

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. _____

NORTH CAROLINA STATE
CONFERENCE OF THE NAACP,
DISABILITY RIGHTS NORTH
CAROLINA, AMERICAN CIVIL
LIBERTIES UNION OF NORTH
CAROLINA LEGAL FOUNDATION,
KIM T. CALDWELL, JOHN E.
STURDIVANT, SANDARA KAY
DOWELL, and
CHRISTINA RHODES,

Plaintiffs-Petitioners,

v.

ROY COOPER, in his official capacity
as Governor of North Carolina,
ERIK A. HOOKS, in his official
capacity as Secretary of the North
Carolina Department of Public Safety, and
BILL FOWLER, ERIC MONTGOMERY,
ANGELA BRYANT, and GRAHAM
ATKINSON, in their official capacities as
Post-Release Supervision and Parole
Commissioners,

Defendants-Respondents.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND PETITION FOR WRIT OF MANDAMUS**

1. Plaintiffs-Petitioners (hereinafter “Plaintiffs”) come to this Court in a time of unprecedented emergency. In a matter of weeks, the COVID-19 pandemic has spread at an alarming rate across the country, killing over 40,000. Experts say the crisis has yet to hit its peak in North Carolina and emphasize that people who are incarcerated face especially grave danger.

2. There have been confirmed COVID-19 cases in at least seven North Carolina prisons, and the first mass outbreak has already happened: at Neuse Correctional Facility in Goldsboro, North Carolina, more than 280 of the 770 people incarcerated there and eight prison staff have confirmed COVID-19 cases, up from 38 less than two weeks ago.

3. Many incarcerated people are elderly or have serious underlying health conditions, making them particularly vulnerable to COVID-19. The over 34,000 adults and hundreds of youth incarcerated in this state live in close proximity and often unsanitary facilities. They cannot engage in the social distancing that experts and Governor Cooper have ordered the rest of us to undertake in order to prevent the spread of COVID-19.

4. When more mass outbreaks in North Carolina prisons occur, the people locked in those prisons will have no choice but to rely on a system that is unequipped to handle a novel, deadly virus that has overwhelmed healthcare systems around the world. Given these dire circumstances, North Carolina public health experts have urged that “reducing the prison population is a critical measure that must be acted on immediately.”

5. Governor Roy Cooper and Secretary of Public Safety Erik Hooks do not disagree. In a recent filing with the Supreme Court of North Carolina, they acknowledged that “in light of this high number of adults who are housed in close proximity to each other, these inmates are at risk of contracting COVID-19[,]” and that the crisis should be “met with a measured reduction of the incarcerated population in state prisons and local jails.”¹

6. Defendants-Respondents (hereinafter “Defendants”) understand the gravity of the situation, have broad authority to release people from state custody through reprieves, commutations, pardons, expedited release, and reinstatement of prior parole or post-release supervision. Moreover, Defendants can suspend enforcement of technical probation, post-release supervision, and parole violations that pull released people back into the state’s overcrowded jails and prisons.

7. While Governor Cooper has taken aggressive measures to protect the state’s non-incarcerated population from COVID-19, Defendants have failed to meaningfully decrease the number of people in Department of Public Safety (“DPS”) facilities.

8. In their April 13, 2020 filing before the Supreme Court of North Carolina, Governor Cooper and Secretary Hooks announced for the first time that they had released, or would soon release, just over 400 people—roughly one percent of the state prison population.

¹ Response to Petition for Writ of Mandamus at 5, 17, *NAACP v. Cooper*, No. 160P20 (N.C. Apr. 13, 2020), https://www.ncappellatecourts.org/show-file.php?document_id=265448.

9. In the regular course of operations, DPS releases approximately 2,000 incarcerated people per month.²

10. Release of only approximately 400 people will not allow for the social distancing needed to ensure the people in DPS custody will be safe during the pandemic, and Governor Cooper and Secretary Hooks have not announced a plan to release significantly more.

11. Without timely relief from the courts, COVID-19 will continue to sweep through the state prisons, inflicting terrible suffering and death.

