No. COA20-775 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE CONFERENCE OF THE NAACP, DISABILITY RIGHTS NORTH CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, KIM T. CALDWELL, JOHN E. STURDIVANT, SANDARA KAY DOWELL, and CHRISTINA RHODES,

Plaintiffs,

v.

ROY COOPER, in his official capacity as Governor of North Carolina, ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and BILL FOWLER, ERIC MONTGOMERY, ANGELA BRYANT, and GRAHAM ATKINSON, in their official capacities as Post-Release Supervision and Parole Commissioners,

Defendants.

From Wake County

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DEFENDANTS-APPELLANTS' BRIEF

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INTRODUCTION

The COVID-19 pandemic is among the gravest public-health emergencies that this State has encountered in its 245-year history. Governor Cooper and Secretary Hooks fully recognize the specific and unique risks that the current pandemic poses for those North Carolinians who are confined in more than 50 state prisons. Accordingly, they swiftly implemented comprehensive measures to prevent and mitigate the spread of the virus. The measures included limits on exposure to the public, medical screenings, aggressive sanitation, early distribution of masks, creation of cohorts, social-distancing, educational campaigns, testing, contact tracing, internal compliance controls and audits, and reasonable reductions in the prison population.[1]

The Department of Public Safety (the "Department") implemented these and other operational changes in consultation with the North Carolina Department of Health and Human Services ("DHHS") to fully comply with COVID-19 guidance for correctional facilities issued by the Center for Disease Control ("CDC") – the most comprehensive guidance available for prison systems. These measures constitute the most aggressive emergency public-

[1] Although the Defendants' response has evolved in response to the unfolding pandemic, Defendants focus in this appeal on the record before the trial court when it granted injunctive relief.

health program that has ever been instituted in our State's correctional facilities. The response is led by an incident command team consisting of high-level officials and multidisciplinary experts that meets daily and communicates weekly with leadership from all facilities. This team adapts its response in real time to address the rapidly evolving situation. In sum, the Department promptly took a broad range of well-considered and well-calibrated actions to protect the health and safety of the incarcerated population.

Despite this, the trial court granted preliminary injunctive relief to Plaintiffs. The trial court erroneously held that Plaintiffs were likely to succeed on a claim that Defendants imposed cruel or unusual punishment in violation of Article I, Section 27 of the North Carolina Constitution. In fact, the record establishes precisely the opposite. As other courts have correctly recognized, thorough mitigation efforts necessarily defeat such claims. This Court should likewise hold that Defendants' unprecedented and comprehensive COVID-19 response means that Plaintiffs have no chance of success on the merits of a deliberate indifference claim.

STATEMENT OF THE CASE

On April 8, Plaintiffs filed a Petition for Emergency Writ of Mandamus with the North Carolina Supreme Court. On April 21, the Court denied the writ. Plaintiffs then filed the instant action in Wake County Superior Court.

This action is a request for declaratory and injunctive relief, or mandamus, brought by multiple organizations and five individuals (including four offenders and one family member) against the Governor, Secretary of the Department, and Post-Release Supervision and Parole Commissioners ("Commissioners") to force a reduction of the North Carolina prison population due to the COVID-19 pandemic. Plaintiffs' complaint asserts two causes of action: (1) violation of the cruel or unusual punishment clause of the North Carolina Constitution (Article I, Section 27); and (2) writ of mandamus.

Plaintiffs moved for a TRO and preliminary injunctive relief, or in the alternative, mandamus. (R pp 39-43) The parties filed briefs and submitted affidavits, and on April 28, the trial court held a hearing. (R pp 46-772) On May 1, the trial court issued an order for additional information. (R pp 773-778) On May 8, the parties submitted additional information. (R pp 779-1412) On May 13, the trial court denied Plaintiff's motion. (R pp 1415-1416)[2]

Plaintiffs moved for clarification and an additional hearing. (R pp 1421-1426) On June 3, the trial court held a hearing. (6/3/20 transcript) On June 8, the trial court verbally announced its decision to grant a preliminary

[2] The order stated that the matter came before the court on "Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and, in the alternative, Petition for Writ of Mandamus." (R p 1415)

injunction. (6/8/20 transcript) On June 16, the trial court entered a written preliminary injunction order. (R pp 1529-1537)

On June 17, Defendants moved for reconsideration or for a limited stay. (R pp 1538-1541) On June 22, the trial court denied the motion to reconsider in part and set a hearing. (R pp 1559-1562) On June 26, Defendants filed proposed plans for universal testing and uniformity in compliance with the June 16 order and later supplemented those plans. (R pp 1563-1583, 1647-1651) On June 29, the trial court held a hearing. On July 10, the trial court issued an order granting in part the motion to reconsider and imposing additional requirements on Defendants. (R pp 1652-1662)

On July 16, Defendants filed a notice of appeal from the trial court's June 16, June 22, and July 10 orders. (R pp 1663-1665) Defendants elected not to move for a stay of the orders.

STATEMENT OF THE FACTS

The COVID-19 pandemic created a state and national emergency with no modern parallel. From the beginning, to address the escalating public-health crisis, Defendants continually assessed how best to keep all North Carolinians as safe as possible. These assessments resulted in numerous concrete actions targeted to mitigate the risk of infection and spread in the State's prisons. Given the rapidly evolving situation, Defendants have

continually adjusted their response in real-time to safeguard the health and well-being of all who live in and work in State prisons.

A. The Governor Took Immediate Action to Mitigate the Effects of the Pandemic in North Carolina.

On March 10, the Governor declared a state of emergency via Executive Order No. 116 to coordinate the State's response and implement protective actions to prevent the spread of COVID-19. (R pp 312, 342-347). In this order, the Governor delegated the power and authority to implement the State's emergency operations plan and coordinate the deployment of the State Emergency Response Team to Secretary Hooks. (R p 343) In a systematic effort to reduce the spread of COVID-19 in North Carolina, the Governor issued numerous additional executive orders. (R p 313-315, 348-443)

B. The Department Took Equally Aggressive Steps to Protect the Health of Offenders.

The Department, which operates 11 juvenile detention and youth development centers and 55 adult correctional facilities in North Carolina (R pp 1135, 1138), likewise has taken aggressive measures to prevent and mitigate the spread of COVID-19 among both offenders and staff. (R pp 321-328, 331-335)

1. The Department Created an Incident Command Team.

On or about March 14, the Department implemented an Incident Command Team ("IC Team") to coordinate its COVID-19 response in the State

prisons. (R p 1140) The IC Team consists of executive staff; senior level custody personnel; medical, mental health, and nursing professionals; and individuals with logistical and financial expertise. (R p 1139-1140) The IC Team meets daily and has a weekly briefing with senior leadership from every adult facility. (R p 1140) Utilizing this structure, the Department issued directives and implemented many operational changes that apply to all correctional facilities designed to minimize the spread of COVID-19. (R pp 1138, 1140)

2. The Department Implemented Operational Changes to Protect the Incarcerated Population and Staff.

Beginning on March 16, even before the March 23 CDC guidance issued, the Department implemented several operational changes, including the suspension of visitation, group activities, volunteer activities, and all non-essential programming, and the reduction of medical appointments to essential appointments only. (R p 1141) The Department also directed that offenders sleep in the head-to-toe configuration. (R pp 1141-1142)

3. The Department Implemented Screening Procedures for Entry and Limited External Movements.

As of March 20, the Department implemented medical screening measures for all people entering facilities, which included temperature checks and screening for respiratory symptoms. (R pp 322, 324, 1141) The Department also limited external movements to court-ordered, high-priority,

and healthcare-related movements only. (R pp 323, 1142) Moreover, offenders who were transported were medically screened for symptoms. (R pp 323) In consultation with DHHS, the Department developed Transportation Guidelines. (R pp 1524, 1526-1528)

4. The Department Operationalized the CDC Guidance Early and Continues to Adhere to These Standards.

On March 23, the CDC provided specific direction for correctional facilities. (R p 1154) The IC team promptly began reviewing the guidance and planning for its implementation. (R p 1151-1152, 1180-1189)

The Department took significant steps to modify its operations to comply with CDC guidance, including, but not limited to the following:

- Pre-intake screening and temperature checks for all new entrants, as of March 13 (R pp 323, 1141, 1183);
- Medical isolation and testing of symptomatic individuals (R pp 322, 1150-1151, 1216-1217, 1223-1224);
- Quarantining those known to have been in close contact of a known COVID-19 case, (R pp 322, 1150, 1466, 1472);
- Directing facilities to provide and continually restock hygiene supplies throughout the facility beginning on or about March 16 (R pp 1142, 1144-1146, 1183);

- Communicating hygienic practices to facilities and providing no-cost access to soap and hand cleanser as of March 13 (R pp 1141-1142, 1182-1183, 1191);
- Implementing social distancing throughout the facilities as early as March 23 (R p 1147, 1183, 1185-1186).

The CDC guidance contained 58 individual recommendations, and as of the end of April, all operational facilities were engaged in efforts to meet or exceed 57 of the recommendations. (R pp 1152, 1154, 1179-1189). The only recommendation that could not be fully satisfied was spacing the bunks six feet apart, due to physical space limitations. (R p 1184) Notably, however, the CDC conditioned this particular recommendation upon the availability of space. (R p 1164) In short, the Department significantly overhauled the operations of all its prisons to comply with CDC guidance and mitigate risk.

5. The Department Directed Facilities to Group Offenders and Modify Internal Movements and Activities to Enhance Social Distancing.

