

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' STATEMENT OF
GROUNDS FOR DIRECT REVIEW**

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I. INTRODUCTION

Petitioners, and the class they seek to represent, have been subjected to ongoing constitutional violations due to practices creating a serious risk of harm from COVID-19 since the beginning of the pandemic. They will remain at serious risk absent timely access to vaccines, accurate and comprehensive education in the prisons to address vaccine hesitancy, and the immediate banning of unvaccinated prison staff from having contact with people in custody. The trial court erred when it denied Petitioners' motion for class certification and motion for preliminary injunction to require immediate and effective actions to protect them from COVID-19. This Court should grant direct review of the denial of these motions because Petitioners seek injunctive relief against state actors, and these are public issues of fundamental and urgent importance.

II. NATURE OF THE CASE AND DECISION

Petitioner Plaintiffs Candis Rush, Justin Autrey, Gregory Steen, Theodore Rhone, and Michael Linear (hereinafter "Petitioners") are five individuals who are currently detained in the custody of the Washington State Department of Corrections (DOC). Petitioners filed their original action on March 29, 2021, in Thurston County Superior Court (Cause No. 21-2-00491-34). Petitioners subsequently filed motions seeking class certification on behalf of all people in DOC custody as well as immediate

injunctive relief to mitigate the ongoing risks of grave illness and/or death from COVID-19 caused by Respondents' failure to adequately address the ongoing pandemic.

Petitioners allege that Respondents have failed to meet their duty of care owed to people in correctional custody in three ways: (1) Respondents have failed to provide timely access to the COVID-19 vaccines to all people in custody; (2) Respondents have failed to provide timely, accurate, and culturally responsive information about the COVID-19 vaccines to people in custody to address vaccine hesitancy and close the vaccine acceptance gap; and (3) Respondents have failed to protect people in custody from ongoing exposure to the COVID-19 virus by allowing unvaccinated staff members to continue to have contact with people in prisons. Petitioners provided the trial court with declarations from three medical experts testifying to the need for Respondents to immediately take additional actions to prevent further outbreaks, illness, and death amongst people in DOC custody.

On April 16, 2021, the trial court heard oral argument on the Petitioners' motion for class certification, and class certification was denied. Petitioners proceeded with the scheduled hearing for preliminary injunctive relief on April 23, 2021, at which time the trial court denied that motion as well. Petitioners now seek direct review of both orders

entered by the Thurston County Superior Court on April 16, 2021, and April 23, 2021 (respectively).

III. ISSUES PRESENTED FOR REVIEW

- A. Does the trial court’s denial of the Petitioners’ motion for class certification warrant direct review by this Court under RAP 4.2(a)(4) because it presents a fundamental and urgent issue of broad public importance: whether people living in DOC facilities are entitled to pursue class relief based on DOC’s failure to protect them from the ongoing COVID-19 pandemic? – **YES.**
- B. Does the trial court’s denial of the Petitioners’ motion for preliminary injunction warrant direct review by this Court under RAP 4.2(a)(4) because it presents a fundamental and urgent issue of broad public importance: whether all people in DOC custody should be given immediate access to the COVID-19 vaccine; offered timely, accurate, culturally responsive information about the vaccines; and be protected from contact with unvaccinated staff and contractors? – **YES.**
- C. Does the trial court’s denial of the Petitioner’s motion for preliminary injunction warrant direct review by this Court under RAP 4.2(a)(5) as it involves a request for injunctive

relief against state officers, officials at the state Department of Corrections and Department of Health? – **YES**.

Issues related to the trial court’s errors in denying the Petitioners’ motions for class certification and preliminary injunction are addressed in detail in Petitioners’ Motion for Discretionary Review, which has been filed concurrently with this Statement of Grounds for Direct Review.

IV. GROUNDS FOR DIRECT REVIEW

Under RAP 4.2(a), a party may seek direct review by the Supreme Court in certain types of cases. Here, direct review of the orders at issue is appropriate because the rulings “involve a fundamental and urgent issue of broad public import which requires prompt and ultimate determination” (RAP 4.2(a)(4)), as well as “an action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus” (RAP 4.2(a)(5)).

A. The Court should grant direct review under RAP 4.2(a)(4), given that there are multiple issues of fundamental and urgent importance that requires final determination by the Supreme Court.

- 1. As Washington State enters its fourth wave of COVID-19 infections, addressing the ongoing risks caused by this pandemic to people in Washington State prisons is of urgent and broad public importance.**

The COVID-19 pandemic is the most significant global public health crisis in living memory. The harm that this virus has caused people in correctional facilities is undeniable. On March 27, 2020, at the outset

of the first wave of infections, there had not yet been one confirmed case of COVID-19 amongst the people in custody in Washington State prisons. Appendix to Motion for Discretionary Review (hereinafter “App.”) at 1223-1227. By mid-summer, during the height of the second wave of infections, more and more DOC facilities were facing outbreaks, and by July 23, 2020, over 300 people in custody had become infected. App. 1228-1234. The third wave of infections took an incredible toll on people in custody, and between November 2, 2020, and February 1, 2021, the number of people in custody who had been infected skyrocketed from 531 to 5,939. App. 1235-1292.

