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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 SUPPORT OF PETITION
FOR A WRIT OF MANDAMUS**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF ISSUE 5

III. STATEMENT OF CASE 5

A. COVID-19 Poses a Significant Threat of Harm to Every Resident of Washington State..... 5

B. Governor Inslee Has Already Moved Quickly to Protect Many People Living in Washington. 8

C. COVID-19 Poses a Particular Danger to People Living in Prisons and Other Similar Congregate Facilities. 9

1. Nationally recognized medical and correctional experts share the public health consensus that COVID-19 poses an imminent threat to everyone who works and lives in Washington’s prisons..... 12

2. The Petitioners’ other evidence also shows how dangerous COVID-19 is to the people who live and work in Washington’s prisons. 14

3. The realities of prison life make implementing and abiding by recommended public health actions more difficult than in other settings..... 18

D.An Outbreak of COVID-19 in Washington’s Prisons Also Endangers the Communities and People Who Live Near Washington’s Prisons. 21

1. Public health and corrections professionals, including Petitioners’ experts, agree that reducing the DOC prison population is the only meaningful way to prevent the harm caused by COVID-19 in prisons and their surrounding communities..... 22

2. The Trump Administration and many other states have already begun to reduce prison populations as an essential public health step. Moreover, there are many people who can be released safely from Washington’s Prisons. 23

3. Governor Inslee and Secretary Sinclair have nearly unbridled authority to downsize the prison population in response to the COVID-19 pandemic.	26
IV. ARGUMENT.....	28
A. This Court Should Issue A Writ Of Mandamus Because Governor Inslee And Secretary Sinclair Each Have A Clear Duty To Act, There Is No Plain, Speedy And Adequate Remedy At Law, And Petitioners Are Beneficially Interested.	28
1. Governor Inslee Has a Clear Duty under Washington’s Constitution and Statutes to Act to Protect Washingtonians in Confinement from the Spread of COVID-19.	32
a. The Governor has a clear duty to exercise his emergency powers to preserve the life, health and safety of all Washingtonians.	32
b. The Governor has a clear duty under the Washington Constitution to protect Petitioners’ fundamental right to liberty and safety, and failure to extend emergency protections relating to COVID-19 violates Article I, Section 12.	37
2. Governor Inslee and Secretary Sinclair Both Have a Clear Duty under Washington’s Constitution and Statutes to act to Protect Washingtonians in Confinement from the Spread of COVID-19.	42
a. Governor Inslee and Secretary Sinclair have a constitutional and common law duty to protect Petitioners’ health and safety.	42
b. Secretary Sinclair Has a Duty Under Article I, Section 12 of the Washington Constitution and the Washington Law Against Discrimination Not To Discriminate Against People with Disabilities.	49
3. Petitioners Have No Plain, Speedy, and Adequate Remedy at Law.	53
V. CONCLUSION	56

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Andersen v. King Cty.</i> , 158 Wn.2d 1, 138 P.3d 963 (2006) (J.M. Johnson, J., dissenting).....	39
<i>Ball v. LeBlanc</i> , 792 F.3d 584 (5th Cir. 2015)	44
<i>Brown v. Mitchell</i> , 327 F. Supp. 2d 615 (E.D. Va. 2004)	45
<i>Brown v. Plata</i> , 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011).....	46
<i>Bullock v. Roberts</i> , 84 Wn.2d 101, 524 P.2d 385 (1974).....	29, 30, 43
<i>Corfield v. Coryell</i> , 6 F. Cas. 546, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa. 1823).....	39
<i>Cougar Business Owners Ass'n v. State</i> , 97 Wn.2d 466, 647 P.2d 481 (1982).....	54
<i>DeGidio v. Pung</i> , 920 F.2d 525 (8th Cir. 1990)	45
<i>Demyanovich v. Cadon Plating & Coatings, L.L.C.</i> , 747 F.3d 419 (6th Cir. 2014)	52
<i>DeShaney v. Winnebago County Dep't of Soc. Servs.</i> , 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).....	48
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<i>Dress v. Washington State Dep't of Corrections</i> , 168 Wn. App. 319, 279 P.3d 875 (2012).....	54
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<i>Duran v. Elrod</i> , 713 F.2d 292 (7th Cir. 1983)	46
<i>Estelle v. Gamble</i> , 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).....	43
<i>Farmer v. Brennan</i> , 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).....	43, 44
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<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	29, 31
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<i>Gregoire v. City of Oak Harbor</i> , 170 Wn.2d 628, 244 P.3d 924 (2010).....	48
<i>Helling v. McKinney</i> , 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).....	44
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<i>Jolly v. Coughlin</i> , 76 F.3d 468 (2d Cir.1996).....	45
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<i>Kumar v. Gate Gourmet Inc.</i> , 180 Wn.2d 481, 325 P.3d 193 (2014).....	51
<i>Macias v. Dep't of Labor & Indus.</i> , 100 Wn.2d 263, 668 P.2d 1278 (1983).....	38
<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	37
<i>O'Connor v. Matzdorff</i> , 76 Wn.2d 589, 458 P.2d 154 (1969).....	30
<i>Ockletree v. Franciscan Health Sys.</i> , 179 Wn.2d 769, 317 P.3d 1009 (2014).....	37, 39, 40, 50
<i>Pennsylvania Dept. of Corrections v. Yeskey</i> , 524 U.S. 206, 118 S. Ct 1952, 141 L.Ed. 2d 215 (1998).....	51
<i>Retired Pub. Employees Council v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	29
<i>Riddle v. Elofson</i> , 193 Wn.2d 423, 439 P.3d 647.....	53, 54
<i>River Park Square, L.L.C. v. Miggins</i> , 143 Wn.2d 68, 17 P.3d 1178 (2001).....	30
<i>Roberts v. Dudley</i> , 140 Wn.2d 58, 993 P.2d 901 (2000).....	50
<i>Schroeder v. Weighall</i> , 179 Wn.2d 566, 316 P.3d 482 (2014).....	38, 39, 40, 41
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	29
<i>Shea v. City of Spokane</i> , 17 Wn. App. 236, 562 P.2d 264 (1977), <i>aff'd</i> , 90 Wn.2d 43, 578 P.2d 42 (1978).....	48

<i>Skylstad v. Washington</i> , 2019 WL 919624 (W.D. Wash. January 14, 2019)	51
<i>Snell v. North Thurston School Dist.</i> , 2015 WL 6396092 (W.D. Wash. 2015).....	52
<i>State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018).....	38, 43
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000), <i>as amended on denial of reconsideration</i> (Mar. 2, 2001).....	43
<i>State v. Vance</i> , 29 Wash. 435, 70 P. 34 (1902).....	39
<i>State v. Zack</i> , 2 Wn. App. 2d 667, 673, 413 P.3d 65 (2018).....	40
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<i>Thakker v. Doll</i> , No. 1:20-cv-480	42
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Statutes	
federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, <i>et seq.</i>	51
RCW 7.16.160	28
RCW 7.16.170	53

RCW 9.94A.728.....	36
RCW 9.94A.728(1)(c)(i).....	36
RCW 9.94A.870.....	36
RCW 43.06.010(12).....	32
RCW 43.06.200-.270	30
RCW 43.06.220	27, 33
RCW 43.06.220(1)(h).....	33
RCW 43.06.220(2).....	27
RCW 43.60.220(2)(g).....	33, 35
RCW 49.60	31, 42
RCW 49.60.010	50
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RCW 49.60.030(1).....	50
RCW 49.60.040(2).....	51
RCW 49.60.040(7)(a)(i), (c)(i)	52
RCW 49.60.130	50
RCW 72.66.018	36
Constitutional Provisions	
Wash. Const. art. I, § 12.....	<i>passim</i>
Wash. Const. art. I, § 14.....	29, 41, 42
Wash. Const. art. III, § 5.....	35
Wash. Const. art. III, § 9.....	35

Wash Const. art. IV, § 4.....	27
United States Constitution	36
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World Health Org.: Regional Off. for Europe, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance*, 2 (Mar. 15, 2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf (last visited Apr. 5, 2020).9

I. INTRODUCTION

COVID-19 has arrived inside Washington's prisons. On Sunday, April 5, 2020, the Department of Corrections acknowledged for the first time that someone incarcerated within a Washington prison is infected.¹ This person lives in a minimum-security unit at the Monroe Correctional Center; shares a housing unit with 119 other people and is in close proximity to over 300 others, including one of the Petitioners in this action, Terry Kill.² This person was likely infectious for a number of days before developing symptoms and being rushed to the hospital, spreading the virus to an untold number of other people. DOC has now quarantined all 420 people who shared the living quarters and dining hall together in their housing units.³ Likely ensuring that COVID-19 will spread throughout this large group of people. DOC has offered no explanation for how the virus got into MCC or how long it has been there. As of April 6, 2020, DOC has confirmed that at least 10 employees and two individuals in their care have tested positive for COVID-19.⁴ The outbreak has begun.

¹ Wash. St. Dep't of Corrections, *Press Release: First Positive COVID-19 Test for Incarcerated Individual within Washington State Correctional Facility* (Apr. 5, 2020), <https://www.doc.wa.gov/news/2020/04052020p.htm>.

² *Id.*

³ *Id.*

⁴ Wash. St. Dep't of Corrections, *COVID-19 Information: Confirmed Cases*, www.doc.wa.gov/news/covid-19.htm (last visited Apr. 6, 2020).

This Court must take immediate action to force Governor Inslee and Secretary Sinclair to begin releasing people.

The devastation caused by the COVID-19 pandemic cannot be underestimated. The world has not seen a public health crisis of this scale in over 100 years. To date, over 1.1 million people have been infected globally.⁵ Nearly 63,000 people around the world have died of the virus,⁶ while thousands of others have fallen severely ill and may face lifelong complications due to infection.

No community has been spared from the spread of the virus, including Washington State. It is no secret that Washington has been one of states hit hardest by the pandemic, being the site of the first reported case of COVID-19 in the U.S. and the first death. For most of February and March, Washington shared the grim distinction of being the state with the most confirmed cases of COVID-19 and the most confirmed deaths.

Though the number of COVID-19 cases and deaths continues to rise in Washington,⁷ early indications are that the unprecedented orders entered by Governor Jay Inslee requiring Washingtonians to engage in

⁵ World Health Org., *Coronavirus Disease 2019 (COVID-19): Situation Report 76* (Apr. 5, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200405-sitrep-76-covid-19.pdf?sfvrsn=6ecf0977_2.

⁶ *Id.*

⁷ *See infra* Part III. A.

social distancing are having the effect of “flattening the curve,” mitigating and/or averting for now the greater devastation occurring in places that may have been slow to act.⁸ These orders will no doubt save hundreds, if not thousands of lives, particularly among the weakest and most vulnerable in our communities who are most likely to succumb to COVID-19 if infected.

Sadly, these orders did not extend to people in state prisons, where social distancing remains nearly impossible. In deciding not to apply his orders to prisons, the Governor has sent a message that the lives of those who are incarcerated are less important than those in all other communities in the state – that the same extraordinary but necessary measures that are vital to protect people outside of prison walls and mitigate against the spread of COVID-19 need not extend to those inside prisons.

