165A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons, Plaintiff-Appellants, v. ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant-Appellees.	)	From Wake County 19 CVS 14089

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PLAINTIFF-APPELLANTS' BRIEF

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TABLE OF AUTHORITIES

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Brown v. Board of Educ., 347 U.S. 483 (1954) 21
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Chambers v. Moses H. Cone Mem'l Hosp.,
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Coleman v. Schwarzenegger, 922 F. Supp. 2d 882 (E.D. Cal. 2009) 52
Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.,
376 N.C. 558, 2021-NCSC-6 (2021) .....*passim*
Corum v. Univ. of N.C.,
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Crow v. Citicorp Acceptance Co.,
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Davis v. Ayala, 576 U.S. 257 (2015) 44
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Dean v. Coughlin, 107 F.R.D. 331 (S.D.N.Y. 1985) 46
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Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989) 62
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Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014) .....*passim*
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Pitts v. Am. Sec. Ins. Co., 144 N.C. App. 1, 550 S.E.2d 179 (2001) 39
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Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990) 27
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Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) 22

Constitutional Provisions

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N.C. Const. of 1868, Art. I, § 27. 58
N.C. Const. Art. I, § 27. ..... *passim*

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N.C.G.S. § 7A-27(a)(4) 18
Fed. R. Civ. P. 23 33

Other Authorities

Black's Law Dictionary (11th ed. 2019) 56, 65
Brief for the United States as Amicus Curiae, *Wilson v. Seiter*, 501 U.S. 294 (1991), 1990 WL 10022404 66
Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015 (2004) 21
James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. Rev. 387 (2013) 45
John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017) 58
John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* (2d ed. 2013) 64
Jules Lobel, *The Liman Report and Alternatives to Prolonged Solitary Confinement*, 125 Yale L.J. F. 238 (2016) 40
Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357 (2018) 58
Mark A. Davis, *A Warren Court of Our Own: The Exum Court and the Expansion of Individual Rights in North Carolina* (2020) 48
Merriam-Webster, https://www.merriam-webster.com/dictionary/ 56
Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History & Review of the Literature*, 34 Crime & Just. 441 (2006) ... 56
Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, N.Y Times (Apr. 24, 2021), https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html) 15
2 William B. Rubenstein, Newberg on Class Actions (5th ed., Dec. 2017 update) 22

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PLAINTIFF-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. Did the trial court err by denying plaintiffs' motion for class certification?

II. Did the trial court err by conflating the issues of class certification and the constitutional standard for plaintiffs' claims?

III. Did the trial court err by adopting the Eighth Amendment "deliberate indifference" test for claims under Article I, Section 27 of the state Constitution seeking prospective relief from dangerous prison conditions?

INTRODUCTION

A class action is a critical tool for protecting vulnerable people placed in the government's care. When hospitals, child welfare agencies, or prisons jeopardize the rights of people in state custody, those people may sue as a class to efficiently litigate their claims and obtain meaningful relief.

That is the situation in this case. Every day, North Carolina subjects thousands of people in state prison to solitary confinement. Each of them faces the same conditions: 22 to 24 hours a day in a cell the size of a parking spot, with little opportunity for human contact. The resulting harms are largely undisputed—defendants have acknowledged that "solitary confinement causes severe psychiatric harm, is 'toxic to brain functioning,' and causes harm that manifests as panic attacks, paranoia, perceptual distortions, and problems with impulse control." (R p 548). And the effects do not always end when the confinement does. Even after release from prison, people suffer lifelong post-traumatic stress, social withdrawal, and higher rates of suicide.

Defendants' statewide policies authorize indefinite placement of people in solitary confinement. The incarcerated named plaintiffs and others like them have endured extreme isolation and sensory deprivation for months or years on end.

Faced with these grim conditions, plaintiffs sued. They allege that defendants' policies and practices of solitary confinement, viewed as a whole, impose cruel or unusual punishment forbidden by Article I, Section 27 of the

state Constitution. Plaintiffs seek declaratory and injunctive relief that would require defendants to use solitary confinement as a last resort and for the shortest time possible.

A class action is the proper way to resolve these claims. Thousands of potential class members face nearly identical physical conditions. They are subject to the same statewide policies that authorize prolonged solitary confinement. They rely on the same legal theory. And they seek uniform relief through changes to statewide policies—no one is asking for an individually tailored remedy based on unique personal circumstances.

Yet the trial court denied class certification, committing reversible error at nearly every step of its analysis.

First, the trial court failed to acknowledge that institutionalized plaintiffs may seek broad systemic relief when faced with systemic risks of harm. This kind of claim does not hinge on the unique experience of any individual, as the trial court believed. Rather, plaintiffs may obtain relief if systemic conditions, "taken as a whole," expose class members to a "substantial risk of serious harm." *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (quotation marks omitted). Individualized assessments of class members have little if any relevance.

That fundamental error of law led the trial court to find that common issues did not predominate over individual issues, and that a class action was not a superior method of adjudication. In a case like this one, where "a class seeks an indivisible injunction benefiting all its members at once, . . . [p]redominance and

superiority are self-evident." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362–63 (2011).

Second, the trial court erred by concluding that the named plaintiffs were inadequate class representatives. These individuals have no conflicts of interest, have personal stakes in this case, and secured experienced counsel. Defendants never contested these points. Even so, the trial court reasoned that the named plaintiffs did not embody the diversity of the proposed class and had committed disciplinary infractions leading to solitary placement. (R p 1006). This rationale imposes the kind of arbitrary restriction on class certification that this Court has long avoided.

As part of its analysis, the trial court also conflated the question of class certification with the constitutional standard for plaintiffs' claims. Plaintiffs argued that an objective test—which focuses on the severity of the challenged conditions—should apply. Defendants urged a standard that also considers the subjective mental state of prison officials. The trial court agreed with defendants, and appeared to conclude that, as a result, a class did not exist.

This too was error. Determining the Section 27 standard is a common question of law for all class members, but the answer to that question does not affect class certification. Regardless of which standard applies, common issues faced by all class members will center on solitary living conditions, the operation of specific state policies and practices, and the nature and severity of resulting risk.

Thus, the Court need not address the constitutional question. But if it does, it should reverse and hold that an objective standard applies: When incarcerated plaintiffs seek prospective relief from state-imposed conditions, they must prove exposure to an objectively substantial risk of serious harm. This approach follows naturally from the text of Section 27, its history, and this Court's precedent, none of which implicate the subjective mindset of state officials.

For these reasons, this Court should reverse the trial court's order denying class certification. If this Court addresses the constitutional standard for plaintiffs' claims, it should hold that an objective standard applies.

STATEMENT OF THE CASE

On 16 October 2019, named plaintiffs Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett filed a putative class action complaint in Wake County Superior Court against the North Carolina Department of Public Safety (DPS) and its secretary, Erik Hooks. (R p 4). Plaintiffs sought to represent "a class of all current and future persons in DPS custody who are being or will be subjected to solitary confinement." (R p 7). They alleged that defendants' "policies and practices concerning solitary confinement, taken as a whole," impose cruel or unusual punishment. (R p 42). Plaintiffs requested declaratory and injunctive relief requiring defendants to limit their use of the practice. (R p 43).

Defendants answered the complaint three months later. (R p 44). Under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, Chief Justice Beasley designated this case as exceptional and appointed Superior Court Judge James E. Hardin, Jr., to preside. (R p 85).

On 24 April 2020, plaintiffs filed a motion for class certification under North Carolina Rule of Procedure 23(a). Plaintiffs asked the trial court to appoint Shawn Bonnett, Anthony McGee, and Robert Parham as class representatives and appoint plaintiffs' counsel as class counsel. (R p 92).[1]

Plaintiffs took limited discovery and the parties submitted evidence. The trial court held a WebEx hearing on the motion on 1 December 2020. The parties also presented argument on the constitutional standard for plaintiffs' claims.

On 18 February 2021, the trial court issued its class certification order. The court elected to first address the constitutional standard. It adopted defendants' view that the current Eighth Amendment standard applies to claims under Section 27 alleging dangerous prison conditions: To prevail, plaintiffs "must present evidence to demonstrate: (1) they face an objectively 'substantial risk' of serious harm, and (2) defendant prison officials were 'deliberately indifferent' to that risk—i.e., they were subjectively aware and failed to respond reasonably to that risk." (R p 1007).

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[1] Rocky Dewalt remains a plaintiff in this case, but plaintiffs did not ask the trial court to appoint him as a class representative.

As for class certification, the trial court held that a class did not exist because (1) plaintiffs had not proven that the challenged policies and practices created the alleged risk of harm, and (2) potential class members faced too many differences in terms of living conditions, length of confinement, and defendants' rationales for solitary placement. (R p 990). As part of this analysis, the trial court found plaintiffs' requested remedy vague, and expressed unwillingness to "oversee a significant portion of the operation of North Carolina's prisons." (R p 1002).

The trial court also implicitly held that the proposed class could not exist under Rule 23 because it disagreed with plaintiffs' proposed Section 27 test: "Central to Plaintiffs' argument that a class exists is their assertion that to be entitled to relief under Section 27, the putative class members need only prove that the challenged policies and practices create a substantial risk of serious harm to the health of incarcerated persons." (R pp 981–82 (quotation marks omitted)).

The trial court next concluded that a class action was not a superior means of adjudication because it would involve too many individualized determinations for different class members. (R p 1004–05). The trial court also stated that a class action was unnecessary because individual plaintiffs could instead seek relief in federal court or the North Carolina Industrial Commission. (R p 1005).

Finally, the trial court found that the named plaintiffs were inadequate class representatives because they did "not represent the wide spectrum of

inmates potentially encompassed in the class" and had been found guilty of prison rule infractions that led to solitary confinement. (R pp 1005–07).

Plaintiffs timely appealed. (R p 1009).

STATEMENT OF THE FACTS

A. Solitary confinement in North Carolina prisons imposes extreme isolation and sensory deprivation.

Defendants employ several administrative classifications of "restrictive housing," the state's official term for solitary confinement. The record shows that for each classification, the physical living conditions are virtually identical.

The trial court considered unrebutted affidavits from the named plaintiffs and other individuals who had "collectively experienced each of the five specified restrictive housing classifications across twenty-one state prisons . . . ." (R p 978). The affiants testified that regardless of which prison or housing classification they were in, their experience was functionally the same. (R pp 270–71, 282, 285, 288–89, 295–96).

