney-client recorded calls being turned over to prosecutors when prosecutors provided these recordings to LAS attorneys as part of discovery materials in criminal cases. LAS immediately requested that DOC conduct an audit.⁹³

⁸⁸ CGSH Decl. Ex. 21, BDS Affirmation ¶ 14.

⁸⁹ *Id.* ¶ 15.

⁹⁰ CGSH Decl. Ex. 24, NYCDS Affirmation.

⁹¹ *Id.*

⁹² CGSH Decl. Ex. 27, LAS Affirmation ¶ 2.

⁹³ *Id.* ¶¶ 13-14.

72. In April 2020, LAS attorneys heard warnings that their calls were being recorded when they received calls from clients. Later that month, LAS sent DOC a full list of numbers to be added to the DNR List and followed up on earlier lists to ensure all numbers were protected and calls remained confidential.⁹⁴

73. On May 8, 2020, DOC responded to LAS that DOC had failed to process and add numbers provided by LAS to the DNR List.

74. That same day, Tina Luongo, Chief Attorney of the Criminal Defense Practice at LAS, informed DOC by letter that all listed LAS numbers must be added to the DNR List by May 11, 2020, and that protocols must be in place to exclude recorded attorney-client communications from being provided to district attorney offices to the detriment of LAS clients.⁹⁵ On May 11, 2020, DOC notified LAS that it approved the processing of the LAS list provided for the DNR List.

75. Later in May 2020, LAS communicated with counsel for DOC and MOCJ about the discovery of new privileged attorney-client calls recorded by Securus.⁹⁶

76. In June of 2020, LAS demanded that DOC conduct a comprehensive audit and sequester any recordings from further access.

77. Despite assurances by DOC that LAS numbers were on the DNR List, on June 23, 2020, an LAS attorney with a phone number on the DNR List received warnings that a call with a client was being recorded.⁹⁷

78. In November 2020, BDS emailed Ms. Mello to advise that a BDS attorney who had been on the list BDS previously provided to DOC was continuing to hear an automated message

⁹⁴ *Id.* ¶¶ 15-16.

⁹⁵ *Id.* ¶ 18.

⁹⁶ *Id.* ¶ 20.

⁹⁷ *Id.* ¶¶ 21-22.

informing her the call was being recorded when her incarcerated clients called her. The email also appended another updated list of BDS staff phone numbers. Ms. Mello said she would double-check that specific attorney's phone number, and confirm whether the automated message indicated the call was in fact being recorded.⁹⁸ By this point, BDS had been reporting breaches for over two years.

79. On December 1, 2020, another BxD attorney learned from a prosecutor that DOC had sent him numerous DOC-recorded conversations between the attorney and her client. The earliest recording was from September 14, 2020.⁹⁹

80. On December 7, 2020, a third BxD attorney was informed by co-defendant's counsel that DOC had recorded and produced to them 27 privileged calls between the BxD attorney and their client. The earliest recording was from January 14, 2020.¹⁰⁰

81. After BxD learned of DOC's recordings of privileged legal calls in December 2020, BxD sent another list with staff phone numbers via email to then DOC Deputy General Counsel Lisa Richardson and copied Laura Mello on this email correspondence. Days later Ms. Richardson responded that, "It will take [DOC] some time to work through the list, but we will ask Securus to confirm."

82. On December 8, 2020, Ilona Coleman, the Legal Director for the Criminal Defense Practice at BxD, sent a detailed letter to then General Counsel of DOC, Heidi Grossman, outlining the many instances of improperly recorded and disseminated attorney-client phone calls that BxD had discovered. Ms. Coleman requested an explanation for each of these breaches, which were recorded over the course of 2020 and, in one case, as early as 2019. All of these phone calls had

⁹⁸ CGSH Decl. Ex. 21, BDS Affirmation ¶ 16.

⁹⁹ *Id.*

¹⁰⁰ CGSH Decl. Ex. 23, BxD Affirmation.

been disseminated to prosecutors, even though each of these BxD staff members' phone numbers had been included in previous lists of BxD phone numbers sent to DOC.¹⁰¹ Ms. Coleman requested that DOC cease this practice of unlawful recording and sharing of privilege communications.

83. DOC did not respond to BxD's December 8, 2020 letter. After Ms. Coleman followed up two weeks later, DOC only addressed the specific phone numbers identified in the letter and declined to conduct a comprehensive audit when asked. Specifically, DOC blamed the problem on Securus placing the numbers on a site-restricted DNR list rather than an agency-wide DNR List. An agency-wide restriction means that any calls placed to the phone number on the DNR List, regardless of location of origin within DOC property, will be restricted from recording, whereas a site-only restriction means only calls placed to the phone number from a specific location within DOC property will be restricted from recording. DOC continued to insist that these breaches were isolated instances, despite Ms. Coleman's request to implement a broader response and ensure that all numbers on BxD's DNR list were included on both agency-wide and site-only restriction lists.¹⁰²

84. In late 2020, NDS learned from fellow public defender offices that DOC had improperly recorded privileged legal calls.¹⁰³ By this point, DOC had let months, if not years, go by without affirmatively reaching out to NDS about this issue. Shortly thereafter, NDS emailed DOC's Legal Department updated lists of NDS phone numbers to be added to the DNR List, and explicitly stated that any calls with these numbers were covered by the attorney-client privilege.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ CGSH Decl. Ex. 25, NDS Affirmation.

85. On January 15, 2021, attorneys with the New York City Council for the Committee of Criminal Justice contacted Ms. Coleman at BxD and Ann Matthews, Managing Director of the Criminal Defense Practice at BxD, via telephone to discuss DOC's recording and dissemination of attorney-client privileged communications. Ms. Coleman and Ms. Matthews discussed what they knew of the breaches at the time, provided their correspondence with DOC to the council members, and were informed that they would "be in touch."¹⁰⁴

86. In early 2021, two more BDS attorneys received their own privileged calls in discovery from prosecutors. As usual BDS reported these breaches to Ms. Mello and asked that DOC cease recording privileged calls. For one of these attorneys, it was the second time DOC had recorded her privileged phone calls since 2019. BDS had reported each of these instances to DOC.¹⁰⁵

87. In February 2021, another attorney at NYCDS discovered a recording of their privileged phone call with an incarcerated client in discovery. This particular attorney's phone number had been included in prior lists sent to DOC since 2018. NYCDS sent another updated list of staff phone numbers to be added the DNR List and notified DOC Legal of the recently discovered phone call with an NYCDS attorney that had been recorded. DOC Legal responded three weeks later simply stating that Securus had successfully updated the DNR list.¹⁰⁶

88. In the same month, on February 11, 2021, Ms. Coleman emailed Ms. Richardson at DOC Legal and advised that BxD had reason to believe that DOC was continuing to record privileged phone calls. Even though DOC had heard of this issue from multiple organizations over

¹⁰⁴ CGSH Decl. Ex. 23, BxD Affirmation.

¹⁰⁵ CGSH Decl. Ex. 21, BDS Affirmation ¶ 17.

¹⁰⁶ CGSH Decl. Ex. 24, NYCDS Affirmation.

the course of several years—including as recently as that month—Ms. Richardson replied: “Until your email this morning, we were unaware that there was an ongoing problem.”¹⁰⁷

89. On March 11, 2021, after LAS learned that privileged legal calls may have been in the possession of prosecutors, LAS provided DOC an updated list of phone numbers to be added to the DNR List.¹⁰⁸

90. On March 26, 2021, LAS also notified DOC that LAS attorneys on the DNR List were still hearing the warning messages that their confidential legal calls with people in custody were being recorded. DOC advised LAS that it was actively investigating the matter with Securus and that telephone numbers provided for the DNR List after 2020 may not have been registered because Securus had failed to competently process LAS’s numbers into the DNR List.¹⁰⁹

91. By mid-2020, it had become clear that all of the breaches being reported to DOC could not be isolated instances. And yet, DOC did not contact any of the defender organizations to confirm the information on its DNR List. Nor did DOC advise defender organizations or private defense attorneys that there was a systemic issue safeguarding privileged communications in the jails.

92. When defender offices contacted DOC, DOC steadfastly treated each report as a “one-off” issue with specific phone numbers or blamed Securus. DOC’s initial befuddlement turned into a studied obfuscation of the fact that multiple organizations were reporting this exact issue over and over.

¹⁰⁷ CGSH Decl. Ex. 23, BxD Affirmation.

¹⁰⁸ *Id.* ¶¶ 26.

¹⁰⁹ *Id.* ¶¶ 29-30.

93. DOC acted as if it did not have an affirmative duty to protect privileged communications: It was content to sit back, passively, and let defender organizations expend resources prodding it into action.

VI. DOC Conducted Belated And Partial Audits Despite Repeated Requests For Comprehensive Reviews

94. In late February and March of 2021, DOC Legal contacted defender organizations individually to discuss the privileged legal calls being recorded.

95. In these calls, DOC shared the results of preliminary audits conducted in conjunction with Securus that showed widespread recordings of privileged communications. Although the problem was clearly systemic, DOC continued to communicate with each office separately, conducting audits with different parameters per office—all insufficient—and only sharing additional information with any one office if it was explicitly asked for.

96. The Bronx Defenders

- a. On February 18, 2021, BxD had a phone call with Ms. Richardson at DOC. DOC's audit spanned between March 2020 and February 2021. Ms. Richardson informed BxD that during this timeframe, 118 phone calls were recorded and accessed by a DOC user. These calls involved 16 BxD staff members and were placed to 17 unique phone numbers on the DNR list.¹¹⁰ The audit was truncated by both time and type; BxD had been reporting violations since 2018, but the audit only covered 11 months starting in 2020, and did not include calls that were recorded but not accessed by DOC, only calls that had affirmatively been accessed.
- b. BxD asked that DOC expand this audit to cover the time period before March 2020. DOC informed BxD that they had not yet begun working on that information. To date, DOC has not provided BxD with this expanded audit information.
- c. On March 15, 2021, Ms. Richardson emailed Ms. Coleman a spreadsheet with the initial audit results. In April 2021, Ms. Richardson provided additional information that identified the recipient of each of the improperly recorded phone calls. All of the identified recipients were associated with law enforcement agencies, including prosecutors, the New York City Department

¹¹⁰ *Id.*

of Investigation (“DOI”), NYPD, and the DOC Corrections Intelligence Bureau. DOC informed BxD that it had shared the results of its audit with the recipients of the recorded calls, including the district attorney’s offices, NYPD, and DOI.