12. In the face of widespread and avoidable loss of life, Plaintiffs ask this Court for declaratory and injunctive relief requiring Defendants to comply with their obligations under Article I, Section 27 of the North Carolina Constitution to ensure that no person incarcerated in North Carolina prisons is subject to cruel or unusual punishment.

PLAINTIFFS

13. Plaintiff North Carolina State Conference of the NAACP (“NC NAACP”) is a nonpartisan, nonprofit organization composed of over 100 branches and 20,000 individual members throughout the state. The fundamental mission of the NC NAACP is the advancement and improvement of the political, civil, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the

² See N.C. Dep’t of Public Safety (“NC DPS”), *DPS Research & Planning: Automated System Query (A. S. Q. DOC 3.0b)*, <https://webapps.doc.state.nc.us/apps/asqExt/ASQ> (query for prison exits by month in 2019).

initiation of lawful action to secure the elimination of racial bias. The NC NAACP has members who are currently incarcerated, members who have been released from incarceration, and members who are currently on probation or under post-release supervision. The NC NAACP advocates for people who are currently and formerly incarcerated as well as their families and communities, as a disproportionate number of incarcerated individuals in this state are people of color.

14. Plaintiff Disability Rights North Carolina (“DRNC”) is a North Carolina nonprofit corporation that maintains its principal place of business in Raleigh. DRNC serves as the federally-mandated protection and advocacy (P&A) system for people with disabilities in North Carolina, and is a “person” authorized to seek legal and equitable relief. The federal statutes creating the P&A systems provide that each is authorized to bring “lawsuits in its own right to redress incidents of abuse or neglect, discrimination and other rights violations impacting on individuals” with disabilities. 45 C.F.R. § 1386.25; 42 C.F.R. § 51.6(f). Many people who are incarcerated are people with disabilities, and have been or will be affected by COVID-19 as a result of their continued incarceration.

15. Plaintiff American Civil Liberties Union of North Carolina Legal Foundation (“ACLU-NCLF”) is a private, non-profit legal organization with its principal office in Raleigh, North Carolina. The mission of ACLU-NCLF is to defend and advance the individual freedoms embodied in the United States Constitution, including the rights of people who are incarcerated. ACLU-NCLF frequently

represents incarcerated people in challenges to unconstitutional conditions and inadequate medical treatment.

16. Plaintiff Kim T. Caldwell is a 64-year-old white man who was recently treated for hepatitis C and tuberculosis and who lives in DPS custody at Dan River Prison Work Farm. Because of his age and underlying health conditions, Mr. Caldwell is at high risk from COVID-19 infection. Mr. Caldwell's projected release date is April 2020.

17. Plaintiff John E. Sturdivant is a 73-year-old African-American man in DPS custody at Pasquotank Correctional Institution in Elizabeth City. He suffers from high blood pressure, has had prostate cancer, and recently had a stroke. Mr. Sturdivant's age and underlying health conditions put him at high risk from COVID-19 infection.

18. Plaintiff Sandara Kay Dowell is a 51-year-old white woman in DPS custody at Swannanoa Correctional Center for Women in Black Mountain. She has many health problems, including high blood pressure, asthma, and Chronic Obstructive Pulmonary Disease (COPD). Because of underlying health conditions, Ms. Dowell is at high risk from COVID-19 infection.

19. Plaintiff Christina Rhodes is the spouse of Andrew Rhodes, a 38-year-old white man with hepatitis C who lives in DPS custody at Wilkes Correctional Center. Because of his disease, Mr. Rhodes is at high risk from COVID-19 infection. Ms. Rhodes is scared that her husband may die from the coronavirus.

20. Plaintiffs bring their claims pursuant to the North Carolina Constitution, N.C.G.S. § 1-253 *et seq.*, and this Court’s common law authority to issue writs of mandamus.

DEFENDANTS

21. Defendant Roy Cooper is the Governor of the State of North Carolina. Pursuant to Art. III, Sec. 5 of the North Carolina Constitution and N.C.G.S. §147-12 he has a duty to “supervise the official conduct of all executive and ministerial officers.” He also has a non-delegable duty to ensure that living conditions in all state prisons comply with state and federal law.

