No. 99745-4

SUPREME COURT OF THE STATE OF WASHINGTON

CANDIS RUSH, JUSTIN AUTREY, GREGORY STEEN, THEODORE RHONE, and MICHAEL LINEAR,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, a state agency; STEPHEN SINCLAIR, Secretary of the Washington State Department of Corrections; WASHINGTON STATE DEPARTMENT OF HEALTH, a state agency; and DR. UMAIR SHAH, Secretary for the Washington State Department of Health;

Respondents.

PETITIONERS' MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS AND TRIAL COURT ACTION

Candis Rush, Justin Autrey, Gregory Steen, Theodore Rhone, and Michael Linear are the petitioners in this matter. They filed suit in Thurston County Superior Court on March 29, 2021. *See Rush v. Wash. Dep't of Corr.*, Civ. Cause No. 21-2-00491-34 (Thurs. Cty Sup. Ct.). Petitioners now seek discretionary review of the trial court's order denying their motion for class certification entered on April 16, 2021, *see* Appendix to Motion for Discretionary Review App. 380-82 (hereinafter "App."), and order denying their motion for a preliminary injunction entered on April 23, 2021. App. 1152-54.

II. ISSUES PRESENTED FOR REVIEW

Issue One: Did the superior court commit an obvious error which would render further proceedings useless when it denied Petitioners' motions for class certification and preliminary injunction?

Issue Two: Did the superior court commit probable error in denying those motions and do those decisions substantially alter the status quo or substantially limit the freedom of a party to act?

III. STATEMENT OF THE CASE

A. Procedural posture of the case.

Petitioners are five individuals who are currently detained in Washington Department of Corrections (DOC) custody. The pleadings and evidence presented to the trial court show that Respondents failed to meet their duty of care owed to people in correctional custody in three

ways: (1) Respondents continue to delay giving everyone in DOC custody access to the COVID-19 vaccines; (2) Respondents have not provided timely, accurate, culturally responsive information about the COVID-19 vaccines to people in custody; and (3) Respondents have allowed staff members who refuse the vaccine to have direct, intimate contact with everyone who lives in our prisons. Even those who are fully vaccinated will continue to suffer harm because of the terrible conditions DOC has imposed in its unsuccessful effort to battle COVID-19. App. 131, ¶ 9; 140-41, ¶¶ 14-21; 163, ¶¶ 18, 20; 419, ¶ 19; 646-48, ¶¶ 19-30; 657-58, ¶¶ 19-25. Based on this evidence, Petitioners asked the trial court to certify a class of all people impacted by Respondents' failings and order them to take immediate steps to prevent further outbreaks, illness, and death amongst people in DOC custody.

The trial court denied Petitioners' motions for class certification and a preliminary injunction. Petitioners now ask this Court to grant Petitioners' motion for discretionary review of those denials.

B. Facts relevant to this Court's analysis.

COVID-19 is a deadly and highly transmissible disease that is easily spread through respiratory droplets between people who come into close contact with one another. App. 416, ¶ 14. Once infected, a person can quickly progress from basic symptoms like cough,

congestion, and fever to life-threatening complications as the virus spreads into the lungs and other organs. App. 416, ¶ 14; 495, ¶¶ 11-12 (detailing myriad long-term and chronic health conditions that COVID can cause).

Prisons are crowded congregate environments where people live, eat, and sleep in close quarters, and residents have little ability to control their environment. App. 416, ¶ 14; 140, ¶ 18 (people quarantined in their cells snore, cough, and talk, spreading germs to everyone else nearby); 166, ¶ 30 (people living in prisons can see neighbors through vents); 498-500, ¶ 23, 26; 645, ¶ 17 ("[w]e're in here breathing everyone's germs."). Residents and DOC staff are therefore at particular risk of harm from exposure and spread of COVID. App. 416, ¶ 14.

During the early phases of the pandemic, DOC introduced a range of policies and practices aimed at stopping COVID from entering the prisons and containing its spread. *Colvin v. Inslee*, 195 Wn.2d 879, 888, 467 P.3d 953 (2020) (discussing DOC's COVID policies and procedures created early in the pandemic). DOC had reported very few cases early on. *See id.* at 887-89 (noting that "no member of the prison population" had contracted COVID when *Colvin* plaintiffs filed their petition in March 2020 and under 250 people had tested positive when Court issued its opinion on July 23, 2020). However, since this Court's July 2020 opinion,

over 6,200 people have been infected and fourteen have died. App. 1307-1313.

These last months have proven that Respondents' actions have been insufficient to contain the virus. As a result, more than 43% of people incarcerated in Washington's prisons have been infected; an infection rate about 8.5 times higher than that in Washington's general population. App. 478, ¶ 6. The evidence in the record verifies that all of the outbreaks in Washington's prisons have been likely caused by infectious corrections staff transmitting the virus to people in custody. App. 169, ¶ 48; 416-17, ¶ 15; 479, ¶ 8.

Despite failing to curb the virus's spread, measures that DOC put in place to combat COVID have led to a marked deterioration in conditions in DOC facilities (e.g. prolonged periods of solitary confinement; lack of access to toilets, running water, and showers; lack of access to family and loved ones; severely limited programming; increased time locked down in cells). App. 131, ¶ 9; 140-41, ¶¶ 14-21; 163, ¶¶ 18, 20; 419, ¶ 19; 646-48, ¶¶ 19-30; 657-58, ¶¶ 19-25.

Since December 2020, Respondents have possessed a tool that could virtually eliminate the risk of COVID and allow DOC to lift these draconian conditions of confinement—the vaccines. App. 422, ¶ 30. Unfortunately, Respondents continue to delay offering vaccines to

people in custody. Respondents have also not taken measures to maximize the level of vaccine acceptance among correctional staff and people in custody, and they continue to allow staff who refuse to be vaccinated access to unvaccinated people in custody.