The affidavits establish that defendants' solitary cells are all about the size of a parking space or "a small bathroom," some no more than sixty square feet. The cells have sparse furnishings, and windows are usually covered with mesh wire that obstructs any view of the outside. (R pp 270, 278, 284, 288, 292, 295). People must spend at least 22 or 23 hours a day there; out-of-cell recreation happens at most five times a week in a slightly larger cage that resembles a dog

kennel. (R pp 270, 278, 279, 285, 288, 292, 295–96). Prison staff exercise their discretion to limit out-of-cell time, so people can go days or weeks on end without leaving their cells for exercise. (R pp 279, 288, 289, 296).

The affiants also confirmed that meaningful human contact in solitary is largely impossible. People there must eat all meals in their cells where they live only feet from their toilet. They may not congregate for religious services, classes, recreation, or any other reason. Inside these cells, people generally cannot see each other face to face. Solitary housing units are often very loud, so people can only communicate by yelling or banging on walls. (R pp 270–71, 279–80, 284–85, 289, 292, 296).

The trial court also considered a report from the nonprofit Vera Institute of Justice (Vera Report) investigating defendants' use of restrictive housing. At defendants' invitation, the Vera Institute "reviewed the Department's policies, analyzed data provided by the Department, and toured various prisons managed by the Department." (R p 978). The report, which is published on defendants' website, made extensive findings and recommendations. (R pp 327–98). The trial court found plaintiffs' affidavits to "generally align with the Vera Report findings." (R p 978).

Vera investigators found DPS restrictive housing units to be "characterized by conditions of extreme isolation and sensory deprivation." (R p 312). People there "spent a minimum of 23 hours a day in their cell with severely limited interaction with other people. Out-of-cell time consisted primarily of individual

recreation in a small secure enclosure for one hour a day, five days a week. There was very little, if any, opportunity for programming or congregate activity." (R p 312).

Defendants told the trial court they had "updated" some of their restrictive housing policies since the Vera Report was published in December 2016, but they did not explain how, nor did they suggest that the actual conditions in solitary confinement cells are now any different. (R p 610; T pp 35–36).

B. Defendants' statewide policies authorize prolonged stays in solitary confinement for thousands of people.

Plaintiffs submitted evidence to the trial court on defendants' written policies governing solitary confinement. Defendants have several differently named classifications, but the conditions imposed throughout are largely identical. Prison staff transfer people between classifications without necessarily even moving them to a different cell. (R p 409).

Restrictive Housing for Control Purposes (RHCP) "is a long-term restrictive housing assignment for the removal of [an incarcerated person from] the general offender population to confinement in a secure area." (R p 976 (brackets original)). Defendants may place someone in RHCP if they are found guilty of certain disciplinary infractions, but no conviction or "overt act of violence" is required. (R p 120). Housing reviews occur every six or twelve months, after which defendants may renew someone's RHCP placement or transfer them to another solitary classification, or return them to the regular

population. (R p 977). If a person is found guilty of injuring prison staff, they automatically receive twelve months in RHCP followed by a transfer to another form of solitary confinement, the Rehabilitative Diversion Unit (RDU). (R pp 120, 977).

The trial court found that "[p]eople in RHCP have access to a maximum of one hour of recreation time in exercise cells, five days a week, and a ten-minute shower, three times a week. Prison staff have authority to curtail this time." (R p 976). "People in RHCP must eat all meals in their cell, and may not attend communal religious, educational, or vocational programs outside their cell." (R p 976). "They have no guaranteed telephone access and no canteen access," and at most may have "two non-contact visits every thirty days . . . ." (R p 977).

High Security Maximum Control (HCON) more severely curtails the few privileges allowed people in RHCP. (R pp 977–78). "Like RHCP, HCON placement does not require a disciplinary infraction, and classification reviews for people in HCON occur every six or twelve months." (R p 978).

Restrictive Housing for Disciplinary Purposes (RHDP) "involves living conditions that are virtually identical to RHCP." (R p 978). The trial court summarized how RHDP placement is a " 'presumptive sanction' for a variety of infractions." (R p 977).

> Some infractions involve violence, but many do not—prison staff may impose up to 20 or 30 days of solitary confinement for disobeying an order, using "language or specific gestures or acts that are generally considered disrespectful, profane, lewd, or defamatory,"

> "[i]nterfering with a staff member in the performance of his or her duties," possessing a cell phone, lying to prison staff, masturbating, or refusing a drug test.

(R p 977 (brackets original)). The policy also authorizes RHDP placement beyond thirty consecutive days. (R p 977).

Defendants assign people to Restrictive Housing for Administrative Purposes (RHAP) "for shorter term non-disciplinary placement. RHAP policy authorizes placement for up to 60 days, though it also authorizes longer periods." (R p 978). It is often used when prison staff are investigating a potential disciplinary infraction. (R p 129).

Finally, the RDU is a program with three phases, each lasting about six months, with the end goal of return to the regular population. (R p 132–33). Defendants usually transfer someone to the RDU directly from RHCP. (R p 405). The first two phases of the RDU involve living in solitary cells for 22 to 24 hours a day with restrictions much like RHCP. (R pp 278–80, 295–96).

Less than three months before this case began, defendants reported keeping approximately 3,006 people in these classifications. About 799 people were in RHCP, 627 in RHDP, 1,162 in RHAP, 65 in HCON, 178 in Phase I of the RDU, and 175 in Phase II. (R p 167).

Defendants' policies set no limit on how long one may be kept in one classification or any sequence of classifications. In discovery, defendants reported that 1,791 people then in solitary confinement had been kept in one classification or a sequence of classifications for at least thirty straight days; 699 people had

spent at least 180 straight days; 297 had spent a year or more; 83 had spent a year and a half or more; and 42 had been there at least two years. (R pp 403–405).

C. The risks of mental and physical harm created by solitary confinement are well-established.

The Vera Report repeatedly acknowledges the "potentially devastating psychological and physiological impacts" of solitary confinement. (R pp 311, 318, 388). And in December 2020, Governor Cooper's Task Force for Racial Equity in Criminal Justice—which includes Secretary Hooks—acknowledged that solitary confinement in North Carolina "comes at the cost of great mental and emotional harm." (R p 548). The Task Force recommended that, following reforms recently adopted by other states, North Carolina should eliminate solitary confinement for indefinite periods of time and periods exceeding fifteen straight days. (R p 549).

The Task Force's findings reflect years of expert consensus, both inside and outside DPS, that solitary confinement creates risks of mental and physical harm. Two years ago, DPS's Director of Behavioral Health, Dr. Gary Junker, wrote a peer-reviewed article acknowledging these risks of harm and expounding on the significant risks following release from DPS custody. (R p 170). Dr. Junker analyzed data from DPS and concluded that "people who had spent any time in restrictive housing during incarceration in a state prison in North Carolina were significantly more likely to die of all causes in the first year after release than those who did not." (R p 177).

The Task Force, the Vera Report, and Dr. Junker's article all cite a 2006 article by Dr. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*. (R pp 179, 318, 548). There, Dr. Grassian observes that the social isolation and lack of environmental stimulation imposed by solitary confinement cause "either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness." (R p 190). Such harm does not take long to manifest; "even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium." (R p 188).

Dr. Grassian further observes that even though some acute symptoms may subside after a person is removed from solitary confinement, many people "will likely suffer permanent harm as a result . . . ." (R p 189). These long-term effects "not only include persistent symptoms of post traumatic stress . . . but also lasting personality changes—especially including a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction." (R p 210).

The Vera Report and Dr. Junker's article also cite the work of Dr. Craig Haney. (R pp 179, 318). Dr. Haney discusses "the risk of psychological harm that social isolation creates," as well as "the importance of meaningful social contact and interaction" for human health. (R p 254). The harm from isolation "is sometimes so severe that it is irreversible. Indeed, for some prisoners, the attempt to cope with isolated confinement sets in motion a series of long-lasting

cognitive, emotional, and behavioral changes that can persist beyond the time that the prisoners are housed in isolation[.]" (R p 255).

Government entities and professional associations have heeded these findings. In 2016, the National Commission on Correctional Health Care stated that "[p]rolonged (greater than 15 consecutive days) solitary confinement is cruel, inhuman and degrading treatment, and harmful to an individual's health." (R p 14). The United Nations' "Nelson Mandela Rules" prohibit solitary confinement exceeding fifteen straight days—anything more constitutes torture. (R pp 14–15). Colorado, New Jersey, and New York have capped their use of solitary confinement at fifteen or twenty straight days. (R pp 18–19; Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, N.Y Times (Apr. 24, 2021), https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html).

North Carolina lags behind. While the Vera Report commended DPS's willingness to consider reform (R p 313), that remark does not negate the otherwise critical nature of the report's findings and recommendations. Indeed, after the report came out, defendants made their solitary confinement policies even harsher: In 2018, defendants changed the RHCP and HCON policies to require an automatic twelve-month placement for causing any injury to prison staff. (R pp 122, 126). There is also automatic placement from RHCP to the RDU and the RDU to HCON. (R pp 122, 128).

D. The named plaintiffs and other potential class members have suffered the effects of prolonged solitary confinement in North Carolina prisons.

In considering the harms of solitary confinement, the trial court received testimony from the named plaintiffs and other incarcerated people who have experienced extended placement in solitary confinement. They recounted the pain of nearly constant isolation.

Shawn Bonnett spent nine straight years in solitary confinement at Central Prison. His pain did not end when he got out: "I had a really difficult time dealing with returning to the conditions of regular population when I was let out of solitary there in 2007. I was told that I had sensory deprivation syndrome. I had anxiety attacks when I was around other people." (R p 281). And Mr. Bonnett's more recent placement in the RDU made "all of the effects of solitary come back for me and is going to make it harder instead of easier for me to go back to regular population." (R p 281).

Anthony McGee recently spent almost two years in solitary confinement. He testified about how the experience nearly cost his life: "Being in such a small cell all day makes me feel like I'm losing my mind. . . . When I wasn't in solitary I didn't think about wanting to die, but now I think about that a lot. I try to stay positive but it's really hard. It breaks you down." (R p 271). In 2019, Mr. McGee cut his wrists, tried to overdose on medication, and swallowed a battery. "I wanted to give up. I felt like nobody wanted to help me." (R p 271).