- d. After receiving the March 2021 audit results, BxD emailed DOC and again requested that DOC expand its audit, specifically to include the universe of calls that were solely recorded (not only those accessed by a DOC user) between BxD defense staff and their incarcerated clients during the DOC audit timeframe (March 2020 to February 2021).¹¹¹ In June 2021, DOC responded via email that, “Securus has not yet completed the second half of the audit, which will provide call details for every call which was inadvertently recorded even if it was not accessed.” Despite DOC’s claims that Securus was working on this request, DOC never provided any additional audit results or information in connection with this request.¹¹²
- e. In November 2021, the Bronx District Attorney’s Office alerted a BxD attorney that they were in possession of seven privileged calls between the attorney and her client, who was incarcerated at a DOC facility. The DOC-recorded conversations were from October 2020 and had been produced to the Bronx District Attorneys’ Office in November 2020. The calls contained substantive conversations regarding the BxD attorney’s investigation of her client’s case, including a conversation during which the attorney provided legal advice to the client regarding the charges, the grand jury process, and whether the client should exercise his right to testify before the grand jury.
- f. This BxD attorney’s number was on the 2020 list of staff numbers, which had been provided to DOC prior to DOC instructing Securus to conduct the BxD audit in early 2021. Based on the audit timeframe, these October 2020 phone calls, which were both recorded and accessed between March 2020 and February 2021, should have been reflected in the DOC audit results. But they were not. This omission shows that even during the limited timeframe DOC investigated, their audit results were incomplete.
- g. DOC’s failure to expand its audit resulted in further dissemination of recorded material. In November 2021, a different BxD attorney was alerted by the Bronx District Attorney’s Office that they were in possession of a recorded call from the attorney’s client, which had been placed on February 17, 2021 to the attorney’s cell phone. The attorney’s cell phone number was on the December 2020 list of staff numbers shared with DOC, and the Bronx District Attorney’s Office had received the call in March 2021. This call was never identified by DOC in its audit, because it was not both recorded and accessed between March 2020 and February 2021—only recorded during the audit timeframe but

¹¹¹ *Id.*

¹¹² *Id.*

accessed later. Had DOC expanded its audit as requested, this call would have been identified prior to disclosure.

97. Brooklyn Defender Service

- a. On February 25, 2021, DOC informed BDS that it was conducting an audit of its DNR List. The results of this audit were conveyed to BDS on March 19, 2021, indicating that at least 1,450 confidential calls had been recorded and shared with law enforcement. These calls were between BDS staff members and over 300 clients.¹¹³
- b. BDS has reason to believe that this DOC review was incomplete. For example, a BDS attorney heard the automated message stating that her call with an incarcerated client was being recorded on September 23, 2020, within the time period covered by the review, but that call did not appear in the results.¹¹⁴

98. New York County Defender Services

- a. On March 26, 2021, DOC emailed NYCDS and NDS separately, indicating they had “recently discovered” that their telephone vendor had made an error when processing the DNR List. DOC explained that they had conducted an audit to determine which privileged phone calls had been recorded and requested a phone call to discuss.
- b. An NYCDS supervisor spoke on the phone with Heidi Grossman and other DOC Legal representatives. DOC shared the results of their initial audit from the previous calendar year, indicating that 13 confidential phone calls involving three clients in custody and one attorney had been improperly recorded and turned over to prosecutors’ offices.¹¹⁵ This audit was based off of the February 18, 2021 list of staff numbers shared with DOC, but it is unclear what time frame this audit covered or which lists were utilized.
- c. DOC emailed a second audit to NYCDS on December 30, 2021. This audit was based off of the February 1, 2019 list of NYCDS staff members sent to DOC for inclusion in their DNR list. The results indicated that 347 confidential calls had been recorded and accessed, involving 73 people in custody and 27 unique dialed telephone numbers of NYCDS defense staff.

99. Neighborhood Defender Service of Harlem:

- a. An NDS supervisor likewise spoke with DOC the week of April 5, 2021.
- b. Prior to the meeting, DOC shared the initial audit results for NDS, indicating that 12 confidential phone calls involving six NDS defense staff and seven

¹¹³ CGSH Decl. Ex. 21, BDS Affirmation ¶¶ 19-21.

¹¹⁴ *Id.* ¶ 23.

¹¹⁵ CGSH Decl. Ex. 24, NYCDS Affirmation.

clients had been recorded. For reasons DOC did not explain, this audit was only conducted for calls placed during the week of December 22, 2021 to December 28, 2021.¹¹⁶

100. Legal Aid Society

- a. On April 1, 2021, Christopher Pisciotta, Attorney-in-Charge of Richmond County at LAS, and Peter Jones, Attorney-in-Charge of Bronx Criminal Defense Practice at LAS, met with DOC counsel to obtain the results of the audit. The initial disclosure indicated that 173 confidential privileged legal calls had been recorded and accessed.¹¹⁷
- a. LAS then requested that DOC expand its audit to include calls recorded by Securus's call platform before March 2020. On April 2, 2021, DOC counsel confirmed that Securus was conducting a full audit of all recorded calls, but declined to expand the audit to recordings of calls before March 2020.¹¹⁸
- b. On April 19, 2021, LAS sent letters to DOC counsel requesting that DOC and Securus disclose the full audit results, including the identities of people who were provided access to the recorded calls and what outside entities (if any) had received these calls.¹¹⁹
- c. On December 30, 2021, DOC sent additional audit results to LAS, which showed that, due to DOC's and Securus's failure to process the list of numbers that LAS had sent on March 10, 2021, 1,302 privileged legal calls had been improperly recorded. Mr. Pisciotta and Mr. Jones met with DOC counsel on March 11, 2022, and DOC counsel confirmed that the second audit had been limited in scope to only those calls involving phone numbers provided on the unprocessed March 10, 2021 list. DOC declined to provide entity access information and ultimately failed to conduct a full audit of all protected phone numbers.

101. At the end of December 2021, DOC emailed certain defender organizations additional audit results. DOC did not share additional results with BxD or BDS—the organizations who first identified the breaches in 2018.

102. By DOC's count, thousands of privileged phone calls were recorded and disseminated to law enforcement. But DOC's review was partial and flawed, making it an

¹¹⁶ CGSH Decl. Ex. 25, NDS Affirmation.

¹¹⁷ CGSH Decl. Ex. 27, LAS Affirmation ¶ 31.

¹¹⁸ *Id.* ¶¶ 32-33.

¹¹⁹ *Id.* ¶ 37.

unreliable estimate. DOC did not include: (1) calls recorded prior to March 2020; (2) privileged conversations that were illegally recorded but were not disseminated to law enforcement; and (3) any privileged conversations that were illegally recorded, but made to defense attorneys who do not work for local public defender organizations. Accordingly, the total number of illegally recorded privileged calls is likely much higher.

103. Despite its circumscribed nature, the audit conclusively revealed widespread breaches of privilege. Specifically, the audit revealed the following: (i) BDS had 1,450 unique privileged telephone calls recorded, accessed, and disseminated, involving over 300 persons in custody and 94 unique dialed telephone numbers;¹²⁰ (ii) NYCDS had 347 unique privileged telephone calls recorded, accessed, and disseminated to law enforcement, involving 73 persons in custody and 27 unique dialed telephone numbers;¹²¹ (iii) NDS had 630 unique privileged telephone calls recorded, accessed, and disseminated involving 93 incarcerated people and 20 unique numbers;¹²² (iv) BxD had 118 unique privileged calls recorded and accessed, involving 29 incarcerated people and 17 unique numbers;¹²³ and (v) LAS had 1,302 unique privileged calls recorded.¹²⁴

VII. DOC Minimized Its Violations And Announced Ineffective Remedial Measures

104. By 2021, public reports and hearings began to shed light on DOC and Securus's recording of privileged communications. DOC, however, continued to minimize the problem and make excuses for Securus, and implemented ineffective corrective measures.

¹²⁰ CGSH Decl. Ex. 21, BDS Affirmation ¶ 21.

¹²¹ CGSH Decl. Ex. 29, Letter from DOC to NYCDS detailing the Securus Expanded Audit Results (Dec. 30, 2021).

¹²² *Id.*

¹²³ CGSH Decl. Ex. 31, Email from I. Coleman (March 3, 2021) at 1:46 pm.

¹²⁴ CGSH Decl. Ex. 27, LAS Affirmation ¶ 40.

105. On March 20, 2021, the Daily News published an article indicating that a “clerical error” resulted in over 1,500 privileged telephone calls between persons in DOC custody and their legal advisers being wrongly recorded.¹²⁵

106. At the March 22, 2021 Committee on Criminal Justice (“CCJ”) Hearing, a DOC representative testified that the privileged calls were recorded due to “human error.” Specifically, DOC claimed that a Securus employee did not know how to use the dropdown menu in Securus’ software and selected the “facility wide” option rather than the “agency wide” option when attempting to privatize numbers. This employee was not terminated from Securus, but only moved off the DOC contract. It is unclear how many Securus employees that are now assigned to the DOC contract were transferred there after making “errors” in other jurisdictions. Pinning the blame on an errant employee does not explain why this practice has been detected nationwide, not just in New York City jails. As then Chairman of the CCJ Keith Powers opined, the fact that DOC claims that the breaches of confidential communication resulted from a Securus employee not knowing how to operate Securus’s own software raises questions about whether Securus should continue to provide services in New York City jails.¹²⁶

107. At a May 2021 Board of Correction hearing, DOC announced certain remedial measures around the recording of privileged calls, including:¹²⁷

- “Quality control” measures, including having Securus perform a 20% “spot check” of phone numbers on the DNR List.
- A modification to the pre-recorded admonishment heard at the start of all phone calls, which warns both the caller and the recipient of the caller that the phone call is being recorded, adding an explicit warning to attorneys.

¹²⁵ Chelsea Marcus, *Over 1,500 NYC Jail Calls Between Inmates, Lawyers Wrongly Recorded: Audit* (Mar. 20, 2021), <https://www.nydailynews.com/new-york/ny-rikers-jail-phone-records-lawyers-inmates-20210320-rdfb2lmuevgsdg5npad4egoqai-story.html>

¹²⁶ CGSH Decl. Ex. 32, March 22, 2021 CCJ Preliminary Budget Hearing Minutes.

¹²⁷ New York City Board of Corrections, *Public Meeting Minutes* (May 11, 2021), <https://www.nyc.gov/assets/boc/downloads/pdf/Meetings/2021/May/2021-05-11-board-meeting-minutes.pdf>.

- A new website where attorneys could check the privatization status of their phone numbers.

