

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

**THOMAS SHEPPHEARD,  
TYLER RANDALL, and  
ADAM PERRY, next friend  
and guardian of Minor child J.P.,  
on their own behalf and on behalf  
of all others similarly situated,**

**Plaintiffs,**

**v.**

**JAMES C. JUSTICE JR.,  
in his official capacity as Governor of  
the State of West Virginia, and  
MARK SORSAIA, in his official  
capacity as the Cabinet Secretary  
of the West Virginia Department  
of Homeland Security,**

**Defendants.**

**Civil Action No. 5:23-cv-00530  
(Judge Berger)**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO GOVERNOR JUSTICE'S COMBINED  
MOTION TO DISMISS AND TO TRANSFER DIVISION**

**COME NOW**, Plaintiffs, on their own behalf and on behalf of all other similarly situated, by counsel, and for *Plaintiffs' Response in Opposition to Governor Justice's Combined Motion to Dismiss and to Transfer Division* [Doc. 15, 16] state as follows:

**STATEMENT OF THE CASE**

Plaintiffs incorporate, as if fully restated herein, the *Statement of the Case of Plaintiffs' Response in Opposition to Defendant Sorsaia's Motion to Dismiss Complaint* [ECF 19, at pp. 1-2]. Governor Justice seeks dismissal of the *Complaint* in its entirety for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). However, Defendant's arguments fail to establish that dismissal is warranted under either rule.

### **STATEMENT OF ALLEGED FACTS**

The Complaint alleges that Plaintiff Thomas Sheppheard, (“Plaintiff Sheppheard”) was incarcerated at Mt. Olive Correctional Complex (“MOCC”) in Fayette County; Plaintiff Tyler Randall, (“Plaintiff Randall”) was incarcerated at Southwestern Regional Jail (“Southwestern”) in Logan County; and, Plaintiff J.P., (“Plaintiff J.P.”), a minor, is an inmate incarcerated at Donald R. Kuhn Juvenile Center (“Kuhn”) in Boone County. *See* Complaint [Doc.9] at ¶¶ 7-9.

Defendant Governor Justice is the duly elected Governor of the State of West Virginia and is sued in his official capacity. *See id.* at ¶¶10 and 14. Governor Justice is responsible for submitting a proposed budget for each fiscal year to the legislature for consideration pursuant to W. Va. Const. art. VI, § 51, as well as overseeing and carrying out various executive functions including, *inter alia*, corrections. *See id.* at ¶11. The Legislature of West Virginia is empowered to appropriate the funds pursuant to W. Va. Const. art. X, § 3, including, *inter alia*, West Virginia’s corrections systems. *See id.* at ¶12. After the budget bill has been finally acted upon by both houses, supplementary appropriation bills may be considered and passed pursuant to W. Va. Const. art. VI, § 51. *See id.* at ¶13.

Defendant Sorsaia is Cabinet Secretary of the West Virginia Department of WVDHS and is sued in his official capacity. *See id.* at ¶¶15 and 17. Defendant Sorsaia is charged with providing support, oversight, and guidance to the WVDCR. *See id.* at ¶16.

The State of West Virginia is charged with ensuring that inmates are subjected to appropriate and humane conditions of confinement while housed in any correctional facility. *See id.* at ¶20. The State of West Virginia is similarly charged with maintaining and operating its correctional facilities in a manner that meets the minimal civilized measure of life’s necessities, by providing, *inter alia*, beds and bedding for all inmates, appropriate food and access to drinking

water, access to basic hygiene products, toilets, showers, and laundry, and providing living conditions free of mold, sink and toilet water, human waste or sewage, rats, insects, and other contaminants for all inmates housed therein. *See id.* at ¶21. The State of West Virginia is tasked by law with ensuring that all correctional facilities are free from the conditions of overcrowding, understaffing, and are properly maintained and it has failed in this regard for over a decade. *See id.* at ¶22. Despite the constitutional requirements set forth in the *Eighth Amendment*, Defendants have subjected inmates housed at all the states correctional facilities and other such facilities throughout the state, including Plaintiffs, to inhumane living conditions, deprived them of basic human necessities, and acted with deliberate indifference towards their health and safety. *See id.* at ¶28.