22. Defendant Erik Hooks is the Secretary of the North Carolina Department of Public Safety and as such has a duty to “ensure the safety of the public,” N.C.G.S. §143B-601(4), and under certain circumstances is statutorily obligated to “reduce the prison population to a more manageable level . . . to meet the State’s obligations under law.” N.C.G.S. §148-4.1. He also has a non-delegable duty to ensure that living conditions in all state prisons comply with state and federal law.

23. Defendants Bill Fowler, Eric Montgomery, Angela Bryant, and Graham Atkinson are the four commissioners constituting the Post-Release Supervision and Parole Commission. They are appointed by the Governor and charged with deciding whether to revoke, modify, or reinstate parole and post-release supervision. *See* N.C.G.S. § 143B-720(a); N.C.G.S. § 15A-1368.3(b), (c),(d); N.C.G.S. § 15A-1368.6(a); N.C.G.S. § 15A-1373(c), (d), (e).

24. Plaintiffs sue Defendants in their official capacities only.

JURISDICTION AND VENUE

25. This Court has jurisdiction under N.C.G.S. § 7A-245.

26. Venue is proper under N.C.G.S. § 1-77(2) and N.C.G.S. § 1-82.

FACTUAL ALLEGATIONS

The COVID-19 pandemic is an extraordinary and deadly public health crisis for incarcerated people and those who work with them.

27. On March 11, 2020, the World Health Organization classified the highly-contagious COVID-19, a respiratory illness caused by the novel coronavirus, as a global pandemic.³ As of the morning of April 20, 2020, the United States leads the world in COVID-19 cases, with 720,630 confirmed cases of infection,⁴ and has a death toll of over 40,000 that continues to rise exponentially.

28. In North Carolina, there have been 6,764 total confirmed cases and 179 confirmed deaths from COVID-19.⁵ Infections are not expected to peak in North

³ World Health Organization (“WHO”) Director General Tedros Adhanom Ghebreyesus, Remarks at media briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ U.S. Centers for Disease Control and Protection (“CDC”), *Coronavirus Disease 2019 (COVID-19) Cases in U.S.* (Apr. 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁵ N.C. Dep’t of Health & Human Servs. (“NC DHHS”), *COVID-19 North Carolina Dashboard* (Apr. 20 2020 10:35 AM), <https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count>.

Carolina until mid-to-late May.⁶

29. Of North Carolina's confirmed cases so far, a total of at least 274 were contracted by incarcerated people, including 239 cases at Neuse Correctional facility alone.⁷

30. The novel coronavirus spreads from person to person through respiratory droplets produced when an infected person coughs, sneezes, or speaks, close personal contact, and contact with contaminated surfaces and objects.

31. Spread of the virus can occur even before an infected person exhibits any symptoms, and asymptomatic people may still infect others.⁸

32. There is no vaccine against COVID-19 and no known medication to treat it. Social distancing (maintaining physical separation of at least six feet from others) and vigilant hygiene, including handwashing and use of alcohol-based hand sanitizers are the only known measures for protection against COVID-19.

33. COVID-19 can severely damage the lungs and other vital organs, including the heart and liver, and may ultimately cause death. Patients who do not die from serious cases require hospitalization, and may face prolonged recovery

⁶ Bradley Adams, MS, *et al.*, *COVID-19 IN orth Carolina, Hospital Capacity and the COVID-19 Epidemic in North Carolina: Preliminary Estimates* at 3, <https://files.nc.gov/ncdhhs/documents/files/covid-19/NC-Covid-Brief-1-4-6-20.pdf>.

⁷ NC DPS, *Prisons Info on Covid-19*, (last updated Apr. 20, 2020), <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>.

⁸ CDC, *How Coronavirus Spreads* (Apr. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

periods, including extensive rehabilitation from neurological damage and permanent loss of respiratory capacity.

34. COVID-19 “can kill healthy adults in addition to elderly people with existing health problems.”⁹ But people age 65 and over face heightened risks of serious complications or death resulting from COVID-19,¹⁰ as do people of any age who suffer from certain disabilities and underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and asthma.¹¹ All of these risk factors are compounded for people in prisons, who are

⁹ Bill Gates, *Responding to Covid-19 – A Once-in-a-Century Pandemic?*, New Eng. J. of Med. (Feb. 28, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2003762>.