108. These measures fell short of what public defenders requested and what the seriousness of the breach required: DOC failed to implement necessary procedures around the spot checks, did not provide a full accounting of the privilege breaches, failed to ensure Securus's technology included safeguards against future breaches, and failed to sequester the privileged recordings it had identified.

109. *First*, DOC failed to implement procedures around the spot checks that Securus conducts to require timely notification of the parties involved in any breach found. DOC also failed to implement procedures to trigger a wider search for unauthorized recordings, dissemination, and storage if a breach is found. DOC has not explained how frequently this manual check is conducted, nor how it verifies that Securus indeed performs this quality control measure (DOC has admitted they do not have access to Securus's system).

110. DOC claims that it conducts its own spot check, although again, no enforcement mechanism is mentioned. DOC claims that it accesses Securus's system and spot checks 10% of the new DNR requests to see: (1) if the number was properly privatized; and (2) whether calls were recorded before or after privatization was requested. Again, no mention is made of what happens when a number is improperly recorded or not privatized. Additionally, DOC previously claimed to check individual phone numbers that were improperly subject to recording and erroneously claimed those numbers were properly on the DNR List. There is no guarantee that their current spot checks would be any more accurate.

111. *Second*, DOC promised that they would conduct an expanded audit of recorded phone calls.¹²⁸ This has never happened. The community cannot know the scope of the breach,

¹²⁸ *Id.*; see also CGSH Decl. Ex. 26, NDS Affirmation.

including whether any legal proceedings may have been irreparably compromised, without a comprehensive audit. After such an extensive breach, and bearing in mind Securus's pattern of malfeasance across the country, DOC and Securus cannot reasonably expect people in custody to feel comfortable speaking to their defense teams solely because they now claim to conduct unenforceable and limited spot checks without procedures ensuring transparency and accountability.

112. *Third*, DOC has not made any requests for a built-in compliance system that would automatically prevent breaches of privilege in the future. For example, Securus could adjust their system so that for the DOC contract there is only an agency-wide restriction available for numbers on the DNR List. But DOC instead took a shortcut instead that had serious consequences.

113. *Finally*, DOC stated in certain of its audit letters to defender organizations that it would sequester improperly recorded calls.¹²⁹ But DOC never sequestered or clawed back the privileged calls it identified.

114. Even after DOC implemented its proposed remedial measures, there continue to be clear signs that DOC's process for safeguarding the confidentiality of privileged calls is susceptible to failure:

- a. Multiple BxD attorneys heard the pre-recorded admonishment during the spring and summer of 2021.¹³⁰ DOC's response was to assure BxD that those attorneys' phone calls were not being recorded,¹³¹ undermining DOC's claim that the pre-recorded admonishment can be relied upon as an accurate indication of call surveillance.
- b. At NYCDS, one attorney making use of the new DNR website found that her cell phone number continued to register as not private. Despite an explicit request to privatize this number sent to DOC in January 2021 and the inclusion

¹²⁹ See CGSH Decl. Ex. 30, Letter from DOC to NDS detailing the Securus Expanded Audit Results at 2 (Dec. 30, 2021); CGSH Decl. Ex. 29, Letter from DOC to NYCDS detailing the Securus Expanded Audit Results at 2 (Dec. 30, 2021).

¹³⁰ CGSH Decl. Ex. 23, BxD Affirmation.

¹³¹ *Id.*

of this number in DNR lists dating back to 2018, this number remained un-privatized. It wasn't until yet another request was sent in July 2021 that this number was finally privatized.¹³²

- c. In October of 2023, an NDS client held at Rikers called an NDS investigator on the phone and heard the pre-recorded admonishment that the call was being recorded. Because he typically engaged in conversations about legal matters with this investigator, this concerned the client, and he reported it to his defense team. NDS general counsel then reported the incident to DOC, who confirmed that the number was properly privatized and had not in fact been recorded. This incident demonstrates that the pre-recorded admonishments are not a reliable indicator of the privatization status of phone numbers on the DNR list.¹³³
- d. Beginning in late August 2023, a BDS attorney whose phone number, according to Securus's "Do Not Record" website, has been set to private has received at least five voicemails from incarcerated clients that began with the pre-recorded admonishment indicating that the calls are being recorded. He also received a call from an incarcerated client in November 2023 that began with this recording as well. DOC Legal claimed that this number was successfully privatized and said that the recording could be playing if call forwarding was being used. Call forwarding was not being used.¹³⁴
- e. DOC has not privatized numbers in a timely way. For example, BDS sent updated numbers for inclusion on the "Do Not Record" list in early November 2023, including the phone number of a new social worker. As of January 12, 2024, her number still was not privatized and all her calls with clients were still being recorded.¹³⁵

115. As DOC has been unable to ensure that privileged communications are not unlawfully intercepted and disseminated, it must cease recording all phone calls.

VIII. DOC Has Not Been Held Accountable For Its Violations Or Lack Of Remediation

116. On March 21, 2021, then-Mayor Bill de Blasio ordered DOI to investigate the breaches of privileged legal calls and whether DOC's contract with Securus should continue. There were two major flaws with this "investigation." First, DOI did not even purport to conduct

¹³² CGSH Decl. Ex. 24, NYCDS Affirmation.

¹³³ CGSH Decl. Ex. 26, NDS Affirmation ¶ 28.

¹³⁴ CGSH Decl. Ex. 21, BDS Affirmation ¶¶ 24-25.

¹³⁵ *Id.* ¶ 26.

an independent investigation, instead relying exclusively on DOC materials. Second, DOI was not in a position to conduct an independent investigation.

117. DOI limited its investigation to the review undertaken by DOC and Securus because “[a]t the time of the referral, DOC and Securus already had investigated the recording of privileged communications, and had shared their findings with the affected defender organizations and the New York City Council Committee on Criminal Justice at the 2021 Preliminary Budget Hearing.”¹³⁶ That is to say, no independent investigation took place. The DOI investigation was merely a review of DOC’s own investigation, conducted by relying entirely on DOC materials.

118. This one-sided methodology is problematic. DOI relied on incomplete and biased information, most critically the partial and inconsistent audits described above. DOI relied exclusively on DOC sources, only reviewing DOC-Securus communications. Despite its broad investigatory powers, DOI reviewed none of the written communications between DOC and public defenders—the organizations who brought this issue to DOC’s attention in the first place. DOI did not interview anyone outside of DOC and Securus to confirm the veracity of the basic facts DOC provided. DOI did not speak with defense organizations or the people in custody whose calls had been recorded. And, without explanation, DOI aligned its time period of investigation with the initial DOC audits.

119. DOI relied exclusively on the audit materials without acknowledging their shortcomings. As noted in Section VII, the audits were incomplete for several reasons, *inter alia*:

- DOC only audited calls that were specifically accessed by law enforcement, rather than all legal calls that were recorded;
- only public defender organizations were audited, leaving out the numerous defense attorneys who do not work as public defenders; and

¹³⁶ CGSH Decl. Ex. 38, DOI Report at 2.

- the audit only reviewed calls that were recorded within a one-year time period, even though the first recorded calls were reported back in 2018.

120. Moreover, DOI was an unusual choice for an “independent” investigator on this issue as DOI investigators themselves directly monitor the phone calls of persons in custody.¹³⁷

121. In particular, in a number of the audits provided to defender offices, DOI was identified as a recipient of illegally recorded privileged phone calls.¹³⁸ Although DOI received these improperly recorded calls, they did nothing to alert DOC, Securus or defense attorneys to this grave problem. Despite this history and its own involvement, DOI did not recuse itself from the breach investigation.

122. The DOI report, issued on May 4, 2023, sought to minimize the findings of DOC’s audits. DOI acknowledged that 324 telephone numbers were subject to illegal recordings, but then claimed that the breaches “impacted only a very small percentage of privileged communications.” This “percentage” reporting is misleading. The audits did not actually review all numbers on the DNR List—only the numbers that public defender organizations submitted and, at least in some cases, only those recordings that DOC accessed or shared. DOI’s focus on unique telephone numbers, rather than on measuring the impact of the breach in terms of call volume and harm done, means DOI’s assessment of the extent of the breach is meaningless.

123. DOI also reported certain key facts wrong, leading to erroneous conclusions.
- a. DOI parroted DOC’s falsehood that the first time DOC was notified of the privilege breaches was by BxD in December 2020. During DOI’s investigation, DOC claimed that Securus’s “human error” was aggravated by the beginning of the Covid-19 pandemic in March 2020 when more attorneys were working from home and using their personal numbers, “which resulted in DOC receiving a large influx of new phone numbers to be added to the DNR list.”¹³⁹ If DOI

¹³⁷ CGSH Decl. Ex. 38, DOI Report at 1 (noting that it “monitor[s] detainees’ calls”), *id.* at 8 n.31 (“DOI investigators have access to Securus and some may have downloaded privileged communications” and provided calls to a prosecutor’s office); *see also* CGSH Decl. Ex. 39, Memorandum of Understanding between the Department of Correction and the Department of Investigation (May 7, 2017).

¹³⁸ *See, e.g.*, CGSH Decl. Ex. 21, BDS Affirmation ¶ 22.

¹³⁹ CGSH Decl. Ex. 38, DOI Report at 6.

had conducted even a rudimentary investigation, they would have seen that DOC was aware of this issue as early as 2018.

- b. DOI also mischaracterized DOC's response to defender organizations as quick and cooperative.¹⁴⁰ DOI posited that, upon learning of these issues, DOC leapt into action "within hours." However, BDS and BxD notified DOC of this issue on multiple occasions dating back to 2018, and DOC undertook action *only after* the public defender organizations repeatedly, over months and years, requested information and answers. These years of inaction were left unmentioned in DOI's report. Further, even as to the December 2020 incident that BxD reported DOC's response was not timely: BxD's Legal Director for the Criminal Defense Practice notified DOC of recorded privileged legal phone calls on December 8, 2020, but received no response from DOC. She followed up two weeks later on her own initiative.
- c. DOI Commissioner Jocelyn Strauber amplified these two inaccurate claims in the press release accompanying the report. She wrote: "DOC and Securus acted promptly to expose and correct the errors that led to the release of privileged phone calls." As detailed above, this misrepresented what happened and DOC's culpability.

124. DOI deemed DOC's purported remediation sufficient, even though these measures are clearly inadequate, as described *supra* Section VII. Ignoring the limitations of DOC's audits, DOI did not recommend a comprehensive audit nor sequestering or clawing back the privileged recordings that were disseminated to law enforcement. DOI did not note that failure to complete a full audit or to sequester or claw back means that illegally-recorded calls are still circulating, accessible to Securus, and able to be produced to other parties.