The Department directed facilities to create discrete cohorts[3] of offenders. (R p 1142) The purpose was to minimize mixing individuals from different parts of the facility, and thus minimize the opportunity for COVID-

[3] The Department operationalized the term "cohort" as a group of offenders that moves together throughout the facility and does not mix with other groups. (R p 1467)

19 to spread within facilities. (R p 1467) The facilities also adjusted recreation, showers, and meals schedules to keep cohorts separated. (R p 1142) Moreover, facilities were directed to keep staff assigned to only one cohort, to the extent possible, without jeopardizing safe operations. (R p 1142) Additionally, the Department directed all facilities to undertake a series of measures to promote social distancing efforts, including increasing the space between offenders in line for meals, calling cohorts individually for medication, limiting occupancy of shared spaces, and limiting internal rehousing of offenders. (R p 1147)

6. The Department Educated Offenders on the Virus and its Response.

The Department engaged in a comprehensive education campaign. (R p 326) Leadership at each facility met regularly with offenders to educate them on the heightened hygiene measures and operational changes necessary to mitigate risks. (R pp 326, 1185) Additionally, COVID-19 prevention posters created by CDC were placed throughout the facilities. (R p 326) Moreover, facility leadership actively encouraged frequent hand-washing and social distancing. (R p 327)

7. The Department Increased Hygiene and Sanitation Efforts.

Correction Enterprises is a division of the Department that manufactures various products for state agencies. *See* N.C.G.S. §§ 148-128, 129 and 132. Early on, Correction Enterprises manufactured hand cleansers,

soap, and masks for use in prisons and beyond. (R p 1141) This included the production and distribution of Nobac, a hand sanitizer. (R pp 1145-1146) Additionally, the Department placed soap throughout the facilities and all offenders received double rations of soap for personal use and additional supplies were available for purchase through facility canteens. (R pp 327, 1144)

The Department also implemented heightened and aggressive cleaning and sanitization efforts in all facilities. (R pp 327, 1148) This included significantly more cleaning and sanitizing of all facilities by staff members. (R p 1141) In particular, facilities were directed to disinfect the dining hall after each cohort and to place disinfectant spray throughout the facilities for easy access and use by offenders. (R p 1148) Staff also directed offenders to clean all doorknobs and other high-touch surfaces, hourly or more if possible, and provided the ability to disinfect telephones after each use. (R p 1148) Lastly, the Department used evaporative cooler units and foggers to disinfect large portions of the facility. (R pp 567, 1148, 1467)

8. The Department Provided Masks to Offenders and Staff.

The Department began distributing one-ply cloth face coverings toward the end of March. (R p 1143) By early May, Correction Enterprises was manufacturing two-ply masks, which were distributed to offenders. (R p 1143)

By late June, the Department ordered 200,000 three-ply masks – an amount sufficient for every offender to have at least 2 three-ply masks. (R p 1576)

9. The Department Adopted the Most Current Testing, Quarantining, and Isolation Protocols.

The Department developed testing strategies in consultation with DHHS and other local Public Health Departments; these strategies followed CDC guidance. (R pp 325, 560) In April, the Department also enhanced procedures to obtain medical care and waived co-pays to encourage prompt reporting of symptoms. (R p 325) Offenders with certain symptoms were immediately isolated and tested (R pp 325, 560, 1472-1473) which complied with CDC guidance. (R p 1175) Additionally, as of late April, the Department performed contact tracing to identify and quarantine offenders that were potentially exposed to a positive case. (R pp 560, 1466, 1472) The IC team, which including medical professionals, could also direct more expansive testing depending on a variety of factors. (R p 1466) The parameters of the Department's medical isolation and quarantine procedures were consistent with CDC guidance. (R pp 1157, 1175, 1223-1224, 1472, 1475)

10. The Department Implemented Compliance Control Measures.

In an effort to ensure that the facilities were adhering to these protocols, Prisons leadership, including the Commissioner and Assistant Commissioner of Prisons and members of their staff, monitored compliance. (R pp 1577-1578)

These efforts included unannounced and random inspections by regional directors and Prisons leadership. (R pp 1577-1578) Additionally, Regional Directors routinely reviewed camera footage from within their facilities to monitor compliance in real-time. (R p 1577) Lastly, the Incident Command team has a multi-disciplinary team that conducted unannounced inspections. (R p 1578)

C. The Department Took Multiple Paths to Responsibly Reduce the Prison Population.

The Department's ability to release lawfully incarcerated persons who have been committed to their custody is constrained by multiple factors, such as mandatory minimum sentences, an obligation to notify victims, and an obligation to determine whether there are pending charges of detainers. (R pp 319-320) Within its authority, however, the Department reduced the overall prison population while safeguarding the public. (R p 330) In exercising this executive discretion, the Department must weigh complex and individualized factors, including public safety and the released person's ability to successfully reintegrate into society without reoffending. (R p 316-319). Thus, all discretionary release decisions are made against the backdrop of the various factors that affect likely recidivism, including each offender's criminal and disciplinary histories, rehabilitative and health needs, community and other

support, substance-abuse and mental-health histories, among other relevant factors. (R pp 318-319)

1. The Department has Implemented a Process for Extending the Limits of Confinement ("ELC") for Qualifying Offenders.

The Department is authorized by statute to extend the limits of confinement of qualifying offenders. (R p 330) Persons released under this plan complete their sentence outside of a correctional facility under the supervision of community corrections officers. (R p 330) The Department prioritized persons who, based on underlying risk factors, were likely to face serious health complications if they contract COVID-19[4] and who posed a lower risk to public safety. (R p 330) To be eligible initially, an offender must not have been convicted of a crime against a person, must have had a projected release date in 2020 or 2021, and must have fallen into one of six specific categories related to COVID-19 and public safety risk factors.[5] (R p 563) By the end of April, the Department had identified and begun evaluating more

[4] The Department also made full use of the medical release statute, but given the stringent statutory requirements, that review did not result in a significant number of releases. (R p 331).

[5] (1) Pregnant offenders, (2) males over 65 with underlying health conditions, (3) females over 50 with underlying health conditions, (4) offenders over 65, (5) offenders already eligible for home leave, and (6) offenders already eligible for work release. (R p 563).

than 500 people for ELC. (R p 330-331) By April 25, the Department had transferred 120 offenders to the community on ELC. (R p 561) By June, the Department had reviewed over 900 offenders and had transferred 267 offenders out of facilities on ELC. (R p 1469)[6]

2. The Department has Awarded Discretionary Time Credits to Offenders.

By statute, the Department is authorized to reduce an offender's maximum term down to, but not below, the minimum term through earned time credits. N.C.G.S. § 15A-1340.13. Through this mechanism, the Department can advance the release dates of offenders making them available for early release. (R p 331) By the end of April, the Department had already released 485 offenders through such discretionary time credits. (R p 561)[7]

3. The Parole Commission Prioritized Certain Offenders for Early Release.

The Commissioners prioritized for early release certain individuals enrolled in the Mutual Agreement Parole Program ("MAPP") by which offenders and the Department mutually agree to establish certain benchmarks that, upon completion, allow offenders to be preapproved for parole. (R pp 336-

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[6] As the pandemic has continued, the Department further expanded the criteria for ELC and continuously reviewed additional offenders under the expanded criteria.

[7] The Department has continued to award discretionary time credits to offenders.

337). In general, individuals must be statutorily eligible for parole (which can apply only to those sentenced before its 1994 abolishment) and be within three years of parole eligibility. (R p 337) In light of COVID-19, the Commission allowed individuals enrolled in MAPP to accelerate their release if they are within six months of their scheduled parole date. (R p 337) Moreover, the Chair met with other commissioners to encourage them to issue fewer warrants for parole and post-release violations and to ask that they work collectively to try to reinstate more post-release violators back to supervision. (R pp 589-590)

4. The Department Halted New Admissions.

On April 6, the Department temporarily suspended acceptance of new entrants to State prisons from county jails and declined to receive new prison admissions based on probation violations in an effort to limit COVID-19 cases. (R p 323) This moratorium was extended on multiple occasions until it was lifted on June 8. (R pp 559-560, 1468-1469)

5. The Department's Population Reduction Efforts Were Successful.

Since the start of the pandemic, the offender population has been on a steady decline. On January 2, before the pandemic, the population was 34,439. (R p 1468) As of April 11, the adult offender population was 34,042. (R p 316) By April 24, that population was down to 33,282 – the lowest level since 2002.

(R p 559) By June 1, there were only 31,250 adult offenders in North Carolina prisons. (R 1468)[8]

D. The Department's Mitigation Efforts Are Reflected in the Statistics.

As of June 1, the Department had tested 1,846 offenders for COVID-19. (R p 1470) Of those, 1,164 offenders tested negative, 682 tested positive, and 11 tests were still pending. (R p 1470) Of the offenders that tested positive, 610 were presumed recovered. (R p 1470) Sadly as of June 1, five incarcerated persons had passed away from complications related to COVID-19. (R p 1470) At the time, there were 49 active cases across seven facilities. (R p 1470)

E. Plaintiffs File This Lawsuit Seeking to Reduce the Prison Population.

Plaintiffs claim that Defendants impose cruel or unusual punishment by failing to address the risks from COVID-19. (R p 36) Plaintiffs moved for preliminary injunctive relief and sought an order for Defendants to "comply with" the North Carolina Constitution "by taking any and all steps necessary to prevent the continued exposure of those in prison to COVID-19, including ensuring enough physical space for the practice of social distancing to occur." (R p 40) Plaintiffs maintain that the only way to comply with the Constitution

[8] Since the end of the moratorium on new admissions from county jails, the Department has managed to keep the offender population at historic lows as shown in subsequent filings.

is to require Defendants to "significantly and immediately reduce the population of people in DPS custody." (R p 41)