As the record shows, Respondent Department of Health (DOH) likely inappropriately deprioritized people living in prisons by initially moving other groups of people ahead of them and then, by opening up vaccine eligibility to all Washingtonians without first ensuring that all people in prisons had access to the vaccine. *See* App. 22-27, ¶¶ 76-108; 388-89; 401-03; 410; 518-546. Furthermore, for many months, Washington has received more than enough vaccine to vaccinate everyone in DOC custody without significantly limiting vaccine availability to anyone else.[1]

In addition, even now that all people living in DOC facilities are technically "eligible" to receive the vaccines, Respondents continue to slow-walk getting shots into the arms of people in custody. *See* App. 1314-1333. Nearly five months after DOC began receiving its first distribution of vaccine doses, close to 60% of people in DOC custody

[1] According to DOH, as of May 1, 2021 the average number of COVID-19 doses administered each day in Washington is 51,039. App. 1345. This is more than three times the total population of DOC. App. 1335. Respondents could have vaccinated every person in DOC custody in a single day and there would still be more than 36,000 doses remaining for distribution to other community sites *for that day*.

have yet to receive even a single dose of the vaccine. App.1335 (14,300 in custody); App. 1332 (8,204 people in custody remain unvaccinated: 14,300 – 6,096 people in custody with at least one dose = 8,204).

DOC repeatedly represented to the trial court in writing and at oral argument that it would be able to vaccinate everyone in DOC custody by the end of April. App. 678; 682; 685; 1175-1176. Yet, as of May 4, 2021, there were still more than 8,200 people living in DOC custody who had not yet received even a first dose of any vaccine. App. 1330-1333. Over the week of April 25, 2021 to May 1, 2021, DOC provided only 926 vaccinations. App. 1330-1333. Some of these doses may have gone to DOC staff. However, even if all 926 doses were administered to people in custody, at this rate, it will take the Respondents months to complete the multiple dose vaccine regimen for the more than 8,200 still-unvaccinated people in DOC custody. These delays have been compounded by egregious error. On May 6, 2021, DOC admitted that it had vaccinated over 200 people at the prison in Monroe with expired Moderna vaccine. App. 1425-27.

People in prison may be reluctant to accept the vaccine when it is offered for lack of accurate and trusted information. The information flowing from DOC is spotty, incomplete and in some cases simply wrong. App. 153, ¶ 22; 132, ¶ 15. In fact, some DOC staff members have

encouraged people in custody to refuse the vaccine and have spread unsubstantiated conspiracy theories and incorrect information regarding the vaccines. App. 154, ⁋ 25. Others have boasted that they have refused to take the vaccine. App. 153, ⁋ 21. The trial court commented on the lack of uniform information flowing to people in DOC custody. *See* App. 1185-86 (noting that "different [prisons] are educating individuals in different degrees and in different manners" about the vaccines).

This lack of accurate information is compounded by the pervasive history of medical racism many BIPOC communities have experienced and a justified skepticism of health information coming from prison officials. App. 162, ⁋13; 170, ⁋57; 481-82, ⁋15; 1045, ⁋ 14. The fact that DOC has now admitted it has used expired vaccine only further legitimizes those reasonable concerns.

Respondents have so far done little to create a robust, culturally responsive outreach and education strategy to address issues of misinformation and to build trust around the vaccine. App. 345-47, ⁋⁋ 6-13; 351, ⁋⁋ 7, 9; 357-58, ⁋⁋ 14-17; 362, ⁋⁋ 5-7; 1050, ⁋ 5; 1055, ⁋⁋ 6-7. Until vaccine acceptance amongst staff and people in custody reaches a "herd immunity" threshold of 75% or greater, COVID will continue to be a threat that people in custody cannot avoid. App. 1042-43, ¶¶ 7-8.

Respondents' ongoing delay in offering the vaccine to people in custody and failure to provide appropriate education to overcome any vaccine resistance is particularly problematic because large numbers of DOC staff are refusing to be vaccinated. Almost 60% of DOC staff have refused the vaccine. App. 1330-1333. This vaccine hesitancy among staff is especially alarming given the fourth wave of the pandemic, evolving COVID variants, and the as-yet unknown long-term efficacy of the vaccines. App. 165-66, ¶¶ 25, 32-33, 52; 418-19, 420, 421-22, ¶¶ 20, 25, 29; 1348-1352.

Prison staff are the likely vector for all of Washington's prison outbreaks. App. 169, ¶¶ 46, 48; 416-17, ¶ 15; 479, ¶ 8. And history has shown that no alternative measure, such as screening and testing or mask requirements for staff, has prevented COVID outbreaks. App. 169-70, 173, ¶¶ 49, 52-54, 65. Rather than take affirmative effective actions, DOC simply continues to allow staff who refuse the vaccine to have direct, intimate contact with people living in DOC facilities.[2]

[2] DOC can legally require its staff to present proof of vaccination status in order to have access to people living in DOC facilities. *See* App. 1377-1417. Moreover, there are steps that DOC could take to incentivize staff to accept the vaccine. *See e.g.* https://gazette.com/premium/colorado-prisons-department-approves-500-bonuses-for-vaccinated-workers-active-cases-drop/article_f27d938e-931f-11eb-8543-53a30b021137.html. For example, it could offer financial bonuses for any staff member who verifies that they have been fully vaccinated. However, DOC has not taken this and other essential steps. Accordingly, this Court must order DOC to protect people living in

The level of risk and need for immediate action has again come into stark relief in the last several days. The Mission Creek Corrections Center for Women (MCCCW) did not have a single reported case of COVID-19 until mid-April 2021. App. 1293-1299. Now, DOC has reported that ten people in custody there are infected. App. 1307-1313. A review of DOC's public-facing data shows how this spread is occurring. On April 9, 2021, there had been no reported cases at MCCCW. App. 1419. By April 19, DOC reported four infected staff members, but no cases among people in custody. App. 1294. On April 23, the day the trial court denied the Petitioners' motion for a preliminary injunction, DOC reported nine cases among people in MCCCW custody. App. 1301. As of May 4, 2021, there are ten cases—a little over 6% of the total custodial population.[3] App. 1308. This outbreak and the news that DOC has injected over 200 people with expired vaccine have both occurred since the trial court denied the Petitioners' motions. These events further demonstrate the need that this Court act quickly to protect the safety of people living in our prisons.

