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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF CARLTON **SIXTH JUDICIAL DISTRICT**

Roger Foster and Kristopher Mehle, on behalf of themselves and all others similarly situated; and Adam Dennis Sanborn, on behalf of himself and all others similarly situated,

Petitioners,

v.

Minnesota Department of Corrections; Paul Schnell, Commissioner; Minnesota Correctional Facility-Moose Lake; and William Bolin, Warden,

Respondents.

Case No.: 09-CV-20-633

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRITS O HABEAS CORPUS AND MANDAMUS

INTRODUCTION

On the record now before the Court, it is clear that this case should proceed to limited discovery and an evidentiary hearing.

Respondents' voluminous submission of Department of Corrections ("DOC") records with their Opposition ("Opp.") shows that as they were complaining to the Court at the June 4 hearing about the burden of reviewing records requested by Petitioners, they were doing, or had completed, much the same review to cull and produce the documents they deemed favorable to themselves, while blocking Petitioners from obtaining adverse documents. Virtually all DOC Declarants swear that their declarations are "based on … personal knowledge and ***review of records*** kept in the ordinary course of business by the DOC." *See, e.g.*, Declaration of James T. Amsterdam (Emphasis added.)

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Petitioners should therefore be permitted to see the records Declarants reviewed, as well as any complaints related to COVID-19 preventive efforts and measures, and data regarding testing. On Sunday, June 7, counsel for Petitioners specifically requested these documents on or before June 15. Exhibit ("Exh.") 1 to Daniel R. Shulman Declaration ("Shulman Decl."). Counsel is still waiting, as Respondents continue to refuse to produce documents. Shulman Decl., Exh. 2.

An evidentiary hearing is also necessary on the dates the Court has reserved in August because the record now fully supports the factual disputes Petitioners foresaw at the June 4 hearing. The Moose Lake prisoners are simply not receiving and benefiting from all the preventive and protective measures described in the Respondents' declarations and exhibits, raising material disputed issues of fact about what is actually occurring at the prison.

Alternatively, Petitioners ask this Court to enter a writ of mandamus requiring Respondents to continue doing what they say they are actually doing, with certain additional measures recommended by Dr. Susan Hasti in her declaration. This Court's Writ has no doubt been a motivating factor in causing Respondents to achieve the progress they claim to have made in fulfilling their duty to keep prisoners at Moose Lake safe from COVID-19. It should continue while the pandemic lasts.

HISTORY OF PROCEEDINGS

A significant deficit in the Respondents' Opposition is their disregard of the record, both factual and legal, already established in this matter. First the facts, then the law.

In support of their Petition, Petitioners submitted declarations, which described conditions at the prison as of April 15, when this lawsuit commenced. In paragraphs 42-53, with citations to Petitioners' declarations, the Petition describes a prison with minimal testing for

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COVID-19 (¶ 49), virtually no social distancing (¶¶ 42-47), ineffective quarantine procedures (¶ 47), shortages of protective gear and sanitary supplies for prisoners (¶¶ 51, 53), punitive segregation (¶ 50), and lax enforcement of preventive measures by prison staff, many COVID-19 positive themselves (¶¶ 46, 48, 52). Even Respondents have implicitly acknowledged these were the conditions in existence at Moose Lake when this case commenced on April 15, causing this Court to issue its Alternative Writ of April 29. In congratulating themselves on what they claim to have done since April 15, Respondents state, "To date, the DOC has done what at the start of this lawsuit appeared to be an insurmountable task" (Opp., at 20). This statement, intended as self-commendation, instead affirms Petitioners' account and this Court's finding of just how bad conditions were at the prison when this case began.

As to the law, in its April 29 Memorandum, Alternative Writ of Mandamus, and Order to Show Cause ("April 29 Order"), this Court carefully and thoroughly analyzed and set forth the controlling law for these proceedings:

> The allegations in the Petition establish (1) that the Respondents failed to perform an official duty clearly imposed by law, and (2) the existence of a legal right to the act demanded which is so clear and complete as not to admit any reasonable controversy. *Id*., citing *Say v. Wright County*, 391 N. W.2d 32, 34 (Minn. Ct. App. 1986), *rev. denied* (Minn. Sept. 24, 1986).
>
> That the government is obliged to provide medical care for those who are incarcerated is elementary. *Estelle v. Gamble*, 429 U. S. 97 (1976). ***Under our state and federal constitutions, when the State takes a person into custody and holds him against his will, they bear a corresponding duty to assume some responsibility for his safety and well-being.*** *Estelle v. Gamble, supra*; *Cooney v. Hooks*, 535 N. W. 2d 609 (Minn. 1985); *Sandborg v. Blue Earth County*, 601 N. W. 2d 192 (Minn. Ct. App. 1999); *rev'd on other grounds* 615 N. W.2d 61 (Minn. 2000). The Minnesota Legislature also weighed in on the issue of the safety and wellbeing of incarcerated persons in Minn. Stat. § 241.021, subd. 1 (2019), which requires MNDOC to promulgate rules "establishing minimum standards for [its] facilities with respect to their management, operation, physical condition, and the security, safety, health, treatment, and discipline of persons defined or contained therein."

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> ***Petitioners allege Respondents are in violation of MNDOC's duty to protect them by failing to implement reasonable measures to slow or stop the transmission of the highly contagious COVID-19 virus. Certainly, the challenges posed by the contagion are substantially beyond MNDOC's experience. Nonetheless, its duty to do so is clear. The allegations in the Petition, supported by sworn affidavits and declarations, demonstrate that thus far, MNDOC has not met its duty.***
>
> April 29 Order at 5-6 (emphasis added).

This Court accordingly issued its Writ ordering Respondents to show cause "why they should not be ordered to perform their legal duty to keep Petitioners reasonably safe from COVID-19 while in Respondents' custody at the Minnesota Correctional Facility-Moose Lake, to include providing for appropriate testing, social distancing, and medical treatment, so long as the COVID-19 pandemic continues." *Id.*, at 6.

