STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Arnold Baker, et al. on behalf of themselves and others similarly situated,

62-CV-20-5143

ORDER

Petitioners,

v.

Minnesota Department of Corrections and Paul Schnell, Commissioner, in his official capacity,

Respondents.

THE ABOVE-CAPTIONED MATTER came before the undersigned on January 15 and again on March 31st, upon Petitioners' motion for class certification, Respondents' response to the Court's Order to Show Cause, and Petitioners' motion to amend their Petition. Dan Shulman appeared on behalf of the Petitioners, along with Teresa Nelson, Ian Bratlie, Isabella Salomão Nascimento, Clare Diegel, Cathryn Middlebrook, and Dan Lew. Cicely Miltich appeared on behalf of the Respondents along with Stephen Forrest. All appearances were made remotely via Zoom due to the ongoing COVID-19 pandemic.

Based on all the files, records, and proceedings herein:

IT IS HEREBY ORDERED that

1. The Petitioners' motion for class certification is granted.
2. The Petitioners' motion to amend their Petition is granted.
3. The Petitioners' request for a writ of mandamus as to the Minnesota Department of Corrections and Paul Schnell, Commissioner, in his official capacity is denied
4. The attached memorandum is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 31, 2021

Sara Grewing

Grewing, Sara (Judge)
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Honorable Sara R. Grewing
Judge of District Court

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BACKGROUND

THE COVID-19 GLOBAL PANDEMIC

The facts in this case remain largely undisputed since the initial filing in October 2020. This case arises out of issues surrounding the spread of COVID-19 in the facilities run by the Minnesota Department of Corrections. The spread of COVID-19 has engendered an unprecedented global health crisis, killing over 511,745 people in the United States. According to the Minnesota Department of Health, over 517,881 Minnesotans have contracted COVID-19 and 6,836 people in the state have died after contracting the virus. COVID-19 is particularly dangerous to people who are over 65 years old or have certain health conditions and disabilities, including diabetes, lung disease, heart disease, and compromised immune systems.

In response to the COVID-19 pandemic, Governor Tim Walz declared a peacetime state of emergency and has issued a series of executive orders, beginning on March 13, 2020, that directed Minnesotans to maintain social distancing, wear masks in public, limit non-essential travel, and not engage in any social activities with people outside of their household. *See, i.e*., Executive Order 20-01, *et. seq*.

DEPARTMENT OF CORRECTIONS AND PETITIONERS

Despite the actions taken to combat COVID-19 in Minnesota's population generally, Petitioners argue that there has been a blind spot on COVID-19 within the Department of Corrections. Petitioners argue that Respondents have failed to act in any coordinated way to prevent COVID-19 from spreading rapidly through correctional facilities and overwhelming medical resources in nearby communities.

All of the Petitioners are committed to, or under the supervision of, the Minnesota Department of Corrections. Petitioners Baker, Green, Hill, Jackson, Moore, Pippitt, Schultz, Washington, and Williams are currently incarcerated at the Faribault facility. Petitioner Henley is incarcerated at the Lino Lakes facility. Petitioner Habedank is incarcerated at the Moose Lake facility. Petitioner Russell is incarcerated at the Red Wing facility. Petitioners Ballard and Millsap are incarcerated at the Stillwater facility. Petitioners Gauthier and Manthey are incarcerated at the Shakopee facility. Petitioner Riley is incarcerated at Rush City. Petitioner Winston is incarcerated at Oak Park Heights. Petitioners Branch and Russell are on the work release program. While the basis for their incarcerations is not relevant here, the Court can

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take judicial notice that the Minnesota Department of Corrections only incarcerates felony offenders, and as such, each Petitioner is serving at least a 366 day sentence.