On August 11, 2022, Governor Justice issued Executive Order 33. 5-22 finding that: “A state of Emergency exists in West Virginia as it pertains to the staffing levels of our juvenile and adult detention and correctional facilities.” *See id.* at ¶33. Governor Justice recognized that “any shortage of correctional officers limits the ability to properly supervise the State’s incarcerated individuals” and lack of proper supervision may present a danger to the incarcerated individuals and others. *See id.* at ¶34. Moreover, excessive amounts of overtime are not conducive to safe working practices and environments. *See id.* at ¶42. Three hundred National Guard members were inserted into in the jails and prisons to help with the severe understaffing in the late summer of 2022. *See id.* at ¶35.

Brad Douglas worked in the state’s correctional system for a quarter century and testified that understaffing and deferred maintenance have an impact on safety. *See id.* at ¶30. Betsy Jividen served as Commissioner of WVDCR from January 2018 to July 2022. In 2022, the inmate population was overcrowded and the facilities were understaffed. *See id.* at ¶31. Both testified that

the overcrowding has been at least a decade in the making. *See id.* at ¶32. Former Cabinet Secretary Jeff Sandy testified that understaffing has been an issue for decades. *Id.*

West Virginia lags behind competitively in terms of correctional officer pay. *See id.* at ¶43. In 2018, Governor Justice recognized correctional officers are grossly underpaid. *See id.* at ¶46. This caused a high turnover rate. *Id.* The current circumstances of overtime, utilizing the National Guard, and, having non-security personnel working at some of the security posts inside the jails is not sustainable. *See id.* at ¶47.

From July 2019 through July 2022, understaffing in West Virginia's facilities worsened. *See id.* at ¶50. The correctional officer shortage and overworked staff affects the security of the jails as the facilities depend on staff and security staff to operate them safely. *See id.* at ¶¶51-52. The 2023 correctional officer shortage is the worst in the past thirty years. *See id.* at ¶53.

With respect to overcrowding, based upon the WVDCR Fiscal Year Annual Reports for 2019, 2020, 2021, and 2022, statistics and charts show an increase in population among all correctional facilities in comparison to prior years. *See id.* at ¶55. The State of West Virginia was aware of the rapidly increasing population of prison inmates as early as 2011. *See id.* at ¶57. From January 2018 through July 2022, overcrowding in West Virginia's facilities worsened. *See id.* at ¶58.

Overcrowding makes a facility less safe, secure, and humane than it could be resulting in having two to three inmates in a cell and inmates sleeping in the day room of the facility. *See id.* at ¶¶59 and 61. Overcrowding also makes the maintenance situation worse. *See id.* at ¶62.

As of April 2022, West Virginia's correctional facilities were in serious need of maintenance that is only getting worse. *See id.* at ¶63. Deferred maintenance is maintenance that needs to be done and is not getting done due mostly to the lack of funding. *See id.* at ¶64. In July

2022, the deferred maintenance was approximately Two Hundred Million Seventy-Seven Million Dollars. *See id.* at ¶65. While a certain amount of money is allotted every year for maintenance, “it doesn't touch what the overarching bill is.” *See id.* at ¶66.

The cost of the deferred maintenance that was believed to be the most critical in 2022 was approximately Sixty Million Dollars. *See id.* at ¶72. Twenty-Seven Million of that amount is needed for door locking control systems and doors and locks. *See id.* at ¶73. A state of disrepair of doors, locks, and door locking control systems can present a risk of harm to inmates as inmates need to be prevented from being able to access other inmates during lockdowns or at night when an inmate is sleeping. *See id.* at ¶74.

Meetings between WVDHS and WVDCR officials and legislators, representatives from the Governor's office, of the Legislature, and State budget office officials have occurred wherein these individuals were informed that using part of the money from the budget surplus would greatly improve a lot of the issues. *See id.* at ¶77. These government officials would be presented with written proposals with options as to how to correct the overcrowding, understaffing, and deferred maintenance problems within the facilities. *See id.* at ¶78. The state is not lacking in funds to address the unconstitutional conditions at the facilities as the state ended the 2023 fiscal year with a \$1.8 billion dollar surplus and according to Governor Justice, “shattering the all-time record for biggest single-year revenue surplus in state history for the second straight year in a row.” *See id.* at ¶¶83-84.