Despite spending more than a decade in solitary confinement, Thomas Accardi still finds it difficult to describe the experience. “Not being able to see people messes with you. . . . I’ve tried to explain it to my family before but I don’t think they understand.” (R p 284). Even so, Mr. Accardi knows that years of isolation have changed him. “The more solitary time I do the harder it gets to be around people. I’m getting more and more anxious and paranoid. . . . I used to not be so angry.” (R p 285).

Charles Hinnant has spent at least two straight years in solitary. He has diagnoses of PTSD and bipolar disorder. Mr. Hinnant’s symptoms worsened after a short time after being place in solitary; he experienced increased depression, more severe mood swings, paranoia, and visual and auditory hallucinations. (R pp 295–96).

Benjamin Pyrtle also knows the pain of nearly constant isolation and having little to occupy his mind. “Almost nothing happens in my unit,” he says. “There’s no people coming and going, no movement. It makes my days much longer and harder. . . . I suffer from anxiety and depression, and the nonstop boredom makes it a lot worse.” (R p 289).

All affiants have diagnoses of significant mental illness, but must live in conditions that make their illness worse, cause new illness, or both. The mental health care provided does little to mitigate these conditions. Prison staff typically make daily stops by restrictive housing cells only to check if the person inside is responsive. Otherwise, a mental health provider typically stops by once or twice a

month for a few minutes to see if the person inside is feeling suicidal. Some patients may have out-of-cell sessions with providers, but those also occur at most once or twice a month. (R pp 271, 282, 285, 289, 293, 296).

STATEMENT OF JURISDICTION

This Court has jurisdiction under N.C.G.S. § 7A-27(a)(4), which allows appeals from "[a]ny trial court's decision regarding class action certification under G.S. 1A-1, Rule 23."

STANDARD OF REVIEW

On appeal of a class certification order, this Court reviews issues of law de novo. *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014).

Findings of fact are binding if supported by competent evidence. *Id.* This standard shows deference to the trial court, but is less deferential than a clear error standard. *Id.* at 338 n.3, 757 S.E.2d at 471 n.3 (rejecting clear error standard for Rule 23). Appellate courts are "noticeably less deferential when the district court has denied class status than when it has certified a class." *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009) (cleaned up), *disc. rev. and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010).

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

In a case particularly well-suited for class action status, the trial court denied certification, committing reversible error nearly every step of the way. The trial court misunderstood the nature of plaintiffs' claims, which led to erroneous conclusions about the predominance of classwide issues and the superiority of the class action method. It improperly addressed the merits of the case on a preliminary procedural question. And it concluded that the named plaintiffs were inadequate class representatives despite its own findings to the contrary.

This Court should correct those errors.

Class Certification Standard

North Carolina Rule of Civil Procedure 23(a) provides: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued."

"By consolidating numerous individual claims with common factual and legal issues into a single proceeding, the class-action device saves the resources of both the courts and the parties." *Chambers v. Moses H. Cone Mem'l Hosp.*, 374 N.C. 436, 440-41, 843 S.E.2d 172, 175 (2020) (quoting *Gen. Tel. Co. of the Sw. v. Falcon.*, 457 U.S. 147, 155 (1982)). This Court has held that "Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary

and technical restrictions." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987) (quoting *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 231 (1979)).

To obtain class certification, plaintiffs must first establish that a class exists. A class "exists under Rule 23 when each of the members has an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 277, 354 S.E.2d at 462.

Plaintiffs must then satisfy other factors:

> (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Beroth Oil, 367 N.C. at 337, 757 S.E.2d at 470 (quoting *Faulkenbury v. Tchrs. & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997)).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 342, 757 S.E.2d at 474 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)).

Courts may only examine the merits of a claim as needed for this inquiry. *Id.* at 342 n.5, 757 S.E.2d at 474 n.5.

Once a plaintiff satisfies these requirements, the trial court must decide "whether a class action is superior to other available methods for" adjudicating the case. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

When construing North Carolina Rule 23, this Court considers Federal Rule 23 decisions as persuasive authority even though the two provisions are worded differently. *See, e.g.*, *Chambers*, 374 N.C. at 449, 843 S.E.2d at 181.

A. Class actions provide critical protection for vulnerable people subjected to harmful state action.

The class action mechanism has proven especially important for people exposed to harm by government institutions. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), class actions have enabled vulnerable groups in the government's care to obtain meaningful relief. *See generally* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1016 (2004) (analyzing state and federal litigation such as *Brown* that "disentrench[es] an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction").

Without the ability to sue as a class, many people suffering a civil rights violation—many of them unable to hire counsel—would effectively be left without a remedy. "For this reason, 'the class action device is especially pertinent

to vulnerable populations.' " *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 915 (10th Cir. 2018) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:65 (5th ed., Dec. 2017 update)).

Through class actions, children endangered by a dysfunctional child welfare system may seek injunctive relief to ensure that they will be spared further harm. *E.g.*, *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994). People with disabilities who are civilly committed to state hospitals can enforce their right to adequate care. *E.g.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). And incarcerated people have a means to address dangerous conditions such as overcrowding and decrepit facilities. *E.g.*, *Small v. Hunt*, 858 F. Supp. 510 (E.D.N.C. 1994), *aff'd*, 98 F.3d 789 (4th Cir. 1996).

The same principle is at work here. Thousands of institutionalized people seek equitable relief against a state agency that places them at substantial risk of serious harm.

B. Common issues predominate because all class members challenge the same policies and practices, face similar risks of harm, rely on the same legal theory, and seek the same relief.

The trial court erred by concluding that common issues of law or fact did not predominate.

Writing for the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), Justice Scalia discussed how courts must carefully examine predominance when class members seek a "combination of individualized and

classwide relief." *Id.* at 361. But when "a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Id.* at 362–63.

That is the case here. Plaintiffs seek indivisible relief from statewide policies, which will benefit the entire class at once.

i. Individualized assessments of class members have minimal relevance to plaintiffs' claims.

On a Rule 23 motion, misconstruing the law governing the plaintiffs' claims constitutes legal error. *See Beroth Oil*, 367 N.C. at 352, 757 S.E.2d at 480 (trial court committed error of law in applying test for property claims); *Blitz*, 197 N.C. App. at 312, 677 S.E.2d at 11 (vacating denial of class certification based on trial court's "misapprehension of the applicable law").

Here, the trial court did not grasp that when institutionalized persons seek systemwide injunctive relief from dangerous conditions, individualized assessments of class memberes have little relevance. The classwide risk of harm is the heart of the case. That error of law led to mistaken conclusions about the predominance of common issues and the superiority of the class action method.

The Eighth Amendment sets the floor—but not the ceiling—for the claims and relief available under Article I, Section 27 of the state Constitution. *See State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) (explaining that the

federal Constitution sets the minimum protections for parallel state provisions). Comparing the Eighth Amendment and Section 27, this Court has observed that "[o]ur state constitutional provision emphasizes the importance of this interest in North Carolina." *Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 844, 412 S.E.2d 654, 659 (1992).

The Eighth Amendment—and thus Section 27—forbids not only cruel and unusual sentences, but cruel and unusual prison conditions as well. "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). This protection applies to conditions "that pose an unreasonable risk of serious damage to [a person's] future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

Institutionalized people may bring such claims not based on any particular instance of harm to any particular person, but "on systemwide deficiencies . . . that, taken as a whole, subject [plaintiff class members] to substantial risk of serious harm . . . ." *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011) (quotation marks omitted) (affirming statewide injunctive relief); *see also Hutto*, 437 U.S. at 687 (affirming ruling that "taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment").

Courts have long recognized that this kind of claim is distinct from claims for individualized relief. *See, e.g.*, *Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) ("Individual claims for injunctive relief related to medical treatment are

discrete from the claims for systemic reform addressed in *Plata*."); *Gates v. Collier*, 501 F.2d 1291, 1301 (5th Cir. 1974) (the Eighth Amendment's protection "is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison"), *cited with approval in Helling*, 509 U.S. at 34; *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) ("The Supreme Court has approved of system-wide relief in prison cases involving systemwide violations resulting from systemwide deficiencies." (cleaned up)).

Courts have also observed this distinction in class actions challenging solitary confinement policies. These courts granted class certification and dismissed the relevance of individualized inquiries. *See, e.g.*, *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (classwide claim "does not require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination"); *Davis v. Baldwin*, No. 3:16-CV-600-MAB, 2021 WL 2414640, at *22 (S.D. Ill. June 14, 2021) ("Plaintiffs' claims do not rely on the types of conditions that differ between the facilities" but "on the baseline conditions in restrictive housing that emanate from . . . formal policies and systemic practices and thus exist at every facility."); *Wilburn v. Nelson*, 329 F.R.D. 190, 197 (N.D. Ind. 2018) ("Plaintiffs are attacking the rote policy of using solitary confinement; they are not challenging the application of it in any given circumstance."); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 856 (S.D. Miss. 2015) ("[T]he types of

injunctive relief requested by Plaintiffs would not require that the Court adjudicate the individual class members' needs or circumstances[.]").

Here, the trial court failed to recognize this vital distinction. The order below repeatedly asserts that each plaintiff's claim "depends greatly on the individual class member's experiences in the various restrictive housing settings." (R p 998). "Indeed, litigating this matter as a class would devolve into a series of mini trials on the particulars of each of the challenged restrictive housing settings and the myriad of circumstances that cause individuals to be placed in and remain in restrictive housing." (R p 999).

The trial court was describing a case that plaintiffs have not brought. This case is not an amalgamation of many individuals seeking damages or injunctions tailored to their unique circumstances. Rather, plaintiffs contend that they are all subject to a system of policies and practices that, viewed as a whole, creates excessive risks of harm for those subjected to it. (R p 42). Plaintiffs seek statewide equitable relief that will benefit the entire class at once by requiring defendants to use solitary confinement as a last resort for the least amount of time possible. (R pp 16, 43).