F. After Initially Denying Preliminary Relief, the Trial Court Reversed Course and Granted a Preliminary Injunction.

After initially denying preliminary relief, the trial court entered an order granting preliminary injunctive relief to Plaintiffs. (R p 1529) The trial court determined that Plaintiffs had established a likelihood of success on their claim that the conditions of confinement violate Article I, § 27 of the North Carolina Constitution. (R p 1530) The trial court noted a "difference between the text of Section 27 and the 8th Amendment." (R p 1530) However, it declined to "decide the legal standard to be applied under the state Constitution" – instead determining that "the Eighth Amendment sets the minimum protections safeguarded under Article I, § 27, and Plaintiffs are likely to satisfy the Eighth Amendment standard that Defendants have been deliberately indifferent to a substantial risk of serious harm test." (R pp 1530-1531) The court specifically found that Defendants: (1) "failed to provide sufficient testing to accompany the crowded and communal social distancing protocols"; (2) "were transferring individuals between facilities without properly protecting those individuals, or preventing spread, in contradiction to CDC guidelines"; and (3) "were providing disparate levels of COVID-19 protection between different facilities." (R p 1531)

The trial court stated it would continue the order in effect and establish other orders as necessary. (R p 1532) The trial court ordered relief related to purported overcrowding, transfers, and prison conditions. (R p 1532)

- With regard to purported overcrowding, Defendants were required to reopen the application process for organizations to serve as reentry partners aiding former offenders with housing and other services upon release. (R p 1532) The trial court also authorized (but did not require) Defendants to identify and determine if any new factors could be utilized for sentence credits, and ordered them to take affirmative steps to effectuate planned releases. (R pp 1532-1533)
- With regard to transfers, the trial court prohibited transfers except for medical and imminent safety reasons without testing or quarantine. (R p 1534) It also ordered that medical isolation not involve a loss of privileges. (R p 1535)
- With regard to prison conditions, the trial court required Defendants to prepare and submit plans for universal testing of the prison population and to identify purported disparities in strategies between different facilities. (R pp 1535-1536)

Plans to identify the purported disparities were to include a description of prevention strategies at each prison; "census" information for each prison,

including photographs or videos and a description of physical spaces in all facilities, down to the number and location of windows in cells and dormitories and the length of spaces; and information about offender privileges. (R p 1536) Defendants also had to provide specific information concerning cohorts at each prison, an accounting of masks, a description and photographs or videos of cells used for medical isolation, a description of medical care, and a description of measures at each prison to protect those over age 65 or with underlying medical conditions. (R pp 1536-1537)

On June 17, Defendants submitted a narrow motion to reconsider primarily related to the order for photographs and videos of all living spaces in 55 adult facilities and additional juvenile facilities (a new requirement in the final order).[9] (R p 1538) Defendants submitted an affidavit from the Commissioner of Prisons expressing significant security concerns related to providing the requested photographs or videos. (R pp 1542-1558) Defendants also raised a concern about the resources required for this effort relative to the need for this information to assess Defendants' mitigation efforts, and expressed their inability to comply with this particular requirement on the timeline ordered. (R pp 1543-1545)

[9] Defendants also moved for reconsideration of the order to provide an individualized accounting of masks. (R p 1540) Plaintiffs and the court later clarified that requirement and accordingly Defendants provided supplemental information about the distribution of masks. (R p 1648)

On June 22, the trial court entered an order denying Defendants' limited motion. The court granted a short extension and indicated that it would hold a hearing to further address the motion. (R p 1559) On June 26, Defendants filed proposed plans for universal testing and uniformity in compliance with the court's order. (R pp 1563-1583) Plaintiffs submitted objections. (R pp 1584-1641) On June 29, the trial court held a hearing on Defendants' motion to reconsider and the proposed plans. On July 9, Defendants notified the trial court that the Department had obtained approval for the National Guard to aid with universal testing with anticipated completion around August 7. (R pp 1642-1646)

On July 10, the trial court issued an order granting in part the motion to reconsider and imposing additional requirements on Defendants. (R pp 1652-1662) The trial court modified its prior order to require only representative photographs.[10] The July 10 order asserts several purported failures by Defendants, including providing "incomplete and potentially incorrect" data,[11] treating its orders with indifference, and more. (R pp 1657-1658) The record reflects, however, that in response to the orders, Defendants timely compiled

[10] Just before filing the Notice of Appeal, Defendants provided the represented photographs from inside all adult correctional facilities, as directed.

[11] Defendants have thoroughly reviewed the submitted materials and have been unable to discern which data the court was referencing.

and submitted more than 400 pages of factual information including charts with facility-level data, over two dozen detailed affidavits, and many more affidavits verifying facility-specific data from more than 55 facilities within tight timeframes ordered by the court. (R pp 993-1392, 1417-1420, 1524-1528, 1542-1558, 1563-1583, 1642-1651) Moreover, Defendants promptly sought limited and appropriate relief from the court when they had reasonable concerns about their ability to comply. (R p 1559) Efforts to comply with the directives of the trial court have strained an already stretched workforce that has worked tirelessly to mitigate the risks posed[12] by COVID-19 while maintaining safe and orderly operations of the state's prison system.

In its order, the trial court recognized that Defendants had "apparently taken significant effort to gather and submit the information that has been provided and have presented voluminous information." (R p 1659) However, the trial court stated that there would be additional information that would be useful to it. (R p 1659) The trial court then ordered another "preliminary injunction" with numerous new requirements, including:

- Requirements relating to medical isolation;
- Drafting and use of language for medical isolation;

[12] It is worth noting that Defendants' staff are public servants who have difficult jobs even during the best of times. Many of the same individuals who are contributing to the compliance efforts are themselves at risk of contracting COVID-19 in the prison setting and thus have every incentive to mitigate risks.

- Appointment of a court liaison at Defendants' cost;
- Detailed facility-by-facility plans detailing the methods to prevent cross-cohort contamination to be submitted by July 24;
- Weekly reports to Plaintiffs and the court to include specified, detailed information about testing and transfers;
- An ongoing surveillance testing plan; and
- Detailed facility-by-facility staffing plans. (R p 1660-1662)

On July 16, Defendants filed a notice of appeal from the June 16, June 22, and July 10 orders. (R p 1663) Defendants elected not to move for a stay. Instead, Defendants have complied in good faith and they have continued to work diligently to mitigate the risks from COVID-19 and protect offenders and staff.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Court may consider this appeal from interlocutory orders because orders granting a preliminary injunction affect a "substantial right" and will cause harm "if not corrected before appeal from final judgment." *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 207, 794 S.E.2d 699, 705 (2016); *see* N.C.G.S. §§ 1-277 & 7A–27(b)(3)(a). A "substantial right" is one that "materially affect[s] those interests which [an individual] is entitled to have preserved and protected by law." *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976).

Because the orders affect and constrain Defendants' ability to exercise their constitutional and statutory rights and duties and to apply executive policymaking discretion during an emergency, the decisions affect a substantial right. *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 77, 678 S.E.2d 602, 605, 606 (2009) (allowing immediate appeal of an injunction that prevents a "defendant from executing its statutory duties"); *see also Cablevision of Winston-Salem, Inc. v. Winston-Salem,* 3 N.C. App. 252, 257, 164 S.E.2d 737, 740 (1968) (allowing immediate appeal of an order restraining a local government from exercising its legislative function). *See also* N.C.G.S. § 7A-27(b)(3)(f) (allowing interlocutory appeal from orders that grant temporary injunctive relief restraining the State from enforcing the operation of an act of the General Assembly).

The Governor has constitutional and statutory duties to lead the State's response to the pandemic. N.C. Const. art. III, §§ 1, 5; N.C.G.S. §§ 166A-19.10 and 19.30. Secretary Hooks likewise has the statutory power and duty to coordinate the State's response and to allocate State resources to cope with the pandemic. *See* N.C.G.S. §§ 166A-19.11; 143B-602(2)-(3). The Department also has the broad statutory duty to operate State prisons. N.C.G.S. § 143B-601(10); N.C.G.S. § 148-4, 148-11, 148-19, 148-36.

Under the preliminary injunction, Defendants are subject to ongoing requirements that require the diversion of limited resources, and the trial

court's June 16 order indicates its intent to continue to exercise jurisdiction and issue additional orders to manage and supervise Defendants' operation of prisons during the pandemic based on the preliminary injunction findings. (R pp 1532-1537) Indeed, the court issued an additional order prior to the notice of appeal imposing new requirements. (R pp 1660-1662)[13] Defendants' ability to exercise their policymaking judgment to address the pandemic will be critically impaired—and, given the evolving nature of the pandemic, perhaps lost forever—if not raised and addressed now. This appeal also involves issues of great public importance and interest.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577-78, 561 S.E.2d 276, 281 (2002) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Furthermore, a mandatory injunction that requires Defendants to take affirmative action—such as the one issued here—is an "extraordinary equitable remedy[.]" *Clinard v. Lambeth*, 234 N.C. 410, 418, 67 S.E.2d 452, 458 (1951).

[13] This Court may take judicial notice that the trial court has continued to exercise jurisdiction over Defendants after the notice of appeal based on its preliminary injunction by holding additional hearings and issuing additional orders to Defendants.

A preliminary injunction may issue only if: (1) the plaintiff shows a likelihood of success on the merits of the case, and (2) the plaintiff "is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *DaimlerChrysler*, 148 N.C. App. at 577, 561 S.E.2d at 281 (quoting *Investors, Inc.*, 293 N.C. at 701, 239 S.E.2d at 574). The party moving for a preliminary injunction bears the burden of establishing entitlement to the relief. *Pruitt v. Williams*, 25 N.C. App. 376, 379, 213 S.E.2d 369, 371 (1975). The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *Horner Int'l Co. v. McKoy*, 232 N.C. App. 559, 561, 754 S.E.2d 852, 855 (2014) (quoting *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983)).

This Court reviews legal issues de novo. *Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). A grant of a preliminary injunction is also reviewed de novo. *Wilson v. N.C. Dept. of Commerce*, 239 N.C. App. 456, 461, 768 S.E.2d 360, 364 (2015). "[O]n appeal from an order . . . granting or denying a preliminary injunction, an appellate court is not bound by the [trial court's] findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983).

SUMMARY OF THE ARGUMENT

The trial court improperly granted preliminary injunctive relief to Plaintiffs.