Similarly, Washington Department of Corrections (DOC) Secretary Stephen Sinclair has failed to use every tool available to him to prevent the spread of the virus in Washington prisons, namely, releasing vulnerable people and those close to their release dates from custody to

⁸ Geoffrey A. Fowler, et al., *Social Distancing Works. The Earlier the Better, California and Washington Data Show*, Wash. Post (Apr. 1, 2020), <https://www.washingtonpost.com/nation/2020/04/01/lockdown-coronavirus-california-data/>.

allow them to effectively engage in the only practices known to protect against spread of COVID-19. DOC has refused to take the same steps that many other states, local and county governments in Washington, the Washington State Department of Social and Health Services, and even the Trump Administration have pursued: the reduction of the number of people confined to government-operated institutions.

Petitioners Shyanne Colvin, Shanell Duncan, Terry Kill, Leondis Berry, and Theodore Roosevelt Rhone, are individuals confined in Washington's prisons. Petitioners bring this original action seeking a writ of mandamus to compel Governor Inslee and Secretary Sinclair to take all actions necessary to prevent the spread of COVID-19 inside prisons. The unprecedented public health crisis now facing Washington State necessitates this powerful remedy, including releasing from confinement certain vulnerable people – those who are over age 50, those with certain serious medical conditions, who are pregnant, or have compromised immune systems – and other people within 18 months of their release date and those who are currently on work release.

The delay has proven costly. COVID-19 has gotten in. Time is of the essence. Each day that passes when the Governor and Secretary of DOC fail to use their authority to reduce the prison population brings us one step closer to a COVID-19 crisis within DOC – a crisis that the prison

system is ill-prepared to handle. Mandamus is required to win this race against time to safeguard Petitioners as well as the public health and safety of the community at-large.

II. STATEMENT OF ISSUE

When there is a global public health emergency due to COVID-19, a highly contagious and lethal virus, and the virus is likely to spread quickly among a vulnerable at-risk population housed in congregate settings and likely to cause great harm to them and the broader community, should this Court issue a writ of mandamus directing the Governor and DOC Secretary Sinclair to exercise their duties to protect the health and safety of people incarcerated in Washington's prisons, including by taking steps to decrease the prison population?

III. STATEMENT OF CASE

A. COVID-19 Poses a Significant Threat of Harm to Every Resident of Washington State.

COVID-19, a highly contagious and potentially fatal infectious disease, threatens every person living in Washington.⁹ There is no available vaccine, and no one is immune.¹⁰ The number of cases and

⁹ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Situation Summary*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last visited Apr. 6, 2020).

¹⁰ *Id.*

deaths continues to rise. On March 23, 2020, the day before Petitioners' original petition for a writ of mandamus was filed, Washington State had at least 2,221 confirmed COVID-19 diagnoses, with 110 deaths.¹¹ By April 5, 2020, the number of confirmed cases in Washington State had risen to 7,984 confirmed cases and 338 deaths.¹² DOC publicly announced that a person living in Monroe Correctional Center has become infected and that it had over a thousand people in medical isolation or quarantine.¹³

COVID-19 is a novel coronavirus; thus, science is only just beginning to study it. As currently understood, COVID-19 attacks the respiratory system and in its most dangerous form, renders its victims unable to breathe. For some, particularly older people or people with underlying health conditions, COVID-19 can lead to serious permanent organ damage or death. COVID-19 is particularly virulent. A significant number of people who become infected may survive but will require exhaustive medical care, including placement in intensive care units, ventilator support, and treatment by highly trained medical professionals.

¹¹ Petition for Writ of Mandamus at Petitioners' Set of Documents Submitted for the Record (PSD) 52, ¶ 110.

¹² Wash. St. Dep't of Health, *2019 Novel Coronavirus Outbreak (COVID-19)*, www.doh.wa.gov/emergencies/coronavirus (last visited Apr. 6, 2020).

¹³ Wash. St. Dep't of Corrections, *COVID-19 Information: Isolation and Quarantine Among Incarcerated Population*, www.doc.wa.gov/news/covid-19.htm (last visited Apr. 6, 2020).

COVID-19 is mainly spread through person-to-person contact, specifically through respiratory droplets which are then inhaled by another person.¹⁴ COVID-19 may also be spread by contact with contaminated surfaces or objects.¹⁵ An infected person can be completely asymptomatic and also contagious, capable of quickly and unknowingly spreading the virus to many other people.¹⁶

Because there is no available cure or vaccine, the best way to prevent illness is to avoid being exposed in the first place.¹⁷ The CDC recommends maintaining distance between people (“social distancing”), with a recommended distance of 6 feet between people at all times. This is especially important for people who are at a higher risk (e.g., advanced age, pregnant, immunocompromised, or with other underlying health conditions).¹⁸ It is essential to maintain space between all people because of the risk of spread from asymptomatic individuals.¹⁹

¹⁴ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others*, www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 5, 2020).

¹⁵ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads*, www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited Apr. 5, 2020).

¹⁶ *Id.*

¹⁷ CDC, *How to Protect Yourself & Others*, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.* The CDC also stresses the importance of regular, thorough handwashing or the use of alcohol-based hand sanitizers. Other essential prevention practices include covering all coughs and sneezes with tissues, wearing a face mask when sick, and thoroughly cleaning

B. Governor Inslee Has Already Moved Quickly to Protect Many People Living in Washington.

In the weeks since the COVID-19 outbreak in Washington, Governor Inslee has entered increasingly restrictive emergency measures meant to increase opportunities for appropriate social distancing.²⁰ These measures have included restrictions on the number of people allowed to gather in public spaces; the closing of public schools and colleges; the temporary shut-down of restaurants and bars; and a prohibition on visitation in long-term care facilities.²¹ On March 23, 2020, the Governor took the extraordinary action of entering a “stay home” order directing Washingtonians to stay inside except to access necessary services such as groceries and essential medical care.²² On April 2, 2020, Governor Inslee

and disinfecting frequently-touched services, including tables, doorknobs, countertops, handles, tables, desks, phones, toilets, faucets, and sinks.

²⁰ The complete list of Governor Inslee’s Proclamations related to COVID-19 is available at this site: Wash. Governor Jay Inslee, *Proclamations*, www.governor.wa.gov/office-governor/official-actions/proclamations (last visited Apr. 6, 2020). *See, e.g.*, Wash. Governor Jay Inslee, *Inslee Announces Statewide Shutdown of Restaurants, Bars and Expanded Social Gathering Limits* (Mar. 16, 2020), <http://www.governor.wa.gov/news-media/inslee-announces-statewide-shutdown-restaurants-bars-and-expanded-social-gathering-limits>; *Proclamation by the Governor 20-25: Stay Home, Stay Healthy*, Wash. Off. of the Governor (Mar. 23, 2020); *Proclamation of the Governor 20-25.1: Extending Stay Home – Stay Healthy to May 4, 2020*, Wash. Off. of the Governor (Apr. 2, 2020) (prohibiting all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants, and all non-essential businesses from conducting business).

²¹ *Id.*

²² *Id.*

extended this order through at least May 4, 2020.²³ Unfortunately, these measures do not protect the individuals who live and work in Washington's prisons.

C. COVID-19 Poses a Particular Danger to People Living in Prisons and Other Similar Congregate Facilities.

People living in congregate environments, such as long-term care facilities, cruise ships, and prisons or jails, are at a heightened risk from COVID-19 due to their near constant, close proximity to other people. These environments have become the epicenters of several outbreaks of COVID-19.²⁴

The public health risks inside prisons are even greater than in other congregate environments outside a correctional setting.²⁵ The World

²³ Wash. Governor Jay Inslee, *Inslee Extends "Stay Home, Stay Healthy" Through May 4* (Apr. 2, 2020), <https://www.governor.wa.gov/news-media/inslee-extends-stay-home-stay-healthy-through-may-4>. This Court has also responded to this unprecedented crisis and the need for social distancing by issuing an Order containing guidance for lower courts to suspend certain operations and move others from in-person appearances to telephonic ones, including in the present case. See Amended Order, *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607 (Wash. S. Ct. Mar. 20, 2020).

²⁴ Jon Swaine & Maria Sacchetti, *As Washington Nursing Home Assumed It Faced Influenza Outbreak, Opportunities to Control Coronavirus Exposure Passed*, Wash. Post (Mar. 16, 2020), https://www.washingtonpost.com/investigations/nursing-home-with-the-biggest-cluster-of-covid-19-deaths-to-date-in-the-us-thought-it-was-facing-an-influenza-outbreak-a-spokesman-says/2020/03/16/c256b0ee-6460-11ea-845d-e35b0234b136_story.html; Ana Sandoiu, *COVID-19 Quarantine of Cruise Ship May Have Led to More Infections*, Medical News Today (Mar. 3, 2020), <https://www.medicalnewstoday.com/articles/quarantine-on-covid-19-cruise-ship-may-have-led-to-more-infections>.

²⁵ World Health Org.: Regional Off. for Europe, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance*, 2 (Mar. 15,

Health Organization (WHO) recognizes that incarceration “is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19” compared with other settings and that people living in prisons or jails may be particularly vulnerable to COVID-19:²⁶

[P]eople in prisons typically have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.²⁷

As a result, prisons and jails serve as “epidemiological pumps,” amplifying conditions for the spread of disease.²⁸ The risk is even greater for people who are over the age of 50, are pregnant, or living with certain underlying medical conditions.²⁹ For these people, exposure to COVID-19 presents a grave risk of serious illness or death.³⁰ Accordingly, the WHO

2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf (last visited Apr. 5, 2020).

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ John Jacobi, *Prison Health Public Health: Obligations and Opportunities*, 31 *Am. J. L. & Med.* 447, 448 (2005).

²⁹ Wash. St. Dep’t of Corrections, *WA State DOC Covid-19 Screening, Testing, and Infection Control Guideline Version 12*, at 4 (Apr. 3, 2020), <https://www.doc.wa.gov/news/2020/docs/wa-state-doc-covid-19-screening-testing-infection-control-guideline.pdf>.

³⁰ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last visited Apr. 5, 2020); WHO, *Preparedness, Prevention and Control*, *supra* note 25, at 10 (“Around one out of every five people who are infected with COVID-19 becomes seriously ill and develops difficulty breathing. Older people,

recommends that governments should reduce the number of people in custody “at all stages of the administration of criminal justice” including post-sentencing.³¹

Almost 19,000 people live in prisons in Washington³² – they sleep, eat, and work extremely close to one another and have regular, close interactions with DOC staff. A number of DOC facilities are overcrowded, requiring people to cram together in cells and, in some cases, to sleep on the floor.³³ Many people use the same bathrooms, sinks, showers, and toilets, and gather regularly in common areas.³⁴ They also share dining halls, kiosks, and telephones, all of which can be vectors for the spread of COVID-19, as DOC has already experienced.³⁵ Public health experts

and those with underlying medical problems such as high blood pressure, heart problems or diabetes, are more likely to develop serious illness.”)

³¹ WHO, *Preparedness, Prevention and Control*, *supra* note 25, at 4.

³² Wash. St. Dep’t of Corrections, *Fact Card* (Dec. 31, 2019), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

³³ *See, e.g.*, Declaration of Shyanne Colvin at Petitioners’ Set of Documents Submitted for the Record (PSD) 288, ¶¶ 10-16; Declaration of Terry Kill at PSD 301, ¶¶ 9-13; Declaration of Linda Graham at PSD 389, ¶ 12.

