SUPREME COURT OF NORTH CAROLINA

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ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons, Plaintiff-Appellants, v. ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant-Appellees.	)	From Wake County 19 CVS 14089

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PLAINTIFF-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs challenge a statewide system that threatens to harm thousands of people. A class action is the most fair and efficient way to resolve their claims. Without a certified class, these people would have to bring individual cases in trial courts across the state. They would either have to be joined into one impossibly unwieldy proceeding, or different courts would likely reach inconsistent results on an important constitutional question.

Defendants emphasize that the trial court had broad discretion to refuse class certification. But any deference owed the trial court applies only to issues of *fact*—issues of law receive de novo review. And here, the trial court's errors were primarily errors of law. This Court may reverse the trial court without disturbing its findings of fact, which largely support the existence of a class, the superiority of the class action method, and the adequacy of the named plaintiffs as class representatives. (R pp 975-79).

Defendants further argue that plaintiffs' claims require individualized inquiries, and so are not suitable to classwide treatment. The U.S. Supreme Court has held otherwise. When incarcerated plaintiffs face a systemic, unconstitutional risk of harm—including harm from prolonged isolation—they may obtain systemwide relief *without* any individualized inquiries. As other courts have recognized, this kind of claim is especially appropriate for class certification because thousands of plaintiffs may rely on classwide proof and obtain simultaneous relief.

Addressing the merits, the trial court found that plaintiffs did not prove that defendants' "practices actually caused the complained of harm." (R pp 991, 992). Defendants say that was proper. This Court, however, has forbidden such premature resolution of the merits on a Rule 23 motion. Injury and causation are issues for trial. For Rule 23, plaintiffs need only show that class members share predominating common issues—not that those issues will be resolved in the plaintiffs' favor.

Despite defendants' claims about the vagueness of a proposed remedy, plaintiffs have always sought equitable relief limiting defendants' use of solitary confinement—not banning it outright. This Court has not required more granular detail, and has held that trial courts need only address a remedy *after* a plaintiff proves a constitutional violation.

As for the named plaintiffs, defendants argue that Shawn Bonnett, Robert Parham, and Anthony McGee are inadequate class representatives because they spent more time in solitary than the "average" class member and would be subject to unique defenses. Both arguments misunderstand the law, and defendants offer no practical reason why the named plaintiffs would not "fairly insure the adequate representation of all" class members. N.C. R. Civ. P. 23(a).

The parties agree that class certification does not hinge on the constitutional standard for plaintiffs' claims. But if the Court addresses the constitutional question, a recent decision by the Washington Supreme Court supports adopting an objective standard over a subjective one. That court

rejected the deliberate indifference standard because it "mistakenly assumes that conditions of confinement can be considered punishment, and therefore subject to constitutional limitations, only if they are subjectively intended as punishment by an identifiable prison official." *Matter of Williams*, No. 99344-1, 2021 WL 4619150, at *10 (Wash. Oct. 7, 2021). Further, it makes more sense to "focus on the institution rather than the prison official's intent" when prisoners only seek injunctive relief and not money damages from individual state officials. *Id.* at *10.

For these reasons and as discussed below, this Court should reverse the trial court.

ARGUMENT

I. Plaintiffs' claims of a systemic constitutional violation are ideally suited for class resolution.

A. The trial court's errors of law are not entitled to any deference.

Defendants emphasize that an appellate court reviews a trial court's Rule 23 order for abuse of discretion, which is highly deferential. But this Court has held that de novo review applies to issues of law in a class certification order. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014). With de novo review, the appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quotation marks omitted).

As discussed in plaintiffs' opening brief and below, the trial court made errors of law in each step of its analysis. These errors are not entitled to any deference. This Court should not hesitate to correct them, and may do so without disturbing the trial court's findings of fact. (R pp 975-79).

Still, a brief recap of the evidence is in order, as defendants wrongly accuse plaintiffs of relying on mere allegations and evidence that has little to do with DPS prisons. The record contains:

- Defendants' written policies, which on their face authorize indefinite solitary confinement, and in many instances mandate it for months on end. (R pp 95-166).
- Defendants' admission of keeping approximately 3,000 people in solitary confinement. (R p 167).
- Defendants' discovery responses, which confirm that large numbers of people are in fact kept in solitary confinement—either in one classification or a sequence of classifications—for months or years on end without necessarily even changing cells. (R pp 403-409).
- Seven unrefuted affidavits from people who have spent decades in DPS solitary units, describing functionally identical experiences across the prison system and detailing their resulting injuries. (R pp 270-98).
- The 2020 Report of the Governor's Task Force for Racial Justice Equity—co-authored by then-Secretary Hooks—stating that "solitary confinement causes severe psychiatric harm, is 'toxic to brain functioning,' and causes

harm that manifests as panic attacks, paranoia, perceptual distortions, and problems with impulse control." (R p 548).

- A published, peer-reviewed article, coauthored by DPS Director of Health and Wellness Gary Junker, acknowledging the harms of solitary confinement and analyzing the associated long-term risks of mortality for DPS prisoners. (R p 170).
- The Vera Report, stating that DPS solitary units are "characterized by conditions of extreme isolation and sensory deprivation" and recognizing the associated risks of harm. (R pp 311, 312, 318, 388).
- Scientific literature relied on by the Vera Report *and* the Task Force Report *and* Dr. Junker's article detailing the harms of solitary confinement. (R p 181). The conditions "in all five of Defendants' restrictive housing classifications . . . are materially consistent with the conditions of solitary confinement at the facilities that were the subjects of" that literature. (Brief of Professors and Practitioners of Psychology, Psychiatry, and Medicine p 5 n.3).

