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IN THE 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.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, PUBLIC DEFENDER ASSOCIATION, AND WASHINGTON INNOCENCE PROJECT IN SUPPORT OF PETITIONERS

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WASHINGTON CASES

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State v. Bassett,
192 Wn.2d 67, 428 P.3d 343 (2018).....15

State v. Gregory,
192 Wn.2d 1, 427 P.3d 621 (2018).....15

Whitney v. Buckner,
107 Wn.2d 861, 734 P.2d 485 (1987).....16

FEDERAL CASES

Brown v. Plata,
563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011).....17

Hoptowit v. Spellman,
753 F.2d 779 (9th Cir. 1985) 15

Money v. Pritzker,
No. 1:20-cv-02093 (N.D. Ill., filed Apr. 2, 2020) 12

RULES

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RAP 16.4(d).....19

OTHER AUTHORITIES

2017 PREA Audit of Clallam Bay Corrections Center, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-cbcc.pdf.....9

2017 PREA Audit of Olympic Corrections Center, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-occ.pdf.....10

2017 PREA Audit of Stafford Creek Correctional Center, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-sccc.pdf.....10

2017 PREA Audit of Washington Corrections Center, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-wcc.pdf.....10

2018 PREA Audit of Larch Corrections Center, https://www.doc.wa.gov/corrections/prea/docs/audit-2018-prison-lcc.pdf.....9

Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20,2020), https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures.....12

Amended Order, *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607 (Mar. 20, 2020).....12

Carolos Ballesteros, *1st Illinois Prison Inmate Dies of COVID-19, Health Officials Say*, Chi. Sun-Times, Mar. 30, 2020, https://chicago.suntimes.com/coronavirus/2020/3/30/21200222/coronavirus-covid-19-prison-jail-illinois-stateville-first-death.....7

Denise M. Baran-Unland, *"We Are Reaching the Breaking Point," Medical Director of Joliet Hospital Concerned About Potential Rise in COVID-19 Patients*, Herald News, Mar. 31, 2020, https://www.theherald-news.com/2020/03/31/we-are-reaching-the-breaking-point/alrfw0b/.....11

William Barr, *Memorandum for Director of Bureau of Prisons* (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000 6

Bureau of Prisons, *Correcting Myths and Misinformation About BOP and COVID-19*, https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf.....5

Bureau of Prisons, *Update on COVID-19* (Mar. 24, 2020), https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf. 4

Maurice Chammah, *Coronavirus Ended His Shot at a Second Chance*, Marshall Project (Apr. 3, 2020), https://www.themarshallproject.org/2020/04/03/coronavirus-ended-his-shot-at-a-second-chance.....5

Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronovirus Due to "Sustained Transmission,"* Lens, Mar. 31, 2020, https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/.....6

Coalition Letter to the Honorable Jay Inslee (Mar. 16, 2020), https://columbialegal.org/wp-content/uploads/2020/03/Letter-to-Gov.-Inslee-re-COVID-19.pdf.....12

Executive Order 2020-21 (Apr. 6, 2020), https://www2.illinois.gov/Pages/ExecutiveOrders/ExecutiveOrder2020-21.aspx.....8

Executive Order 2020-267 (Apr. 2, 2020), https://governor.ky.gov/attachments/20200402_Executive-Order_2020-267_Conditional-Commutation-of-Sentence.pdf 13

Gov. Beshear Signs Executive Order to Reduce Kentucky's Inmate Population, WLKY CBS News, Apr. 2, 2020, https://www.wlky.com/article/gov-beshear-signs-executive-order-to-reduce-kentuckys-inmate-population/32025080 13

Christy Gutowski, *Gov. J.B. Pritzker Quietly Grants Clemency Requests to Illinois Prisoners Amid Coronavirus Pandemic, Including One Released Thursday Who Had Been Serving Life*, Chi. Trib., Apr. 9, 2020, https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html 8

Illinois Coalition for Higher Ed. in Prison et al. Letter to Governor Pritzker (Mar. 12, 2020), https://assets-global.website-files.com/5e3dd3cf0b4b54470c8b1be1/5e72d3c81b7413738d640cdb_Letter%20to%20IL%20Gov%20Pritzker%20re%20COVID19%20in%20Carceral%20Facilites.pdf 7, 12

Ill. Dep't of Corr., Facilities, *COVID-19 Response*, https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx 7

Inslee Announces Statewide Shutdown of Restaurants, Bars and Expanded Social Gathering Limits (Mar. 16, 2020), https://www.governor.wa.gov/news-media/inslee-announces-statewide-shutdown-restaurants-bars-and-expanded-social-gathering-limits 18

Kimberly Kindy, *Inside the Deadliest Federal Prison, the Seeping Coronavirus Creates Fear and Danger*, Wash. Post, Apr. 10, 2020, https://www.washingtonpost.com/national/inside-the-deadliest-federal-prison-the-seeping-coronavirus-creates-fear-and-danger/2020/04/09/deeceb6e-75b4-11ea-a9bd-9f8b593300d0_story.html ... 5, 6