This is the same kind of claim brought in *Plata* and other class actions involving people in the state's care—a "kind of claim [that] is firmly established in our constitutional law." *Parsons*, 754 F.3d at 676. In these cases, which are not limited to prisons or jails, individualized assessments of class members have little if any relevance. *See id.*; *Baby Neal*, 43 F.3d at 61 (noting "the court can

substantially avoid examining those individualized circumstances" of foster children seeking classwide relief); *M.D. v. Perry*, 294 F.R.D. 7, 45 (S.D. Tex. 2013) ("[W]hether [state] policies subject class members" in long-term foster care to an unconstitutional risk of harm "can be proven on the basis of classwide evidence without individualized inquiries.").

By conducting its Rule 23 analysis with this misapprehension of the applicable law, the trial court committed legal error. As detailed below, that error led to mistaken conclusions about predominance and superiority. Common issues predominate because the trial court would not have to examine *any* individual issues to determine liability or a proper remedy. The class action method is superior in part for the same reason—the trial court could resolve thousands of identical claims in a single proceeding.

This Court should therefore reverse or vacate the trial court's order. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990) (vacating and remanding where the trial court's "order was signed under a misapprehension of the law").

ii. This Court has held that common issues predominate even when some class members face different circumstances and degrees of injury.

While this Court has not addressed a Rule 23 motion in the context of an institutionalized class, the principles of this Court's Rule 23 precedent support certification here. Classwide issues predominate when class members seek the

same kind of relief for the same kind of harm, and a court would not have to address the circumstances of many individual class members.

In *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), the plaintiffs challenged the constitutionality of a reduction in public employees' disability benefits. The state argued against certification because some class members had different interests than the named plaintiffs, and different class members would recover different amounts. *Id.* at 698, 483 S.E.2d at 431–32.

This Court disagreed. It held that all class members shared common predominating issues because each class member alleged the same *kind* of injury—caused by the same unconstitutional action—and sought the same kind of relief: "The interest of the plaintiffs named and unnamed is to recover what they can for what they contend is underpayment of retirement benefits. This is an issue which defines the class." *Id.* The differences among class members raised by the state, on the other hand, were "collateral." *Id.*

Similarly, in *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 369 N.C. 202, 794 S.E.2d 699 (2016), thousands of tobacco producers brought contract claims against a cooperative administering a federal tobacco price support program. The defendant focused on the many factual distinctions among class members, arguing that the case presented "far too many individualized, fact-intensive determinations for class certification to be proper." *Id.* at 214, 794 S.E.2d at 709 (quotation marks omitted).

Again, this Court disagreed. Despite any factual differences between class members, all were subject to substantially identical agreements, advanced the same legal theories, and sought the same kind of relief. Thus, the Court held that "the same basic questions of fact and law will determine whether defendant is liable to plaintiffs for its actions." *Id.* at 215, 794 S.E.2d at 709.

By contrast, *Beroth Oil* shows when class certification is inappropriate. There, property owners alleged that the state had unlawfully interfered with at least 800 unique parcels. 367 N.C. at 336, 757 S.E.2d at 470. "Plaintiffs proposed a bifurcated trial in which the first phase would determine whether NCDOT is liable to the class, and the second phase would consist of individual trials to determine each property owner's individual damages." *Id.* at 336, 757 S.E.2d at 469–70.

The Court agreed that differing degrees of injury did not preclude certification. *Id.* at 344, 757 S.E.2d at 475. It explained, however, that "the takings issue is inextricably tied to the amount of damages; the extent of damages is not merely a collateral issue, but is determinative of the takings issue itself." *Id.* Unlike cases challenging generally applicable policies, the state's liability to each class member could "be established only after extensive examination of the circumstances surrounding each of the affected properties." *Id.* at 343, 757 S.E.2d at 474 (quotation marks omitted). In other words, because of "the 'discrete fact-specific inquiry' necessary to decide" the plaintiffs' claims, *Fisher*, 369 N.C. at

214, 794 S.E.2d at 709, the trial court could not have determined *classwide* liability in one stroke.

These cases establish a guiding principle: When plaintiffs seek the same kind of relief for the same kind of injury, and the trial court will not have to assess the unique circumstances of many class members to determine a defendant's liability as to each, class certification is appropriate.

iii. Federal courts regularly certify solitary classes seeking indivisible relief.

As discussed above, federal courts have certified classes of people in the government's custody who seek systemwide injunctive relief—including classes that challenged solitary confinement policies. Those courts did not find relevant the different circumstances among class members, different administrative labels, or different placement procedures. Rather, the courts focused on the baseline experience of isolation and related health risks imposed by systemwide policy and practice.

In *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), the plaintiffs alleged facts much like those here: People incarcerated in Arizona prisons would spend months or years in solitary confinement with inadequate medical care, and therefore faced substantial risk of serious harm. *Id.* at 663. The court affirmed certification of a sub-class of "[a]ll prisoners who are now, or will in the future be, subjected by the [state] to isolation, defined as confinement in a cell for 22

hours or more each day or confinement in [certain housing units]." *Id.* at 672 (brackets original).

Relying on *Plata*, the court explained why the claims of all class members depended on the same issues, even if individual class members might be affected differently:

> What all members of the putative class and subclass have in common is their alleged exposure, as a result of specified statewide [prison] policies and practices that govern the overall conditions of health care services and confinement, to a substantial risk of serious future harm to which the defendants are allegedly deliberately indifferent. . . . [A]lthough a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide [prison] policy or practice that creates a substantial risk of serious harm.

Id. at 678.[2]

The plaintiffs in *Davis v. Baldwin*, No. 3:16-CV-600-MAB, 2021 WL 2414640 (S.D. Ill. June 14, 2021) also challenged the systemic use of solitary confinement. The court certified the proposed class because "common questions exist . . . , namely, whether the conditions that exist as a result of the [state's]

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[2] The same reasoning supports class certification when plaintiffs challenge widespread failures in child welfare systems. *See, e.g.*, *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 969 (9th Cir. 2019) ("[A]s in *Parsons*, the statewide policies and practices are the 'glue' that holds the class together."). Without noted dissent, the U.S. Supreme Court recently denied a petition for a writ of certiorari seeking reversal of that case and the Ninth Circuit's entire *Parsons* line of cases. *See Faust v. B. K. ex rel. Tinsley*, 140 S. Ct. 2509 (2020).

formal policies and systemic practices deprive class members of their basic human needs and expose them to a substantial risk of serious harm." *Id.* at *23 (emphasis omitted); *accord Dockery*, 253 F. Supp. 3d at 854 (certifying solitary sub-class because plaintiffs' "claims will have, at their core, common issues regarding (1) the physical conditions under which prisoners at [the prison] are being housed . . . and (2) whether those conditions and health care have . . . subjected prisoners to an unconstitutionally unreasonable risk of harm").

These cases—much like *Faulkenbury* and *Fisher*—rejected the argument that factual differences among class members precluded certification. *Parsons* held that despite the state's "assertion that each inmate's alleged injury is amenable only to individualized remedy, every inmate in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in statewide . . . policy and practice." 754 F.3d at 689. And *Davis* rejected the argument "that commonality does not exist because questions regarding conditions of confinement are too individualized to resolve at once." 2021 WL 2414640, at *22.

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In sum, when a class of people in the state's custody or care seeks uniform equitable relief from statewide policy and practice, the predominance of common issues is readily established. This case is no different.

iv. Plaintiffs established predominance.

Here, the claims of plaintiff class members share common questions of law and fact. Because plaintiffs challenge the statewide use of solitary confinement, the answers to these questions will be the same for the entire class—the challenged state action "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quotation marks omitted).[3]

Determining the constitutional standard is a question of law common to all class members. And as the trial court recognized, the ultimate determination of "[w]hat constitutes cruel and unusual punishment is a question of law" as well. (R p 981 (quoting *State v. Rogers*, 275 N.C. 411, 421, 168 S.E.2d 345, 350 (1969))).

Issues of fact underlying this determination further establish the existence of a class. All class members will face highly similar living conditions, risks of prolonged placement there, and associated risks of harm. The trial court found that plaintiffs' affidavits "generally align with the Vera Report findings," (R p 978), which concluded that DPS solitary units are "characterized by conditions of extreme isolation and sensory deprivation." (R p 312). And the record shows how

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[3] The trial court noted that *Dukes* was refencing Federal Rule 23(b)(2), and North Carolina Rule 23 lacks such a provision. (R p 999). That is true, but this Court has still found decisions applying Federal Rule 23(b)(2) persuasive, as that provision also promotes principles of efficiency and fairness on claims for classwide equitable relief. *See, e.g.*, *Chambers*, 374 N.C. at 437, 843 S.E.2d at 173 (adopting reasoning from *Richardson v. Bledsoe*, 829 F.3d 273 (3d Cir. 2016)).

defendants freely transfer people between these classifications, keeping them in isolation for months or years at a time. *See* pp 10–13, *supra*.

Thus, common issues will include (1) the nature and severity of harm threatened by solitary living conditions; (2) how prolonged time in those conditions, imposed by specific policies and practices, exacerbates the risks of harm; and (3) defendants' purported justifications for the risks. These issues predominate over any individual issues because they must be examined as to the entire class—not individual members. *See Plata*, 563 U.S. at 505 n.3.

In finding no predominance, the trial court focused on differences in living conditions, placement procedures, average times, and "penological purposes" for each classification. (R p 994). Again, such differences cannot negate the existence of a class seeking relief from "the baseline conditions in restrictive housing that . . . exist at every facility." *Davis*, 2021 WL 2414640, at *22. Even so, the trial court's description of vastly different circumstances among potential class members does not find support in the record.

Living Conditions. As detailed above, the trial court made findings showing that the physical living conditions across solitary classifications are functionally identical. But the trial court ultimately dismissed the relevance of "conditions common to all forms of the Department's restrictive housing, the majority of which are 'inescapable accompaniments of segregated confinement.' " (R p 993 (quoting *Mickle v. Moore*, 174 F.3d 464, 472 (4th Cir. 1999) (quoting *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854, 861 (4th Cir. 1975)))). This statement

shows the trial court's acceptance of the challenged conditions as constitutional—an improper resolution of the merits at this early stage—and relies on decisions that are no longer good law.

