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IN THE UTAH SUPREME COURT

ACLU OF UTAH, et al., Plaintiffs-Petitioners, v. STATE OF UTAH, et al., Defendants-Respondents.	PETITIONERS' REPLY TO STATE RESPONDENTS' RESPONSE IN OPPOSITION TO PETTION FOR EXTRAORDINARY RELIEF [REDACTED FOR PUBLIC FILING] Case No. 20200281

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Petitioners hereby submit the following reply to the Response filed by the State of Utah, Governor Gary R. Herbert, Executive Director of the Utah Department of Corrections Mike Haddon, and Chair of the Board of Pardons and Parole Carrie Cochran (together, the "State" or the "State Respondents").

INTRODUCTION

As the State Respondents' briefing makes clear, at bottom, the disputed issues raised by this Petition do not revolve around the seriousness of the risks faced by incarcerated people in Utah by the COVID-19 pandemic, or the need to take meaningful, immediate action in response. Rather, the points of contention between Petitioners and Respondents come down to the questions of whether the measures that the State Respondents are currently taking are sufficiently speedy and effective and whether this Court is an appropriate entity to make decisions about those measures and order relief. Based on the State Respondents' own report of their responses, as well as additional information Petitioners are filing confidentially, the answer to the first question is no. Second, the Petitioners continue to believe that this Court can and should hear this Petition with respect to the State Respondents.

There is no question that the State Respondents have been and are undertaking meaningful, commendable work in response to the pandemic. Of particular note, avoiding incarcerating people on probation and parole for technical violations and only seeking warrants in cases involving public safety risk are important. Moreover, the State Respondents' work to secure early releases are exactly the kind of measures called for by the Petition. As explained in detail below, however, Plaintiffs believe that these measures do not go far enough to alleviate the current crisis.

As for whether this Petition by these Petitioners should be heard by the Court, the answer to that question is yes. Petitioners are appropriate parties to bring this action, which raises significant questions of great public importance. Moreover, the present worldwide deadly pandemic raises exactly the extremely rare exigency for which this Court continually reserves its discretion to hear emergency petitions quickly and directly. The alternatives suggested by State Respondents, mainly individual petitions to the Board and a myriad of petitions in district courts in across Utah, are not speedy, effective options. To the contrary, those options have not resulted in significant releases, and will invite competing rulings from district courts from all corners of the State aimed at jails, prisons, and community correctional centers in other corners of the State. These realities make the State Respondents' citation to *Hadley v. Zmuda*, No. 122,760, at 1 (Kan. April 14, 2020) (slip op.) unavailing because in that case, the court could identify one district court in which the action should have been brought and remanded it there, whereas here, there are many district courts that could have original jurisdiction and the State Respondents do not identify which one should decide the questions raised here.

In response to the State Respondents' general critique that this Petition is based on hyperbole or asks for relief that is beyond the pale, this Court's own recent actions taking swift, statewide action in the criminal justice system are a powerful counterpoint. Specifically, as discussed further below, this Court has by administrative order prohibited all criminal trials across the state indefinitely, even when the defendant is in custody. That action must mean that the Court believes that there are no feasible measures that any district court can take now or in the foreseeable future to alleviate the danger that congregating people together in enclosed areas for long periods of time entails as a result of the pandemic.

Even as the State government in general has relaxed the alert level generally, this Court has repeatedly reaffirmed and extended this unprecedented, decisive action to protect court and judicial staff, jurors, attorneys, and criminal defendants. Given the incredible implications for the speedy trial rights of all of the presumed innocent defendants posed by this order, and that the Court issued the order even in light of those implications, there is no question that this pandemic calls for unprecedented, even controversial action of the kind sought in the Petition.

Petitioners Have Public Interest Standing

Petitioners have public interest standing. Initially, it is worth noting that the State's argument that *Kendall v. Olsen*, 2017 UT 38, 424 P.3d 12 is a bar to Petitioners further clarifying their standing in reply is unavailing. In *Kendall*, unlike here, there was a ruling below that denied standing that the appellant did not address until reply. *See id.* at ¶ 13. Here, Petitioners filed the Petition in this Court. All of the Respondents, as well as amicus curiae, recognized that considering that Petitioners themselves are not incarcerated or asserting the rights of incarcerated members, the Petitioners assert public interest standing. Like a party raising the issue in a motion to dismiss, Respondents attacked standing in response. It is appropriate to allow Petitioners to address it here in reply.

Here, the ACLU of Utah, the Utah Association of Criminal Defense Lawyers and the Disability Law Center are all appropriate parties raising issues of significant public importance in this action. These elements make it appropriate to grant them public-interest standing. As explained in *Gregory v. Shurtleff*, 2013 UT 18,

> "Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' and 'controversies,' since no similar requirement exists in the Utah Constitution." *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983). While it is "the usual rule that one must be personally adversely affected before he has standing to prosecute an action

> .... it is also true this Court may grant standing where matters of great public interest and societal impact are concerned." *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978).

2013 UT 18, ¶ 12 (footnotes omitted). *Gregory* went on to explain the test required for a party to show that they can obtain public-interest standing:

> [W]e summarized this alternative basis for standing as follows: "[T]he statutory and the traditional common law tests are not the only avenues to gain standing; Utah law also allows parties to gain standing if they can show that they are an appropriate party raising issues of significant public importance ...." *Cedar Mountain Envtl., Inc. v. Tooele Cnty. ex rel. Tooele Cnty. Comm'n*, 2009 UT 48, ¶ 8, 214 P.3d 95 (emphasis added).

2013 UT 18, ¶ 14. A party shows that it is appropriate by "demonstrating that it has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing." *Gregory*, 2013 UT 18, ¶ 15 (citation omitted). To meet the second prong, a party must show that the issue is one of sufficient public importance and not be more appropriately handled by another branch of government. *Utah Chapter of Sierra Club*, 2006 UT 74, ¶ 39.