This evidence—little of which defendants have actually disputed—establishes the existence of a class and the propriety of the class action method.

B. U.S. Supreme Court precedent supports predominance and superiority.

The U.S. Supreme Court has affirmed classwide relief for claims of systemic Eighth Amendment violations. *Hutto v. Finney*, 437 U.S. 678 (1978);

Brown v. Plata, 563 U.S. 493 (2011). Those cases did not ask whether individual class members were being treated unconstitutionally based on individual circumstances. Plaintiffs' claims here are of the same ilk.

Defendants call those cases irrelevant because they dealt with the propriety of injunctive relief and not a Rule 23 motion. (Defs. Br. p 24). But *Hutto* and *Plata* addressed the nature of the claims brought, which necessarily affects whether class members share common issues. *See Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 215, 794 S.E.2d 699, 709 (2016) (affirming certification because claims would not require individualized inquiries to prove liability); *Davis v. Baldwin*, No. 3:16-CV-600-MAB, 2021 WL 2414640, at *20 (S.D. Ill. June 14, 2021) (explaining that "the nature of Plaintiffs' claims" supported certification as they did not allege "a collection of individual" violations "based on the specific application . . . of those policies on each individual class member").

Hutto affirmed the district court's ruling on the merits that, "taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment." 437 U.S. at 687. The Court also affirmed the district court's prohibition of "punitive isolation" for more than thirty days. *Id.* at 685. It did not address whether any specific plaintiffs were suffering a constitutional violation based on individual circumstances—the pervasive conditions were unconstitutional for anyone subjected to them. *See id.*

Relying on *Hutto*, *Plata* affirmed statewide injunctive relief for a systemic Eighth Amendment violation. 563 U.S. at 511, 525. The Court invoked the nature of the plaintiffs' claims, which were not based "on deficiencies in care provided on any one occasion," but "on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to substantial risk of serious harm . . . ." *Id.* at 506 n.3 (quotation marks omitted). Again, there was no mention of the danger faced by any individual class members based on personal facts, although different class members undoubtedly faced different circumstances. *See id.* at 531.

This language was not dicta, as defendants say, but among the main reasons why the Court affirmed statewide relief. That injunction affected the entire prison system. *Id.* It would not have been appropriate if the plaintiffs had brought thousands of individualized claims for individualized relief.

The logic of these cases naturally extends to class certification: If a court may grant systemwide relief for a pervasive risk of harm without examining individual issues, courts must be able to certify classes seeking that relief in the first place. Other courts have relied on *Plata* when certifying classes of incarcerated people, including those challenging solitary confinement policies. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014); *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016); *Scott v. Clarke*, 61 F. Supp. 3d 569, 587 (W.D. Va. 2014).

Moreover, the *Plata* Court knew that its decision had implications for class certification. In dissent, Justice Scalia argued against "certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality[.]" *Plata*, 563 U.S. at 552 (Scalia, J., dissenting). That view did not prevail.

Hutto and *Plata* therefore support class certification. Defendants, however, continue to misread these cases and plaintiffs' claims. They argue that the "trial court would have to find that an assignment to RHAP pending an investigation, or for a person's own protection, is unconstitutional just as an assignment to HCON following multiple violent assaults on correctional staff." (Defs. Br. p 35).

Defendants assume that plaintiffs allege any use of solitary confinement to be unconstitutional. They do not. Defendants also suggest that each classification is completely divorced from the others, and that plaintiffs challenge each classification standing alone. That is also wrong.

The classifications function in concert with one another. On their face, defendants' policies authorize and require transfers between the classifications: RHAP leads to RHDP, which leads to RHCP or HCON, which lead to the RDU, which can lead back to any of the others. (R pp 120, 122, 128, 129, 131, 152). And the record shows that people's experience in each classification is functionally identical: "extreme isolation and sensory deprivation" in a small cell for 22 to 24 hours a day, every day, with "very little, if any, opportunity for programming or congregate activity." (R p 312).

As such, plaintiffs do not challenge each classification standing alone. The claims instead address the reality that DPS classifications function as a whole to create systemic risk. (R pp 7, 42). If Secretary Hooks had enacted the reforms he personally touted—like limiting the consecutive days someone may be kept in solitary—the level of risk would be significantly lower, and there would be less need for this litigation. (R p 549).[1] Now, defendants cannot hide their system from constitutional challenge by drawing attention from the forest to the trees. *See Davis*, 2021 WL 2414640, at *22 (different classifications such as "investigative," "disciplinary," and "administrative" did not defeat commonality because "baseline conditions" in solitary were highly similar); *Harvard v. Inch*, 411 F. Supp. 3d 1220, 1237 (N.D. Fla. 2019) ("Plaintiffs allege a systematic, statewide policy of isolation. . . . And regardless of the type of isolation, the deprivations caused by the policy and practice of isolation are the same.").

In sum, precedent from the U.S. Supreme Court—relied on by lower courts—establishes that plaintiffs' claims do not require individualized inquiries to establish classwide liability or to craft a remedy. This dynamic supports the predominance of classwide issues and the superiority of the class action method. The trial court committed errors of law by asserting otherwise.

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[1] Washington just became the latest state to stop "using disciplinary segregation agency-wide." Washington Governor Jay Inslee, *Making Washington's prisons safer and more humane* (Sept. 30, 2021), https://www.governor.wa.gov/news-media/making-washingtons-prisons-safer-and-more-humane.

