STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Civil Division

Terry Branson, Kevin Nelson, Richard Fageroos, Nathan Freeman, Brad Stevens, Anthony Green, Chester Grauberger, Michael Perseke, Austin Black Elk, and all other similarly situated et al., Petitioners, v. Minnesota Department of Human Services, Commissioner Jodi Harpstead, Minnesota Department of Health, Commissioner Jan Malcolm, Minnesota Sex Offender Program Moose Lake, Executive Director Nancy Johnston and Medical Director Dr. John Barry M.D., et al Respondents.	Case File No:62-cv-20-5412 **PLAINTIFFS MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER/INJUNCTION PURSUANT TO MINN. R. CIV. P. 65.01; 65.02.**

INTRODUCTION

In these unprecedented times, the Court must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Petitioner's attached affidavits clearly show they are entitled to a temporary restraining order ("TRO"). As of December 2, 2020, over 57 residents and 75 staff have been infected with the coronavirus at the Minnesota Sex Offender (MSOP) facilities. This information was only released to Petitioners upon request and Respondents were otherwise silent about positive COVID-19 cases in the facility. Two residents, Emery Bush and Gerald Olsen, have lost their lives due to COVID-19. There can be no injury more irreparable. Only recently have Respondents temporarily suspended group therapy to mitigate further irreparable injury, loss, or damage from the COVID-19. Petitioner's request for a TRO before Respondents can be

heard in opposition because of the impossibilities of social distancing at the MSOP. As the Complex Buildings at MSOP Moose Lake site are double occupancy rooms and always in heavily populated areas.

Petitioners have two extraordinary Writs before this Court: One is a Mandamus action that shows that there is no other adequate legal remedy to return Petitioners back their county of commit. This Writ of Mandamus is justified based upon Respondent's failure to protect Petitioner's health and safety from the potential danger, risk, injury, harm, or damage of the COVID-19.

The other action is a Writ of Habeas Corpus *Ad Prosequendum.* During this lethal pandemic Respondents are deliberately indifferent to Petitioner's health and safety. Petitioners share a special relationship with Respondent that includes Petitioners being confined for pyscho-educational based care and treatment. No legitimate government interest exists that is so strong that it compels the state to put an individual's health and/or safety at risk to the point of death. This would clearly amount to punishment. Because Respondents cannot comply with Center for Disease Control (CDC) guidelines to socially distance at the MSOP, infections and transmissions of the coronavirus are fueled.

Petitioners' continued placement at the heavily populated MSOP facilities once mere desirable for state policy, is no longer good public policy. The world as we know it today has been handed a coronavirus that possess irreparable harm onto others. Petitioners before the Court has clear evidence that the protective measures in place in MSOP facilities are not working. The Court can expect the number of positive COVID-

19 cases at the MSOP and the harm it imposes to be an ongoing conversation. The choices that others now make must reflect this new reality.

RELEVANT COVID-19 BACKGROUND

Because of the unprecedented magnitude of the COVID-19 pandemic and the extremely serious health risks for permanent injuries including losses of life, "[T]he court may not shut its eyes to what all others can see and understand." *U.S. v. Butler*, 297 U.S. 1, 57 (1936).

COVID-19 is a type of highly contagious novel coronavirus that is thought to be spreading easily and sustainably in the community.[1] Experts believe that it can live on some surfaces for up to 72 hours after contact with an infected person.[2] A simple sneeze or brush of the face without washing your hands is now known to easily spread the virus, which generally causes fever, cough, and shortness of breath. (*How Coronavirus Spreads*, Centers for Disease Control).

The effects of COVID-19 can be drastically severe in older individuals or those with medical conditions. In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. (*Id.*). The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*). These long-term consequences and the likelihood of fatality increases in those of advanced age and those with other medical conditions, like

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[1] How Coronavirus Spreads, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html (last accessed March 31, 2020).

[2] *New Coronavirus Stable for Hours on Surfaces*, National Institute of Health (March 17, 2020), https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces.

the Petitioners here. (*Id.*). For those in high-risk categories, the fatality rates are concerning.