Petitioners meet both of these prongs. Each has a deep interest in effectively assisting this Court to develop and review relevant legal and factual questions involved in this case. The ACLU of Utah has been defending civil rights and civil liberties in Utah for over 60 years. Over those years, it has fought for prisoners' rights in various ways, including extensive litigation. (*See*, *e.g.*, *ACLU of Utah and Disability Law Center v. Davis County*, Case Number 180700511 (Second District) (regarding release of county jail standards); *Redmond v. Crowther*, 2:13-cv-393 (D. Utah) (regarding release of tear gas in State prison); and *Bennett v. Utah County*, 2:96-cv-215 (D. Utah) (regarding overcrowding in Utah County Jail). The Disability Law Center ("DLC") is a private, non-

profit organization designated by the governor as Utah's Protection and Advocacy agency. For over 40 years, the DLC has advocated for the rights of people with disabilities in the criminal justice system in Utah, including litigation involving those in pre-trial detention and those incarcerated. (*See*, *e.g.*, *ACLU of Utah and Disability Law Center v. Davis County*, Case Number 180700511 (Second District) (regarding release of county jail standards); *Disability Law Center v. State of Utah*, 2:15-cv-645 (D. Utah) (regarding detention of pre-trial detainees deemed incompetent to stand trial). The UACDL is a member organization made up of attorneys in Utah who practice criminal law, whose mission includes "to achieve justice and dignity for defense lawyers, defendants, and the criminal justice system itself." Their efforts to achieve that goal include legislative and policy advocacy around criminal justice issues in Utah, and extensive legal education work to ensure effective court advocacy of criminal defendants. It goes to the core of these organizations missions to help this Court develop and review the legal and factual issues raised in the Petition.

Respondents suggest that the issues raised in the Petition would be more appropriately litigated by individual inmates on a case-by-case basis or in a class action. But no individual petitioner has a strong incentive to undertake the full scope of the issues raised by this Petition, meaning that the raised larger systemic questions and relief urged by the Petition is unlikely to be litigated outside of the Petition. For example, for a correctional facility to be able to effectively allow the people in them to make serious attempts to follow state and federal guidelines to prevent the spread of COVID-19, the facility needs to house as few people as possible. Single-party petitioners, however, would understandably be focused on getting themselves released, with no reason to try to

ensure that others are safely released. A prisoner with a serious medical condition such as diabetes but a long sentence, for example, would not have a personal stake in an action that seeks release of relatively healthy prisoners with short times left on their sentences. Moreover, many, if not most incarcerated people are unable to afford legal representation to assist them in any petition, lessening the chances that they will be able to litigate effectively. Moreover, at least one court has cited the difficulties of individualized litigation in granting organizational standing in a case seeking release of pre-trial detainees in the face of COVID-19. *Committee for Public Counsel Servs. v. Chief Justice of Trial Court*, 142 N.E.3d 525, 599 (Mass. 2020). Outside of judicial remedies, people in correctional facilities have little to no ability to pursue the issues raised in the Petition.

While it might (or might not) be appropriate to certify this Petition as a class action broken into various subclasses under Utah Rule of Civil Procedure 23(b)(2) if named Petitioners were added, the existence of that vehicle does not make the present Petitioners less appropriate in this particular instance. To the contrary, Petitioners are certain that any named plaintiffs in any class action would seek the exact relief sought by the Petition, namely making as many timely releases as safely possible, and ensuring safety measures for those who are required to stay in the facilities. Granting public-interest standing to Petitioners would lessen the time and complexity involved in this litigation, which is in the best interest of any plaintiff who would move for a class to seek the same relief. Petitioners appreciate the safeguards built into class action procedure and do not advocate a position that public-interest standing is an appropriate alternative in most situations. But in this unique case, where the time is of the essence and the questions involved go the very lives and safety of incarcerated people, it is appropriate to

allow the Petitioners to press the issues involved in this Petition. *Kerkorian v. Governor of Nevada, 2020 WL 2121524*, *1-2 *(Nev. Apr. 30, 2020) (unpublished)* is not persuasive because Petitioners here expressly rely on Utah public interest standing as an alternative to class action.

As to the second public-interest standing prong, Petitioners submit that questions involving the appropriate treatment of people in correctional facilities required by the Utah Constitution are of significant public importance. First, people in correctional facilities have inherent dignity that is protected by our state's constitution. Moreover, if society believed that prisoners were being treated with unnecessary rigor, it would undermine trust in the criminal justice system. Finally, on a more practical level, most incarcerated people will be released to reintegrate into their communities, giving an incentive to ensure that their treatment while incarcerated comports with the constitution.

The State Respondents citation of *Connecticut Criminal Defense Lawyers Ass'n. v. Lamont*, No. UWYCV206054309S (Conn. Super. Ct. Apr. 24, 2020) (slip op.) at 2-4 is not availing because that state court's standing doctrine is not analogous to Utah's, so its reasoning is not persuasive. With these considerations in mind, public-interest standing by the Petitioners should be recognized in this action.

Relief Ordered by this Court is the Only Plain, Speedy, and Adequate Remedy Available in this Emergency

A. State prisoners do not have other plain, speedy, adequate remedies

The State Respondents' suggestions that inmate grievances and requests to the Board are speedy, adequate, and equal to the exigencies present here, are unconvincing, as discussed below.