Plaintiffs seek to certify three classes. Class A includes all currently incarcerated individuals who are inmates housed at MOCC and other prison facilities in West Virginia. *See id.* at ¶95. Class B includes all currently incarcerated individuals who are inmates housed at Southwestern and other jail facilities. *See id.* at ¶118. Class C includes all currently incarcerated

minor individuals who are inmates housed at Kuhn Juvenile Center and other Juvenile Center facilities in West Virginia. *See id.* at ¶141.

Plaintiff Sheppheard is the Named Plaintiff who is the proposed representative for Class A. Plaintiff Sheppheard was incarcerated at MOCC on or about May 1, 2023. *See id.* at ¶109. Plaintiff Randall is the Named Plaintiff who is the proposed representative for Class B. Plaintiff Randall was incarcerated at Southwestern on or about April 15, 2022. *See id.* at ¶132. Plaintiff J.P. is the Named Plaintiff who is the proposed representative for Class C. Plaintiff J.P. was incarcerated at Kuhn Juvenile Center on or about May 31, 2023. *See id.* at ¶155.

These Plaintiffs and the putative class members are subject to overcrowded facilities, resulting in conditions that were unsafe, unsanitary, and did not meet the requirements set out by law. *See id.* at ¶¶110, 133, and 156. These Plaintiffs and the putative class members are subjected to facilities that were not properly staffed, resulting in unsafe conditions for all inmates in the jails resulting in conditions that were unsafe, unsanitary, and did not meet the requirements set out by law. *See id.* at ¶¶111, 134, and 157. These Plaintiffs and the putative class members are subjected to correctional facilities that require hundreds of millions of dollars of maintenance, resulting in facilities that are unsafe, unsanitary, and did not meet the requirements set out by law. *See id.* at ¶¶112, 135, and 158.

Plaintiff Sheppheard has been given inadequate portions of food at MOCC; has only had access to showers with hot water, which resulted in blisters on his back; does not get regular access to new toothbrushes and toothpaste; does not have access to a law library; and, does not have recreational time at MOCC. *See id.* at ¶¶113-117. Plaintiff Randall has been housed in overcrowded cells; observed inmates sleeping on the floor; has been exposed to mold; has been exposed to rodent feces while in his pod; and, has been given inadequate portions of food at

Southwestern. *See id.* at ¶¶137-140. Plaintiff J.P. has been served undercooked food and has not always had access to hot water since being incarcerated at Kuhn. *See id.* at ¶¶159-160.

### **LEGAL STANDARD**

Plaintiffs incorporate, as if fully restated herein, the *Legal Standard of Plaintiffs' Response in Opposition to Defendant Sorsaia's Motion to Dismiss Complaint* [ECF 19, at pp. 8-9].

### **ARGUMENT**

#### **I. State Sovereign Immunity does not Bar Suit Against the Governor.**

##### **1. Plaintiffs sufficiently allege the legal ability to directly remedy the alleged constitutional violation on the part of Governor Justice.**

Governor Justice's argument regarding the application of sovereign immunity is unavailing. Initially, Governor Justice has "the legal ability to directly remedy the alleged constitutional violation, thereby ensuring that any federal injunction 'will be effective with respect to the underlying claim.'" *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). Governor Justice, at a minimum, has the legal ability to address overcrowding. In fact, not only does he have the legal ability, but also, he has the constitutional authority.

*Article VII, Section 11 of The Constitution of West Virginia* vests Governor Justice with the power "to grant reprieves and pardons after conviction." This power is also codified in *West Virginia Code Section 5-1-16, Remission of fines and penalties; commutation of sentences; reprieves; paroles; pardons*. The statute provides, in pertinent part, "[t]he Governor shall have power [. . .] to grant reprieves, paroles and pardons, after conviction."

Plaintiffs allege that the State of West Virginia is tasked by law with ensuring that all correctional facilities are free from the conditions of overcrowding, understaffing, and are properly maintained and it has failed in this regard for over a decade. *See Complaint* [Doc. 9] at ¶22. Furthermore, WVDCR Annual Reports for 2019 through 2022 show an increase in population

among all correctional facilities in comparison to prior years. *See id.* at ¶55. From January 2018 through July 2022, overcrowding in West Virginia’s facilities worsened. *See id.* at ¶58.