125. DOI commended Securus for agreeing to implement a spot check of 20% of numbers added to the DNR List, but DOI did not investigate or report on any of the questions raised in *supra* Section VI that would ensure the spot checks function as safeguards to protect privilege legal calls. DOI recommended that DOC notify *DOI* when privileged calls are

¹⁴⁰ *Id.* at 8.

improperly recorded. But DOI made no such recommendations that DOC notify the people deprived of the privilege, assess the harm from the breach, or trigger a broader review.¹⁴¹

126. DOI gave DOC credit for adding the list of phone numbers of attorneys registered with OCA to its DNR list, but acknowledged and had no issue with the fact that Securus did not conduct a spot check on that list because it was too large.¹⁴²

127. Just as concerning is that DOI affirmatively concluded that DOC's relationship with Securus should continue. This conclusion was largely driven by the unexamined assumption that DOC's program of universal recording and extensive surveillance must also continue: DOI noted that there are no companies who provide such extensive monitoring who have *not* engaged in similar malfeasance.

128. Given DOI's failure to fully investigate the privilege breaches or issue meaningful recommendations to protect privileged conversations, its conclusion that DOC and Securus have remediated these violations is empty and strains credulity.

IX. Incarcerated People Need To Communicate With Their Lawyers By Telephone To Defend Their Criminal Cases

129. The recording and dissemination of privileged phone calls has far-reaching consequences. Incarcerated people need to be able to communicate confidentially with their defense team and prepare their defense, and they are told by DOC that these calls are confidential and not recorded.¹⁴³

130. Phone calls are the only means people in DOC custody have of immediately initiating contact with anyone outside their jail, including their defense team. Communication

¹⁴¹ CGSH Decl. Ex. 32, March 22, 2021 CCJ Preliminary Budget Hearing Minutes.

¹⁴² CGSH Decl. Ex. 38, DOI Report at 10.

¹⁴³ CGSH Decl. Ex. 3, Eric Leon Affidavit ¶ 8; CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 6-7; *see also* CGSH Decl. Ex. 1, NEW YORK CITY DEPARTMENT OF CORRECTION, *Inmate Handbook* at 43 (last revised Dec. 2007), https://www.nyc.gov/assets/doc/downloads/pdf/inmate_hand_book_english.pdf).

over the phone between a person facing criminal charges and their defense team is particularly important in the first few days after they are arraigned. In that initial stage, time is of the essence as attorneys and their clients talk about such important matters as investigations, the contents of initial discovery, the merits of any plea offer, and whether or not a client should testify in the grand jury. Because Criminal Procedure Law § 180.80 creates either a five or six-day deadline for many of these important decisions, these conversations often occur over the phone. If someone is considering testifying before the grand jury, that initial preparation for testimony may also take place over the phone.¹⁴⁴

131. Videoconferences and in-person visitations must be initiated by defense staff and are not a dependable means of regular communication. Videoconferences take days to schedule and, oftentimes, DOC fails to bring people in custody to the videoconference on time or at all.¹⁴⁵ Mr. Scott averred that “even if my lawyer does get a timeslot, there’s no guarantee that I will actually be brought to the video conference room on that date and time.”¹⁴⁶ These episodes occur frequently. Mr. Scott noted that “[i]t feels like half the time, the officers don’t even come to get me at the scheduled time. I don’t know if it’s because they forgot, or they were too busy, but the end result is that another opportunity to speak to my lawyer is lost.”¹⁴⁷

132. Mail is also inadequate as the primary means of communication. There is a delay of days and sometimes weeks between sending a letter and receiving a response from someone in DOC custody. A physical letter with confidential information or legal advice could be read by others in the jail. Letter-writing “is simply not a substitute for an actual two-way conversation”

¹⁴⁴ See CGSH Decl. Ex. 21, BDS Affirmation ¶ 7; CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 15.

¹⁴⁵ See CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 16; CGSH Decl. Ex. 21, BDS Affirmation ¶ 8.

¹⁴⁶ CGSH Decl. Ex. 5, Tyrell Scott Affidavit.

¹⁴⁷ *Id.*

with one's defense team.¹⁴⁸ Moreover, defender organizations have been informed by their incarcerated clients of multiple instances where the defense team's mail never reaches their client. What's more, to rely on letter-writing assumes that the client is literate, which is not always the case.¹⁴⁹

133. In-person discussion via client production to court is impracticable as a regular means of communication, as substantive conversations must often occur in preparation for court. Further, Mr. Scott reported: "On a typical day, I will be woken up at 5 or 6 in the morning, and taken on a bus to 100 Centre Street. I will be in the courthouse the entire day, but I won't be brought to the actual courtroom until the very end of the day—sometimes it will be 4:45 before I see my lawyer or a judge. By that time in the day, the court officers are understandably eager to close down for the day, and therefore they rush me and my lawyer along. Invariably, my lawyer tells me she was in the courtroom much earlier in the day waiting for me and was told that I hadn't made it to court yet."¹⁵⁰

134. While defense teams attempt in-person legal visits directly at DOC facilities when possible, it is not always an accessible method for regular communication. Rikers Island is physically remote and even when defense staff are able to make the journey, which either must occur after court, after hours, or on a rare day without any court appearances, DOC often requires defenders to wait for hours before meeting with one client. In multiple instances, DOC staff have said the reason for the prolonged wait is that DOC does not have the correctional staff to escort the client to the counsel visit area. Public defenders, who maintain a high caseload, may be visiting

¹⁴⁸ *Id.*

¹⁴⁹ According to DOJ literature, "the illiteracy for adult inmates is estimated at 75%." E. Herrick, *Prison Literacy Connection*, 16 CORRECTIONS COMPENDIUM 1 (1991), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prison-literacy-connection>.

¹⁵⁰ CGSH Decl. Ex. 5, Tyrell Scott Affidavit.

multiple clients in a trip and cannot always wait for multiple hours to see a client. They may have to leave the facility without meeting every person on their list that day.

135. For these reasons, access to confidential phone calls with their legal teams is essential for people in custody facing criminal charges.

X. DOC's Surveillance System And Violations Of Privilege Have Led To Concrete Harm

136. DOC's expanding surveillance system, universal recording, breaches of privileged calls, and failure to safeguard legal communications violate Petitioners' right to privacy and chills their ability to communicate with their defense teams.

137. Since the widespread breaches of confidential calls first came to light, many attorneys now avoid having substantive conversations with their incarcerated clients over the phone whenever possible because they fear those conversations will be recorded despite their phone numbers being on "Do Not Record" lists.¹⁵¹ DOC's claims that the problem has been remedied are belied by DOC's ongoing failure to identify and mitigate potential breaches and safeguard confidential phone calls, as set forth in Section VII, *supra*. Thus, defense teams cannot rely on the confidentiality of phone calls they receive from clients, and have revised their practices accordingly, significantly limiting the ways in which they are able to have substantive conversations with clients.¹⁵²

138. After the breaches of legal privilege, many people who are in custody pretrial avoid discussing substantive matters on legal calls, out of fear that legal calls may no longer be confidential.¹⁵³ Mr. Scott, who was detained after the breaches became public, noted that while

¹⁵¹ See, e.g., CGSH Decl. Ex. 24, NYCDS Affirmation ¶ 40.

¹⁵² CGSH Decl. Ex. 24, NYCDS Affirmation ¶ 40; CGSH Decl. Ex. 23, BxD Affirmation ¶ 32; CGSH Decl. Ex. 25, NDS Affirmation ¶¶ 26, 28; CGSH Decl. Ex. 21, BDS Affirmation ¶ 31.

¹⁵³ CGSH Decl. Ex. 5, Tyrell Scott Affidavit ¶¶ 2, 5; CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶¶ 13-14; CGSH Decl. Ex. 3, Eric Leon Affidavit ¶¶ 12-13.

“we are told by DOC that phone calls with our lawyers are private . . . it is common knowledge among those of us detained at Rikers that this is not true.”¹⁵⁴ The widespread understanding that legal calls have been and could be recorded has had a chilling effect on legal communications and, accordingly, people in custody’s access to substantive conversations with their defense teams is restricted.

139. Named Petitioners Mr. Reid and Mr. Leon have had their privileged calls recorded and disseminated to law enforcement during their criminal proceedings. Mr. Scott feared that his privileged calls were recorded. Inability to rely on the confidentiality of phone conversations, negatively impacts how Petitioners communicated with defense teams over the phone.

140. Marcus Reid

- a. Marcus Reid is a 30-year-old who, up until recently, was in pre-trial detention in DOC custody.¹⁵⁵ DOC recorded forty-three of Mr. Reid’s privileged phone calls with his defense team from May and June 2020 and provided them to Assistant District Attorney Paul Barker at the Manhattan District Attorney’s Office.¹⁵⁶ These calls were recorded while Mr. Reid was awaiting trial on two criminal cases in Manhattan, both of which were prosecuted by Assistant District Attorney Barker.¹⁵⁷
- b. Access to phones was critical to Mr. Reid’s communication with his attorneys. Alternatives like video conferencing were not adequate as they are difficult to schedule and DOC failed to produce him to video conferencing at times. Fear of being recorded discouraged Mr. Reid from speaking freely to his attorneys over the phone.¹⁵⁸

141. Eric Leon

- a. Eric Leon is a 40-year-old now serving a prison sentence but was previously in DOC custody from December 16, 2020 through April 2023.¹⁵⁹
- b. In 2021, Mr. Leon and his attorneys became aware that DOC recorded a nine-minute phone call on January 12, 2021 with his attorney at BDS and provided

¹⁵⁴ CGSH Decl. Ex. 5, Tyrell Scott Affidavit ¶ 4.

¹⁵⁵ CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 3.

¹⁵⁶ *Id.* ¶ 11.

¹⁵⁷ *Id.* ¶ 12.

¹⁵⁸ *Id.* ¶ 16.