1. Administrative grievance procedures are not adequate

Requiring individual prisoners to follow grievance procedures would not provide a speedy or adequate remedy for prisoners, especially because the relief required is of a systemic nature. In discussing the federal Prison Litigation Reform Act's exhaustion requirement, a district court recently excused a prisoner from exhausting administrative remedies because the prison's two step grievance process, giving about 5 weeks to respond to a first level grievance, "presents no possibility of some relief," given the imminent danger from how quickly COVID-19 spreads in correctional facilities. *See Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1916883 at *9 (S.D. Tex. Apr. 20, 2020) (citing to the rapid rise in confirmed cases in less than 2 weeks in Rikers Island Jail, Cook County Jail, and Texas Department of Criminal Justice facilities). Here, the UDC's grievance process gives the State 21 days to respond to each of three grievance levels (63 total days) and prison officials may get extensions. During a fast-moving deadly pandemic that has spread to many correctional facilities in about 8 weeks, exhausting the grievance process could take over two months, which is not a speedy remedy. Moreover, as State Respondents note, prisoners cannot use the grievance process to address Board decisions regarding release.

2. The State's current Compassionate Release and Special Attention plans are not speedy, adequate remedies for the vast majority of prisoners

The State argues that compassionate release petitions and Special Attention petitions to the Board are a sufficient remedy for inmates. This remedy, however, is not speedy and effective given the scope and fast-moving pace of the danger. First, it is important to note that most prisoners do not have the knowledge and/or resources to make such individual petitions an effective option. For example, an unrepresented prisoner dealing with the anxiety and effects of

his or her medical condition would not be in a good position to make a fulsome petition to the Board: the State itself has detailed how complicated and daunting the process is even when undertaken by a knowledgeable and powerful actor like the State. Indeed, only about 40% of the petitions prepared by the State for the prisoners in the highest risk categories have been successful, *see* Washington Decl. ¶ 53, calling into serious question the feasibility of requests by unrepresented prisoners without the weight of the State behind them. Moreover, the Board has stated that it is giving preference to petitions that come from UDC and that it gives "weight to the amount of time the offender has spent incarcerated in relation to his/her total sentence and guidelines," though this consideration has no apparent relevance to medically vulnerable prisoners, nor is it necessarily related to their public safety risk. (Moxon Decl. ¶¶ 89, 93.)

By the State's own recognition, the process of hearing these petitions in the manner that the Board currently does is slow and burdensome. While Petitioners applaud the State's efforts to make petitions on behalf of prisoners, that effort has only resulted in the release of a relatively small number of medically high-risk inmates, the exact number of which the State does not reveal. The State notes that 153 more people were released in March 2020 and 88 more in April 2020 than in February. The State, however, gives no specific numbers of how many people have been released through compassionate release or special attention review that did not have a parole or expiration date within the next several months. *See* State Resp. Memo. at 13. While the State "made a total of 637 COVID-related decisions for individuals incarcerated in prison," it does not quantify the outcome of those decisions. *See* Lizon Decl. ¶ 11. According to the State's own numbers, out of the nearly 2,000 inmates who are over 65 or have a medical condition that makes them more vulnerable to injury or death from COVID-19, the list they compiled to consider for release contained 173 individuals, and the Board has approved about 40% of the

requests. *See* State Resp. Memo. at 12, 20; Washington Decl. ¶ 39, 53. Further, the list is under inclusive because even those with controlled conditions such as diabetes are still at a significantly higher risk of death or serious injury should they contract COVID-19.

The State has also stressed the need for individualized risk assessment because of public safety concerns, a valid concern in the abstract. The facts they present, however, do not necessarily line up with that concern. The State, for example, observes that approximately half of current inmates are incarcerated for parole violations or probation failure, implying that those indicate some inherent danger. State Resp. Mem. at 25. Yet the State also notes that AP&P has stopped issuing warrants for parole violations that do not pose a public safety risk, indicating that a violating parole does not on its own make someone dangerous. *See* Blanchard Decl. ¶ 18, 20, 22. The State does not break down how many of the prisoners serving time on parole violations and probation failures would present an identifiable risk to the public if they are released.

Similarly, the State's observation that nearly 70% of inmates are persons "whose primary offenses involved direct acts of violence against people, a sex offense, or use of weapons" is not alone a reason to deny relief here. State Resp. Mem. at 26. First, by Petitioners' count, there are about 1,800 individuals whose primary offenses do not fall into those categories. Second, this framing suggests that individuals who have been convicted of sex offenses, violent offenses, or use of weapons offenses would inherently be dangerous to society if released, regardless of the circumstances of the offense, the time since its commission, or the prisoner's age or infirmity. This proposition is overbroad and does not directly address many of the people the Petition seeks to release. Specifically, the Petition seeks release for medically vulnerable individuals, many of whom are elderly or infirm, and some of whom have already been denied releases. This issue is further spelled out in the factual supplement filed today. Further, elderly or infirm individuals

are far less likely to be a public safety risk, which is reflected in the Board's rules for compassionate release. *See* State Ex. C, R671-314-1(4)(a). Petitioners have asked for releases with or without conditions. Accordingly, a released person could be placed in home confinement (a measure which the United States Attorney General directed the Bureau of Prisons to prioritize) and/or subjected to surveillance measures already implemented by AP&P. *See* Att'y Gen. William P. Barr, *Mem. for Dir. Of Bureau of Prisons Re: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf. While Petitioners appreciate the State's concern with releasing people into homelessness, this should not stop the State from releasing more individuals who will not be homeless.

The State Respondents also argue that a special master would be a slower remedy than the Board in part because parties may object to a proposed special master, slowing down proceedings. This concern could be alleviated in several ways, such as, for example, appointing a district judge or judges. Additionally, the Court may also appoint more than one special masters who are experienced in sentencing and are empowered to help the Court make judgments on constitutional violations, which is not a function of the Board. This step would also resolve the concerns raised in *Wisconsin Association of Criminal Defense Lawyers v. Evers*, No.2020AP687-OA (April 24, 2020) (slip op., Ex. I), about appointing a special master to the extent they involve a "myriad of factual determinations" the master would make. Furthermore, while many prisoners have sought review from the Board for themselves, individual prisoners cannot seek release for others. Each prisoner's safety during this pandemic, however, is impacted by the number of people he or she is housed with. Individuals who cannot be safely released, however, will not have their interests adequately represented before the Board.