¹⁰ CDC, Coronavirus Disease 2019 (COVID-19), *Older Adults* (last visited Apr. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>. The preliminary mortality rate analyses based on data from the coronavirus outbreak in China showed overall mortality rates by age to be at 1.3 percent for 50-59 year-olds, 3.6 percent for 60-69 year-olds, and 8 percent for 70-79 year-olds. By comparison, the mortality rate for people younger than 50 years old was 0.4 percent or lower. Chinese Center for Disease Control and Prevention, *The Epidemiological Characteristics of an Outbreak of 2019 Novel Coronavirus Diseases (COVID-19) – China 2020*, 2 CCDC Weekly 8, at 115, Table 1, <http://weekly.chinacdc.cn/en/article/id/e53946e2-c6c4-41e9-9a9b-fea8db1a8f51>.

¹¹ The WHO-China Joint Mission Report indicates that the mortality rate was 13.2 percent for those with cardiovascular disease, 9.2 percent for diabetes, 8.4 percent for hypertension, 8.0 percent for chronic respiratory disease, and 7.6 percent for cancer. World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* at 12 (Feb. 16-24, 2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>.

often in poorer health and physiologically 10 to 15 years older than their non-incarcerated counterparts.¹²

35. Even people experiencing non-life-threatening infections may still suffer from debilitating coughing fits, difficulty breathing, and high fevers that can last weeks.

36. Recognizing the gravity of the situation, Governor Cooper issued a March 14 Executive Order closing all K-12 public schools,¹³ and a statewide Stay at Home Order on March 30, instructing North Carolinians to remain at home with limited exceptions.¹⁴ The March 30 Order also banned gatherings of more than ten people and directed everyone to stay at least six feet apart from others.¹⁵

COVID-19 will be a death sentence for many incarcerated people.

37. The state prison system confirmed its first case of COVID-19 of an incarcerated person on April 1, 2020, at the Caledonia minimum-custody facility.¹⁶

¹² See Kathryn M. Nowotny, MA, *et al.*, *Growing Old Behind Bars: Health Profiles of the Older Male Inmate Population in the United States*, 1 *J. Aging & Health* 22, 3 (Nov. 17, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5929998/>.

¹³ Gov. Cooper Exec. Order No. 117 (Mar. 14, 2020), <https://files.nc.gov/governor/documents/files/EO117-COVID-19-Prohibiting-Mass-Gathering-and-K12-School-Closure.pdf>.

¹⁴ Gov. Cooper Exec. Order No. 121 (Mar. 27, 2020), <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf>.

¹⁵ *Id.*

¹⁶ Michael Balsamo & Michael Sisak, *First inmate coronavirus case reported in NC prison*, WRAL (Apr. 1, 2020), <https://www.wral.com/coronavirus/first-inmate-coronavirus-case-reported-in-nc-prison/19038486/#.XoVFLYidSpY.email>.

There have now been confirmed COVID-19 cases in at least seven DPS facilities.¹⁷

38. Due to the severe shortage in testing, the true scope of COVID-19 infections inside the DPS 52 adult prisons and 4 Youth Development Centers (“YDCs”)¹⁸ across the state remains unknown.

39. Neuse Correctional Institution has seen the state’s biggest outbreak. There, DPS has confirmed 239 infections in a population of over 700.¹⁹

40. The outbreak at Neuse is no aberration—other prisons and jails in North Carolina and across the country provide grim examples of how quickly this deadly virus will sweep through incarcerated populations.