The Fourth Circuit recently disclaimed *Mickle* and *Sweet*, explaining that they were decided before much of the modern research on solitary confinement became available. *Porter v. Clarke*, 923 F.3d 348, 358 (4th Cir. 2019). As the district court in that case put it, "[g]iven the rapidly evolving information available about the potential harmful effects of solitary confinement" and "the explicit incorporation of contemporary standards of decency into the Eighth Amendment standard," older cases endorsing the use of solitary confinement are no longer controlling. *Porter v. Clarke*, 290 F. Supp. 3d 518, 529 (E.D. Va. 2018). Thus, the "inescapable accompaniments of segregated confinement" can no longer be so readily accepted as constitutional.

In finding that a class did not exist, the trial court also focused on how some people have television privileges and access to different "in-cell activities." (R p 995). The decision to let anyone in restrictive housing watch television is discretionary. (*See* R p 621). The reference to different "in-cell activities" appears to be a reference to the RDU, which has its own curriculum. (R p 706).

But the RDU cells are the same as all other restrictive housing cells. People in the first two phases of the RDU still spend 22 to 24 hours there. And they still have severe limitations on visitation and congregate activity. (R pp 280, 296). Thus, the first two phases of the RDU—along with the other classifications—are

properly viewed as part of a single system of solitary confinement. *See Davis*, 2021 WL 2414640, at *22 (certifying class despite differences in solitary living conditions across prison system); *Hutto*, 437 U.S. at 688 (affirming classwide relief "supported by the interdependence of the conditions producing the violation" in isolation cells).

If, however, the RDU is in fact fundamentally different from the other classifications, the trial court should simply narrow the proposed class or create a sub-class—not deny certification altogether. *See Parsons v. Ryan*, 912 F.3d 486, 505 (9th Cir. 2018) (excluding individuals from solitary sub-class because of significantly different out-of-cell time); *Baby Neal*, 43 F.3d at 63 (courts may "decertify or modify the class so that the class action encompasses only the issues that are truly common to the class").

Accordingly, the highly similar living conditions across solitary classifications establish the existence of a class.

Placement Rules. Defendants' procedures for putting or keeping someone in solitary confinement all involve prison staff—who do not necessarily have any medical or mental health training—exercising enormous discretion. (R pp 280, 286, 292, 297, 351). Even when someone is charged with a serious infraction that will automatically result in at least a *year* in RHCP or HCON, there is no guaranteed right to cross-examine adverse witnesses or to present exculpatory evidence—the accused only has the right to *request* these basic protections. (R p 156). Nor does DPS policy even identify the applicable burden of

proof. Together, these policies authorize the widespread, prolonged solitary confinement from which plaintiffs seek relief.

As for health considerations, those have not stopped defendants from placing people with documented histories of severe mental illness in solitary confinement. Defendants reported keeping about 700 people in solitary with a mental health designation of "M3" or higher (on a scale from M1 to M5), which indicates "significant mental disorder." (R pp 167–69). Robert Parham suffered horrific abuse as a child and has multiple diagnoses of serious mental and physical illness. (R pp 36, 73, 274–77). Shawn Bonnett developed sensory deprivation syndrome during his initial nine-year stint in Central Prison. (R p 281). Anthony McGee was driven to attempt suicide in solitary confinement. (R p 271).

Given the common experiences of class members, any variation in defendants' procedures is ultimately a "collateral" consideration that does not negate the existence of a class. *See Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 432.

Average Duration. The trial court noted that the average duration for each classification varies from eight days to a year or more, and thus concluded that plaintiffs could not establish "widespread imposition of Restrictive Housing for months and years on end." (R p 997).

This finding contradicts itself. It acknowledges how three of the five classifications do in fact regularly impose long stretches in solitary confinement, even without consideration of transfers to other classifications. On their face, the

RHCP, HCON, and RDU policies *require* placement lasting at least six or twelve months. (R pp 122, 126, 132). That placement often comes immediately after time in another classification. (R pp 120, 124, 131). Thus, defendants cannot dispute that they often impose solitary confinement far beyond what the United Nations, several states, and the National Commission on Correctional Health Care have recognized as torturous. (R pp 14–19).

What's more, the trial court was referencing figures that do not reflect the total consecutive (or cumulative) time one may spend in solitary confinement. Defendants reported keeping about 699 people in solitary confinement for at least six straight months, 297 for at least a year, and 42 for at least two years—whether in one classification or a sequence of classifications. (R p 403–405).

The trial court, however, treated defendants' classifications as if they each operate in a vacuum. That is simply not how the system works. As in other solitary cases, each DPS classification functions as part of a "systematic, statewide policy of isolation." *Harvard v. Inch,* 411 F. Supp. 3d 1220, 1237 (N.D. Fla. 2019) (plaintiffs could bring claims not based "on specific types of isolation at specific prisons" but "on the cumulative effects of the statewide policies and practices of isolation that subject all persons to the same substantial risk of serious harm"). Defendants may—and at times must—transfer people from one classification directly to another and back again.

Penological Purposes. The trial court reasoned that differing penological reasons for solitary placement meant that common issues did not

predominate. Under state law, however, it is dubious whether potential defenses to some class members' claims matter for class certification. *See Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 12, 550 S.E.2d 179, 188 (2001) ("may have a defense to claims asserted by some members of the proposed class relates to the merits of individual plaintiff's claims and should not be considered at the certification stage"), *aff'd by an equally divided court*, 356 N.C. 292, 569 S.E.2d 647 (2002).

But assuming that potential defenses are relevant, *individualized* defenses—including those based on different penological interests—have little import here. Plaintiffs' claims do not hinge on individualized inquiries, but on the systemwide risk of harm. *See Harvard*, 411 F. Supp. 3d at 1237 ("[R]egardless of the type of isolation, the deprivation caused by the policy and practice of isolation are the same.").

As support for its conclusion that individualized defenses precluded class certification, the trial court cited *Dockery v. Fischer*, 253 F. Supp. 3d 832 (S.D. Miss. 2015). (R pp 996–97). Ironically, that case *did* certify a sub-class of medically vulnerable people in solitary confinement. The court explained that potential "individualized defenses do not necessarily make class certification improper. . . [s]o long as the common questions linking the putative class members are dispositive of their claim and the claim arises out of a single course of conduct and on a single theory of liability." *Id.* at 849. The court held that injunctive relief sought "would not require that the Court adjudicate the

individual class members' needs or circumstances." *Id.* at 856; *accord Parsons*, 754 F.3d at 685 n.31 (individual class members' claims would not be "subject to unique defenses").

That is precisely the situation here. Plaintiffs challenge defendants' statewide use of solitary confinement, no matter what defendants call it or how they purport to justify it. If plaintiffs establish a systemic risk of harm, it follows that defendants must provide a systemic justification for that risk. *See Scott v. Clarke*, 61 F. Supp. 3d 569, 585 (W.D. Va. 2014) (common questions for entire class included defendants' justifications for challenged prison conditions).[4]

The trial court would have to determine whether defendants' extensive use of solitary confinement is appropriately tailored to advance legitimate state interests. The existence of multiple purported interests would not make a class action too unwieldy. Indeed, there are only two at work for each classification: discipline and safety. Defendants place someone in RHAP either for their own

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[4] The U.S. Supreme Court has held that prison officials cannot defeat Eighth Amendment claims by showing that the challenged action has a "reasonable relation" to a state interest. *Johnson v. California*, 543 U.S. 499, 510–11 (2005). "Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary[.]" *Id.* (quoting *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979)). Thus, defendants could only justify their conduct by meeting some form of heightened scrutiny. *See Leandro v. State*, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) (strict scrutiny required to justify deprivation of fundamental right to education); Jules Lobel, *The Liman Report and Alternatives to Prolonged Solitary Confinement*, 125 Yale L.J. F. 238, 242–43 (2016) (proposing test similar to strict scrutiny for use of prolonged solitary confinement).

protection or investigation of a potential rule infraction. (R p 129). RHDP, RHCP, and HCON are all penalties for rule infractions and the latter two are also used for general safety concerns. (R pp 120, 124, 129, 149, 150). Defendants overwhelmingly transfer people to the RDU (which purports to improve safety by easing reentry into the regular population) directly from the other classifications. (R p 405). Analysis of justifications for any of these classifications would be highly similar if not identical.

Accordingly, plaintiffs carried their burden of establishing the predominance of common issues of fact and law.

v. The trial court improperly assessed the merits of plaintiffs' claims.

On a Rule 23 motion, the merits of a claim are off limits except "to the extent necessary to determine whether the requirements of Rule 23 have been met." *Beroth Oil*, 367 N.C. at 342 n.5, 757 S.E.2d at 474 n.5. The trial court, however, found that plaintiffs "failed to provide sufficient evidence connecting the Department's practices and policies to the alleged similar harm or risks of harm." (R p 993).

This reasoning essentially requires plaintiffs to prove that defendants have in fact imposed a classwide substantial risk of serious harm—the central question in this case—before a class is even certified. Such a high burden bypasses the process of merits discovery and trial, and is not the law in North Carolina. *See id.* at 342, 757 S.E.2d at 474 (Rule 23 does not ask "whether the plaintiff . . . will

prevail on the merits"); *Maffei v. Alert Cable TV of N.C., Inc.*, 316 N.C. 615, 618, 342 S.E.2d 867, 870 (1986) (trial court could not decide at class certification stage central issue of whether "the defendant had or had not breached the contract").

Class actions "save[ ] the resources of both the courts and the parties." *Chambers*, 374 N.C. at 440–41, 843 S.E.2d at 175. To that end, Rule 23 is designed to be flexible and must receive a liberal construction. *Crow*, 319 N.C. at 279–80, 354 S.E.2d at 463–64. If plaintiffs must put on their whole case for a Rule 23 motion, they will have to expend far more resources early on, a defendant will have to expend additional resources in opposition, and courts will have to expend additional resources on adjudication—all before a class is certified and merits discovery has even begun.

Thus, imposing this heightened burden would undermine Rule 23's most basic purpose. It would also disrupt the orderly process for discovery, summary judgment, and trial, and might prejudice all parties. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("[A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.").

The trial court committed legal error by requiring a heightened showing on the merits. To the extent that the merits are relevant here, plaintiffs must only show that state policy and practice exposes class members to common risks of

harm. Whether those risks are severe enough to violate the Constitution must be resolved later.