Jill Lyman, *IL Gov. Announces Plan to Release Select Inmates to Cut Down on Spread of COVID-19 in Prisons*, NBC 14 News, Mar. 31, 2020, https://www.14news.com/2020/03/31/watch-live-il-gov-pritzker-giving-tuesday-update/ 8

Joe Mahr & Jonathan Berlin, *COVID-19 Cases in Illinois by Zip Code: Search For Your Neighborhood*, Chi. Trib., Apr. 11, 2020, https://www.chicagotribune.com/coronavirus/ct-viz-covid-19-cases-by-zip-code-20200407-aikakoyycje4fbqvferzjffkg4-htmlstory.html 8

National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx 1

New Report: Distancing Efforts Working and Must Continue in Key Washington Counties (Apr. 14, 2020), https://coronavirus.wa.gov/news/new-report-distancing-efforts-working-and-must-continue-key-washington-counties 18

Alex Ortiz, *Coronavirus: 3 Cases Confirmed at Stateville Correctional Center in Crest Hill*, Herald-News, Mar. 25, 2020, https://www.theherald-news.com/2020/03/25/coronavirus-3-cases-confirmed-at-stateville-correction-center-in-crest-hill/a8p1j1x/ 7

Alex Ortiz, *Illinois Prisons Take "Aggressive" Actions to Stop Spread of COVID-19*, Herald-News, Mar. 28, 2020, https://www.theherald-news.com/2020/03/27/illinois-prisons-take-aggressive-actions-to-stop-spread-of-covid-19/ax4ympr/ 7

Danny Peterson, *Brown Mulling Release of Certain Inmates from Oregon's Prisons to Slow Virus Spread*, KOIN-6 CBS, Apr. 9, 2020, https://www.koin.com/news/health/coronavirus/brown-mulling-release-of-certain-inmates-from-oregons-prisons-to-virus-spread/ 14

Press Release, *Quickly, Safely Reducing the Jail Population So Staff Can Ensure the Health of Everyone in Correctional Facilities* (Mar. 24, 2020), https://www.kingcounty.gov/elected/executive/constantine/news/release/2020/March/24-jail-population.aspx 12

Jeremy Roebuck et al., *Thousands of State Prison Inmates in Pa. and N.J. Are Now Eligible for Temporary Release as Governors Act to Avert Coronavirus Spread*, Phil. Inquirer, Apr. 10, 2020, https://www.inquirer.com/health/coronavirus/coronavirus-prisoners-pennsylvania-new-jersey-governor-wolf-murphy-20200410.html 14

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 13

Wash. Dep't of Corr., *Annual PREA Report: Calendar Year 2018*, https://www.doc.wa.gov/docs/publications/reports/400-RE004.pdf 9, 10

Wash. Dep't of Corr., *COVID-19 Information*, https://www.doc.wa.gov/news/covid-19.htm 19

Wash. Dep't of Corr., *Prisons Map*, https://www.doc.wa.gov/corrections/incarceration/prisons/map.htm 10

Wash. Dep't of Corr., *Press Release: DOC Suspending Visitation, Limiting Other Events* (Mar. 12, 2020), https://www.doc.wa.gov/news/2020/03122020p.htm 12

Wash. Dep't of Corr., *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 19

Wash. Dep't of Corr., *Press Release: Additional Positive COVID-19 Tests for Incarcerated Individuals within Monroe Correctional Complex* (Apr. 7, 2020), https://www.doc.wa.gov/news/2020/04072020p.htm 19

IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici Fred T. Korematsu Center for Law and Equality and the American Civil Liberties Union of Washington are set forth in the Motion for Leave to File Brief of Amici Curiae submitted on March 27, 2020; leave to file was granted by the Chief Justice, notice of which was provided by letter on April 1, 2020.

Amicus Washington Innocence Project (WashIP), though not a party to the motion, joins this amicus brief. Founded initially in 1997 as Innocence Project Northwest, WashIP comprises lawyers, advocates, and truth seekers who envision and fight for a fair justice system that always seeks the truth so innocent people never have to spend a day in prison. WashIP, having worked successfully to exonerate 15 people who collectively endured more than 100 years incarcerated in Washington prisons, is acutely aware of the cruelty inflicted when people are incarcerated for crimes they did not commit.[1] WashIP currently represents eight incarcerated clients and is reviewing over 80 additional applications for assistance. The majority of clients and applicants are either over the age of 50 and/or have serious underlying medical conditions. As the Washington court system grinds to a halt, these incarcerated individuals

[1] Including these 15, the National Registry of Exonerations has documented 52 cases of wrongful conviction in Washington state occurring from 1989 to present. Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (click on Washington on interactive U.S. map).

live with the fear they will succumb to COVID-19 before their innocence claims are investigated or litigated.