³⁴ *See, e.g.*, Colvin Decl. at PSD 287-89, ¶¶ 9-17, 20; Declaration of Francis Cota at PSD 354-57, ¶¶ 9-14, 18-19; Declaration of Daniel Ralph Maples at PSD 377-78, ¶¶ 5-6, 13-17, 20; Declaration of Maurice Phillip-Meadows at PSD 336-37, ¶¶ 11-16; Kill Decl. at PSD 302, ¶¶ 17-18; Declaration of Leondis Berry at PSD 312-14, ¶¶ 5-9, 14-15; Declaration of William Burkett at PSD 364-65, ¶¶ 8-13; Declaration of Brian Stark at PSD 327, ¶ 6.

³⁵ CDC, *How COVID-19 Spreads*, *supra* note 15.

agree that because of these realities, this pandemic will be catastrophic when it enters Washington's prisons.³⁶

1. Nationally recognized medical and correctional experts share the public health consensus that COVID-19 poses an imminent threat to everyone who works and lives in Washington's prisons.

Five nationally recognized correctional and health care experts have provided this Court with testimony in support of the Petition.³⁷ Their opinions are supported by the testimony of medical and other experts in similar cases that have been filed across the country since the COVID-19 outbreak.³⁸ These experts agree that COVID-19 poses an imminent risk of serious harm or death to people in DOC custody, and that immediate action must be taken to reduce the prison population to protect public health and safety, both within and outside DOC facilities.³⁹

The declarations from Petitioners' experts show that the risk is extreme and outbreaks in prisons in Washington are likely inevitable.⁴⁰

³⁶ See Amended Declaration of Alex Bergstrom at PSD 261, ¶ 12; Declaration of Frederick L. Altice, MD at PSD 227-28, ¶ 16; Declaration of Robert B. Greifinger, MD at PSD 202-03, ¶¶ 17-19; Declaration of Dr. Michael Puisis and Dr. Ronald Shansky at PSD 177-78, ¶ 12; Declaration of Dan Pacholke at PSD 241-42, ¶ 12.

³⁷ See Altice Decl. at PSD 221-34; Pacholke Decl. at PSD 235-48; Greifinger Decl. at PSD 195-220; Puisis and Shansky Decl. at PSD 168-94.

³⁸ See Declaration of Laurel Simonsen at PSD 424-27, ¶¶ 4-6.

³⁹ See Amended Bergstrom Decl. at PSD 262, ¶ 14; Altice Decl. at PSD 229-30, ¶ 20; Greifinger Decl. at PSD 202, ¶ 18; Puisis and Shansky Decl. at PSD 179, ¶ 1; Pacholke Decl. at PSD 241-42, ¶ 12; Simonsen Decl. at PSD 426-35, ¶¶ 6-14.

⁴⁰ Altice Decl. at PSD 227, ¶ 16 ("It is almost inevitable that COVID-19 will enter prisons.").

Today's news has proven their early and repeated warnings correct. Prisons "are a formula for disaster for spread of COVID-19," as they are porous, congregate places where a number of people enter and exit regularly.⁴¹ In fact, "[o]ne couldn't devise a system more contrary to current public health recommendations...than a prison, especially with classification systems that house large numbers of elderly or persons with comorbid medical conditions in the same housing units."⁴²

Even Secretary Sinclair has acknowledged the inevitability of COVID-19 getting into the prisons, recently admitting that "at some point we'll have an active case, or more than one" in Washington's prisons.⁴³ As Secretary Sinclair concedes and as today's outbreak proves, no matter how well DOC screens people coming into the prisons, nothing it can do will prevent an asymptomatic yet infectious person from spreading COVID-19 throughout a cell, unit, dining hall, or entire prison.

Governor Inslee and Secretary Sinclair understand this reality. However, rather than listening to the experts and taking steps to reduce the prison population, the State has risked the health of everyone living in Washington's prisons on the chance that no asymptomatic person gets

⁴¹ *Id.*

⁴² Puisis and Shansky Decl. at PSD 175, ¶ 10.

⁴³ See Austin Jenkins, *A Washington inmate fears coronavirus could sweep through his prison like a fire*, KUOW/NPR (Apr. 2, 2020), <https://www.kuow.org/stories/a-washington-inmate-fears-coronavirus-could-sweep-through-his-prison-like-a-fire>.

inside at any point in the next 18 months, before a vaccine is readily available. They have now lost that bet.

2. The Petitioners' other evidence also shows how dangerous COVID-19 is to the people who live and work in Washington's prisons.

The declarations filed in this action from people currently living in DOC facilities bear out the concerns of the nationally recognized experts.⁴⁴ People live on top of each other, sleep in extremely close quarters with many other people, and use the same bathrooms, telephones, and computer kiosks.⁴⁵ They congregate at least twice a day in large meal halls and all day long in congested day rooms and recreation yards.⁴⁶ Many have limited access to essential cleaning supplies and lack basic information about disease prevention.⁴⁷ The Petitioners and other

⁴⁴ See generally Colvin Decl. at PSD 286-93; Graham Decl. at PSD 387-92; Cota Decl. at PSD 353-62; Maples Decl. at PSD 376-86; Phillip-Meadows Decl. at PSD 335-43; Declaration of Timothy Pauley at PSD 344-52; Kill Decl. at PSD 299-310; Berry Decl. at PSD 311-21; Burkett Decl. at PSD 363-71; Stark Decl. at PSD 326-30.

⁴⁵ See Colvin Decl. at PSD 287-89, ¶¶ 9-17, 20, 22; Graham Decl. at PSD 389, ¶¶ 12-14; Cota Decl. at PSD 354-57, ¶¶ 9-14, 18-19; Maples Decl. at PSD 377-78, ¶¶ 4-17, 20; Phillip-Meadows Decl. at PSD 336-37, ¶¶ 11-16, 18; Kill Decl. at PSD 301-02, ¶¶ 9-14, 17-20; Berry Decl. at PSD 312-14, ¶¶ 5-11, 13, 17; Burkett Decl. at PSD 364-66, ¶¶ 8-12, 15; Stark Decl. at PSD 327, ¶ 6.

⁴⁶ See Colvin Decl. at PSD 289, ¶¶ 20-21, 23; Cota Decl. at PSD 357, ¶¶ 18-19; Maples Decl. at PSD 378, ¶ 20; Phillip-Meadows Decl. at PSD 336-37, 339-40, ¶¶ 12-15, 18, 39-47; Pauley Decl. at PSD 346-47, ¶¶ 16, 19, 23; Kill Decl. at PSD 301, 305, ¶¶ 15, 38-41; Berry Decl. at PSD 313-14, 317, ¶¶ 11, 15, 31; Burkett Decl. at PSD 365, 367, ¶¶ 13, 19-21; Stark Decl. at PSD 327, ¶ 6.

⁴⁷ See Colvin Decl. at PSD 288, ¶¶ 18-19; Cota Decl. at PSD 356, ¶¶ 15-17; Maples Decl. at PSD 378, 382-84, ¶¶ 18-19, 59-61, 66-69; Phillip-Meadows Decl. at PSD 337, 339-40, ¶¶ 17-21, 34-35, 42-44, 48; Pauley Decl. at PSD 346-47, ¶¶ 11, 20-22, 25-26; Kill Decl.

declarants paint in vivid detail the realities of prison life and how dangerous an exceedingly contagious virus like COVID-19 can be in that environment.

Petitioner Shyanne Colvin is a 21-year-old pregnant person who recently entered DOC custody on a low-level drug charge.⁴⁸ She is due to give birth in May.⁴⁹ Until a few days ago when she was moved to another unit, Ms. Colvin was locked up in the receiving unit at the Washington Correctional Center for Women in Gig Harbor.⁵⁰ The receiving unit is where people first enter the DOC system from all of the local and county jails in Washington.⁵¹ Ms. Colvin's receiving unit was so crowded that three people were crammed into her cell designed for two.⁵² One person slept on the floor of the cell only inches from their communal toilet.⁵³ Ms. Colvin, her unborn child, and everyone else in the receiving unit are at serious risk from the likely introduction of COVID-19 by recently arrived people who may not know that they are infected.⁵⁴ Once established in

at PSD 302, 305, ¶¶ 19-20, 44; Berry Decl. at PSD 312-15, ¶¶ 7-9, 16, 18; Burkett Decl. at PSD 364-66, 368, ¶¶ 8, 12, 14-17, 29; Stark Decl. at PSD 327, ¶ 7.

⁴⁸ Colvin Decl. at PSD 287, 290, ¶¶ 1, 35.

⁴⁹ *Id.* at PSD 289, ¶ 25.

⁵⁰ *Id.* at PSD 287, ¶¶ 4, 8-9.

⁵¹ *Id.* at PSD 287, ¶ 8.

⁵² *Id.* at PSD 288, ¶ 10.

⁵³ *Id.* at PSD 288, ¶ 14.

⁵⁴ Greifinger Decl. at PSD 198-99, ¶ 8 (CDC has identified current or recent pregnancy as possibly increasing the risk of serious COVID-19).

that unit, the virus can quickly spread to other parts of the prison without anyone knowing that it has arrived.

Petitioner Terry Kill, 52, is currently incarcerated in the Minimum Security Unit at the Monroe Correctional Center, the same unit which housed the first person to have tested positive.⁵⁵ Mr. Kill sleeps a few feet from two other people in one of twelve cubicles in his dormitory style unit.⁵⁶ The cubicles are separated from each other by only a short partition.⁵⁷ Mr. Kill can look into the cubicle next to his by standing on his bed.⁵⁸ All of the thirty to forty people in his unit breathe the same air, and use the same toilets, showers, and sinks.⁵⁹

Mr. Kill is worried about contracting COVID-19 not only because of his communal living situation, but also because of his work in the kitchen where he stood shoulder to shoulder for hours on end with many other people.⁶⁰ Kitchen workers serve two meals a day to the 350 people who stand in line and file by to gather their trays.⁶¹ One sneeze or cough could infect dozens of people. Mr. Kill's concerns are echoed by others.⁶²

⁵⁵ Kill Decl. at PSD 300, ¶ 4.

⁵⁶ *Id.* at PSD 301, ¶¶ 9-10.

⁵⁷ *Id.* at PSD 301, ¶ 12.

⁵⁸ *Id.*

⁵⁹ *Id.* at PSD 301-02, ¶¶ 14, 17-18.

⁶⁰ *Id.* at PSD 303-04, ¶¶ 26, 37.

⁶¹ *Id.* at PSD 304-05, ¶¶ 37-41; *see also* Phillip-Meadows Decl. at PSD 339-40, ¶¶ 39-48 (many people work closely together in prison kitchens).

⁶² Phillip-Meadows Decl. at PSD 339, ¶ 39; Maples Decl. at PSD 381-82, ¶¶ 42-53.

The cleanliness of the kitchens, meal halls, trays and utensils used by people inside prisons can vary significantly.⁶³

The declarations filed with the Court also document the types of disabilities and health conditions that are, unfortunately, quite common among people living in these institutions – conditions that leave people particularly vulnerable to COVID-19.⁶⁴

For example, Declarant Daniel Maples is 62 years old and currently incarcerated at the Stafford Creek Correctional Center (SCCC) in Aberdeen.⁶⁵ He has Early Onset Parkinson’s Disease, which significantly impacts his mobility and, at times, his cognitive functioning.⁶⁶ He suffers from tremors, must use a catheter in order to urinate, and has difficulty defecating because of his Parkinson’s.⁶⁷

Like the majority of other people incarcerated at SCCC, Mr. Maples lives with another person in a small cell without a toilet or sink. They share communal bathrooms with over 150 other people who live in

⁶³ Kill Decl. at PSD 304-05, ¶¶ 37-41; *see also* Phillip-Meadows Decl. at PSD 339-40, ¶¶ 39-48; Maples Decl. at PSD 381, ¶¶ 42-46 (trays and utensils not always washed very well or conscientiously).