Plaintiffs carried their burden. As detailed above, the parties agree that defendants have enacted statewide policies authorizing placement in solitary confinement for thousands of people, and that such placement often lasts for months or years at a time. DPS officials including Secretary Hooks have publicly acknowledged that solitary confinement creates short- and long-term risks of serious harm. *See* pp 9–16, *supra*.

Defendants, on the other hand, did not submit any evidence to support their contention that solitary confinement does not create serious health risks. The weight of the record can only be read to support plaintiffs' claims.

Beyond this evidence, an ever-growing body of case law acknowledges the risks of harm created by solitary confinement. Over 130 years ago, the United States Supreme Court recognized the practice as "an infamous punishment" that caused serious illness and death:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168, 169 (1890). In the time since, courts have continued to make the same observations substantiated by robust scientific research—including the research considered by the trial court here.[5]

Accordingly, because of defendants' extensive reliance on solitary confinement, all class members face similar, well-documented risks of harm, and will benefit from a systemwide remedy reducing that risk. The trial court committed legal error by requiring more.

iv. Plaintiffs made a sufficiently detailed request for relief.

Finally, the trial court's predominance analysis faulted plaintiffs for "fail[ing] to identify any concrete measures which they contend would provide

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[5] *See, e.g.*, *Apodaca v. Raemisch*, 139 S. Ct. 5, 9 (2018) (statement of Sotomayor, J., respecting denial of certiorari) ("[W]e do know that solitary confinement imprints on those that it clutches a wide range of psychological scars."); *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price."); *Porter*, 923 F.3d at 361 (evidence of Eighth Amendment violation included "the extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement . . . [showing] that the risk of such harm was so obvious that it had to have been known") (quotation marks omitted); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 567 (3d Cir. 2017) ("Now, with the abundance of medical and psychological literature, the 'dehumanizing effect' of solitary confinement is firmly established."); *Grissom v. Roberts*, 902 F.3d 1162, 1176–77 (10th Cir. 2018) (Lucero, J., concurring) (reviewing scientific literature and summarizing that "solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill"); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1236 (M.D. Ala. 2017) (similar); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) ("A conclusion . . . that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.").

relief." (R p 1002). This imposes an erroneously heightened pleading standard while misreading plaintiffs' complaint.

In any civil action, a complaint need only give "sufficient notice of the claim asserted to enable the [defendant] to answer and prepare for trial and to show the type of case brought." *U.S. Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 728, 800 S.E.2d 412, 416 (2017) (cleaned up). This Court has never held that a complaint must detail the precise nature of the injunction sought. Indeed, when addressing a widespread constitutional violation, this Court has noted the importance of allowing the state to attempt a remedy before a court imposes one. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 643, 599 S.E.2d 365, 393 (2004) ("[I]f the offending branch of government or its agents either fail to [remedy a constitutional violation] or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy . . . .").

Moreover, in complex prison cases, courts usually address the particulars of an injunction *after* the plaintiffs establish liability and the court enlists the aid of a special master. *See* James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. Rev. 387, 428–29 (2013) (issue of judicial involvement in "governance of institutions . . . comes at the remedial stage"); *Plata*, 563 U.S. at 511 ("Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers . . . .").

Here, plaintiffs provided ample notice as to the nature of the relief sought. The complaint states that "prison administrators should use solitary confinement only as a last resort, and for the shortest duration possible, to address an imminent safety threat." (R p 16). Plaintiffs also noted examples of prison systems in other states that have significantly limited their use of solitary confinement through specific policy changes, such as limits on consecutive days a person can be kept there. (R pp 16–20).

Thus, the trial court erred by finding that plaintiffs' requested relief weighed against class certification.

C. A class action is a superior means of adjudication.

As discussed above, the superiority of a class action is "self-evident" when a class seeks indivisible injunctive relief. *Dukes*, 564 U.S. at 362–63. "The fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals involved may change, the nature of the wrong and the basic parameters of the group affected remain constant." *Dean v. Coughlin*, 107 F.R.D. 331, 332–33 (S.D.N.Y. 1985).

Without class certification here, thousands of potential class members—many of whom are indigent and suffer from mental illness—would have to litigate their claims pro se from a solitary confinement cell. This "multiplicity of lawsuits," potential for inconsistent results, and prejudice to vulnerable plaintiffs is exactly what class actions are supposed to prevent. *See Fisher*, 369 N.C. at 216,

794 S.E.2d at 710 (certification appropriate given large number of class members and impracticality of requiring each to sue individually); *Rosiles-Perez v. Superior Forestry Serv., Inc.*, 250 F.R.D. 332, 348 (M.D. Tenn. 2008) (class action was superior method because plaintiffs were indigent, "vulnerable workers with extremely limited resources rendering separate actions highly unlikely").

In finding against superiority, the trial court also stated that class members could seek relief in the North Carolina Industrial Commission or federal court. (R p 1005). But the Industrial Commission can only adjudicate claims of negligence and cannot issue injunctive relief. *See* N.C.G.S. § 143-291(a). Federal court is a proper forum for federal claims, but this lawsuit involves plaintiffs who wish to vindicate their *state* constitutional rights. North Carolina's General Court of Justice cannot be closed to them.

Compounding this error, the trial court further disclaimed responsibility over the case: "[T]his Court declines Plaintiffs' invitation to oversee a significant portion of the operation of North Carolina's prisons." (R p 1002 (quotation marks omitted)).

Courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Plata*, 563 U.S. at 511 (cleaned up). In North Carolina, the judiciary has "the responsibility to protect the state constitutional rights of the citizens, and this obligation 'is as old as the State.' " *State v.*

Robinson, 375 N.C. 173, 184, 846 S.E.2d 711, 720 (2020) (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)). And few people need the judiciary's protection more than incarcerated people, who comprise "North Carolina's least powerful constituency." Mark A. Davis, *A Warren Court of Our Own: The Exum Court and the Expansion of Individual Rights in North Carolina* 121 (2020).

For these reasons, the trial court erred by concluding that a class action was not a superior means of adjudication.

D. The named plaintiffs are adequate class representatives.

On the adequacy of class representatives, this Court has examined potential conflicts of interest and whether named plaintiffs have a genuine personal interest in the case. *Crow*, 319 N.C. at 282, 354 S.E.2d at 465. The Court of Appeals has also considered the adequacy of class counsel. *Ehrenhaus v. Baker*, 216 N.C. App. 59, 75, 717 S.E.2d 9, 20 (2011).

Here, neither defendants nor the trial court suggested that the named plaintiffs had any conflicts or lacked personal stakes, nor did they challenge the adequacy of plaintiffs' counsel. (*See* R p 975). Even so, the trial court found the named plaintiffs inadequate "because they do not represent the wide spectrum of inmates potentially encompassed in the class." (R p 1006). Also, because the named plaintiffs were placed in solitary confinement after disciplinary

infractions, "their own actions may compromise the viability of their own claims." (R p 1006). Both conclusions are wrong.

First, this Court has not required named plaintiffs to embody the entire diversity of a broad class. This Court's concerns have been far more practical, examining conflicts of interest and personal stakes—factors that could realistically prevent "the interests of the unnamed class members [from being] adequately and fairly protected." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465.[6]

By requiring more, the trial court imposed the kind of arbitrary restriction this Court has avoided. *See id.* at 280, 354 S.E.2d at 464. For example, in *Faulkenbury*, despite factual differences among class members, the named plaintiffs were adequate because the "interest of the plaintiffs named and unnamed is to recover what they can for what they contend is underpayment of retirement benefits. This is an issue which defines the class." 345 N.C. at 698, 483 S.E.2d at 431. Here, the interest of the plaintiffs named and unnamed is also the same: relief from the risk of prolonged placement in solitary confinement and the associated risks of harm.

As to the named plaintiffs' disciplinary charges, those could only be relevant if plaintiffs were suing for damages or individualized injunctive relief.

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[6] In keeping with Rule 23's overall design, even these considerations are flexible. A named plaintiff whose claim has become moot may still be adequate if they diligently pursue class certification. *Chambers*, 374 N.C. at 448, 843 S.E.2d at 180. And a named plaintiff with a conflict of interest may still be adequate depending on the nature of the conflict. *Fisher*, 369 N.C. at 212, 794 S.E.2d at 708.

But they are not. If plaintiffs establish a classwide substantial risk of serious harm, defendants will have to justify their policies on a classwide basis—not as to any individual person. *See A.T. ex rel. Tillman v. Harder*, 298 F. Supp. 3d 391, 418 (N.D.N.Y. 2018) (rejecting proffered "justification for the current implementation of the policy and practice" of solitary confinement at jail).

Moreover, these disciplinary charges make the named plaintiffs *more* like the rest of the class, not less. Nearly everyone in solitary confinement is there because of actual or potential disciplinary charges. *See* p 12, *supra*.

In sum, Robert Parham, Shawn Bonnett, and Anthony McGee have collectively experienced decades of solitary confinement across multiple prisons and classifications. They understand the grave toll of solitary confinement in North Carolina better than most. They have no conflicts of interest, understand their responsibilities in this case, and secured experienced counsel. (R p 975). Rule 23 does not require more.

II. THE TRIAL COURT ERRED BY CONFLATING THE RULE 23 ANALYSIS WITH IDENTIFYING THE CONSTITUTIONAL STANDARD FOR PLAINTIFFS' CLAIMS.

The trial court believed that granting class certification depended on accepting plaintiffs' argument on the constitutional standard: "Central to Plaintiffs' argument that a class exists is their assertion that to be entitled to relief under Section 27, the putative class members need only prove that the challenged

policies and practices create a substantial risk of serious harm to the health of incarcerated persons." (R pp 981–82 (quotation marks omitted)).

Plaintiffs argued against adopting the current Eighth Amendment "deliberate indifference" standard, which accounts for the subjective mindset of prison officials. (R p 982). By disagreeing with plaintiffs, the trial court appeared to believe that a class could not exist.

That was error. Identifying the constitutional standard is a question of law common to all class members, as neither this Court nor the Court of Appeals has addressed the issue. But the *answer* to that question does not control whether a class exists. Regardless of which standard applies, common issues will revolve around defendants' statewide policies and practices, the physical living conditions in solitary confinement, and the nature and severity of the associated risks of harm.