Respondents concede the correctness of this Court's finding as to their duty: "Here, the DOC does not contest that it has an obligation to provide medical care to individuals committed to its custody." Opp., at 30. Nor do they seriously challenge the Court's findings as to conditions at Moose Lake at the time Petitioners filed suit. Instead, they contend, "Mandamus cannot remedy an alleged insufficient response to a novel disease during a global pandemic." *Id*. This raises the question, if not mandamus, then what can require performance of a duty Respondents admit they have. They provide no answer.

To the contrary, Respondents argue that they are now performing their duty to keep Petitioners safe, so this Court cannot order them to keep doing it, even if they were not doing it when this lawsuit began. Petitioners will agree that Respondents now apparently have learned what they need to do to keep Petitioners reasonably safe from COVID-19. With important reservations, Petitioners also agree that, for the most part, Respondents are issuing appropriate directives in this regard. What is not occurring, however, is actual implementation of those

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directives at the prison level. Which is why the writ should issue, or the Court should proceed with an evidentiary hearing.

PETITIONERS' NEW DECLARATIONS

Petitioners have submitted declarations from prisoners and health professionals that specifically set out their disagreements with Respondents' declarations and highlight the disputed issues of fact that warrant an evidentiary hearing. Simply stated, the preventive measures the DOC describes for the Court are not actually happening for prisoners at Moose Lake.

Petitioners Foster and Sanborn reviewed pages 4 through 19 of Respondents' Opposition, which purport to relate the DOC's preventive actions for prisoners generally and Moose Lake specifically. Petitioners dispute the following alleged facts:

- Petitioner Foster never received or saw the memorandum to all prisoners warning about the dangers of COVID-19 referenced in Opp., at 6. Foster Decl. ¶ 2(a).
- The DOC's assertion of distributing additional handwashing stations in all facilities at Opp., at 6, is misleading. There was only a single hand sanitizing station in Unit 8; additional handwashing stations were for guards only, not prisoners. *Id*., ¶ 2(b). Petitioner Sanborn agrees: "I did not see additional handwashing stations in the facility that were accessible to the individuals who are incarcerated." The handwashing station at the entrance to the facility was not accessible to prisoners. "We did not have access to additional handwashing stations in the unit entrances, in the unit hallways, or at various other locations throughout Moose Lake prison." Sanborn Decl., ¶ 2(b). Petitioner Sanborn also believes the single handwashing station at the entrance to Moose Lake was not installed until after the first positive COVID-19 case on March 29. *Id*.

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- Opp., at 6, claims that on March 11, "the DOC began distributing additional bars of soap." Petitioner Sanborn declares, "I never received any extra bars of soap, and I do not know of anyone who received extra bars of soap." Sanborn Decl., ¶ 2(a).
- It is not true, as claimed in Respondents' Opp., at 6, that inmates were "expected to disinfect unit bathrooms following their use and were provided cleaning supplies," and "DOC employed additional unit swampers … to clean and disinfect unit bathrooms." Petitioner Foster declares that there was only a bottle of green germicide sanitizer in rest rooms, which was not designed to fight COVID-19; and this never changed during the pandemic. The germicide's instructions also required it to sit for ten minutes on surfaces to be disinfected before being wiped off. Accordingly, prisoners have not used it. Petitioner Foster, who was on cleaning detail, never received instructions to sanitize bathrooms or other common areas. Foster Decl. ¶ 2(c). Petitioner Sanborn concurs. Sanborn Decl., ¶ 2(c).
- Petitioner Foster never saw the memo referenced in Opp., at 7, that "encouraged all offenders to contact Health Services if they had any concerns about their health." The assertion is also misleading because the process of signing up for health care "is cumbersome and delays medical treatment. Offenders must sign up for sick call the night before to be seen the next morning. But Health Services won't see a person on a weekend. Additionally, many offenders have to make repeated KITEs to ask for health service visits because their first request is ignored." Foster Decl. ¶ 2(d).
- Petitioner Sanborn disputes the assertion in Opp., at 7, that "social distancing measures at MCF-Moose Lake have been strictly enforced by correctional staff who have seen general compliance from offenders and few instances of formal discipline related to lack

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of compliance." According to Petitioner Sanborn, "In my experience, social distancing has not been strictly enforced. I have seen inmates playing cards in the common area of my unit, and at recreation time, I have seen inmates playing Frisbee in groups, where multiple inmates would be standing and pushing against one another attempting to catch the Frisbee. Sanborn Decl., ¶ 2(e). Petitioner Foster concurs: "One guard might say 'wear a mask' but other guards won't care. At all times, offenders use the common areas. Further, inmates housed in Unit 84, which was a classroom but was converted into housing because segregation was full, would use Unit 8 commons areas and showers. People in Unit 84 included people transferred from Rush City or other facilities. Further, most inmates sleep in rooms that will not permit social distancing." Foster Decl. ¶ 2(e).

- The assertion in Opp., at 8, that prisoners now have free phone calls each week after the cancellation of visitations is misleading. Whereas in-person visitations were an hour in length, prisoners now get two free five-minute calls each week. Foster Decl. ¶ 2(f).
- Petitioner Foster agrees with the assertion in Opp., at 9, that Moose Lake "is particularly susceptible to COVID-19 infection because, unlike other DOC facilities, it houses many offenders in congregate living settings." The statement is incomplete, however, in its lack of detail. According to Petitioner Foster, "Housing in Unit 8 consists of offenders sleeping in 'dry cells,' two, three, four or eight men sleeping cells. Bathrooms are not in the cells but rather the hallways so you have to leave your cell to use the bathroom." Unit 8 also contains confined common areas, which "are about 15x20 with a TV, microwave, and sink. Another common area is 20x20 with a toaster, microwave; this room is often used for AA meetings." There is also a 30x30 common area shared with guards, which has vending machines, phones, two microwaves, a sink, the j-pay kiosk,

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and five tables. The room is always crowded, and prisoners do not social-distance there. *Id*., ¶ 2(h).

