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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR PIERCE COUNTY

RYAN MICHAEL RAY NAGEL,
et al.,

Plaintiff,

v.

WASHINGTON DEPARTMENT
OF CORRECTIONS, et al.,

Defendants.

CAUSE NO. 20-2-05585-4

MEMORANDUM OF AMICUS CURIAE
SEATTLE CHAPTER OF THE
NATIONAL LAWYERS GUILD

COMES NOW the Seattle Chapter of the National Lawyers Guild, by and through its attorney, Neil M. Fox,¹ and submits this memorandum of amicus curiae, and respectfully asks that the Court grant the Plaintiffs’ requested relief.

A. Identity and Interest of Amicus Curiae

The National Lawyers Guild (“NLG”) is a non-profit voluntary bar association of lawyers, law students, legal workers and jailhouse lawyers. From its formation in 1937, it was the nation’s first racially integrated bar association. Since then, the

¹ Mr. Fox was assisted in this brief by two law students, Laura Lyons and Sara Suryan.

1 NLG has been at the forefront of efforts to develop and ensure respect for the rule of
2 law and basic rights. Its mandate is to advocate for fundamental principles of social
3 and economic fairness and for human and civil rights, including the protection of rights
4 guaranteed under international law, the United States Constitution and laws, and the
5 constitutions and laws of the various states. Many of the members of the Seattle
6 Chapter of the NLG are criminal defense lawyers and immigration lawyers who have
7 particular concerns for the rights of incarcerated people.

8 **B. *Issues of Concern to Amicus Curiae***

9 1. What duty does the State have to protect the physical safety and welfare
10 of people who are incarcerated in our prisons?

11 2. What historical experience has there been with the failure of the
12 government to care for the physical safety and welfare of prisoners during times of
13 emergency?

14 **C. *Argument***

15 **1. *The State Has a Special Duty to Protect People Confined in its***
16 ***Prisons***

17 “Washington courts have long recognized a jailer’s special relationship with
18 inmates, particularly the duty to ensure health, welfare, and safety.” *Gregoire v. City of*
19 *Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010) (plurality). A jail, and by
20 extension its staff, also have a duty “to protect an inmate from injury by third parties
21 and jail employees.” *Id.* at 645 (Madsen, C.J., concurring/dissenting). Though
22 *Gregoire v. City of Oak Harbor* discussed a prisoner in a county jail, the Washington
23 Court of Appeals has noted that “[i]t is undisputed the Department [of Corrections]
24 owes a duty to ensure the health, welfare, and safety of incarcerated individuals.”
25 *Hopovac v. State Department of Corrections*, 197 Wn. App. 817, 823, 391 P.3d 570
26 (citing *Gregoire*, 170 Wn.2d at 635), *rev. granted and case dismissed upon joint*
27 *motion* 188 Wn.2d 1014, 396 P.3d 339 (2017).

28 In *Kusah v. McCorkle*, 100 Wash. 318, 325, 170 P. 1023 (1918), over a hundred
years ago, our Supreme Court acknowledged that a sheriff running a county jail “owes

1 the direct duty to a prisoner in his custody to keep him in health and free from harm,
2 and for any breach of such duty resulting in injury he is liable to the prisoner or, if he
3 be dead, to those entitled to recover for his wrongful death.” The source of this duty
4 arises from the very lack of freedom of the prisoner:

5 The duty owed “is a positive duty arising out of the special relationship
6 that results when a custodian has complete control over a prisoner
deprived of liberty.”

7 *Gregoire v. City of Oak Harbor*, 170 Wn.2d at 635 (plurality) (quoting *Shea v. City of*
8 *Spokane*, 17 Wn. App. 236, 242, 562 P.2d 264 (1977), *aff'd*, 90 Wn.2d 43, 578 P.2d 42
9 (1978).

10 This common law duty that the Department of Corrections specially owes to
11 those people locked behind its walls is amplified both by statute and constitutional
12 protections. Deliberate indifference by prison personnel to prisoners’ medical issues
13 can constitute “unnecessary and wanton infliction of pain” and therefore contravenes
14 the Eight Amendment of the United States Constitution. *Estelle v. Gamble*, 429 U.S.
15 97, 104, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251 (1976) (quoting *Gregg v. Georgia*, 428
16 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). Washington’s own
17 constitutional prohibition against cruel punishment, article I, section 14, of the
18 Washington Constitution provides even broader protections than the Eighth
19 Amendment. *See State v. Gregory*, 192 Wn.2d 1, 14-17, 427 P.3d 621 (2018).