¹⁵⁹ CGSH Decl. Ex. 3, Eric Leon Affidavit ¶¶ 3-4.

this call to Assistant District Attorney Michael Brovner at the Queens District Attorney's Office, the prosecutor in one of his criminal cases.¹⁶⁰

- c. Knowing his calls were recorded, Mr. Leon no longer felt secure discussing sensitive legal matters over the phone with his attorneys. Unfortunately, there are no adequate alternatives to telephones. Video conferences are difficult to schedule and not guaranteed even if they are scheduled, while mail can take weeks to go back and forth.¹⁶¹

142. Tyrell Scott

- a. Tyrell Scott is a 31-year-old who was held at Rikers Island from June 8, 2022 to January 8, 2024.¹⁶²
- b. Mr. Scott feared that his legal calls were recorded, which made him distrustful of having substantive legal conversations over the phone with his attorneys. Moreover, Mr. Scott's defense attorneys discouraged him from having substantive legal conversations over the phone, due to the probability of being recorded.¹⁶³
- c. However, there are no adequate alternatives to telephonic communication. Video conferences, in-court meetings, and letter writing are each unreliable and problematic in their own right.¹⁶⁴
- d. Video conferences are both difficult to schedule and frequently subject to last-minute cancellations by DOC. Like Mr. Reid, DOC has failed to produce Mr. Scott to video conferences. In-person court meetings prove too short and too busy to substantively discuss matters. Finally, the back-and-forth of letter writing is too slow to discuss fraught, time-sensitive legal matters.¹⁶⁵
- e. This inability to have substantive legal conversations over the phone has negatively impacted Mr. Scott's right to counsel.¹⁶⁶

143. The chilling effect on substantive legal phone communications can also be harmful when people in custody at Rikers have out-of-city cases. For example, Mr. Scott has an active case in Las Vegas. He observed that, "with regard to my Nevada lawyer, he doesn't even practice in New York. That means he is not familiar with any procedures for how lawyers' phone numbers

¹⁶⁰ *Id.* ¶ 9.

¹⁶¹ *Id.* ¶¶ 13-14.

¹⁶² CGSH Decl. Ex. 5, Tyrell Scott Affidavit ¶ 1.

¹⁶³ *Id.* ¶¶ 6-7.

¹⁶⁴ *Id.* ¶¶ 11-14.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* ¶ 15.

are privatized here, nor is he familiar with DOC's system for videoconferencing. He also can't come visit me at Rikers or in court."¹⁶⁷

144. This chilling effect prevents candid communication. Mr. Scott explained: "With [my Nevada lawyer], then, we are pretty much forced to communicate over the phone, but we try to keep our conversations as surface-level as possible. With my Nevada case, therefore, that simply means that there are a lot of details I just don't get to discuss with my lawyer."¹⁶⁸ Mr. Reid similarly explained: "After finding out that my legal calls were recorded and given to the Assistant District Attorney who was prosecuting me, I became even more uncomfortable speaking on the phone with my legal teams. I was not sure whether my legal calls were still being recorded and listened to."¹⁶⁹

145. Defense teams and people in custody must also take into account that, not only has DOC monitored and recorded confidential calls, but DOC has produced those recordings to law enforcement. The disclosure of privileged calls to district attorney's offices and other law enforcement agencies prejudices people in custody and contributes to the chilling effect over confidential legal communications.

146. Disclosure of privileged legal calls can prejudice people in custody in myriad ways. Prosecutors can hear people discuss defense strategy over the phone with their defense team, such as grand jury testimony or other information that can give the prosecution an advantage in plea negotiations. For example, if a prosecutor learns that a person in custody is unable to afford bail or rapidly decompensating and desperate to be released,¹⁷⁰ they may offer a plea deal to secure a conviction on a case where the complaining witness may be uncooperative and if the person had

¹⁶⁷ *Id.* ¶ 9.

¹⁶⁸ *Id.* (emphasis added)

¹⁶⁹ CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 13.

¹⁷⁰ CGSH Decl. Ex. 21, BDS Affirmation ¶ 26.

not been incarcerated, the case would have ultimately been dismissed. Law enforcement could also learn that witnesses are cooperating with defense investigators, which could lead them to try to cut off access to the witness and negatively affect the person in custody's ability to prepare a defense. Disclosure to third parties, such as co-defendants, causes similar harm to people's ability to defend against criminal charges.

147. It is difficult for defender organizations to fully assess the damage caused by the prior improper disclosure of these calls: the full scope of calls recorded and disseminated is unknown as DOC never shared results from a comprehensive review, and defenders were not able to obtain and review all the unlawfully produced recordings. Defenders are unable to quantify how often clients were prejudiced and determine the extent of the prejudice because that information is in the hands of the law enforcement and district attorney's offices.

148. Moreover, breaches of the attorney-client privilege cause a *per se* harm because they undermine the integrity of the legal system. The criminal legal system is predicated on the notion that attorneys can communicate confidentially with their clients.

149. This problem persists and actively makes those in custody fearful of having substantive communications with their defense teams over the phone. By way of a recent example, in October 2023, an NDS client held at Rikers called a NDS investigator on the phone and heard the pre-recorded admonishment at the beginning of the call. The client was very shaken, and now feels that he cannot speak freely with his legal team on the phone. When NDS followed up on the October 2023 incident with DOC, DOC confirmed that the number in question is on the DNR list and that a review of phone calls made to that number in the past 18 months indicated that no calls

had been recorded.¹⁷¹ DOC is unable to explain why the NDS client heard this admonishment when the NDS investigator's phone number is purportedly on the DNR list.

XI. DOC's Surveillance System Invades The Privacy Of People Attempting To Communicate With Family Members In DOC Custody And Further Isolates Incarcerated People

150. Family, loved ones, and friends are an irreplaceable source of support for people who are incarcerated and play an important role in the mental health of people in custody, including improving rates of recidivism.¹⁷² When BOC and DOC first began providing access to phones for people in DOC custody, the agencies emphasized the importance of unmonitored community communication for those detained.¹⁷³ DOC's project of employing Securus to collect, index and database not only call recordings and data, but also the biometric and financial data as well as associational networks of community members chills this much needed positive support from loved ones and friends. DOC's invasive surveillance regime undermines privacy, speech, and associational freedoms.

151. DOC surveillance regime has also caused harm to people in custody, including the named Petitioners Mr. Reid, Mr. Leon, and Mr. Scott. The chilling effect of DOC's surveillance

¹⁷¹ CGSH Decl. Ex. 26, NDS Affirmation

¹⁷² See, e.g., Don Adams and Joel Fischer, *The Effects of Prison Residents' Community Contacts on Recidivism Rates*, 22 CORRECTIVE & SOCIAL PSYCHIATRY & JOURNAL OF BEHAVIOR TECHNOLOGY, METHODS & THERAPY 4, 21-27 (1976); see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 6 (noting that jails began rolling out phone programs as a result of research on the benefits of community contact on incarcerated people).

¹⁷³ See, e.g., CGSH Decl. Ex. 20, Board of Correction, *Minutes of the Meeting of the Board of Correction* (June 10, 1974) ("It was noted in general how difficult it was for visitors to get to Rikers Island and, once there, to be cleared to go to the institutions. Also noted generally was the lack of inmates' access to telephones. Mr. Brickman urged that the Board's report should be strong in calling for the installation of telephones on Rikers Island as quickly as possible."); BOC, *Meeting Minutes* (Feb. 11, 1971) ("The Chairman then informed the Board that he would like its approval to announce publicly . . . an 'Agenda for Action,' . . . [that] would call on the community to show its good faith in helping to improve the conditions in the prisons. For example, the Telephone Company would be urged to expedite phone installations in the prisons."); BOC, *Meeting Minutes* (Oct. 30, 1970) ("Among the principal changes being worked on is phones so inmates can make unmonitored outside calls."); see also CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 6, 14.

practices has alienated them from their loved ones, damaging their mental health and disconnecting them from their community in an already stressful jail environment.

152. Mr. Reid utilized phone calls to remain connected with friends and family, which was an irreplaceable way to maintain his mental health while incarcerated.¹⁷⁴ However, as a result of DOC and Securus's recording and dissemination of calls, some of his closest friends refused to speak to him because they did not know how the recordings and their personal information would be used. Other friends and family still spoke with Mr. Reid, but refused to discuss personal topics. This surveillance system isolated Mr. Reid from his loved ones, which in turn harmed his mental health.¹⁷⁵

153. Mr. Leon depended on phone calls with friends and family to feel connected to the outside world and help manage his mental health symptoms. Friends and family were reluctant to speak to him over the phone because they were uncomfortable with having personal issues being recorded, and were fearful of what will be done with recordings of their calls or how they will be used. In turn, Mr. Leon felt like he could not express himself on these calls either. This left him entirely isolated while incarcerated.¹⁷⁶

154. The practice of recording phone calls also alienated Mr. Scott from his community. Most of Mr. Scott's friends and family told him they did not want to talk to him because they were afraid of being recorded and having their conversations turned over to law enforcement. This left him isolated while in custody.¹⁷⁷

155. Phone calls with family and loved ones are regularly turned over to prosecutors in criminal cases without a judicial subpoena or a showing that the conversations would be relevant.

¹⁷⁴ CGSH Decl. Ex. 1, Marcus Reid Affidavit ¶ 17.

¹⁷⁵ *Id.* ¶¶ 18-19.

¹⁷⁶ CGSH Decl. Ex. 3, Eric Leon Affidavit ¶ 15.

¹⁷⁷ CGSH Decl. Ex. 5, Tyrell Scott Affidavit ¶¶ 16-19.

Often such calls are deeply personal, ranging from intimate discussions of relationships, traumatic events either or both parties have experienced, and even reasons to live, if people in custody are struggling with suicidal ideation. All of these calls are recorded, indexed, databased and made available to prosecutors or other law enforcement for their review.

156. The experience of an NDS client who was in pre-trial detention for two years and was eventually acquitted following trial is a representative example:

- a. While he was detained, his attorneys learned that at least 1,500 of his phone calls with family and loved ones were recorded and turned over to prosecutors at the Manhattan DA's office. In addition to the recordings, there was a log of every call that he had made, which was turned over to prosecutors. These logs showed the phone numbers he was calling, including those of his friends and family. There were recordings from nearly every day he was incarcerated.¹⁷⁸ Not a single one of these recordings was used at his trial or probative of anything related to his charges.
- b. Phone calls were integral to his contact with his friends and family as well as his attorneys, and this contact was crucial to both his mental health and his safety.¹⁷⁹ Particularly, it allowed him to stay in touch with his minor children.
- c. After learning that his phone calls were recorded, the NDS client felt limited in how open he could be with family, friends and lawyers, on the phone, particularly with his school-aged daughter.¹⁸⁰ The fact that his phone calls were recorded to this extent disturbed him and discouraged him from using the phone, exacerbating the isolation he already experienced while in custody.¹⁸¹

157. Named Petitioners Ms. Nelson and Ms. De Freitas have been harmed by the blanket recording of calls from people in custody to anyone with whom they correspond, whether family members, friends, commercial contacts, or even civil and political group members. This violates their rights to privacy and alienates them from their loved ones.