41. At the Rikers Island jail in New York City, it took only twelve days for one COVID-19 case to explode into nearly 200 cases.²⁰ The jail’s chief physician has warned that it is “unlikely” that they will be able to stop the spread, and predicted

¹⁷ WBTV Web Staff, *Four employees, four offenders in NC prison system test positive for COVID-19*, WBTV (Apr. 2, 2020), <https://www.wbvtv.com/2020/04/02/four-employees-found-offenders-nc-prison-system-test-positive-covid/>

¹⁸ Youth are typically imprisoned in YDCs post-disposition (as opposed to “juvenile detention centers” where youth are detained pretrial). See NC DPS, *Juvenile Facility Operations*, (last visited Apr. 20, 2020 at 11:39 AM), <https://www.ncdps.gov/Juvenile-Justice/Juvenile-Facility-Operations>.

¹⁹ NC DPS, *Prisons Info on Covid-19*, (last updated Apr. 20, 2020), <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>.

²⁰ Miranda Bryant, *Coronavirus spread at Rikers is a ‘public health disaster,’ says jail’s top doctor*, The Guardian (Apr. 1, 2020), <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster>.

that 20 percent of those infected will need hospital treatment.²¹

42. At Stateville Correctional Center in Illinois, when dozens of incarcerated people began showing symptoms, those that had to be taken to the closest hospital for emergency treatment “overwhelmed” the hospital’s resources and “maxed out” the hospital staff.²²

43. At the Butner federal prison in North Carolina, it took only five days for the number of confirmed COVID-19 cases to surge from single digits to nearly 60.²³ Now, there are at least 91 confirmed infections, and five people have died.²⁴

44. The practices that can slow the spread of COVID-19—especially social distancing—are inherently impossible in prisons that are operating at or near capacity.

45. Due to the congregate nature of DPS detention facilities, incarcerated people and staff who work in these facilities cannot comply with the statewide mandate to remain six feet apart from others at all times. Even isolation in single

²¹ *Id.*

²² Chuck Goudie, *et al.*, *Illinois prisoners sick with COVID-29 “overwhelm” Joliet hospital*, ABC-7 Chicago (Mar. 30, 2020), <https://abc7chicago.com/health/illinois-prisoners-sick-with-covid-19-overwhelm-joliet-hospital/6064085/>.

²³ CBS 17 Digital Desk, *COVID-19 cases at federal prison in Butner jump from 9 to 59 in five days*, Apr. 6, 2020), <https://www.cbs17.com/news/local-news/covid-19-cases-at-federal-prison-in-butner-jump-from-9-to-59-in-five-days/>.

²⁴ CBS 17 Digital Desk, *5th inmate from federal prison in Butner dies from coronavirus, 91 COVID-19 cases reported*, (Apr. 17, 2020), <https://www.cbs17.com/news/local-news/5th-inmate-from-federal-prison-in-butner-dies-from-coronavirus-91-covid-19-cases-reported/>.

cells for those who have been confirmed to have COVID-19 does not eliminate the risk of contagion due to shared ventilation systems and the necessity of personal contact in preparing and serving meals.

46. Defendants recently represented to the Supreme Court of North Carolina that DPS “houses approximately 34,042 inmates across 52 adult facilities. In light of this high number of adults who are housed in close proximity to each other, these inmates are at risk of contracting COVID-19.”²⁵

47. It is estimated that close to a third of people in DPS custody have at least one disability,²⁶ and over 8,000 of incarcerated adults are over the age of 50.²⁷

48. Older people and people with disabilities, which include the underlying health conditions identified by the CDC as high-risk, are at extreme risk for infection, and once infected are likely to suffer more severe symptoms, including death, due to their disability.

49. African Americans, who comprise 22 percent of North Carolina’s

²⁵ *Supra* note 1 at 17.

²⁶ According to the Bureau of Justice Statistics, an estimated 32 percent of people in prisons report having at least one disability. Jennifer Bronson Ph.D., Laura M. Maruschak, *Disabilities Among Prison and Jail Inmates*, 2011-12 (Dec. 14, 2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5500> (noting also that approximately 2 in 10 people incarcerated in prison have a cognitive disability).

²⁷ NC DPS, *DPS Research & Planning: Automated System Query (A. S. Q. DOC 3.0b)*, <https://webapps.doc.state.nc.us/apps/asqExt/ASQ> (query for individuals 50 and over).

population,²⁸ but account for 52 percent of the prison population,²⁹ will disproportionately bear the devastation caused by a COVID-19 outbreak in DPS facilities. The data collected thus far shows that African Americans in the general population have been disproportionately impacted by this pandemic.³⁰ That risk is compounded for African Americans who are confined to an environment where it is impossible to practice social distancing.

