No. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, SHANELL DUNCAN, TERRY KILL, LEONDIS BERRY, and THEODORE ROOSEVELT RHONE,

Petitioners,

v.

JAY INSLEE, Governor of the State of Washington, and STEPHEN SINCLAIR, Secretary of the Washington State Department of Corrections,

Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

Petitioners are among the almost 18,000 people incarcerated in Department of Corrections (DOC) facilities. The first confirmed case of COVID-19 hit Washington State (and the U.S.) on January 21, 2020.[1] Yet the Governor took no action to protect people in DOC until nearly three months later, after this lawsuit was filed, and after this Court ordered Governor Inslee and Secretary Sinclair to "immediately exercise their authority to take all necessary steps to protect the health and safety of the named petitioners and all Department of Corrections inmates in response to the COVID-19 outbreak."[2]

In an April 9 press conference, Governor Inslee was asked to explain the delay in depopulating prisons to comply with public health recommendations, to which the Governor responded: "As far as why we're doing this now, it's because I have seven million other people who I care about and I've been working 24/7 for them and we approach these things as they become time-critical, and this is time-critical and we're

[1] Centers for Disease Control and Prevention, "First Travel-related Case of 2019 Novel Coronavirus Detected in United States," (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.
[2] Order, *Colvin v. Inslee*, Wash. St. Sup. Ct. No. 98317-8 (Apr. 10, 2020).

acting accordingly." [3] The Governor's words indicate the priority that the State has placed on the health and safety of the Petitioners and the other people living in Washington's prisons: the needs of seven million Washington residents ***not*** experiencing incarceration come first.[4] Unfortunately, in their response, the Respondents continue to utilize the rhetoric of demonization-and-dismissal as cover for their slow and inadequate steps to protect people in prison. Accordingly, this Court must act and require the Respondents to live up to their duties owed the Petitioners and other vulnerable people living in DOC's facilities.

At least ten people living in the Monroe Correctional Complex (MCC) have now tested positive for COVID-19. Two of the Petitioners live in the Minimum Security Unit at MCC with over 400 people, the unit where many of these infections occurred. There are likely many others

[3] In the Governor's April 9th press conference on COVID-19, the Governor was asked: "[A]nd Governor why has it taken so long to get to this point where still few if any have been released from prison to make more room for isolation?" *Governor Inslee Press Conference on COVID-19*, TVW (April 9, 2020) at 14:50; 17:34-17:45. https://www.tvw.org/watch/?clientID=9375922947&eventID=2020041030.

[4] To make matters worse, in their response brief, Respondents make a point of calling out the names of infamous serial killers– Charles Campbell (executed in 1994) (Resp'ts' Br. at 15), Robert Yates (referenced twice) (Resp'ts' Br. at 11 and 39), and Gary Ridgway (four separate references) (Resp'ts' Br. at 11, 12, 39) —thereby conveniently ignoring over 17,000 other people in Washington's prisons who are not notorious serial killers. Similarly, Respondents describe the disruption at MCC-MSU in order to suggest that people in prison are too dangerous to release. Resp. to Pet'rs' Emergency Mot. at 16.

who have been infected but are currently asymptomatic or awaiting test results.

As the Governor has now grudgingly acknowledged, the only public health measure that will truly mitigate the risk is a large enough release to allow for true social distancing in all the State's facilities.[5] Yet, even with the epidemic raging inside the prison system for over a week, Respondents have still not released a single person. The undisputed scientific evidence before the Court proves the Respondents' current actions and limited release plan are woefully inadequate.

Rather than present the Court with a detailed, evidence-based release plan, the Respondents complain about how difficult it will be to release enough people to ensure appropriate social distancing. And rather than acting quickly to meet their constitutional and statutory obligations, the Respondents continue to delay and deflect. Accordingly, this Court

[5] *Governor Inslee Press Conference on COVID-19*, TVW (April 15, 2020) at 28:04-28:24. https://www.tvw.org/watch/?eventID=2020041048. The measures that the Governor announced the night before this reply brief was due are not supported by any scientific justification or explanation. *See* Wash. Governor Jay Inslee, *Inslee issues new orders to reduce prison populations during the COVID-19 outbreak* (Apr. 15, 2020), https://www.governor.wa.gov/news-media/inslee-issues-new-orders-reduce-prison-populations-during-covid-19-outbreak. The Governor has finally acknowledged that releases are a vital tool in combatting COVID-19, but the State continues to refuse to explain how these limited measures will actually address the dangers that COVID-19 poses to people locked up in Washington's prisons. In fact, Respondents have failed to provide other essential, basic information to the Court in either their April 13 report or their responsive brief such as: the common denominators between the people who have tested positive at MCC, how COVID-19 got into MCC, and what DOC is doing to prevent additional outbreaks at all of its facilities. As all of the independent experts who have provided this Court with testimony agree, the State must do much more.

should force the Respondents to promptly fulfill their non-discretionary duties to protect the people who live in Washington's prisons and order them to significantly decrease the prison population by releasing the Petitioners and many other people.