158. Lillian Nelson

- a. Lillian Nelson is the mother of A.N., a woman who has been incarcerated in DOC custody multiple times since December 2020. Most recently, A.N.

¹⁷⁸ CGSH Decl. Ex. 26, Villasenor-Grant Affirmation, ¶¶ 22-24.

¹⁷⁹ *Id.* at ¶¶ 8, 16, 18.

¹⁸⁰ *Id.* ¶¶ 20-21.

¹⁸¹ *Id.*

was incarcerated from January 19, 2023, through April 12, 2023.¹⁸² She is currently held in DOCCS custody.

- b. Ms. Nelson's primary means of communication with her daughter is the telephone. They talk nearly every day. Ms. Nelson explained: "I have many serious health issues, I have another daughter with a disability, I juggle multiple jobs, and therefore it is difficult for me to physically visit my daughter when she is on Rikers Island. So phone calls are an essential way for us to stay connected and for me to provide support to her. I have no choice but to use the phone to stay in touch with her."¹⁸³
- c. By communicating over the phone, Ms. Nelson is able to provide emotional support as A.N. goes through heroin withdrawal while incarcerated. Ms. Nelson also learns about what A.N. needs and coordinates assistance. For example, she notifies A.N.'s lawyer and social worker when she is not getting medication prescribed for her mental and physical health issues.
- d. Ms. Nelson's privacy has been violated by DOC's practice of recording and turning over their phone calls with A.N. to law enforcement. Ms. Nelson stated: "I do not want all of my private, personal calls between myself and my daughter to be recorded and I don't understand why they have to be recorded. It is an unfair invasion of mine and my family's privacy, and I felt that I had no real choice in the matter, because I needed to use the phone to stay in contact with my daughter and to make sure she was alive and safe."¹⁸⁴

159. Samiyah De Freitas

- a. Samiyah De Freitas is the niece of A.N.
- b. While A.N. has been incarcerated, Ms. De Freitas and A.N. have used the phone to communicate regularly. Ms. De Freitas's aunt struggles with drug addiction and numerous mental health issues. Along with her mother, Ms. De Freitas is "[A.N.'s] primary support system."¹⁸⁵
- c. Ms. De Freitas said: "Our phone calls were personal in nature, about her struggles, her ups and downs, her addiction recovery, her relationships, her hopes for her future."
- d. By recording and disseminating these phone calls, DOC compromised some of the most intimate, personal parts of Ms. De Freitas's life.¹⁸⁶

¹⁸² CGSH Decl. Ex. 7, Lillian Nelson Affidavit ¶ 3.

¹⁸³ *Id.* ¶ 5.

¹⁸⁴ *Id.* ¶ 11.

¹⁸⁵ CGSH Decl. Ex. 9, Samiyah De Freitas Affidavit ¶ 5.

¹⁸⁶ *Id.*

- e. Nevertheless, Ms. De Freitas surrendered her privacy to maintain ties with A.N. “Although it feels like a huge violation of my privacy, I feel I have no other choice but to use the phone so that I can remain in contact with my aunt. It is difficult for me to physically visit her regularly, because of my school and other obligations.”

160. The blanket recording of calls between people in custody and their community has isolated people in custody from their loved ones and invaded the community members’ rights to privacy.

XII. DOC’s Surveillance System Has Not Made Rikers Island Safer

161. To justify the harm caused by its mass surveillance system, DOC and other City officials disingenuously cabin discussion to focus on only one element of DOC’s broad surveillance apparatus—phone calls. They claim that “monitoring” the phone system enables jail officials to identify potential sources of contraband and safety risks within the jails.¹⁸⁷ But as described above, the DOC surveillance system is not a benign and old-fashioned system of tape recorders and old-school wiretapping conducted only after a particularized and articulable level of suspicion is established.

162. The original purpose for telephones installation in jails was to maintain community ties between incarcerated people and their loved ones, friends, and support systems, because those ties improved public safety outcomes.¹⁸⁸ On the back of a nebulous fear of “contraband” and “safety risks,” DOC has instead weaponized a tool meant for community connection in ways that undermine the very purpose for phones in jails, as well communities’ constitutional rights. Without lawful authority or public oversight, DOC and its contractor replaced simple phone service with a mass community surveillance system that extracts, indexes, and databases biometric

¹⁸⁷ CGSH Decl. Ex. 38, DOI Report at 1.; *see also* Press Release, Jocelyn E. Strauber, Commissioner, The City of New York Department of Investigation, Strauber Statement on DOC and Securus Investigation, 1 (May 4, 2023), <https://www.nyc.gov/assets/doi/press-releases/2023/May/22SecurusTechRpt.Release.05.04.2023.pdf>.

¹⁸⁸ CGSH Decl. Ex. 22, Vasquez Affirmation ¶¶ 6, 14.

and associational information from people in custody *and* the people who communicate with them, while also universally recording, indexing and databasing all forms of community communication.¹⁸⁹ The system extends beyond call-related data collection to also collect additional personal data from community members who are connected to people in custody, including information like financial details and home addresses. What's more, they built this system without adequate safeguards in place, including for protecting privileged communications.

163. There is no rational jail security basis for this mass surveillance system. In light of the breadth of data it collects and the people it targets, it cannot be called a jail safety tool as it functions as a community surveillance tool. Under DOC's surveillance system, people who are in community with those in pre-trial detention have their constitutional protections illegally diminished: whether they are family and friends or business, educational, religious, medical, or mental health contacts, or members of a legal team.

164. Even on its own disingenuous terms, DOC's jail security rationale is not borne out by the facts. DOC officials are reviewing only a fraction of the millions of recorded phone calls. In just a two-year period, from January 1, 2020 through January 1, 2022, DOC records indicate that at least 17,977,510 completed phone calls were recorded.¹⁹⁰ Within that same time period, DOC employees listened to calls 305,381 times, which includes repeated listening to the same recorded phone call.¹⁹¹ This indicates that within a two-year period, less than 1.7% of phone call recordings were accessed by DOC officials.

165. Since the beginning of DOC's surveillance system, phone call recordings have been used almost exclusively by prosecutors to prosecute the criminal cases for which people are held

¹⁸⁹ *Id.* ¶¶ 30-32, 35-36, 95, 100-01.

¹⁹⁰ CGSH Decl. Ex. 36, Letter from DOC Record Access Officer to Elizabeth Vasquez, re: DOC Initial Response to FOIL 22FR1426 (May 25, 2022).

¹⁹¹ *Id.*

in pre-trial detention, rather than by DOC to promote safety in the jails.¹⁹² For example, directly after implementation of the recording amendment, DOC requested 195 call recordings between September 2008 and March 2009. In the same time period, District Attorney's Offices requested almost 14 times as many call recordings, totaling 2,707 calls.¹⁹³

166. This same disproportionality exists today: recorded phone calls from incarcerated people are seldom used for assessing jail safety concerns but are routinely provided to prosecutors for use in criminal cases when the person they are prosecuting is detained.

167. As DOC Commissioner Martin Horn reminded the BOC in the March 2009 meeting, "it was the District Attorney's Offices that most strongly supported the amendment to permit taping phone calls and that the DAs say the tapes promote public safety."¹⁹⁴

168. The original purpose for telephones in jails was to maintain community ties because those ties demonstrably improved public safety outcomes. In direct contradiction to purported public safety benefits, DOC's surveillance system is burdening and disrupting community connections, and by severing community ties represents a *cost* to public safety.

169. It is clear that DOC's surveillance regime has not improved the administration of New York City's jails. In response to a FOIL request, DOC was unable to provide any data or records about instances in which listening to the calls of people in custody led to the interception of contraband, the disruption of smuggling networks, or the prevention of threatened violence

¹⁹² CGSH Decl. Ex. 22, Vasquez Affirmation ¶ 94.

¹⁹³ *Id.*

¹⁹⁴ NYC BOARD OF CORRECTIONS, *Board of Correction Meeting Minutes* (March 12, 2009), [https://www.nyc.gov/assets/boc/downloads/pdf/BOCMinutes%20\(3.12.09\).pdf](https://www.nyc.gov/assets/boc/downloads/pdf/BOCMinutes%20(3.12.09).pdf).

within DOC's facilities.¹⁹⁵ Instead, levels of administrative dysfunction and institutional violence are at an all-time high.¹⁹⁶

XIII. DOC Violated Its Own Procurement Rules By Renewing And Expanding Its Contract With Securus

170. DOC is required to abide by renewal procedures promulgated under the Procurement Policy Board Rules ("PPB Rules"), yet they failed to follow those rules with respect to Securus's contract. The renewal procedures in PPB Rule require an assessment and monitoring of the vendor's performance during a prior contract period, as well as either a public hearing to elicit information concerning the vendor's performance or an explanation of why a public hearing was not held. *See* PPB §§ 4-04(c) and 4-01(b).

171. DOC did not assess Securus's performance during the prior five-year contract period before exercising its five renewal options each year starting in 2019, 2020, 2021 and 2022. Further, no public hearing was conducted to elicit information concerning the vendor's performance and no explanation of the failure to conduct a public hearing was given. The PPB process would have shed further light on Securus's performance as a vendor, rather than allowing for automatic renewals by DOC.

¹⁹⁵ CGSH Decl. Ex. 36, Letter from DOC Record Access Officer to Elizabeth Vasquez, re: DOC Initial Response to FOIL 22FR1426 (May 25, 2022).

¹⁹⁶ *See, e.g.,* Steve J. Martin, *Status Report on DOC's Action Plan by the Nunez Independent Monitor*, New York City, 1 (Oct. 5, 2023), https://www.nyc.gov/assets/doc/downloads/Nunez/Status_Report_Filed_October_5_2023.pdf ("The jails remain dangerous and unsafe, characterized by a pervasive, imminent risk of harm to both people in custody and staff. The Monitoring Team is disturbed by evidence that suggests the alarming conditions reported to the Court during the August 10, 2023 Status Conference have only worsened."); Steve J. Martin et al., *Special Report by the Nunez Independent Monitor*, New York City, 1 (Nov. 30, 2023), https://www.nyc.gov/assets/doc/downloads/Nunez/Special_Report_Filed_November_30_2023.pdf ("Interference, obfuscation, and deflection have become normalized, and yet another imminent leadership transition is expected to further impact an already unstable, erratic, and chaotic environment. This has exacerbated the Monitoring Team's concerns about the elevated risk of harm faced by those in custody and the staff who work in the jails on a daily basis."); Steve J. Martin et al., *Status Report by the Nunez Independent Monitor*, New York City, 1 (Dec. 22, 2023), <https://www.nyc.gov/assets/doc/downloads/Nunez/Monitor-Report-December-22-2023.pdf> ("The grave conditions of the jails have been well documented throughout the year and no significant changes in practice have occurred.").