50. As the number of COVID-19 cases in state prisons increases, it is likely that care rationing programs that disproportionately harm older people and people with disabilities will be implemented—a measure that some hospitals in other states have already been forced to take.³¹

²⁸ U.S. Census: North Carolina Quick Facts, <https://www.census.gov/quickfacts/fact/table/NC/PST045219>.

²⁹ Vera Institute of Justice, *Incarceration Trends in North Carolina* (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-north-carolina.pdf>

³⁰ See NC DHHS COVID-19 North Carolina Dashboard, <https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count#by-race/ethnicity> (last updated 10:35 AM, Apr. 20, 2020) (African-Americans are 38 percent of NC COVID-19 cases, whereas they comprise 22 percent of the state’s population); Akiyah Johnson and Talia Buford, *Early Data Shows African-Americans Have Contracted Coronavirus at an Alarming Rate* (Apr. 3, 2020), <https://www.propublica.org/article/early-data-shows-african-americans-have-contracted-and-died-of-coronavirus-at-an-alarming-rate>; Ibram X. Kendi, *What the Racial Data Shows* (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/>.

³¹ For example, the Washington State Health Department issued guidance last week recommending that triage teams consider transferring patients out of the hospital to palliative care if their baseline function was marked by “loss of reserves in energy, physical ability, cognition and general health.” Sheri Fink, *The Hardest*

51. DPS has already limited medical services to essential appointments.³² As the number of COVID-19 infections grow, they will overwhelm DPS's medical services, leaving people with disabilities and underlying medical conditions without access to the routine care that they require to manage their health conditions.

52. For youth in DPS custody, many of whom also have disabilities and underlying medical conditions, there are additional, grave concerns about maintaining quality of care and supervision. The statewide ban on visitation at DPS facilities means that youth are unable to visit their parents and families. Youth in confinement are therefore likely to experience isolation and trauma. Moreover, because young people are more frequently asymptomatic carriers of COVID-19, an outbreak in the youth facilities across the state would be particularly difficult to contain, even while facility staff would continue to come and go, spreading the disease among the youth and in their communities.

53. DPS lacks the trained staff, infrastructure, and supplies to manage the inevitable COVID-19 outbreak. Defendants have openly acknowledged this.

54. On March 28, 2020, Governor Cooper informed local sheriffs that DPS could not accept any people from the jails in the event of an outbreak: "Like many of you, the Division of Prisons is extremely short staffed and therefore does not have

Questions Doctors May Face: Who Will Be Saved? Who Won't?, N.Y. Times (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/us/coronavirus-medical-rationing.html>.

³² North Carolina Department of Public Safety, *DPS Actions on COVID-19* (lasted updated Apr. 20, 2020), <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>.

the capability to take on all high medical need offenders at this time.”³³ He also said that the state’s only two medical prison facilities had no ventilators.³⁴

55. At a March 27 press conference with Governor Cooper, Secretary Hooks also confirmed that no prisons are equipped with ventilators or the ability to provide intensive care.³⁵ People in prisons who need more intensive care for COVID-19 will therefore have to be treated in already overwhelmed community-area hospitals. As many DPS facilities are located in rural parts of the state with limited healthcare infrastructure, rural hospitals and the communities they serve will struggle to meet this need.

56. Even before the pandemic, DPS Commissioner of Prisons Todd Ishee briefed state lawmakers that the effective correctional officer vacancy rate was near 30 percent. Commissioner Ishee explained, “The trends are getting worse by the year and we’re at the point where we need to take drastic measures.”³⁶

57. In the context of testing and treatment for the highly infectious but *curable* hepatitis C virus, former DPS medical director Anita Wilson acknowledged

³³ Taylor Knopf, *NC governor to sheriffs: No extra state COVID-19 resources available for jail inmates*, North Carolina Health News (Mar. 28, 2020), <https://www.northcarolinahealthnews.org/2020/03/28/covid-19-county-jails/>.