There is currently a vaccine for COVID-19. However, it will be months before the efficacy of the vaccine is known, or if it prevents infections. As a result, public health officials have touted the importance of maintaining physical separation of at least six feet between individuals, now commonly known as social distancing. Absent effective quarantines and social distancing procedures, public health officials acknowledge that there is little that can be done to stop the spread of COVID-19.

Experts have also emphasized that proper hand hygiene with soap and water is vital to stop the spread.

Prevalence of the Virus

The United States now records more confirmed cases of COVID-19 than any other country in the world.[3] Every twenty four hours there are new cases confirmed in the MSOP and across Minnesota. In Carlton County alone they have seen a great increase of infections. For instance, there were 2,400 cases and 29 deaths in Carlton county as of December 16, 2020.

As of December 6, 2020, the Governor of Minnesota continues his emergency peacetime message to practice social distancing, wash your hands and wear a mask. This is good public policy. Public health officials have determined that social isolation is

[3] Nicole Chavez, Holly Yan, and Madeline Holcombe, *US has more Known Cases of Coronavirus than any Other Country*, CNN, https://www.cnn.com/2020/03/26/health/coronavirus-thousand-deaths-thursday/index.html (last accessed March 31, 2020).

necessary to keep our hospital systems from becoming overwhelmed. The same rationale applies, perhaps even more so, to those being detained within MSOP detention facilities housing high-risk populations.

Unique Nature of Detention Facilities

Various public health officials have warned that the nature of congregate detention facilities makes them uniquely vulnerable to the rapid spread of COVID-19. COVID-19 is transmitted primarily through close contact via respiratory droplets produced when an infected person coughs or sneezes. Such conditions provide "ideal incubation conditions" for COVID-19.

Petitioners seek to have this Court:

(1) Order MSOP to cease from providing services that they have deemed not medically justified and that place clients at a higher risk to exposure or infection;

(2) Order Respondents to provide single occupancy rooms and use available space for living arrangements so clients and staff can socially distance at the facility;

(3) Order Respondents to make timely accommodations for clients willing to return to their County of Commitment for their own safety and wellbeing. Also order Respondents to offer information on post-return planning, which clients may assist in providing;

(4) Order Respondents cannot use MSOP facilities as a means to strengthen weaker older criminal sentences. Doing so would not be rationally related to a legitimate governmental objective and violates Petitioners Fourteenth Amendment;

(5) Take judicial notice of precedent case law as applied to Petitioners Writ.

I. RELEVANT POSTURE OF THE CASE

Minnesota Courts have authorized the Commissioner of Department of Human Services to confine Petitioners in MSOP's custody. Black Letter Law authorizes, "[t]he State may take measures to restrict the freedom of the '*dangerously mentally ill.*'" *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997).

Petitioners are civilly committed by a District Court under Minnesota's Sexual Psychopathic Personality (SPP) and/or Sexually Dangerous Person (SDP) statutes. The mental illness prong of either the SPP or SDP Acts mandate the District Court "shall commit the patient to a secure treatment facility unless the patient establishes by clear and convincing evidence that a less-restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. §253B.185, subd. 1(d) (2012).

The purpose of Minnesota's Commitment and Treatment Act involves two purposes: (1) protection of the public, and (2) rehabilitation of the patient. Minnesota Courts have interpreted this interest to mean the enacted civil commitment laws lies 'in both protecting the public from sexual violence and rehabilitating the *mentally ill.*' *In re*

Civil Commitment of Johnson, 800 N.W.2d 134, 147 (Minn. 2011) (citing *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

Once Petitioners were committed to a Minnesota Department of Human Services facility, namely the Minnesota Sex Offender Program, Respondents duties included Petitioners "Safety". This safety is defined as protecting them from "potential danger, risk, injury, harm, or damage." Minn. Stat. §253D.02, Subd. 12. Respondent's Administrative duties further require policies to prevent abuse and provide a safe environment. Minn. R. 9515.3040, subp. 2 (2015).