The vast majority of the named Petitioners have serious health concerns that put them at heightened risk of COVID-19. *See* Center for Disease Control, *People with Certain Medical Conditions,* available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. Petitioner Baker has been diagnosed with chronic obstructive pulmonary disease ("COPD"), emphysema, asthma, hepatitis B, and high blood pressure. Petitioner Branch has asthma and high blood pressure. Petitioner Grant has COPD asthma, chronic sleep apnea, and high blood pressure. Petitioner Habedank has asthma and dysfibrinogenemia, a serious blood-clotting disorder. Petitioner Henley has asthma. Petitioner Hill has hypertension, breathing problems, and a lung issue arising from an internal decapitation and a double stroke. Petitioner Hill uses a walker and eats through a feeding tube. Petitioner Jackson has one kidney and has a diagnosis of hypertension and a history of leg infections. Petitioner Moore is HIV positive, has high blood pressure, and is a kidney cancer survivor. Petitioner Schultz suffers from kidney and respiratory issues. Petitioner Washington has previously contracted COVID-19 and has Type 2 Diabetes, high blood pressure, and heart arrhythmia. Petitioner Williams has Type 2 diabetes and high blood pressure. Petitioner Gauthier suffers from congestive heart failure, has a third of her lung removed, and has blood clots in her heart. Petitioner Manthey is 87 years old, uses a walker, has had a stroke, and has congestive heart failure. Petitioner Pippitt has Type 2 Diabetes, severe asthma and chronic bronchitis. Petitioner Riley previously tested positive for COVID-19 in October 2020. Petitioner Winston suffers from obesity and hypertension. *See* Pet. Reply in Support of Motion for Leave to Amend, 7-9.

According to counsel for the Minnesota Department of Corrections, as of March 31, 2021, Petitioners Hill, Pippitt, Gautheir and Manthey have been vaccinated against COVID-19. Petitioners Jackson, Henley and Wilson have declined vaccination. Petitioners Branch, Greene, Russell and Schultz have been released, but the Court is not certain whether they remain under the supervision of the DOC.

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LAWSUIT

Petitioners are before this Court with three requests: First, Petitioners have filed a motion for class certification under Rule 23. Second, Petitioners seek to amend their Petition to add new Respondents and new causes of action for injunctive and declaratory relief. Finally, Petitioners seek a writ of mandamus against the Commissioner of Corrections on the basis that their close confinement and vulnerable status as incarcerated individuals puts them at substantial risk of contracting COVID-19.

ANALYSIS

Class Certification

A class action provides an exception to the general rule that litigation is conducted by and on behalf of the individual named parties only. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011). In order to justify a departure from that rule, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. *Id.* (Quotations omitted). Minnesota Rule of Civil Procedure 23 ("Rule 23") governs the litigation of class actions. A party seeking class certification must establish the following prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23(a). After satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; or (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. *See* Minn. R. Civ. P. 23(b)(1)–(3).

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A trial court has broad discretion to decide whether class certification is appropriate. *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). However, "[a] party seeking class certification must affirmatively demonstrate compliance with [Rule 23]—that is, the party must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores*, 564 U.S. 338 at 350. The preliminary inquiry of the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case. *Blades v. Monsanto Co*., 400 F.3d 562, 566 (8th Cir. 2005). "In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994).

While this is a case of somewhat first impression in Minnesota, trial court judges around the country have provisionally certified similar classes of detainees bringing claims arising from the COVID-19 pandemic. *See, e.g*., *Hernandez Roman v. Wolf*, 829 Fed.Appx. 165 (9th Cir. 2020) *Mays v. Dart*, -- F.Supp.3d --, -- at *4 (N.D. Ill. Apr. 9, 2020); 2020 WL 1812381; *Wilson v. Williams*, -- F.Supp.3d --, 2020 WL 1940882, at *8 (N.D. Ohio Apr. 22, 2020)(reversed on other grounds by 961 F.3d 829); *Hines v. Sheriff of White Cty*., Indiana, No. 4:20 CV 43-PPS-JPK, 2021 WL 651351, at *1 (N.D. Ind. Feb. 19, 2021); *Martinez v. Reams*, No. 20-CV-00977-PAB-SKC, 2021 WL 603054, at *1 (D. Colo. Feb. 16, 2021); *Lucero-Gonzalez v. Kline*, No. CV2000901PHXDJHDMF, 2020 WL 8258216, at *14 (D. Ariz. Nov. 3, 2020).