20 In the 1970s and early 1980s, the failure of Washington to provide a safe and
21 healthy environment in our prisons, particularly in the area of health and medical care,
22 led first to prison unrest² and then to extended litigation with federal court intervention.
23 *See Hoptowit v. Ray*, 682 F.2d 1237, 1252-54 (9th Cir. 1982) (upholding finding that
24 Washington State Penitentiary’s medical care was so deficient it violated the Eighth
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28 ² *See* “9 Persons Are Seized As Hostages at Prison In Washington State,” *New York Times*(5/10/79)
(<https://www.nytimes.com/1979/05/10/archives/9-persons-are-seized-as-hostages-at-prison-in-washington-state.html>)
(accessed 3/25/20).

1 Amendment).³ In the wake of this history, in 1989, the Legislature mandated that
2 people “in the custody of the department of correction receive such basic medical
3 services as may be mandated by the federal Constitution and the Constitution of the
4 state of Washington.” RCW 72.10.005.

5 This duty to provide medical services is tied into the duty to prevent prison
6 overcrowding. *See Hoptowit*, 682 F.2d at 1249 (overcrowding “may dilute other
7 constitutionally required services such that they fall below the minimum Eighth
8 Amendment standards, and it may reach a level at which the shelter of the inmates is
9 unfit for human habitation.”). Here, while Washington prisons may not be
10 unconstitutionally overcrowded under normal circumstances, given the social
11 distancing required to prevent the widespread transmission of COVID-19, it is
12 apparent that with current levels of population in DOC, DOC is simply not able to
13 comply with the Governor’s Emergency Proclamations. Under RCW 9.94A.870, the
14 Governor has the power to reduce prison population in this circumstance so as to place
15 the prisons into compliance with the requirements of the current pandemic emergency,
16 a result that is constitutionally required as well.⁴

17 **2. *Historically During Times of Disaster, Our Government Has***
18 ***Sometimes Failed to Protect People in our Prisons***

19 Already before the Court is evidence and briefing regarding the special
20 problems with protecting from disease the people who are confined within

21
22 ³ Amicus curiae recognizes that prison conditions litigation has experienced huge changes in terms of
23 procedure over the last generation and does not rely on *Hoptowit* as authority for the procedural mechanisms of court
intervention into prison conditions.

24 ⁴ RCW 9.94A.870 provides in part:

25 If the governor finds that an emergency exists in that the population of a state residential
26 correctional facility exceeds its reasonable, maximum capacity, then the governor may do any one
or more of the following: . . .

27 . . .

28 (2) Call the clemency and pardons board into an emergency meeting for the purpose of
recommending whether the governor's commutation or pardon power should be exercised to meet
the present emergency.

1 Washington’s prisons. But there is a history of problems that our country has had
2 regarding the protection of prisoners from civil emergencies, a history that we should
3 learn from.

4 During a remarkably similar epidemic in 1918, San Quentin Prison in California
5 experienced three waves of the so-called “Spanish Flu.” The first of these three
6 outbreaks likely began April 13th, when a prisoner sick with the illness was transferred
7 to the facility and subsequently ate in the mess hall, shared a room with about 20 new
8 prisoners, and mingled with the 1,900 other prisoners in the yard. By May 26, 101
9 people had been admitted into the hospital and 3 people died. At the peak of the
10 outbreak, respectively on April 23 and 24, about half of the prison population was ill.
11 During the second outbreak, which began October 3, there were 69 cases with 2
12 deaths. During the second outbreak, prisoners were given masks for protection but
13 largely went unused. The last outbreak, which began November 25, resulted in 58
14 cases and no new deaths. After epidemics, the main prison doctor, Dr. Leo Stanley,
15 concluded that the infection spread throughout the prison because of the close contact
16 of the prisoners in poorly ventilated rooms.⁵

17 The inability of the government to protect people confined its penal institutions
18 during times of crisis and social disorder was even more vividly demonstrated during
19 Hurricane Katrina. On August 29, 2005, during this extraordinary crisis, the sheriff’s
20 department in New Orleans abandoned hundreds of inmates in Templeman III, one of
21 the buildings at the Orleans Parish Prison (“OPP”) compound. As the international
22 human rights organization Human Rights Watch would later document, the prison
23 administrators had no evacuation plan in place and prisoners in a unit of 600 people,
24 “were abandoned in their cells without food or water for days as floodwaters rose
25 toward the ceiling.” According to inmates interviewed afterward, they “had no food or
26 water from the inmates’ last meal over the weekend of August 27-28 until they were
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⁵ See Stanley, L. L. “Influenza at San Quentin Prison, California.” Public Health Reports (1896-1970), vol. 34, no. 19, 1919, pp. 996-1008 (www.jstor.org/stable/4575142) (accessed 3/25/20).

