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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CANDIS RUSH, et al.,

Petitioners,

WASHINGTON STATE DEPARTMENT OF CORRECTIONS et al.

Respondents.

MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY AND AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON IN SUPPORT OF
PETITIONERS' MOTION FOR DISCRETIONARY REVIEW AND
PETITIONERS' MOTION FOR ACCELERATED REVIEW

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IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File that accompanies this memorandum.

INTRODUCTION

The ongoing COVID-19 pandemic in Washington state and its prisons continues to create a great risk of harm for all who remain incarcerated in congregate settings. Despite this danger, the Department of Corrections (DOC) has failed to offer vaccination to all residents or take other obvious measures to protect them through vaccination education and limits on unvaccinated staff having contact with residents. With mandamus rejected by this Court and incarcerated persons left to pursue individualized claims for relief through administrative and court processes, petitioners appropriately seek immediate equitable class relief that would grant a measure of protection.

Review is warranted because, in rejecting class certification and immediate relief, the trial court misapprehended the critical role courts play in our constitutional democracy. Courts of first instance must not shy away from engaging in meaningful review of actions taken by state agencies that may infringe the constitutional rights of petitioners.

Review is further warranted to allow full consideration of the impact that current facially neutral policies have on people held in carceral

institutions that embody, tangibly, the sedimentation of decades of accumulated race disproportionality in the criminal justice system.

Accelerated review is warranted because Washington state is in the midst of a resurgence of COVID-19, including its variants, that places persons in DOC custody at an unacceptable, immediate risk of harm requiring further action by DOC.

ARGUMENT

- I. Review is Warranted to Correct the Misapprehension Exhibited by the Trial Court which Incorrectly Applied the Separation of Powers Doctrine to Abdicate Its Critical Role in Our Constitutional Democracy.

The trial court incorrectly relied upon a notion of the separation of powers doctrine that is not in accord with this Court's jurisprudence. *Cf. McCleary v. State*, 173 Wn.2d 477, 515, 269 P.3d 227 (2012) (affirming constitutional structure of co-equal branches whereby "the judiciary has the ultimate power and duty to interpret, construe and give meaning to words, sections and articles of the constitution." (quoting *Matter of Salary of Juv. Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976)); *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) ("different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances"). Order, *In re Pers. Restraint of Williams*, 99344-1 (Wash. Mar. 12, 2021) (finding conditions of

confinement cruel and directing Department of Corrections to remedy it without specifying how, precisely, but requiring report to Court on compliance). The trial court's misapprehension is evident when the court expressed that it "cannot nor should not make decisions usurping the authority of the Department of Corrections as related to" its statutory obligations and that "this court does not, has not, and will not make political decisions." Verbatim Rep. of Proc. at 30, 31 (March 23, 2021).

The court's reliance upon RCW 72.09.050,¹ and perhaps RCW 72.09.135 and RCW 72.09.251 from respondents' briefing, is misplaced. RCW 72.09.135 makes clear that any standards adopted "shall be the minimums necessary to meet federal and state constitutional requirements relating to health, safety, and welfare of inmates and staff." RCW 72.09.135.² Petitioners are asking that respondents must abide by constitutional requirements, including that petitioners not be subjected to cruel punishment, Const. art. I, § 14, nor denied privileges and immunities, Const. art. I, § 12. Nothing in RCW 72.09 indicates that the legislature intended to strip the courts of jurisdiction. Nothing in RCW 72.09 indicates that decisions and policies made by respondents are

¹ The hearing transcript refers to RCW 79.09.050, a chapter that relates to public lands. *See* Verbatim Rep. of Proc. at 29.

² To the extent that the state or trial court rely upon RCW 72.09.251, a careful reading reveals that it applies only to precautions that relate to "offenders with communicable diseases" and not to DOC staff who may have communicable diseases. RCW 72.09.251.

political questions immune from judicial scrutiny.

Review is warranted to correct the misapprehension of the trial court regarding its proper role and responsibility.

II. Review Is Warranted to Allow this Court to Consider How to Account for COVID's Disproportionate Impact on People of Color that Is Exacerbated by Existing Race Disproportionalities in Incarceration.

The effects of continued outbreaks of COVID-19 in Washington's prisons will likely not be felt equally. The Centers for Disease Control's most recent information, updated April 23, 2021, on COVID-19 and hospitalization and death shows that "Black or African American, Non-Hispanic persons," when compared to "White, Non-Hispanic persons," have hospitalization rates (2.8 times) and death rates (1.9 times) that exceed the relative rate of COVID-19 cases (1.1 times).³ Hispanic or Latino persons have hospitalization rates 3.0 times, death rates 2.3 times, and infection rates 2.0 times that of "White, Non-Hispanic persons."⁴ American Indians or Alaska Natives have hospitalization rates 3.5 times, death rates 2.4 times, and infection rates 1.6 times that of "White, Non-Hispanic persons."⁵ The CDC data is suggestive that Black or African

³ Centers for Disease Control, *Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity* (updated Apr. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last visited May 4, 2021).

⁴ *Id.*

⁵ *Id.*

American persons, Hispanic or Latino persons, and American Indian or Alaska Native persons have worse health outcomes and higher rates of death among those who have contracted the virus.

This is consistent with Washington data. When examining hospitalization and death among confirmed cases, the Washington State Department of Health reports that “Black populations” with confirmed or probable COVID-19 infections have hospitalization rates 2.5 times higher and death rates approximately two times as high as “white populations” with COVID-19.⁶ American Indians and Alaska Natives with confirmed or probable COVID-19 infections have hospitalization rates at 2.5 times and death rates three times higher than white populations. Native Hawaiians and Other Pacific Islanders with confirmed or probable COVID-19 infections have hospitalization rates ten times higher and death rates six times higher than white populations. Hispanic populations with confirmed or probable COVID-19 infections have hospitalization rates five times higher and death rates three times higher than whites.