⁶⁴ *See, e.g.*, Phillip-Meadows Decl. at PSD 337-39, ¶¶ 22-35 (describing history of serious heart conditions and on-going hypertension); Cota Del. at PSD 358, ¶¶ 21-23 (describing recent heart related medical conditions); Maples Decl. at PSD 378-80, ¶¶ 10-12, 22-33 (describing difficulty living with Early Onset Parkinson’s Disease and COPD).

⁶⁵ Maples Decl. at PSD 377, ¶¶ 1-2.

⁶⁶ *Id.* at PSD 378-80, ¶¶ 11, 22-23, 32-33.

⁶⁷ *Id.* at PSD 378-79, ¶¶ 10, 12, 25.

their unit.⁶⁸ They all breathe the same air and use the same day room, dining hall, and recreation yard.⁶⁹ Mr. Maples was supposed to be released from prison on April 1, 2020, but remains behind bars.⁷⁰

3. The realities of prison life make implementing and abiding by recommended public health actions more difficult than in other settings.

The crowded conditions in prisons make them particularly dangerous environments for infectious diseases like COVID-19. Other unique characteristics of prison life only add to the difficulty of preventing a large-scale outbreak.

Isolation of ill people and the quarantine of people who have come into contact with ill people are important recommended public health responses in most settings.⁷¹ DOC's current COVID-19 response efforts include the expansive use of isolation and quarantine.⁷² However, the

⁶⁸ *Id.* at PSD 377-78, ¶¶ 4-8, 13-17.

⁶⁹ *Id.* at PSD 377-78, ¶¶ 5-7, 17.

⁷⁰ *Id.* at PSD 378, ¶ 21.

⁷¹ Ctrs. for Disease Control and Prevention, *Social Distancing, Quarantine, and Isolation*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 5, 2020).

⁷² This appears to be how DOC is addressing the recent outbreak at Monroe Correctional Complex. *See* DOC, *Press Release, supra* note 1 (“The housing unit where the individual was previously housed was placed on quarantine with no movements in or out of the unit. There are approximately 119 in the housing unit where the individual was previously housed. There are a total of 420 individuals in the Minimum Security Unit.”). As of Monday April 6, 2020, DOC was holding 159 people in COVID-19 solitary confinement and an additional 1,1074 people in quarantine. *See* Wash. St. Dep’t of Corrections, *COVID-19 Information: Isolation and Quarantine Among Incarcerated Population*, <https://www.doc.wa.gov/news/covid-19.htm> (last visited Apr. 6, 2020).

design of many of DOC's facilities, and the current size of the prison population do not allow for easy and effective isolation of a sick individual or small groups of quarantined people.⁷³ As a result, DOC is quarantining large groups of people together in designated quarantine units or simply in the same units as people who are not under quarantine.⁷⁴ In addition to quarantining large numbers of people together, many of whom who may not yet be infectious. DOC does not appear to be providing personal protective equipment to people even when there is a confirmed case of COVID-19 in their housing unit.⁷⁵ DOC's quarantine practices thus make it more likely that an infectious person will spread the virus to many other people who share the same unit.⁷⁶

DOC's quarantine practices are dictated to some degree by the physical designs of its prisons. For example, Mr. Maples's unit does not allow for individual isolation because he and the other men on his unit have access to only a communal bathroom. If locked into his cell, he would have no way to address his medical needs. "I need to use a catheter

⁷³ See, e.g. Maples Decl. at PSD 378, ¶¶ 13-18 (almost all units share the same communal bathrooms); Kill Decl. at PSD 301, ¶ 9-14 (everyone breathes the same air since walls do not reach the ceiling).

⁷⁴ Graham Decl. at PSD 389, ¶¶ 13-14.

⁷⁵ DOC, *Press Release*, *supra* note 1 (noting that DOC staff in the minimum security unit at MCC should wear protective masks, while providing no information about similar requirements for people living in that unit).

⁷⁶ Declaration of Dr. Craig W. Haney at PSD 616, ¶¶ 10-11.

and would have no way of cleaning my catheter or getting rid of my urine if we were on lockdown.”⁷⁷ Similarly, Mr. Kill shares a communal housing unit with 30 to 40 other people that has no permanent walls separating them from each other.⁷⁸ These design limitations make the spread of COVID-19 more likely, even when DOC attempts to isolate or quarantine individuals.

Furthermore, isolation and quarantine in prison bring with them a particularly harsh reality. Isolation and quarantine involve conditions similar to solitary confinement or cell lockdown: long hours locked alone or with another person in a concrete cell with only an hour of time out of that cell every day or so – conditions that DOC normally uses only to punish people for serious misbehavior.⁷⁹ Many people who live in prison are understandably worried about reporting COVID-19 symptoms because of the isolation that they and potentially every other person in their cell, unit, or prison will face.

DOC has not given us any real idea what to do if we get sick. We think they will just quarantine us, which will be much worse than where we are now. This will dissuade guys from telling DOC that they are sick....[G]uys won't tell staff or doctors about being sick because they don't want to be the guy that forces everyone else to go onto lockdown or quarantine. So, people inside have strong reasons not to tell staff even when they are sick.⁸⁰

⁷⁷ Maples Decl. at PSD 378, ¶ 12.

⁷⁸ Kill Decl. at PSD 301, ¶ 12.

⁷⁹ Haney Decl. at PSD 616, ¶¶ 10-11.

⁸⁰ See Maples Decl. at PSD 383-384, ¶¶ 68-70.

Moreover, the high incidence of people with mental health disorders in Washington's prisons makes any widespread adherence to social distancing and personal hygiene standards even more complicated than in other settings. As Dr. Puisis and Dr. Shansky point out, people living with mental health conditions may be less likely to appreciate their symptoms, understand what to do if they become ill, or respond appropriately if isolated or quarantined.⁸¹ These realities of prison make imposing public health interventions that might be appropriate in the community more broadly particularly difficult to implement behind bars. As the experts unanimously agree, less crowded facilities will allow DOC to implement much more effective public health strategies. Release will provide greater protection not only to those people who are released, but also to those who remain behind.

D. An Outbreak of COVID-19 in Washington's Prisons Also Endangers the Communities and People Who Live Near Washington's Prisons.

An outbreak in Washington's prisons also endangers the people who live in nearby communities. As Cassie Sauer, the President and Chief Executive Officer of the Washington State Hospital Association, notes in her declaration, once prison medical care systems collapse under the strain

⁸¹ Puisis and Shansky Decl. at PSD 177, ¶ 12.

of a COVID-19 outbreak, critically ill people will then be sent out to the community hospitals in the generally rural areas where many of DOC's prisons are located – thereby adding new people in need of intensive medical care and trained medical personnel to already strained rural community hospitals.⁸² Dr. Puisis and Dr. Shansky agree:

Prison health care programs are internally not set up to manage hospital level care including ventilation. Typical arrangements of transferring prisoners to a hospital, in a setting of a pandemic with large numbers would overwhelm the security staff of the WDOC and complicate arrangements at local hospitals. Some WDOC facilities such as the Clallam Bay Corrections Center are remote and do not have easily accessible hospitals making care linkage more tenuous.⁸³

1. Public health and corrections professionals, including Petitioners' experts, agree that reducing the DOC prison population is the only meaningful way to prevent the harm caused by COVID-19 in prisons and their surrounding communities.

Petitioners' experts agree on the dangers that COVID-19 poses to people in prison and to the communities in which prisons are located. The medical and corrections experts also agree that DOC must immediately reduce the number of people living behind bars to address these threats.⁸⁴

Dan Pacholke, a former DOC Secretary, states:

⁸² See Sauer Decl. at PSD 252-55, ¶¶ 12-16, 21; see also Altice Decl. at PSD 228-29, ¶ 18.

⁸³ Puisis and Shansky Decl at PSD 178, ¶ 13.

⁸⁴ Pacholke Decl. at PSD 237, ¶ 5; Greifinger Decl. at PSD 202, ¶¶ 17-18; Puisis and Shansky Decl. at PSD 173-79, ¶¶ 9-13, 1; Altice Decl. at PSD 229-30, ¶¶ 21-22.

In my opinion, the COVID-19 virus represents a serious and unprecedented risk to the health and safety of people in DOC custody and DOC staff. This risk makes it imperative that DOC immediately take steps to proactively respond to the virus to protect those individuals. ... **This includes releasing people from custody, which allows individuals to maintain social distancing and have better access to testing and treatment.**⁸⁵

Dr. Fredrick Altice, a nationally recognized epidemiologist and expert in correctional health care, agrees:

COVID-19 has created an extraordinary public health emergency, which will require an extraordinary response now to prevent widespread fatalities in prisons and the community. **As such, urgent and drastic action is required to immediately reduce the prison population. Reducing the prison population immediately is the primary way to achieve recommended social distancing within those facilities.**⁸⁶ (emphasis added).

Other public health experts from around the country also agree that reducing the number of people in correctional facilities is an essential public health step in the fight against COVID-19.⁸⁷

2. The Trump Administration and many other states have already begun to reduce prison populations as an essential public health step. Moreover, there are many people who can be released safely from Washington's Prisons.

⁸⁵ Pacholke Decl. at PSD 237, ¶ 5 (emphasis added).

⁸⁶ Altice Decl. at PSD 229-30, ¶ 20.

⁸⁷ See Simonsen Decl. at PSD 424-27, ¶¶ 4-6 ("Each of these experts unequivocally states that reducing the population in correctional facilities is necessary to prevent the rampant spread of the COVID-19 virus amongst the population of people housed within them.").

Washington is quickly becoming an outlier by continuing to refuse to release anyone from its prisons as a public health response to COVID-19. By contrast, a number of other states have begun reducing their prison populations. *See, e.g.*, California (Governor plans to accelerate the release of 3,500 people from state prisons in an effort to reduce the population as COVID-19 infections continue to spread in the prisons);⁸⁸ New York (Governor Cuomo ordered the release of more than 1,000 people who are in prisons and jails across the state on the basis of a parole violation);⁸⁹ Iowa (DOC expediting the release of about 700 prisoners, or 7% of its population);⁹⁰ Vermont (DOC has released over 200 out of approximately 1500 prisoners);⁹¹ North Dakota (state parole board released over fifty people, or about 2% of its prison population, on early parole).⁹² Even the

⁸⁸ Paige St. John, *California to release 3,500 inmates early as coronavirus spreads inside prisons*, L.A. Times (Mar. 31, 2020), <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons> (last visited Apr. 6, 2020).

⁸⁹ Brendan J. Lyons, *NY to release 1,100 parole violators as coronavirus spreads*, Times Union (Mar. 27, 2020), <https://www.timesunion.com/news/article/Deaths-surge-again-in-New-York-from-coronavirus-15160973.php> (last visited Apr. 6, 2020) (reporting on New York Governor Cuomo's order to release parole violators).