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their care by barring staff who refuse the vaccine from having contact with people in custody.

[3] As of March 2021, there were 154 people in custody at MCCCW. App. 1335.

IV. ARGUMENT

The Court should grant this motion because the trial court incorrectly denied Petitioners' motions for class certification and preliminary injunction. In each instance, the trial court committed obvious or probable errors of law. Petitioners ask this Court to act now because of the fast and constantly evolving nature of the COVID-19 pandemic and how it is harming people living in Washington's prisons. Accordingly, the Court should grant discretionary review of these orders and consider the merits of Petitioners' appeal.

RAP 2.3(b) sets out the standards applicable to a motion for discretionary review. The two relevant standards here are:

> (1) The superior court has committed an obvious error which would render further proceedings useless, and
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]

RAP 2.3(b)(1)-(2). Discretionary review is appropriate where a trial court's error is "reasonably certain and its impact … manifest." *Minehart v. Morning Star Boys Ranch, Inc.,* 156 Wn. App. 457, 462, 232 P.3d 591 (2010). Orders regarding class certification and preliminary relief are particularly appropriate for discretionary review. *See Chavez v. Our Lady of Lourdes Hosp. at Pasco,* 190 Wn.2d 507, 513, 415 P.3d 224 (2018)

(Court of Appeals and then Supreme Court accepts discretionary review of denial of motion for class certification); *Speelman v. Bellingham/Whatcom Cty. Hous. Authorities,* 167 Wn. App. 624, 629-30, 273 P.3d 1035 (2012) (reviewing denial of motion for preliminary injunction). In fact, discretionary review is the only means by which to seek review of a denial of a motion for preliminary injunction. *See State ex rel. Carroll v. Simmons*, 61 Wn.2d 146, 149, 377 P.2d 421 (1962) ("[t]he temporary injunction was also merged in the final judgment and any question as to the propriety of the entry of such an order is now moot.").

A. The trial court's failures to explain its reasoning are obvious and probable errors.

Both of the trial court's orders are bereft of factual details and include merely conclusory conclusions of law. For example, the order denying the motion for a preliminary injunction says only:

> 2. Plaintiffs have not shown a clear legal or equitable right or a well-grounded fear of immediate invasion of that right;
>
> 3. Plaintiffs have not shown that the acts complained of have or will result in actual and substantial injury;
>
> 4. The balance of the equities weighs in favor of the status quo[.]

App. 1154. This order does not mention Article I, § 14 or any relevant standard to adjudge Petitioners' "cruel punishment" claim. App. 1154. The trial court's order denying class certification is similarly inadequate. It

does not include any findings that support its conclusory statements regarding the CR 23 elements. App. 381-382.

Ordinarily, an appellate court reviews trial court orders on motions for class certification and preliminary injunction for an abuse of discretion. *Chavez*, 190 Wn.2d at 517. However, "a trial court's decision is not entitled to the traditional deference given to certification decisions when the court fails to make sufficient findings." *Id.* (internal quotations and citations omitted); *cf. San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 154, 157 P.3d 831 (2007) (trial court "must enter findings of fact and conclusions of law and set forth its reasons for issuing a preliminary injunction").

The trial court is entitled to no deference given its orders. *Chavez,* 190 Wn.2d at 515 (if trial court "fails to articulate its application of the CR 23 criteria to the facts relevant to class certification, an appellate court will reverse the denial of class certification").

B. The trial court committed obvious and probable errors of law when it denied the class certification motion.[4]

[4] As detailed herein, the trial court committed obvious or probable errors of law. In addition, the obvious errors of law "render further proceedings useless", RAP 2.3(b)(1), and the trial court's decisions "substantially alter[ed] the status quo or substantially limit[ed] the freedom of a party to act[.]" RAP 2.3(b)(2). The orders denying class certification and preliminary injunction have rendered any further proceedings in the trial court futile and determined the outcome in this matter. Class certification is required in order for the Petitioners, and the class they seek to represent, to obtain the relief they seek

The trial court erred when it entered its order denying class certification on the basis that Petitioners failed to meet CR 23(a)'s commonality and typicality requirements and that they also failed to meet CR 23(b)(2)'s requirement of showing that Respondents had acted or refused to act on grounds generally applicable to the class.[5]

The trial court believed it did not have an adequate record to decide class certification. App. 1183-84. Yet, in its oral ruling, the trial court said:

> [t]he court declines to accept the invitation to simply adopt the plaintiffs' assertions as accurate in the context of ruling on an issue of class certification; rather, it is clear to this court, based upon the court's review of applicable case law, that the court is required to conduct a more thorough analysis of the issues, and, frankly, on this record there are several contested issues of fact on virtually all, or certainly most, of the issues set forth in 23(a) and 23(b).

App. 1183.

The trial court misunderstood the standard. Disputed facts do not translate to there being no facts, especially given the early stage of this

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and require. This Court should issue a preliminary injunction because Petitioners need immediate relief. Respondents' failures to meet their legal obligations have limited Petitioners' ability to be free of the threat from COVID and the terrible prison conditions to which they have been subjected.

[5] The trial court's written order, prepared by Respondents' counsel, did not explain its reasoning. App. 381-82. The court adopted Respondents' proposed language regarding commonality, typicality, and the CR 23(b)(2) requirement verbatim. App. 381-82.

litigation. Certification of a class is to be undertaken with no consideration of the merits of the moving party's claims, nor must the moving party demonstrate the likelihood of ultimately prevailing. *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980). *See also Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, (1974) (nothing in either language or history of Rule 23 that gives court authority to conduct preliminary inquiry into merits to determine whether it may be maintained as class action). The trial court committed obvious or probable error by ruling that the record did not support the Petitioners' motion for class certification.