First, the trial court's determination that Plaintiffs demonstrated a likelihood of success on the merits of their claim under the North Carolina Constitution was error. As an initial matter, while the individual Plaintiffs have standing to seek relief on their own behalf and the Associational Plaintiffs could have standing to seek some relief on behalf of incarcerated members, Plaintiffs lack standing to challenge the response across a prison system with more than 50 facilities statewide.

Moreover, the record overwhelmingly establishes that Defendants' response to the pandemic was swift, aggressive, and in compliance with (or in some instances, ahead of) CDC guidance. Thus, the record does not support a finding of a likelihood of success on the merits. Furthermore, the trial court's legal analysis appears to collapse the objective and subjective components of the deliberate indifference standard into an objective reasonableness standard, which is error. Nonetheless, holding, on this record, that Defendants' COVID-19 response in state prisons was not objectively reasonable, as the trial court appears to have done, was also error. Notably, the trial court based its determination on three erroneous factual findings related to testing, transfers, and purported disparities.

Under a correctly applied deliberate indifference standard, the record cannot support a determination that Plaintiffs established a likelihood of success of proving either the objective or subjective components of the test set out in *Farmer v. Brennan*, 511 U.S. 825 (1994). In particular, Plaintiffs failed to show a conscious disregard of a serious risk to the health and safety of incarcerated people (*i.e.*, a culpable state of mind), which is essential to establishing liability in a deliberate indifference claim. *Farmer* is clear that reasonable actions by prison officials preclude liability under the Eighth Amendment. Since the evidence demonstrates that Defendants undertook a thoughtful, expert-driven response implementing myriad measures specifically designed to protect the incarcerated population, the trial court's determination that Plaintiffs were likely to succeed on a deliberate indifference claim was clear legal error.

Second, the trial court erred in its analysis of the balance of equities. The trial court failed to give due weight to the importance of allowing Defendants to continue exercising their executive duties in good faith in order to balance the goals of offender protection and general public safety. Moreover, the trial court's analysis fails to account for the existing incentive of Defendants to protect the health and safety of the men and women who work throughout its facilities. Important constitutional principles of separation of powers are not merely theoretical, but practical: the trial court's

orders have required the devotion of significant resources to gather specific and detailed information, often with no clear relation to the pandemic response – draining staff resources that could otherwise be focused on the executive branch's pandemic response and offender health and safety. The trial court's orders have also created moving targets that have constrained Defendants' flexibility at a time when discretionary executive action in response to an evolving, fact-sensitive crisis is most critical.

For these reasons, Defendants respectfully request that this Court reverse the trial court's grant of preliminary injunction.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PRELIMINARY INJUNCTIVE RELIEF BECAUSE PLAINTIFFS DID NOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM.

Likelihood of success on the merits is a necessary pre-requisite to issuance of injunctive relief. *DaimlerChrysler*, 148 N.C. App. at 577, 561 S.E.2d at 281. On this record Plaintiffs cannot demonstrate a likelihood of success on the merits.

A. Plaintiffs Lack Standing to Seek the Broad Relief they Request.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113-14, 574 S.E.2d 48, 51 (2002) (citation omitted). A

plaintiff does not have standing to sue unless she has an "injury in fact." *Id.* at 114, 574 S.E.2d at 52. An "injury in fact" is one that is "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . ." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Moreover, a plaintiff must demonstrate standing for each claim he seeks to press and must demonstrate standing separately for each form of relief sought. *Davis v. FEC,* 554 U.S. 724, 733-34 (2008).

Plaintiffs purport to represent the interests of, and affect the relief potentially afforded to, more than thirty thousand offenders in more than 50 adult facilities across North Carolina. However, Plaintiffs failed to demonstrate standing to seek such broad, systemic relief on behalf of all offenders.

1. The Individual Plaintiffs Lack Standing.

The individual Plaintiffs lack standing as they cannot assert an injury in fact. Plaintiff Rhodes is not personally incarcerated. (R p 20) She therefore lacks standing to seek relief on behalf of her husband. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (noting that "next friend" standing, a federal doctrine that permits one to seek relief on behalf of a detained person, is generally limited in scope to habeas corpus litigation and rejecting its application where the petitioner sought to intervene and appeal a criminal

conviction of another). The U.S. Supreme Court concluded that an essential element of "'next friend' standing is for the proposed 'next friend' to demonstrate that the real party in interest is unable to litigate his own cause[.]" *Id*. 495 U.S. at 165. Plaintiff Rhodes has made no such showing and therefore cannot proceed on behalf of her husband as a "next friend."

The other individual Plaintiffs lack standing to seek relief that is broader than that which may be necessary to address their individual situations. *See Moss v. Spartanburg Cty. School Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012) (holding that plaintiffs lacked standing to the extent that they were "seeking to vindicate, not their own rights, but the rights of others.") In *Moss*, the court held that certain plaintiffs, a mother and child, lacked standing to challenge a policy allowing public school students to receive two academic credits for off-campus religious instruction because they did not demonstrate any injury as they did not receive promotional material, nor were they encouraged to participate in the program. *Id*. Similarly, in this case the other individual Plaintiffs have not demonstrated that they have or will be personally injured by the system-wide policies which they challenge. Thus, these individual Plaintiffs lack standing to seek such broad relief affecting the entire prison population.

2. The Associational Plaintiffs Lack Standing.

The associational Plaintiffs also lack standing to pursue the broad relief sought. To establish associational standing in North Carolina, an association must show that:

(1) Its members would otherwise have standing to sue in their own right;

(2) The interests it seeks to protect are germane to the organization's purpose; and

(3) Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

River Birch Assoc. v. City of Raleigh, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

The associational Plaintiffs fail the first prong of the test because they have not each shown that they have at least one member who would be affected by the requested relief. Disability Rights North Carolina simply says that many incarcerated persons are disabled (R p 19), but that does not establish that it has a member with standing to sue, let alone membership sufficiently distributed throughout the system such as to confer standing to challenge the state's entire COVID response in prisons. The ACLU contends that it frequently represents prisoners, but it does not allege that it has any members

currently incarcerated in North Carolina state prisons. (R p 19-20) For its part, the NAACP only alleges generally that it has members who are currently incarcerated, have been released from incarceration, or are under some sort of post-release supervision. (R pp 18-19) Such general assertions are not sufficient to establish membership throughout a system of more than 50 facilities and over 30,000 offenders.

In short, the associational Plaintiffs have not alleged that they have a member in *each* prison throughout the prison system who would be impacted by the relief they request. The associational Plaintiffs lack standing to seek relief on behalf of tens of thousands of unnamed persons who are not members of their organizations. Thus, they lack standing to seek the broad, systemic relief outlined in their pleadings.

Because they lack standing to pursue the broad relief they seek, Plaintiffs cannot establish a likelihood of success on the merits of the claim.

B. Plaintiffs Failed to Establish a Likelihood of Success on the Merits of Their Deliberate Indifference Claim.

The trial court's finding that Plaintiffs established a likelihood of success on the merits was erroneous. The trial court applied an incorrect legal standard and based its legal determination on erroneous factual findings. Applying the proper test, Plaintiffs cannot establish deliberate indifference.

1. Article I, Section 27 is Interpreted Consistently with the Eighth Amendment.

While the trial court's order states that it need not decide the legal standard applicable under Section 27, it indicates a mistaken belief that the North Carolina Constitution imposes a higher standard than the Eighth Amendment. That is incorrect.

The North Carolina Supreme Court has examined the texts of these two provisions where criminal defendants have challenged the constitutionality of their sentences. In so doing, the Court has "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819 828 (1998); *see also State v. Peek*, 313 N.C. 266, 276, 328 S.E.2d 249, 256 (1985); *State v. Fulcher*, 294 N.C. 503, 525, 243 S.E.2d 338, 352 (1978). Citing the United States Supreme Court's analysis of the phrase "cruel and unusual punishment," the North Carolina Supreme Court recognized, like the United States Supreme Court, that "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." *Green*, 348 N.C. at 603, 502 S.E.2d at 828 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality)). Rather than getting mired down in an exacting interpretation of the provisions' language, the North Carolina Supreme Court noted that the United States Supreme Court "simply examine[d] the particular punishment involved in

light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'" *Id*. Nothing in the Court's rationale for treating the provisions the same indicates, as the trial court suggests (R p 1530), that Section 27 would warrant different treatment based on the nature of the case. Thus, this Court is bound by the North Carolina Supreme Court's opinion in *Green* and the other cases interpreting Section 27 to have the same meaning as the Eighth Amendment.

Additionally before *Green*, our Supreme Court addressed the relevant provisions in *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 844, 412 S.E.2d 654, 659 (1992). The discussion of Section 27 in *Medley* was dicta. Nonetheless, the majority noted the Eighth Amendment and Section 27 were "similar." *Id*. While the concurring judge *suggested* that the language of Section 27 might lead to a different interpretation, the majority did not endorse this. *Id*. Moreover, in *Green*, the North Carolina Supreme Court expressly declined to adopt the "lone" concurring judge's suggestion, concluding "research reveals neither subsequent movement toward such a position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position." *Green*, 348 N.C. at 603 n.1, 502 S.E.2d at 828 n.1 (emphasis added).

Section 27's history further indicates that it should be interpreted the same as the Eighth Amendment. The two provisions are drawn from the same source, the English Bill of Rights of 1686, a provision of which the Eighth

Amendment "repeats almost verbatim." John V. Orth & Paul Martin Newby, The North Carolina State Constitution 84 (2d ed. 2013). Moreover, the initial precursor to Section 27 may have been adopted by giving consideration to similar provisions in the Declaration of Rights of 1776 in the constitutions of Maryland and Virginia. *See Id*. Notably, Maryland's courts have used the "cruel or unusual" punishment language in its state constitution interchangeably with the "cruel and unusual" punishment language of the Eighth Amendment. *See Thomas v. State*, 634 A.2d 1, 10 n.5 (Md. 1993).