1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. *See Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985). To be impracticable, plaintiffs need not show that joinder of all class members would be impossible; they must show that it would be difficult. *Jenson v. Continental Fin. Corp*., 404 F. Supp. 806, 809 (D.Minn.1975). Rather than establish any absolute numbers that necessarily would or would not satisfy the numerosity requirement, the Eighth Circuit has held that "the question of what constitutes impracticability depends upon the facts of each case." *Boyd v. Ozark Air Lines, Inc*., 568 F.2d 50, 54 (8th Cir.1977) (citing 7A

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Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil § 1762 at 592 (1972)).

Here, the class Petitioners ask this Court to certify includes all prisoners within the custody or control of the DOC within the duration of the COVID-19 pandemic. As of January 21, 2021, the total DOC prison population was roughly 7,593 people, according to the Department of Corrections' website. *Available at* https://mn.gov/doc/data-publications/statistics/ https://mn.gov/doc/. Defendants do not dispute that joinder of more than 7,000 potential plaintiffs would be impracticable, and this Court agrees. The numerosity requirement is satisfied for the purposes of Rule 23.

2. Commonality

Since any question can be crafted "at a sufficiently abstract level of generalization ... to display commonality," the key inquiry here is whether "a class-wide proceeding [will] generate common answers apt to drive the resolution of the litigation." *Love v. Johanns*, 439 F.3d 723, 729–30 (D.C. Cir. 2006) (quoting *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 397 (6th Cir. 1998)); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 201 (D.D.C. 2020). The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention ... capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350; *see also id*. ("What matters to class certification ... is not the raising of common questions ... but, rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."). Differences among putative class members can impede the generation of such common answers. *Id.*

The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members. *Jenkins v. Raymark Industries, Inc*., 782 F.2d 468, 472 (5th Cir.1986); *Streich v. Am. Fam. Mut. Ins. Co*., 399 N.W.2d 210, 214 (Minn. Ct. App. 1987). In the instant case, Petitioners allege that the class members are all asking the same questions, namely

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(1) What is the nature of the DOC's – and ostensibly, the newly-added Respondents' -duty to keep prisoners safe from COVID-19;

(2) What have the Respondents done to comply with their legal duties;

(3) Are the Respondents' actions sufficient to meet their legal duties; and

(4) Is the issuance of a writ of mandamus a just and appropriate remedy?

Here, Respondents argue that Petitioners have failed to meet the stringent demands of the commonality requirement under *Wal-Mart Stores*. Respondents assert that Justice Scalia's opinion in *Wal-Mart* requires that the class present not just a common question, but also a common answer. 564 U.S. at 350. *See also*, *C.G.B*. 464 F. Supp. 3d 174, at 201. Respondents argue that the issues identified by the Petitioners in the complaint are far too different and individualized to be capable of class wide resolution.

Essentially, Respondents argue that Petitioners' claims are at once too specific and also too vague to meet the commonality requirement for class certification. For example, Respondents assert that Petitioners' own allegations note that the duty to keep prisoners safe from COVID-19 could depend on the unique medical history of each prisoner.

Similar to the allegations in *C.G.B*., Respondents also argue that Petitioners here have failed to crystallize precisely what discrete actions or policies of the Department of Corrections constitute its purported failure to protect its inmates. Respondents argue that the vague allegation that DOC lacks policies sufficient to protect inmates from COVID-19 does not constitute "a uniform policy or practice that affects all class members." *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013) (emphasis added); *C.G.B*. 464 F. Supp. 3d at 202.