1. Petitioners satisfy the commonality requirement.[6]

The sum total of the trial court's oral explanation with respect to commonality was:

> On the second issue, the court finds that the potential class does not have common questions of law or fact. It would be an oversimplification for this court to find that all members are similarly situated. Some members of the prospective class have received a vaccination, at least one inoculation. Some have received two. Some have not. Some perhaps have opted out.
>
> Clearly, the information shared or offered by the Department of Corrections as it relates to education is not common in all of the institutions and to all of those individuals who are incarcerated within the institutions.

[6] Respondents filed a proposed class certification order on April 15, 2021, that mentioned only the CR 23(a) factors of commonality and typicality, thus conceding the other CR 23(a) factors of numerosity and adequate representation. App. 373-74.

> This record leads this court to conclude that different institutions are educating individuals in different degrees and in different manners and that different individuals in different institutions either avail themselves of that information or are practically estopped from having access to that information. But in any event, it is not common across the board as it relates to all of the institutions.

App. 1185-86.

The trial court's ruling against commonality is incorrect. Petitioners have identified several failures by Respondents: access to the vaccine, staff refusal of the vaccine, and inadequate education. Until those failures are rectified, all class members are suffering in similar ways. All class members need not benefit from the relief sought in exactly the same way for there to be commonality, but there is no dispute all will benefit from a return to pre-pandemic correctional operations. Dr. Frederick L. Altice, M.D., agrees that this will only be accomplished if sufficient numbers of people in custody are vaccinated. App. 419-20, ¶¶ 21-25.

Commonality exists when, as here, the legal question "linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Miller v. Farmer Bros. Co.,* 115 Wn. App. 815, 824, 64 P.3d 49 (2003) (*citing Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971)). CR 23(a)(2) does not require that every question of law or fact be common to every member of the class. *Id*. The requirement is met if the "course of conduct" that gives

rise to the cause of action affects all the class members and at least one of the elements of the cause of action is shown by all class members. *Pellino v. Brink's Inc*., 164 Wn. App. 668, 682, 267 P.3d 383 (2011) (commonality satisfied when alleged facts indicate Respondent was engaged in common course of conduct in relation to all potential class members).

For example, in this case, through their actions, Respondents have created a series of common questions, including whether:

1) Respondents have violated legal duties owed Petitioners by refusing to provide them with timely access to the COVID-19 vaccine and by prioritizing other groups of people who are at less risk of contracting the virus;

2) Respondents have violated legal duties owed to Petitioners by failing to put in place a comprehensive, evidence-based, culturally competent, and trustworthy education program; instead of waiting for months before any significant effort was geared towards education campaigns;

3) Respondents have violated legal duties owed to Petitioners by continuing to allow correctional staff who refuse to be vaccinated access to class members;

4) Respondents are continuing to subject Petitioners and all class members to restrictive and harsh conditions of confinement; and

5) Every person in DOC custody would benefit from an order requiring Respondents to take immediate action as Petitioners have requested.

The record before the trial court demonstrated that Petitioners and class members share common issues of law or fact. DOH set the policies for access to the vaccine. At first, DOH prioritized those in custody, but later changed that prioritization until people in custody were, essentially, competing with the general public for vaccine access. *See* App. 22-27, ¶¶ 76-108; 388-89; 401-03; 410; 518-546. As detailed above, the Respondents continue to delay providing people living in our prisons access to the vaccines and at current vaccination rates will take months to vaccinate everyone. Respondent DOC set policies and procedures that allowed unvaccinated DOC staff, contractors, and agents, to have close, personal contact with people in custody. App. 102, ¶¶ 147, 149, 153. Respondent DOC set policies and procedures for the education (or more accurately, the lack of education) about the vaccine for those in custody.

Vaccine education is essential to getting as many people as possible protected against COVID. DOC admits that as many as 50% of people living in DOC facilities may refuse the vaccine. App. 847, ⁋ 12.

Unfortunately, DOC's efforts to increase this percentage with appropriate educational efforts have been seriously delayed and inadequate. For example, according to the information on its YouTube link, the COVID educational video DOC produced with Dr. Anna Wald has been available since February 23, 2021, but DOC said it did not provide this video to all facilities until April 8th or 9th. App. 1000, ¶ 3. Moreover, although Respondents recognize the importance of providing information through trusted community voices, they have only just started working on this prong. App. 219, ¶ 6. These educational efforts remain inadequate to meet the reality that thousands of people living in DOC custody are hesitant to accept the vaccine.

The Respondents failings here are analogous to the situation in Oregon's prisons regarding vaccine prioritization. There, a class of adults in the custody of the Department of Corrections sued Oregon officials and agencies for access to the COVID vaccine. *Maney v. Brown*, --- F.Supp.3d ----, 2021 WL 354384 (D. Or. Feb. 2, 2021). The court certified the class and entered a preliminary injunction.[7] The *Maney* court granted class

[7] The *Maney* court found Petitioners were likely to prevail under the U.S. Constitution's Eighth Amendment "deliberate indifference' standard. *Maney* at *14. Petitioners have brought their claims under Article I, § 14 of Washington's constitution, which provides greater protection for people in DOC custody than the federal constitution. *See* Order, *In re Pers. Restraint Petition of Williams*, No. 99344-1 (Wash. Sup. Ct. Mar. 12, 2021) found at App. 594-55.

certification finding that a common question of law and a common question of fact existed. *Maney* at *9. This was so even though some adults in custody were at greater risk from the virus than others. *Id.* at *8 (fact that some class members are at higher risk than others does not change alleged constitutional injury).

The relief Petitioners seek satisfies commonality because even the minority of people in custody who have been fully vaccinated are still suffering the effects of Respondents' failures to address the pandemic. COVID has not been controlled in DOC facilities because too few people who are inside those facilities' walls have been vaccinated – staff and people in custody alike. Those in custody who are unvaccinated are at greatest risk of infection, but all people in DOC custody have suffered and continue to suffer terrible conditions. Until DOC is able to demonstrate an ongoing and continued management of COVID by ensuring that the vast majority of people have been fully vaccinated, people in custody cannot return to normal day-to-day functioning. Everyone in custody is affected by Respondents' constitutional and common law injuries.