- Petitioner Foster disputes the statement in Opp., at 9, that prisoners in lock-up status could leave their cells only to go to the bathroom. After a prisoner in a four-person cell tested positive for COVID-19 and went into isolation, his three cellmates were quarantined and "were allowed to leave their cells to go to the common areas or bathrooms without staff oversight." *Id*., ¶ 2(i).
- Petitioner Foster disagrees with the DOC's statement at Opp., pp. 9-10: "DOC's mitigation efforts curbed the spread to manageable levels." There is no basis for drawing this conclusion in light of the paucity of testing (discussed more fully hereafter). "They dropped the ball back in March and never tested anyone. The virus has run through the entire prison and they did nothing to help us. They were only concerned in keeping their reported numbers low which is why they will not test us for COVID-19 antibodies." *Id*., ¶ 2(j).
- Petitioner Foster also disputes the statement in Opp., at 10, that the DOC "significantly restricted the ability of offenders to move throughout the facility." According to Petitioner Foster, "The prison did not close chow hall until early April, well after they knew people were sick, and there was a lot of co-mingling in March and April between units. And while we are still restricted from moving from units, DOC is constantly moving inmates around, especially in treatment units." *Id*., ¶ 2(k).
- Respondents say in Opp., at 10, that the DOC immediately isolates anyone showing COVID-19 symptoms. Both Petitioners say this is false and give a specific example from their Unit. Foster Decl. ¶ 2(l); Sanborn Decl., ¶ 2(e).

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- Petitioner Foster does not accept the statement in Opp., at 11, that "as of June 3, there are no offenders on quarantine status because they have had a cellmate placed on isolation status." He responds, "Ten people were put into quarantine on May 27 because inmate Mike Smith had a high temperature but his test came back negative. DOC is calling this a false negative, and they are treating it as a real case. Mike was moved to segregation, where he remains, and the other seven men in his cell and three other men in a three man cell were all put on quarantine. DOC did not test these ten men until June 8. Moreover, DOC permits these individuals to use the same common areas or bathrooms that we use." Foster Decl. ¶ 2(m).
- Petitioner Sanborn disputes that as of June 3, only one offender was in isolation status because of COVID-19. Opp., at 11. He personally was in isolation with a COVID-19 positive inmate, as was a former cellmate of his at the same time. Sanborn Decl., ¶ 2(f).
- Both Petitioners disagree with the statement in Opp., at 12, that prisoners on quarantine status are expected to practice social distancing in quarantine. According to Petitioner Sanborn, "It is impossible to social distance inside of the cells. For example, we are closer than 6 feet distance just when in our bunks to sleep." *Id*., ¶ 2(g). In addition, Petitioner Foster reports, "In Unit 8, individuals in quarantine can leave their cells at any time to use the bathrooms. While they now have scheduled time for the common areas and yard that was not always the case. Through most of April and mid-May, they did not have different schedules for individuals in quarantine and thus there was a lot of commingling." Foster Decl. ¶ 2(n). Petitioner Sanborn concurs that "Quarantined inmates use the bathrooms with the rest of the non-quarantined inmate population. I have been in the bathroom on multiple occasions when a quarantined inmate from my

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unit has come in, and there was no enforcement of social distancing." Sanborn Decl., ¶ 2(h).

- Petitioner Sanborn says it is untrue that the 16 offenders on quarantine status must remain their cells. Opp., at 13. "The offenders on quarantine in segregation are not all being successfully quarantined. For example, while I was recently in segregation—from Sunday, June 7, 2020, to Tuesday, June 9, 2020—there was a janitor, Offender White (OID #216537), who was cleaning the segregation common areas, phones, showers, and the cells of people who leave segregation. He was one of the quarantined inmates who was transferred out of Moose Lake, but he was also expected, while in segregation, to clean all of the high-touch areas, including those used by confirmed positive COVID-19 patients. Sanborn Decl., ¶ 2(i).
- "On pages 13-14, Respondents' Opposition says health services staff were wearing N95 masks when assessing patients suspected of COVID-19. This is not true. Staff didn't start wearing the N95 mask until this lawsuit was filed." Foster Decl. ¶ 2(o). The same is true with regard to inmates. The statement is false that "as of April 8, all offenders are required to wear their mask while in the presence of staff and other offenders, with limited exception." Opp., at 14. According to Petitioner Sanborn, "Mask wearing did not become mandatory until after this lawsuit was filed. I specifically recall because a cellmate of mine commented that my involvement in this Petition was the reason he was required to wear a mask all the time." Sanborn Decl., ¶ 2(j).
- Likewise, the statement in Opp., at 14, that all staff wear N-95 masks in the isolation unit is false. While in isolation, Petitioner Sanborn personally observed staff without N-95 masks. Sanborn Decl., ¶ 2(k).

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- Generally, not all staff wore N-95 masks, many never did, and none did before the filing of this lawsuit. Foster Decl. ¶ 2(o), ¶ 2(p).
- It is also untrue that all staff members wear a cloth barrier mask at all times within the presence of other staff and offenders. Opp., at 14. "This is not happening. Even if they are required to do so, not all staff wears their masks when near the inmates." Sanborn Decl., ¶ 2(l). Petitioner Foster also refutes the statement, and declares, "Every time I've been moved to a room to call my attorney, the individual setting up the call for me has never worn a mask in my presence." Foster Decl. ¶ 2(q).
- Petitioner Sanborn declares that testing on day 12 of quarantine was not done until well after the filing of this lawsuit. Opp., at 14-15. "I believe they are doing this now, but in the beginning, quarantined inmates would be confined to their cells for the 14-day period, but once that 14-day period expired, they were simply off quarantine status. No testing was done." Sanborn Decl., ¶ 2(m).
- Both Petitioners dispute that any significant testing for COVID-19 has been done at Moose Lake since the filing of this lawsuit on April 15. Foster Decl. ¶ 3; Sanborn Decl., ¶ 3. "Since the Petition was filed on April 15, 2020, there has not been an increase in testing in the facility. In fact, testing has decreased, as the virus has spread and run its course through the facility." Sanborn Decl., ¶ 3.