Overcrowding makes a facility less safe, secure, and humane than it could be resulting in having two to three inmates in a cell and inmates sleeping in the day room of the facility. *See id.* at ¶¶59 and 61. Overcrowding also makes the maintenance situation worse. *See id.* at ¶62.

With respect to understaffing, on August 11, 2022, Governor Justice issued Executive Order 33. 5-22 finding that: “A state of Emergency exists in West Virginia as it pertains to the staffing levels of our juvenile and adult detention and correctional facilities.” *See id.* at ¶33. Three hundred National Guard members were inserted into in the jails and prisons to help with the severe understaffing in the late summer of 2022. *See id.* at ¶35.

Overcrowding makes a facility less safe, secure, and humane than it could be resulting in having two to three inmates in a cell and inmates sleeping in the day room of the facility. *See id.* at ¶¶59 and 61. Overcrowding also makes the maintenance situation worse. *See id.* at ¶62.

As of April 2022, West Virginia’s correctional facilities were in serious need of maintenance that is only getting worse. *See id.* at ¶63. Meetings between WVDHS and WVDCR officials and legislators, representatives from the Governor's office, of the Legislature, and State budget office officials have occurred wherein these individuals were informed that using part of the money from the budget surplus would greatly improve a lot of the issues. *See id.* at ¶77. These government officials would be presented with written proposals with options as to how to correct the overcrowding, understaffing, and deferred maintenance problems within the facilities. *See id.* at ¶78.

Therefore, Governor Justice has the power to reduce the inmate population and address the understaffing in the correctional facilities. He also has the power to propose increased funding for



the deferred maintenance from various sources. Plaintiffs are not relying on the general power and duty of the Governor, but, his specific power deriving, in part, from the state constitution for setting the budget for certain items, including corrections.

Governor Justice’s contention that Plaintiffs solely rely upon his general right to oversee and carry out various executive functions [Doc 1, ¶ 11] is only supported if the remaining allegations of the *Complaint* are completely ignored. Governor Justice obviously has the power to “implement and enforce policies, procedures, and practices necessary” to remedy the allegedly unconstitutional conditions of confinement by granting reprieves, paroles and pardons to lessen the inmate population.<sup>1</sup> He has already demonstrated the power to attempt to relieve understaffing by activating the National Guard.

The cases cited by the Governor support a rejection of his claim for sovereign immunity. For example, where the Maryland State Governor and Attorney General had “no control over the potential enforcement actions that could be brought against [the plaintiff]” for violation of a statute, the *Ex Parte Young* exception did not apply. *Doyle v. Hogan*, 1 F.4th 249, 257 (4th Cir. 2021). Governor Justice is granted control over the inmate population by the state constitution and statute.

The Governor of Virginia, who lacked “direct enforcement authority with respect to the statutory provisions at issue,” was not dismissed by the lower court because the lower court found he “was a proper defendant because he actively and publicly defended the statutory provisions at issue.” *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 330-331 (4th Cir. 2001). The Fourth

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<sup>1</sup> “Moreover, in reviewing a Rule 12(b)(6) dismissal, we are not confined to the four corners of the complaint. It is well established that ‘we may properly take judicial notice of matters of public record,’ including statutes.” *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (quoting, *Philips v. Pitt Cnty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)).

Circuit Court of Appeals disagreed and ordered that he be dismissed as he “lacks a specific duty to enforce the challenged statutes.” *Id.* at 331. Again, not the case with respect to Governor Justice.

The Fourth Circuit Court of Appeals has rejected as inapposite the test proposed by an Appellant that required “the Executive Director of the SCDOT [to be] ‘charged with any duty under a federal statute or . . . with enforcement of a state statute that would violate federal law.’” *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). Applying a multifactorial analysis, the Court of Appeals determined that the suit could be maintained against the Director. The Court of Appeals analyzed the SCDOT’s involvement with the federal environmental statute applicable to a construction project in the state and relied upon such factors as the Director’s supervisory power over the agency; deep involvement in the process; SCDOT’s designation as a joint lead agency under the federal statute; participation in the overall process; involvement with the engineering aspects of the project; and, overseeing the actual construction of the project. *Id.*

In a case involving the prohibition of certain conduct, requiring masks in schools, that was tied to state appropriations, the Fourth Circuit dismissed the claim as the Governor had no role in enforcing the prohibition tied to the legislative appropriations. *Disability Rights S.C. v. McMaster*, 24 F.4th 893, 897, 901 (4<sup>th</sup> Cir. 2022). This case involves claims of violation of the *Eighth Amendment*, not a violation of a statute.