II. ARGUMENT

A. Mandamus Is Appropriate Because the Respondents Have Non-Discretionary Duties to Protect Petitioners and All Other People Living in Washington's Prisons.

Mandamus is an "extraordinary" remedy and COVID-19 has created extraordinary circumstances appropriate for resolution by this Court. *See Staples v. Benton County*, 151 Wn.2d 460, 464, 89 P.3d 706 (2004) (mandamus is an "extraordinary writ."). As this Court has long recognized, a writ of mandamus is appropriate:

> in order that the court of highest authority in the state should have the power to protect the rights, interests, and franchises of the state, and the rights and interests of the whole people, ***to enforce the performance of high official duties affecting the public at large***, and, ***in emergency*** (of which the court itself is to determine), to assume jurisdiction of cases affecting local public interests, or private rights, where there is no other adequate remedy, and ***the exercise of such jurisdiction is necessary to prevent a failure of justice***....

State ex rel. Pac. Bridge Co. v. Washington Toll Bridge Auth., 8 Wn.2d 337, 341–42, 112 P.2d 135 (1941) (emphasis added).

Petitioners' opening brief detailed the myriad sources of the Governor and Secretary's duties that are relevant to this case.[6] A duty is no less a duty simply because an agency "has discretion to determine the ways in which the duty may be met." *Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 906-07, 949 P.2d 1291 (1997); *see also, id.* at 914 ("where the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, then the courts may interfere to protect the rights of individuals.")(citation omitted). This Court can issue a writ to compel the Respondents to meet their duties *See Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987) ("Although mandamus will not lie to control exercise of discretion, it will lie to require that discretion be exercised.").

The Respondents pick and choose quotes from several cases, without context, to argue that mandamus does not lie to control "discretion" or compel a "discretionary act" and is only appropriate where there is an "existing mandatory duty to act." Resp'ts' Brief at 26-27. Indeed, this Court has recognized that mandamus "will not by mandamus attempt to control the discretion of subordinate bodies acting within the limits of discretion *vested in them by law." Stoor v. City of Seattle*, 44

[6] Pet'rs' Br. in Support of Pet. for a Writ of Mandamus, 30-53.

Wn.2d 405, 410, 267 P.2d 902, 905 (1954) (quotations and citations omitted) (emphasis added). However, Respondents here are not acting within discretion "*vested in them by law*." Rather, they are *violating* the law and their duties. Compliance with the Constitution is not "discretionary." The Respondents have an existing mandatory duty to protect those in their custody.

None of the cases the Respondents cite in their brief support the proposition that DOC can operate illegally with unfettered discretion, immune from this Court's review. In fact, every case Respondents cites involves non-emergent circumstances where government agencies acted appropriately and in accord with the legitimate discretion particular statutes afford them. *See Vangor v. Munro*, 115 27 Wn.2d 536, 543, 798 P.2d 1151 (1990) (refusing to intervene to compel certification of a ballot initiative where the responsible agency diligently carried out its statutory duties); *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979) (declining to intervene to force the Department of Ecology to issue a groundwater permit when it complied with applicable statutes and standards); *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658

(1940) (Court did not compel a government official to participate in hiring decision to benefit other prospective applicant).[7]

Here Respondents' infliction of "cruel punishment" is *not* an act of discretion. Under our laws and Constitution, Respondents have a mandatory duty to keep individuals housed in DOC facilities healthy and safe, including safe from contagious disease. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Shea v. City of Spokane*, 17 Wn. App. 236, 241, 562 P.2d 264 (1977); *see also Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)(exposure to toxic substances or disease can be an Eighth Amendment violation; *Jolly v. Coughlin,* 76 F.3d 468, 477 (2d Cir. 1996) (prison officials have an affirmative duty to protect inmates from infectious disease and referencing other cases). Further, this Court can order release of the Petitioners and others as an appropriate remedy for Respondents' failures to comply with their duties. *See, e.g., Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 1928, 179 L. Ed. 2d 969 (2011) (mandated reduction of prison population warranted as a remedy for

[7] This Court also did not intervene to review the constitutionality of a statute that had not yet been effective or enforced. *See Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.3d 920 (1994). However, the Court did intervene to require the DOC to comply with certain safety statutes when assigning inmates to perform electrical work, while allowing it to exercise some discretion in choosing inmate labor over private contractors. *See Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 24, 29-30, 978 P.2d 481 (1999).