³⁴ *Id.*

³⁵ Rev, *Gov. Cooper Coronavirus Transcript March 27: Stay-at-Home Order Issued*, (Mar. 27, 2020), <https://www.rev.com/blog/transcripts/north-carolina-governor-roy-cooper-coronavirus-transcript-march-27-stay-at-home-order-issued>.

³⁶ Opinion, *NC’s prison crisis needs drastic change*, News & Observer (Oct. 28, 2019), <https://www.newsobserver.com/opinion/article236582913.html>.

in November 2019 that DPS faces “staffing shortages that make it nearly impossible for medical providers to cover the basics.”³⁷ And “[s]etting aside the lack of trained providers and moving to the actual medical treatment, we encounter cost issues.”³⁸

58. Given these realities, significantly reducing the number of people incarcerated in North Carolina is the only way to prevent devastating loss of life resulting from COVID-19 outbreaks in the prison system.

**Despite an emergency state existing for over a month,
Defendants have taken little action to decrease the number of
incarcerated people in DPS custody.**

59. Defendants have yet to use their broad authority to substantially decrease North Carolina’s adult prison population.

60. Concerned about the ticking time bomb COVID-19 represents for incarcerated people, advocates (including many of the undersigned) sent letters to Governor Cooper and DPS Prisons Commissioner on March 19, emphasizing the dangers faced by incarcerated people and urging them to make significant reductions to the prison population to prevent mass death and suffering.

61. On March 27, a group of North Carolina’s medical and public health experts sent Governor Cooper a letter explaining that DPS facilities are “breeding grounds for the uncontrolled transmission of SARS-CoV-2, the virus that causes COVID-19,” and urging Governor Cooper to “immediately release people from jails

³⁷ Anita Wilson, *Challenges Within North Carolina Correctional Medicine*, 8 N.C. Med. J. 6 (Nov. 14, 2019), <https://www.ncmedicaljournal.com/content/ncm/80/6/344.full.pdf>.

³⁸ *Id.*

and prisons.”³⁹

62. Other concerned North Carolina community groups, civic organizations, faith leaders, legal scholars, and advocates have similarly called on Defendants to decrease the prison population in light of the life-threatening dangers posed to incarcerated people and prison staff by the COVID-19 pandemic.⁴⁰

63. After Defendants failed to take action, a group of petitioners, including all Plaintiffs in this case, filed an emergency petition for a writ of mandamus with the North Carolina Supreme Court on April 8. There, Petitioners argued that the Supreme Court had jurisdiction to review Petitioners’ claims upon direct petition, and should order Governor Cooper and Secretary Hooks to take immediate actions under their considerable constitutional and statutory authority to reduce the prison population as necessary to comply with the North Carolina constitution’s prohibitions on cruel or unusual punishment, N.C. Const. Art I, Sec. 27. The Emergency Petition filed with the Supreme Court included a detailed prayer for relief which specified the legal authority and corresponding actions that Governor Cooper and Secretary Hooks should be compelled to undertake to avoid constitutional violations.

64. Governor Cooper and Secretary Hooks filed a response to the

³⁹ Letter from Dr. Gavin Yamey, et al. to Governor Cooper, (Mar. 27, 2020), <https://www.scribd.com/document/453980709/Governor-Cooper-Letter>.

⁴⁰ Letter from Leonard G. Dunston, MSW, et al. to Governor Cooper, (Apr. 3, 2020), <https://www.scribd.com/document/454859721/Roy-Cooper-Letter-April-3>; Letter from NC NAACP to Governor Cooper, (Mar. 24, 2020), <https://forwardjustice.org/resources/covid-19-naacp-crisis-strategy>.

Emergency Petition on April 13, in which they argued, among other things, that Petitioners were not entitled to file directly with the Supreme Court for a writ of mandamus and that the only proper avenue for the Petition was to file in Superior Court and proceed through the “orderly process of judgment and appeal.”

Petitioners filed their reply in support of their Emergency Petition on April 15. On April 17, the Supreme Court dismissed the petition without prejudice, but provided no explanation as to its reasoning.