The remaining cases are wholly without argumentative value. In *Sonda*, the plaintiffs made “no attempt to explain how their injuries are fairly traceable to the Governor.” *Sonda v. Justice*, Civil Action No. 5:22-CV-124, 2022 U.S. Dist. LEXIS 202358, \*8 (N.D.W. Va. Sep. 7, 2022). The relief sought by the Plaintiffs in *Penkowski* was “‘a declaration and injunction to enjoin the state from legally recognizing gay marriage for violating the *first amendment establishment clause* [sic] for (1) constituting a non-secular sham, for (2) serving as an [sic] defensible legal weapon

against non-observers, and for (3) excessive entanglement of government with the religion of secular humanism.”” *Penkoski v. Justice*, Civil Action No. 1:18-CV-10, 2018 U.S. Dist. LEXIS 192715, \*5 (N.D.W. Va. Aug. 3, 2018), *report and recommendation adopted*, No. 1:18CV10, 2018 U.S. Dist. LEXIS 192105 (N.D.W. Va. Nov. 9, 2018). The action was deemed to be frivolous. *Id.* at \*23. *Young* brought the action against the Attorney General. Plaintiff’s complaint addressed an Executive Order requiring that a mask be worn in public and plaintiff claimed a *First Amendment* violation. *Young v. Morrissey*, No. 2:20-cv-00666, 2020 U.S. Dist. LEXIS 255968 (S.D. W. Va. Nov. 3, 2020), *report and recommendation adopted*, No. 2:20- CV-00666, 2021 U.S. Dist. LEXIS 111913 (S.D.W. Va. June 15, 2021). The analysis in *Young* is hypothetical and not precedential as the action was dismissed for failure to pay the filing fee. *Young v. Morrissey*, No. 2:20-cv-00666, 2021 U.S. Dist. LEXIS 111913, \*3 (S.D. W. Va. June 15, 2021).

Governor Justice attempts to seek dismissal by relying on cases that address the enforceability of a statute, ultimately by an official other than the Governor. He seeks to tip the scales of justice in his favor by stacking case citations upon one another as if that will weigh heavily in his favor. Absent from his argument however are cases such as *Jones v. Gusman*, 296 F.R.D. 416 (E.D. La. 2013); *Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910 (2011); and, *Goff v. Harper*, 59 F. Supp. 2d 910 (S.D. Iowa 1999) addressed in *Plaintiffs’ Response in Opposition to Defendant Sorsaia’s Motion to Dismiss Complaint* [Doc 17].

Governor Justice has demonstrated that he has a direct connection with the correctional facilities in West Virginia and can effectuate future changes to correct the continuing unconstitutional conditions. Had he made more extensive use of his constitutional powers to grant reprieves, paroles and pardons previously, the inhumane conditions may have been lessened over

the past five years that he has held office.<sup>2</sup> Had he set appropriate budgets based upon the recommendations of his cabinet secretary, West Virginia's correctional facilities would not be in the shape they are.

**2. Plaintiffs Request Appropriate and Permissible Relief pursuant to 18 U.S.C. § 3626.**

Governor Justice proffers the same argument as Defendant Sorsaia proffered in his Rule 12 motion, that is, that since two paragraphs of the Prayer for Relief request money to remediate the unconstitutional conditions, Plaintiffs' entire *Complaint* must be dismissed. In response, Plaintiffs reiterate their previous arguments.

Plaintiffs do not seek compensation for actions that were supposed to be taken in the past by the state, but were not taken. Plaintiffs, in fact, seek to enjoin ongoing violations of the *Eighth Amendment* that result from overcrowding, understaffing, and deferred maintenance. Plaintiffs allege that these constitutional violations have been occurring for years and continue to occur and in fact, the State knows well a precise amount to alleviate the conditions. In the *Elderman* case relied upon by Governor Justice, the United States Supreme Court, in referencing cases wherein the Court authorized equitable relief that had an impact on state treasuries, stated:

State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

*Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1358 (1974).