Amicus Public Defender Association ("PDA"), though not a party to the motion, also joins this amicus brief. PDA is a non-profit corporation which advocates for justice system reform and develops alternatives that shift from a punishment paradigm to a system that supports individual and community health. It houses the Racial Disparity Project, which works to reduce racial disparity in the justice system. PDA has a special interest in this case because of two inescapable truths:

(1) racial disproportionality is a feature of Washington's criminal justice system, and African Americans, Latinas/os, and Native Americans are imprisoned at rates that far exceed their relative, respective populations in this state; and

(2) if COVID-19 takes hold in Washington prisons, a disproportionate number of African Americans, Latinas/os, and Native Americans may fall ill and succumb to the disease.

PDA seeks to ensure that the Court is mindful that a COVID-19 outbreak in prison may compound the effects of prior race disproportionality.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before COVID-19 exploded in a federal prison in Oakdale, Louisiana, and a state prison in Joliet, Illinois, officials uniformly said that they were proactively addressing COVID-19. They said they had things under control. They did not.

Though the officials had the power to do more, they chose not to exercise this power, at least not until things got out of control. Then, prisoners who previously, categorically, could not be released were now to be released in order to make possible social distancing measures that might better protect those remaining in custody, correctional staff, and their communities.[2]

Amici offer context about the potential impact if mitigation does not occur, information about targeted release of prisoners occurring around the country, and additional argument that supports Petitioners' mandamus action as well as Petitioners' alternative theory for targeted release because restraint in prison for certain residents is no longer lawful.

Amici write with the hope that whatever steps Respondents take, voluntarily or at the direction of the Court, will not be too little, too late.

ARGUMENT

This Court, in an extraordinary interim order, directed "the Governor and Secretary Sinclair to immediately exercise their authority to take all necessary steps to protect the health and safety of the named petitioners and **all** Department of Corrections inmates in response to the COVID-19 outbreak." Order on Motion, *Colvin v. Inslee*, No. 98317-8 (Apr. 10, 2020) (emphasis added). Amici argue that targeted release is

[2] *See infra* p. 6 (discussing Attorney General Barr's actions) & pp. 7-8 (discussing Governor Pritzker's actions).

necessary to mitigate or avert a health tragedy that has already begun with a COVID-19 cluster among prisoners and correctional staff that may explode beyond the prison walls.

I. Two Prisons in Other States Are Undergoing COVID-19 Outbreaks After Officials Refused to Take Action Similar to that Requested by Petitioners.

When called upon by lawyers, advocates, and residents, officials overseeing the following facilities failed to act more affirmatively to reduce the carceral population through targeted release of the medically vulnerable and those approaching their release date. Outbreaks began with one person and are now affecting dozens at one facility and hundreds at the other, with unknown numbers afflicted in the communities surrounding the facilities.

A. Federal Prison, Oakdale, Louisiana.

On March 24, 2020, the Federal Bureau of Prisons (BOP) reported:

> On March 13, 2020, the Bureau instituted significant measures to prevent COVID-19 virus from spreading in its facilities. These measures include temporary restrictions on visitation, restricting inmate movement to only required and mission-essential transfers increased health screening of staff and inmates, and increased sanitary measures. In addition, all Bureau facilities have been directed to designate available space for isolation and quarantine for inmates who have been exposed to and have symptoms of the virus.[3]

These measures, described in more detail on the Bureau of Prisons

[3] Bureau of Prisons, *Update on COVID-19*, Mar. 24, 2020, https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

website,[4] bear a striking similarity to measures described by Respondents. *See* Br. of Respondents at 4-8.[5]

The measures implemented by BOP, though, failed to protect Patrick Jones, a 49 year-old African American man serving a 27 year sentence for drug convictions involving crack cocaine.[6] Though he had sought release under the First Step Act, his release was opposed by U.S. Attorney John F. Bash and denied by U.S. District Judge Alan Albright in late February 2020.[7] For Mr. Jones, it began with a cough. A persistent one. Taken to the hospital on March 19, 2020, he tested positive for the virus, was placed on a ventilator, and, on March 28, 2020, became the first person in federal prison to die of COVID-19.[8] He would not be the last.

As of April 10, 2020, five other residents of Oakdale had died of COVID-19.[9] Also as of that date, 39 residents had tested positive and there were at least 17 confirmed cases among correctional staff, though these

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[4] *E.g.*, Bureau of Prisons, *Correcting Myths and Misinformation About BOP and COVID-19*, https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf (emphasizing its contingency plans, its previous experience with pandemic outbreaks throughout BOP's history; highlighting its planning that began in January 2020, and its incorporation of CDC guidance).

[5] Amici laud DOC's efforts to prevent a COVID-19 outbreak. Amici note, though, that similar measures in federal prisons have proved insufficient.