MSOP is a "treatment facility" which "means a hospital, community mental health center, or other treatment provider qualified to provide care and treatment for persons who *are mentally ill*, developmentally disabled, or chemically dependent." Minn. Stat. § 253B.02, subd. 19 (2016).

Therefore, reasons SPPs and SDPs are properly housed in treatment facilities is "due to the fact that the statute dictates that SPPs and SDPs be treated similarly to the Mentally Ill and Dangerous (MID), whose mental illness *is* a component of their commitment. Minn. Stat. § 253B.02, subd. 17 (2000)." *Hince v. O'Keefe*, 632 N.W.2d 577, 585 n.5 (Minn. 2001).

While Petitioners are confined, Minn. Stat. §253B.03 (2016) provides certain rights for civilly committed clients. Minn. Stat. §253B.03, subd. 5 provides that a civilly committed patient has the right to periodic medical assessment, including assessment of the *medical necessity* of continuing care. The physical and mental condition of a civilly

committed patient shall be assessed by the treatment facility as frequently as necessary, but not less often than annually. *see Call v. Gomez*, 535 N.W.2d 312, 318-19 (Minn. 1995) ("[O]nce a person is committed, his or her due process rights are protected through procedural safeguards that include periodic review and re-evaluation, the opportunity to petition for transfer to an open hospital, the opportunity to petition for full discharge, and the right to competent medical care and treatment.").[4]

Minnesota case law is clear: the purposes of the commitment statute is medical treatment and protection of the public, as opposed to punishment. *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995); *see also In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994). MSOP cannot be used for punishment for past crimes, as the "institution expressly designed to provide psychiatric care and treatment." *Allen v Illinois*, 478 US 364, 373 (1986); *Hendricks*, 521 U.S. at 368 n.4.

The only way the Petitioners can be released from their civil commitment is through the statutory process for a reduction in custody. The client can petition for a Transfer to Community Preparations Services, Provisional Discharge and Discharge. *See* Minn. Stat.§§253D.29, 253D.30, 253D.31 (2016). This process can take several years and petitions are rarely granted by the Commissioners Review Boards.

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[4] It should be noted that Appellate Judge Randal Dissenting in; In re Civ. Commitment of Eischens, 2014 Minn. App. Unpub. LEXIS 622, n 5. (Minn. Ct. App., June 23, 2014) ("The next great myth (close to being a "lie") is that it is for medical treatment. If there was any legitimate extended medical treatment provided, then why in the 20 years since MSOP was created has the number of civilly committed offenders grown to 698 clients? [] The third great myth or "lie," is that once you are civilly committed you have a rational due process chance to be medically discharged. The reality is that only two clients have been provisionally discharged.)

A committed person may not petition the Special Review Board any sooner than six months following the entry of judgment in the District Court of the order for commitment issued under section 253D.07, subdivision 5, or upon the exhaustion of all related appeal rights in state court relating to that order, whichever is later; or (2) any recommendation of the special review board or order of the judicial appeal panel, or upon the exhaustion of all appeal rights in state court, whichever is later. The executive director may petition at any time. See Minn. Stat. §253D.27, subd. 2 (1) (2).[5]

The reduction in custody process does not allow the Special Review Board or Commitment Appeal Panel a client's return back to the county for any reason.

> Respondent Dr. John Berry as Medical Director of MSOP could have at any time petitioned the Commissioner to reduce the custodies of all non-dangerous mentally ill residents to mitigate infection and transmission of a potential deadly coronavirus applicable to Minn. Stat. §253B18, subd. 5 (a)
>
> Respondent Nancy Johnston as Executive Director of MSOP could have at any time petitioned the Commissioner to reduce the custodies of all non-dangerous mentally ill residents to mitigate infection and transmission of a potential deadly coronavirus applicable to Minn. Stat. §253D.27, subd. 2 (1) (2)
>
> Respondent Jodi Harpstead as Commissioner of the DHS could have released all non-dangerous mentally ill residents to mitigate infection and transmission of a potential deadly coronavirus applicable to Minnesota Commitment and Treatment Act.
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> Respondent Jan Malcom as Commissioner of the Department of Health should have supervised COVID-19 testing provided by Dr. John Berry and Nancy Johnston at the MSOP that included informed consequences of client refusals of testing that subjects them to isolation and quarantine to mitigate infection and