172. There are strong grounds for a hearing in this situation, even beyond the requirement. DOC itself claimed the privilege breaches were caused by Securus's ineptitude. At the March 2021 CCJ Hearing, the DOC representative testified that the privileged calls were recorded due to a Securus employee's "human error," *see supra* Section VII. And then Chairman of the CCJ Keith Powers noted that the fact that DOC claims that breaches of confidential communication resulted from a Securus employee not knowing how to operate Securus's own software raises questions about whether Securus should continue to provide services in New York City jails.¹⁹⁷

173. Despite the constitutional violations, errors, and inadequate safeguards, DOC exercised its renewal option on April 1, 2021, registering that renewal on October 27, 2021.¹⁹⁸ In DOC's letter to Securus announcing the renewal of the contract on August 6, 2021, Patricia Lyons, DOC Deputy Commissioner, tersely stated, "the Department will exercise its renewal option."¹⁹⁹ There was no public assessment of the widespread, well-documented problems Securus has had as a vendor, both for DOC and in other jurisdictions. This violates PPB Rule 4-04(c)(10), which calls for "an assessment of vendor's performance during the prior contract period ... and a statement ... of whether the provider's performance for the prior contract period was determined to be in compliance with the requirements of the contract."

174. Not only has DOC continued to renew its contract with Securus every year, DOC recently expanded its business relationship with Securus to cover tablet services for people in DOC

¹⁹⁷ CGSH Decl. Ex. 32, March 22, 2021 CCJ Preliminary Budget Hearing Minutes.

¹⁹⁸ This 2021 renewal option was only extended through December 31, 2021. A subsequent renewal ran from January 1, 2022 to December 31, 2022. SECURUS TECHNOLOGIES, Comptroller's CheckbookNYC, https://www.checkbooknyc.com/contracts_landing/status/A/yeartype/B/year/125?expandBottomContURL=/contract_details/agid/8272979/doctype/CT1.

¹⁹⁹ CGSH Decl. Ex. 24, [Letter Re. Renewal Agreement to PIN 072201315MIS/E-PIN 07219P0148001R002 Inmate Phone System for the Department of Corrections](#) (Aug. 6, 2021).

custody, which accounts for the increased expenditures of \$5.4 million, up from the prior contract extension amount of \$3 million.²⁰⁰

175. The existing tablet contract with American Prison Data Systems (“APDS”) ended June 30, 2022 and DOC did not explain why it was not extended.²⁰¹ Shortly thereafter, DOC announced that the new tablet provider was Securus.²⁰² There was no competitive bidding process for this tablet program contract.

176. In the fall of 2022, DOC also tried to expand Securus’s role in city jails to include the scanning of physical mail sent to incarcerated people, which would involve Securus digitizing the contents, photos, and identifying information in the documents.²⁰³

177. This year, the contract expires and DOC will be required to issue a new Request for Proposal for phone and tablet services in New York City jails.²⁰⁴

178. Comptroller Brad Lander recently rejected a different contract with Securus to provide entertainment to people in DOC custody via tablets for similar violations of the PPB Rules, including that DOC did not provide sufficient oversight to Securus, particularly given its “history

²⁰⁰ SECURUS TECHNOLOGIES, Comptroller’s CheckbookNYC, https://www.checkbooknyc.com/contracts_landing/status/A/yeartype/B/year/125?expandBottomContURL=/contract_details/agid/8272979/doctype/CT1.

²⁰¹ Matt Katz, *Incarcerated New Yorkers lose access to free electronic tablets, a critical lifeline*, GOTHAMIST (Nov. 9, 2022), <https://gothamist.com/news/incarcerated-new-yorkers-lose-access-to-free-electronic-tablets-a-critical-lifeline>.

²⁰² Press Release, The New York City Department of Correction, *DOC Officially Launches New Tablet Program for All People in Custody* (Dec. 13, 2022), <https://www.nyc.gov/site/doc/media/tablet-program.page>.

²⁰³ See Letter from Julio Medina, Acting Chair of NYC BOC, to Louis A. Molina, Commissioner of NYC DOC, (Nov. 14, 2022), <https://www.nyc.gov/assets/boc/downloads/pdf/Meetings/2022/November/mail-variance-request.pdf>; Reuven Blau, *City Jails Move to Digitize Mail, Which Led Other Lockups into Legal Fights*, THE CITY (Nov. 4, 2022), <https://www.thecity.nyc/2022/11/4/23439318/city-jails-could-digitize-mail-other-lockups-legal-fights>. DOC ultimately withdraw its request for a variance from the BOC that would allow them to proceed with the mail scanning policy.

²⁰⁴ CGSH Decl. Ex. 38, DOI Report at 3.

of data privacy violations” and that the contract was “inappropriately sole-sourced [and] no-bid.”²⁰⁵

179. DOC’s plans to expand Securus’s surveillance and communication tools in its jails without assessment of its existing contracts and after Securus facilitated the breaches of confidential communications demonstrates DOC’s indifference to protecting the privacy and constitutional rights of the people in its custody.

CLASS ACTION ALLEGATIONS

180. Petitioners bring this Article 78 mandamus to compel as a class action pursuant to Article 9 of the C.P.L.R.²⁰⁶

181. Named Petitioners Mr. Reid, Mr. Leon, and Mr. Scott seek to represent themselves and the putative Incarcerated Petitioners Class, consisting of all past, current, and future people incarcerated in DOC facilities who have had or fear they will have their phone calls recorded, including their privileged attorney-client phone calls, based on Respondent’s failure to comply with its ministerial duties and violation of Petitioners’ state and federal constitutional rights.

182. Named Petitioners Ms. Nelson and Ms. De Freitas bring this action individually and on behalf of the putative Community Members Class, consisting of individuals who have communicated or will communicate with people in custody using the Securus NextGen SCP and in doing so have had their state and federal constitutional rights violated.

183. All five requirements of C.P.L.R. Section 901(a) are met by the proposed classes:
- a. *Numerosity*: Numerosity is met when “joinder of all [class] members [...] is impracticable.” C.P.L.R. Section 901(a)(1). Here, joinder of all putative class

²⁰⁵ Graham Rayman, *NYC Comptroller Nixes Contract for Rikers Jails Detainee Video Vendor*, NYDAILY NEWS (Feb. 22, 2024), <https://www.nydailynews.com/2024/02/22/nyc-comptroller-brad-lander-nixes-contract-for-rikers-jails-detainee-video-vendor/>.

²⁰⁶ Petitioners hereby incorporate by reference his Petition, as if fully set forth herein, the Memorandum of Law in Support of Petitioners’ Article 78 Mandamus to Compel Petition and Motion for Class Certification, including all facts alleged and argument contained therein.

members is impracticable because of the size of the classes and contextual factors. *See Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382, 399 (2014).

- **Incarcerated Petitioners Class:** Approximately 6,200 potential class members are incarcerated in the custody of DOC at the time of filing. Upon information and belief, all or a large percentage of current and formerly incarcerated people in DOC custody are class members because the Securus NextGen SCP is the only method for making telephone calls out of the jails. Additional class members will enter Respondent's custody because the incarcerated population is transient.
 - **Community Members Class:** As there are approximately [6,200] people incarcerated in the custody of DOC at the time of filing, upon information and belief, thousands of community members who use the Securus NextGen SCP to speak with people in DOC custody are class members, as that is the only method for receiving telephone calls from incarcerated people. Additional people in the community will become class members because the incarcerated population is transient.
- b. *Commonality:* Commonality is met when there are “questions of law or fact common to the class which predominate over any questions affecting only individual members.” C.P.L.R. Section 901(a)(2). The predominant questions here are whether DOC violated incarcerated people's statutory and constitutional rights by illegally recording their attorney-client privileged phone calls and all class members' state and federal constitutional rights by recording all other calls and extracting their personal, financial, and biometric data. In particular, questions of law and fact common to the class members include: (1) whether DOC violated its duties not to record attorney-client communications; (2) whether DOC violated incarcerated persons' constitutional rights under the Fourth Amendment by unreasonably searching and seizing attorney-client communications through recording them; and (3) whether DOC violated the statutory and constitutional rights of both community members and incarcerated petitioners by capturing their personal, financial and biometric data without consent.
- c. *Typicality:* Typicality is satisfied where, “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” C.P.L.R. Section 901(a)(3). The claims of the Petitioners are typical of the claims of the putative class members because they all arise from Respondent's failure to discharge their duties to provide a telephone service consistent with its ministerial duties and the federal and state constitutions. The same unlawful conduct is directed at and affects—or will affect—both the named Petitioners and the class sought to be represented.

- d. *Adequacy of Representation*: Named Petitioners will protect the interests of the putative classes fairly and adequately. *See* C.P.L.R. Section 901(a)(4). Named Petitioners have faced significant harm as a result of DOC's failure to comply with the Rules of the City of New York, federal wiretapping and state eavesdropping laws, New York Civil Rights Law, Procurement Policy Board Rules, and the state and federal constitutions. Petitioners have a strong interest in vigorously pursuing relief on behalf of the proposed classes, and their interests are not antagonistic to those of other class members. Additionally, putative class counsel has many years of combined experience in complex civil litigation, civil rights, and class action litigation, and as such, are qualified, experienced, and generally able to conduct the litigation.
- e. *Superiority*: A class action is superior to other available methods for the fair and efficient adjudication of this controversy. C.P.L.R. Section 901(a)(5). Class action treatment will prevent the imposition of undue financial, administrative, and procedural burdens on the parties and the Court, which individual litigation on these claims would impose. Counsel anticipates no difficulty in the management of this Petition as a class action.

JURISDICTION AND VENUE

184. This Court has jurisdiction over this petition pursuant to CPLR Section 7803(1) because Petitioners seek an order to compel Respondent to perform duties that it has failed to perform.