The Court recognizes that counsel for Respondents are at a positional disadvantage here, because it made its arguments before the newly-added Respondents were included in this action. (*See, Infra*.) With all parties added to this lawsuit, it is clearer to this Court that Petitioners have met their burden and satisfied the commonality requirement for class-certification. While the common question may be too broad for specific relief under mandamus, (*see, infra*) it is still sufficient for Rule 23 certification. Simply put, if the common question that the class members are asking of this Court is "Have the Respondents protected us

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from the dangers of COVID-19?" it is possible that the common answer is "Yes, if vaccinations are available to every inmate and staff member of the Department of Corrections."

3. Typicality

The typicality requirement is met when the claims or defenses of the representative party are typical of those of the class. Minn. R. Civ. P. 23(a)(3). The requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1174 (8th Cir. 1995). In determining typicality, courts consider whether the named plaintiff's claim "arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc*., 84 F.3d 1525, 1540 (8th Cir. 1996).

Petitioners assert that "it is inconceivable" that anyone incarcerated at the Department of Corrections would not want to be protected from COVID-19. While the named Petitioners may be more potentially vulnerable to the depredations of COVID-19 than the average prisoner because of their pre-existing health conditions; Petitioners assert that this does not mean that their claims are not typical of the class.

Respondents allege that the Petitioners each allege a medical history and a need based on their facility that is so unique that the complaint must fail the typicality requirement. Moreover, Respondents also argue that the extraordinary remedy of mandamus that the Petitioners seek further underscores why Petitioners cannot satisfy the typicality requirement. To have standing to bring their mandamus claim, Petitioners must show how they specifically were injured as a result of the Respondents' failure to perform a ministerial duty and how they specifically will benefit from a court compelling performance of that duty. *See Bank of Boyd v. Hatch*, 384 N.W.2d 550, 554-55 (Minn. Ct. App. 1986). It follows, Respondents argue, that because each Petitioner is impacted uniquely by COVID-19, they are not typical of absent class members with respect to their ability to demonstrate a public wrong specifically injurious to them.

While mindful of the extraordinary remedy of mandamus relief, the Court is satisfied that Petitioners have met their burden for typicality under Rule 23. The named Petitioners' claims and the claims of the remainder of the class arise from the same course of conduct: Respondents' policies

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surrounding the COVID-19 pandemic. These claims are identical to the claims that could be raised by any member of the class. In addition, all putative class members share a common injury of having these policies applied to them, and as a result, suffering a significant risk of harm. The potential injury to each individual Petitioner is also the same: contracting COVID-19. Therefore, the Petitioners are typical because they, too, are exposed to the same risk. *See also Postawko v. Missouri Dep't of Corr*., 910 F.3d 1030 (8th Cir. 2018).

4. Adequacy

Rule 23(a)(4) requires that the class representative and class counsel will "fairly and adequately protect the interests of the class." The adequacy requirement is met where: "(1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously; and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Carpe v. Aquila, Inc*., 224 F.R.D. 454, 458 (W.D. Mo. 2004). This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

Here, Respondents do not dispute that counsel for the representatives are able and willing to prosecute the action competently and vigorously. Rather, Respondents argue that Petitioners cannot meet the requirements of Rule 23.02(b) for the same reasons that they cannot demonstrate commonality or typicality. Respondents argue that Petitioner is uniquely situated, and no single injunction could solve the plethora of diverse issues raised in the Petition related to each Petitioner's medical care, unique living situation, susceptibility to COVID-19, eligibility for early release, and other factors.

This Court is satisfied that Petitioners have met their burden for establishing adequacy because, as discussed above, their claims arise out of the same common course of conduct, face the same potential injury (contracting COVID-19) and are based upon the same legal theories as the class members' claims. *See also*, *Wal-Mart Stores*, 564 U.S. 338, 349, n. 5 (2011) (noting that the two requirements of typicality and adequacy "tend to merge").

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Rule 23.02(b) Requirements

Petitioners seek to certify their class under Rule 23.02(b), which permits relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Certification under rule 23.02(b) is appropriate "when the party opposing the class has acted in a consistent manner towards members of the class so the actions may be viewed as part of a pattern of activity." *Ellis v. O'Hara*, 105 F.R.D. 556, 563 (E.D. Mo. 1985). The requirement is met "when plaintiffs allege[] the adoption of general policies by governmental defendants [are] applied to the plaintiffs in general." *Id*.