Finally, if defendants thought that plaintiffs had failed to state a claim by alleging a systemic violation and seeking statewide relief, they should have filed a motion to dismiss. Only now do they argue that "system-wide conditions-of-confinement suits" are unavailable to plaintiffs—a thinly veiled 12(b)(6) motion. (Defs. Br. p 24).

The issue here "is not whether . . . plaintiffs have stated a cause of action but rather whether the requirements of Rule 23 are met." *Beroth Oil*, 367 N.C. at 342, 757 S.E.2d at 474 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)). For this inquiry, defendants are stuck with the systemic constitutional violation alleged in the complaint. They may not raise a 12(b)(6) motion for the first time on appeal. *Dale v. Lattimore*, 12 N.C. App. 348, 350, 183 S.E.2d 417, 419, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971); N.C. R. App. P. R. 10(a)(1).

C. Other means of adjudication are inferior if they could not hear plaintiffs' claims or grant the relief sought.

When plaintiffs seek class certification, other forms of adjudication are inferior as a matter of law if they cannot award the relief sought or would not have jurisdiction over the plaintiffs' claims. *See Blitz v. Agean, Inc.*, 197 N.C. App. 296, 309, 677 S.E.2d 1, 10 (2009) (holding that small claims court "cannot, *per se,* be a superior venue . . . for violations of the TCPA, because it does not possess the authority to grant injunctions" and lacks jurisdiction over claims exceeding $500), *disc. rev. and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010).

Defendants say that a class action is not superior because plaintiffs could go to the Industrial Commission or federal court. Plaintiffs have already explained that those forums are dead ends—they either lack jurisdiction over state constitutional claims, lack authority to grant injunctive relief, or both. *See* N.C.G.S. § 143-291(a); 28 U.S.C § 1331; 28 U.S.C § 1367 (federal courts may only hear state claims when there is original jurisdiction over a related federal claim).

Defendants barely acknowledge this argument. Nor do they explain why individual actions in Superior Court would be a better alternative. If hundreds or thousands of plaintiffs bring identical claims across the state, different courts will almost certainly reach different results on an important constitutional issue. *See Beroth Oil*, 367 N.C. at 354, 757 S.E.2d at 481 (Newby, J., dissenting in part and concurring in part) (making class members proceed individually "will result in disparate treatment of the same fundamental property rights"). Joining all those plaintiffs before a single court could make the case function more like a class action, but without the administrative benefits, putting an extraordinary burden on the court. *See* N.C. R. Civ. P. 23(a) (class action appropriate when the number of plaintiffs would make the case "impracticable" to administer).

Defendants also say that the trial court acted within its discretion to deny class certification because it did not wish to become involved in matters of prison administration. The reasoning boils down to this: Class certification is inappropriate because, if plaintiffs prove a widespread civil rights violation, the

trial court would have the responsibility of crafting and enforcing a remedy for incarcerated people.

That cannot be the law. North Carolina courts do not have discretion to turn away civil rights cases simply because they may require judges to enforce prisons' compliance with the Constitution. *See Plata*, 563 U.S. at 511; *State v. Robinson*, 375 N.C. 173, 184, 846 S.E.2d 711, 720 (2020).

Accordingly, whether viewed as an issue of fact or law, the trial court's superiority analysis strayed too far afield and warrants correction.

D. Cases applying Federal Rule 23(b)(2) are highly persuasive in this context.

North Carolina Rule 23(a) and Federal Rule 23(b)(2) are textually different, but this Court has relied on cases applying the federal rule to construe the state rule. *See Chambers v. Moses H. Cone Mem'l Hosp.*, 374 N.C. 436, 445, 843 S.E.2d 172, 178 (2020). Federal Rule 23(b)(2)—which asks whether a defendant has acted on grounds generally applicable to the class—is especially relevant here because it "serves most frequently as the vehicle for civil rights actions and other institutional reform cases." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58–59 (3d Cir. 1994). It facilitates "challenge[s] [to] widespread rights violations of people who are individually unable to vindicate their own rights." *Id.* at 64.

Defendants discount the relevance of Federal Rule 23(b)(2) cases because predominance and superiority requirements are not in that rule's text. (Defs. Br. p 17). But the same is true of North Carolina Rule 23(a). Predominance and

superiority are judicially-created requirements, not statutory ones. They make perfect sense for cases like *Crow*, *Faulkenbury*, *Beroth Oil*, and *Fisher*, which involved claims for individualized relief. But exacting predominance and superiority inquiries make less sense for cases like this one, where the claims are identical and "a class seeks an indivisible injunction benefiting all its members at once[.]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011).

Given the nature of this case, Federal Rule 23(b)(2) provides a helpful guide. Many prison class actions fall under this rule, *see Parsons*, 754 F.3d at 686-87, as would this one.

Each class member challenges defendants' system of solitary confinement—not their individual placement in any specific classification—and each class member will obtain relief from a single declaratory judgment and injunction requiring systemwide reform. *See Davis*, 2021 WL 2414640, at *26 (certifying class where plaintiffs sought "to cure purported systemic defects in how the IDOC as a whole administers placement in extreme isolation");*Wilburn v. Nelson*, 329 F.R.D. 190, 197 (N.D. Ind. 2018) ("Plaintiffs are attacking the rote policy of using solitary confinement; they are not challenging the application of it in any given circumstance.").