2. A Deliberate Indifference Claim Includes Separate Objective and Subjective Components.

To establish a conditions-of-confinement claim under the Eighth Amendment, an offender must prove both that the condition creates a "substantial risk of serious harm," referred to as the objective component, and that prison officials were deliberately indifferent to that risk, referred to as the subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994).

The Court in *Farmer* carefully defined the "level of culpability deliberate indifference entails," settling on "subjective recklessness as used in [] criminal law[.]" 511 U.S. at 839-40. More specifically, the Court held

> that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that

> a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837. *See also Rhodes v. Chapman,* 452 U.S. 337, 347 (1981) (providing that the Eighth Amendment is implicated by conditions which involve the "wanton and unnecessary infliction of pain," or which are "grossly disproportionate to the severity of the crime warranting imprisonment"). "[P]rison officials who actually knew of a substantial risk to inmate health or safety" may nonetheless "be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844. Deliberate indifference is without question "a very high standard" and thus, "a showing of mere negligence will not meet it." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999).

3. The Trial Court Erred by Collapsing the Objective and Subjective Components of the Deliberate Indifference Analysis.

The trial court determined that it did not have to decide whether Section 27 should be read in the same way as the Eighth Amendment because Plaintiffs had established a likelihood of success on the merits of their deliberate indifference claim under the Eighth Amendment. (R p 1530) However, while the trial court specifically referenced the *Farmer* standard, it appeared to collapse the objective and subjective components of the *Farmer*

test into some sort of objective reasonableness test.[14] In particular, the trial court found that Defendants' testing and transferring protocols as well as the purported provision of disparate levels of COVID-19 protection between different facilities "at the very least, lie 'somewhere between the poles of negligence at one end and purpose or knowledge at the other.'" (R p 1531) However, any inference that anything more than negligence could constitute deliberate indifference is belied by the full sentence in *Farmer* to which the trial court refers. "With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness." *Farmer*, 511 U.S. at 836.

The trial court's truncated application of the *Farmer* test to the facts in this case constitutes legal error. *See, e.g., Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020) (reasoning, in a case involving the risk of COVID-19 in a prison, that the district court had misapplied the deliberate indifference analysis by collapsing the objective and subjective components of the inquiry and requiring reasonable steps in its own assessment). Moreover, as

[14] The trial court's objective reasonableness test does not appear to be equivalent to the objective prong of *Farmer*, which requires that the "deprivation alleged was, objectively, sufficiently serious." *See Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016)(internal quotations and citation omitted).

discussed below, under the proper standard, Plaintiffs have no chance of success, because they cannot show the required culpable state of mind.

4. Even Applying its Own Erroneous Standard, the Trial Court Erred in Determining That Defendants' Response Was Objectively Unreasonable.

Even if the trial court's legal analysis were correct and subjective deliberate indifference was not required, the trial court erred in determining that Defendants' response was not objectively reasonable.

As an initial matter, the trial court's determination was based on erroneous factual findings. In pertinent part, the trial court's June 16 order stated:

> It appears based on the record that Defendants have failed to provide the sufficient COVID-19 testing to accompany the crowded and communal social distancing protocols; Defendants are transferring incarcerated individuals between facilities without properly protecting those individuals, or preventing the spread of COVID-19, in contradiction to Centers for Disease Control ("CDC") guidelines; and Defendants are providing disparate levels of COVID-19 protection between different facilities.

(R p 1531). These findings were not supported by the record.

With regard to testing, the record demonstrated that the Department's testing strategies were developed using CDC guidance and through consultation with DHHS. (R pp 325, 560) Offenders who exhibited any COVID symptoms were immediately isolated and tested. (R pp 1466, 1472-1473) The

Department waived co-pays to encourage prompt reporting of symptoms. (R p 325) The Department was also testing all new entrants into the system (R pp 1466, 1472) which exceeded CDC guidance. (R p 1163) Additionally, the Department was identifying and quarantining close contacts through contact tracing (R pp 1466, 1472) which complied with CDC guidance. (R p 1172) Thus, the record lacks any factual basis upon which the trial court could have found that the testing strategy deviated from CDC guidance.

Likewise, the record does not support a finding that Defendants' transportation practices contravened CDC guidance. In fact, the record demonstrates the opposite. The CDC guidance did not prohibit transfers but rather recommended restricting transfers to those necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding. (R pp 1162, 1167) The guidance also contained details about how to proceed with such transfers when they are necessary. (R pp 1162, 1167) The Department's transportation practices comported with these recommendations as they limited offender transportation to only court-ordered, high priority, and health care movements. (R pp 1142, 1469) Moreover, the Department's transportation guidelines, which were developed in consultation with DHHS, contain detailed directives about how to safely effectuate transfers when necessary. (R pp 1524, 1526-1528) Thus, the trial court's conclusion that "Defendants [were]

transferring incarcerated individuals […] in contradiction to [CDC] guidelines" is not supported by the record.

In the June 16 order, the trial court did not specify how Defendants purportedly were "providing disparate levels of COVID-19 protection between different facilities." (R p 1531) Indeed, the record demonstrates that the Department had instituted a number of operational changes that applied to all facilities. (R pp 1141-1148, 1575-1577) In its July 10 order, the trial court stated that: (1) it appeared there was no method for uniform and equitable distribution of masks; and (2) there was extreme variation in the number and efficacy of cohorting with cohorts ranging in size from 2 to 200. (R pp 1657-1658) The first statement is incorrect, and the second does not establish disparate treatment.

The record shows that the Department distributed masks to all facilities in amounts sufficient for each offender to have at least two masks (with more subsequently ordered). (R pp 1142-1144, 1576, 1582, 1648-1651) The record further shows that the cohorts were not haphazardly created. Variation in the size of cohorts was a consequence of factors such as physical space, layout, and offender classification and custody levels (R pp 1142, 1581-1582), and thus was not an indication of any disparate treatment.

Because the trial court based its injunction on erroneous factual findings, its orders should be reversed. *See Ronald G. Hinson Elec. v. Union*

Cty. Bd. of Educ., 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997) (noting that conclusions of law drawn upon findings of fact that are not supported by competent evidence are erroneous).

Moreover, even if any of the trial court's findings on these limited topics were correct, such facts would nonetheless be insufficient to establish that Defendants' comprehensive response, overall, was not objectively reasonable. As explained above, Defendants' COVID-19 response included modifications to internal operations, testing and screening protocols, movement limitations, heightened sanitation, distribution of cloth face coverings, population reduction efforts, and more. (*See* Statement of Facts Section B above). This response was expert driven and designed to comply with applicable CDC guidance. Thus, even under an objective reasonableness standard (which Defendants do not concede applies) and even accepting the trial court's findings of fact (which this Court is not obligated to do), Defendants should nonetheless prevail.

5. Plaintiffs Cannot Show They Are Likely To Succeed In Meeting the *Farmer* Test for Deliberate Indifference.

When the deliberate indifference standard is properly applied to this record, it is clear that Plaintiffs failed to show likelihood of success on the merits.

a. Plaintiffs Cannot Establish the Objective Component of their Deliberate Indifference Claim.

To satisfy the objective prong, an offender must "demonstrate that the deprivation alleged was, objectively, 'sufficiently serious.'" *Scinto*, 841 F.3d at 225 citing *Farmer*, 511 U.S. at 834. And "[t]o be 'sufficiently serious,' the deprivation must be 'extreme' – meaning that it poses a 'serious or significant physical or emotional injury resulting from the challenged conditions,' or 'a substantial risk of serious harm resulting from . . . exposure to the challenged conditions.'" *Id.* 841 F.3d at 225 (quoting *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (emphasis added).

Defendants do not dispute that COVID-19 poses significant health risks. However, Plaintiffs did not produce evidence that the *conditions* throughout the North Carolina prison system (as opposed to the generalized risk of contracting COVID-19) posed a serious or significant risk of harm – particularly in light of Defendants' substantial mitigation measures. *Cf. Valentine*, 956 F.3d at 801 (determining that "after accounting for the protective measures [state defendants] ha[d] taken," in response to COVID-19 in a correctional facility, the plaintiffs had not shown a "substantial risk of serious harm."). Thus, Plaintiffs cannot establish the first prong of a deliberate indifference claim.

b. Plaintiffs Cannot Establish the Subjective Component of their Deliberate Indifference Claim.

As discussed above, the second prong of deliberate indifference is an extremely high standard. It has been equated with the standard for criminal recklessness. *Farmer*, 511 U.S. at 837. A plaintiff is required to prove that defendants were subjectively conscious of a risk and chose, despite such knowledge, to disregard the risk. *Id*. at 838. Mere negligence is not enough. *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014). Rather, the law requires that the treatment a prisoner receives be so grossly incompetent, inadequate, or excessive as to shock the conscience. *King v. United States*, 536 F. App'x. 358, 362 (4th Cir. 2013). These criteria are not met here. Moreover, a reasonable response in the face of actual knowledge of a substantial risk may preclude liability "even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

Plaintiffs cannot show that Defendants have consciously disregarded the risks of COVID-19 in prisons. The record shows the opposite. As discussed above, Defendants are continually engaged in sincere, intentional, and substantial efforts to protect the health and safety of offenders during the pandemic. (*See* Statement of Facts Sections B and C) Such efforts are antithetical to a deliberate indifference claim. *See Money v. Pritzker*, 453 F. Supp. 3d 1103, 1131 (N.D. Ill. 2020) (finding "no chance of success" on a

deliberate indifference claim where defendants had "come forward with a lengthy list of the actions they have taken to protect [ ] inmates.")