Thus, the critical inquiry is whether Petitioners are seeking uniform relief from a practice applicable to everyone who is currently committed to the Minnesota Department of Corrections. Here, Petitioners challenge the conditions at the DOC's facilities and Respondents' allegedly insufficient response to the COVID-19 pandemic. Petitioners ultimately seek uniform relief: an order compelling Respondents to mitigate the dangers of COVID-19 within the Department's Correctional facilities. *See i.e.*, *Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014) (Rule 23(b)(2)(similar to Minn. R. Civ. P. 23.02(b)) satisfied where state department of corrections established policies and practices that placed "every inmate in custody in peril" and all class members sought essentially the same injunctive relief). For purposes of this inquiry, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Id*. Here, a single injunction – perhaps broadly or specific to vaccinations - would provide relief to each class member. *Id*. See *Wal-Mart Stores*, 564 U.S. at 360. Accordingly, the Court concludes that the Rule 23.02(b) requirements are also satisfied.

Motion to Amend

After a responsive pleading has been served, a party may amend a pleading only by leave of court or by written consent of the adverse party. Minn. R. Civ. P. 15.01. Rule 15 requires that leave should be freely given when justice so requires, if doing so will not result in prejudice to the adverse party. *See* Minn. R. Civ. P. 15.01; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). "[T]he liberality to be shown in the

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allowance of amendments to pleadings depends in part upon the stage of the action and in a great measure upon the facts and circumstance of the particular case." *Bebo v. Delander*, 632 N.W.2d 732, 741 (Minn. Ct. App. 2001); *see also Taubman v. Prospect Drilling & Sawing, Inc*., 469 N.W.2d 335, 338 (Minn. Ct. App. 1991) ("A court may consider the stage of the proceedings in deciding whether to allow an amendment.").

Even if there is no prejudice to the nonmoving party, "the court may… properly deny a motion to amend when it would serve no useful purpose." *Bridgewater Tel. Co. v. City of Monticello*, 765 N.W.2d 905, 915 (Minn. Ct. App. 2009) (internal citations omitted). An amendment may be futile and should not be permitted if it does not state or otherwise support a valid legal claim. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 332 (Minn. 2004) (cautioning "that the court should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment").

Here, Petitioners argue that they need to amend their claims as a result of developments that have occurred subsequent to the filing of their previous petition. Primarily, Petitioners argue that the availability of effective vaccines and the policies and procedures implemented by the DOC, MDH, and Governor for their distribution and use, violate their constitutional rights. Petitioners further contend that these policies merit relief through declaratory and injunctive measures, in addition to the mandamus relief they have already sought.

Respondents vigorously oppose Petitioners' motion to amend on the grounds that Petitioners new claim would also fail as a matter of law. Respondents argue that Petitioners have not identified any official duty clearly imposed by law sufficient to warrant mandamus relief. Moreover, Respondents argue, inmates at DOC facilities are already being vaccinated, so even if the court were to find a ministerial duty justifying mandamus relief a Court order would be ineffective.

Further, Respondents argue that Petitioners failed to act with due diligence on the question of vaccine distribution. Respondents argue that Petitioners had actual knowledge of the vaccine distribution process and the determinations of eligibility in late December or early January. Respondents argue that an amended petition would prejudice them because there has already been substantial litigation and the amended petition would cause further delay.

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This Court cannot conclude as a matter of law that the Petitioners' declaratory judgement actions against all the parties or the mandamus actions against the Minnesota Department of Health or Governor Walz would necessarily fail. Moreover, it is deeply troubling to this Court that the Petitioners allege that only four of their 1b-Tier 2 eligible named Petitioners and roughly twenty percent of the current inmates at the Minnesota Department of Corrections have been vaccinated. As such, the Court is not convinced that judicial involvement in the vaccination schedule would be moot. As such, the motion for leave to amend the complaint is granted.