constitutional violations); *Inmates of the Allegheny Cnty. Jail v. Wecht*, 565 F. Supp. 1278, 1293-94 (W.D. Pa. 1983) (discussing cases where courts have ordered releases and population reductions as a remedy). Some courts have recently ordered releases because of the dangers that COVID-19 poses to people in institutions. *See, e.g*., *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *15 & 22 n.15 (M.D. Pa. Mar. 31, 2020) (Fifth Amendment challenge by ICE detainees for releases due to COVID-19; court found that detainees would also have shown a likelihood of success on the more stringent Eighth Amendment standard of cruel and unusual punishment).

Respondents address their duties under Article I, § 14 only briefly, citing a single case, *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019), to argue that the risk of exposure to disease does not amount to cruel punishment.[8] However, *Hines* is inapposite to the present situation. The *Hines* court confronted a question of qualified immunity, not whether the failure to protect people from an infectious disease constituted cruel and unusual punishment. *Hines,* 914 F.3d at 1229 ("[t]he courts below did not decide whether exposing inmates to a heightened risk of Valley Fever

[8] Resp'ts' Br. at 48-49. Respondents cite to only a few other general cases outlining the Eighth Amendment standard, with little to no discussion. *Wilson v. Seiter*, 501 U.S. 294, 303-04, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991); *Farmer*, 511 U.S. at 836; and *Johnson v. Lewis*, 217 F.3d 726, 731-32 (9th Cir. 2000).

violates the Eighth Amendment. Neither do we."). Furthermore, *Hines* involved a disease, Valley Fever, for which there was no scientific consensus about the risk it posed to people's health and safety or whether it required particular precautions. As a result, the Court concluded that it was not "obvious" to reasonable officials that the threat was particularly "grave" and thus the risk the disease posed was not sufficient to overcome the defendants' assertion of qualified immunity. *Id.* COVID-19 is not Valley Fever. Science, society, and even Respondents agree that the risk posed by this disease is grave, a risk so great that it justifies unprecedented global, economic, and social disruptions.[9]

Finally, the Court is not hamstrung by the separation of powers doctrine from directing another branch of government to cease unconstitutional actions. As this Court has explained, one of the judicial branch's central roles is to serve as "a check on the activities of another

[9] The Respondents complaints regarding the costs and difficulties associated with providing constitutional conditions to the people under their care are equally unavailing. Administrative difficulty or expense do not justify conditions that amount to cruel punishment. *See Wilson v. Seiter*, 501 U.S. at 311 (White J., concurring) (prison officials cannot "defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature"); *see also Johnson v. Bowers*, 884 F.2d 1053, 1055 (8th Cir. 1989) ("the lack of adequate funds cannot justify unconstitutional treatment of prisoners"); *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986) (cost is not basis to deny remedy for unconstitutional prison condition); *Anderson v. City of Atlanta*, 778 F.2d 678, 688 n.14 (11th Cir. 1985) ("[l]ack of funds for facilities cannot justify an unconstitutional lack of competent medical care or treatment of inmates").

branch" – even when "contrary to the view of the constitution taken by another branch." *McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012).[10] In *McCleary*, this Court held that the State was not meeting its constitutional duties to the school-age children of Washington. *Id.* at 485. Next, the Court retained jurisdiction, required periodic reports from the State, and issued orders directing the State to lay out its plan for remedying the violation. Order, *McCleary v. State*, No. 84362-7, at 2-3 (Wash. Dec. 20, 2012). Subsequently, the Court held the State in contempt for its on-going violations of its constitutional duties, even as the State argued that Court was overstepping its constitutional bounds:

> [The court] does not wish to dictate the means by which the legislature carries out its constitutional responsibility or otherwise directly involve itself in the choices and trade-offs that are uniquely within the legislature's purview. Rather, ***the court has fulfilled its constitutional role to determine whether the State is violating constitutional commands, and having held that it is, the court has issued orders within its authority directing the State to remedy its violation***[.]

Order, *McCleary v. State*, No. 84362-7, at 3 (Wash. Sept. 11, 2014) (emphasis added). As in *McCleary*, this Court undoubtedly has the authority and justification to issue a writ of mandamus compelling the Respondents to fulfill their lawful duties.

[10] This constitutional division of government into three branches is "for the protection of individuals" against centralized authority and abuses of power. *State v. Rice*, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012).