[6] Maurice Chammah, *Coronavirus Ended His Shot at a Second Chance*, Marshall Project, (Apr. 3, 2020), https://www.themarshallproject.org/2020/04/03/coronavirus-ended-his-shot-at-a-second-chance.

[7] *Id*.

[8] *Id*.

[9] Kimberly Kindy, *Inside the Deadliest Federal Prison, the Seeping Coronavirus Creates Fear and Danger*, Wash. Post, Apr. 10, 2020, https://www.washingtonpost.com/national/inside-the-deadliest-federal-prison-the-seeping-coronavirus-creates-fear-and-danger/2020/04/09/deeceb6e-75b4-11ea-a9bd-9f8b593300d0_story.html.

numbers are almost certainly an undercount for residents because the prison stopped testing as of March 31, 2020.[10] Ill residents presenting COVID-19 symptoms were presumed to have the disease, but the Bureau did not report them as such,[11] and only those ill enough to require hospitalization would be tested.[12]

In addition to the lack of testing and reporting of numbers within the facility, Amici are unaware of any information regarding contact tracing to determine community spread from correctional staff. The Bureau of Prisons has reported no information regarding whether family members of correctional staff or members of their community have been afflicted or died of the virus.

In response to the growing crisis, U.S. Attorney General William Barr, in a memorandum dated April 3, 2020, directed the Bureau of Prisons to "**IMMEDIATELY MAXIMIZE APPROPRIATE TRANSFERS TO HOME CONFINEMENT OF ALL APPROPRIATE INMATES**" held at Oakdale and two other federal prisons that had seen high infection levels.[13]

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[10] Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronovirus Due to "Sustained Transmission,"* Lens, Mar. 31, 2020, https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/.
[11] *Id*.
[12] Kindy, *supra* n. 9.
[13] William Barr, *Memorandum for Director of Bureau of Prisons* (Apr. 3, 2020), copy available at https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000 (emphasis in original as a heading).

B. State Prison, Joliet, Illinois.

The first confirmed COVID-19 case of a resident at Stateville Correctional Center in Joliet, Illinois, occurred on or about March 25, 2020.[14] On that date, it was also known that at least 2 staff had tested positive. Less than one week later, on March 30, the numbers had grown, including 12 residents who had to be hospitalized, with one reported death and several needing ventilators.[15] By April 14, 2020, 123 residents and 65 staff had been confirmed to have COVID-19.[16]

Criminal justice advocates called on Illinois Governor J.B. Pritzker as early as March 12, 2020, to provide medical furloughs or compassionate release to elderly and infirm prisoners.[17] Visitation to correctional facilities was halted on March 14 and on March 20, "all correctional facilities statewide were placed on 'administrative quarantine.'"[18] On March 31, 2020, Governor Pritzker in a press

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[14] Alex Ortiz, *Coronavirus: 3 Cases Confirmed at Stateville Correctional Center in Crest Hill*, Herald-News, Mar. 25, 2020, https://www.theherald-news.com/2020/03/25/coronavirus-3-cases-confirmed-at-stateville-correction-center-in-crest-hill/a8p1j1x/.
[15] Carolos Ballesteros, *1st Illinois Prison Inmate Dies of COVID-19, Health Officials Say*, Chi. Sun-Times, Mar. 30, 2020, https://chicago.suntimes.com/coronavirus/2020/3/30/21200222/coronavirus-covid-19-prison-jail-illinois-stateville-first-death.
[16] Ill. Dep't of Corr., Facilities, *COVID-19 Response*, https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx (last visited April 14, 2020).
[17] Illinois Coalition for Higher Ed. in Prison et al. Letter to Governor Pritzker (Mar. 12, 2020), https://assets-global.website-files.com/5e3dd3cf0b4b54470c8b1be1/5e72d3c81b7413738d640cdb_Letter%20to%20IL%20Gov%20Pritzker%20re%20COVID19%20in%20Carceral%20Facilites.pdf.
[18] Alex Ortiz, *Illinois Prisons Take "Aggressive" Actions to Stop Spread of COVID-19*, Herald-News, Mar. 28, 2020, https://www.theherald-news.com/2020/03/27/illinois-prisons-take-aggressive-actions-to-stop-spread-of-covid-19/ax4ympr/.

conference stated, "An incarcerated person is a person, and my administration will not be in the business of claiming one life is worth more than another" and that they were "looking closer at low-level offenders at the end of their sentences and also pregnant prisoners" and said "some of them may qualify for early releases."[19] It would take a week, though, for the governor to issue an executive order to permit the Illinois Department of Corrections director to allow 'medically vulnerable' inmates to temporarily leave prison, extending the previous 14-day limit for such leave to the duration of the Gubernatorial Disaster Proclamation and expanded who could qualify for medical furloughs.[20] Since March 11, 2020, Governor Pritzker has released only 17 individuals from Stateville Correctional Center.[21]

Though Amici have not been able to discover direct information about whether family or community contacts of Stateville correctional officers have been afflicted, the area near the prison appears to be a COVID-19 hotspot.[22]

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[19] Jill Lyman, *IL Gov. Announces Plan to Release Select Inmates to Cut Down on Spread of COVID-19 in Prisons*, NBC 14 News, Mar. 31, 2020, https://www.14news.com/2020/03/31/watch-live-il-gov-pritzker-giving-tuesday-update/.