Writ of Mandamus

A writ of mandamus is an extraordinary legal remedy that courts issue only when the petitioner shows that there is a clear and present official duty to perform a certain act. *Kramer v. Otter Tail Cty. Bd. of Comm'rs*, 647 N.W.2d 23, 26 (Minn. Ct. App. 2002); *see also*, Minn. Stat § 586.01. The reason that mandamus is so rare and extraordinary is because it allows a court to command another branch of government to take a specific action, something the separation of powers typically forbids. *See Colvin v. Inslee*, 195 Wash. 2d 879, 467 P.3d 953 (2020). A writ of mandamus can only command what the law itself commands. If the law does not require a government official to take a specific action, neither can a writ of mandamus. *Id*. *See also Marbury v. Madison*, 5 U.S. 137, 170, 2 L. Ed. 60 (1803) (noting "the province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.") As such, Minnesota follows the traditional holding that mandamus is not appropriate to control the discretion of a public official, and is appropriate only when the acts to be compelled are clearly and positively required by law. *Northern States Power Co. v. Minnesota Metropolitan Council*, 684 N.W.2d 485, 491 (Minn. 2004).

Therefore, to be entitled to mandamus relief, the Petitioners must demonstrate three elements: "(1) the failure of an official to perform a duty clearly imposed by law; (2) a public wrong specifically injurious to petitioner; and (3) no other adequate remedy." *Id*. (citing *Demolition Landfill Servs., L.L.C. v. City of Duluth*, 609 N.W.2d 278, 280 (Minn. Ct. App. 2000), *review denied* (Minn. July 25, 2000)). *See also In the Matter of the Welfare of the Child of S.L.J.,* 772 N.W.2d 833, 838 (Minn. Ct. App. 2009). Moreover, to

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succeed in a petition for mandamus, a party must convince the court 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) (emphasis supplied).

In plain terms, the mandamus question before this Court is not whether the risk of COVID-19 in the Minnesota Department of Corrections requires an immediate response to protect the lives of inmates and staff—clearly it does. Instead, this question asks whether this Court can issue a writ of mandamus to direct the Commissioner to respond in a particular way. *See Colvin*, 195 Wash. 2d at 890.

Petitioners argue that the DOC has an official duty to protect Petitioners from COVID-19 and that the DOC has failed and refused to perform that duty. At a minimum, Petitioners argue that this duty requires the Department to take the following steps, which are "undisputed" measures that will protect prisoners form COVID-19:

1. Enforce social distancing in its facilities through population reduction;

2. Enact a policy for timely, widespread, and regular testing;

3. Enforce universal mask-wearing; provision of supplies;

4. Make personal protective equipment available to all inmates;

5. Make facilities available for hand-washing and other sanitary measures;

6. Establish appropriately safe and non-punitive isolation and quarantine of infected and exposed prisoners; and

7. Identify and protect the individuals most vulnerable to COVID-19. (Pet. Brief at ¶ 79).

Respondents argue that the mandamus claim fails because mandamus cannot be used to enforce a broad general duty to "protect Petitioners from COVID-19" that even Petitioners cannot define. Respondents argue that Petitioners have not established the existence of a clear and present official duty to perform a certain act, they have not established that DOC breached any duty, and they cannot demonstrate that other adequate legal remedies are unavailable to them. Under these circumstances, Respondents argue that the extraordinary remedy of mandamus is improper.