To be sure, plaintiffs do not believe they "need only allege a broadly defined constitutional violation, characterize that alleged violation as being system-wide, and seek amorphous system-wide injunctive relief." (Defs. Br. p 16). Plaintiffs must still show that class members share at least one common issue,

that the class is sufficiently numerous, and that they meet Rule 23's other requirements

Accordingly, federal cases applying Federal Rule 23(b)(2) in institutional reform cases provide the best persuasive authority for the Court. (*See* Pls. Br. pp 30-32).

E. Sabata *dealt with a much broader class than this case.*

Defendants rely heavily on *Sabata v. Nebraska Dep't of Corr. Servs.*, which denied a motion for class certification. 337 F.R.D. 215 (D. Neb. 2020). Unlike this case, however, *Sabata* involved a challenge to a vast array of policies on subjects ranging from dental care to disability access. And even if *Sabata* were on point, it is an outlier among courts addressing class certification in prisons and jails.

The *Sabata* plaintiffs sought "to certify a class whose members suffer from a multitude of diseases, mental health conditions, and other alleged problems, and they challenge many dozens of [prison] policies and practices related to these various conditions." *Id.* at 267. The court denied certification because the plaintiffs had "not shown a single policy or question whose resolution would apply across the class." *Id.* at 263. The court also noted that the case could involve it taking over "management of nearly all aspects of the state prison system." *Id.* at 271.

Here, the proposed class is not so broad. It would only encompass a small subset of the prison population—roughly 3,000 people out of more than 28,600.[2] These people experience virtually identical living conditions, are subject to a discrete set of policies governing a single practice, and would benefit from a single injunction limiting the use of that practice. This is far simpler than what the plaintiffs proposed in *Sabata*. Indeed, that court observed how class certification is proper for narrower classes challenging policies that deal with limited subject matter, such as hepatitis C treatment. *Id.* at 266-67 (discussing *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030 (8th Cir. 2018)).

These differences aside, the court's decision in *Sabata* may have been wrong. Like defendants here, *Sabata* criticized the Ninth Circuit's decision in *Parsons* for certifying a broad class seeking broad relief. *Id.* at 266. But every federal circuit to consider *Parsons*, along with many district courts, has cited it favorably.[3] Indeed, certification of broad prison classes is the rule, not the exception, as it can be impossible to remedy unlawful conditions without addressing many interconnected factors. *See Plata*, 563 U.S. at 525-26 (statewide Eighth Amendment violation was a "spider web" of interconnected problems and

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[2] Department of Public Safety Statistics, Adult Correction, https://www.ncdps.gov/about-dps/department-public-safety-statistics (last visited Oct. 13. 2021).

[3] *See Parent/Prof'l Advocacy League v. City of Springfield, Massachusetts*, 934 F.3d 13, 28 (1st Cir. 2019); *Postawko*, 910 F.3d at 1039; *Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 552-53 (7th Cir. 2016); *In re D.C.*, 792 F.3d 96, 102 (D.C. Cir. 2015); *Baxley v. Jividen*, 338 F.R.D. 80, 87 (S.D.W. Va. 2020).

so "[o]nly a multifaceted approach aimed at many causes, . . . will yield a solution" (quotation marks omitted)).

F. Beroth Oil *is inapposite because it dealt with fundamentally different claims.*

Defendants argue that this case is akin to *Beroth Oil* where class certification was denied. Plaintiffs addressed this argument in their opening brief. (Pls. Br. pp 29-30). In sum, the nature of the *Beroth Oil* claims made it impossible to use classwide evidence to establish the state's liability. The trial court would have had to go plaintiff-by-plaintiff, property-by-property, and then do so again at the remedy stage. 67 N.C. at 334, 757 S.E.2d at 474.

This case requires no such inquiry. Like other class actions challenging solitary confinement, plaintiffs here will show that everyone "who is presently in restrictive housing or who will be" faces "a substantial risk of serious harm." *Davis*, 2021 WL 2414640, at *20. It does not matter that "a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death[.]" *Parsons*, 754 F.3d at 678. As explained above, plaintiffs' claims are not individualized, and if they prevail, statewide policy reform will benefit all class members at once by reducing their exposure to a known, severe risk.

G. Accepting the trial court's reasoning would have ruinous consequences for North Carolina class action law.

Affirming the trial court's reasoning would not only affect this case. Nor would it only affect class actions brought by incarcerated people. It would inhibit all manner of class actions, such as those seeking to vindicate children's rights or property rights.

The trial court thought that each class member's claim required individualized treatment because they faced different circumstances. (R pp 998-99). But that would be true in virtually every case when plaintiffs seek relief from general policies imposed by institutions such as schools, hospitals, or state agencies. *See, e.g.*, *Baby Neal*, 43 F.3d at 57 (certifying class despite "the individualized circumstances of the children" placed in foster care); *Troutman v. Cohen,* 661 F. Supp. 802, 811 (E.D. Pa. 1987) (certifying subclass of 1,973 nursing home patients alleging due process claims "because it is not the unique facts of the individual [class members] which give rise to this action but rather the [defendants'] decision making process"). Under the trial court's logic, these classes could seemingly never be certified, even with a strong showing on the merits.

Other areas of law would suffer as well. Property owners, for example, will always have at least somewhat different circumstances because of the unique nature of land. *See Beroth Oil*, 367 N.C. at 333, 757 S.E.2d at 468. Under the trial

court's logic, it is unclear when, if ever, they could collectively challenge state action interfering with property rights.