Moreover, here, the remedy sought is not merely to generally comply with the Constitution. "[T]he remedy by mandamus contemplates the necessity of indicating the precise thing to be done." *Clark Cnty. Sheriff v. Department of Social & Health Servs.*, 95 Wn.2d 445, 450, 626 P.2d 6 (1981) (upholding a writ of mandamus as sufficiently specific where it compelled a government entity to take specific actions in order to comply with its legal duty). Rather, the remedy is specific: Protect the health and safety of persons people in DOC custody from the threat of the COVID-19 virus by depopulating the prison, in compliance with unanimous public health recommendations.

As detailed at length in Petitioners' opening brief, the risk that COVID-19 poses to Petitioners and other people incarcerated in Washington's prisons is particularly acute – a risk that has materialized with at least ten new cases in just the brief amount of time that has passed since the initiation of this lawsuit. Respondents have only now begun to acknowledge this unfortunate reality, and even then only in a very limited way, unsupported by actual public health science.

Respondents have made no showing that the limited releases they have publicly announced will reasonably abate the harm and spread of COVID-19. Until Respondents have proven to this Court that they have reduced the population enough to allow for appropriate social distancing

in all of Washington's prisons, they will continue to violate their constitutional duties. *See Farmer,* 511 U.S. at 844-845 (cruel and unusual punishment exists when prison officials "know of a substantial risk of serious harm" and do not "take *reasonable measures to abate* it.") (emphasis added).

Respondents pay little attention in their briefing to the other duties that they owe Petitioners and other people in Washington's prisons, but those duties also justify the Court acting here as the Petitioners request.[11] Governor Inslee has duties to protect *all* people living in Washington, including those who live in Washington's prisons. While his concern for the other "7,000,000" of us is admirable, it does not justify his refusal to properly care for the more than 17,000 people currently incarcerated in Washington. Furthermore, Respondents' behavior constitutes discrimination against people living with disabilities and therefore violates duties imposed by Washington's Law Against Discrimination, RCW 49.60.

[11] See Pet. for Writ of Mandamus at PSD 56-68; Pet'rs' Br. at 27, 30-40; 50-52 for discussion of other duties the Respondents owe the Petitioners and all other people living in Washington's prisons.

B. The Court Can Grant Release to Petitioners and other People in DOC Custody Pursuant to Court's Habeas Power through this Personal Restraint Petition.[12]

RAP 16.4 authorizes this Court to release the Petitioners and other people if the "conditions or manner of [their] restraint … are in violation of … the Constitution or laws of the State of Washington." RAP 16.4(c)(6); *see also In re Arsenau*, 98 Wn. App. 368, 371, 989 P.2d 1197 (1999) (RAP 16.4 does not prevent court from considering claims that are unrelated to the validity of incarceration); April 14, 2020 Order (Gordon McCloud, J. concurring) ("[t]hese petitioners, confined at state correctional facilities, are clearly under a restraint. And if their allegations are true, then that restraint is unlawful."). As detailed above, the Respondents' inadequate response to the COVID-19 pandemic has resulted in Petitioners' unconstitutional restraint. Release is the only appropriate remedy.[13]

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[12] The Petitioners filed a motion to amend their Petition to include request for relief through a personal restraint petition. *See Colvin v. Inslee*, Wash. St. Supr. Ct. No. 98317-8, Petitioners' Motion to Amend… (filed on Apr. 13, 2020). Respondents complain in their response that the Court should refuse to consider whether release is appropriate pursuant to a Personal Restraint Petition because the request it is untimely. Nonetheless, they go on to argue against it on the merits. Clearly, the Respondents have not been prejudiced by the Court's consideration of this alternative ground for release and there is no reason given the extreme nature of the current circumstances why the Court should not consider release pursuant to its habeas power.

[13] Respondents wrongly rely on *In re Det. of Campbell*, 139 Wn.2d 341, 349-50, 986 P.2d 771 (1999), and *In re Det. of Turay*, 139 Wn.2d 379, 420, 986 P.2d 790 (1999), to argue that release is not an available remedy. *Campbell* and *Turay* were challenges to the State's civil commitment statute and the conditions at the Special Commitment Center (SCC). Petitioners in both cases argued that conditions at the SCC violated applicable

C. There Is No Adequate and Speedy Remedy Other than a Writ or PRP Ordering a Plan for Large-scale Evidence-Based Depopulation and Protection for Vulnerable Persons in DOC Custody.

Respondents argue that a writ of mandamus is improper because Petitioners have an adequate remedy at law: individual superior court actions. However, the emergency that this case presents and the significant issues of law and fact presented must be decided by this Court. The delay attendant in the Respondents' proposed approach would deprive those housed in DOC facilities of a timely, adequate remedy.