185. Venue is proper in this Court pursuant to CPLR Sections 7804(b) and 506(b).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Comply With Its Duties To Refrain From Illegally Monitoring Attorney-Client Communication In Violation Of The Rules Of The City Of New York

(On Behalf Of The Incarcerated Petitioners Class)

186. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

187. The Rules of the City of New York ("R.C.N.Y.") provide that "[p]eople in custody [of the DOC] are entitled to access to courts, attorneys, legal assistants and legal materials." 40

R.C.N.Y. § 1-10(h) provides that “[t]elephone calls to ... attorneys ... shall not be listened or monitored.” Further, 40 R.C.N.Y. § 1-08(c)(5) stipulates that, “[t]elephone communications between people in custody and attorneys shall be kept confidential and protected, in accordance with the provisions of 40 RCNY § 1-10.” This constitutes a mandatory, nondiscretionary duty to not listen to, monitor, record, or disseminate attorney-client telephone calls. DOC must abide by this duty.

188. DOC refuses to comply with its nondiscretionary duty to not listen to or monitor attorney-client telephone calls as specified in 40 R.C.N.Y. §§ 1-10(h) and 1-08(c)(5).

189. DOC’s practice of recording privileged conversations and disseminating them to law enforcement is a longstanding prima facie violation of 40 R.C.N.Y. §§ 1-10(h) and 1-08(c)(5), which violates DOC’s mandatory duty to ensure the confidentiality of privileged legal calls.

SECOND CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Refrain From Violating The Right To Counsel of People In Custody

(On Behalf Of The Incarcerated Petitioners Class)

190. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

191. The right to confidential communication with one’s attorney is an essential component of the right to counsel protected by both the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the New York State Constitution.

192. DOC not only recorded privileged communications, but also disseminated those recordings to law enforcement, despite repeated objections from multiple public defender organizations. Even after the recordings were revealed, DOC did not sequester or claw back the privileged communications. DOC enabled this intrusion by the government into the confidential

relationship between a defendant and their defense team, which is a violation of the Sixth Amendment right to counsel.

193. As a result of these disclosures, people in custody and their defense teams are unable to rely on DOC to ensure the confidentiality of their communications.

194. Without confidential communications, the attorney-client relationship is harmed, which further violates incarcerated Petitioners' right to counsel.

THIRD CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Refrain From Violating Incarcerated Peoples' Constitutional Rights In Their Communications With Their Legal Teams

(On Behalf Of The Incarcerated Petitioners Class)

195. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

196. The Government cannot intrude on the rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the New York State Constitution without obtaining a warrant or otherwise satisfying a warrant exception.

197. DOC recorded privileged legal conversations and then disseminated those recordings to prosecutors and law enforcement, thereby violating Plaintiffs' clearly established rights to be free of unreasonable searches and seizures, under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the New York State Constitution.

198. This search is unreasonable, as there is no justification that would render the recording of attorney-client conversations reasonable.

199. By monitoring and recording privileged phone calls between people in custody and their legal teams, DOC is violating the constitutional rights of incarcerated Petitioners.

FOURTH CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Cease Intercepting Electronic Communications In Violation Of The Statutory Rights Of Incarcerated People

(On Behalf Of The Incarcerated Petitioners Class)

200. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

201. DOC has violated both federal wiretapping and state eavesdropping laws by unlawfully recording privileged legal conversations, and then disseminating those recordings to others. The Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. § 2511, prohibits the intentional, nonconsensual interception of electronic communications. New York State law, N.Y. Penal L. Art § 250.05, criminalizes the intentional, nonconsensual recording of telephonic communication. New York Penal Law further criminalizes both the failure to report when unlawful wiretapping occurs and the knowing nonconsensual acquisition of the contents and nature of private telephonic communications. N.Y. Penal L. Art. 250, §§ 250.15, 250.25.

202. DOC intentionally intercepted attorney-client phone communications. Not only was this interception nonconsensual, but it was also specifically prohibited by law.

203. DOC failed to report this unlawful wiretapping activity, and knowingly, repeatedly, and systematically obtained the contents and nature of legally protected communications.

204. This conduct was not merely illegal, violating both Federal wiretapping and State eavesdropping laws, but was also criminal under New York law.

205. As DOC has been unable to ensure that privileged communications are not unlawfully intercepted and disseminated, it must cease recording all phone calls.

FIFTH CAUSE OF ACTION

**Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Stop Violating
Community Members' Right To Be Free From Unreasonable Searches And Seizures
And To Reasonable Expectation of Privacy In Their Data**

(On Behalf Of The Community Members Class)

206. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

207. Under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the New York State Constitution, community members' personal, associational, financial, and biometric data are protected from governmental search and seizure unless a warrant is obtained or an exception to the warrant requirement is met.

208. DOC's surveillance system extracts sensitive data from community members who speak with people in custody or send money to a person in custody's commissary account, resulting in deeply revealing personal information being extracted, databased, and shared with other law enforcement.

209. DOC's surveillance system collects voice data from calls, creates voiceprints from that data, and permits that voiceprint to be used to track and identify community members who receive calls from people in custody.

210. When a community member adds money to the commissary account of a person in custody, the community member's financial information is captured by DOC's surveillance system.

211. None of this data collection is authorized by state, local, or administrative law, contemplated by Board of Correction minimum standards, permitted by a warrant, or excepted from the warrant requirement by consent or exigent circumstances.

212. Community members are not given notice that their personal, biometric, and financial information is being collected, and the only way community members could stop their personal data from being collected would be to stop associating and relating to people in custody.

213. DOC's community surveillance is illegal and unconstitutional.

SIXTH CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Stop Violating The Civil Rights Of Community Members

(On Behalf Of The Incarcerated Petitioner Class And Community Members Class)

214. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

215. New York Civil Rights Law § 51, allows an action for “[a]ny person whose ... voice is used within this state ... for purposes of trade without [their] written consent.”

216. Through its contractual relationship with Securus, DOC receives preferential rates and free add-on services and, in turn, it supplies Securus access to voice data, as well as additional personal data, from incarcerated people and the community members they have contact with.

217. This voice data is used for purposes of trade, as DOC's surveillance system collects and databases voice recordings, generates voiceprints from those voice recordings, enables Securus to improve its machine-learning products with that voice data, and makes that voice data available for sale through Securus's THREADS program in New York and nationwide.

218. Petitioners have not been given notice of this voiceprint collection and have not provided consent, written or otherwise, for the extraction of their voiceprint or for its use in trade. Thus, DOC has violated Section 51, by recording voices in New York State without written consent for pecuniary gain.

SEVENTH CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Stop Violating The First Amendment Rights Of People In Custody And Community Members

(On Behalf Of The Incarcerated Petitioners Class And The Community Members Class)

219. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

220. The First and Fourteenth Amendments of the United States Constitution and Article I, Sections 8 and 9 of the New York State Constitution protect the right to freedom of speech, expression, and association.

221. The United States Supreme Court has recognized “the vital relationship between [the] freedom to associate and privacy in one’s associations.” *NAACP v. Alabama Patterson*, 357 U.S. 449, 462 (1958).

222. In addition to protecting associational privacy, the First Amendment also protects freedom of speech and expression. Speech is protected even when it may lead to disturbance or dispute. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

223. DOC’s community surveillance program infringes on these rights. By targeting community members for biometric and other personal data collection when they associate with people in custody, by leveraging that communication to build social network maps and reveal private association, and by blanketly recording all communication between people in custody and community members, DOC creates a chilling effect and unreasonably burdens their rights of association, associational privacy, speech, and expression.

224. There is no valid, rational connection between the policies that created and maintain this broad and illegal surveillance network, and a legitimate government interest in jail security; nor are these policies narrowly-tailored in any way.

225. DOC's broad and unconsidered surveillance policies are not reasonably related to any penological justification and violate the constitutional rights of both community members and people in custody.

EIGHTH CAUSE OF ACTION

Mandamus To Compel DOC Pursuant To CPLR Section 7803(1) To Comply With Its Duty To Adhere To The Procurement Policy Board Rules And To Terminate Its Contract With Securus

(On Behalf Of The Incarcerated Petitioners Class And The Community Members Class)

226. Petitioners incorporate by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

227. Section 4-04(c) of the PPB Rules lists the documentation required for the Agency Chief Contracting Officer ("ACCO") to issue a recommendation for a contract renewal, including: "an assessment of vendor's performance ... and a statement ... of whether the provider's performance for the prior contract period was determined to be in compliance with the requirements of the contract." It also requires either a public hearing or "if a public hearing was not held, an explanation of why a public hearing was not held." This constitutes a mandatory, nondiscretionary duty to assess the vendor's performance and either hold a public hearing or explain why one was not held.

228. DOC's renewal of Securus's contract violated PBB Rules. The ACCO of DOC did not issue recommendations for renewal. There were no public hearings for the renewal process, nor was there an explanation of why such public hearings did not occur. No monitoring, evaluation, or assessment of Securus's performance—which resulted in the systemic breach of attorney-client confidentiality—was performed.

229. DOC failed to annually monitor Securus’s performance “on an ongoing basis and sufficiently far in advance of the end of the contract term” to determine whether DOC should have renewed the contract with Securus as required by Section 4-01(b) of the PPB Rules. Instead, DOC continued to renew—and even expand—its contract with Securus without a performance review, in direct violation of this provision.

REQUEST FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court:

230. Certify this Article 78 petition as a class action;
231. Issue an order of mandamus compelling Respondent to comply with its nondiscretionary duties found in the Rules of the City of New York and its obligations under the United States and New York Constitutions to stop all recordings of privileged legal conversations and immediately enjoin all telephonic recording activities;
232. Issue an order of mandamus compelling Respondent to comply with the Procurement Policy Board Rules as to its contractual relationship with Securus Technologies, including terminating the contract with Securus;
233. Appoint a monitor to ensure Respondent complies with such nondiscretionary duties as compelled by its mandamus order;
234. Grant such other relief as the Court may deem just and proper.

Dated: April 15, 2024
New York, New York

CLEARY GOTTlieb STEEN & HAMILTON

/s/Rishi N. Zutshi

Rishi N. Zutshi
Sean Larner
Isabella M. Riishojgaard
Michael Obuchi
One Liberty Plaza
New York, New York 10006
T: (212) 225-2085

THE BRONX DEFENDERS

Ilona Coleman
Ann Matthews
Meghna Philip
360 East 161st Street
Bronx, New York 10451

BROOKLYN DEFENDER SERVICES

S. Lucas Marquez
Elizabeth Daniel Vasquez
Alyssa Briody
Kevin Siegel
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
T: (718) 254-0700

**NEW YORK COUNTY DEFENDER
SERVICES**

Sergio de la Pava
Rebecca Phipps
100 William Street, 20th Floor
New York, NY 10038
T: (212) 803-5100

Attorneys For Petitioners