Under the current Eighth Amendment standard, a violation occurs when a plaintiff faces an objectively serious risk of harm from deficient medical care or dangerous living conditions, and a defendant shows "deliberate indifference" to that risk—that is, they have actual knowledge of it and fail to respond reasonably. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Here, a class exists even if that standard applies. Consider *Plata* and *Hutto*, cases in which district courts issued injunctive relief for various dangerous conditions that collectively violated the Eighth Amendment. The district courts in *Plata* applied the deliberate indifference standard. *See Coleman v.*

Schwarzenegger, 922 F. Supp. 2d 882, 963 (E.D. Cal. 2009). *Hutto* only addressed the objective severity of challenged conditions. *See* 437 U.S. at 687–88. Even so, both cases focused on the same issues of prison policies, practices, living conditions, and risk of harm to class members. *See id.*; *Plata*, 563 U.S. at 501–04

So too here. Common issues will be largely identical even if plaintiffs must prove defendants' subjective knowledge. Indeed, if plaintiffs establish an ongoing substantial risk of serious harm, defendants will be hard-pressed to argue that they continue to lack knowledge of that risk—especially since they have already publicly acknowledged it. (R p 548). *See Porter*, 923 F.3d at 361 (given extensive scientific literature and defendants' "status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction on death row could cause").

For these reasons, the trial court erred by basing its Rule 23 analysis on the question of the constitutional standard. Regardless of which standard applies, this case will hinge on the same issues of law and fact.

III. THE TRIAL COURT ERRED BY IMPOSING THE DELIBERATE INDIFFERENCE REQUIREMENT FOR ARTICLE I, SECTION 27 CLAIMS SEEKING PROSPECTIVE RELIEF FROM DANGEROUS CONDITIONS.

As discussed above, identifying the constitutional standard for plaintiffs' claims does not affect whether a class exists. This Court

will "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). But if the Court reaches this question, it should reverse.

When examining the state Constitution and deciding whether to construe it differently from the federal Constitution, this Court examines the text, history, and purpose of the provision at issue, as well as precedent, any textual differences between the state and federal constitutions, and the practical effects of adopting one reading over another. *See generally Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6 (2021) ["*Forest*"].

Here, all of these factors support applying a purely objective standard to plaintiffs' claims.

A. Section 27 must be construed liberally in favor of plaintiffs.

In North Carolina's constitutional system, the Declaration of Rights takes center stage:

> The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights.

Tully v. City of Wilmington, 370 N.C. 527, 533, 810 S.E.2d 208, 213 (2018) (quoting *Corum*, 330 N.C. at 782, 413 S.E.2d at 289–90).

While the federal Constitution provides a "floor of fundamental rights" setting the minimum protections for parallel state provision, state courts may construe those parallel provisions more expansively. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). This Court has recognized that "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens," and state courts must "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Corum*, 330 N.C. at 783, 413 S.E.2d at 290.

In this spirit, the Court has construed certain state constitutional guarantees more expansively than their federal counterparts. *E.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 381, 562 S.E.2d 377, 396 (2002) (applying heightened scrutiny on Section 19 equal protection claim); *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988) (rejecting good-faith exception to Section 20 warrant requirement). And the Court has at least suggested that Section 27 provides greater protection than the Eighth Amendment in the context of prison medical care: "Our state constitutional provision emphasizes the importance of this interest in North Carolina." *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 844, 412 S.E.2d 654, 659 (1992); *see also id.* at 846, 412 S.E.2d at 660 (Martin, J., concurring) (Section 27 may impose "a greater duty" on prison officials than Eighth Amendment).

These principles should guide the Court's analysis here.

B. The text of Section 27 only addresses the objective qualities of a punishment—not the mindset of the punisher.

"As ours is a written constitution, we begin with the text." *Forest*, 2021-NCSC-6, ¶ 15. "The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and compare it with other words and sentences with which it stands connected." *Id.* (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)). This Court is "free to interpret our state Constitution differently than the United States Supreme Court interprets even identical provisions of the federal Constitution." *Jackson*, 348 N.C. at 648, 503 S.E.2d at 107.

Section 27 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." The final clause, like the rest of the section, focuses exclusively on the nature the prohibited acts—not what a state official knows or thinks about them.

Nor is there an implicit subjective component in the word "punishments." As Justice Blackmun wrote,

> "Punishment" does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers "severe, rough, or disastrous treatment," see, *e.g.*, Webster's Third New International Dictionary 1843 (1961), regardless of whether a state actor intended the cruel treatment to chastise or deter. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as "[a]ny

> pain, suffering, or loss inflicted on *or suffered by* a person because of a crime or evil-doing"). . . .

Farmer, 511 U.S. at 854–55 (1994) (Blackmun, J., concurring) (alterations original).

Nor does the word "inflicted" contain an intent requirement. An experience may be inflicted upon someone regardless of whether those responsible intend it. *See Inflict*, Merriam-Webster, https://www.merriam-webster.com/dictionary/inflict?src=search-dict-box (defining word as "to cause (something unpleasant) to be endured").

Section 27's qualifying adjectives do not impute an intent requirement either. Cruel and unusual punishment is "[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community." Black's Law Dictionary (11th ed. 2019). A state official might sincerely believe that a certain practice is benevolent. They may not know that such action is largely proscribed elsewhere, or viewed as immoral. But the torturous or degrading experience of the person being punished would not change. That consideration should be the focus, as Section 27 prohibits cruel or unusual "punishments," not punishers.[7]

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[7] America's early experience with solitary confinement bears this out. Prison officials in the early nineteenth century believed that extreme isolation would have rehabilitative benefits. *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History & Review of the Literature*, 34 Crime & Just. 441, 456 (2006). But those good intentions did not prevent people subjected to the practice from becoming "violently insane" or otherwise seriously ill. *In re Medley*, 134 U.S. 160, 168 (1890).

For these reasons, a plain reading of the constitutional text does not support imposing an intent requirement. "Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle v. Gamble*, 429 U.S. 97, 116–17 (1976) (Stevens, J., dissenting).

C. The original understanding of Section 27 did not include government officials' state of mind.

Section 27 and the Eighth Amendment are not fixed in time. Courts interpret both provisions not by looking to what society tolerated at the founding, but "from the *evolving standards of decency that mark the progress of a maturing society*." *State v. Green*, 348 N.C. 588, 604, 502 S.E.2d 819, 828 (1998) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). And because the current state Constitution was adopted in 1971, "one may object that, whatever the meaning . . . as used by colonial lawyers raised on the English common law in 1776, that meaning no longer holds today." *Forest*, 2021-NCSC-6, ¶ 28.

Thus, the Court should construe Section 27 through a modern lens. But if the Court considers original understanding, history shows that North Carolina's framers (whether in 1776, 1868, or 1971) most likely did not understand the prohibition on cruel or unusual punishment to include a subjective element.

A wealth of scholarship details why the framers of the federal Constitution understood the Eighth Amendment to prohibit punishments with cruel effects, regardless of the punisher's intent. *See e.g.*, Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L. Rev. 357, 430 (2018) (reviewing originalist scholarship and concluding "the words 'cruel and unusual' do not support a subjective focus"); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 445 (2017) ("[T]he original meaning of the word 'cruel' in the Eighth Amendment is 'unjustly harsh,' not 'delighting in, or indifferent to, the pain of others.' ").

As for the state Constitution, there is little scholarship on the original understanding of the bans on cruel or unusual punishment.[8] But this Court has explained that original understanding may be inferred from early decisions interpreting the provision at issue and contemporaneous understandings. *Forest*, 2021-NCSC-6, ¶¶ 30, 79.

This Court's early decisions did not address the intent behind a punishment. Those decisions focused instead on the proportionality of the punishment to the crime, and—though at times viewed through a sexist or racist

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[8] All three iterations of the state Constitution have similar or identical language. North Carolina's first Declaration of Rights stated: "That excessive bail should not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." N.C. Const. of 1776, Dec. of Rights, § 10. The Constitution of 1868 deleted "That" and changed the final "nor" to "or." N.C. Const. of 1868, Art. I, § 27. The same language appears in the current Constitution adopted in 1971. N.C. Const. Art. I, § 27.

lens—the experience of the person being punished. *See State v. Manuel*, 20 N.C. 144, 164, 4 Dev. & Bat. 20, 37 (1838) ("What would be cruelty if inflicted on a woman or a child, may be moderate punishment to a man."); *State v. Driver*, 78 N.C. 423, 426 (1878) ("[W]hat is greater than has ever been prescribed or known or inflicted, must be 'excessive, cruel and unusual.' ").

The concept of deliberate indifference, on the other hand, did not appear in the relevant jurisprudence of the U.S. Supreme Court or this Court until 1976 and 1979, respectively. *Estelle*, 429 U.S. at 104; *State v. Sparks*, 297 N.C. 314, 322, 255 S.E.2d 373, 378 (1979). Before then, Eighth Amendment case law had focused on whether a punishment was gratuitously painful or otherwise "degrading to the dignity of human beings." *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) (citing *Weems v. United States*, 217 U.S. 349, 366 (1910)).

The focus on objective criteria would persist for decades. *Green* stated that "courts should look to objective indications of society's current values in determining whether the punishment in question complies with [society's] 'evolving standards.' " 348 N.C. at 604, 502 S.E.2d at 828 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). *Green* also observed that this Court and the U.S. Supreme Court had "looked only to whether a particular punishment involves basic inhuman treatment" to assess a punishment's validity. 348 N.C. at 612, 502 S.E.2d at 833.

Thus, around the time North Carolina adopted its current Constitution in 1971, the framers most likely understood Section 27 to focus on the nature of the punishment and the experience of the person being punished. It seems improbable that they believed a *mens rea* element applied which courts would not recognize until years later.

D. This Court does not have to adopt the federal deliberate indifference requirement, nor should it.

The trial court held that it was bound by *Green* to conclude "that Section 27 should be interpreted the same as the Eighth Amendment." (R p 986). Not so. The U.S. Supreme Court's imposition of the deliberate indifference requirement was erroneous, and this Court need not do the same.

As noted above, the federal Constitution sets the "floor" for parallel state provisions, but not the ceiling. *Jackson*, 348 N.C. at 648, 503 S.E.2d at 103. This Court has "the authority to construe our own constitution differently from . . . the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *Carter*, 322 N.C. at 713, 370 S.E.2d at 555.