As of the date of this filing, more than 6,200 individuals detained in DOC facilities have become infected with the virus, which represents more than 43% of the people in custody. App. 1330-1333; 1335. Many of those people have become seriously ill, requiring intensive medical care, and 14 people in custody have died. Even for those individuals who have not become infected, they have been subjected to terrible conditions, including: widespread lockdowns; pervasive use of solitary confinement and isolation; lack of access to toilets, showers, and running water; inadequate sanitation and cleaning supplies; no visitation and limited contact with loved ones; limited or no programming; and other major changes to their living conditions.

Respondents have a constitutional duty to protect the health and safety of people in Washington State correctional facilities. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924, 927 (2010). Since the introduction of the COVID-19 vaccines, the Respondents have been in the position to immediately protect people in DOC custody from the ongoing harms of the pandemic – both the risk of infection and the impact of the poor prison conditions. The Washington State Department of Health has been distributing COVID-19 vaccines throughout Washington State, including to DOC, since December 2020. App. 678. And yet, as of May 4, 2021 – five months after the introduction of these vaccines – only 6,096 people in custody have received even a single dose of the vaccine. App. 1330-1333. That means that nearly 60% of the roughly 14,300 people in DOC custody have not been vaccinated against this deadly virus. App. 1330-1333; 1335.

Furthermore, DOC staff continue to come and go from these facilities each day, despite the fact that DOC has administered vaccines to fewer than half of its employees. App. 1330. While staff have been the undisputed vectors of COVID-19 outbreaks inside prisons, the Respondents have not taken any steps to ensure that people in their care and custody are protected from staff who refuse the vaccines. Meanwhile, Washington State has entered its fourth wave of infections (App. 1348-

1352) and there continue to be new, emerging cases in DOC facilities each week. On April 23, 2021, the same day the trial court denied Petitioners' motion for preliminary injunction, Mission Creek Corrections Center for Women – which had so far managed to avoid transmission of any COVID-19 cases inside the facility – announced that nine people in custody had tested positive. App. 1293-1313. Despite the rise in the infection rate around the state, and the fact that people in DOC custody remain at an exponentially higher risk of infection than the general population, the Respondents have failed to take steps necessary to protect people in custody, to whom they owe an affirmative duty of care.

Prison health is public health. App. 419, ¶22. The health of the people in our State prisons, and the health of the staff who come and go from those prisons every day, are issues of significant public importance that necessitate this Court's involvement. Until the health and safety of the people in DOC custody is adequately protected, there remains the constant threat of another massive outbreak that can impact not only the people inside, but the surrounding communities where staff members return to each day. This urgent public matter warrants review under RAP 4.2(a)(4).

2. In the wake of the Court’s decision in *In re Pers. Restraint of Williams*, this case raises novel questions that should be addressed by this Court.

Another fundamental issue of broad public importance implicated by the trial court’s denial of Petitioners’ motions for class certification and preliminary injunction is the question of what constitutes cruel punishment under the Washington Constitution in the prison conditions context.

In support of their motion for preliminary injunction, Petitioners reference this Court’s recent decision in *In re Pers. Restraint of Williams*, which held that “Article I, Section 14 of the Washington State Constitution *provides more protection* than the 8th Amendment to the United States Constitution[.]” in prison conditions cases. Order, No. 99344-1 (Wash. Sup. Ct. Mar. 12, 2021) (emphasis added). Thus, *Williams* is relevant to the Petitioners’ claims. However, while both the Petitioner in *Williams* and Petitioners here challenge their conditions of confinement under art. I, sec. 14, based on the State’s failure to protect people in prison from COVID-19, there are distinct factual and procedural differences between these cases, as raised by both parties, that require examination by this Court.

One key distinction is that *Williams* was brought as a personal restraint petition (PRP) by an individual incarcerated at a Washington State prison. *See Matter of Williams*, 15 Wn. App. 2d 647, 671, 476 P.3d

1064 (2020). Specifically, in his PRP, Mr. Williams alleged that “due to the spread of COVID-19 in prisons, including his prison in particular, and his age, race, and disability, the conditions of his confinement have become a cruel punishment in violation of article I, section 14 of the Washington Constitution[.]” *Id.* at 652. Additionally, the relief he requested was release. *Id.* Consequently, the court tailored its analysis to these circumstances. *Id.* at 672 (court noting the need to consider characteristics particular to Williams under the legal test it developed to determine the risk posed by COVID-19 and whether release was warranted).