Respondents refuse to acknowledge the utterly unprecedented nature of this crisis and the need for decisive and immediate steps to meaningfully address it. Notwithstanding this Court's decision to review this case on the merits, Respondents continue to insist that an action in Superior Court is an adequate remedy to address a crisis that threatens the lives of thousands of people and which even Respondents agree is a public health emergency. The Court has already decided to exercise its original jurisdiction and hear this case. It could have transferred this action to a

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constitutional duties owed them. *See Campbell*, 139 Wn.2d at 346; *Turay*, 139 Wn.2d at 415-16. However, this Court held that release was not appropriate in *Campbell* because the conditions at the SCC were not so deficient that they constituted punishment in violation of double jeopardy protections. 139 Wn.2d at 346. Similarly, the *Turay* Court denied release, not because it was precluded from doing so, but because it was not appropriate under the facts presented. 139 Wn.2d at 420. Here, as detailed above, the conditions Petitioners and others face in Washington's prisons are unconstitutional, and large-scale release is the only solution to the unprecedented danger of COVID-19.

superior court weeks ago, but it did not do so.[14] Respondents had an opportunity to challenge that decision but did not. *See* RAP 17.7. The Court should not countenance the Respondents' untimely attempt to now second-guess the Court's decision to rule on the merits of this case as quickly as possible.

Nor does well-established Washington law support Respondents' argument. They ignore the long-established principle that whether a remedy is "plain, speedy, and adequate" is a discretionary determination that turns upon "the ***facts*** of each particular case[.]" *Riddle v. Elofson*, 193 Wn.2d 423, 433-34, 439 P.3d 647 (2019) (emphasis added) (quoting *State ex rel. O'Brien v. Police Court*, 14 Wn.2d 340, 348, 128 P.2d 332 (1942)).

Rather, Respondents rely on cases where the facts simply do not approach the seriousness of the COVID-19 crisis. This Court's recent decision in *Burrowes v. Killian*, __ Wn.2d __, 459 P.3d 1082, 2020 WL 1467030 (Mar. 19, 2020), cited by Respondents, is an example of a case where the difference in magnitude could not be more extreme. In *Killian*,

[14] Respondents ignore that the Court has already ruled that "this court has original jurisdiction over this matter under article IV, section 4 of the Washington Constitution and RAP 16.2(a)[,]" that this case will be retained by the Court for a decision on the merits and that accelerated review is appropriate. *See* Letter from Comm'r Susan L. Carlson, *Colvin v. Inslee,* Wash. St. Supr. Ct. No. 98317-8 (Mar. 27, 2020) at PSD 397-398. Respondents did not seek review of that ruling as authorized by RAP 17.7. Accordingly, that decision is now unassailable. *See e.g. Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.").

the issue was whether superior court judges could require a court clerk to maintain paper files of court documents as well as electronic files. 2020 WL 1467030 at *1. In response to the Franklin County clerk's refusal to maintain paper records, the judges sought a writ of mandamus in superior court, compelling the clerk to comply. *Id.* The alleged harm from the failure to maintain paper records? One judge explained that if he conducted a settlement conference in a jury room, which lacked computers, he would need paper records. *Id.* at *2. This Court properly vacated the writ issued by the lower court, explaining that the judges' "plain, speedy, and adequate remedy" was a declaratory judgment. *Id.*

Here by contrast, Petitioners and other people living in Washington's prisons face a tremendous risk of serious illness or death because of Respondents' failure to take necessary steps to protect them. Adjudication of a dispute regarding the convenience of paper versus electronic records is simply not comparable to a proceeding where people's lives are at stake.[15]

[15] Respondents' other cases are similarly distinguishable. None of them involve issues that require speedy relief to save lives. *See Wash. State Council of Cnty. & City Emps., Council 2, Local 87 v. Hahn*, 151 Wn.2d 163, 165, 86 P.3d 774 (2004) (holding that court employees who sought writ of mandamus compelling judges to collectively bargain over nonwage issues had adequate statutory remedy under RCW 41.56, the Public Employees' Collective Bargaining Act); *City of Seattle v. Williams*, 101 Wn.2d 445, 456, 680 P.2d 1051 (1984) (holding that the Rules for Appeal of Decisions of Courts of Limited Jurisdiction provided an adequate remedy for defendants charged with misdemeanors in municipal courts who sought to appeal decisions denying their jury demands).