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This Court has already concluded in issuing the preliminary writ that the Department of Corrections has a duty to protect prisoners from COVID-19 and that the Department has failed to do so. As this Court initially concluded, the COVID-19 infection rates among inmates and staff at the Minnesota Department of Corrections are staggering. Moreover, after the Court ruled on this issue in December 2020, the same conclusion was reached by the Minnesota Ombuds for Corrections, who also determined that the State had failed to prevent the disparate spread of COVID-19 in its correctional facilities. As the Ombuds report noted, roughly 10% of Minnesota's adult population is presumed or confirmed to have had COVID-19, yet in 3 of 11 State Correctional Facilities over 70% of incarcerated adults tested positive for the virus, and over 60% in a fourth. *See* Minnesota Office of the Ombuds for Corrections, Covid-19 Report, March 1, 2021, available at https://mn.gov/obfc/

For the purpose of ultimate mandamus relief, however, the Court remains concerned that Petitioners continue to request the Court direct the Respondents' exercise of discretion. Indeed, as counsel for Respondent noted at argument, the Department of Corrections' response to COVID-19 involves the exercise of thousands of discretionary acts, both at the leadership and facility level. This is not a case where Petitioners are arguing that the government has failed to act. It is undisputed that the DOC has acted. It has engaged in population reduction to increase social distancing, it has tested its population, and it has quarantined some individuals. Instead, Petitioners are arguing that the DOC is doing it wrong.

This does not strike the Court as an appropriate basis for mandamus relief. There is no law that mandates specifically *how* the Commissioner should be responding to COVID-19 whether it be through social distancing requirements, PPE availability or testing. Thus, this Court cannot require a specific action in mandamus as to the Department of Corrections. Absent a clear mandate for more specific action on the Commissioner's part, this Court does not have the authority to oversee his many discretionary actions to address the COVID-19 pandemic. In issuing this narrow ruling, this Court does not in any way wish to minimize the serious risk that COVID-19 poses to those who are incarcerated in Minnesota. Rather, this Court cannot use this pandemic as an occasion to exercise powers that exceed the judicial branch's

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constitutional authority. For this reason, the petition for a writ of mandamus relating to the Department of Corrections is denied.

CONCLUSION

In summary, this Court grants the request to certify the Petitioners as a class under Rule 23. Unless and until shown otherwise, because of the media coverage and publicity surrounding the case and the urgency of the underlying issues, the Court is not requiring additional notice to the class. The class consists of all prisoners either in the custody or under the supervision of the Minnesota Department of Corrections. The Court also grants Petitioners leave to file and serve the Second Amended and Supplemental Petition attached to their motion as Exhibit A. Governor Walz and Commissioner Malcolm in their official capacities are added to this litigation, along with the Minnesota Department of Health. This matter now also includes Petitioners' claims for violation of the Minnesota Equal Protection Clause (Article I, § 2), the Due Process Clause (Article I, § 1), and the Cruel or Unusual Punishment Clause (Article I, § 5) of the Minnesota Constitution.

In dismissing the writ of mandamus against the Department of Corrections, the Court takes no position on the question of whether the failure to vaccinate incarcerated Minnesotans is an action appropriate for declaratory, injunctive or mandamus relief against the newly-added Respondents, either individually or jointly with the DOC. Having granted the motion to file a second amended petition, the Court will rule on whether the vaccination process or other actions taking by the Respondents violate the Equal Protection, Due Process, and Cruel or Unusual Punishment Clauses of the Minnesota Constitution after the issue is fully briefed and argued by the parties.

Again, the allegation that only 1,672 of the roughly 7,600 – just over 20% – of the Minnesotans incarcerated at the DOC are fully vaccinated is deeply troubling. At this point in the fight against COVID-19, it is universally accepted that people working and living together are at exponentially heightened risk for contracting COVID-19. In fact, at least two courts in other states have determined that the vaccination schedule for prison inmates under their state constitutions. *See, i.e. Holden v. Zucker,* -- Misc. 3d.--; Docket No. 801592/2021E (Bronx March 30, 2021); *Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384,

at *7 (D. Or. Feb. 2, 2021). The Court noted the Department of Corrections' update at argument that all incarcerated Minnesotans will be vaccinated by April 9. The Court looks forward to additional affidavits from the Department of Health and the Department of Corrections that will verify this important information. In the meantime, the parties are directed to attempt to resolve this matter with urgency, and without further protracted litigation.