The *Eleventh Amendment*, read literally, does not prohibit a federal court from exercising its judicial power when the suit involves a Citizen of the State commencing an action against that

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<sup>2</sup> See also, [https://famm.org/wp-content/uploads/West-Virginia\\_Final.pdf](https://famm.org/wp-content/uploads/West-Virginia_Final.pdf) summarizing Executive Clemency and Medical Respite (accessed November 19, 2023).

State:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

*USCS Const. Amend. 11.*

The prohibition against Citizens suing their own State in federal court was developed out of the application of common law that a state could not be sued without its consent with a caveat that any suit alleging unconstitutional acts could be brought against an official of the State. *See e.g. Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890).

Plaintiffs seek a number of remedies in their *Complaint* not related to specific appropriations. Plaintiffs seek to enjoin Defendants from engaging in further unconstitutional practices [Doc. 8, Prayer for Relief, at c)]; compel them to make all necessary structural and/or infrastructure repairs, hazard abatements, financial investments, and personnel changes/additions to ensure these constitutional deprivations cease and do not continue in the future [Doc. 8, Prayer for Relief, at d)]; enjoin them, under 18 U.S.C. § 3626, from engaging in further unconstitutional practices, by the least intrusive means to correcting that harm with respect to all inmates housed in a West Virginia prison; [Doc. 8, Prayer for Relief, at g)]; impose definite time limitations within which the Defendants and the State of West Virginia must comply with the injunction [Doc. 8, Prayer for Relief, at h)]; and, grant any further relief this Honorable Court deems just and proper [Doc. 8, Prayer for Relief, at k)]. Plaintiffs seek to enjoin continuing unconstitutional practices, which is exactly the type of relief permitted under *Ex Parte Young*. Moreover, the Prison Litigation Reform Act (“PLRA”) defines “prospective relief” as “all relief other than compensatory monetary damages.” *See*, 18 U.S.C. § 3626(g)(7). Therefore, Plaintiffs herein are entitled to all appropriate

relief, but are not entitled to compensatory monetary damages, nor are they seeking the same.

Plaintiffs' claims are not unique. The Orleans Parish Prison ("OPP") in the State of Louisiana faced similar unconstitutional conditions of confinement and a lawsuit sought "to address deficiencies in safety and security, medical and mental health care, environmental conditions, fire safety, and Spanish language services at OPP." *Jones v. Gusman*, 296 F.R.D. 416, 423 (E.D. La. 2013). In *Jones*, the United States District Court for the Eastern District of Louisiana considered a motion filed by Class Plaintiffs, the United States, and the Sheriff of Orleans Parish for approval of a proposed consent judgment. *Id.* at 426.

The Louisiana District Court considered the requirement under the PLRA that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Id.* at 429 (*citing*, 18 U.S.C. § 3626(a)(1)(A)). The plaintiffs in *Jones* alleged violations of the *Eighth* and *Fourteenth Amendments* and alleged that the "underlying constitutional violations alleged in this matter are systemic." *Id.* at 430. The plaintiffs alleged deficiencies at OPP as follows: (1) safety and security, (2) medical care and mental health care, (3) environmental conditions, and (4) fire safety." *Id.* at 431. With respect to the funding of the constitutionally required remedies, the District Court noted that the consent agreement provided that "[t]he Court shall determine the initial funding needed to ensure constitutional conditions of confinement at OPP, in accordance with the terms of this Agreement, and the source(s) responsible for providing that funding at an evidentiary hearing ('funding trial')." *Id.* at 456 (underlining omitted). Thus, the PLRA permits a court to determine the remedies necessary to alleviate the unconstitutional conditions and consider the source of the funding required for the remedies.<sup>3</sup>

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<sup>3</sup> Plaintiffs recognize that sovereign immunity was not applicable in the case.

The United States Supreme Court considered the unconstitutional conditions in the California penal system due to overcrowding. *See, Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910 (2011). Specifically, the *Brown* Court considered whether “the remedial order issued by the three-judge court is consistent with requirements and procedures set forth in a congressional statute, the Prison Litigation Reform Act of 1995 (PLRA).” *Id.* at 500. The three-judge court determined that the violations of the *Eighth Amendment* could not be effectively remedied without a reduction in the prison system population. *Id.* The order gave the state officials the discretion to choose the method to reduce the overcrowding, such as new construction or out-of-state transfers, but the failure to meet the terms of the order would require the release of prisoners. *Id.* at 500-501. The Supreme Court also noted that California did not have the financial ability to construct new facilities. *Id.* at 528. West Virginia does not suffer from fiscal constraints.