65. Prior to the filing of the April 8 Petition, any efforts by Defendants to improve conditions in the prisons were initially focused on implementing such modest measures as increased cleaning, limited visitation, educational posters, not accepting new admissions from county jails, and purportedly reducing the number of prison-to-prison transfers.⁴¹

66. Since April 4, 2020, DPS data shows 1,322 movements of people incarcerated in DPS custody, including admittance of people into DPS facilities and transfer of people from one DPS facility to another.

67. On April 13, 2020, only after an action was filed against them in the state’s highest court, Defendants announced for the first time that they had released or planned to release in the coming weeks approximately 400 people through discretionary time credits and the parole process, and were “considering” release for approximately 500 people with health conditions.

⁴¹ North Carolina Department of Public Safety, *DPS Actions on COVID-19* (updated Apr. 20, 2020), <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>.

68. These releases—even if actually effectuated and not merely “considered”—by Defendants would constitute a very limited approach that will not significantly reduce the prison population. Indeed, before the pandemic, DPS released approximately 2,000 people per month in the ordinary course of their operations.⁴²

69. Defendants have not stated or even suggested that the measures they have taken thus far will allow for effective social distancing in North Carolina’s prisons.

70. In documents that will be filed in support of Plaintiffs’ claims, North Carolina public health experts explain in greater detail that people in North Carolina prisons face “a significantly higher risk of infection with COVID-19 as compared to the population in the community and—because of lack of medical staff and resources—they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death.” Therefore, releasing people who are elderly or have underlying health conditions is “both necessary and urgent[.]”

CAUSES OF ACTION

COUNT I: Article I, Section 27 of the North Carolina Constitution (Cruel or Unusual Punishments Clause)

71. Plaintiffs incorporate all preceding paragraphs by reference.

⁴² *DPS Research & Planning: Automated System Query (A. S. Q. DOC 3.0b)*, <https://webapps.doc.state.nc.us/apps/asqExt/ASQ> (query for prison exits by month in 2019).

72. The state Constitution prohibits cruel or unusual punishment.

73. Defendants' acts and omissions described above subject all people incarcerated in state prisons—particularly those who are elderly or have underlying health conditions—to a substantial risk of serious harm.

74. Defendants are operating their prison system in a way that fails to address the imminent mass suffering and death threatened by COVID-19.

75. Defendants have therefore imposed conditions that amount to cruel or unusual punishment forbidden by the state Constitution.

76. Plaintiffs bring their claim directly under the state Constitution because they have no other effective remedy to obtain the relief sought.

COUNT II: Writ of Mandamus

77. Plaintiffs incorporate all preceding paragraphs by reference.

78. People incarcerated in North Carolina's prisons have a clearly established right to living conditions that do not expose them to a deadly, highly communicable disease.

79. Defendants have affirmative constitutional and statutory duties to provide such conditions, including Defendant Hooks' duty to "reduce the prison population to a more manageable level . . . to meet the State's obligations under law." N.C.G.S. §148-4.1.

80. Under the extraordinary circumstances present here, the duty to protect the prison population is mandatory—Defendants do not have discretion to not act.

81. Defendants have failed to carry out this duty.

82. Even if the decision to release people from prison under these circumstances is discretionary in nature, Defendants' conduct described above is arbitrary and capricious, constituting an abuse of discretion.

PRAYER FOR RELIEF

83. WHEREFORE, Plaintiffs pray this Court grant the following declaratory and preliminary and permanent injunctive relief or, in the alternative, the following writ of mandamus:

- A. Declare that Defendants' acts and omissions described above violate Article I, Section 27 of the North Carolina Constitution;
- B. Order Defendants to immediately comply with Article I, Section 27 of the North Carolina Constitution by taking any and all steps necessary to prevent the continued exposure of those in prison to COVID-19, including ensuring enough physical space for the practice of social distancing to occur.
- C. If the Court finds it necessary, appoint a special master to aid the Court in ensuring Defendants' compliance with the relief ordered.
- D. Award reasonable attorney's fees and costs.
- E. Order any other relief the Court finds just and proper.

This is the 20th day of April, 2020.

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