Petitioners have also submitted declarations from ten other inmates: Varle Wright; Paul Applegate; Justin Thomas; Derek Chambers; Anthony LaPointe; Chad Pryatel; Michael Smith; Antonio Robinson; Christopher Terwilliger; and Kevin Turck. They tell a common story and reinforce the declarations of Petitioners Foster and Sanborn. Its elements are:

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- Absence, failures, and refusals of testing for COVID-19: Wright Decl. ¶¶ 12-14,16; Applegate Decl. ¶ 7; Thomas Decl. ¶¶ 6, 23; Chambers Decl. ¶¶ 3, 8-9, 26; Pryatel Decl. ¶¶ 1, 11-12; Terwilliger Decl. ¶¶ 2(d), 2(i), 2(k); Turck Decl. ¶¶ 4(a)-(b), 9.
- Lack of social distancing: Wright Decl. ¶¶ 17-19; Applegate Decl. ¶ 9; Thomas Decl. ¶¶ 5-6, 18-19, 27, 30; Chambers Decl. ¶¶ 5, 29-30; LaPointe Decl. ¶ 13; Pryatel Decl. ¶ 15; Smith Decl. ¶¶ 6(e)-(g), 7; Robinson Decl. ¶¶ 9-10; Terwilliger Decl. ¶¶ 2(e), (g); Turck Decl. ¶¶ 4(c)-(g).
- Absence, failures, and refusal of mask-wearing enforcement: Wright Decl. ¶¶ 17, 19; Applegate Decl. ¶¶ 14-15; Thomas Decl. ¶¶ 20, 29; Chambers Decl. ¶ 31; LaPointe Decl. ¶¶ 5, 14-16; Pryatel Decl. ¶ 16; Robinson Decl. ¶ 8.
- Failure to provide sufficient protective equipment and sanitation supplies: Wright Decl. ¶¶ 15; Applegate Decl. ¶ 16; Thomas Decl. ¶¶ 3-7, 26; Chambers Decl. ¶ 30; LaPointe Decl. ¶¶ 7-9; Smith Decl. ¶ 6(c); Terwilliger Decl. ¶¶ 11(a)-(c);
- Unduly punitive segregation facilities and procedures: Thomas Decl. ¶¶ 15-17; Chambers Decl. ¶¶ 10-14; Terwilliger Decl. ¶¶ 1, 7; Turck Decl. ¶¶ 4-(b) .

With this Reply, Petitioners have also submitted declarations from Drs. Susan Hasti and Faris Keeling. Although both acknowledge that the DOC is aware of much of what needs to be done and has issued directives towards that end, both have concerns about what is actually being done in the prisons. Dr. Hasti has also reviewed historical COVID-19 testing information from the DOC web site for all DOC facilities and found serious delays at Moose Lake: "It is clear that even with improvements in testing at Moose Lake, other facilities were more diligent." Hasti Decl., ¶ 5(d).

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Dr. Hasti raises two significant concerns about crucial gaps in the DOC's efforts. The first involves identification and protection of prisoners most vulnerable to COVID-19. Hasti Decl. ¶¶ 6(b)-(c), (g)-(i). According to Dr. Hasti, the State's battle against COVID-19 has moved from the containment phase to the mitigation phase:

> From the medical community perspective, at both a state and national level, it is clear that we are no longer in a "containment" phase as it pertains to the novel coronavirus. Rather, we are operating in a "mitigation" phase of the pandemic. What this means is that the medical community has recognized that it is not possible to contain, or eliminate, the virus, as it has spread too far into the community at large. Now, the efforts are directed toward mitigating the potential harms.
>
> *Id*., ¶ 6(b).

An essential part of mitigation is identifying those most vulnerable to COVID-19 and protecting them. The United States Center for Disease Control and Prevention ("CDC") has identified these vulnerable groups (persons with asthma, diabetes, immunocompromised, chronic obesity, etc.), as the DOC well knows. *Id.*, ¶ 6(c). Because these vulnerable people, including those in custody, are unlikely to self-identify, it is essential that their custodians actively and affirmatively identify them and make it a priority to protect them, particularly because of the heightened accelerated spread of COVID-19 within a confined congregate setting, *e.g*., a prison. *Id*., ¶¶ 6(d)-(f).

Dr. Hasti sees no indication that Respondents are meaningfully engaged in either actively identifying or adequately protecting these vulnerable prisoners. *Id*., ¶¶ 6(g)-(i). She states, "Given the rapidity of spread, it is my opinion that this effort should be prioritized and completed with urgency." *Id*., ¶ 6(h).

Respondents describe in their Opposition the DOC's Conditional Medical Release ("CMR") program as an effort to deal with this issue. Opp., at 17-18. The numbers, however, show the woeful inadequacy of CMR. First, prisoners must self-identify by filing applications,

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rather than being affirmatively identified and selected by Respondents. Second, implementation has simply overwhelmed the DOC, which as of June 1 had 1,523 applications, of which only 84 were approved for release, including only 17 at Moose Lake. *Id*. Significantly, the Opposition fails to state how many actual releases have occurred at Moose Lake or elsewhere.

By June 11, the number of applications had swelled to 1,636, with the approvals up to 110; the actual releases, however, totaled only 19 for the entire 8,100-person prison system. Shulman Decl. Ex. 3, slide 11. Dr. James Amsterdam apparently has been responsible for reviewing the medical basis for release with respect to each of the 1,636 applications, which may explain the bottleneck that has resulted in the release of far less than one-tenth of one percent of the prison population. Amsterdam Decl., at 7-8, ¶ 21.[1]

The CMR program is no answer to Dr. Hasti's concern.