Respondents' sole support for the proposition that requesting injunctive relief in a suit in superior court is an adequate remedy here is *Nagel v. Dep't of Corrections*, currently pending in Pierce County Superior Court.[16] The mere fact that another party has filed a lawsuit in another court regarding COVID-19 does not require this Court to hold that any other remedy is adequate. In fact, notwithstanding Respondents' characterization of *Nagel*, the *Nagel* plaintiffs did not seek relief identical to that sought here.[17]

Indeed, the Superior Court Judge hearing the *Nagel* matter has already ruled that "the injunctive process" relied on by the *Nagel* plaintiffs is ***not*** the method to address their claims. Instead, the court noted that other forms of relief might be available to the plaintiffs, which they had not sought, including PRPs, furlough, and release via the Governor's pardon and clemency powers.[18] In contrast to the relief sought in *Nagel*, the Petitioners here ***do*** ask the Court to order the Respondents to release them and others pursuant to their existing constitutional and statutory

[16] Resp'ts' Br. at 23.
[17] In addition, the Nagel plaintiffs did not name the Governor as a defendant or request that he exercise his statutory and constitutional authority to order DOC to release Petitioners and other prisoners. *See Nagel* Complaint, attached as Appendix F, Exhibit 1 to Index of Respondents' Court Record (Resp'ts' App.).
[18] *Nagel* Order at Resp'ts' App. F, Ex. 2.

powers because of the unconstitutional conditions that threaten everyone living in Washington's prisons.[19]

The Court should reject Respondents' attempts to avoid a definitive and speedy decision in this case. Starting over in superior court, in a case where this Court has already accepted review, is a "remedy" that is not supported by law, equity, or the unique circumstances here, which endanger more people each day because of Respondents' failure to take steps to release many people from custody.

D. The Court Must Order The Petitioners and Many Other People Released in Order to Remedy The Unconstitutional Conditions That The Respondents Have Allowed to Continue.

1. The State's "release plan" is undefined, lacks specificity, and not connected to actual science. Much more is required.

After weeks of refusing to acknowledge the need to release people, Respondents now admit that they must do so in order to protect people living in their care and custody. As Governor Inslee said at his press conference on April 15: "[W]e do have a court order that has ordered the governor to produce a plan to [do] whatever is necessary to provide for the physical health of these inmates. And ***the only way to do that is to reduce***

[19] *See* Pet. For Writ of Mandamus at PSD 58-68.

the population in these facilities so that there's more distance to reduce the risk." [20]

While the Governor has now, on the eve of this Reply, issued a Proclamation and Commutation Order,[21] these actions are too little and too late. The Respondents provide no solid timeline for these releases, no explanation why the number of people they identify will allow them to engage in appropriate social distancing, or what the public health justification is to release only 1/17 of the population of people currently held in DOC's custody.[22] By contrast, Petitioners' uncontradicted expert testimony shows that many more people must be released.[23]

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[20] *Governor Inslee Press Conference on COVID-19*, TVW (April 15, 2020) at 28:04-28:24: https://www.tvw.org/watch/?eventID=2020041048 (emphasis added).

[21] *Proclamation by the Governor Amending Proclamation 20-05: 20-50 Reducing Prison Population*, Wash. Off. of the Governor (Apr. 15, 2020), https://www.governor.wa.gov/sites/default/files/20-50%20-%20COVID-19%20Reducing%20Prison%20Population%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery; *Emergency Commutation in Response to COVID-19*, Wash. Off. of the Governor (Apr. 15, 2020), https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery.

[22] There are roughly 17,000 people living under DOC's custody at this time. DOC Fact Sheet, the release announced by the Respondents would reduce this number by only 1/17th or less.

[23] Petitioners' uncontradicted factual evidence shows that DOC does not have the facilities to allow for appropriate quarantining and continues to risk the health of many people by allowing the on-going interaction of people who may be infected with many other people who are not infected. Rhone Suppl. Decl. at PSD 709, ¶ 11; O'Brien Decl. at PSD 702, ¶ 12; Kill 2d Suppl. Decl. at PSD 693, ¶¶ 8-14; Duncan Suppl. Decl. at PSD 716, ¶¶ 18-19. Respondents admit that their "quarantine" efforts involve the widespread use of "co-horting." Martin Decl. at Resp. App. D, 28, 32; *see also*, Rhone Suppl. Decl. at PSD 709, ¶ 11; O'Brien Decl. at PSD 702, ¶ 12; Kill 2d Suppl. Decl. at PSD 692, ¶ 6-7; Duncan Suppl. Decl. at PSD 716, ¶ 17. This inadequate public health measure brings

Even at this late stage, Respondents have failed to provide this Court with any testimony from any scientist, medical, or public health expert – not even a declaration from one of their own medical or public health officials – to support or explain their actions or the scientific basis to their limited release plan. The silence is deafening. The only scientific, medical or public health expert evidence before the Court comes from Petitioners. And that undisputed evidence is consistent: DOC must engage in a widespread release of people in order to address the COVID-19 pandemic; a release much larger than what the Respondents have announced.[24]

Furthermore, Respondents have failed to give this Court any first-hand information regarding what is happening on the ground in Washington's prisons. The evidence they have submitted comes from high-level DOC officials who are not regularly present in any of the DOC

many different people together who may have had contact with someone who may be infected. Co-horting is inappropriate because it allows one infected person to spread the contagion to many others. Simonsen Decl. Attachment 6 (Decl. of Homer Venters) at PSD 531, ¶ 18.