Insulating such civil rights violations from classwide challenge would undermine Rule 23's purpose of efficiently seeing justice done at scale. Doing so would also have terrible implications for the public interest. Cases like this one are critical when the government has failed to remedy a widespread injustice. *See Plata*, 563 U.S. at 530 ("The Court cannot ignore the political and fiscal reality" that "California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis . . . ."). This Court should therefore decline defendants' invitation to limit the reach of North Carolina Rule 23.

II. The trial court improperly resolved the merits of plaintiffs' claims.

The order below reads like a final adjudication on the merits. The trial court denied class certification because plaintiffs did not prove that defendants' "practices actually caused the complained of harm." (R pp 991, 992).

Defendants argue that, "in context," the trial court only addressed the merits of plaintiffs' claims as necessary for Rule 23. (Defs. Br. p 15). Not so. The trial court "improperly engaged in a substantive analysis of plaintiffs' arguments," *Beroth Oil*, 367 N.C. at 342, 757 S.E.2d at 474, resolving the quintessential merits questions of injury and causation.

A. The trial court committed errors of law.

First, the trial court dismissed the relevance of "conditions common to all forms of [defendants'] restrictive housing" as "inescapable accompaniments of segregated confinement." (R p 993 (quotation marks omitted)). But whether conditions common to all class members violate the Constitution *is the ultimate question in this case*. Like other solitary cases, plaintiffs challenge "the baseline conditions in restrictive housing that emanate from . . . formal policies and systemic practices and thus exist at every facility." *Davis*, 2021 WL 2414640, at *22. This premature resolution of the merits was an error of law.

In support, the trial court relied on older Fourth Circuit cases. Defendants note that the Fourth Circuit did not overrule *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999). But the Fourth Circuit has since observed that *Mickle* is "no longer good law" given "changes in the law and academic literature[.]" *Latson v. Clarke*, 794 Fed. Appx. 266, 270 (4th Cir. 2019). And even if *Mickle* is still the law of the Fourth Circuit, it does not bind state courts, and the trial court would still have erred by resolving the merits at the class certification stage.

The trial court also found that plaintiffs "failed to provide sufficient evidence connecting [defendants'] practices and policies to the alleged similar harm or risks of harm." (R p 993). Again, the trial court was asking the wrong legal question: not whether common issues exist, but whether those issues would resolve in plaintiffs' favor. That must happen at summary judgment or trial—not a Rule 23 motion.

The record shows definitively that class members share common issues of law and fact. All class members have virtually identical living conditions and are subject to statewide policy and practice that threaten prolonged placement in those conditions. The trial court confirmed this in its findings of fact. (R pp 975-79).

Thus, as in other solitary confinement cases, plaintiffs' "claims will have, at their core, common issues regarding (1) the physical conditions under which prisoners . . . are being housed . . . and (2) whether those conditions and health care have . . . subjected prisoners to an unconstitutionally unreasonable risk of harm." *Dockery v. Fischer*, 253 F. Supp. 3d 832, 854 (S.D. Miss. 2015); *accord Davis,* 2021 WL 2414640, at *23 (common issues were whether state policy and practice "deprive class members of their basic human needs and expose them to a substantial risk of serious harm; and whether IDOC is deliberately indifferent to that harm" (italics removed)). And because no individualized inquiries are necessary, the predominance of these common issues is "self-evident." *Dukes*, 564 U.S. at 363.

B. The trial court abused its discretion by ignoring highly relevant portions of the record.

Because the trial court's order relied on a misunderstanding of Rule 23 and plaintiffs' claims, this Court need not address the trial court's findings on the merits. If this Court does examine the merits, however, it is clear that the trial court simply ignored competent evidence in the record.

A trial court abuses its discretion when it ignores legally relevant evidence before it. *See Green v. Green*, 54 N.C. App. 571, 575, 284 S.E.2d 171, 174 (1981)*; Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 29 (2008).

Here, plaintiffs submitted evidence supporting their claims and the existence of a class. Absent from the trial court's order, however, is any mention of the most relevant passages in the Vera Report, defendants' discovery responses, or the Task Force Report—all of which come from defendants themselves. That evidence shows how defendants keep people in conditions of "extreme isolation and sensory deprivation" for extended periods of time, and that such "confinement causes severe psychiatric harm[.]" (R pp 312, 548). Thus, there can be no serious dispute that defendants' use of solitary confinement does indeed create risks of harm for putative class members.

Finally, defendants try to distinguish federal cases where courts either found an Eighth Amendment violation or observed how solitary confinement creates serious health risks. (Defs. Br. pp 61-63). The effort is misplaced. While those cases do not automatically establish a constitutional violation here, they do demonstrate the ever-increasing obviousness of harm threatened by solitary confinement. As plaintiffs' amici explain, "the physical and psychological injuries resulting from solitary confinement are 'obvious'—and have been for nearly a century." (Brief of Professors and Practitioners of Psychology, Psychiatry, and Medicine p 19).

Accordingly, to the extent the merits of plaintiffs' claims are relevant, the order below failed to engage with highly relevant portions of the record supporting plaintiffs. Doing so was an abuse of discretion that warrants reversal.

III. Defendants seek to impose new and burdensome Rule 23 requirements that defy this Court's precedent.

Rule 23's basic aim is efficiency. It "should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

Defendants, however, ask this Court to impose new requirements of (1) expert evidence, which the legislature has chosen not to require; (2) a highly detailed request for relief, which is incompatible with this Court's precedent; and (3) class representatives who embody the "average" class member, an unworkable standard that has no practical impact on a plaintiff's adequacy. These requirements go far beyond Rule 23's text and purpose, and should be rejected.