1 evacuated on Thursday, September 1. By Monday, August 29, the generators had died,
2 leaving them without lights and sealed in without air circulation. The toilets backed up,
3 creating an unbearable stench. . . . Some inmates from Templeman III have said they
4 saw bodies floating in the floodwaters as they were evacuated from the prison. A
5 number of inmates told Human Rights Watch that they were not able to get everyone
6 out from their cells. Inmates broke jail windows to let air in. They also set fire to
7 blankets and shirts and hung them out of the windows to let people know they were
8 still in the facility. Apparently at least a dozen inmates jumped out of the windows.”⁶

9 The ACLU would later put out an extensive report after an 11-month
10 investigation.⁷ The findings revealed not only a callous disregard for the lives and
11 well-being of the people locked up in OPP, but a pattern of governmental denial and
12 coverups:

13 At the time, public officials and traditional news media said little
14 about the OPP prisoners. The first reports from government officials
15 were based on rumors that prisoners had rioted and taken over parts of
16 the jail complex. New Orleans City Council President Oliver Thomas
17 told a local television station that rioting prisoners had taken a deputy,
18 his wife, and their four children hostage. [footnote omitted] Louisiana’s
19 Department of Public Safety and Corrections received a report that
20 prisoners had taken over an armory on the 10th Floor of an OPP building
21 and that a firefight was in progress.[Footnote omitted] These claims, like
22 so many that were repeated in the days after the storm, were never
23 substantiated.[Footnote omitted]

24 The first accounts of what really happened at OPP during and
25 after Hurricane Katrina came to light once the prisoners started
26 recounting their experiences to family members, lawyers, and local and
27 national civil rights and human rights organizations. The picture that
28 emerged from all of these accounts was one of widespread chaos, caused
in large part by inadequate emergency planning and training by local
officials, and of racially motivated hostility on the part of prison officials
and blatant disregard for the individuals trapped in the jail.

ACLU, *Abandoned & Abused: Executive Summary and Recommendations*.⁸

6 Human Rights Watch, *New Orleans: Prisoners Abandoned to Floodwaters*, Sept. 21, 2005
(<https://www.hrw.org/news/2005/09/21/new-orleans-prisoners-abandoned-floodwaters#>) (accessed 3/25/20)

7 https://www.aclu.org/sites/default/files/field_document/oppreport20060809.pdf (accessed 3/25/20).

8 <https://www.aclu.org/other/abandoned-abused-executive-summary-and-recommendations> (accessed
(continued...))

1 What took place in New Orleans occurred in the middle of a modern American
2 metropolis, only 14-15 years ago. If such chaos could occur there, there is reason to
3 suspect that Washington State will similarly not protect the thousands of people who
4 are entrusted to its care during the current pandemic and that many of these people will
5 be abandoned, not to face rising flood waters, but to contract a serious illness due to
6 overcrowding and the inability to conform with the Governor's social distancing
7 orders. Too be sure, the Respondents have provided evidence that they are taking the
8 pandemic seriously and claim to have the best of intentions to protect those people
9 inside Washington's prisons who cannot care for themselves. But in an emergency,
10 without the oversight of civil society and the courts, we should not defer blindly to the
11 assurances that all is fine.

12 **D. Conclusion**

13 While the State has the power to commit thousands of people to confinement in
14 our prisons, no person's crime in Washington currently justifies a death sentence. *See*
15 *State v. Gregory, supra* (striking down Washington's capital punishment system under
16 article I, section 14). Because the State has a special duty to protect those entrusted in
17 its care, the Court should grant the Plaintiff's requested relief.

18 Dated this 25th day of March 2020.

19 Respectfully submitted,

20 s/ Neil M. Fox
21 WSBA No. 15277
22 Attorney for Amicus Curiae

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⁸(...continued)
3/25/20).

1 *CERTIFICATE OF SERVICE*

2 I certify that on the date below, I caused the MEMORANDUM OF AMICUS
3 CURIAE SEATTLE CHAPTER OF THE NATIONAL LAWYERS GUILD to be
4 served on counsel for the plaintiffs and counsel for the respondents by having my staff
5 email copies to:

6 BLAKE I KREMER Blake@kremerlaw.com
7 DENA ALO-COLBECK alocolbecklaw@gmail.com
8 TIMOTHY J. FEULNER Tim.Feulner@atg.wa.gov

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

11 Dated this 25th day of March 2020, at Seattle, WA.

12 s/ Neil M. Fox
13 _____
14 WSBA No. 15277