In *Green*, this Court explained that it had "historically . . . analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." 348 N.C. at 603, 502 S.E.2d at 828. This language, written in a criminal sentencing case, does not forever bind the development of Section 27 to the Eighth Amendment in all contexts. Doing so

would abdicate this Court's role as "the only entity which can answer with finality questions concerning the proper construction and application of the North Carolina Constitution." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 474, 515 S.E.2d 675, 692 (1999).

This Court therefore does not have to adopt the federal deliberate indifference standard. Instead, this Court should judge plaintiffs' claims by the objective severity of risk created by the challenged conditions.

The U.S. Supreme Court's imposition of the deliberate indifference requirement is relatively recent. For most of the Eighth Amendment's history, when an incarcerated person sought injunctive relief from dangerous prison conditions, that Court examined "only the objective severity [of the conditions], not the subjective intent of government officials." *Wilson v. Seiter*, 501 U.S. 294, 309 (1991) (White, J., joined by Marshall, Blackmun, and Stevens, JJ., concurring in the judgment).

In *Hutto v. Finney*, 437 U.S. 678 (1978), the Supreme Court affirmed the district court's finding of an Eighth Amendment violation, and did not mention the defendants' state of mind. *Id.* at 685–87. And in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court only examined the degree of danger created by double-celling—not whether the practice was intended or known to be dangerous. *Id*. at 348–49. Indeed, *Rhodes* explained that the meaning of the Eighth Amendment "should be informed by objective factors to the maximum possible extent." *Id*. at 346 (quotation marks omitted).

In these cases, the subjective knowledge of prison officials simply had no bearing on the outcome. Years later, however, the Court added the deliberate indifference requirement for conditions-of-confinement cases. *Wilson*, 501 U.S. at 299. The majority reasoned that the Eighth Amendment "bans only cruel and unusual *punishment.* If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300.[9]

As explained by the concurrence, the majority in *Wilson* ignored cases such as *Hutto* and *Rhodes* where the challenged "conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge." *Id.* at 306 (White, J., concurring in the judgment). The cases relied on by the majority did not involve "a challenge to conditions of confinement," but "specific acts or omissions directed at individual prisoners." *Id.* at 309.

Justice White elaborated on why an intent requirement made little practical sense in a conditions-of-confinement case:

> Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

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[9] The U.S. Supreme Court first applied the deliberate indifference standard in *Estelle v. Gamble*, 429 U.S. 97 (1976). *Estelle*, however, was essentially a medical malpractice action for a single person alleging inadequate care. The plaintiffs in *Hutto* and *Rhodes*, on the other hand—like plaintiffs here—sought only prospective equitable relief from systemically dangerous living conditions.

Id. at 310.

Justice Blackmun later expanded on this reasoning: " 'Punishment' does not necessarily imply a culpable state of mind on the part of an identifiable punisher." *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (Blackmun, J., concurring). "[R]egardless of what state actor or institution caused the harm and with what intent, the experience of the inmate is the same. A punishment is simply no less cruel or unusual because its harm is unintended." *Id.* at 855–56.

This Court has not addressed a challenge to prison conditions, but other state cases in which the plaintiffs sought equitable relief are instructive. In *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), the plaintiffs alleged violations of the state constitutional right to an adequate education. In defining that right, this Court focused on the objective quality of the services provided—not whether the defendants had *knowingly* provided inadequate funds. *See id.* at 347, 488 S.E.2d at 255; *see also State v. Nicholson*, 371 N.C. 284, 292, 813 S.E.2d 840, 845 (2018) (noting that "the subjective intent' motivating the relevant officials" in Fourth Amendment context is irrelevant); *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002) (recognizing importance of "objective factors" in racial gerrymandering cases).

For these reasons, the U.S. Supreme Court wrongly grafted an intent requirement onto Eighth Amendment claims for injunctive relief from dangerous

prison conditions. This Court should not repeat that error. Section 27 has been—and should remain—governed by objective criteria.

E. The textual difference between the Eighth Amendment and Section 27 matters.

This Court acknowledged in *Forest* that textual differences between the state and federal constitutions provide compelling reason to construe the documents differently. There, this Court considered the state Constitution's lack of a case-or-controversy clause in holding that the plaintiff did not have to show injury-in-fact to have standing. *Forest*, 2021-NCSC-6, ¶ 85.

This case involves another textual difference: The Eighth Amendment prohibits "cruel and unusual punishments," while Section 27 prohibits "cruel *or* unusual punishments" (emphasis added). This disjunctive feature supports more expansive protection under the state Constitution. *Medley*, 330 N.C. at 846, 412 S.E.2d at 660 (Martin, J., concurring); *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 84 (2d ed. 2013) (the distinction "may conceivably have practical consequences").

Other state courts have held that the same or similar distinctions supported construing their respective state constitutional provisions more broadly than the Eighth Amendment. *See, e.g.*, *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998) (use of "or" instead of "and" supported broader protection); *People v. Bullock*, 440 Mich. 15, 30–31, 485 N.W.2d 866, 872 (1992) (same); *State v. Bassett*, 192 Wash. 2d 67, 80, 428 P.3d 343, 349 (2018) (lack of "and

unusual" language "weigh[ed] in favor of interpreting [state provision] as affording broader rights than the Eighth Amendment").

Plaintiffs acknowledge that, in a footnote, *Green* summarily rejected any associated difference in meaning—at least in the context of a juvenile sentencing statute: "[R]esearch reveals neither subsequent movement toward such a position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position." 348 N.C. at 603 n.1, 502 S.E.2d at 828 n.1.

But it is unclear what research the *Green* majority considered. More importantly, this Court just reemphasized in *Forest* that textual analysis matters, while *Green* took an *atextual* approach. Thus, in light of *Forest*, *Green* has diminished value when considering whether to depart from the federal Constitution.

A renewed focus on Section 27's disjunctive text may also dispose of any subjective element. A punishment should be invalid if it is cruel but not unusual, or unusual but not cruel. *See Green*, 348 N.C. at 615, 502 S.E.2d at 835 (Frye, J., concurring in part dissenting in part). Thus, even if a punishment is not cruel because the harm is unintended, that logic could not possibly affect whether a punishment is *unusual*. A penalty may be "[e]xtraordinary," "abnormal," or "[d]ifferent from what is reasonably expected" even if no one knows or wants it to be. *Unusual*, Black's Law Dictionary (11th ed. 2019).

For these reasons, the textual difference between the state and federal constitutions weighs in plaintiffs' favor.

F. The deliberate indifference standard could leave many institutionalized plaintiffs without an effective remedy.

When deciding whether to incorporate federal constitutional principles into state law, this Court has considered the practical effects that may result. *See, e.g.*, *Carter*, 322 N.C. at 721, 370 S.E.2d at 560 (rejecting adoption of federal good-faith exception to state warrant requirement to discourage police misconduct and because alternative remedies would be ineffective). Here, adopting the deliberate indifference standard could leave many institutionalized plaintiffs without an adequate state remedy for harm threatened by state action—a situation that the Constitution forbids. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992).

Thirty years ago, the George H.W. Bush administration warned against adopting the deliberate indifference standard: "[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." Brief for the United States as Amicus Curiae, *Wilson v. Seiter*, 501 U.S. 294 (1991), 1990 WL 10022404, at *19.

Unfortunately, that warning was prescient. Some courts applying deliberate indifference have denied injunctive relief to people in dire situations simply because prison officials made largely ineffective efforts to mitigate the risk of harm.

For example, people incarcerated at the Butner federal prison sought relief from a massive COVID-19 outbreak at the height of the pandemic: 617 people out of about 1,162 had contracted the virus, and twenty had died, including a staff person. *Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 596 (E.D.N.C. 2020). The court held that the plaintiffs likely faced an objectively serious risk of harm and would suffer irreparable injury without relief. *Id.* at 604, 608. Even so, the court denied relief because officials had improved cleaning efforts, provided education about the virus, and provided face coverings. *Id.* at 605. It simply did not matter that those efforts had failed, and the spread of COVID-19 showed no signs of abating. *See also Swain v. Junior*, 961 F.3d 1276, 1289 (11th Cir. 2020) (vacating injunction against prison officials who were "doing their best" even though serious risks of injury and death remained (quotation marks omitted)).

It is not hard to think of other situations where the deliberate indifference standard would lead to disturbing results. Consider a prison with faulty electrical wiring that creates an ongoing fire hazard. Prison officials know about it, make some good-faith efforts at repairs, and fail. Applying deliberate indifference, a court could deny future injunctive relief simply because prison officials *tried* to fix the problem. *Cf. Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (affirming relief under objective standard for prison's dangerous lack of firefighting readiness despite "good faith" efforts by prison officials).

Not all courts have endorsed this view of deliberate indifference. *See, e.g.*, *Riley v. Olk-Long*, 282 F.3d 592, 597 (8th Cir. 2002) (measures taken by the

state were "not adequate given the known risk" and thus did not defeat liability); *LaMarca v. Turner*, 995 F.2d 1526, 1538 (11th Cir. 1993) (unsuccessful "good faith efforts" to address inadequate security conditions did not defeat deliberate indifference claim). But adopting that standard would open the door to the shocking results foreseen by the United States in *Wilson*.

Here, a liberal construction of Section 27 cannot mean a standard that leaves state litigants without a meaningful remedy to avert serious injury or death. "[A] remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). But if the Court does adopt deliberate indifference, plaintiffs strongly urge the Court to make clear that it does not foreclose injunctive relief when institutionalized plaintiffs face substantial risk of serious injury, and state officials make ineffective efforts to mitigate that risk.

CONCLUSION

The Court should reverse the trial court's order denying class certification, and remand with instructions to certify the proposed class. Alternatively, the Court should vacate the trial court's order and remand for reconsideration with instructions on the applicable law. If the Court reaches the constitutional question, it should hold that an objective standard governs plaintiffs' claims. Alternatively, if the Court adopts the deliberate indifference standard, it should hold that ineffective efforts to mitigate the health risks of dangerous prison conditions do not defeat a Section 27 claim for injunctive relief.

Respectfully submitted, this 2nd day of July, 2021.

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