2. Petitioners satisfy the typicality requirement.

The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Typicality is satisfied if the class members' claims all arise from the same course of

conduct and are based on the same legal theory. *Doe L v. Pierce County*, 7 Wn. App. 2d 157, 203, 433 P.3d 838 (2018) (*citing Pellino,*164 Wn. App. 684). Like every member of the putative class, each Petitioner was, at the time of filing, at serious risk of contracting COVID and was suffering in other ways due to Respondents' illegal acts. *See generally* App. 130-35; 138-46; 150-156.

The trial court did not explain its typicality ruling except to say:

> The court also finds that the claims of prospective class members are not identical or typical. The court finds that the represented parties will fairly and adequately protect the interests of the parties -- well, with respect to that issue, the court can't answer that because what are the claims of the represented parties? Are they consistent? Are they inconsistent? The court just doesn't have enough information in this record to make a ruling on that fact.

App. 1186. The trial court seems to have misunderstood the typicality requirement, but that is difficult to tell from its oral ruling. The *Maney* court set out the typicality standard and found typicality had been satisfied.

> To satisfy the typicality requirement, Plaintiffs "must show that the named parties' claims or defenses are typical of the claims or defenses of the class." *McKenzie*, 2020 WL 1970812, at *5 (*citing* FED. R. CIV. P. 23(a)(3)). Under this subsection's "permissive standards," the "representative's claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* In assessing "whether claims and defenses are typical, courts often look to whether other members have the same or similar injury,

> whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.*

Maney at *9 (internal quotations omitted); *see also, Doe L*, 7 Wn. App. 2d at 203 ("[t]ypicality is satisfied if the class members' claims all arise from the same course of conduct and are based on the same legal theory").

Everyone in DOC custody is experiencing harsh conditions of confinement – conditions which flow directly from Respondents' constitutional and common law violations. No end date to these conditions is in sight because well under half the people in DOC custody have not been vaccinated, DOC does not know how many of its staff have not been vaccinated, and DOC still has not provided comprehensive, evidence-based, culturally competent, and trustworthy education to overcome vaccine resistance.

Respondents represented to the trial court that all people in custody would have been offered at least one dose by April 30, 2021. App. 678; 682; 685; 1175-1176. As of the date of this filing, approximately 8,200 people in custody have yet to receive a *single* dose. App. 1330-1333; 1335. This is far less than the 75% or greater needed to achieve herd immunity among those in custody. *See* App. 1042-43, ¶¶ 7-8.

Petitioners' claims are "reasonably co-extensive" with the class. All class members have been and continue to be affected by the pandemic;

while the unvaccinated are at higher risk from infection than those who have been vaccinated, they all continue to experience the fallout of Respondents' ongoing constitutional and common law violations.[8]

3. Petitioners satisfy the CR 23(b)(2) requirements.

A class action is also appropriate because the Respondents have "acted or refused to act on grounds generally applicable to the class." CR 23(b)(2). In its oral ruling, the trial court said:

> Also, with respect to 23(b)(2), the plaintiffs must establish that the defendants have refused to act on grounds generally applicable to the class, thereby making the relief appropriate to the entire class.
>
> This court finds that the Department of Corrections has not refused to act. They have acted. Have they fully acted? Have they acted to the degree that is required by law? It is unknown at this point. But the Department has acted.

App. 1186-87. The trial court misunderstood CR 23(b)(2) in two ways. First, some form of action by Respondents is not sufficient to defeat class certification. Second, the trial court failed to apply (or mention) the general applicability test.

[8] When the amended complaint was filed, *only one* of the class representatives was fully vaccinated, and *one other* had been administered a preliminary dose. App. 328, n.3. At the time of the class certification hearing, two additional representatives had received their first dose of the vaccine. App. 313-314. This fact led Respondents to assert that since four of the five representatives had been "vaccinated", they had no standing to act on behalf of the class. App. 204-209. The trial court correctly rejected this contention. App. 381.

CR 23(b)(2) asks whether the opposing party has acted or refused to act in a way that impacts the proposed class. As the pleadings allege, Petitioners and all people in DOC custody are affected by:

- Respondents' *refusal* to prioritize people in DOC custody on the same basis as staff;
- Respondents' *refusal* to expedite access to the vaccine to people in DOC custody;
- Respondents' across-the-board *refusal* to provide comprehensive, evidence-based, culturally competent, and trustworthy education about the vaccine to those in DOC custody; and
- Respondents' *refusal* by DOC to act to protect people in custody from unvaccinated staff.

These refusals were and are generally applicable to everyone in custody. Even the minority of those in custody that have been vaccinated continue to be harmed by the long-standing, DOC-imposed pandemic-related conditions discussed elsewhere in this brief.

Class certification is particularly appropriate because Petitioners seek declaratory and injunctive relief. *Johnson v. Moore*, 80 Wn.2d 531, 535-36, 496 P.2d 334 (1972). In *Johnson*, the plaintiffs sought to terminate the practice of holding individuals in the city jail 'on suspicion' of various crimes without bringing them promptly before a magistrate. *Id.*

at 532. They sought CR 23(b)(2) certification and no monetary damages. This Court reversed the trial court's denial of class certification, noting that a class action injunction proceeding "places in issue only the constitutionality of the presumably unvarying standards applied in holding members of the class 'on suspicion' of various charges without bringing them before a magistrate." *Id.* at 535. Similarly, Respondents' actions or inactions are generally applicable to the class thereby making appropriate class-wide declaratory and injunctive relief.

C. The trial court committed a number of obvious or probable errors when ruling on Petitioners' motion for a preliminary injunction.

1. The trial court did not apply the correct preliminary injunction standard.

The trial court's preliminary injunction order states that Petitioners failed to show that they have "a clear and certain entitlement to relief." App. 1153, ¶ 1. This is the incorrect legal standard to apply on a motion for preliminary relief and places an improperly high burden upon Petitioners at this stage in the litigation.