Thus, the Washington-specific data shows that “Black populations,” “Native Hawaiian and Other Pacific Islander,” “American

⁶ Wash. Dep’t of Health, *Covid-19 morbidity and mortality by race, ethnicity, and spoken language in Washington state*, (Dec. 9, 2020), <https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/COVID-19MorbidityMortalityRaceEthnicityLanguageWASState.pdf> (last visited May 4, 2021). This document lacks pagination but the relative rates appear on pp. 4-5 and graphs on pp. 6-8 of the downloaded PDF.

Indian and Native Alaskans,” and “Hispanics,” after they have a positive or probable COVID-19 infection, suffer worse health outcomes than “white populations.” These worse health outcomes, as reported by DOH, are comparing apples to apples – when comparing those with actual or probable COVID-19 diagnoses, individuals in certain minority groups have significantly worse health outcomes than do white persons.

Thus, even though the relative rate of infection might not show racially disproportionate rates of infection for those residing in DOC facilities,⁷ CDC and Washington Department of Health data suggests that Black, American Indian/Alaska Native, Native Hawaiian and Other Pacific Islander, and Hispanic residents will be disproportionately impacted by COVID-19 if they contract it.

In addition, the criminal legal system itself may be partially responsible for the disparate rates of infection and death among communities of color. As recently as 2018, this Court took “judicial notice of implicit and overt racial bias against black defendants in this state” and discussed examples from “[o]ur case law and history of racial

⁷ See Wash. Dep’t of Corr., *Covid-19 Data*, <https://www.doc.wa.gov/corrections/covid-19/data.htm> (last visited May 5, 2021) (Demographics table: 68% of incarcerated population is white, 70.6% of confirmed cases are white; 17.8% of incarcerated population is Black, 16.8% of confirmed cases are Black; 5.9% of incarcerated population is American Indian/Alaska Native, 6.1%, confirmed cases; 14.6% of incarcerated population is of Hispanic origin, 15%, confirmed cases) (last visited May 4, 2021).

discrimination.” *State v. Gregory*, 192 Wn.2d 1, 22-23, 427 P.3d 621 (2018) (citing and quoting from numerous cases and sources, including the Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System (2011)⁸). Race disproportionality exists in incarceration. Black persons constitute 4.4% of Washington’s population but make up 18.1% of DOC residents; American Indian/Alaska Native constitute 1.9% of Washington’s population but make up 6.0% of DOC residents; Hispanic persons make up 13.0% of Washington’s population but make up 15.2% of DOC residents.⁹

Thus, COVID-19 outbreaks in Washington prisons, even if there is no racially disproportionate rate of transmission among those who are confined, will produce a racially disproportionate outcome because certain racial minorities are overrepresented in those facilities. The extent to which this overrepresentation is traceable to “[o]ur case law and history of racial discrimination,” *Gregory*, 192 Wn.2d at 22, requires careful consideration by this Court as it weighs and gives guidance to lower courts that are assessing relief for those who are incarcerated and who cannot

⁸ <https://perma.cc/6BV4-RBB8>.

⁹ Compare U.S. Census, Quick Facts: Washington, <https://www.census.gov/quickfacts/WA> (Population estimates, July 1, 2019) (last visited May 5, 2021) with Wash. Dep’t of Corr., Agency Fact Card (Dec. 31, 2020), <https://doc.wa.gov/docs/publications/reports/100-QA002d.pdf> (last visited May 5, 2021). Data for Native Hawaiians and Other Pacific Islanders in DOC custody is not disaggregated from broader “Asian/Pacific Islander” category.

socially distance within the confines of the congregate settings.

III. Review Is Warranted to Allow this Court to Consider Relief Similar to the Order Issued in *Williams*, which Struck Proper Balance Between the Courts and DOC.

In its March 12, 2021, Order in *Williams*, this Court declared that maintaining the status quo was unconstitutional. It then directed DOC to remedy the constitutional violation and to report back to the Court. This approach struck a workable balance that afforded DOC the opportunity and obligation to come into compliance.

Here, the trial court declared that it “should not and cannot as a legal or practical matter supervise or oversee the State’s vaccination process.” Transcript at 29. It failed to consider an approach similar to the one taken by this Court in *Williams*, where in essence declaratory relief was granted. If review is granted, if this Court remains uncertain about the precise contours of the remedy, it can declare that under the status quo – the current vaccination policy and the lack of any policy relating to unvaccinated staff and protocols regarding their contact with DOC residents – are facts on which petitioners are likely to prevail on one or more of their constitutional claims and then to give DOC the opportunity to remedy the violation. *Cf. Williams, supra; Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*,

349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

IV. The Court Should Grant Accelerated Review to Ensure that Relief, If Warranted, Is Provided in a Timely Manner to Address the Pandemic.

As petitioners demonstrate in their motions before this Court, residents in DOC custody remain especially vulnerable in the midst of the pandemic and the rise and increasing prevalence of virus variants that may be more contagious and more dangerous. These exigent circumstances, DOC's dangerously slow and inadequate vaccination policies, and the trial court's failures to act consistent with the vital role courts play in constitutional adjudication warrant accelerated review under RAP 18.12.

CONCLUSION

The foregoing reasons demonstrate the fundamental and urgent issue of broad public import that warrants discretionary review directly by this Court consistent with RAP 2.3(d)(2), 2.3 (d)(3), and 4.2(a)(4) and for accelerated review pursuant to RAP 18.12.

DATED this 11th day of May, 2021.

Respectfully Submitted:

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on May 11, 2021, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 11th day of May, 2021.

/s/ Melissa R. Lee

Melissa R. Lee

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