⁹⁰ *Officials cut prison, jail numbers; Iowa virus cases hit 105*, Newton Daily News (Mar. 24, 2020), <http://www.newtondailynews.com/2020/03/23/officials-cut-prison-jail-numbers-iowa-virus-cases-hit-105/acs5xbk/> (last visited Apr. 6, 2020).

⁹¹ Anna Merriman, *"It's very difficult to control": Many Vermont inmates released so that those who remain can be spread out*, Valley News (Mar. 26, 2020), <https://www.vnews.com/Vermont-NH-prisons-working-to-reduce-population-to-prevent-virus-spread-33512589> (last visited Apr. 6, 2020). For population size, see <https://doc.vermont.gov/sites/correct/files/documents/2020-03-23-DOC%20Staff%20Test.pdf>.

⁹² See April Baumgarten, *North Dakota paroles 56 prisoners early amid pandemic, including 3 convicted of sexual assault*, Grand Forks Herald (Mar. 20, 2020),

Trump Administration and Congress recognize the danger that COVID-19 poses to people in prison and have begun reducing the number of people incarcerated in federal prisons across the country.⁹³ Similarly, local and county jails in many jurisdictions, including in Washington, have dramatically reduced the number of people confined within them. In fact, DOC has fallen behind even other Washington executive agencies. On April 3, the Washington State Department of Social and Health Services announced that it plans to begin releasing people currently hospitalized at Western and Eastern State Hospitals.⁹⁴

Furthermore, releases can be done safely for both the people released and the public generally. Many people currently incarcerated in Washington's prisons have stable homes and anxious families waiting for them on the outside.⁹⁵ Petitioner Shanell Duncan is married to a nurse who

<https://www.grandforksherald.com/news/crime-and-courts/5009882-North-Dakota-paroles-56-prisoners-early-amid-pandemic-including-3-convicted-of-sexual-assault> (last visited Apr. 6, 2020).

⁹³ Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. Times (Apr. 3, 2020), available at <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html>; Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), H.R. 748-236, 116th Cong. § 12003 (2), available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> (expanding authority for early releases of individuals in federal prisons to home confinement).

⁹⁴ *Western State Hospital to move patients out to relieve staff; 16 workers, 6 patients have COVID-19*, Q13 Fox (Apr. 3, 2020), <https://q13fox.com/2020/04/03/western-state-hospital-to-move-patients-out-to-relieve-staff-16-workers-6-patients-have-covid-19/>.

⁹⁵ The documents the State submitted for the record on Friday, April 3, 2020, suggest that the State may be preparing to argue that Plaintiffs' recommendations will result in the release of people like Gary Ridgway. See Declaration of David D. Luxton, PhD, M.S. at

lives in their home in Spokane.⁹⁶ He is scheduled to be released on December 27, 2020, and DOC has already approved his housing placement.⁹⁷ Like many other people behind bars, he can immediately move home if released and take the same steps that all of us on the outside are taking to keep ourselves and our families safe. Similarly, Shyanne Colvin, John Graham, Francis Cota and Terry Kill, like thousands of other people, could be quickly released to family members.⁹⁸ Given the emergency facing the State, DOC and the Governor can find the resources and staffing necessary to ensure that people who may need some assistance in finding safe, affordable housing and access to medical care receive it.⁹⁹

3. Governor Inslee and Secretary Sinclair have nearly unbridled authority to downsize the prison population in response to the COVID-19 pandemic.

4, ¶ 8, attached as Appendix C to Index of Respondents' Court Record (Resp. App.). All experts who do not work for DOC agree that many people need to be released. Many people, like all of the Petitioners, can be released without compromising public safety. Of course, there will be unique circumstances that will not allow individual people, like Mr. Ridgway, to be released.

⁹⁶ Declaration of Shanell Duncan at Petitioners' Set of Documents Submitted for the Record (PSD) 295 at ¶ 5.

⁹⁷ *Id.* at ¶¶ 4, 6, 9.

⁹⁸ *See* Colvin Decl. at PSD 290, ¶ 33; Graham Decl. at PSD 388, ¶¶ 6, 9; Cota Decl. at PSD 359, ¶ 26; Kill Decl. at PSD 305, ¶ 45.

⁹⁹ The Petitioners have also asked that the State take steps to appropriately notify people who have been the victims of crime and provide them with support and assistance to plan for the release of people from prison. Petition for Writ of Mandamus at PSD 68, ¶ (VI)(3)(h). With appropriate forethought and resources, the State can both release people and support those on the outside in remaining safe.

As detailed in the Petition for a Writ of Mandamus filed in this Court on March 24, 2020, the Governor and Secretary Sinclair have the current authority to quickly release many people from DOC custody.¹⁰⁰ These existing release powers include clemency, extraordinary release, furlough, and extraordinary medical placement.¹⁰¹ Furthermore, as discussed in greater detail below, Governor Inslee has the authority pursuant to his emergency powers to remove any barrier that may limit his ability or DOC's ability to release people as necessary to address the pandemic.¹⁰²

Petitioners and many other stakeholders have urged Governor Inslee and Secretary Sinclair to begin immediate releases and have provided them with scientific and public health resources, which demonstrate the need for those releases.¹⁰³ Both are aware of the dangers that COVID-19 poses to people living in Washington's prisons and of the

¹⁰⁰ See Petition for a Writ of Mandamus at PSD 21, ¶¶ 47-48, PSD 56-57, ¶¶ 115-118 (Governor Inslee can exercise his emergency powers to preserve the life, health, and safety of individuals in DOC custody under RCW 43.06.220. This includes the ability to waive any restrictions or limitations in state law or policy to enable the release of people in DOC custody. See RCW 43.06.220(2). Secretary Sinclair has a number of tools at his disposal to effect immediate release, including furlough, emergency medical placement, graduated reentry, or Community Parenting Alternative sentencing. Petition for a Writ of Mandamus at PSD 21, ¶¶ 47-48. As Former Washington DOC Secretary Dan Pacholke notes in his declaration, Secretary Sinclair's existing furlough power grants him wide authority to extend releases to many different people to accommodate the current crisis. See Pacholke Decl. at PSD 238-240, ¶¶ 6-10.

¹⁰¹ See Petition for a Writ of Mandamus at PSD 21, ¶¶ 47-48, PSD 56-57 115-118.

¹⁰² See *infra* Part IV. A. 1.

¹⁰³ See Declaration of Nicholas B. Straley at PSD 94-98, ¶¶ 17-34.

different tools available to each of them.¹⁰⁴ Nonetheless, Governor Inslee and Secretary Sinclair have refused to release anyone for any reason related to the COVID-19 epidemic.¹⁰⁵

IV. ARGUMENT

A. This Court Should Issue A Writ Of Mandamus Because Governor Inslee And Secretary Sinclair Each Have A Clear Duty To Act, There Is No Plain, Speedy And Adequate Remedy At Law, And Petitioners Are Beneficially Interested.

The outbreak has begun. Because the Governor and Secretary Sinclair refuse to take the essential public health step of releasing many people from DOC custody, this Court must step in and order them to do so.

A court may issue a writ of mandamus to “compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station.” RCW 7.16.160. *See also* Const. art. IV, § 4 (Supreme Court has original jurisdiction in mandamus actions as to all state officers).

The Court should issue a writ if (1) the state officer has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested.

¹⁰⁴ *Id.* at PSD 95-96, ¶¶ 19-23.

¹⁰⁵ *Id.* at PSD 95-96, ¶¶ 39-43.

Seattle Times Co. v. Serko, 170 Wn.2d 581, 588-89, 243 P.3d 919 (2010) (citing RCW 7.16.160, .170).¹⁰⁶

The writ of mandamus may be used to require a state officer to perform a clear duty. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). Moreover, “mandamus will not lie to control the exercise of discretion. Mandamus will lie, however, to require that discretion be exercised.” *Bullock v. Roberts*, 84 Wn.2d 101, 103, 524 P.2d 385 (1974) (internal citations omitted); see also *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.”).

In *Bullock*, this Court issued a writ of mandamus against a judge who refused to exercise his discretion and review the petitioners’ requests to proceed *in forma pauperis* in divorce proceedings. *Id.* at 102. Though the trial court had discretion to determine whether to grant such IFP motions, this Court nonetheless held that the judge had a duty to consider those requests in order to protect the petitioners’ constitutional right of access to the courts. *Id.* at 103.

¹⁰⁶ A party is beneficially interested “if he has an interest in the action beyond that shared with other citizens.” *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003) (internal citation omitted). There can be no serious dispute in this case that all persons who are presently incarcerated in DOC facilities are at a high risk of serious harm from exposure to COVID-19 “beyond that shared with other citizens” who are not in DOC custody, and, thus, Petitioners are beneficially interested in the performance of Respondents’ duties, as sought by this action.

A court may issue a writ to order a state officer to exercise a duty to protect people's fundamental rights. *See O'Connor v. Matzdorff*, 76 Wn.2d 589, 592, 458 P.2d 154 (1969) (Court issues writ requiring state officer to take action to protect plaintiff's fundamental right of access to the courts); *see also Bullock*, 84 Wn.2d at 105 (issuing writ ordering judge to exercise discretion in divorce cases to determine if filing and service fees should be waived to ensure that plaintiff would receive constitutional right of free access to the courts); *Whitney*, 107 Wn.2d at 867 (issuing writ ordering court to exercise discretion regarding ex parte orders received in the mail from incarcerated prisoners, rather than blanket refusal to accept orders). Whether a statute creates a duty that a state officer must perform is a question of law. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001) (internal citation omitted).

Here, Governor Inslee and Secretary Sinclair have the non-discretionary duty to protect the Petitioners and all other people who live in Washington's prison. In this instance, their duties require that they take all reasonable steps to protect people in prison from COVID-19. These duties arise from a variety of constitutional and statutory sources, including Const. art. I, § 12 (privileges and immunities); Const. art. I, § 14 (cruel punishment); the Governor's emergency powers under RCW 43.06.200-.270; the common law duty to keep the Petitioners and others in

state custody in health and safety; and the Washington Law Against Discrimination, RCW 49.60. As discussed in detail herein, the release of many people from DOC custody is an essential step that must be taken to protect people living in Washington's prisons. Furthermore, Governor Inslee and Secretary Sinclair each have existing statutorily granted authority to take this essential step.¹⁰⁷ Nonetheless, neither has taken this essential public health measure.

Petitioners ask this Court to issue a declaration that the Governor and Secretary have violated their duties by failing to release people, and a writ of mandamus requiring them to do so.¹⁰⁸ Petitioners' request is only what is absolutely necessary in order to provide the protections that this pandemic requires. Governor Inslee must be ordered to use his existing authority to depopulate prisons, to order Secretary Sinclair to do so as well, and to provide the Secretary with any necessary additional authority he may need to achieve this purpose.¹⁰⁹ The Court should also order Secretary Sinclair to use his existing authority to begin releasing people

¹⁰⁷ See *infra* Part IV. A. 1(a) and notes 117-118, describing the different statutorily granted avenues by which Secretary Sinclair and Governor Inslee could release many people from custody.

¹⁰⁸ The Court may grant declaratory relief in an original mandamus action if the declaration is necessary to the issuance of the writ. *Gerberding*, 134 Wn.2d at 195.