The State Respondents' argument that the Board has exclusive power to release state prisoners is not accurate. To the extent that releases would be mandated as a remedy to constitutional violations arising from conditions of confinement, the State cites no authority to suggest that the judiciary does not retain the power to order such relief. Moreover, to the extent that the current process used by the Board is insufficiently speedy and effective to alleviate the danger to prisoners in State custody from the pandemic, the judiciary has the ability to both review Board decisions for constitutionality and review the Board's failure to perform constitutionally required acts. *See* Utah R. Civ. P. 65B(d)(2) and *Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994) (observing the possibility that courts may review Board decisions challenged on constitutional grounds such as "cruel and unusual punishment"). The State Respondents' reliance on *Wisconsin Association of Criminal Defense Lawyers v. Evers*, No. 2020AP687-OA (April 24, 2020) (slip op., Ex. I) is not helpful on this question because it does not explain why Wisconsin law would preclude courts from assigning a master and why Utah law is anolagous.

The State Respondents' discussion of *Monson v. Carver*, 928 P.2d 1017 (Utah 1996) is off-point because the Petitioners are not challenging a particular release determination as amounting to cruel and unusual punishment, but are instead alleging that the pace with which the Board and the low number of prisoners being released generally are insufficient to alleviate the risks posed by the pandemic. *Monson* gives no indication that its individualized test would apply to the situation prisoners are now faced with.

B. The number of relevant sentencing courts and current exigent circumstances makes extraordinary relief in this forum more appropriate than district court actions

State Respondents' argument that these claims should have originated in the district court falls short. First, the novel coronavirus is quickly spreading to correctional facilities around the country, and in the weeks since Petitioners filed it has it has infected 10 individuals held by the State in a community correctional center. Ex. A, UDC Coronavirus (COVID-19) Updates. While this Court "typically" limits itself to only addressing petitions that cannot be decided in another forum, *Carpenter v. Riverton City,* 2004 UT 68 ¶ 4. 103 P.3d 127, 128, these are not typical circumstances. As of April 22, 2020, 9,437 prisoners have become infected and 131 have died throughout the country. Ex. B, *Tracking the Spread of Coronavirus in Prisons*. These numbers are almost very likely substantially lower than the current aggregate amount. In early April, the Cook County Jail in Chicago was the largest known single source of infections in the country, until two Ohio prisons became the largest and second largest sources of infection. *See* Exhibit C, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 8, 2020); Exhibit D, *Coronavirus Surges at Pickaway Prison, Now No. 2 Hot Spot in the Nation – Behind Marion Prison*, COLUMBUS DISPATCH (Apr. 22, 2020).

The State asserts that the UDC's COVID-19 Action Plan has lessened the risk, but Petitioners do not believe the risks are adequately under control, and the question is how and where this dispute should be heard. Again, the core of this dispute is not that State's correctional facilities should be more empty. The question is whether there there are steps that this Court should take to increase the speed of that process, including facilitating a process to release more prisoners who are not a public safety risk, thereby protecting both those who have been released and reducing the risk for those who remain.

If prisoners were to seek extraordinary relief in the district courts, they would have to file in the "court in the county in which the commitment leading to confinement was issued." Utah

R. Civ. P. 65B(b)(2). State prisoners have been sentenced by numerous district courts throughout Utah's eight districts. Requiring thousands of prisoners to file petitions or lawsuits in many sentencing courts across Utah will lead to inconsistent outcomes on the same legal and factual issues and an unneeded strain on judicial resources, all the while delaying relief for incarcerated people who could suffer irreparable injury or death. In the instances where habeas relief may be unavailable, it is unclear whether Petitioners could bring a petition for extraordinary relief in a district court to challenge Board and UDC action with regards to inmates housed all over the state through IPP. Myriad filings in various courts invites inconsistent findings on the risk of harm and constitutional violations taking place in the same facilities.

Moreover, requiring each prisoner to file his or her own emergency relief petition, most of which will be pro se, would amplify the problem. Courts would be inundated with mailed petitions, placing serious strain on them, especially those with reduced staff schedules and limited operations.[1] A multitude of courts working through this stack of petitions under the current conditions will not be a speedy, effective, or likely consistent process. Moreover, most post-conviction prisoners cannot afford counsel, making it substantially more difficult for them to advocate for themselves at a time when they are at risk of irreparable harm.

As a general rule, this Court hears petitions for extraordinary relief when the material facts are not in serious dispute, and when there are disputes, it may appoint a special master to assist. *See Carpenter*, 2004 UT 68 ¶ 4-5. In this case, the State has not refuted the factual information that Petitioners presented regarding the serious danger to incarcerated people during this pandemic, instead only providing a generalized critique of the factual sources. Among these unrefuted facts are the following: that COVID-19 has spread to correctional facilities that were

[1] *See, e.g.,* Second District Court, Emergency General Court Order No. 20-04, Re: Pandemic Response Plan, https://www.utcourts.gov/alerts/docs/2nd%20District%20-%20Emergency%20Pandemic%20General%20Order.pdf,

implementing screening procedures like those implemented by correctional facilities in Utah; that COVID-19 spreads asymptomatically[2] and that it has a long incubation period; and that Salt Lake County already had 15 inmates test positive, which apparently happened after Salt Lake County implemented their COVID-19 plan. *See* Salt Lake County Resp. Mem. at 37. The. The State itself repeatedly acknowledges the threat to incarcerated people by COVID-19, making the key dispute here not one over the nature of the threat, but of the scope of the remedy.

This Court's own recent actions in keeping potential juries safe is illustrative of the kind of remedy that is appropriate at this point in this emergency. Specifically, this Court has, by administrative order, suspended all criminal jury trials indefinitely, even for defendants in custody. *See* Exhibit G, Administrative Order for Court Operations, Utah Supreme Court and Utah Judicial Council, Paragraph 10(a) (May 11, 2020). As far as Petitioners are aware, this action of putting speedy trials on hold for an as-yet undetermined number of months is unprecedented in Utah's history. The Court's swift, statewide action is a clear recognition that legally requiring people to gather is too dangerous to risk at this time.