To obtain a preliminary injunction, a party must show: 1) a clear legal or equitable right; 2) a well-grounded fear of immediate invasion of that right; and 3) that the facts complained of either are or will result in actual and substantial injury. *Kucera v. State Dep't of Transp.*, 140 Wn.2d

200, 209, 995 P.2d 63 (2000). In addition, the court must balance the relative interests of the parties and when appropriate, the interests of the public. *Id.* Furthermore, "[w]hen deciding whether a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits." *Id.* at 216; *cf.,* RCW 34.05.550(3)(a) (preliminary relief awardable under APA if "the applicant is likely to prevail when the court finally disposes of the matter").[9]

The trial court replaced the appropriate "likely to prevail" element with a much more strenuous requirement that at this early stage Petitioners must prove that they have "a clear and certain entitlement to relief." App. 1153. The standard articulated by the trial court is an obvious or probable error.

2. The trial court committed obvious or probable error in the deference it gave Respondents.

The trial court ruled that it had no role in reviewing Respondents'

[9] Petitioners seek judicial review of Respondent DOH's actions pursuant to the state Administrative Procedures Act. *See* RCW 34.05.570. Respondent DOC is explicitly exempt from the APA's coverage. RCW 34.05.030(1)(c). Nonetheless, the APA's "likely to prevail" standard, see RCW 34.05.550(3)(a), and *Kucera*'s "clear legal or equitable right" standard require the same analysis when reviewing a motion for preliminary injunction. *Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc.*, 6 Wn. App. 2d 709, 715, 432 P.3d 426 (2018) (*citing Kucera*, 140 Wn.2d at 216).

actions. *See* App. 1219-22. It did so without making any findings regarding the risks that Respondents' actions posed to Petitioners or any findings regarding whether Respondents had met the constitutional or common law duties they owe Petitioners. App. 1153-54; 1217-21. Instead, the trial court ruled in a conclusory fashion that the separation of powers doctrine barred it from reviewing Respondents' actions, deeming Petitioners' claims "political decisions" that "this court does not, has not, and will not make[.]" *See* App. 1221. The trial court is mistaken.

Courts are well positioned to properly evaluate challenged prison conditions and can do so without inappropriately intruding on executive branch discretion. Justice Stephens in the majority *Colvin* opinion recognized that courts may have to intervene to address DOC actions that put people at risk. *See Colvin*, 195 Wn.2d at 901 (finding no Eighth Amendment violation upon facts presented, however, "the result might be different on different facts, and we do not suggest the inadequacy of safety measures can never amount to deliberate indifference."). Other Justices agreed. *Id.* at 903 (if courts are to fulfill their essential duty, they must decide whether challenged acts or omissions violate the constitution, and learn from history which shows "that in times of distress, courts all too often defer to the executive branch and sacrifice precious liberties, especially for our most vulnerable") (Gonzalez, J. dissenting).

As detailed above, the record establishes a likelihood of success on the claim that Respondents have put Petitioners at risk and continue to violate duties owed to them. In response to these facts, Respondents asserted that the trial court had no authority to do anything about these failures. App. 681-83. Rather than grapple with the underlying issues, the trial court simply agreed with Respondents and refused to examine those actions, risks or injuries. App. 1219-21. The level of deference Respondents demanded and the level of deference the trial court showed constitutes an obvious or probable error of law.

3. The trial court committed obvious or probable error by not finding that Respondents are likely violating Petitioners' rights to be free from cruel punishment.

Petitioners' relevant rights arise from Article I, § 14 and the State's common law duty to keep them in health and safety. The trial court failed to mention these provisions or duties in its written ruling. *See* App. 1153-54.[10] Nonetheless, the record before this Court shows that Respondents are likely subjecting Petitioners to cruel punishment by refusing to provide all people with timely access to the vaccines, by

[10] The trial court also rejected Petitioners' arguments based on Article I. § 12 of Washington's Constitution, the Privileges or Immunities Clause. Petitioners focus their arguments on Respondents' violations of Article I, § 14 and their common law duties in this motion for discretionary review. The Privileges or Immunities arguments they will present if the Courts accepts review of this matter are outlined in Petitioners' Motion for Preliminary Injunction. App. 404-06. Petitioners incorporate them here by reference.

failing to provide people in custody with trusted and accurate information, by refusing to bar correctional staff who refuse the vaccine from contact with people in custody, and by maintaining harsh conditions.

a. The evidence before the trial court demonstrated that Petitioners and others are subject to "cruel punishment."

i. Article I, § 14 of the State Constitution provides more protection than the Eighth Amendment in the prison conditions context.

Article I, § 14 prohibits the infliction of "cruel punishment." As this Court recently affirmed "Article I, Section 14, of the Washington State Constitution ***provides more protection*** than the Eighth Amendment to the United States Constitution[]" in prison conditions cases like this one. Order, *In re Pers. Restraint Petition of Williams*, No. 99344-1 (Wash. Sup. Ct. Mar. 12, 2021) (emphasis added) (found at App. 594-55).

This Court has not yet issued its full opinion in the *Williams* case and thus, has not articulated the standard to be applied in examining cruel punishment claims in prison conditions cases. The Court of Appeals in reviewing Mr. Williams' Article I, § 14 claims began by finding that the cruel punishment clause provides greater protection than its federal counterpart in the prison conditions context. *See Matter of Williams,* 15

Wn. App. 2d 647, 476 P.3d 1064 (2020). It then announced a test to analyze cruel punishment claims involving an individual who seeks release from confinement because of the horrendous conditions under which he is being held. *Id.* at 671.[11]

The court ruled that Art. I, § 14 requires courts to "consider whether the conditions of [] confinement create an unreasonable and unacceptable risk of death or serious injury in light of all relevant circumstances." *Id*. This test is significantly more protective than the federal Eighth Amendment test which requires that prison officials act with culpable intent in order for any condition to violate the Eighth Amendment. *Compare id. with Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (Eighth Amendment violated