The United States District Court for the Southern District of Iowa considered a plan submitted by the defendants to remedy a constitutional violation of substantive due process resulting from extraordinarily long lockup sentences; *Eighth Amendment* violations of inadequate exercise time and inadequate mental health treatment; and, violations resulting from the creation of overly stressful living conditions by housing mentally ill and non-mentally ill prisoners together at a state penitentiary. *Goff v. Harper*, 59 F. Supp. 2d 910, 912-913 (S.D. Iowa 1999). This was the fourth plan the District Court considered, noting that “plan four is now a better plan due to the two Iowa legislative sessions which provided the money to make the improvements possible.” *Id.* at 913.

The Defendants were given the opportunity to devise a plan to remedy the unconstitutional conditions; however, the Court altered the plan to provide additional relief. *Id.* at 914. Ultimately, the District Court concluded that the relief order with respect to the constitutional violations

“extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.” *Id.* at 928.

Defendant’s arguments with respect to the relief sought are also untimely as the Court has not ruled that the Plaintiffs are entitled to relief nor has the Court determined the nature of the appropriate relief to prevent the continuing violation of Plaintiffs’ constitutional rights. As demonstrated by the opinions in *Jones, Brown, and Goff*, fashioning a remedy involves an intensive examination of the existing conditions at the facility and the proposed remedies. Factual determinations are not appropriate at this stage of the litigation regarding those issues.

Moreover, “[i]t is simply premature to rule upon the issue of [the relief sought] in the context of a motion to dismiss stage as there has been no discovery or development of a record in this case.” *Weirton Area Water Bd. v. 3M Co.*, No. 5:20-CV-102, 2020 U.S. Dist. LEXIS 244141, at \*24 (N.D.W. Va. Dec. 30, 2020) (citation and quotation marks omitted). *See also, Hoffman v. Richardson*, No. 2:18-CV-333, 2020 U.S. Dist. LEXIS 252729, \*12 (S.D. Tex. Aug. 5, 2020) (memorandum and recommendation by Magistrate Judge) (“At this stage in the case, the undersigned cannot conclude that the injunctive relief sought by Plaintiff is not so narrowly drawn as to be the least intrusive means necessary to correct any violation of her constitutional rights.”)

In summary, Defendant Justice is not entitled to dismissal of the entire action based upon his arguments regarding two paragraphs in the Prayer for Relief. Plaintiffs seek an appropriate remedy under the PLRA, which would be determined only after discovery and the provision of expert opinions. Therefore, dismissal on the basis of speculative future remedies is not warranted.

## **II. Plaintiffs do not Lack Standing**

Governor Justice’s arguments regarding standing are similar to his arguments regarding sovereign immunity, which he recognizes. *See, Memo in Support* [Doc 16 at p. 13]. Therefore,



Plaintiffs incorporate their arguments set forth in Section I.(1.) above as if fully restated herein. Additionally, with respect to Governor Justice's argument that Plaintiffs do not have standing on the basis that the unconstitutional conditions of confinement are due to the failure to appropriate additional funds, Plaintiffs do not allege that the lack of funds is the sole basis for the unconstitutional conditions; nor do Plaintiffs allege that the unconstitutional conditions will be entirely alleviated without additional staffing and additional policy changes.

Additionally, Plaintiffs allege that unconstitutional conditions result from overcrowding, understaffing, and deferred maintenance. *Title 18, Section 3626 of the United States Code* sets forth the parameters of appropriate remedies for prison overcrowding. One of the remedies permitted is the issuance of a prisoner release order issued by a three-judge panel if the enumerated statutory conditions are met. *See, 18 U.S.C. § 3626(a)(3); See also, Brown v. Plata, 563 U.S. 493, 131 S. Ct. 1910 (2011).* In fact, the West Virginia Supreme Court of Appeals has already established the requisite connection between unconstitutional overcrowding and the Governor of the state:

Our statutory scheme thus not only contemplates, but mandates, a system in which convicts sentenced to the penitentiary are received by the Department of Corrections and incarcerated in a *State* penal facility. As a result of the current condition of our state prisons, obedience to this statutory scheme leads inexorably to unconstitutional overcrowding. The safety valve on the system, however, is the Governor's power of reprieve, pardon and parole set forth in *W.Va. Const.* art 7, § 11 and *W.Va. Code* 5-1-16 [1923]. Convicts *must* be accepted *by the State* for incarceration; but to bring our overcrowded prisons into constitutional compliance, the Governor may pardon, parole, transfer, or otherwise make constitutional accommodations for those convicts already incarcerated.