Plaintiffs' position in this case appears to be that Defendants are deliberately indifferent because their response purportedly has been too slow and inadequate. Plaintiffs have also alleged incomplete implementation. Such contentions, at best, echo claims of negligence – not deliberate indifference. *Cf. Money*, 453 F. Supp. 3d at 1132 (holding in a COVID-19 prisons lawsuit that "objections about the speed or scope of action and suggestions for altering it through a 'prod' do not support either half of the phrase 'deliberate indifference.'"); *Valentine v. Collier*, No. 20-20525, 2020 U.S. App. LEXIS 32325, at *19 (5th Cir. Oct. 13, 2020) (noting that the Eighth Amendment does not "mandate perfect implementation[.]").

Nor can Plaintiffs prevail because Defendants' response is not the one they prefer. As the Washington Supreme Court recognized in *Colvin v. Inslee*, 195 Wash. 2d 879, 901, 467 P.3d 953, 965 (2020), "reasonable minds may disagree as to the appropriate steps that should be taken to protect the prison population while preserving public safety." *See also United States v. Clawson*, 650 F.3d 530, 538 (4th Cir. 2011) ("a mere difference of opinion regarding the adequate course of treatment does not give rise to an Eighth Amendment violation"). Such a difference in opinion, however, does not support a deliberate indifference claim. On this record, Plaintiffs cannot show that

Defendants were subjectively conscious of a risk and chose, despite such knowledge, to simply disregard the risk. Threfore, Plaintiffs cannot establish the subjective component of a deliberate indifference claim.

6. The Vast Majority of Other State and Federal Courts Have Correctly Declined to Find Deliberate Indifference in a Good Faith Correctional Response to COVID-19.

Several other state and federal courts have denied requests for injunctions or mandamus in COVID-19-related lawsuits against correctional facilities based on a plaintiff's failure to establish a likelihood of success on a deliberate indifference claim. In the limited cases in which trial courts have issued injunctions, appellate courts have generally reversed. Moreover, the United States Supreme Court has twice weighed in on the side of prisons to prevent injunctive relief from going into effect pending appeal. These decisions constitute persuasive authority supporting Defendants' position in this case.

a. State Supreme Courts

Like the North Carolina Supreme Court, other state supreme courts have denied mandamus. In doing so, several have expressly rejected deliberate indifference claims. *See Colvin v. Inslee*, 195 Wash. 2d at 900, 467 P.3d at 965 (noting that "[u]nder this constitutional standard, the record must evidence subjective recklessness or deliberate indifference; that is, the official must know of and disregard the risk[]" and holding that the record did not

establish such deliberate indifference); *Kerkorian v. Governor of Nevada*, 462 P.3d 256, 2020 Nev. Unpub. LEXIS 458, at *4 (Nev. Apr. 30, 2020) (unpublished) (denying relief because petitioner had not demonstrated cruel and unusual punishment); *Comm. for Pub. Counsel Services. v. Chief Justice of Trial Court*, 484 Mass. 1029, 1031, 143 N.E.3d 408, 412, (2020) (declining to order the early release of prisoners in the absence of a constitutional violation because doing so "would co-opt executive functions[.]"); *Smith v. Montana, Dep't of Corrs.*, 399 Mont. 554, No. OP 20-0185, 2020 Mont. LEXIS 954, at *1-2 (Mont. Mar. 31, 2020) (unpublished) (denying relief where petitioner failed to demonstrate that the defendants were not "taking reasonable measures under the circumstances" and thus could not establish that defendants acted with "conscious disregard of the risk").

b. Federal District Courts

Many federal district courts have likewise denied injunctive relief based on Eighth Amendment claims. In *Hallinan v. Scarantino*, No. 5:20-HC-2088-FL, 2020 U.S. Dist. LEXIS 103409 (E.D.N.C. June 11, 2020), a court in North Carolina denied preliminary injunctive relief on behalf of offenders at the Butner federal prison complex. The court found that petitioners had not shown a likelihood of success on the merits of an Eighth Amendment claim. There, the federal prison had adopted many practices similar to those in the North Carolina State prisons – including issuing masks, isolating and

quarantine positive cases, education about the virus, screening of new offenders, medical screening of staff, symptoms, testing offenders with symptoms, and enhanced sanitation. *Id.* at *16-17. Despite those efforts, Butner was experiencing a significant outbreak. Moreover, Butner's dormitories held as many as 150 offenders and social distancing and proper hygiene practices were challenging (or even impossible). *Id.* at *19. Despite this, the court held that petitioners were not likely to succeed on the merits. *Id.* at *42. The court held that Petitioner's expert testimony, declarations, and documentary evidence did not undermine the court's finding that respondents responded carefully and proactively to the pandemic. *Id.*

Other federal courts have come to similar conclusions. *See Money*, 453 F. Supp. 3d at 1131 (finding "no chance of success" on the deliberate indifference prong of an Eighth Amendment claim where the State defendants had "come forward with a lengthy list of the actions they have taken to protect [ ] inmates."); *Baxley v. Jividen,* No. 3:18-cv-1526, 2020 U.S. Dist. LEXIS 61894, at *6 (S.D. W. Va. Apr. 8, 2020) (denying injunctive relief and finding that "the evidence before the Court suggests that Defendants have been anything but unresponsive to the threat posed by COVID-19"); *Frazier v. Kelley*, No. 4:20-cv-00434-KGB, 2020 U.S. Dist. LEXIS 90821, at *64 (E.D. Ark. May 19, 2020) (denying injunctive relief based on a deliberate indifference claim); *Wragg v. Ortiz,* No. 20-5496 (RMB), 2020 U.S. Dist. LEXIS 92033, at

67-68 (D.N.J. May 27, 2020) (denying injunctive relief based in part on alleged lack of social distancing and nothing that "the inability of a defendant to take an action that a plaintiff seeks will likely not constitute a reckless state of mind.").*

c. Federal Appellate Courts

At least three federal appellate courts have ruled in favor of a correctional facility by staying or reversing preliminary injunctions in these cases, and the United States Supreme Court has twice issued orders preventing injunctive relief from going into effect.

In *Cameron v. Bouchard*, 815 F. App'x 978, 985 (6th Cir. 2020), the Sixth Circuit reversed a decision granting preliminary injunctive relief. The court determined that plaintiffs' evidence "is insufficient to demonstrate that the jail officials acted with reckless disregard to the serious risk COVID-19 poses." The court noted that plaintiffs' argument "at most shows that defendants' response was imperfect" but held "[t]hat is not enough to establish deliberate indifference." *Id.* at 986. *See also Williams, et al. v. Wilson, et* al., 961 F.3d 829, 837 (6th Cir. 2020) (vacating a preliminary injunction against a prison related to COVID-19 and holding that petitioners had not shown a likelihood of success on the merits of their Eighth Amendment claim).

The Fifth Circuit also stayed a permanent injunction related to the COVID-19 response at a geriatric prison. *Valentine v. Collier*, 2020 U.S. App.

LEXIS 32325, at *3. The Court noted that the "[trial] court held [defendants] to a higher standard than the Constitution imposes" by concluding that the "lack of a systematic approach" and a "failure to abide by basic health guidance [. . .] together demonstrated [. . .] deliberate indifference[.]" *Id.* at **17-18. The Court explained that the "Eighth Amendment does not enact the CDC guidelines." *Id.* at **18-19. Moreover, the Court reiterated that "'prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.'" *Id.* at *19.

In *Swain v. Junior*, 457 F. Supp. 3d 1287 (S.D. Fla. 2020), the trial court denied injunctive relief related to releases but ordered relief related to medical care, sanitation, and social distancing. However, the Eleventh Circuit stayed the injunction because the record evidence demonstrated that the correctional defendants took a series of mitigation measures and the trial court improperly conflated resultant harm with a liable state of mind. *Swain v. Junior*, 961 F.3d 1276, 1287-89 (11th Cir. 2020).

The United State Supreme Court has twice weighed in on the side of prisons. In the *Valentine* case, the Court declined to vacate the stay issued by the Fifth Circuit to prevent a preliminary injunction from going into effect. *See Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020). The United States Supreme Court also stayed an order requiring an Orange County, California jail to take additional steps to combat COVID-19. *Barnes v. Ahlman*, 140 S.

Ct. 2620 (2020). The Court reversed the Ninth Circuit, which had denied a stay to the prison system. *Ahlman v. Barnes*, No. 20-55568, 2020 U.S. App. LEXIS 20300 (9th Cir. June 29, 2020).

The trial court's deviation from this substantial authority is unwarranted by any of the record facts. In sum, Plaintiffs have not established, and cannot establish, a likelihood of success on the merits.

II. The Trial Court Did Not Afford Proper Deference to the Executive Branch in Balancing the Equities.

A proper balancing of the equities favored denial of the injunction. Defendants have a strong interest in applying their expertise to manage state prisons without interference. As other courts have found, an injunction is likely to do more harm than good by tying Defendants' hands at a critical juncture – particularly where Defendants are already acting in good faith and following expert guidance. Thus, the balance of equities favored denial of an injunction.

The risk to offenders arguably weighs in favor of an injunction. However, in weighing the risk to offenders, the trial court had to consider the extensive steps already taken to mitigate the crisis. As the court in *Baxley* explained:

> "[M]itigation is all that can be demanded in this case, as no technology yet exists that can cure or entirely prevent COVID-19. The best scientists in the world have been unable to eliminate the risk of the disease, and the Court can expect no more of Defendants. This ... lessens the weight that Plaintiffs' risk of irreparable harm would otherwise carry."

2020 U.S. Dist. LEXIS 61894, **22-23.

On the other side of the scale, Defendants have a significant interest in exercising their constitutional and statutory responsibility to manage prisons in accordance with their executive discretion, particularly in light of the uniquely sensitive policy decisions needed to balance public safety with the public health crisis. As the United States Supreme Court has recognized, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), *superseded by statute on other grounds*. Furthermore, "[p]rison administration is ... a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.*

This discretion is particularly important now. As Chief Justice Roberts has explained, it is critical that courts protect executive officials' ability to take appropriate emergency measures in response to this unprecedented public-health crisis. "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter" that is "fraught with medical and scientific uncertainties[.]" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020)

(Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U. S. 417, 427 (1974)). Given these uncertainties, courts must give "especially broad" deference to executive officials, because courts "lack[] the background, competence, and expertise to assess public health[.]" *Id.* at 1614. In the context of this acute public-health emergency, good-faith emergency measures "should not be subject to second-guessing" by the courts. *Id.* Yet the trial court, in this case, declined to afford any meaningful level of deference to Defendants' response.