[5] Petitioner Stevens early on in the Pandemic made request to Executive Johnston to reduce its population so its residents can social distance and or engage in mental health diversion by using county services. Ms. Johnston denied Mr. Stevens request and suggested using the SRB Process.

transmission of the potential deadly coronavirus under Governor's Peace Time Emergency Powers, applicable to Minn. Stat. §12.39 subd. 2.

A. The MSOP is no Longer an Institution Expressly Designed to Provide Psychiatric Care and Treatment

Rather than release clients who are observed to exhibit no symptoms of a mental illness, Respondents designed a sex offender program meant to educate its residents of the harm caused by their past sex crimes or sex offending behaviors. The program does is not designed to abate an illness. *See Attached Affidavit of Petitioners at ¶21.* [6]

In August 2005, MSOP Executives updated existing rules that govern medical care and treatment provided by the MSOP. As a result, there was a massive influx of admissions to MSOP. This is when Executive Directors determined that, "the vast majority of clients committed to the Minnesota Sex Offender Program do not experience symptoms of mental illness that requires psychiatric treatment." *See Att. Aff'd of Pet. at ¶22.*

Executive Director Nancy Johnston has recently admitted that, "The variances were approved indefinably with the understanding the rules governing MSOP were outdated and do not accurately reflect the nature of our program, the needs of our clients and contemporary best standards in sex offender treatment." *See Att. Aff'd of Pet. at ¶23.* However, State law only authorizes the Commissioner discretion to grant a permanent variance when conditions under which the variance is requested do not affect the *health*

[6] MSOP 2014 Theory Manual is designed to rehabilitate criminal offenders. The manual cites the word Criminal 18 times, the word Criminogenics or criminology cited 14 times, Crime is sited 24 times. Mental illness is mentioned twice by reference to other information.

or safety of persons being served by the licensed program, nor compromise the qualifications of staff to provide services. Minn. Stat. § 245A.04, Subd. 9 (a).

B. MSOP's Facilities are Currently Being Used as a State Tactic for Strengthening Older Weaker Criminal Sentences.

Currently, MSOP employs tactics to use its facilities to strengthen older weaker criminal sentences that were previously imposed by the criminal court. *See Att. Aff'd of Pet. at ¶24.*

C. Civil Commitment of Sex Offenders Authorized Limited Use by the Judiciary

While the U.S. Supreme Court Justices were deciding *Hendricks* and *Crane,* the Court recognized confinement must be medically justified by a mental illness element. *See Att. Aff'd of Petitioners at ¶20;* Zander. T.K (2005), "Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," *Journal of Sexual Offender Civil Commitment: Science & The Law 1,* pp. 17-82.

In *Kansas v. Crane* (2002), the Court limited the scope of SVP commitments as follows:

> [T]here must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. (p. 413)

In other words, the Justices suggested that, in order for a civil commitment statute to be consistent with the constitutional limits on State power imposed by the Fourteenth Amendment's Due Process Clause, the statute's criterion for committability that specified

a mental condition, i.e., "mental disorder" or "mental abnormality," would have to distinguish persons who have that condition from those who do not.[7]

This recognition was also evident in the following colloquy between Justice Souter and the Kansas Attorney General Stovall in the oral argument in *Hendricks* (1996, Oral Argument, pp. 20-22), in which the Kansas Attorney General was defending Kansas's use of a civil commitment criterion that allowed commitment of a person alleged to have a "mental abnormality or personality disorder":