¹⁰⁹ These actions include directing Secretary Sinclair to immediately identify all people in DOC custody who (1) are 50 years of age and older; (2) have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19; or (3) have early release dates within the next 18 months or those people who are currently on work release.

and to assist the Governor in removing any obstacle that may exist to achievement of that goal. Petitioners also ask the Court to order the Governor and the Secretary to take other relevant actions necessary to protect the life and safety of all people living in Washington's prisons.

1. Governor Inslee Has a Clear Duty under Washington's Constitution and Statutes to Act to Protect Washingtonians in Confinement from the Spread of COVID-19.

Governor Inslee has a clear duty to exercise emergency powers to preserve and maintain life and health of all Washingtonians. The Governor has rightly acted to protect public health and safety of many – actions that implicate fundamental rights enjoyed by all Washingtonians. However, he has abrogated his duty owed to the Petitioners and others in prison by failing to protect them, without reasonable grounds for doing so, thus violating Article I, § 12 of the Washington Constitution.

a. The Governor has a clear duty to exercise his emergency powers to preserve the life, health and safety of all Washingtonians.

The Governor has the power to declare a state of emergency “after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace.” RCW 43.06.010(12). In declaring a state of emergency, the Governor has made the determination that he must exercise his emergency powers in order to protect the people of Washington from

COVID-19. That decision confers upon him both expansive emergency powers and the duty to properly exercise them. *See* RCW 43.06.220.

The Governor’s emergency powers include the authority to regulate any activity that he reasonably believes must be banned or limited to “help preserve and maintain life, health, property or the public peace,” RCW 43.06.220(1)(h). Furthermore, just last year, the Legislature recognized the Governor’s duty to take immediate and wide ranging steps at times of public emergency by granting him the additional power to waive or suspend any law, regulation or policy, “if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.” RCW 43.60.220(2)(g).¹¹⁰ In granting such sweeping powers, the Legislature expected that Governor Inslee properly exercise those powers once he has determined an emergency exists.

¹¹⁰ As to the legislative intent, the bill stated in relevant part:

The legislature intends to allow the governor **to immediately respond during a proclaimed state of emergency** by temporarily waiving or suspending other statutory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance would in any way prevent, hinder, or delay necessary action in coping with the emergency.

Laws of 2019, chap. 472, § 1(2) (emphasis added).

On February 29, 2020, Governor Inslee accepted those duties when he proclaimed a State of Emergency for the entire State of Washington as a result of the COVID-19 outbreak.¹¹¹ Subsequently, the Governor has exercised his emergency powers by issuing over 39 different Proclamations (as of April 3, 2020).¹¹² In them, Governor Inslee has specifically acknowledged the tremendous risk that COVID-19 poses to older people and those with chronic health conditions. He has also recognized and taken action to address the increased risk of rapid spread of COVID-19 among persons who are living in congregate residential settings.¹¹³ His Proclamations have had a dramatic impact on millions of people across the state, going so far as to close entire sectors of business and employment, all as necessary and reasonable steps to protect people from COVID-19.¹¹⁴ The Governor has also exercised his emergency

¹¹¹ *Proclamation by the Governor 20-05*, Wash. Off. of the Governor (Feb. 29, 2020), [https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20\(final\).pdf](https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20(final).pdf).

¹¹² The complete list of Governor Inslee's Proclamations related to COVID-19 is available at this site: Wash. Governor Jay Inslee, *Proclamations*, www.governor.wa.gov/office-governor/official-actions/proclamations (last visited Apr. 6, 2020).

¹¹³ See, e.g., *Proclamation by the Governor 20-16: Statewide Limits on LTC – No Visitors*, Wash. Off. of the Governor (Mar. 16, 2020) (protecting people in a long list of institutional settings, including state psychiatric facilities, community transition facilities, nursing and assisted living facilities, and adult family homes); *Proclamation by the Governor 20-17: Statewide Limits on LTC – No Visitors Amendment*, Wash. Off. of the Governor (Mar. 17, 2020) (extending prohibitions on the admission of visitors to evaluation and treatment facilities and residential treatment facilities).

¹¹⁴ See e.g., *Proclamation by the Governor 20-25: Stay Home, Stay Healthy*, Wash. Off. of the Governor (Mar. 23, 2020); *Proclamation of the Governor 20-25.1: Extending Stay Home – Stay Healthy to May 4, 2020*, Wash. Off. of the Governor (Apr. 2, 2020)

powers under RCW 43.60.220(2)(g) to waive statutory and regulatory requirements that exist under normal circumstances – for example, regarding tax collection, shortages in long-term care workers, and drivers’ licensing issues.¹¹⁵

Through these Proclamations, Governor Inslee has exercised his powers to mandate extraordinary, swift, and wide-reaching measures to fulfill his duty to protect the “life and health” of most people in the State. Yet, conspicuously absent from the myriad protective measures Governor Inslee has issued in the exercise of his emergency powers is *any* action to protect a large and highly vulnerable population that is disproportionately made up of people of color and marginalized backgrounds: the over 19,000 people in DOC custody.¹¹⁶ He has refused protect these people even though he has broad authority to do so.

(prohibiting all people in Washington State from leaving their homes or participating in social, spiritual and recreational gatherings of any kind regardless of the number of participants, and all non-essential businesses from conducting business).

¹¹⁵ See, e.g., *Proclamation by the Governor 20-20: Department of Revenue – Interest, Fees, Penalties, Due Dates*, Wash. Off. of the Governor (Mar. 18, 2020) (waiving and suspending certain statutory obligations and limitations concerning the application of tax penalties relating to collection of taxes); *Proclamation by the Governor 20-18: Department of Social and Health Services*, Wash. Off. of the Governor (Mar. 18, 2020) (waiving and suspending specified statutes that prevent, hinder or delay necessary action to prevent a long-term care worker shortage and other disruptions to the long-term care system); *Proclamation by the Governor 20-15: Department of Licensing*, Wash. Off. of the Governor (Mar. 16, 2020) (waiving specific statutes pertaining to DOL eye examinations and renewals of driver licenses and identification cards).

¹¹⁶ This number includes prison and work release facilities. See DOC, *Fact Card*, *supra* note 32.

In addition to the authority granted him pursuant to his emergency powers, the Governor also has the pre-existing authority under several other statutes to reduce the prison population.¹¹⁷ He may “grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances,” to any person upon recommendation from the Clemency and Pardons Board. RCW 9.94A.728. He has unbridled authority to issue clemency to any person he deems appropriate. *See* Const. art. III, § 9. Finally, the Governor can release people from prison, following a recommendation of the Board, if as a consequence of an emergency “the population of a state residential correctional facility exceeds its reasonable, maximum capacity.”¹¹⁸

The best public health science proves that the Governor and DOC should begin releasing particular groups of people: those who (1) are 50 years of age and older; (2) have serious underlying medical conditions,

¹¹⁷ Secretary Sinclair also has pre-existing powers that he can exercise to immediately release people at risk from prison. He may authorize release for extended periods of time through extraordinary medical placement and through emergency furloughs. RCW 9.94A.728(1)(c)(i); RCW 72.66.018, .042; *see also* Pacholke Decl. at PSD 235, ¶¶ 6-10. The Governor has a duty to “see that the laws are faithfully executed” by officers of the state. Const. art. III, § 5. Accordingly, he has the duty to ensure that Secretary Sinclair properly exercises his statutory authority to begin reducing the number of vulnerable people in Washington’s prisons.

¹¹⁸ RCW 9.94A.870 also authorizes the Governor to call the Sentencing Guidelines Commission into an emergency meeting for the purpose of evaluating the standard sentencing ranges and other standards.

including pregnancy, that put them at particular risk of serious harm or death from COVID-19; or (3) have early release dates within the next 18 months or who are currently on work release. By refusing to exercise any of his powers – even though a significant reduction of the prison population is an essential step to protect people living in Washington’s prisons from COVID-19 – Governor Inslee has violated his duty to everyone currently incarcerated in Washington’s prisons.

b. The Governor has a clear duty under the Washington Constitution to protect Petitioners’ fundamental right to liberty and safety, and failure to extend emergency protections relating to COVID-19 violates Article I, Section 12.

Article I, § 12 of the Washington Constitution protects “any citizen, class of citizens, or corporation other than municipal,” from being granted “privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” This Court has also “consistently recognized that the text and aims of article I, section 12 differ from that of the federal equal protection clause.” *Ockletree v.*

Franciscan Health Sys., 179 Wn.2d 769, 775-76, 317 P.3d 1009 (2014).¹¹⁹

¹¹⁹ This Court has previously determined that the privileges and immunities clause of the Washington Constitution “requires an independent constitutional analysis from the equal protection clause of the United States Constitution.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004). Therefore, “it is unnecessary to engage repeatedly in further *Gunwall* analysis simply to rejustify performing that separate and independent constitutional analysis.” *Madison v. State*, 161

Article I, § 12 is “more protective than the federal equal protection clause and require[s] a very different analysis in certain situations.” *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P.3d 482 (2014).¹²⁰

“Privileges” analysis applies where a law implicates a “privilege” or “immunity.” *Id.* This Court applies a two-part test for privileges or immunities challenges under article I, § 12. First, the Court “ask[s] whether a challenged law grants a ‘privilege’ or ‘immunity’ for purposes of our state constitution.” *Id.* at 573. If the answer is yes, the Court then

Wn.2d 85, 94, 163 P.3d 757 (2007) (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)).

¹²⁰ In the alternative, if the Court applies a more traditional equal protection analysis, the Proclamations violate Article I, § 12 because their exclusion of people in DOC custody excludes a group that is disproportionately comprised of people of color. This Court has recognized that “[t]he fact of racial and ethnic disproportionality in [Washington’s] criminal justice system is indisputable.” *State v. Gregory*, 192 Wn.2d 1, 23, 427 P.3d 621 (2018) (quoting *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013)) (plurality opinion) (internal quotation omitted). In Washington State, the general population is 4.3% Black/African-American and 1.9% Native American or Alaska Native. See U.S. Census Bureau, *Quick Facts: Washington* (July 2019), <https://www.census.gov/quickfacts/WA>. Yet both populations are vastly overrepresented in DOC facilities, where Black and Native American /Alaska Natives, are 17.7% and 5.8%, respectively. See DOC, *Fact Card*, *supra* note 32. This Court has suggested that something more than traditional rational basis review should apply to equal protection challenges to laws that have a disproportionate impact based on race or other protected characteristics. See, e.g., *Macias v. Dep’t of Labor & Indus.*, 100 Wn.2d 263, 271, 668 P.2d 1278 (1983) (when a statutory scheme has “a substantial disparate impact upon a racial minority,” an intermediate standard may be appropriate) (citing *Plyler v. Doe*, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)). Under any standard, there is no legitimate purpose for the exclusion from the emergency Proclamations and the disproportionate impact on Blacks and Native American/Alaska Natives and other people of color.

asks whether there is a “reasonable ground” for granting that privilege or immunity. *Id.*

The benefits triggering privilege or immunity analysis are benefits implicating fundamental rights of state citizenship. *Id.* (citing *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). This Court has consistently looked to early cases to identify such fundamental rights, citing often to *Vance*. See *id.* at 572-73; *Ockletree*, 179 Wn.2d at 778. As set out in a Pennsylvania case that has been described by this Court as “the classic statement of the law on privileges and immunities,”¹²¹ these fundamental rights include “protection by the government,” “the enjoyment of life and liberty, and the right” “to pursue and obtain . . . safety.” See *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa. 1823) (No. 3230) (providing an encompassing list of fundamental rights).¹²²

Here, the Governor has declared a state of emergency and has issued at least 39 different Proclamations related to the COVID-19

¹²¹ *Andersen v. King Cty.*, 158 Wn.2d 1, 60-61, 138 P.3d 963 (2006) (J.M. Johnson, J., dissenting) (citing full list of fundamental rights from *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (Cir. Ct. E.D. Pa. 1823) (No. 3230)) & at 122-23 (Chambers, J., concurring in dissent) (citing *Corfield* for the rights encompassed by the privileges or immunities clause).