In *Valentine*, the Fifth Circuit expressed precisely these concerns, which it determined would cause "irreparable harm" to the State:

> As we've said before about such intrusive orders, this one creates an administrative nightmare for [the Texas Department of Criminal Justice (TDCJ)] to comply with the district court's quotas and deadlines … [T]he burden upon TDC[J] in terms of time, expense, and administrative red tape is too great while it must respond in other ways to the crisis. … The harm to TDCJ is particularly acute because the district court's order interferes with the rapidly changing and flexible system-wide approach that TDCJ has used to respond to the pandemic so far.

956 F.3d at 803 (internal quotations and citations omitted). It further recognized that the preliminary injunction "significantly hampered" the State's ability to adjust policies and "locks in place" a set of policies for "a crisis that defies fixed approaches." *Id.*

The *Baxley* court likewise acknowledged defendants' "strong interest" in promulgating their own policies for prison management except in rare circumstances. 2020 U.S. Dist. LEXIS 61894, at *23. That court was "mindful that—even apart from questions of its own authority—it cannot act as an administrator of state prison facilities to ensure that every element of Defendants' plan is implemented to the letter." *Id*. at *20. The *Baxley* court likewise acknowledged that because "COVID-19 is a fast-moving threat that requires efficient and efficacious responses from state authorities […] Defendants will need to make rapid decisions and take immediate action […] and the Court's intervention in these considerations would only inhibit their ability to do so." *Id*. at *23-24. The Court in *Baxley* specifically stated that "any injunction would leave Defendants unsure of precisely what actions they could take without notifying Plaintiffs and the Court, thereby slowing any response and making disease prevention more difficult." *Id*. at *24.

The trial court failed to properly take into account the very real risk that injunctive relief could negatively affect the executive branch's ongoing response to the COVID-19 pandemic because it would tie Defendants' hands and divert their resources at a time when it is critical for them to be responsive and nimble to address the pandemic. In fact, the court's numerous orders and requests for specific information require the diversion of substantial resources to reporting and compliance functions that otherwise could have been devoted

directly to the pandemic response. This is particularly concerning where court intervention was unnecessary, because Defendants were following CDC guidance and indicated a commitment to continue to do so.

Furthermore, some of the trial court's orders relate to requirements that fail to improve Defendants' ability to mitigate the risk of COVID-19. For instance, the trial court has imposed requirements related to offender privileges that place a burden on Defendants but do not directly mitigate the risk of COVID-19 in prisons.[15] It is also unclear how providing detailed measurements, including of windows, in every facility would mitigate the spread.

Significantly, it remains uncertain what further orders the trial court may issue, as it had not explained what it will do with the information it has requested or what, if any, further orders it intends to issue. If this Court fails to reverse the preliminary injunction, additional and potentially heightened court intervention that constrains Defendants' executive discretion is likely.

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[15] The trial court ordered that medical isolation could not be effectuated in a manner that would result in the loss of privileges, including "confinement in a locked cell" and "restrictions to recreational, religious, educational or vocational activities, exercise, [and] TV[.]" (R p 1765) However, to keep offenders safe and reduce the risk of spreading COVID-19, it may be beneficial to safety to temporarily limit some privileges (*e.g.*, visits to a communal TV room). (R pp 1150, 1581)

CONCLUSION

For the foregoing reasons, the Defendants respectfully ask this Court to reverse the trial court's preliminary injunction order, as well as its subsequent orders expanding injunctive relief.

Respectfully submitted, this 16th day of November, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2) of the Rules of Appellate Procedure and this Court's order dated 2 November 2020, in that, according to the word processing program used to produce this brief (Word 2013), which was prepared using a 13-point proportional font, the document does not exceed 12,000 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service and appendices.

This the 16th day of November, 2020.

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CERTIFICATE OF SERVICE

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ADDENDUM

Kerkorian v. Governor of Nev.

Supreme Court of Nevada

April 30, 2020, Filed

No. 80917

Reporter
2020 Nev. Unpub. LEXIS 458 *; 462 P.3d 256

GREGORY KERKORIAN, Petitioner, vs. THE GOVERNOR OF NEVADA, STEVE SISOLAK; AND THE DIRECTOR OF NEVADA DEPARTMENT OF CORRECTIONS, CHARLES DANIELS, Respondents.

Notice: NOT DESIGNATED FOR PUBLICATION. PLEASE CONSULT THE NEVADA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Judges: **[*1]** Pickering, C.J., Gibbons, J., Parraguirre, J., Cadish, J., Hardesty, J., Stiglich, J., Silver, J.

Opinion

ORDER DENYING PETITION

This original petition seeks a writ of mandamus (1) directing the Governor and the Director of the Nevada Department of. Corrections (Director) to "take all actions necessary to prevent the spread of the highly infectious and deadly COVID-19 virus to vulnerable populations in State custody," (2) directing the Governor to use his emergency powers under NRS Chapter 414 in a number of specific ways to reduce the prison population, and (3) commuting petitioner Gregory Kerkorian's sentence to time served and directing his immediate release from prison.

As a threshold matter, we note that petitioner purports to seek relief on behalf of the entire "vulnerable population[ ] in State custody." But it does not appear that a petition of this sort may be used as an ad hoc class action, given that doing so would sidestep the procedural requirements that would otherwise apply. *See* NRCP 23; *see also* United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1539-40, 200 L. Ed. 2d 792 (2018) (questioning "functional class actions" where there has been no formal mechanism for aggregating claims). Amici's briefing attempts to further widen the appropriate scope of Kerkorian's petition by pointing **[*2]** to an entirely different writ—habeas corpus—for our consideration. This too was likely procedurally improper, *see* 3B C.J.S. *Amicus Curiae §§* 17-18 (2013), in addition to seeking relief that is beyond the scope of habeas corpus in Nevada, *see* Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) (holding that challenges to conditions of confinement cannot be raised in a habeas corpus petition); Director, Nev. Dep't of Prisons v. Arndt, 98 Nev. 84, 86, 640 P.2d 1318, 1319 (1982) (observing that this court has "consistently held that use of the extraordinary writ [of habeas corpus] is warranted only to challenge present custody or restraint and the legality of that confinement").

Based upon our review of the documents filed in this court, we decline to exercise our original jurisdiction as to the claims Kerkorian asserts on his own behalf for two interrelated reasons. First, the record is replete with contested issues of fact which this court, as an appellate tribunal, cannot call live witnesses to hearing to resolve. Second, given the conflicts in the facts asserted, we cannot say, as a matter of law, that the respondents have violated a clear and unmistakable legal duty to act, which is what the law requires for a writ of mandamus to issue from this court. Poulos v. Eighth Judicial Dist. Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982) ("We have consistently attempted to reserve our discretion for those **[*3]** cases in which there was no question of act, and in which a clear question of law, dispositive of the suit, was presented for our review.").

"[A]n appellate court is not an appropriate forum in which to resolve disputed questions of fact." Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981). Our review of the petition demonstrates that it presents disputed facts regarding

the actions taken by the respondents and what further actions should be taken, if any. When there are factual issues presented, this court will not exercise its discretion to entertain a mandamus petition even though "important public interests are involved." *Id.*

Given the underlying factual disputes, Kerkorian has not demonstrated that respondents have a duty to act in a specific manner. *See* NRS 34.160 (providing that a writ of mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station"); *see also* In re Montierth, 131 Nev. 543, 550, 354 P.3d 648, 652 (2015) (describing a "ministerial" act as "an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual" (quoting Pittman v. Lower Court Counseling, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994), *overruled on other grounds by* Nunez v. City of N. Las Vegas, 116 Nev. 535, 1 P.3d 959 (2000))); Round Hill, 97 Nev. at 603, 637 P.2d at 536 (recognizing that the respondent must have "a clear, present **[*4]** legal duty to act). Without an unmistakable duty to act—or a manifest abuse of discretion in disregarding such a duty—mandamus does not lie.

And finally, Kerkorian has not demonstrated respondents have acted arbitrarily or capriciously, or manifestly abused their discretion because he has not demonstrated a constitutional violation (i.e., cruel and unusual punishment based on the conditions of confinement or an equal protection violation). *See* Round Hill, 97 Nev. at 604, 637 P.2d at 536 (recognizing an exception to the general rule that mandamus may not be used to control a discretionary action for when "discretion is manifestly abused or is exercised arbitrarily or capriciously"); *see also* Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (requiring a prisoner to demonstrate that he or she has been incarcerated under conditions posing a substantial risk of serious harm and that the prison official's state of mind was deliberate indifference to inmate health and safety); Butler v. Bayer, 123 Nev. 450, 459, 168 P.3d 1055, 1062 (2007) ("Mhe official must actually know of and disregard an excessive risk to inmate health or safety."); Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000) (providing that an equal-protection analysis depends on the level of scrutiny to be applied, and unless the case involves fundamental rights or a suspect class, the government's actions will likely be upheld **[*5]** if there is a rational basis for them); Glauner v. Miller, 184 F.3d 1053, 1054 (9th Cir. 1999) (determining prisoners are not a suspect class).