The State Respondents contend that the Petition does not present sufficient undisputed facts for this Court to resolve the questions raised. The Petition, however, does provide specific evidence related to the serious risk to state prisoners, including reports on the spread of COVID-19 into correctional facilities, including facilities implementing screening measures, and the ineffectiveness of screening mechanisms.

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[2] For further evidence of asymptomatic transmission, see Exhibit E, Nathan W. Furukawa et al., Early Release: *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, CDC, 26 EMERGING INFECTIOUS DISEASES (July 2020), https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article. *See also* Exhibit F, *Montgomery County's Jail Tested Every Inmate for COVID-19—and Found 30 Times More Cases Than Previously Known*, PHILADELPHIA INQUIRER (Apr. 28, 2020), https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html (reporting that a county jail tested all 948 inmates, and 171 out of 177 positive cases exhibited no symptoms when they were tested).

Dexter v. Bosko, which mentions the need to identify "particular event or act" leading to the constitutional injury, is off point because it was considering a claim for damages after an injury that had already taken place. *See* 2008 UT 29, ¶ 18, 184 P.3d 592 (2008). Unlike *Dexter*, which sought retrospective relief, this Petition is prospective in nature, meant to minimize the incredible risk of harm already suffered by 10 individuals housed in a state community correctional center who have tested positive.

Moreover, the main relief sought by the Petition was to facilitate releases and to make it feasible to follow government recommended measures to prevent the spread of COVID-19. Based on the total number of prisoners as of April 1, 2020 and even as of the date of State Respondents' brief, the Petitioners contend that the number of people in State Respondents' correctional facilities is still far too high. The State Respondents do not break down the number the capacity of each facility. But with over 3,000 people in the prison at Draper, about 1,700 in Gunnison, and over 1,400 in jails, *see* State Resp. Mem. at 3, there can be little dispute that the State Respondents are still incarcerating people in shared cells and common spaces, as well as dormitory style living spaces. Appropriate social distancing in those conditions is not feasible, and the Petition asks for more meaningful reductions wherever possible.

Notably, while the State has produced evidence of preventative measures that it has taken for inmates at the Utah State Prison and Central Utah Correctional Facility, the State has not provided any evidence related to measures that it is taking to ensure the safety of the 1,464 prisoners housed in county jails. With regards to those prisoners, the State has not contradicted any of of the Petition's claims or provided any information related to how, or if, it is ensuring that county jails are providing adequate preventative measures.

III. The State is Violating Prisoners' Constitutional Rights

State Respondents' argument that the Petition does not allege a constitutional violation does not prevail. First, the State Respondents argue that deference to State prison officials is warranted, essentially the same argument as their separation of powers argument, which Petitioners will address below. State Respondents then make unsuccessful arguments against Petitioners' cruel and unusual punishment and excessive rigor claims.

A. Petitioners' cruel and unusual punishment claim prevails.

1. The State of Mind Requirement is Met

The State Respondents' contention that the Petitioners' claim for cruel and unusual punishment fails is incorrect. The State first argues that Petitioners need proof that prison officials had a "sufficiently 'culpable state of mind,"" citing to a federal Eighth Amendment damages claim requirement. *See* State Resp. Mem. at 56 (quoting *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005)). *Mata*, however, misses the mark because the Petitioners seek injunctive relief under the Utah Constitution. In any event, since the Petition was filed, several sources provided information regarding the conditions at the State's correctional facilities, provided in the confidential supplement. As such, Petitioners rely on more than the mere speculation about possible risks that precluded relief in distinguishing this case from cases cited by State Respondents such as *United States v. Gray*, 2020 WL 1554392, *2 (D. Md. April 1, 2020) and *Williams v. Nevada*, 2020 WL 1876220, *4 (D. Nev. April 15, 2020).

2. Prisoners are at a higher risk of serious future harm due to their incarceration

The Petitioners have also shown that the risk of harm requirement is met. A risk of future harm is serious enough to be constitutionally unacceptable when society does not choose to tolerate it and it violates contemporary standards of decency to unwillingly expose anyone to that

risk. *See Helling v. McKinney*, 509 U.S. 25, 36 (1993). As of this date, Utah is still at a high threat level, with large gatherings still cancelled, schools still closed statewide, and college dorms still closed, because society has recognized that being in close proximity to one another is unacceptably dangerous and should be avoided whenever possible. Unsurprisingly, the top sources of infections in the country have all been places where social distancing is extremely difficult if not impossible, such as nursing homes, meat processing plants, and correctional or detention facilities. *See, e.g.,* Exhibit H, *6 New Coronavirus Hotspots Around the U.S. Show Disease Still Spreading*, FORBES (May 6, 2020). As stated above, for a period of time in April, the top sources of infection were the Cook County Jail and then an Ohio prison, and neither those corrections facilities were in the national epicenter in New York. The Petitioners are filing a confidential factual supplement to discuss further specific reports of conditions in State correctional facilities.

The State has argued that it is preventing harm by releasing hundreds of prisoners in response to the coronavirus risk, while also suggesting that prison is not necessarily more dangerous than living in society at large despite the substantially more crowded living conditions. The State relies on a case involving the risk from a non-contagious illness spread by inhaling fungal spores to support the proposition that prisons are no more dangerous than society at large, when COVID-19 is spread from person to person. *See* Resp. Mem. at 70 (citing *Hines v. Youseff,* 914 P.3d 1218, 1232 (9th Cir. 2019). The fact that the State has requested the Board to expedite release for people who are within 3-6 months of their parole date bolsters the Petition's claims. Moreover, in early April, a federal court found that "the risk of infection clearly exists [in the Utah State Prison] (despite the State's effort to downplay that risk)," citing to the State's March 23 COVID-19 Action Plan. *Taylor v. Crowther*, No. 2:07-CV-194, 2020 WL 1677078 at

*3, *5 (D. Utah Apr. 6, 2020) (denying release on the basis of the plaintiff's potential to be a flight risk and danger to the public).