A. Expert testimony is not required for class certification.

In attempting to distinguish the relevant federal authority, defendants emphasize that the plaintiffs in those cases provided expert reports supporting class certification, and plaintiffs here did not. (Defs. Br. pp 20, 23, 28). The trial court did not deny class certification on this basis. Still, defendants' argument fails for two reasons: Nothing in Rule 23 or this Court's precedent requires expert testimony for class certification, and the Vera Report largely serves the same function as an expert report.

The General Assembly can impose an expert witness requirement when it deems appropriate. *See, e.g.*, N.C. R. Civ. P. 9(j) (expert requirement for pleading medical malpractice claims). The General Assembly has not done so for Section 27 claims or Rule 23, which was designed to be flexible and conserve resources. *Crow*, 319 N.C. at 279, 354 S.E.2d at 463. Therefore, the Court should not impose an additional and costly Rule 23 requirement when the legislature has chosen not to. *See Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (courts construing statute should look to "the spirit of the act, and the objectives the statute seeks to accomplish").

Moreover, in federal court, some plaintiffs offer expert testimony at the class certification stage, but some do not. *See, e.g.*, *Wilburn v. Nelson*, 329 F.R.D. 190 (N.D. Ind. 2018) (certifying solitary confinement class without expert evidence). Thus, there is no implicit requirement in state or federal law that plaintiffs must provide expert testimony to certify a class.[4]

Even so, while plaintiffs did not submit formal expert testimony, the Vera Report serves the same purpose. The trial court found that Vera "reviewed [defendants'] policies, analyzed data provided by [defendants], and toured various prisons managed by [defendants]." (R p 978). Relying on relevant scientific literature, these researchers made findings as to solitary living conditions across the state, DPS's use of the practice, and associated risks of

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[4] Nor is expert evidence necessary to prove the merits of an Eighth Amendment claim. *See Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994).

harm. (R pp 327-98). Defendants do not contend that solitary living conditions are any different today than they were when the Vera Report came out in 2016. (*See* Defs. Br. p 21). And the trial court found that plaintiffs' recent affidavits "generally align" with the Vera Report findings. (R p 978).

Thus, the Vera Report contains "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" N.C. R. Evid. 702(a). Indeed, the report is especially relevant since defendants themselves commissioned and published it. *Cf*. *Davis*, 2021 WL 2414640, at *8 (finding 2009 Vera Report for Illinois prisons to support solitary confinement class certification).

B. Courts need only address the details of a constitutional remedy after a plaintiff establishes liability.

This Court has explained that trial courts should address a remedy for a constitutional violation *after* a plaintiff establishes liability and the factual record is fully developed:

> What that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful[.] . . . Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case.

Corum v. Univ. of N. C., 330 N.C. 761, 784, 413 S.E.2d 276, 290-91 (1992).

Defendants nevertheless say that plaintiffs' requested remedy is too vague and that plaintiffs have changed their position on appeal. The record shows otherwise—plaintiffs gave ample notice of the relief sought, and have not said anything new on the subject before this Court. And even if a prayer for relief is vague, that does not warrant denial of class certification.

The complaint alleges that defendants' use of solitary confinement, viewed as a whole, creates systemic, unconstitutional risks of harm. (R pp 7, 42). Plaintiffs explained that feasible alternatives exist, as other prison systems have limited their use of solitary confinement. (R pp 6, 16-20). Plaintiffs requested an injunction requiring defendants to implement new policies that comply with the state Constitution. (R p 43).

As defendants describe it, one might think they had no idea what plaintiffs were talking about. But defendants never argued that plaintiffs gave inadequate notice as to the nature of the case. Nor did defendants move for a more definitive statement. Nor did the trial court ask any questions about the relief sought at the hearing on plaintiffs' Rule 23 motion.

More importantly, this Court has not suggested that a complaint or Rule 23 motion must detail the precise nature of the relief sought. Nor have other courts when certifying broad classes of civil rights plaintiffs, including solitary confinement cases. Those courts were not concerned with the detail in the prayer for relief. They only cared whether they could grant relief to the class "as a whole"

by ordering changes to systemwide policies. *See, e.g.*, *Parsons*, 754 F.3d at 686; *Davis*, 2021 WL 2414640, at *8; *Braggs*, 317 F.R.D. at 669.

Defendants cite a single case—*Sabata* again—where the court faulted the plaintiffs' vague request for relief. The problem there, however, was that the relief sought would cover "nearly all aspects of the state prison system," and so the court doubted whether it could craft "sufficiently specific" relief required by a federal rule. 337 F.R.D. at 271 & n.14 (citing Fed. R. Civ. P. 65(d)(1)).

Here, the subject matter is far more discrete. The trial court would only have to address a few policies dealing with a single practice. Everyone in solitary confinement—who are all at risk of prolonged placement there—would clearly benefit from policy changes that reduce that risk, such as limiting the total consecutive and cumulative time allowed. If plaintiffs prevail and the case proceeds to a remedy phase, the trial court can craft a specific remedy with the benefit of a fully developed record and the parties' input.

C. Defendants seek to impose arbitrary, unworkable requirements for class representatives to demonstrate their adequacy.

Rule 23 ties a named plaintiff's adequacy to "fairly insur[ing] the adequate representation of all" class members. N.C. R. Civ. P. 23(a). Defendants do not argue that the named plaintiffs will somehow prejudice unnamed plaintiffs. Instead, defendants argue that the named plaintiffs "are not representative of the purported class" because they "exceeded the average stay" in solitary and are

"part of a small percentage of incarcerated persons who repeatedly cycle in and out of restrictive housing." (Defs. Br. pp 48-49).