> **SOUTER:** When you speak of a--I think you spoke of a medically--you didn't use the word medically recognized category. What was the term you used?
>
> **GENERAL STOVALL:** Medically justified.
>
> **SOUTER:** Medically justified. Do you mean by that a category which is recognized in some standard medical literature like the DSM manual?
>
> **GENERAL STOVALL:** I don't think we are limited, Justice Souter, just to the DSM, but I think certainly the psychiatric community has to believe that this is a condition that they can identify and diagnose, but it would not--
>
> **SOUTER**: You don't take the position that the--or maybe you do, that the legislature of any State could say, we recognize a category of mental abnormality or mental illness. It hasn't been recognized in any medical or psychiatric literature, but we're recognizing it now, and that satisfies the rule that requires *some mental illness element.* You wouldn't say that a State could do that.
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> **GENERAL STOVALL:** That would not be the argument the State would make. We're very comfortable with the fact that what we're describing *is medically justified.*
>
> **SOUTER:** What is the function of this medical recognition as you understand it under Foucha? Why do we have this element? Why do we--why would you say--why do you say that in order to satisfy the *mental illness* element under Foucha there has got to be a medically recognized category within which the particular individual falls?

[7] Current MSOP Executive Director Johnston has distinguished Petitioners from other dangerously mentally ill clients by actions to seek waivers from mandatory medical assessment that justifies continued medical care and treatment of a mental health condition. MSOP's current program is designed to educate its residents about sex offending behaviors.

> **GENERAL STOVALL:** I think so that the Court doesn't worry that we confine merely for dangerousness or merely for a class of people that we don't want to be around. We need to--to be able to civilly commit and provide treatment for them it has to be a medically recognized condition, I--
>
> **SOUTER:** Its less likely to be abused if there's a categorical approach rather than a purely individual approach.
>
> **GENERAL STOVALL:** That would be correct.

Id. Zander. T.K at *Pp. 32.*

In this colloquy, the Kansas Attorney General Stovall and Justice Souter are referring to Justice O'Connor's concurring opinion in *Foucha v. Louisiana* (1992, p. 83), in which she stated that civil commitment could not be justified "absent some medical justification for doing so; in such a case the *necessary* connection between the nature and purposes of confinement would be absent."

In Justice White's plurality opinion in *Foucha* (1992, p. 76, nt. 3), he refers to the need for psychiatric opinion to be "reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is *mentally ill and dangerous*."

In the above quoted colloquy, the Kansas Attorney General, while initially contending that a state would not need a *DSM*-recognized mental disorder to justify civil commitment, upon being pressed by Justice Souter, agrees with him that a "medically recognized" "categorical" approach is "less likely to be abused."

Thus, diagnostic validity is not simply an issue for psychodiagnosis, it is also relevant to issues of constitutional law and sound public policy. *Kansas v. Hendricks* (1997) is the decision that marked the turning point between civil commitment being

primarily used for persons with psychotic disorders, and it being used for persons with non-psychotic disorders. In this case, Justice Kennedy warns in his concurring opinion, *"[I]f it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it"* (p. 373) [italics supplied].

If Justice Kennedy had not joined the four other Justices who made up the majority in *Hendricks*, the case would have probably resulted in the Kansas commitment law being struck down as unconstitutional.[8]

The "nature" of Petitioners' annual Mental Health Assessment only consists of a review of past sex offending history. Therefore, rather than using the more stringent DSM practice of behaviorally anchoring disorders on observable behaviors when liberties are at stake, MSOP only considers ancient criminal behavior. The practice of behaviorally anchoring disorders on observable behaviors is precisely what was done in the case of *Foucha* when the DSM III was the standard. This standard has never changed. *See In re Civil Commitment of Opiacha*, 943 N.W.2d 220,229-30 (Minn. Ct. App., Apr. 13, 2020) (the question whether he can control his behavior, which is a necessary predicate to his due-process claim.). *See Att. Aff'd of Pet. at ¶44.* However the DSM requires a scientific practice to anchor a valid and reliable mental disorder when liberties are at stake. Most sex offenses are crimes and not mental disorders. However,

[8] Current MSOP Executive Director Johnston has distinguished Petitioners from other dangerously mentally ill clients by actions to seek waivers from mandatory medical assessments that would justify continued medically necessary care and treatment for mental illness. Instead, MSOP's current program is designed to educate its residents about their previous sex offending behaviors to deter future criminal behavior.