The conditions inherent to incarceration, especially in a large facility like the prisons which have dorm style housing for the most medically vulnerable in the Draper prison, make incarceration more dangerous than the conditions for society at large. Even in nursing homes, which have communal living, residents are not sleeping 30 people to a room and they are not sharing shower and bathroom facilities with about 30 people. College dorms nationwide have been closed and most people in society at large do not live in e.g. dorm housing with 30 other people.

[redacted]

The State Respondents, moreover, have not provided any information about what steps it is taking to ensure prisoner safety for individuals in the Inmate Placement Program. The county jails housing those people are not necessarily using the same precautions as the State, and in their responses as Respondents, several of them did not provide information on how many IPP prisoners are in their custody. [redacted]

[redacted] Notably, the Legislative Office of the State Auditor has encouraged the UDC to take affirmative steps to proactively protect IPP prisoners after IPP prisoners were abused in a county jail. Exhibit L, Performance Audit No 20-01, A Performance Audit of the Utah Dep't of Corrections Inmate Placement Program, Office of the State Auditor.

3. The State's efforts are not reasonable in light of the scope of the danger

Prison officials are deliberately indifferent under the cruel and unusual punishment clause of the Utah Constitution when they provide care that is insufficient for the scope of the problem. *See Bott v. DeLand*, 922 P.2d 732 (Utah 1996). In *Bott*, while a prisoner-plaintiff complaining of serious symptoms was in fact examined by a nurse practitioner, the Court nonetheless held that the prisoner's right to be free from cruel and unusual punishment was violated because the treatment did not go far enough. *See id*. at 734-35. The State has distinguished its response from a hypothetical the Court presented in *Bott* of a prison guard "intentionally denying or delaying access" to medical care. *See* State Resp. Mem. at 67. But that was simply one example of deliberate indifference, and the facts of *Bott* show that the State was liable even though it provided some care.

"Easier and less efficacious treatment" can lead to liability for prison physicians under the deliberate indifference standard. *See Bott*, 922 P.2d at 740. It is true that the State made important efforts to prevent an outbreak, including releases of some prisoners early and screening and cleaning procedures, but the question here is whether the scope of those measures is enough. *Helling v. McKinney* instructs that courts should not deny injunctive relief to "inmates

who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." 509 U.S. 25, 33. Being housed in close quarters increases the risk of COVID-19 transmission, a condition that would be life-threatening for a large number of prisoners.

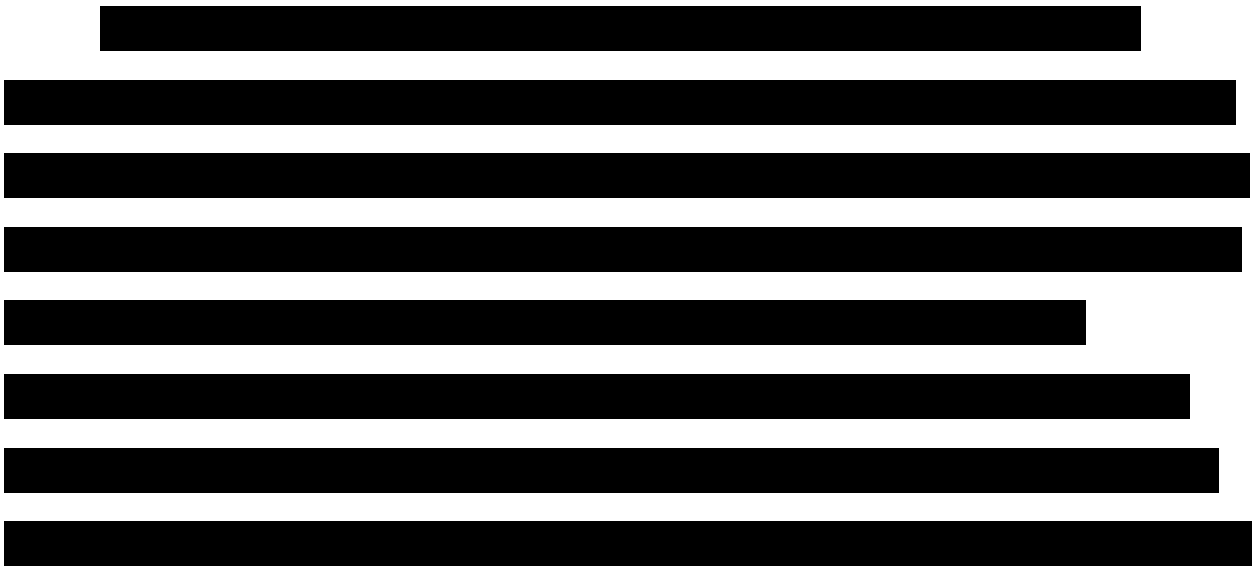
Over 6,000 of the individuals incarcerated by the State in February, 2020 in prisons, jails, and correctional centers are still incarcerated now. Until a significant number more prisoners are released sufficient to allow for meaningful social distancing, those thousands of prisoners are still being exposed to an unacceptable and unnecessary risk.

The exigent and extraordinary circumstances of this pandemic necessitate extraordinary measures to avoid irreparable serious harm. While the State is making releases, it is not doing so at a rate or in a quantity sufficient to facilitate meaningful social distancing, which can constitute deliberate indifference. Other courts have found that detention or correctional facilities were being deliberately indifferent to a serious risk of harm despite those facilities taking steps to mitigate risk.