[20] Executive Order 2020-21 (Apr. 6, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-21.aspx.

[21] Christy Gutowski, *Gov. J.B. Pritzker Quietly Grants Clemency Requests to Illinois Prisoners Amid Coronavirus Pandemic, Including One Released Thursday Who Had Been Serving Life*, Chi. Trib., Apr. 9, 2020, https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html.

[22] Joe Mahr & Jonathan Berlin, *COVID-19 Cases in Illinois by Zip Code: Search For*

II. Failure to Mitigate the Crisis Through Targeted Release Will Have Consequences that Extend Far Beyond Prison Walls.

If mitigation occurs too late such that COVID-19 takes hold in Washington's prisons, it is not just Petitioners who are in jeopardy. As Petitioners note, "[a]lmost 19,000 people live in prisons in Washington." Petitioners' Motion to Accelerate Review at 6 (citation omitted). Correctional staff, too, are in jeopardy. Though Amici have not been able to determine the precise number of current staff in each of Washington's prisons, an approximate number may be discerned from a variety of sources collected in the following table:

Table: DOC Facility and Approximate Staff

DOC Facility	Staff
Airway Heights Corrections Center	"over 700 employees"[23]
Cedar Creek Corrections Center	"approximately 139 fulltime staff"[24]
Clallam Bay Corrections Center	440[25]
Coyote Ridge Corrections Center	"over 700 staff"[26]
Larch Corrections Center	133 staff[27]
Mission Creek Corrections Center for Women	"approximately 135 state employees and contractors"[28]

Your Neighborhood, Chi. Trib., Apr. 11, 2020, https://www.chicagotribune.com/coronavirus/ct-viz-covid-19-cases-by-zip-code-20200407-aikakoyycje4fbqvferzjffkg4-htmlstory.html (search zipcode "60403," last visited Apr. 12, 2020).

[23] Wash. Dep't of Corr., *Annual PREA Report: Calendar Year 2018* [*2018 Annual PREA Report*], at 26, https://www.doc.wa.gov/docs/publications/reports/400-RE004.pdf.

[24] *Id*. at 29.

[25] *2017 PREA Audit of Clallam Bay Corrections Center*, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-cbcc.pdf

[26] *2018 Annual PREA Report*, at 35.

[27] *2018 PREA Audit of Larch Corrections Center*, https://www.doc.wa.gov/corrections/prea/docs/audit-2018-prison-lcc.pdf

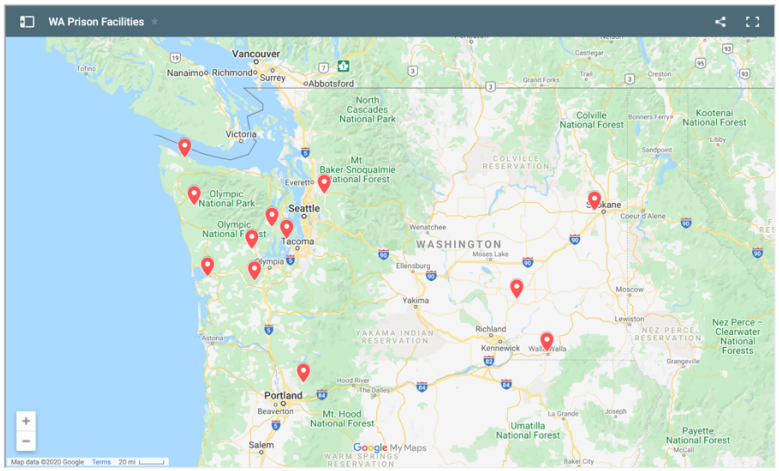
[28] *2018 Annual PREA Report*, at 42.

Monroe Correctional Complex	"approximately 1,200 staff"[29]
Olympic Corrections Center	117 staff[30]
Stafford Creek Corrections Center	550 staff[31]
Washington Corrections Center	654 staff[32]
Washington State Penitentiary	"approximately 1,100 staff"[33]

This approximate total of 5,800 staff at the listed facilities is consistent with the number reported by Respondents.[34] It is important, though, to be mindful of the disaggregated numbers and where staff likely live.