This argument departs from the practical considerations of North Carolina Rule 23 precedent—personal stakes, conflicts of interest, adequate counsel, and diligent action—all of which plaintiffs have satisfied. (Pls. Br. pp 48-49). Tellingly, defendants do not cite any authority supporting their position. That is because varying circumstances among class members is the norm. A plaintiff's degree of injury, for example, does not affect whether they will act fairly on behalf of other class members. *See Faulkenbury v. Teachers' & State Employees' Retirement System of N.C.*, 345 N.C. 683, 698, 483 S.E.2d 422, 431 (1997).

Indeed, this Court held in *Chambers* that a named plaintiff could be adequate even though his claim was moot. 374 N.C. at 451, 843 S.E.2d at 182. If a plaintiff without a live claim facing no real injury can be adequate, surely plaintiffs *with* a live claim—two of whom will be subject to the challenged state action for the rest of their lives—have an even stronger case. (R pp 274, 278).

These plaintiffs are otherwise highly qualified to represent the class. They have spent years in solitary confinement, and know firsthand the horrible outcomes that await countless others if defendants' policies are not reformed. (R pp 272, 274, 278).

All of this is not enough for defendants, who urge the Court to fashion a new rule for adequacy: Named plaintiffs must also be "representative of the purported class." It is unclear what this means. Beyond bringing the same claim

for the same relief, when is a named plaintiff sufficiently similar to other class members? Must their alleged injury not be too severe? What about too slight? Must they be injured (or face the risk of being injured) in exactly the same way as other class members? How much deviation from the mean is acceptable, and how exactly are courts supposed to calculate that? And why does any of this matter for protecting the interests of unnamed plaintiffs? Defendants offer no guidance.

Defendants' argument that class members would be subject to "unique defenses" is also meritless. Defendants cannot cite a single case where this argument defeated certification of a civil rights class seeking indivisible relief. (*See* Defs. Br. pp 50-51). When an institutionalized class brings a systemic challenge and seeks indivisible relief, each claim is identical, and so individual claims are not "subject to unique defenses." *Parsons*, 754 F.3d at 685 n.31. Defendants can either justify systemic conditions as a whole or they cannot.

Moreover, each classification here would implicate the same potential defenses of discipline or safety. RHDP, RHCP, and HCON are all penalties for infractions. RHAP and the RDU often come before, after, or during the others. Each policy invokes safety concerns as well. (R pp 120, 122, 124, 126, 129, 131, 152).[5]

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[5] The RDU is the only classification that invokes rehabilitation. But whether the RDU actually advances that interest is a merits question. Suffice to say, calling twelve months of solitary confinement "rehabilitative" seems a misnomer.

Defendants would have to present these defenses as to the entire class—not any individual member. And whether defendants' actions actually advance any of these interests is another merits question that cannot be decided now.

IV. If the Court reaches the constitutional question, it should reverse.

The parties agree that class certification does not depend on the constitutional standard for plaintiffs' claims. However, the constitutional issue has been briefed, and this Court has the benefit of amici law professors with scholarly expertise. For these reasons, and because the trial court decided the constitutional question in conjunction with class certification, the Court may address the matter now if it deems appropriate.

Each factor in this Court's analysis—text, precedent, original understanding, practical considerations, and differences from the federal Constitution—weighs in favor of applying an objective standard. That standard would focus on whether defendants' use of solitary confinement poses a substantial risk of serious harm to plaintiffs.

A. The Washington Supreme Court has adopted an objective standard for prisoners seeking injunctive relief under the state constitution.

Recently, the Washington Supreme Court adopted an objective standard for prisoners seeking injunctive relief under the state analog to the Eighth Amendment. To prevail, a plaintiff must show that "(1) the conditions create an objectively significant risk of serious harm or otherwise deprive a person of the

basic necessities of human dignity and (2) the conditions are not reasonably necessary to accomplish a legitimate penological goal." *Matter of Williams*, No. 99344-1, 2021 WL 4619150, at *12 (Wash. Oct. 7, 2021).

The unanimous court rejected the deliberate indifference standard, accepting two of the main arguments that plaintiffs have made here. First, a subjective standard "mistakenly assumes that conditions of confinement can be considered punishment . . . only if they are subjectively intended as punishment by an identifiable prison official." *Id.* at *10. Second, when plaintiffs only seek injunctive relief and not damages from individual officials, it makes more sense to "focus on the institution rather than the prison official's intent." *Id.* at *10. A subjective standard "allows conditions of confinement to persist—even if those conditions are unquestionably cruel—so long as the relevant prison official pleads ignorance or good intentions." *Id.*

Thus, a subjective factor cannot change whether a state has actually imposed dangerous or degrading conditions, and it risks creating unjust results. Moreover, in a case like this one, a subjective inquiry would be largely redundant; once litigation begins, defendant prison officials *must* be aware of the challenged conditions by virtue of getting sued. *See Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015) ("Prison officials may not simply bury their heads in the sand and

thereby skirt liability."). If they cannot or will not remedy those conditions, court intervention is appropriate.[6]

B. Defendants offer minimal textual argument supporting a subjective standard.

When construing the state Constitution, the document's text is the first consideration. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.,* 376 N.C. 558, 2021-NCSC-6, ¶ 15 (2021). Defendants, however, do not engage with the text of Section 27 at all. They merely refer to *Wilson v. Seiter*, where the U.S. Supreme Court held that state-imposed conditions are only "punishments" under the Eighth Amendment if subjectively intended to "chastise or deter." 501 U.S. 294, 300 (1991) (quotation omitted).