Petitioners' liberties are at stake and authors of the DSM have prompted warning of the misuse of the Diagnostic and Statistical Manual for this specific concern. *See also Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 158 n.4 (Minn. 2012) ("Dr. Frances cautions that the DSM has been poorly used "in areas well beyond its competence," noting that, "[i]t is widely used (and misused) in the courts.")).

I. TEMPORARY RESTRAINING ORDER

A. Legal Standard

A temporary restraining order ("TRO") is an extraordinary equitable remedy used to preserve the status quo pending adjudication of the merits of a case. *See; Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). A temporary injunction is issued after a hearing whereas a temporary restraining order is issued to "prevent immediate irreparable injury until a hearing can be conducted to determine the need for a temporary injunction." (2A David F. Herr & Roger S. Haydock, *Minnesota Practice* 65.1 (5th ed. 2012)); *see also* Minn. R. Civ. P. 65.02 (contemplating a hearing on a motion for a temporary injunction).

A district court may grant a TRO if the party seeking the order establishes that monetary damages are not adequate and that denial of the order will result in irreparable harm. *See; Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979). The trial court has broad discretion when considering whether to grant a TRO. In doing so, the Court must consider five factors: (1) the nature and background of the relationship between the parties; (2) the balance of harms suffered by the parties; (3) the

likelihood that the party seeking the injunction will prevail on the merits; (4) public-policy considerations as expressed in statute; and (5) the administrative burdens involved in judicial supervision and enforcement of the injunction. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220-21 (Minn. App. 2002) (citing *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965)); *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (using TRO standards for constitutional violations)).

A temporary restraining order may be granted based solely on a complaint if the complaint makes out a sufficient case, is verified, and contains positive allegations. Minn. R. Civ. P. 65.01; *Indep. Sch. Dist. No. 35 v. Engelstad*, 274 Minn. 366, 369, 144 N.W.2d 245, 248 (1966). "[E]vidence is 'positive' where the witness states that a certain thing did or did not happen or exist." *Miller v. Hughes*, 259 Minn. 53, 59, 105 N.W.2d 693, 698 (1960).

1. The Nature of the Parties Relationship.

The parties share a special relationship in the sense that Petitioners are alleged mental patients in Respondents custody. While in custody, Respondents have a duty to keep Petitioners safe and improve conditions that protects Petitioners from potential danger, risk, injury and harm under Minn. Stat. Sec. 253D.02 subd. 12.

The nature of the parties pre-existing relationship is one in which Petitioners must place a level of trust when it comes to Respondents providing a safe environment. *See Att. Aff'd of Pet. at ¶¶1-3.*

Providing a safe environment would also address Petitioner's mental health needs. The level of trust has dramatically deteriorated due to Respondent's unwillingness to adapt to the COVID-19 pandemic by providing a safer social distancing environment. *See Att. Aff'd of Pet. at ¶4.* In addition, MSOP has locked up cleaning supplies. Thus the only way Petitioners has access to adequate cleaning supplies to aid in cleaning is to have unnecessary contact with staff. Also we have no access to cleaning supplies while locked in their room. *See Att. Aff'd of Pet. at ¶¶7-9.*

With the current testing procedures implemented, Respondents are failing to employ sufficient measures to ensure that the entire community remains safe. In addition, Respondents are not being transparent when it comes to providing the population with accurate information when asked. *See Att. Aff'd of Pet. at ¶¶6,11.*