[11] As Petitioners note in their Statement of Grounds for Discretionary Review, this case raises novel questions that should be addressed by this Court. *See* Petitioners' Statement of Grounds for Direct Review at 8-10. The standard and analysis that the Court of Appeals announced in *Williams*, may not adequately address claims like those raised here. While both the Petitioner in *Williams* and Petitioners in the present matter challenge their prison conditions under Art. I, § 14 based on Respondents' failure to protect them from COVID-19, there are distinct factual and procedural differences between these cases. Notably, Mr. Williams filed a personal restraint petition seeking release from prison because of the individual conditions that he suffered. *Williams*, 15 Wn. App. 2d at 65. By contrast, Petitioners seek to represent the interests of many people and do not seek release, only the end of unconstitutional conditions. These important issues involved here complement those that this Court is currently considering in *Williams*. Accordingly, these two cases provide the Court with the opportunity to articulate the appropriate standard and analysis that applies to a wide range of cases challenging prison conditions under Washington's Constitution. As detailed herein, the record before the Court demonstrates that Petitioners will likely succeed under the Court of Appeals' standard. That record also shows that the Petitioners are likely to succeed under any other standard that this Court may announce in the future.

only if prison officials are "deliberate indifferen[t] to a substantial risk of serious harm").

The *Williams* court then articulated three factors to determine whether a particular condition of confinement poses "an unreasonable and unacceptable risk of death or serious injury[:]" 1) whether "there is a clear national consensus" against the challenged condition; 2) "the severity of the risk for this petitioner, including how the conditions of confinement impact his degree of risk"; and 3) whether the challenged condition or practice serves a "legitimate penological purpose." *Williams*, 15 Wn. App. 2d at 672.

The first *Williams* factor focuses on a "national consensus." The prevalence of a particular practice or condition in other jurisdictions is relevant to the objective analysis applicable to a conditions case in Washington; however, it is not determinative. Rather, even a "national consensus" among prison officials that a barbaric prison condition is acceptable does not mean it satisfies Article I, § 14. Furthermore, as this Court recently recognized in *State v. Gregory*, additional considerations determine what constitutes a "consensus" for purposes of cruel punishment analysis: "When considering a challenge under article I, section 14, ***we look to contemporary standards*** and experience in other states." *State v. Gregory*, 192 Wn.2d 1, 23–24, 427 P.3d 621 (2018)

(*citing State v. Campbell,* 103 Wn.2d 1, 32, 691 P.2d 929 (1984)) (emphasis added).

The second *Williams* factor addresses the degree and severity of the risk facing the people living in prisons from the challenged action or condition. This is a vital part of any prison conditions analysis that addresses possible future harm. Under federal law, the Eighth Amendment is implicated only if a petitioner can show that a challenged practice or condition poses a "substantial risk of serious harm." *Farmer,* 511 U.S. at 828; *see also Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014). This factor involves an examination of the likelihood the harm will occur and the significance of the harm if it does occur. The more protection afforded people under Washington's Constitution requires DOC to provide people in custody greater protection from lesser risks than required under federal law. *Compare Williams*, 15 Wn. App. 2d at 677-78 (examining "the severity of the risk faced by Williams" and "the degree to which Williams' confinement exacerbates that risk") with *Farmer,* 511 U.S. at 828; *see also Parsons*, 754 F.3d at 662 (examining whether prison's medical and mental health policies and practices exposed petitioners to a substantial risk of harm to which the defendants were deliberately indifferent).

The third *Williams* factor requires that the challenged action or condition "serve a legitimate penological purpose." *Williams*, 15 Wn. App. 2d at 672.[12] Again, this factor is not determinative and must be interpreted in light of the Constitution's objective minimum baseline. Accordingly, an objectively barbaric practice that may serve some "legitimate" penological interest is nonetheless unconstitutional.

ii. Long-standing precedent supports the *Williams* court's finding that objectively unreasonable and unacceptable risks violate Article I, § 14 in the prison conditions context.

For over a century, Washington courts have recognized that a prison official "owes the direct duty to a prisoner in his custody to keep him in health and free from harm, and for any breach of such duty resulting in injury he is liable to the prisoner[.]" *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918); s*ee also Gregoire v. City of Oak Harbor,* 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (jailers owe duty to protect the health, welfare, and safety of people under their care); *Shea v.*

[12] The Court of Appeals in *Williams* used a "proportionality" analysis when it decided whether continuing to confine Mr. Williams served a "legitimate penological interest." *See Williams*, 15 Wn. App. 2d at 680 (evaluating crime, length of sentence and time remaining on sentence in deciding whether release is appropriate). While potentially relevant in that case because Mr. Williams sought release, the crime of conviction or sentence length has no bearing here on whether prison officials may impose "cruel" prison conditions. Even a person serving time for the most heinous crime cannot be subject to unconstitutional conditions.

City of Spokane, 17 Wn. App. 236, 242, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42 (1978) (jailers owe "nondelegable" duty of care). This duty "is a positive duty arising out of the special relationship that results when a custodian has complete control over a prisoner deprived of liberty." *Gregoire*, 170 Wn.2d at 635. Negligent conduct violates this affirmative duty of care. *Id.* at 634; *see also Kusah*, 100 Wash. at 325 ("The sheriff, being responsible for reasonable care in the selection of his deputies, is responsible also for the negligence of a deputy in the performance of his duty as such."). Accordingly, a prison official violates this duty when harsh prison practices or conditions fall below an objective baseline, irrespective of the intent or knowledge of prison officials or any rationale supporting the substandard practice. This common law reasonableness standard is a reflection of and derivative of the State's constitutional obligation to not inflict "cruel punishment." *Williams*, 15 Wn. App. 2d at 668.

