

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 20CVS500110

NORTH CAROLINA STATE
CONFERENCE OF THE NAACP, *et al.*,

Plaintiff-Petitioners,

v.

ROY COOPER, in his official capacity
as Governor of North Carolina,
et al.,

Defendant-Respondents.

**PLAINTIFFS' SUBMISSION FOR
DECEMBER 4, 2020 STATUS REVIEW HEARING**

NOW COME Plaintiff-Petitioners ("Plaintiffs"), by and through counsel, and respectfully submit for the Court's consideration the following information prior to the December 4, 2020 Status Review Hearing.

In a November 30, 2020 email the Court invited the parties to provide, in advance of the December 4, 2020 Status Review Hearing, responses to several questions, including questions related to the recent North Carolina Department of Public Safety prison closures. While most of the Court's questions are more appropriately responded to by Defendants, Plaintiffs offer this submission in response to the question:

What limitations, if any, do the parties contend the Court has in modifying the existing Preliminary Injunction Order without making findings of contempt by Defendants?

A preliminary injunction is a matter generally left to the sound discretion of the trial court. *In re Albright*, 278 N.C. 664, 669, 180 S.E.2d 798, 802 (1971). Neither the North Carolina Rules of Civil Procedure nor case law impose any requirement that a court must first make a finding of contempt before it can modify a preliminary injunction that it has entered. For example, North Carolina Rule of Civil Procedure 62(c) explicitly authorizes a trial court “in its discretion to “suspend, modify, restore, or grant an injunction” during the pendency of an interlocutory appeal from a preliminary injunction, and does not require a contempt finding before modification is permitted. N.C. R. Civ. P. 62(c); *cf.* N.C. Gen. Stat. §1-498 (“Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the superior court division may be heard by the judge having jurisdiction[.]”); *see also* 42 AM JUR 2d INJUNCTIONS §284 (“A preliminary injunction is an interlocutory order which the issuing court may modify or vacate so long as the court has jurisdiction over the underlying action[.]” (citation omitted)).

The only limitation on a court’s authority to modify a preliminary injunction that the undersigned could find in case law was that a superior court judge may modify a preliminary injunction entered by a *different* superior court judge only upon a finding of “changed circumstances.” *See Wachovia Bank, Nat. Ass’n v. Harbinger Capital Partners Master Fund I, Ltd.*, 201 N.C. App. 507, 516-17, 687 S.E.2d 487, 493 (2009). This limitation is based on the principle that “no appeal lies

from one Superior Court judge to another,” and the Court of Appeals has explained this limitation does *not* apply where the superior court judge who modified the preliminary injunction did so as the presiding judge in the case, after the judge who had entered the original preliminary injunction was recused. *Id.* at 516-17, 519, 687 S.E.2d at 493, 495. Thus, the law imposes few restrictions, and requires no finding of contempt, before a trial court can modify a preliminary injunction.

Here, this Court continues to have jurisdiction over this case, and stated in its original Preliminary Injunction that it would “establish such other orders as necessary.” Prelim. Inj. (June 16, 2020) at 4. The Court has also heard from the parties, both during hearings and in writing, regarding Plaintiffs’ requested remedy of release of vulnerable incarcerated people and of appointment of a Special Master in this case, and the parties have had an opportunity to provide the Court with proposed candidates for Special Master. *See, e.g.*, Pls’ Supp. Br. TRO/PI (June 2, 2020) at 22-23; Defs’ Response to May 1 Order (May 8, 2020) at 5-9; Pls’ Submission Pursuant to May 1 Order (May 8, 2020) at 3-4.

As the North Carolina Supreme Court has explained, “[t]rial courts have broad discretion to fashion equitable remedies to protect innocent parties when injustice would otherwise result,” which “includes the power to grant, deny, limit, or shape relief as necessary to achieve equitable results.” *Kinlaw v. Harris*, 364 N.C. 528, 532-33, 702 S.E.2d 294, 297 (2010) (internal quotation marks and citation omitted). Where individual constitutional rights are threatened, the state judiciary’s

“obligation to protect the fundamental rights of individuals is as old as the State.”
Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)

As such, “when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004) (citations omitted). Any statute, regulation, or policy that prevents the Court from adequate remedy is invalid and must be ignored. *See Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 357.