Most of Washington's 12 prisons are located in rural communities:

Map: Washington DOC Prisons[35]



The fact that most DOC prisons are located away from major metro areas

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[29] *Id.* at 44.
[30] *2017 PREA Audit of Olympic Corrections Center*, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-occ.pdf
[31] *2017 PREA Audit of Stafford Creek Correctional Center*, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-sccc.pdf.
[32] *2017 PREA Audit of Washington Corrections Center*, https://www.doc.wa.gov/corrections/prea/docs/audit-2017-prison-wcc.pdf.
[33] *2018 Annual PREA Report*, at 60.
[34] *See* Decl. of Julie Martin, App. D at ¶ 3, Index of Respondents' Court Record (Apr. 3, 2020) ("over 5,000 custody and non-custody staff").
[35] Wash. Dep't of Corr., *Prisons Map*, https://www.doc.wa.gov/corrections/incarceration/prisons/map.htm.

presents both good and bad news with regard to COVID-19 spread. On the one hand, lower residential density may reduce community spread; on the other, the healthcare infrastructure – medical professionals, hospital beds, ICU beds, and ventilators – in rural areas is much more likely to be stretched beyond their breaking points if COVID-19 spreads like wildfire through and beyond the correctional facilities.

An example of the strain on hospitals can be seen following the COVID-19 outbreak in the Illinois Stateville Correctional Center, described *supra* at Part I.B., that led by the end of March to the admission of 15 of its residents to the AMITA Health Saint Joseph Medical Center, with one dying and eight still on ventilators.[36] The hospital's medical director, Dr. John Walsh, noted that there were an additional 20 patients on ventilators, and while the hospital still had ventilators and "a few" ICU rooms left, it did not have enough nurses and respiratory therapists and said, "We are reaching the breaking point."[37]

If this is happening in the fourth largest city in Illinois, common sense tells us that Washington's rural community hospitals are likely ill-equipped to handle COVID-19 outbreaks in Washington's prisons.

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[36] Denise M. Baran-Unland, *"We Are Reaching the Breaking Point," Medical Director of Joliet Hospital Concerned About Potential Rise in COVID-19 Patients*, Herald News, Mar. 31, 2020, https://www.theherald-news.com/2020/03/31/we-are-reaching-the-breaking-point/alrfw0b/

[37] *Id*.

III. Action Taken by Government Officials to Mitigate the Spread of COVID-19 by Reducing the Incarcerated Population Suggests Strongly that Timely Mitigation Is Needed.

A number of state officials have acted to reduce prison populations to protect the vulnerable and those relatively close to release dates. Amici have observed that these releases typically follow a common script:

- Advocates and attorneys call on government officials to address proactively COVID-19 in prisons and jails before residents die and health crises explode.[38]
- Those in charge of correctional facilities implement policies aimed to stem the spread of COVID-19.[39]
- Government officials implement policies to limit jail populations, especially with regard to pretrial detainees.[40]
- Advocates and attorneys file lawsuits seeking relief for individuals and/or systemic solutions.[41]
- Outbreaks in detention facilities spur action.

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[38] *E.g.*, IL-CHEP Letter to Governor Pritzker, *supra* note 17; Coalition Letter to the Honorable Jay Inslee (Mar. 16, 2020), https://columbialegal.org/wp-content/uploads/2020/03/Letter-to-Gov.-Inslee-re-COVID-19.pdf (calling for action to address COVID-19 risk in Washington prisons).

[39] *E.g.*, *supra* text accompanying notes 3-4 (discussing Federal Bureau of Prison COVID-19 response); Wash. Dep't of Corr., *Press Release: DOC Suspending Visitation, Limiting Other Events* (Mar. 12, 2020), https://www.doc.wa.gov/news/2020/03122020p.htm.

[40] *E.g.*, Advisory from California Chief Justice Tani Cantil-Sakauye to Presiding Judges and Court Executive Officers of the California Courts (Mar. 20,2020), https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures; Amended Order, *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607 (Mar. 20, 2020); Press Release, *Quickly, Safely Reducing the Jail Population So Staff Can Ensure the Health of Everyone in Correctional Facilities* (Mar. 24, 2020), https://www.kingcounty.gov/elected/executive/constantine/news/release/2020/March/24-jail-population.aspx (discussing actions taken by King County to reduce its jail population).

[41] *E.g.*, *Money v. Pritzker*, No. 1:20-cv-02093 (N.D. Ill., filed Apr. 2, 2020) (class action seeking injunctive relief to redress COVID-19 crisis in Illinois prisons); instant Petition for Writ of Mandamus, *Colvin v. Inslee*, No. 98317-8 (seeking redress for COVID-19 in Washington prisons).

The sequence of events at the two prisons discussed above in Part II follow this script, with Attorney General Barr and Governor Pritzker, for the most part, acting reactively in response to outbreaks after the fact.