Dr. Hasti's second major concern is the DOC's failure to adequately educate prisoners on the principal means of transmission of COVID-19, which is oral or respiratory droplets. *Id*., ¶ 6(j). As the prisoner declarations discussed above make clear, wearing of masks and social distancing are sporadic, not rigorously enforced, and far from a top priority for prisoners and apparently staff at Moose Lake. Instead, Respondents appear to give equal, if not greater weight to handwashing. Dr. Hasti comments,

> While handwashing is important, and highlighting it is appropriate, hand-to-hand transmission is not the primary route of viral transmission. The Department's measures did not clearly explain that air droplets contain the virus, how a mask reduces the volume of particles in the air, define what "social distancing" is in easy-to-understand terms, or provide how social distancing plays its role by keeping apart individuals at a distance that air droplets cannot cross to be passed from person to person. Based on my experience with vulnerable populations, this

[1] The DOC's expanded Work Release Program is doing no better in thinning prison populations, particularly at Moose Lake. To date only four Moose Lake prisoners have been approved for release out of a population of almost 1,000 prisoners. Opp., at 18.

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> explicit education is critical. Knowledge cannot be assumed; nor can complete understanding of written information be assumed.

Hasti Decl., *id.*.

The final paragraph of Dr. Hasti's declaration suggests that had Respondents done everything they now claim to be doing, but done it before this lawsuit began on April 15, this suit might never have been necessary.

> Finally, it is my opinion that, if the Department of Corrections had done before this lawsuit was filed all that it states it was doing during that time when the novel coronavirus was first identified in Minnesota and the state began shutting down, it might have avoided, or at least lessened, the outbreak of COVID-19 in Moose Lake, and now in its other facilities.

Id., at ¶ 7.

Petitioners have also submitted the declaration of Dr. Faris Keeling, who is involved in medical supervision of long-term residential treatment at four separate residential units, as well as a short-term residential detoxification center. He is thus "familiar with the complex, difficult issues which the covid-19 pandemic has presented to residential facilities." Keeling Decl., ¶ 1(a). After reviewing the COVID-19 protection measures on the DOC web site, *available at* https://mn.gov/doc/about/covid-19-updates/mcf-moose-lake-covid-19-response/, Dr. Keeling concludes:

> I read the measures being taken at Moose Lake (as well as Willow River). They are good as far as they go. They are potentially effective (*if actually applied conscientiously*) to DECREASE medical risk to inmates and staff, compared to making no changes. However, they do not likely go far enough to actually MINIMIZE coronavirus transmission and associated medical risks—especially in this unique type of residential setting—where residents are involuntary, and unable to control most of the factors relevant to staying well during the covid-19 pandemic.

Keeling Decl., ¶ 3 (emphasis in original).

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As shown, there are serious questions in this record about whether these measures are being "actually applied conscientiously." Based on the declarations submitted with this Reply, they are not.

Finally, both Drs. Hasti and Keeling raise numerous serious questions and the need for additional information about the workings of the DOC's efforts to protect prisoners from COVID-19. Hasti Decl. ¶¶ 5(a)-(c), 5(e)-(k), 6(g), 7. Answers to these questions most likely reside in the "records kept in the ordinary course of business by the DOC" reviewed by Respondents' declarants in preparing their declarations. This is yet another reason to require Respondents to respond to discovery.

One of these areas involves the DOC's approach to testing for COVID-19, which on the face of the DOC's web page (*available at* https://mn.gov/doc/about/covid-19-updates/) is difficult to understand. For example, as of April 15, when this case was filed, the DOC reported that only 14 persons at Moose Lake had been tested for COVID-19, and that 12 of them tested positive, one tested negative, and one was awaiting results, with another 31 presumed positive. Petition, ¶ 9. As of June 9, the web site reported 172 tests at Moose Lake, with 43 confirmed positive and 31 presumed positive. The prison contains approximately 1,000 prisoners, was the original epicenter of the COVID-19 outbreak in the Minnesota prison system, and yet had only 17 percent of its population tested, even though carriers of COVID-19 were in many cases asymptomatic. Then on June 11, the DOC revealed testing of two Units at Moose Lake, which increased the number of tests to 436 and the confirmed positive COVID-19 prisoners to 45, with 164 test results still pending. This raises the question why such extensive testing could not have occurred much earlier, when the DOC knew the virus was in the prison. Why wait until now?

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Petitioners have requested documents from Respondents showing testing dates and numbers at Moose Lake. Respondents have refused. Shulman Decl. Exhs 1,2.

On the other hand, the DOC tested all 1,418 inmates at Stillwater for COVID-19, when there were no known cases.

In addition, the outbreaks at Willow River with 80 positive and now Faribault with 155 positive for COVID-19—the former weeks and the latter months after the DOC was aware of the outbreak at Moose Lake—raise serious questions regarding Respondents' claims of expertise about COVID-19 and effectiveness for their protective measures to keep prisoners safe from the virus. One serious question is whether Respondents limited testing at Moose Lake because they decided the virus was already in the prison, could not be contained, and should be allowed to run its course through the population, after which the DOC could shift its efforts to mitigation. These are all questions to which Petitioners and the Court should have answers. Petitioners ask the Court to allow discovery directed at this issue to proceed in advance of an evidentiary hearing.

ARGUMENT

The Petition for Habeas Relief[2]

The essence of Respondents' argument for denying habeas relief is that Petitioners are required to show that the conditions of their confinement either amount to cruel and unusual punishment under the Eighth Amendment of the United States Constitution or its Minnesota

[2] Respondents are correct that Petitioner Kristopher Mehle escaped from the Bethel Work Release Center on May 14, 2020, and is at present a fugitive. Given his present status, Petitioners believe he should be dismissed from this case without prejudice. A dismissal with prejudice is unwarranted because if and when he is apprehended and re-imprisoned, the State will still owe him the same duty to keep him reasonably safe, wherever he may be confined.