[24] Respondents have had ample opportunity to provide expert testimony that challenges Petitioners' experts. Petitioners filed their expert opinions in this Court on March 24, 2020. DOC had over three weeks to identify, gather, and present contrary expert evidence, but have failed to do so, even from their own DOC medical or public health staff.

facilities where people live and work.[25] By contrast, Petitioners have provided uncontroverted, first-hand accounts of what is truly happening in Washington's prisons and how DOC's policies are actually being implemented or ignored.[26] The Petitioners undisputed evidence proves that the Respondents' slow, halting and begrudging acceptance that release is necessary is still insufficient to meet the current public health care crisis.

2. Respondents complain that releasing people is too hard and dangerous.

Respondents spend pages describing the difficulty of releasing people; something they admit that they do over 8200 times every year, and

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[25] *See* Leavell Decl. at Resp. App. A, ¶ 2 (Susan Leavell is a Senior Administrator within the Reentry Division of DOC); Lewallen Decl. at Resp. App. B, ¶ 1 (Sheila Lewallen is the Victim Services Program Manager for DOC); Luxton Decl. at Resp. App. C, ¶ 2 (David Luxton, PhD, MS, is the Director of Research and Data Analytics Unit within the Administration Operations Division of DOC); Martin Decl. at Resp. App. D, ¶ 2 (Julie Martin is the Deputy Secretary of DOC); Pevey Decl. at Resp. App. E, ¶ 2 (Mac Pevey is the Assistant Secretary for Community Corrections for DOC); Fuelner Decl. at Resp. App. F, ¶ 1 (Timothy Feulner is an Assistant Attorney General assigned to represent the defendants in *Nagel v. Dep't of Corrections*).

[26] The Petitioners provided 13 declarations from people living in Washington's prisons with their original Petition. They have now provided the Court with an additional 7 original and supplemental declarations from the Petitioners and others. *See e.g.*, Berry Suppl. Decl. at PSD 667-75; Colvin Suppl. Decl. at PSD 676-82; Fernandez Decl. at PSD 683-91; Kill 2d Suppl. Decl. at PSD 692-98; O'Brian Decl. at PSD 699-705; Rhone Suppl. Decl. at PSD 706-11; Duncan Suppl. Decl. at PSD 712-19. Those declarations all tell a similar tale. The Respondents' assertions regarding policies are not what is happening on the ground and nothing the Respondents can do will actually address the dangers that people living and working in Washington's prisons actually face. The Petitioners' uncontradicted factual and expert declarations prove that large-scale releases are the only steps that the Respondents can take to appropriately address the COVID-19 pandemic.

over 650 times every month. They assert that the State lacks resources or staff to do what is necessary to protect the lives and health of the people under their care, even at this unprecedented time.

The Respondents' excuses ignore that in times of emergency, DOC is able to, and has, acted immediately and decisively to address the release of large numbers of prisoners and do so in a way that supports successful reentry.[27] Moreover, while Respondents recognize that a key component of successful reentry is connections with family and community, they ignore that Petitioners and many other people already have reentry plans in place, the active, enthusiastic support of family members, and connections to other community-based, reentry services and programs.[28]

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[27] See Declaration of Dan Pacholke, explaining his actions as Secretary of DOC to address DOC sentencing miscalculations that resulted in approximately 3,600 people being released early. Pacholke Decl. at PSD 240, ¶ 11. As former Secretary Pacholke explains, based on his experience and knowledge from over three decades as a DOC employee which culminated as his appointment as Secretary in 2015, the risks to the health and safety of people in DOC custody require DOC to "immediately take steps to proactively respond to the virus" and there are several ways in which DOC "could exercise its discretion to quickly and efficiently release people from DOC facilities to help mitigate the effects of COVID-19." Pacholke Decl. at PSD 238-239, ¶¶ 6-10.