In other instances, governors are taking actions in advance of outbreak crises. California Governor Gavin Newsom announced proactive measures to slow the spread of the virus in order to protect those incarcerated and those who work in California correctional facilities. These protective actions went into place on March 31, 2020, and include accelerated prison discharges for 3,500 prisoners serving terms for nonviolent crimes.[42] On April 2, 2020, Kentucky Governor Andy Beshear signed an executive order calling for the release of 186 medically vulnerable prison residents convicted of felonies.[43] That same day, he announced that Kentucky was "screening 743 other inmates who are within 6 months of completing their sentences and who may be released next week."[44] Similar actions are being taken by the governors of New Jersey and Pennsylvania. Though New Jersey Governor Phil Murphy did not provide an estimate of how many might be freed, Pennsylvania

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[42] 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.
[43] Executive Order 2020-267 (Apr. 2, 2020), https://governor.ky.gov/attachments/20200402_Executive-Order_2020-267_Conditional-Commutation-of-Sentence.pdf.
[44] *Gov. Beshear Signs Executive Order to Reduce Kentucky's Inmate Population*, WLKY CBS News, Apr. 2, 2020, https://www.wlky.com/article/gov-beshear-signs-executive-order-to-reduce-kentuckys-inmate-population/32025080.

Governor Tom Wolf announced that up to 1,800 prison residents could be freed.[45] Oregon Governor Kate Brown is seeking information from the Oregon Department of Corrections about residents "with underlying medical conditions, those over 60, and those with limited time left on their sentences."[46] Time will tell what action Governor Brown takes based on the information she receives.

Whether a governor waits to act until a serious outbreak has occurred or acts in anticipation to prevent a serious outbreak, the duty that motivates both is the same: to safeguard the health and safety of prison residents; to safeguard the health and safety of correctional staff; and to safeguard the health and safety of the community. The authority to act likewise exists whether a governor is reactive or proactive.

IV. Petitioners and Others Similarly Situated Suffer Cruel Punishment and This Court May Enter an Extraordinary Writ to Provide an Effective Remedy.

A. The Record Establishes Cruel Punishment in Violation of Article I, Section 14 of the Washington Constitution.

Article I, section 14 of Washington's constitution prohibits "cruel punishment." This Court, while recognizing that it has often found this

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[45] Jeremy Roebuck et al., *Thousands of State Prison Inmates in Pa. and N.J. Are Now Eligible for Temporary Release as Governors Act to Avert Coronavirus Spread*, Phil. Inquirer, Apr. 10, 2020, https://www.inquirer.com/health/coronavirus/coronavirus-prisoners-pennsylvania-new-jersey-governor-wolf-murphy-20200410.html.

[46] Danny Peterson, *Brown Mulling Release of Certain Inmates from Oregon's Prisons to Slow Virus Spread*, KOIN-6 CBS, Apr. 9, 2020, https://www.koin.com/news/health/coronavirus/brown-mulling-release-of-certain-inmates-from-oregons-prisons-to-virus-spread/.

prohibition to offer greater protection than its federal analogue, *State v. Gregory*, 192 Wn.2d 1, 15, 427 P.3d 621 (2018), made clear that "[a]t the very least, article I, section 14 cannot provide for less protection than the Eighth Amendment," *id*. at 16.[47]

Federal courts have long recognized that prison conditions that "seriously threaten [inmates'] physical and mental well-being … amount to cruel and unusual punishment under the Eighth Amendment." *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985). In finding that conditions at the Washington State Penitentiary violated the Eighth Amendment, the Ninth Circuit held that "[p]ersons involuntarily confined by the state have a constitutional right to safe conditions of confinement," and under the Eighth Amendment "[p]risoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions." *Id.* at 784 (citations omitted).

It is fortunate that no resident in the custody of Washington has yet died. But this standard makes clear that this Court need not wait until

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[47] A context in which this Court has found Article I, section 14 to be more protective is with regard to assessing punishment of children. In its decision finding that a sentence of life without parole for a child violates the Washington constitution, this Court said, "This court has "repeated[ly] recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *State v. Bassett*, 192 Wn.2d 67, 78, 80 428 P.3d 343 (2018) (recognizing that article I, section 14 prohibits "cruel" punishment and does not require that the punishment be both cruel and unusual).

residents die before ordering relief. Instead, under this standard, the life- and health-threatening conditions for at-risk prisoners at issue here and documented by Petitioners violate article I, section 14 of the Washington Constitution.

This Court has made clear that "Washington courts have long recognized a jailer's special relationship with inmates, particularly the duty to ensure health, welfare, and safety." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 625, 244 P.3d 924 (2010). There is ample evidence before the Court to establish a violation of article I, section 14 of the Washington Constitution.

B. An Effective Remedy Is Required and May Be Imposed By Writ.

The pandemic has rendered time exceedingly short and created dire threats to prisoners, staff, and the community. Extraordinary writs are designed for extraordinary situations, and there may never have been as extraordinary a situation as this one. This Court is empowered to take direct action suited to the dire situation.