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counterpart, or violate some other constitutional or statutory right. Opp., at 21-24. Specifically, Respondents assert, "The writ may be used to bring claims concerning fundamental constitutional rights, significant restraints on liberty, conditions of confinement alleged to constitute cruel and unusual punishment, and confinement that allegedly violates applicable laws." *Id*., at 21.

Respondents' insistence on a showing of cruel and unusual punishment lacks merit for two reasons. First, Minnesota law does not limit habeas relief only to a showing of cruel and unusual punishment. Cruel and unusual punishment is only one of a number of circumstances that can support habeas relief based on unlawful conditions of confinement. Second, failing to protect prisoners from COVID-19, when their custodian knows the virus is in the prison and is potentially fatal, ***is*** cruel and unusual punishment.[3]

Respondents cite *Kelsey v. State*, 283 N.W.2d 892, 895 (Minn. 1979) in support of the statement, "In considering what would constitute unlawful conditions of confinement in the context of habeas relief, Minnesota courts have held that conditions of confinement that are cruel and unusual punishment ***may be*** a basis for habeas relief." Opp., at 27; emphasis added. Respondents unfortunately neglect to say that the issue in the case was actually whether there could be ***other*** grounds for habeas relief for prisoners, and the holding of the case is that there can be. Immediately after the Court's saying that cruel and unusual punishment may be a ground for habeas relief, the opinion continues:

[3] A false premise that colors all of Respondents' arguments is that "Absent statutory authority, the Commissioner cannot release offenders early—before their supervised-release date—and disregard the court orders committing individuals to his custody." Opp., at 16. Petitioners dispute this. If the Commissioner has a duty to safeguard prisoners—and he does—and statutory provisions do not enable him to perform that duty, then this Court can order him to take measures to perform this duty regardless of what the statutes say, especially if this duty is based in the Minnesota Constitution, and it is.

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> In fact, some courts in other states have allowed the use of habeas corpus to challenge conditions of confinement that allegedly abridge interests protected by statute rather than by the constitution. See, e.g., In re Harrell, 2 Cal.3d 675, 87 Cal.Rptr. 504, 470 P.2d 640 (1970), certiorari denied, 401 U.S. 914, 91 S. Ct. 890, 27 L.Ed.2d 814 (1971). Some of these same courts permit the use of habeas to challenge the determination of the length of confinement. See, e.g., In re Streeter, 66 Cal.2d 47, 56 Cal.Rptr. 824, 423 P.2d 976 (1967). See generally 39 C.J.S Habeas Corpus § 101a and cases cited therein.
>
> * * *
>
> In conclusion, we believe that, in the absence of an amendment of the postconviction remedy act to permit that remedy to be used for this purpose, habeas corpus is the most appropriate remedy.
>
> *Id.*

Accord: Loyd v. Fabian, 682 N.W.2d 688, 690 (Minn. Ct. App. 2004) ("The scope of inquiry in habeas corpus proceedings is limited to constitutional issues, jurisdictional challenges, claims that confinement constitutes cruel and unusual punishment, and claims that confinement violates applicable statutes.").

Here, as this Court has already found in its April 29 Order, the duty to keep prisoners safe is both constitutional and statutory:

> Under our state and federal constitutions, when the State takes a person into custody and holds him against his will, they bear a corresponding duty to assume some responsibility for his safety and well-being. Estelle v. Gamble, supra; Cooney v. Hooks, 535 N. W. 2d 609 (Minn. 1985); Sandborg v. Blue Earth
> County, 601 N. W. 2d 192 (Minn. Ct. App. 1999); rev'd on other grounds 615 N. W.2d 61 (Minn. 2000). The Minnesota Legislature also weighed in on the issue of the safety and well-being of incarcerated persons in Minn. Stat. § 241.021, subd. 1 (2019), which requires MNDOC to promulgate rules "establishing minimum standards for [its] facilities with respect to their management, operation, physical condition, and the security, safety, health, treatment, and discipline of persons defined or contained therein."
>
> *Id.*, at 5-6.

There is thus no requirement that Petitioners must prove cruel and unusual punishment to be entitled to habeas relief.

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Even if there were such a requirement, however, Petitioners have met it here.

The United States Supreme Court has long held that the Eighth Amendment must be "interpreted in a flexible and dynamic manner," *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (*quoting Gregg v. Georgia*, 428 U.S. 153, 171 (1976)), and its "applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008). As a result, the Court has repeatedly rejected static lines in the Eighth Amendment context, and has explicitly instructed lower courts to keep pace with ***scientific understanding*** when bringing their independent judgment to bear. *See, e.g., Hall v. Florida*, 572 U.S. 701, 710 11 (2014). As the Court has instructed time and again, the Eighth Amendment "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Hall v. Florida*, 572 U.S. 701, 708 (2014). As Justice Stewart famously observed in *Furman v. Georgia*, the Eighth Amendment prohibits arbitrary punishment because it is "cruel and unusual in the same way that being struck by lighting is cruel and unusual." 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

The Minnesota Supreme Court has specifically stated, "It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution." *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985). It has also repeatedly stated that Article 1, section 5's ban on "cruel ***or*** unusual" punishments provides "more protection" than the Eighth Amendment's ban on "cruel ***and*** unusual" punishments. "The difference is not trivial." *State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010); *see also State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998).

It is certainly cruel ***and*** unusual, as well as cruel ***or*** unusual, for a custodian of prisoners to withhold care when the custodian knows a life-threatening, highly contagious pathogen is

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moving uncontrolled through the custodian's prison, and the custodian has received guidance on how to respond to keep prisoners protected. Here, Respondents acknowledge receiving CDC guidance on March 23, six days before the first confirmed COVID-19 positive test at Moose Lake. Two weeks later, when this case was filed, the prison had tested only 14 prisoners for COVID-19, with 12 reported positive. Nor had the prison imposed effective social distancing and other preventive and protective measures. It still has not, as Petitioners' declarations show. Even some of those measures that have been implemented are unduly punitive, specifically segregation, which has the counterproductive effect of being so hellish that it deters prisoners from coming forward for testing for fear of being sent to the "hole."