¹²² The Court in *Vance* includes a list of fundamental rights quoted nearly verbatim from a treatise by Thomas M. Cooley. See *Vance*, 29 Wash. at 458 (citing Thomas M. Cooley, *Constitutional Limitations*, at 597 (6th ed.)). Cooley in turn relies on the earlier federal case of *Corfield*, 6 F. Cas. 546, which provides a more encompassing list of fundamental rights than the one abbreviated in *Vance* – including “protection by the government,” “the enjoyment of life and liberty . . . and to pursue and obtain happiness and safety.” *Corfield*, 6 F. Cas. at 551-52.

outbreak, in the exercise of his emergency powers. A gubernatorial proclamation is treated as a “law” subject to constitutional review. *State v. Zack*, 2 Wn. App. 2d 667, 673, 413 P.3d 65 (2018). These Proclamations implicate the fundamental rights of “protection by the government,” “the enjoyment of life and liberty, and the right “to pursue and obtain . . . safety.” And each has conferred a benefit or privilege on many different Washingtonians. Yet none extends any protection to the “class of citizens” who are confined in DOC facilities.

Furthermore, there is no “reasonable ground” for granting that privilege only to members of the general public, but not persons in DOC custody. The “reasonable ground” test is different from, and more exacting than, rational basis review under equal protection jurisprudence.

Schroeder, 179 Wn.2d at 574; *Ockletree*, 179 Wn.2d at 783, 797 (Stephens, J., dissenting) (recognizing that if the reasonable ground test did not require more than rational basis review, “there would be no reason to confine its scope to laws concerning a fundamental right of state citizenship”) (citation and internal quotation marks omitted). Whereas the rational basis standard requires only that a classification “must be rationally related to a legitimate state interest,” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1988), under the reasonable ground standard, courts must make a legal determination by

“scrutiniz[ing] the legislative distinction to determine whether it in fact serves the legislature’s stated goal.” *Schroeder*, 179 Wn.2d at 574. “Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction.” *Id.* The basis to justify the legislative distinction must be found in the legislation or legislative history itself. *Id.*

In this situation, there are no reasonable grounds for refusing to take the essential public health action that all experts agree is required, reducing the prison population, particularly those people most at risk. The record establishes that like long-term care facilities, where the Governor has chosen to act, prisons also uniquely provide for the easy, quick and deadly spread of the disease. Moreover, people in prison are even more likely than the public generally to suffer from conditions of age or infirmity that place them at tremendous risk of developing serious complications if they become infected.¹²³ Finally, it requires only one asymptomatic, yet infectious person to enter a prison in order to create an outbreak that may overwhelm the facility’s ability to address it, and there is now already at least one confirmed case of a person inside.

In fact, other courts have already recognized in similar circumstances that continuing forward as the State has here is not

¹²³ Greifinger Decl. at PSD 201, ¶ 15.

reasonable in the face of this unprecedented, global, deadly virus. *See, e.g., Thakker v. Doll*, No. 1:20-cv-480, at 15 & 22 n.15 (M.D. Pa. Mar. 31, 2020) (measures such as “cohorting” are “patently ineffective in preventing the spread of COVID-19” given report of a positive test among employees at detention center). Given the particular realities of the present pandemic, Governor Inslee has no reasonable grounds for failing to provide people in prison with the same “privileges,” or protections, that he has conferred on other Washingtonians.

2. Governor Inslee and Secretary Sinclair Both Have a Clear Duty under Washington’s Constitution and Statutes to act to Protect Washingtonians in Confinement from the Spread of COVID-19.

Governor Inslee and Secretary Sinclair both have a clear duty to protect the health and safety of people in DOC custody based on Article 1, § 14, the “cruel punishment” clause of the Washington Constitution, Washington’s common law, and the Washington Law Against Discrimination, RCW 49.60. Accordingly, this Court should issue a writ mandating that the Governor and the Secretary take steps to live up to their duties and begin releasing people.

a. Governor Inslee and Secretary Sinclair have a constitutional and common law duty to protect Petitioners’ health and safety.

The State owes a duty to people who are incarcerated to avoid “cruel punishment.” Const. art. I, § 14. Washington’s “cruel punishment”

clause has been interpreted to provide greater protections than its analogous federal counterpart, the Eighth Amendment.¹²⁴ “At the very least, article I, section 14 cannot provide for less protection than the Eighth Amendment.” *State v. Gregory*, 192 Wn.2d 1, 16, 427 P.3d 621 (2018). Thus, if state action violates the federal constitutional prohibition on “cruel and unusual punishment,” it also violates Washington’s “cruel punishment” clause under Article I, § 14.

The Eighth Amendment creates an affirmative duty upon state officials to provide conditions of reasonable safety to people in prison. *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Prison officials engage in cruel and unusual punishment when they show deliberate indifference, through actions or omissions, to a substantial risk of harm. *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L.

¹²⁴ This court has “repeatedly recogni[z]ed that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment.” *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001). As this Court has held:

Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation. The historical evidence reveals that the framers of [the Washington Constitution, article I, section 14] were of the view that the word “cruel” sufficiently expressed their intent, and refused to adopt an amendment inserting the word unusual.

Gregory, 192 Wn.2d at 15 (quoting *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980)). Accordingly, as in *Gregory* and *Roberts*, here, a formal *Gunwall* analysis is not necessary under established principles of state constitutional jurisprudence. *Id.* at 15-16 (citing *Roberts*, 142 Wn.2d at 506 n.11).

Ed. 2d 251 (1976) (deliberate indifference to serious medical needs may be cruel and unusual punishment). Deliberate indifference exists when a prison official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer*, 511 U.S. at 847. Obvious prison conditions that pose a substantial danger to prisoners’ health and safety are risks sufficient to meet this standard. *See, e.g., Ball v. LeBlanc*, 792 F.3d 584, 593 (5th Cir. 2015) (holding that confining people in hot prison cells violated the Eighth Amendment; plaintiffs need to show only that there is a “substantial risk of serious harm” and not actual serious injury or death); *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995) (officials knew or suspected existence of asbestos yet allowed prisoners to continue to work with asbestos or in asbestos-filled conditions).

Substantial risks to the future health and safety of inmates can constitute cruel and unusual punishment, even if that harm has not yet come to pass. “A remedy for unsafe conditions need not await a tragic event.” *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (a prisoner may state an Eighth Amendment claim even if he had not yet been actually injured).

Specifically, of import to this case, the United States Supreme Court acknowledged in *Helling* that the *future exposure to toxic*

substances could constitute violations “for which the Eighth Amendment requires a remedy.” *Id.* (internal citations omitted) (emphasis added). The Court reasoned that prison officials could be deliberately indifferent to inmates’ exposure to a serious, communicable disease *even if* “the complaining inmate shows no serious current symptoms” where they had “plainly proved an unsafe, life-threatening condition.” *Id.* (emphasis added).

Multiple other federal courts have likewise concluded that a failure to provide adequate protections against contagious diseases may constitute “cruel and unusual” punishment. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir.1996) (prison officials have an affirmative duty to protect inmates from infectious disease, citing additional cases); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (prison’s inadequate response to tuberculosis outbreak violated the Eighth Amendment); *Gates v. Collier*, 501 F.2d 1291, 1303 (5th Cir. 1974) (concluding prisoners were entitled to relief for conditions that included mingling with others with serious contagious diseases); *Brown v. Mitchell*, 327 F. Supp. 2d 615, 630-31 (E.D. Va. 2004) (the basic need for safety prohibits housing of inmates in crowded conditions that could spread disease).

Where conditions of confinement violate the Eighth Amendment or other constitutional rights by posing an unreasonable risk to health and

safety, courts have ordered the release of individuals as a remedy. *See, e.g., Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 1928, 179 L. Ed. 2d 969 (2011) (a prison that cannot provide adequate medical care is incompatible with protections of human dignity, concluding that mandated reduction of California prison population was warranted as a remedy); *see also Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983) (court has authority to release low-bond pretrial detainees to make sure jail was not overcrowded in compliance with a consent decree); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1293-94 (W.D. Pa. 1983) (discussing cases where courts have ordered reductions in population in jails and prisons and ordering a reduction in jail population).

In this case, there can be no credible assertion that the Governor or the DOC Secretary are unaware that COVID-19 constitutes an extreme and serious risk to every person in Washington State, including those living and working in prisons.¹²⁵ Many in Washington State have already died.¹²⁶ The conditions at correctional facilities exponentially increase the

¹²⁵ Two declarations from Alex Bergstrom beginning at PSD 257 and PSD 622 contain information and links to 97 news articles and studies relevant to this case.

¹²⁶ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-in-us.html (last visited Apr. 5, 2020) (page updated regularly by the CDC).

risk for contraction and spread of the COVID-19 virus.¹²⁷ Specifically, the conditions at the DOC's facilities, where individuals congregate, sleep, and eat in enclosed group environments, put the approximately 19,000 individuals in DOC custody at constant risk of a serious outbreak.¹²⁸ The crowded conditions that make it impossible to achieve social distancing along with a lack of appropriate sanitary and hygiene facilities further exacerbate these substantial risks.¹²⁹

Today's announcement that COVID has invaded Washington's prisons should come as no shock to either Governor Inslee or Secretary Sinclair. In fact, Secretary Sinclair admitted before the outbreak announced today that "at some point we'll have an active case, or more than one."¹³⁰ Furthermore, both Governor Inslee and Secretary Sinclair are aware that public health officials resoundingly recommend releasing people from Washington's prisons as an essential step in fighting the COVID-19 pandemic – both to protect people in prisons and the communities where prisons are located.¹³¹ Though both are aware of the

¹²⁷ Anne C. Spaulding, *Coronavirus and the Correctional Facility*, Emory Center for the Health of Incarcerated Persons, 17 (Mar. 9, 2020), https://www.ncchc.org/filebin/news/COVID_for_CF Administrators_3.9.2020.pdf.

¹²⁸ DOC, *Fact Card*, *supra* note 32.

¹²⁹ See, e.g., Puisis and Shansky Decl. at PSD 172-73, ¶ 12; Greifinger Decl. at PSD 201, ¶ 14.

¹³⁰ See Jenkins, *supra* note 43.

¹³¹ See Straley Decl. at PSD 93-94, ¶¶ 9-14; Attachments 9, 15-16 at PSD 128-31, 164-66.

substantial risk of serious harm or death to the Petitioners and other people living in Washington’s prisons, neither the Governor nor the Secretary have taken these necessary actions. Their inaction constitutes deliberate indifference to the health and safety of people living in Washington’s prisons.

In addition to their constitutional duties to refrain from cruel punishment, the Governor and Secretary Inslee also owe the Petitioners and others “an affirmative duty to provide for inmate health, welfare, and safety,” given the special relationship with people in their custody.

Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 639, 244 P.3d 924 (2010) (plurality) (discussing this special relationship and duty of a city jails); *see also Shea v. City of Spokane*, 17 Wn. App. 236, 241, 562 P.2d 264 (1977), *aff’d*, 90 Wn.2d 43, 578 P.2d 42 (1978) (officials have a duty to keep prisoners “in health and safety”) (quoting *Kusah v. McCorkle*, 100 Wash. 318, 323, 170 P. 1023 (1918)). When the State takes a person into custody and limits that person’s liberty to care for themselves, it triggers an affirmative “corresponding duty to assume some responsibility for [their] safety and general well-being” and provide for needs like “medical care” and “reasonable safety.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200, 109 S. Ct. 998, 1005, 103 L. Ed. 2d 249 (1989); *see also Shea*, 17 Wn. App. at 241-42 (“The duty to the

prisoner arises because when one is arrested and imprisoned for the protection of the public, he is deprived of his liberty, as well as his ability to care for himself.”) (relying on 2 Restatement of Torts 2d § 314A(4) at 118). The Governor and Secretary Sinclair’s refusal to take the essential step of releasing people violates this common law duty. The Court should declare that these state officials have violated their constitutional and common law duties to protect people living in Washington’s prisons and order them to take appropriate steps to remedy those failings by releasing people as requested in the Petition.

b. Secretary Sinclair Has a Duty Under Article I, Section 12 of the Washington Constitution and the Washington Law Against Discrimination Not To Discriminate Against People with Disabilities.

Secretary Sinclair also has a constitutional and statutory duty not to discriminate against Petitioners as individuals with disabilities, or against the disproportionate number of other people in DOC custody with disabilities.¹³² These duties are rooted in Article I, Section 12 of the

¹³² Approximately 40% of the incarcerated population suffers from at least one chronic medical condition, with a higher rate of diabetes, hypertension, and asthma than their non-incarcerated counterparts. Alexa N. Kanbergs & Shayla N.M. Durfey, *Incarcerated Individuals’ Perspectives on Living with Serious Illness*, R.I. Med. J. 24 (Mar. 2019) (citation omitted), <http://www.rimed.org/rimedicaljournal/2019/03/2019-03-24-ppm-kanbergs.pdf>. One study found that prisoners were nearly three times more likely than the general population to report having at least one disability. Jennifer Bronson, Laura M. Maruschak, and Marcus Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011–2012*, U.S. Dep’t of Justice: Bureau of Justice Statistics (Dec. 2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>.

Washington Constitution and the Washington Law Against Discrimination (WLAD), RCW 49.60.010, *et seq.* See *Ockletree*, 179 Wn.2d at 794-97 (Stephens, J., dissenting) (concluding the right to be free from discriminatory employment practices is as fundamental as the “commercial rights” addressed by early cases).

The Legislature passed the WLAD as “an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights.” RCW 49.60.010. The Legislature also decreed that “practices of discrimination against any of its inhabitants ... are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” *Id.* The WLAD expressly states that “[t]he right to be free from discrimination because of ... the presence of any sensory, mental, or physical disability ... is recognized as and declared to be a civil right.” RCW 49.60.030(1).¹³³

¹³³ RCW 49.60.130 confers a broad right to be free from discrimination, without reference or limitation to public accommodations. Even people not expressly covered by the statute are protected by the state’s public policy against discrimination. *Roberts v. Dudley*, 140 Wn.2d 58, 69-70, 993 P.2d 901 (2000) (small employers are not exempt from WLAD’s condemnation of discrimination as against public policy). This Court has never ruled on the precise question of whether prisons and jails are “public

The right to be free from discrimination creates a duty to provide reasonable accommodations to people with disabilities. *See Doe v. Boeing Co.*, 121 Wn.2d 8, 18, 846 P.2d 531 (1993) (recognizing “an affirmative obligation to reasonably accommodate the sensory, mental, or physical limitations” of employees with disabilities). In interpreting the WLAD for disability claims, courts look to the federal Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* *See Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014); *see also Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998).

Because of Petitioners’ particular medical disabilities, they are at a heightened risk of serious illness and death if infected with COVID-19, for which there is no vaccine, known treatment, or cure.¹³⁴ Specifically, Petitioners suffer from serious medical conditions that qualify as

accommodations” under RCW 49.60.040(2), though some federal district courts have interpreted them not to be, because they are not open to the public. *See Skylstad v. Washington*, 2019 WL 919624 *6 (W.D. Wash. January 14, 2019) (correctional facilities are not public accommodations because members of the general public must obtain permission to enter and are restricted to certain areas); *Knight v. Washington State Dep’t of Corr.*, 147 F.Supp.3d 1165, 1172 (W.D. Wash. 2015) (prison was not public accommodation as to visitors participating in DOC extended family visitation program). By contrast, courts have held that the federal ADA applies to correctional facilities and other state institutions. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 210, 118 S. Ct 1952, 141 L.Ed. 2d 215 (1998) (holding that state prisons are “public entities” under Title II of the ADA).

¹³⁴ Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited Apr. 5, 2020).

disabilities under the WLAD,¹³⁵ including heart disease,¹³⁶ diabetes,¹³⁷ Parkinson's disease,¹³⁸ and Chronic Obstructive Pulmonary Disease (COPD).¹³⁹ See, e.g., *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 433 (6th Cir. 2014) (heart condition and diabetes); *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378 (4th Cir. 2008) (Parkinson's disease); *Snell v. North Thurston School Dist.*, 2015 WL 6396092 *7 (W.D. Wash. 2015) (diabetes constitutes "disability" under the WLAD); *Dryer v. Flower Hosp.*, 383 F. Supp. 2d 934, 938-39 (N.D. Ohio 2005) (person with COPD was "disabled" under the ADA).

Accordingly, the Secretary has a duty to reasonably accommodate Petitioners who are particularly vulnerable to COVID-19 due to their medical conditions. As discussed in detail herein, no matter what steps DOC takes to address the COVID-19 pandemic, the Secretary does not satisfy his duties unless and until DOC begins to release people. The need for release is particularly acute for those with disabilities that render them

¹³⁵ Under the WLAD, an individual is considered disabled if they have a "sensory, mental, or physical impairment that...[i]s medically cognizable or diagnosable" including "any physiological disorder, or condition ... or anatomical loss affecting one or more of the following body systems: [n]eurological, musculoskeletal, ... respiratory, ... cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, ... and endocrine" systems. RCW 49.60.040(7)(a)(i), (c)(i).

¹³⁶ Berry Decl. at PSD 315-16, ¶¶ 20-25; Cota Decl. at PSD 358, ¶¶ 21-22; Phillip-Meadows Decl. at PSD 337-38, ¶¶ 22-31.

¹³⁷ Rhone Decl. at PSD 323, ¶ 3; Burkett Decl. at PSD 367-68, ¶¶ 22, 26.

¹³⁸ Maples Decl. at PSD 379-80, ¶¶ 22-33.

¹³⁹ Burkett Decl. at PSD 367-68, ¶¶ 22, 26; Holley Decl. at PSD 332, ¶ 2; Maples Decl. at PSD 380, ¶¶ 29-32.

more susceptible to serious outcomes from COVID. Under the unique, unprecedented circumstances presented by this pandemic, release is the only actual “reasonable” accommodation that DOC can provide to the Petitioners and other disabled people. Other efforts to mitigate the threat are simply insufficient. Accordingly, the Secretary has a duty to accommodate Petitioners’ disabilities by releasing them and other people living with disabilities behind bars.

3. Petitioners Have No Plain, Speedy, and Adequate Remedy at Law.

“The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170. “The question as to what constitutes a plain, speedy, and adequate remedy is not dependent upon any general rule, but upon the facts of each case, and its determination therefore rests in the sound discretion of the court in which the proceeding is instituted.” *Riddle v. Eloffson*, 193 Wn.2d 423, 433-34, 439 P.3d 647 (citation omitted).

“Something in the nature of the action must make it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.” *Id.* at 434.

“The complete absence of any ‘other remedy’ is not strictly required. The operative word of the second prong is the ‘adequacy’ of the

remedy available.” *Id.* (quoting *State ex rel. W. Canadian Greyhound Lines, Ltd. v. Superior Court*, 26 Wn.2d 740, 747-48, 175 P.2d 640 (1946)); see also *Dress v. Washington State Dep’t of Corrections*, 168 Wn. App. 319, 338-39, 279 P.3d 875 (2012) (a plain, speedy and adequate remedy requires more than merely the existence of “some process” by which the plaintiff may seek redress for the allegedly unlawful action, rejecting DOC’s argument for “[s]uch a relaxed standard”).¹⁴⁰

This Court has previously suggested that a writ of the type requested here is an appropriate way to challenge the Governor’s exercise of – or failure to exercise – his police power during a state of emergency. See *Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 471, 647 P.2d 481 (1982) (rejecting property owners’ damage claims based on the Governor’s exercise of police power during the Mt. St. Helens eruption, stating “[a]ppellants may have challenged the actions by using an extraordinary writ at an earlier stage”).

In this case, there is no other plain, speedy and adequate remedy. A personal restraint petition (PRP) is not adequate because it is not speedy. *Dress*, 168 Wn. App. at 338 (ruling that a writ is required because

¹⁴⁰ As Justice Yu noted in her dissent in *Riddle*, “[t]he circumstances presented ... indicate that the delay and difficulty of seeking declaratory and injunctive relief, which the lead opinion acknowledges, could actually deprive [the petitioner] of redress.” 193 Wn.2d at 448 (Yu, J., dissenting).

“typically PRPs take six months or probably longer to address.”)

Likewise, if Petitioners sought declaratory and injunctive relief in a trial court, it would be inadequate because of the need for this Court to weigh in on these important issues on an expeditious timeline. This Petition raises issues that are not only urgent, but also present novel questions of law that inevitably would be brought before this Court, whether pursuant to its original jurisdiction or pursuant to its appellate jurisdiction. It is appropriate that this Court weigh in as soon as possible to issue a definitive ruling. Any other proceeding would not allow this Court to consider these issues on the timeline that they require.

In addition, the Court Commissioner has already acknowledged the urgency, stating that “mindful that the spread of COVID-19 is a matter of urgent statewide concern...this action should be reviewed on an accelerated basis.” Even Secretary Sinclair has acknowledged he expects “a case or more” in DOC facilities. An outbreak of COVID-19 in a DOC facility was a matter not of if, but when. With news today of the first case inside DOC, “when” is now.

Failure to order the Governor and the Secretary to comply with their constitutional and statutory duties and to take swift, decisive, and extraordinary action could result in serious, irreparable harm and death. It is hard to imagine a case in which it could be any clearer that there is no

other plain, adequate, or speedy remedy – other than this Court issuing the requested relief.

V. CONCLUSION

For the reasons set forth above, this Court should declare that Governor Inslee and Secretary Sinclair have violated myriad duties owed the Petitioners and every other person living in Washington’s prisons. Petitioners respectfully request this Court to issue a writ ordering the Governor and the Secretary to take appropriate actions to mitigate the harms that COVID-19 poses by beginning a large-scale release of people most at risk and others in order to prevent a widespread outbreak, as well as any other actions needed so that DOC will properly implement other crucial public health measures.

DATED this 6th day of April, 2020.

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