Wilson merits consideration, but it cannot end the matter. At best, defendants have presented the Court with competing dictionary definitions of "punishment" which ascribe a mental component. Plaintiffs have provided other definitions that do not. (Pls. Br. pp 55-56).

If this Court must choose among plausible definitions of a constitutional term "designed to safeguard the liberty and security of the citizens in regard to

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[6] Defendants cite this Court's recent decision in *Deminski v. State Bd. of Educ*, 377 N.C. 406, 2021-NCSC-58. Those plaintiffs pled deliberate indifference to a risk of harm at a public school, which this Court found adequate to state a claim for denial of access to education. *Id.* at ¶ 1. However, the Court did not decide whether pleading deliberate indifference was *necessary* rather than merely adequate. Moreover, those plaintiffs sought damages as well as injunctive relief, *id.* at ¶ 6, so the Court had no reason to consider whether a different test should apply to claims solely for injunctive relief.

both person and property," it should lean towards the definition most "in favor of its citizens . . . ." *Corum*, 330 N.C. at 783, 413 S.E.2d at 290. That would undoubtedly be an objective standard. Tellingly, defendants do not even try to rebut plaintiffs' discussion of how the deliberate indifference standard has caused grave injustice for vulnerable people in state custody. (Pls. Br. pp 66-68).

C. An objective Section 27 standard would be far more demanding than mere negligence.

Defendants argue that an objective standard would equate constitutional violations with negligence. (Defs. Br. pp 99 67-68). Plaintiffs' amici have ably disposed of this argument. (Law Profs. Br. p 18 ("Every federal circuit to apply an objective standard to conditions-of-confinement claims raised by pretrial detainees has rejected the notion that officials could be held liable for negligent acts.")).

Moreover, on a negligence claim, a plaintiff may recover for *any* harm suffered. *See, e.g.*, *Smith v. White*, 213 N.C. App. 189, 196, 712 S.E.2d 717, 722 (2011) (plaintiff recovered for "relatively minor injuries that did not require extensive hospitalization or treatment"). Under the Eighth Amendment objective standard, however, a plaintiff could only prevail if exposed to a "substantial risk of *serious* harm . . . ." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (emphasis added). Thus, the objective standard is far more demanding than mere negligence.

Accordingly, defendants' concerns on this topic are unpersuasive.

D. "Punishment" takes different forms and is analyzed differently depending on context.

All Eighth Amendment claims derive "from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But courts analyze such claims differently depending on context. Claims for inadequate medical care are reviewed differently from claims for excessive force, which are reviewed differently from conditions-of-confinement claims, which are reviewed differently from challenges to criminal sentences. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

Thus, contrary to defendants' argument, it is unremarkable that Section 27 might involve different analyses in different contexts. (Defs. Br. p 71). As explained above, for this kind of case—plaintiffs seeking injunctive relief from an ongoing risk of serious harm—prison officials' subjective knowledge is particularly unhelpful. This Court should not require it.

E. An objective standard would be workable and account for safety concerns.

Defendants argue that an objective test would be unworkable, mainly because of safety concerns. (Defs. Br. pp 68, 74). They are mistaken.

First, an objective standard still allows courts to consider government interests like safety to determine whether there has been a constitutional violation. Multiple courts have accounted for safety concerns in the context of the Eighth Amendment's objective prong. *See, e.g.*, *Williams*, 2021 WL 4619150, at *12; *Thomas v. Bryant*, 614 F.3d 1288, 1311 (11th Cir. 2010); *Foster v. Runnels*,

554 F.3d 807, 814 (9th Cir. 2009). North Carolina courts could easily do the same.

Second, an objective test does not present practical difficulties. That test applies to excessive force claims brought by pretrial detainees, *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), and multiple federal circuits have applied it to conditions-of-confinement claims as well. *See Miranda v. County of Lake*, 900 F.3d 335, 351–52 (7th Cir. 2018); *Castro v. Cnty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc). North Carolina courts applying such a test would not be breaking any new ground.

Accordingly, applying an objective standard would be workable and in fact less complicated than probing defendants' subjective mental state.

F. The modern meaning of Section 27 is not controlled by an English document from 1686.

Defendants have largely not responded to plaintiffs' arguments on the original understanding of Section 27. They only assert that the Eighth Amendment and Section 27 are both linked to the English Bill of Rights of 1686, apparently suggesting that both documents should be construed the same way. (Defs. Br. p 71).

As plaintiffs have explained, centuries-old documents do not control the meaning of the North Carolina Constitution adopted in 1971. And what was considered cruel or unusual in the colonial era (or even the 1970s) does not control what is cruel or unusual today. (Pls. Br. p 57). Even so, defendants do not

contend that the framers of any iteration of the state Constitution understood the meaning of cruel or unusual punishments to have a subjective element. This factor therefore weighs in favor of an objective standard.

CONCLUSION

At critical steps of the Rule 23 analysis—predominance, superiority, and adequacy—the trial court applied incorrect legal standards. Because the evidence of solitary living conditions and defendants' policies is undisputed, this Court may reverse the trial court and remand with instructions to certify the proposed class. Alternatively, "a remand to the trial court to apply the appropriate legal standard[s] is warranted." *Chambers*, 374 N.C. at 451, 843 S.E.2d at 182. If the Court reaches the constitutional question, it should hold that an objective standard applies to plaintiffs' claims.

Respectfully submitted, this the 13th day of October, 2021.

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