It is undoubtedly cruel and unusual, as well as cruel or unusual, knowingly to subject confined prisoners to an aggressive virus that has now killed over 1,200 Minnesotans, 114,000 Americans, and 422,000 people worldwide, with few signs of abating. *See* https://www.startribune.com/coronavirus-covid-19-minnesota-tracker-map-county-data/568712601/ (viewed June 12, 2020).

Respondents cite authority where courts have denied habeas and other relief to claimants in custody raising COVID-19 claims. Opp., at 25-26. Numerous other courts, however, have granted relief on habeas and other grounds to prisoners seeking relief because of COVID-19. *Thakker v. Doll*, Case 1:20-cv-00480-JEJ, Memorandum and Order (M.D. Pa. March 31, 2020); *Jimenez v. Wolf*, Case 1:18-cv-10225-MLW, Memorandum and Order (D. Mass. March 26, 2020); *United States v. Ramos*, 18-CR-30009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Docket No. 084230, Consent Order (March 22, 2020 N.J.); *Basank v. Decker*, Case 1:20-cv-02518-AT, Memorandum and Order (S.D.N.Y. March 26, 2020); *United States v. Stephens*, No. 15-CR-95

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(AJN), 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020); *United States v. Zukerman*, 16 CR. 194 (AT), 2020 WL 1659880, at *1 (S.D.N.Y. Apr. 3, 2020); *United States v. Mahan*, 1:19-CR-00233-DCN, 2020 WL 1846789, at *1 (D. Idaho Apr. 10, 2020).

Finally, Respondents' insistence on a constitutional or statutory predicate for habeas relief is surprising in view of directly contrary authority in a 2019 Minnesota Supreme Court decision, which expressly refused to adopt their position and granted habeas relief against Respondents DOC and Commissioner Schnell. *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 404-05 (Minn. 2019). Respondents here make essentially the same argument the Supreme Court rejected in *Ford v. Schnell*:

> The Department argues that habeas relief is not available for an alleged violation of an internal agency policy. In the absence of a constitutional or statutory violation, the Department contends that, by granting Ford's petition for a writ of habeas corpus, the district court erred as a matter of law.
>
> We disagree for several reasons. First, the plain language of the habeas corpus statute lacks the limitations that the Department would have us impose. See Minn. Stat. § 589.01 (2018) (providing that "[a] person imprisoned or otherwise restrained of liberty" may petition for a writ, without stating what kind of illegal restraint the petition must challenge). The statutory phrase "otherwise restrained of liberty" broadens the scope of relief available beyond only "a person imprisoned."
>
> Second, our precedent does not support the Department's narrow view of habeas corpus. [Citations omitted.]
>
> *Id.*

Respondents' entire argument thus rests on a demonstrably false premise.

There is no reason this Court should deny habeas relief at this time in the absence of discovery and an evidentiary hearing.

The Petition for Mandamus Relief

Respondents' begin their argument against mandamus relief by stating, "Here, the DOC does not contest that it has an obligation to provide medical care to individuals committed to its

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custody." Opp., at 30. Actually, this is only part of the DOC's legal obligation, which is much broader in that it requires Respondents to keep prisoners reasonably safe. When a person has custody of another under circumstances in which the other person is "deprived of normal opportunities of self protection," a duty is imposed on the custodian because of the special relationship that exists between custodian and detainee. *Cooney v. Hooks*, 535 N.W.2d 609, 611 (Minn. 1995). This duty requires the government to exercise reasonable care to safeguard prisoners. *Id*.; *Davis v. State Dept. of Corrections*, 500 N.W.2d 134, 136 (Minn. App. 1993); *Sandborg v. Blue Earth County*, 601 N.W.2d 192, 196 (Minn. App. 1999). The duty of protection arises when the harm to be prevented is foreseeable under the circumstances. *Sandborg v. Blue Earth County*, 601 N.W.2d at 197.

The distinction is obviously important because limiting the duty to the provision of medical care might arguably exonerate Respondents from their obligation to prevent entry and spread of COVID-19 in Moose Lake Prison. In other words, defining the proper scope of the duty eliminates the defense that Respondents have no duty to protect prisoners from COVID-19 until they actually get sick.

Respondents contend, "Petitioners do not allege the DOC failed to provide medical care, nor do they allege that the DOC failed to provide any COVID-19 mitigation response. At issue in this case is the sufficiency of the DOC's response. Mandamus cannot remedy an alleged insufficient response to a novel disease during a global pandemic." Opp., at 30. Respondents mischaracterize the nature of Petitioners' claims and further state a conclusion that leads to an absurd and unjust result: that if Respondents did anything at all, no matter how minimal, unsuitable, and harmful, this Court cannot issue mandamus to compel them to perform their legal duty to keep Petitioners reasonably safe from COVID-19.

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For example, if Respondents decided that every inmate must drink a cup of bleach once a day to ward off COVID-19, then, according to them, this Court would be unable to issue a writ of mandamus to compel Respondents' performance of the duty to keep them safe.

Petitioners fully accept the Court's determination of the nature of mandamus relief:

> The two primary purposes of mandamus are, first, to compel the performance of an official duty clearly imposed by law or, second, to compel the exercise of discretion when the exercise of discretion is required by law. See Minn. Stat. § 586.01 (2019). Mandamus properly issues only when a petitioner shows that there is "a clear and present official duty to perform a certain act." *Breza v. City of Minnetrista*, 706 N.W.2d 512, 518 (Minn. Ct. App. 2005), citing *Kramer v. Otter Tail County Bd. of Comm'rs*, 647 N.W.2d 23, 26 (Minn. Ct. App. 2002); *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn.2004).

April 29 Order, at 4.