Our observations are consistent with those made by other courts faced with making COVID-related decisions of this character and magnitude. For instance, the Kansas Supreme Court recently transferred to a state district court a case where a petitioning prisoner sought release for himself and other prison inmates with preexisting medical conditions in light of the pandemic, determining that there were "significant issues of fact and [that] those issues must be determined before the questions of law presented by [the petition] can be addressed." *Hadley v. Zmuda*, No. 122,760, Order Canceling Oral Argument and Transferring Jurisdiction (Kan. April 14, 2020), available at https://www.kscourts.org/Cases-Opinions/High-Interest-Cases/James-Hadley,-et-al-v-Jeffrey-Zmuda,-Secretary-of . And the Washington Supreme Court likewise denied a petition for writ of mandamus much like that filed here because petitioners had "not shown that the. Respondents are currently failing to perform a mandatory, nondiscretionary duty in addressing the COVID-19 risk at the Department of Corrections facilities, nor shown other **[*6]** constitutional or statutory grounds for the relief they request." *Colvin v. Inslee*, No. 98317-8, Order at 1-2 (Wash. April 23, 2020), available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%200rders/983178Public0rder042320.pdf (last visited April 30, 2020). Indeed, we have not found any case from a state appellate court responding to a petition of this sort differently than we do here. *See, e.g., Comm. for Pub. Counsel Serus. v. Chief Justice of Trial Court*, No. SJC-12926, 2020 WL 1659939, at *3 (Mass. Apr. 3, 2020) (concluding that absent a constitutional violation, the court could not take any action to commute or modify sentences or order the early release of prisoners currently serving sentences of incarceration because doing so "would usurp the authority of the executive branch"); *Smith v. Montana, Dep't of Corrs.*, No. OP 20-0185, 2020 WL 1660013, at *1-2 (Mont. Mar. 31, 2020).[1]

For these reasons, we conclude that Kerkorian has not established a basis for this court to issue extraordinary writ relief. We therefore deny his petition but do so

[1] The respondents note that the federal district court denied a TRO from an immigrant detainee with similar arguments because the petitioner could not show more than speculative harm. *See Ramirez v. Gulley*, No. 2:20-cv-00609-JAD-VCF, 2020 WL 1821305 (D. Nev., Apr. 9, 2020).

expressly without prejudice to his seeking appropriate relief before a district court, the Nevada Parole Board, or the Nevada Pardons Board. Accordingly, we

ORDER the petition DENIED.[2]

/s/ Pickering, C.J.

Pickering

/s/ Gibbons, J.

Gibbons

/s/ Parraguirre, **[*7]** J.

Parraguirre

/s/ Cadish, J.

Cadish

/s/ Hardesty, J.

Hardesty

/s/ Stiglich, J.

Stiglich

/s/ Silver, J.

Silver

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[2] Kerkorian filed a motion to seal the reply and supplemental appendix pending further action on those documents after this court had an opportunity to determine whether they should be publicly filed, remain filed under seal, or stricken from the record. The controversial information included in those documents is not necessary to our decision; thus, we do not need to resolve the confidentiality and waiver issues implicated in the pending motion and related pleadings. For that reason and in the interest of expediency, we deny the motion, except to the extent that we allow the redacted versions of the reply and supplemental appendix to remain filed on the docket, which is publicly available. We direct the clerk of this court to strike the *unredacted* reply provisionally filed on April 24, 2020. The clerk also shall not accept for filing any *unredacted* version of the supplemental appendix.

Smith v. Dep't of Corr.

Supreme Court of Montana

March 31, 2020, Decided; March 31, 2020, Filed

OP 20-0185

Reporter
2020 Mont. LEXIS 954 *; 399 Mont. 554; 460 P.3d 405

CHASE SMITH, Petitioner, v. STATE OF MONTANA, DEPARTMENT OF CORRECTIONS; WATCH PROGRAM/COMMUNITY COUNSELING & CORRECTIONAL SERVICES (CCCS), INC., Respondents.

Notice: DECISION WITHOUT PUBLISHED OPINION

PUBLISHED IN TABLE FORMAT IN THE MONTANA REPORTS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Judges: **[*1]** Mike McGrath, Chief Justice. John C. Sheehy, Laurie McKinnon, Beth Baker, James Jeremiah Shea, Justices.

Opinion

ORDER

Chase Smith has filed a petition for writ of habeas corpus, alleging that he is being held in the WATCh program in violation of his *Eighth Amendment* right to be free from cruel and unusual punishment and his right to individual dignity under *Article II, Section 4, of the Montana Constitution*. Smith asks to be released to serve the remainder of his sentence on probation because he alleges the facility in which he is being held endangers him due to his risk of COVID-19 infection.

Smith contends he can establish that his rights under the *Eighth Amendment* are being violated by his circumstances because: (1) he is deprived of the ability to take precautionary measures to prevent infection with COVID-19, thus denying him life's necessities, and (2) by continuing to admit new residents who may be infected with COVID-19, WATCh has acted with deliberate indifference towards Smith's wellbeing.

As applicable to the States via the *Fourteenth Amendment*, the *Eighth Amendment to the United States Constitution* protects individuals from cruel and unusual punishment. Accordingly, the government custodian responsible for the custody and care of incarcerated persons has a constitutional duty to provide for the "general well-being" and "basic human **[*2]** needs" of incarcerated persons, including but not necessarily limited to food, clothing, shelter, medical care, mental health care, and reasonable safety. *See* *Wilson v. State, 2010 MT 278, ¶ 28, 358 Mont. 438, 249 P.3d 28*. *See also* *Helling v. McKinney, 509 U.S. 25, 32-34, 113 S. Ct. 2475, 2480-81, 125 L. Ed. 2d 22 (1993)* (in re postconviction prisoners); *Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002)* (similar due process right of pre-dispositional detainees).[1]

In order to show an alleged violation of the *Eighth Amendment* based on an alleged deprivation of adequate health care, an inmate must make an evidentiary showing (1) that the level of health care at issue is constitutionally inadequate from an objective standpoint based either on a pattern of negligent conduct or systematic deficiencies or a serious deprivation resulting in the denial of even a minimal civilized measure of a necessity of life and (2) that the correctional institution acted with deliberate indifference to the inmate's health and safety through a conscious disregard of a substantial risk of serious harm to the inmate's health, or safety. *Wilson, ¶¶ 27-30*; *Walker v.*

[1] However, a merely negligent breach of this duty does not rise to the level of a constitutional violation. *Helling, 509 U.S. at 32-34, 113 S. Ct. at 2480-81*; *Estelle v. Gamble, 429 U.S. 97, 104-06, 97 S. Ct. 285, 291-92, 50 L. Ed. 2d 251 (1976)*. A constitutional violation occurs only if the government custodian breaches this duty of care with "deliberate indifference to serious . . . needs" of the inmate or detainee. *Helling, 509 U.S. at 32-34, 113 S. Ct. at 2480-81*; *see also* *Wilson, ¶¶ 28-32*.

State, 2009 MT 134, ¶ 56, 316 Mont. 103, 68 P.3d 872; *Farmer v. Brennan, 511 U.S. 825, 840-41, 114 S. Ct. 1970, 1980-81, 128 L. Ed. 2d 811 (1994)*.

Article II, Section 4, of Montana Constitution further guarantees Montanans a fundamental right to human dignity. When the allegations at issue implicate both the *Eighth Amendment* protection against cruel and unusual punishment and the Montana right to human dignity, we read both together to provide Montanans **[*3]** "greater protection[] from cruel and unusual punishment" than the *Eighth Amendment*. *Wilson, ¶ 31* (citing *Walker, ¶¶ 73-75*). Accordingly, in order to show an alleged violation of the Montana right to human dignity based on an alleged deprivation of adequate health care to inmates in a correctional institutional or detention center, an inmate must make an evidentiary showing (1) that prison officials or conditions subjected the inmate to a substantial risk of serious harm to the inmate's health or safety and (2) that prison officials "acted with deliberate indifference to the inmate's health and safety" through a conscious disregard of that risk. *Wilson, ¶¶ 30-32*; *Walker, ¶ 73-76*. As the government entity responsible for the custody and care of postconviction inmates, the Montana Department of Corrections "assumes responsibility" under the *Eighth Amendment* and the Montana right to human dignity for the "general wellbeing" and "basic human needs" of incarcerated inmates including food, clothing, shelter, health care, and reasonable safety. *Wilson, ¶ 28*; *Walker, ¶ 80*.

Here, Smith has made a sufficient threshold showing that the COVID-19 virus pandemic generally poses a substantial risk of serious harm to the health and **[*4]** safety of incarcerated inmates in a prison facility. However, aside from cursory assertion and citation to the Chief Justice's recent memorandum to lower courts regarding local detention center prisoner population management in response to the virus threat, Smith has made no evidentiary showing that the Department of Corrections is not taking reasonable measures under the circumstances to protect him and other inmates from the COVID-19 risk.

As a threshold matter, the Chief Justice's memorandum to lower courts regarding pretrial detainees does not apply to the Department of Corrections or postconviction inmates committed to it. Though the COVID-19 risk is similar to prisoners in state correctional facilities and local detention, centers, the memorandum is no more than a recommendation that lower courts "release as many [misdemeanor] prisoners [committed to local detention centers] as [they] are able" to safely release in their discretionary exercise of existing legal authority. Thus, the Chief Justice's memorandum to lower courts regarding local detention center prisoners is insufficient alone to demonstrate that the Department is not taking reasonable measures to provide for Smith's **[*5]** health and safety under the circumstances, that it is impossible for the Department to do so, or that the Department is in any event acting in conscious disregard of the risk to petition and other state inmates posed by the COVID-19 virus.

Smith has failed to demonstrate that he is being unlawfully incarcerated in violation of either the *Eighth Amendment* protections against cruel and unusual punishment or the Montana right to human dignity. Thus, Smith has failed to show cause for the requested habeas relief.

Therefore,

IT IS ORDERED that the petition for a writ of habeas corpus is DENIED.

The Clerk is directed to provide copies of this Order to all counsel of record.

DATED this 31st day of March, 2020.

/s/ Mike McGrath

Chief Justice

/s/ John C. Sheehy

/s/ Laurie McKinnon

/s/ Beth Baker

/s/ James Jeremiah Shea

Justices

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