A court’s remedy must be proportional in scope and substance to the constitutional injury. *See Brown v. Plata*, 563 U.S. 494, 527 (2011) (affirming statewide prison population cap when lesser remedies could not adequately address unconstitutional overcrowding). Applying these principles, a California state court recently ordered officials at San Quentin prison (at which 28 incarcerated people died of COVID-19 during a large-scale outbreak) to reduce the prison population to 50 percent of its June 2020 population. *In re Von Staich*, 2020 Cal. App. LEXIS 974, at *84 (Cal. Ct. App. Oct. 20, 2020).

In this case, the Court has given Defendants generous opportunity over the course of the past six months to implement its orders and remedy the ongoing constitutional violation challenged here. Defendants have squandered that

opportunity and done shockingly little to manage the prison population during this pandemic. Rather, as outlined in Plaintiffs' most recent supplemental filing, in recent weeks Defendants have engaged in several prison closures and mass inter-prison transfers, squeezing their large prison population into even fewer prisons and less space. *See* Pls' Supp. Filing (Nov. 30, 2020) at 2-4. The dangerousness of this practice is compounded by the approximate 1,000 people waiting in a backlog in local jails whom Defendants plan to admit into their prisons in the coming weeks, an alarming fact that Commissioner Ishee reported to the North Carolina Senate Select Committee on Prison Safety earlier this week.¹

These developments will almost certainly result in more COVID-19 outbreaks and more human suffering, illness, and death. As Plaintiffs noted in their November 13, 2020 submission to the Court, Defendants have reported in discovery that they currently hold in their custody **nearly 14,000 people who have at least one CDC risk factor, and over 1,000 people who are 65 years or older.** Pls' Reply (Nov. 13, 2020) at 3. Yet, Defendants currently have placed a mere 357 people on Extended Limits of Confinement ("ELC") status² —the sole vehicle for population management that Defendants have chosen to use. In fact, as Defendants reported in their recent filings, as of October 12, 2020, only 3,723 of the over 30,000 people in

¹ *Presentation by Commissioner Todd Ishee, Commissioner of Prisons Before the S. Select Committee on Prison Safety, 2019-20 Leg. Sess. (Nov. 30, 2020 9:00 AM).*

² N.C. Dep't of Public Safety ("NC DPS"), *FAQs on Serving Sentences Outside a Prison: Offenders impacted by ELC*, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19#offenders-impacted-by-elc> (last visited Dec. 3, 2020 10:50 AM).

their custody are even eligible to be *considered* for ELC, and only about half of those candidates have been reviewed. *See* Defs' Update (Oct. 13, 2020) at 9. This is not a population management plan. Meanwhile, the virus continues to spread (there are currently 18 prisons with active COVID-19 outbreaks),³ and the death toll continues to rise (at least 24 incarcerated people and 6 prison staff have died preventable deaths from COVID-19).⁴ The situation is dire and the darkest days of the pandemic remain ahead of us. Relief is needed to prevent further irreparable harm.

Plaintiffs respectfully reiterate their request that the Court order the release of incarcerated people. Those who have at least one CDC risk factor, or who are over 65 years, or who have been approved to be on work release (which is a form of ELC), and thus deemed by Defendants to be "safe" to be in the community, are obvious categories of people who should be released immediately. In addition and in the alternative, the Court should appoint a Special Master to oversee management of the prison population during the pandemic, as well as Defendants' compliance with the Court's other orders, including adequate testing, safe transfers, and effective medical isolation, quarantine, and care. For example, a Special Master could make recommendations for expanding categories for release and recommendations

³ *See* NC DPS, *Offender-Related COVID-19 Data - updated daily at 3 p.m.*, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19> (last visited Dec. 3, 2020 10:57 AM).

⁴ ND DPS, *Tests Performed/Positives/Hospitalizations/Deaths*, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19#tests-performed/positives/hospitalizations/deaths> (last visited Dec. 3, 2020 11:08 AM); Ishee Presentation, *supra* note 1, (stating that four prison staff and one contractor had died COVID-19-related deaths).

regarding release of particular individuals at heightened risk. As discussed above, the Court has the authority to order the appointment of a Special Master, and as pandemic conditions worsen in Defendants' prisons, a Special Master is sorely needed.

This the 3rd day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that counsel for Defendants have stipulated to service via electronic mail, and that on December 3, 2020, I served the foregoing on:

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