In contrast, Petitioners here filed their case as a proposed class action on behalf of all persons in DOC custody, alleging that Respondents’ ongoing failings related to vaccination policies and practices within the prisons – and the resulting harms suffered by Petitioners and the class they seek to represent – amounts to cruel punishment under art. I, section 14. App. 7, ¶6. Rather than seeking release, as Mr. Williams requested, Petitioners ask the court to correct the unconstitutional conditions by entering a preliminary injunction ordering Respondents to provide timely access to the vaccine to people in DOC custody; restrict DOC staff who refuse vaccination from being in contact with people in custody; and to provide accurate and thorough information about COVID-19 and the

vaccines to people in the prisons. *See* App. 385. Respondents even acknowledge these distinctions. *See* App. 693 (stating that the penological interest prong of the test established by the Court of Appeals in its review of *Williams* fits awkwardly in the analysis of Petitioners' case because Petitioners are not seeking release).

Scant caselaw exists in Washington in the prison conditions context on the cruel punishment clause of the Washington constitution. In fact, the *Williams* Court of Appeals and Supreme Court decisions may be the only existing cases addressing this specific issue *within the conditions context*. Moreover, while this Court in *Williams* held that art. I, sec. 14 provides more protection than the Eighth Amendment, it has not yet issued its opinion articulating the standard it applied in arriving at its decision. Although unfortunate, the COVID-19 pandemic, and Petitioners' case in particular, has highlighted the incredible amount of danger and suffering faced by people living in Washington prisons on a daily basis, and the degree to which conditions quickly deteriorate in those facilities when prison officials fail to meet their constitutional and common law duties. Accordingly, clear and timely guidance on what prison conditions can constitute cruel punishment under the state constitution is essential and of great public importance. This Court is best positioned to provide that

guidance. In light of this reality, direct review of the trial court's orders is warranted under RAP 4.2(a)(4).

3. The Thurston County Superior Court provided an undue level of deference to the Department of Corrections, which if allowed to continue, would prevent the Courts from ever reviewing the constitutionality of agency actions.

The question of how much deference courts should grant to state agencies is yet another fundamental and urgent issue of broad public import that warrants prompt review by this Court.

In ruling on the Petitioners' motion for preliminary injunction, the trial court refused to examine the actions taken by Respondents in response to COVID-19 in the prisons. Initially, the court provided that "[t]his court should not and *cannot* as a legal or practical matter supervise or oversee the State's vaccination process;" later it announced, "this court does not, has not, and will not make political decisions." App. 1219; 1221 (emphasis added).

While some degree of deference may be accorded Respondents in the exercise of their duties, that deference is not absolute, particularly when the exercise of those duties results in significant constitutional violations, as alleged in the present matter. *See e.g., Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) (separation of powers doctrine does not depend on the different branches of government being sealed off from

one another); *id.* (“separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread”) (citing *In re Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1973)); *Colvin v. Inslee*, 195 Wn.2d 879, 903, 467 P.3d 953 (2020) (“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)); *see also* *Burton v. Lehman*, 153 Wn.2d 416, 426 n.4, 103 P.3d 1230 (2005) (deference not due to DOC’s interpretation of a statute because it was neither consistent with the plain language of the statute nor an official interpretation of the statute).

Courts, in fulfilling their essential judicial duties, are often called upon to “decide whether challenged acts or omissions violate the constitution, even when making that decision is difficult.” *Colvin*, 195 Wn.2d at 903 (Gonzalez, J., dissenting). While these cases, including the action brought by Petitioners, may involve political actors and executive agencies like the Department of Health and Department of Corrections, that alone does not make decisions regarding their conduct “political,” allowing courts to completely preclude themselves from ever weighing in on matters involving these agencies.

Petitioners allege that Respondents’ failures to act have resulted in serious violations of Petitioners’ constitutional rights—violations that, if

allowed to persist, will have potentially life-threatening consequences for Petitioners and the proposed class. It is imperative that this Court review whether a court can avoid its judicial duty to hold state actors accountable for constitutional violations involving significant issues of public health and safety by granting absolute deference to those actors and declaring that the court's weighing in on matters involving state actors amounts to political decision-making.

B. The Court should grant direct review under RAP 4.2(a)(5), as the Petitioners are seeking injunctive relief against state officers.

Direct review by this Court is warranted in this matter because it involves an action against a state officer in the nature of injunction. RAP 4.2(a)(5). Respondents are "state officers." They include the state Department of Health and Department of Corrections, and the persons responsible for operation and management of those agencies.

Moreover, this action is in the nature of injunction. Petitioners, among other relief sought, specifically seek entry of a preliminary injunction against Respondents, requiring Respondents to: immediately provide COVID-19 vaccinations to all people in DOC custody who want it; provide vaccine outreach and education to people in prisons that are comparable in content and quality to what is being deployed in communities outside of carceral settings; and require DOC to prohibit

contact between any unvaccinated DOC staff member, contractor, or agent and any member of the proposed class. *See* App. 384-385.

V. CONCLUSION

For the foregoing reasons, this Court should grant direct review of the trial court's denial of the Petitioners' motions for class certification and preliminary injunction.

DATED this 7th day of May, 2021.

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