*State ex rel. Dodrill v. Scott, 177 W. Va. 452, 457, 352 S.E.2d 741, 745 (1986).*

Governor Justice's argument regarding standing is wholly unsupported under the federal statute and West Virginia precedent. Governor Justice is fully authorized and capable of redressing Plaintiffs' injuries by the exercise of his constitutional and statutory power.

### III. PLAINTIFFS STATE A CLAIM AGAINST THE GOVERNOR

In this argument, Governor Justice seeks to have this Court decide a factual issue, that is, whether he acted with deliberate indifference. In making this argument, Governor Justice sets forth many allegations in the *Complaint* that undercut his arguments seeking dismissal on the various jurisdictional bases he asserted as his actions demonstrate his relatedness to and proximity to the unconstitutional conduct. Absent from his argument is the detailing of any steps he has taken since taking office in 2017 to reduce the prisoner population. Furthermore, in response to this argument, Plaintiffs incorporate, as if fully restated herein, Section C of *Plaintiffs' Response in Opposition to Defendant Sorsaia's Motion to Dismiss Complaint* [ECF 19, at pp. 17-21].

Governor Justice asks this Court to make a factual determination as to the merits in a Rule 12(b)(6) motion. The request is inappropriate. Further, even if all of those allegations are taken as true, none of them address his failure to institute measures to release or otherwise relieve inmates from inhumane conditions when appropriate. Therefore, this argument does not support his request for dismissal.

### IV. Incorporation of Portions of *Plaintiffs' Response in Opposition to Defendant Sorsaia's Motion to Dismiss Complaint* in Response to Additional Arguments and Venue

Governor Justice joins by reference additional arguments advanced by Secretary Sorsaia supporting his motion to dismiss regarding mootness; exhaustion of administrative remedies; venue; injunctive relief limits; non-justiciable political question; and, Tenth Amendment prohibition. *See*, DOC 13 pp. 8–14, 19–25.

Plaintiffs fully incorporate as if restated herein the corresponding portions of *Plaintiffs' Response in Opposition to Defendant Sorsaia's Motion to Dismiss Complaint*. Specifically, Plaintiffs incorporate Section C [ECF 19, at pp. 14-15] in response to mootness; Section D [ECF 19, at pp. 15-17] in response to exhaustion of administrative remedies; Section E [ECF 19, at p.

17] in response to venue; Section G [ECF 19, at p. 21] in response to injunctive relief limits; Section H [ECF 19, at pp. 22-24] in response to non-justiciable political question; and, Section I [ECF 19, at p. 24] in response to the Tenth Amendment.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that *Governor Justice's Combined Motion to Dismiss and to Transfer Division* be denied.

**PLAINTIFFS,  
By Counsel**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

**THOMAS SHEPPHEARD,  
TYLER RANDALL, and  
ADAM PERRY, next friend  
and guardian of Minor child J.P.,  
on their own behalf and on behalf  
of all others similarly situated,**

**Plaintiffs,**

**v.**

**JAMES C. JUSTICE JR.,  
in his official capacity as Governor of  
the State of West Virginia, and  
MARK SORSAIA, in his official  
capacity as the Cabinet Secretary  
of the West Virginia Department  
of Homeland Security,**

**Defendants.**

**Civil Action No. 5:23-cv-00530  
(Judge Berger)**

**CERTIFICATE OF SERVICE**

Undersigned counsel for Plaintiffs hereby certifies that a true and correct copy of the foregoing *Plaintiffs' Response in Opposition to Governor Justice's Combined Motion to Dismiss and to Transfer Division* was filed with the clerk on November 20, 2023 via the Court's CM-ECF Filing System which will provide electronic notification to all counsel of record.

/s/ Stephen P. New  
Stephen P. New (WVSB No. 7756)