Petitioners are not seeking nor is the Court ordering Respondents to perform their duty in a particular manner. Rather the Court is asking Respondents to show cause why they should not be ordered to perform their duty when the Petition and supporting declarations establish that they have not performed it. Respondents are specifically ordered to show cause "why they should not be ordered to perform their legal duty to keep Petitioners reasonably safe from COVID-19 while in Respondents' custody at the Minnesota Correctional Facility- Moose Lake, to include providing for appropriate testing, social distancing, and medical treatment, so long as the COVID-19 pandemic continues." *Id*., p. 6. This does not tell Respondents how to perform their clear legal duty. It asks them to show why they should not be ordered to perform it, when the evidence submitted by Petitioners satisfies the Court that there is reason to find they have not.

The Order to show cause makes reference to wanting particulars about testing and social distancing, but Respondents cannot seriously contend they can protect prisoners from COVID-19 without these precautions. Of course, Petitioners' evidence before the April 29 Order, and in this

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Reply, shows that testing and social distancing are two critical aspects in which Respondents have been deficient in keeping prisoners reasonably safe from COVID-19.

Finally, Respondents make the puzzling argument that because Petitioners are not seeking relief under 42 U.S.C. § 1983, they "cannot satisfy their burden of establishing that there is no adequate remedy at law," and therefore "cannot maintain a cognizable mandamus claim." Opp., at 32. This ignores the Court's finding that Petitioners have already satisfied it: "Given the seriousness of the situation, the rapid spread of COVID-19 in the Moose Lake Facility, indeed throughout the State of Minnesota and the United States, and the particular vulnerability of the Petitioners, there is no adequate legal remedy." April 29 Order, p. 6. As of April 29, no part of this was in dispute.

In addition, the one authority Respondents cite in support of this argument, *Mendota Golf v. City of Mendota Hgts*, 708 N.W.2d 162 (Minn. 2006), provides no support for this argument. The case involved a writ of mandamus entered in a land use dispute. The Court merely observed that Minn. Stat. § 586.02 bars mandamus "where there is a plain, speedy, and adequate remedy in the ordinary course of law." 708 N.W.2d at 171. The Court also noted, "Moreover, mandamus is used in many cases in which an adequate remedy at law — a declaratory judgment action — is available." *Id*. at 178. The case, however, says nothing about why Petitioners might have an adequate remedy at law here.

Respondents in no way explain why failure to file an action under 42 U.S.C. § 1983 shows there is an adequate remedy at law or establishes a failure of proof on the absence of an adequate remedy at law. This contention by Respondents appears to be an unsupported *non sequitur*.

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What is at stake here are health and lives. The absence of an adequate remedy at law goes without saying.

Minn. Stat. § 586.12 provides, with respect to mandamus, "Issues of fact in proceedings commenced in a district court shall be tried in the county in which the defendant resides, or in which the material facts stated in the writ are alleged to have taken place. Either party shall be entitled to have any issue of fact tried by a jury, as in a civil action." Petitioners have shown numerous issues of fact concerning the adequacy of Respondents' performance of their duty to keep Petitioners safe from COVID-19, not only before and at the time this action was filed on April 15, but continuously through the last two months to the present time. These factual disputes require an evidentiary hearing pursuant to § 586.12.

Alternatively, Petitioners have submitted sufficient evidence for this Court to find that Respondents breached their duty as of April 15 and continue to do so. Even assuming that they now know what they need to do and are issuing directives to do what should be done, there is ample evidence that at the level of the prison, it is not happening. It also appears that the existence of this lawsuit has been to some degree responsible for whatever progress has occurred in protecting prisoners. Petitioners therefore suggest that there is a sufficient basis for this Court to issue a writ of mandamus to compel Respondents to continue to do in fact what they claim to be doing to keep prisoners reasonably safe from COVID-19.

Request for a Special Master

At this time, given the Court's expressed reluctance to consider a special master at this early stage of the proceedings, Petitioners do not press their request. Petitioners still believe that this case may eventually warrant this, but see no need to brief the issue now.

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There is, however, another alternative, which Petitioners believe is more appropriate at this stage of the case, in view of the many disputed issues of fact and their epidemiological complexities. Petitioners instead ask the Court to consider a court-appointed expert under Minn. R. Evid. 706. [4] The Rule permits the Court "on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations." Minn. R. Evid. 706(a). The parties could then confer either to agree on an expert or to provide the Court with a list of possible experts.

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[4] **Rule 706.Court Appointed Experts**

(a)Appointment.

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b)Compensation.

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c)Disclosure of appointment.

In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d)Parties' experts of own selection.

Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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If ever there was a case appropriate for a court-appointed expert, it is this one, where the Court and parties are dealing with unprecedented cutting edge medical, epidemiological, and public health issues. This case need not and should not turn into a battle of experts. Petitioners would welcome the Court's appointment of an expert whose independence the Court can trust. With the strong possibility of an evidentiary hearing and the burden the Court will face in sorting through the conflicting evidence, Petitioners suggest this would be an ideal time for the appointment of a Rule 706 expert.

CONCLUSION

This Court now has before it an extensive evidentiary record. Because the parties disagree over so many important facts, Petitioners ask this Court to permit limited discovery and to proceed with an evidentiary hearing on the early August dates the Court has reserved. There are serious issues raised regarding how Respondents have proceeded in their efforts to protect prisoners from COVID-19, many of them unanswered, which the Court will have to resolve. Live testimony, subject to cross-examination, even via Zoom, remains essential to the discovery of truth. *State v. Hollander*, 590 N.W.2d 341, 348 (Minn. Ct. App. 1999) (noting "the importance of cross-examination, 'the greatest legal engine ever invented for the discovery of truth.'"); *California v. Green*, 399 U.S. 149, 158 (1970) (confrontation "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'".)

Respectfully submitted.

Dated: June 15, 2020

By: /s/ Daniel R. Shulman

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ACKNOWLEDGEMENT

The Petitioners by the undersigned hereby acknowledge that pursuant to Minn. Stat. Sec. 549.211 sanctions may be imposed under this section.

/s/ Daniel R. Shulman