For example, an Ohio federal court found that petitioners had made a sufficient showing that a prison had acted with deliberate indifference, not just negligence, despite preventative measures that exceeded those being implemented by UDC. *See* Order Granting in Part and Denying in Part, *Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Ohio Apr. 22, 2020). Prison officials in Ohio were isolating new inmates for two weeks, evaluating inmates with symptoms, and checking inmate and staff temperatures, screening incoming staff to evaluate risk of exposure and possible symptoms, processing some inmates for compassionate release, requiring daily cleanings of common areas, giving face masks to all inmates and staff, and providing inmates with information on prevention, preventing congregating at meal times, and they had

developed quarantine plans. Resp. Answer, *Wilson v. Williams*, No. 4:20-cv-00794 at 8-12 (N.D. Ohio Apr. 17, 2020). The defendant prison officials also detailed preventative measures that go beyond what UDC is doing, such as active ongoing temperature screenings for medically high-risk inmates. *Id.* at 8-9.

Despite all of these measures implemented beginning in March, the court still found that the petitioners had made a sufficient showing of deliberate indifference and ordered the respondents to evaluate hundreds of remaining inmates for transfer out "through any means." Order, *Wilson v. Williams,* at 16, 20. The prison began implementing prevention measures that went above and beyond UDC's in March and inmates still died. *See* Sarah Dees Decl. for Resp., 4:20-cv-00794 (N.D. Ohio Apr. 17, 2020), Order at 17. *See also Pimentel-Estrada v. Barr,* No. C20-495 RSM-BAT, 2020 WL 2092430 at *16 (Apr. 28, 2020) (concluding that the detainee had "established a likelihood that Respondents had acted with reckless disregard for to the significant risk of serious harm to Petitioner" even though the detention facility had no confirmed cases and had implemented screening measures, population reduction measures, increased cleaning, and a two-week quarantine for new detainees).



[redacted]

[redacted]

Moreover, while the State Respondents provide significant documentation of preventative measures in the prisons, it has provided no information about its plan to ensure the safety of IPP prisoners. A number of the Respondent Counties which have a substantial IPP population did not state how many IPP prisoners are in their custody and submitted plans with far less detail and preventative measures than what the State has presented.

The State Respondent's reliance on *Connecticut Criminal Defense Lawyers Ass'n. v. Lamont*, No. UWYCV206054309S (Conn. Super. Ct. Apr. 24, 2020) (slip op.) and *New Mexico Law Offices of the Public Defender v. State*, No. 1-SC-38252 (N.M. May 4, 2020) (slip op.) in support of the lack of constitutional violation here is unavailing because those cases were not decided under Utah law, and those states' law and federal law are not sufficiently analogous to Utah's.

4. Release with or without conditions is the proper remedy for the danger posed by continued incarceration in light of the virus' demonstrated ability to spread to facilities using screening measures that match or exceed those employed by UDC

It is true that the remedy for conditions of confinement is generally not release because there are usually other ways of remedying the unsafe or inhumane condition. This general rule, however, is not appropriate here because communal living, inherent to life in a correctional facility, now poses an unacceptably high risk of COVID-19 transmission, an exigent and

extraordinary circumstance. In *Wickham v. Fisher*, there were concrete steps that the jail could take to create a more humane environment and improve conditions while the new jail was being built. 629 P.2d 896, 902. Here, the main danger lies in the well documented fact that the virus spreads asymptomatically, it persists on surfaces, it is highly contagious, and it has evaded screening measures both at State community corrections centers and the Salt Lake County Jail and correctional facilities around the country.

The State noted that *Brown v. Plata*, 563 U.S. 493 (2011) was the only situation in which a federal court released a broad class of inmates. Resp. Mem. at 71. A federal court, however, has very recently ordered prison officials to start evaluating broad classes prisoners for transfer out of a prison "through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks." Order Granting in Part and Denying in Part, *Wilson v. Williams*, No. 4:20-cv-00794, at 20 (N.D. Ohio Apr. 22, 2020). The Court issued that order 9 days after the petitioners filing, rather than waiting for a "painstakingly long" trial that the State has suggested would be appropriate based on *Brown*, despite the fact that the PLRA does not apply to state law claims in state court or habeas petitions. Although several prisoners had already died by the time the Northern District Court of Ohio made its decision, Petitioners are requesting much less extreme relief before this outcome becomes a reality in Utah.

IV. The State is Subjecting Prisoners to Unnecessary Rigor

The unnecessary rigor clause protects prisoners from being "unnecessarily exposed to an increased risk of serious harm." *Dexter v. Bosko*, 2008 UT 29 ¶ 19, 184 P.3d 592, 597 (Utah 2008). The risk of dying or sustaining permanent organ damage is far beyond "the frustrations, inconveniences, and irritations that are common to prison life." *Id.* The State Respondents have

not effectively shown how the current pace and number of releases is appropriate to alleviate the danger, especially with regards to older and infirm prisoners.

Separation of Powers Concerns do not Merit Dismissal

A This Case Does Not Implicate Deference to State Respondents.

The State has correctly asserted that as a general matter, Utah statute has given the UDC authority to "direct resolution" "of riots, disturbances, or other emergencies." Utah Code 64-13-6. But the Utah Legislature cannot take transfer the judiciary's ability to determine individual rights and craft appropriate remedies to violations of those rights as appropriate. *Turner v. Safley*, 482 U.S. 78, 89 (1987) does not teach otherwise, as that case involved the weighing of legitimate penological interests against rights unrelated to proscriptions on unnecessary rigor. No case holds that prisons can judge for themselves whether their treatment of prisoners meets the State constitution. Likewise, cases such as *Taylor v. Freeman*, 34 F.3d 266, 269 (4th Cir. 1994) are not persuasive here, as the Petition does not ask the Court to administer the prison, but to judge whether measures taken in response to the pandemic meet constitutional requirements. While it is true the courts in cases such as *Money v. Pritzker*, 2020 WL 1820660 (N.D. Ill. April 10, 2020) were reluctant to make such judgments, the court in *Money* based its decision partially on the procedural requirements of the PLRA, inapplicable here, and other recent cases have held otherwise. Similarly, *Connecticut Criminal Defense Lawyers Ass'n. v. Lamont*, No. UWYCV206054309S (Conn. Super. Ct. Apr. 24, 2020) (slip op.) applied another state's well established doctrine, and it is unclear how or why that doctrine should apply here. The State's citation of *Loftin v. Dalessandri*, 3 Fed. App. 658, 662 (10th Cir. 2001), involving an infectious disease is also off the mark, as the Petition is not asking the Court to make any guarantees of safety, but challenging the reasonableness of the State's responses.