Mandamus is proper to compel public officials to respect the constitutional rights of prisoners. *E.g., Whitney v. Buckner*, 107 Wn.2d 861, 734 P.2d 485 (1987) (requiring superior court to respect the constitutional right of access to the courts of prisoners who attempt to file

pleadings). In some mandamus cases, the court can compel a public official to exercise discretion, but the official has much latitude to determine implementation. But this case is different. The violation of the constitutional right against cruel punishment due to the imminent threat of a deadly disease sharply limits the Governor's choice of actions. The Governor is not free to decide he has done enough if that course of action leaves many prisoners still at grave risk in violation of the constitution.

Due to the dire threat to prisoners' health and safety and the imminence of constitutional harm, mandamus is appropriate here to compel *effective* action to protect prisoners. Due to the unique threat of COVID-19 in a congregate environment, the only effective remedy for at-risk prisoners is release, or at the least their removal from environments that threaten them. Therefore, that is what this Court should order. *Cf. Brown v. Plata*, 563 U.S. 493, 500, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) (ongoing constitutional violations could not be effectively remedied absent release order).

Another extraordinary writ procedure recently requested by the Petitioners, a class Personal Restraint Petition (PRP), would lead to the same result, as the concurrence to this Court's Order of April 10, 2020, strongly suggests. PRPs may challenge confinement based on unconstitutional "conditions or manner of restraint." RAP 16.4(c)(6). This

recognizes that, as here, sentences lawful when imposed become unlawful if prisoners' health and safety are put at grave risk where they are confined. This Court can and should order that those at risk are entitled to relief from the restraint posed by the constant threat of serious illness or death. In addition, the Court should be mindful that Respondents' failure to do their duty to safeguard residents creates jeopardy for correctional staff and the community as set forth, *supra* Part II.

For Respondents to argue that no writ should issue because Petitioners are free to pursue a mandatory injunction through the ordinary course of civil litigation ignores that these are extraordinary times. Respondents cannot claim to be unaware that the state is facing an emergency. One of them, in essence, closed down the state.[48] Nor can that same Respondent claim to be unaware that effective social distancing appears to be working to "flatten the curve" for the non-incarcerated.[49] Yet Petitioners are told that, for their claims, it is business as usual.

In the meantime, the number of residents at Monroe Correctional Complex testing positive for COVID-19 keeps creeping up. It started with

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[48] *E.g.*, *Inslee Announces Statewide Shutdown of Restaurants, Bars and Expanded Social Gathering Limits* (Mar. 16, 2020), https://www.governor.wa.gov/news-media/inslee-announces-statewide-shutdown-restaurants-bars-and-expanded-social-gathering-limits.
[49] The Washington State Coronavirus Response (COVID-19) website includes the following information it has made available to the public: *New Report: Distancing Efforts Working and Must Continue in Key Washington Counties* (Apr. 14, 2020), https://coronavirus.wa.gov/news/new-report-distancing-efforts-working-and-must-continue-key-washington-counties.

one, announced by a DOC press release.[50] Two more the next day, again announced by a press release.[51] Three more confirmed positives the day after that, but no press release issued. Instead, the information could be found on the DOC website. Early in the day on April 15, 2020, the number of residents testing positive was listed as 7; when Amici checked late in the evening that day, the number had increased to 10.[52] And the number of confirmed DOC staff COVID-19 diagnoses across DOC facilities is slowly ticking up.[53] The numbers are not yet exploding as seen in Oakdale, Louisiana, or Joliet, Illinois. Perhaps, with luck, they will not. But we need not and ought not leave things to chance.

This Court has ample authority to provide relief to Petitioners because other remedies are "inadequate under the circumstances." RAP 16.4(d). This Court is empowered to issue a specific mandate to the Governor for effective action as either a writ of mandamus or a PRP order requiring action to protect at-risk residents. Procedures can be fashioned to quickly determine who is at most risk (and DOC has already begun this process, *see* Br. of Respondents at 11) and how they can be released or

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[50] Wash. Dep't of Corr., *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.
[51] Wash. Dep't of Corr., *Press Release: Additional Positive COVID-19 Tests for Incarcerated Individuals within Monroe Correctional Complex*, (Apr. 7, 2020), https://www.doc.wa.gov/news/2020/04072020p.htm.
[52] Wash. Dep't of Corr., *COVID-19 Information*, https://www.doc.wa.gov/news/covid-19.htm (visited 8am and 11:30pm, Apr. 15, 2020).
[53] *Id*.

otherwise effectively removed from harm's way, possibly through employing a Special Master or the like. But however it is accomplished, this Court may and should address this extraordinary situation through an extraordinary writ.

CONCLUSION

Amici respectfully requests that the Court find for the Petitioner for the foregoing reasons.

DATED this 16th day of April 2020.

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[54] We acknowledge the assistance of Catherine Bentley, Shelby Bowden, and Kristen Schmit, third year students at Seattle University School of Law.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 16, 2020, 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 16th day of April 2020.

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