[28] Colvin Decl. at PSD 290, ¶¶ 32-34; Duncan Decl. at PSD 295, ¶¶ 5-6; Kill Decl. at PSD 305, ¶ 45; Berry Decl. at 318; ¶¶ 35-37. Petitioners note that community organizations appearing as amici in this case will address this issue in their amicus brief. *See* Motion for Leave to File Brief of Amici Curiae COVID-19 Mutual Aid Seattle, Community Passageways, and Surge Reproductive Justice in Support of Petition for Writ of Mandamus at 5 (explaining that "amici believe that it is important for the Court to be aware that many of their constituents stand ready to help their incarcerated family members and loved ones transition home from prison if they are released"). Furthermore, these amici recognize "the disproportionate impact that continued incarceration has had on low-income families and communities of color" which is heightened during the COVID-19 epidemic. *Id.* at 4-5.

In fact, the Governor has repeatedly recognized the importance of successful reentry, has allocated resources to that end, and has supported government and community partnerships that address reentry issues and provide support for justice-involved people post-incarceration. Indeed, he has assembled a "brain trust" of reentry specialists and stakeholders to address and advise him on these issues.

In 2016, Governor Inslee issued an executive order that removes barriers for people reentering society post-incarceration.[29] Executive Order 16-05 recognized that of the approximately 17,000 people incarcerated in Washington State's prisons, 95 percent of those individuals "will eventually return to society[.]" *Id.* The Governor noted that DOC was "currently partnering" with other state agencies and stakeholders "to support and increase opportunities for those reentering their communities." *Id.* Executive Order 16-05 expressly directed several state agencies to support reentry for people leaving Washington correctional institutions by providing services and benefits for those individuals immediately upon leaving prison, and in some cases, prescreening people for benefits and services before they left prison. *Id.*

[29] Executive Order 16-05, Building Safe and Strong Communities Through Successful Reentry (April 26, 2016), *available at* https://www.governor.wa.gov/sites/default/files/exe_order/eo_16-05.pdf (last visited April 14, 2020).

Pursuant to this authority, Governor Inslee launched the Statewide Reentry Council ("Reentry Council").The Reentry Council, comprised of 15 members appointed by the governor, is empowered to advise the legislature and the governor on reentry issues and to make policy and funding recommendations and to promote and support initiative that support "successful reentry and reintegration of offenders." RCW 43.380.030(1); *also* RCW 43.380.050(1).[30] Respondents, particularly the Governor, has many other significant resources that they can call upon in this moment of crisis to ensure that everyone leaving DOC's custody is provided the support and assistance they need in order to succeed.[31]

[30] By statute, Reentry Council membership must include representatives of DOC, statewide organizations representing law enforcement, prosecutors, public defenders, "the interests of crime victims," businesses and employers, faith-based communities, and housing providers. RCW 43.380.030(2)(a)(i). The governor must also appoint Reentry Council members with lived experience reentering the community after incarceration. RCW 43.380.030(2)(a)(ii). Currently co-chaired by Tarra Simmons, an attorney and co-founder of Civil Survival, an advocacy organization for formerly incarcerated people, and King County Prosecutor Dan Satterberg, the Reentry Council currently includes among its members Danielle Armbruster, DOC Assistant Secretary for Reentry; Karen Lee, Chief Executive Officer of Pioneer Human Services, a leading provider of housing, social services, and job training for criminal justice-involved people; Linda Olsen, Housing Program Director for the Washington State Coalition Against Domestic Violence, and other people with years of experience and knowledge of reentry issues. Statewide Reentry Council Members – Washington State Department of Commerce, https://www.commerce.wa.gov/statewide-reentry-council-members/ (last visited April 14, 2020).

[31] Similarly, the Respondents, if motivated to do so, can bring resources to bear and provide sufficient notification and supports to people who have experienced crime. Governments in Washington have purchased motels, opened field hospitals in playgrounds and athletic fields and undertaken many other emergency actions in order to address the coronavirus emergency. No reason exists why they cannot similarly rally services and resources to support people leaving prisons and people who have experienced crime.

III. CONCLUSION

Respondents have now at the last moment, months into this pandemic, admitted that they must release people to protect the Petitioners and others living in Washington's prisons. And yet, their announced plans are insufficient to meet the realities that COVID-19 has brought to Washington. All relevant expert and factual evidence proves that this Court must order the Respondents to release all of the Petitioners and many more people. Anything less will perpetuate unconstitutional conditions in Washington's prisons and endanger the health and lives of untold numbers of vulnerable people. In addition, the Court should maintain oversight of how Respondents manage this crisis for the next many months until a vaccine is readily available. Respondents' delay, obfuscation, and limited actions require this Court's on-going vigilance and attention.

Dated this 16th day of April, 2020.

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