The State's concerns about a separation of powers are not founded here. Courts appoint special masters to perform judicial functions and a special master has an inherently judicial role. While it is undisputed that the Board has exclusive authority to grant pardons, parole, and commutations, those are not the remedies the Petition seeks, distinguishing it from cases like *Comm. for Public Counsel Services*, cited above. The State's reliance on *Comm. for Public Counsel Services* is also misplaced because there, unlike here, the petitioners agreed that there was no violation of constitutional rights, and the Court held that it did not have the authority to exercise supervision over the executive branch in that circumstance. *See* 142 N.E.3d at 435. Here, the Petitioners have made no such concessions.

Here, the Petition seeks releases as a remedy to unconstitutional conditions. To the extent that the Court agrees that the Board is the only entity capable of releasing prisoners at all, then the Petition asserts that the Board's process is insufficient in quickly and effectively making releases in a manner effective to address the risk of COVID-19 transmission. If the Court agrees with this proposition, *Lancaster* and Rule 65B(d)(2) give the Court the power to remedy that with appropriate orders.

While court reviews of claims involving cruel and unusual punishment review of Board decisions have only thus far been raised in the context of a challenge to sentence length, the State Respondents cite no authority challenging this Court's ability to review Board decisions and inaction based on conditions of confinement. In *State v. Herrera*, this Court reviewed a mentally ill defendant's claim that sentencing him to prison, rather than allowing him to stay at the state hospital, violated his right to be free from unnecessary rigor because he would not receive adequate treatment for his mental illness and would likely be abused by other prisoners. 1999 UT 64 at ¶ 40. Although Herrera was challenging a sentencing court's decision, not the Board's, the

underlying basis of his claim was not that the length of his sentence was disproportionate and therefore cruel and unusual, but that his constitutional rights would be violated if he had to be incarcerated at the prison because of the conditions of his confinement. *See id.* The Court denied this claim not because of the unavailability of that sort of relief, but because the Court held that his claims were too speculative based in part on the fact that it was not yet certain that he would end up in the prison and the prison was changing its policies for treating mentally ill inmates. *See id.* at ¶ 43-44.

Analogously, conditions of confinement relief could be available as a remedy for Board decisions, because although they are not judicial, there are circumstances when constitutional conditions of confinement issues are implicated in the determination of whether and where to hold someone in custody. This Court has affirmed that Board decisions are subject to habeas corpus review. *See Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 735 (1991). In *Renn v. Utah State Bd. of Pardons*, the Court affirmed that "a writ of habeas corpus may be used to challenge cruel or oppressive conditions of imprisonment." 904 P.2d 677, 682 (Utah 1995) (citing *Wickham v. Fisher*, 629 P.2d 896 (Utah 1981). While the Court held in *Renn* that writs of habeas corpus cannot be used to challenge Board actions under Rule 65B(e) (the predecessor for Rule 65B(d)), see 904 P.2d 677, 683 (Utah 1995), Petitioners are not individual prisoners challenging Board action, but are seeking review and expanded release criteria for large categories of prisoners, both for the safety of those prisoners who are released as well as those who remain.

To the extent that this Court may find that habeas relief is not available vis a vis the Board, extraordinary relief is still warranted under Rule 65B(d), and the Court has authority to In *State v. Barrett*, this Court explained that a court reviewing a petition for extraordinary relief "will consider multiple factors . . . such as the egregiousness of the alleged error, the significance

of the legal issue presented by the petition, the severity of the consequences occasioned by the alleged error, and additional factors, may all affect the court's decision." 2005 UT 88, ¶ 24, 127 P.3d 682. The Court explained that a person challenging a Board decision must show a substantial violation of rights before the courts could interfere, *see id.*, ¶ 25, and Petitioners have alleged, and presented supporting evidence that incarcerated individuals are being subjected to cruel and unusual punishment and unnecessary rigor because they are being exposed to an unacceptably high risk of serious injury or death.

Egregiousness of Board error is not necessarily dispositive. *See id.* "[A] simple mistake of law or a simple abuse of discretion can have dramatic consequences, and it would be a disservice to this state for this court to adopt a standard of review so stringent as to foreclose the possibility of remedying such an error." *Id.* Here, the consequences from error can be incredibly dire, and not correcting those errors puts prisoners, corrections staff, and their families and community in serious danger. In correctional facilities across the country COVID-19 has spread rapidly and silently (based on available data from mass testing efforts showing large numbers of asymptomatic infected individuals) in spite of robust screening procedures equal to or surpassing those presented by UDC, infecting tens of thousands and killing hundreds. The legal issues presented by the petition, namely the constitutionality of conditions of confinement during a global pandemic, are significant, pressing, and far-reaching.

Finally, the Petition does not suggest that procedures including required notice and opportunity to victims should be abridged, nor does the State. The Petitioners explain in detail in their opposition to the movant intervenors' motion to intervene why those issues are not seriously implicated in this Petition, and why State Respondents are adequate representatives to the extent that they are. Petitioners adopt those arguments herein.

CONCLUSION

For all of these reasons, the Court should grant the Petition for Extraordinary Relief and order further proceedings to determine the appropriate remedies.

Dated May 13, 2020.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 2020, I sent copies of this [redacted] version of the reply brief and attached exhibits via electronic mail to the following:

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