Washington's constitution permits the State to limit a person's liberty and the exercise of other rights as "punishment" for violation of the criminal law. However, certain "punishments" are constitutionally prohibited in all circumstances. *See Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (prison officials may not whip people); *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012) (prison officials cannot starve

prisoners); *Gates v. Cook*, 376 F.3d 323, 334 (5th Cir. 2004) (cannot subject prisoners to excessive heat); *Shea,* 17 Wn. App. at 242 (cannot deny medical care); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999) (cannot deprive access to exercise). These acts constitute "cruel punishment" irrespective of prison officials' intent or any rationale that may support a challenged practice or condition. For example, a lack of funds does not transform a cruel punishment into one that is constitutional. *Cf. Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986) ("The fact that a remedy is costly does not preclude a district court from ordering the remedy"). The standard announced by the Court of Appeals in *Williams* appropriately reflects the objective nature of the constitutional "cruel punishment" analysis applicable to prison conditions cases like this one. Unfortunately, the trial court failed to evaluate Petitioners' claims in light of this constitutional standard.

iii. Petitioners satisfied the *Williams* standard and showed that Respondents' actions likely amounted to cruel punishment.

Respondents have created an "unreasonable and unacceptable risk of death or serious injury". The evidence shows that people in prison are at particular risk of contracting COVID and of having bad outcomes once they do. *See* App. 163-64, ¶¶ 17-23; 422, ¶ 30; 493-94*,* ¶¶ 7-9 (detailing

health impacts of COVID-19). Furthermore, there is no legitimate debate that vaccines are the best way for Respondents to protect Petitioners and others in custody from the virus. DOH acknowledges on its website that "COVID-19 vaccination is one of the most important tools to end the COVID-19 pandemic." *See* App. 1354-1358; *see also*, App. 172-73, ¶ 64; 418-19, 422, ¶¶ 20, 30. The evidence also shows that Washington's prisons lag significantly behind other correctional systems in providing people access to the vaccines. App. 161-62, ¶ 10. And at least two courts have found that governments must provide people in prison immediate access to COVID vaccines. *See* App. 559-92 (Opinion and Order, *Maney v. Brown*, No. 6:20-cv-00570-SB (D. Or. Feb. 21, 2021)); 597-615 (Order, *Holden v. Zucker*, No. 801592/2021E (NY Sup. Ct. Bronx Cty. Mar. 29, 2021)).

Similarly, there is widespread agreement that appropriate vaccine-related, education and information must be provided to people living in prison. App. 162, ¶ 13; 170, ¶¶ 57-58. Experts also agree that people who are unvaccinated should not have close, intimate contact with other unvaccinated people who live outside their immediate household. App. 1043, ⁋ 10. The consensus supports Petitioners' claims.

The evidence further demonstrates that Respondents' actions pose

a threat of immediate harm to Petitioners and others in custody.[13] This Court in *Colvin* recognized that COVID-19 constitutes a substantial risk of serious harm to people living in Washington's prisons:

> [T]he petitioners face a substantial risk of serious harm….In prison…facilities, inmates live in close confinement with one another with no real choice as to social distancing or other measures to control spread of the virus. The risk of a COVID-19 outbreak is undeniably high in these facilities and under these conditions.

Colvin, 195 Wn.2d at 900.[14]

Unfortunately, events since this Court issued its *Colvin* opinion prove that DOC has been unable to stop the introduction of COVID into its facilities or limit its spread once it gets in. The vaccines offer the means to protect people in DOC custody and reduce the associated restrictions. However, Respondents have refused to act with appropriate speed, focus, or effectiveness.

As detailed above, all people in custody should have been offered

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[13] Respondents' acts detailed here "either are or will result in actual and substantial injury" sufficient to support the Petitioners' motion for preliminary injunction. This discussion also explains why any balancing of the interests of the parties also favors the Petitioners. Any administrative or other burden placed upon the Respondents by entry of a preliminary injunction does not justify the serious risk of harm that threatens the Petitioners and all other people living in DOC facilities.

[14] Furthermore, the State agrees with this Court that the conditions in Washington's prisons are very likely to lead to widespread COVID infections. *Cf. Proclamation by Governor Inslee regarding COVID-19* (December 10, 2020) (Governor Inslee acknowledging that COVID poses a particularly serious risk to people who live in congregate settings like prisons). App. 1360-1365.

the vaccine months ago, yet delays continue. *See supra* at 5-6. Additionally, Respondents have failed to implement practices and policies that will maximize vaccine acceptance among DOC staff and people in custody, and DOC continues to allow its staff who refuse the vaccine to have access to people in custody, placing them at serious risk of contracting the virus. *Id.* at 6-8; 8-9. Moreover, DOC continues to impose serious restrictions across its system because of the on-going threat that COVID presents. All people in DOC custody live with these deplorable conditions or the risks of future harm on a daily basis. They will continue to do so until enough people are vaccinated.

The recent and on-going outbreak at MCCCW, the negligence demonstrated by injecting people with expired vaccine, and the other evidence presented to the trial court demonstrate that COVID-19 likely continues to pose a serious risk of harm and that unvaccinated staff pose an on-going and unreasonable threat to people in custody due to Respondents' failures. The trial court erred by refusing to even examine those risks and the ongoing harm.

Finally, Respondents' ongoing failures and delays do not support any legitimate penological interest. Respondents have the means to end the risks and put an end to the harms caused by the conditions people in custody have endured. No legitimate penological interest is served by their

refusal to provide timely access to the vaccine; their failure to implement a trusted and comprehensive, vaccine-related, education and information campaign; or by their unwillingness to stop staff who refuse the vaccine from having intimate contact with vulnerable people living in our prisons. Respondents have not taken the steps necessary to ensure that people living in our prisons are safe. Their inaction and delays have led to another outbreak. The Court must intervene now and require them to meet their legal obligations.

V. CONCLUSION

As explained above, the Court should accept discretionary review of the trial court's denials of Petitioners' motions for class certification and preliminary injunction pursuant to RAP 2.3(a)(1) or (2).

DATED this 7th day of May, 2021.

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CERTIFICATE OF SERVICE

I certify that on the date noted below, I electronically served the following documents:

1. **Motion for Discretionary Review**
2. **Appendix to Petitioners' Motion for Discretionary Review**
3. **Petitioners' Statement of Grounds for Direct Review**
4. **Petitioners' Motion to Accelerate Review**
5. **Petitioners' Motion for Leave to File Over-Length Brief in Support of Motion for Discretionary Review**

upon the attorneys for Respondents in this matter at their email addresses as listed below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 7th day of May, 2021.

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