Despite the parties current relationship status, the District Court *does* have the power to shape preliminary injunctive relief in a manner that protects the rights of the parties, "even if in some cases it requires disturbing the status quo." *Cox v. Northwest Airlines, Inc.*, 319 F. Supp. 92, 95 (D. Minn. 1970); *N. Star State Bank of Roseville v. N. Star Bank Minn.*, 361 N.W.2d 889, 895 (Minn. App. 1985), *review denied* (Minn. Apr. 26, 1985) (A district court "has the power to shape [injunctive] relief in a manner which protects the basic rights of the parties, even if in some cases it requires disturbing the status quo)). Petitioners' are mindful that judicial decisions such as these are both controversial and difficult for the public to absorb. It is all too easy for some to embrace the notion that individuals such as Petitioners should be denied relief simply because they

had previously sexually offended. However, Courts do not operate according to polls or the popular will, but rather to do justice and to rule according to the facts and the law.

Petitioner's request a TRO at the scheduled February 8, 2020 hearing. They also move for a temporary injunction upon a clear showing that they are entitled to such relief, and where the current circumstances clearly demands it.

Petitioners have met the first prong in favor of granting a TRO.

2. The Balance of Harms Suffered by the Parties.

In addressing the second factor, the District Court must determine whether the balancing of harms favors Petitioners or Respondents. In order to be irreparable, the injury must be of such a nature that money alone will not suffice. *Morse v. City of Waterville,* 458 N.W.2d 728, 729-30 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Money damages are generally not independently sufficient to provide a basis for injunctive relief. *See; Miller v. Foley*, 317 N.W.2d 710, 713 (Minn. 1982). "the failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *See; Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996).

a. Irreparable Harm

Petitioner's extraordinary Writ is rooted in imminent, irreparable harm. Since the original filing of Petitioner's Writs, two residents lives have passed because of COVID-19 and Petitioner Chester Grauberger has been infected with the virus. *See Att. Aff'd of Chester Grauberger at ¶¶45-62.* In addition, numerous other clients have also been infected. *See Att. Aff'd of Pet. at ¶¶35-39.*

At this point, the court has to balance the harms Petitioner's now face. Considering Petitioners are no longer confined as being dangerously mentally ill requiring medical care and treatment, but instead confined by the state to educate Petitioner on their past criminal behaviors, confinement is no longer justified.

Instead, further confinement can only be viewed as nothing more than an extension of Petitioner's criminal sentences. *See Att. Aff'd of Pet. at ¶¶5-9*. This tips in Petitioner's favor, as keeping them confined without *medical justifications* and subjecting them to potentially a life ending virus as they are not able to socially distance. This is harm that is irreparable.

b. Petitioners are at Uniquely High Risk for Contracting COVID-19

Not only are MSOP facilities themselves uniquely suited to rapidly spread COVID-19, but also many Petitioners themselves are members of high-risk groups that are likely to feel the effects of the virus more keenly than the average individual.[9] Every named Petitioner before the Court has an underlying medical condition that heightens their risk of serious COVID-19 effects. For instance, Petitioners suffer from asthma, diabetes, heart conditions, obesity, cancers and recent sickness. *See Att. Aff'd of Pet. at ¶¶44-45*.

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[9] *People at Risk for Serious Illness from COVID-19*, Centers for Disease Control and Prevention, (Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html ("Older people and people of all ages with severe underlying health conditions like heart disease, lung disease and diabetes, for example seem to be at higher risk of developing serious COVID-19 illness"); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control and Prevention, (Mar. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (stating that "moderate to severe asthma," "heart disease," "obesity," and "diabetes" are conditions that trigger higher risk of severe illness from COVID-19).

MSOP detention facilities are particularly at risk for such close contact because they are considered congregate settings, or places where people live or sleep in close proximity. *See Att. Aff'd of Pet. at ¶¶12-13.*

c. The Threat to High-Risk Individuals Posed By COVID-19 Constitutes Irreparable Injury

Courts across the Country specifically held that COVID-19 constitutes an irreparable harm that supports the granting of a TRO. See Attached Cases of:

i. *Thakker v. Doll.* No. 1:20-CV00480, 2020 U.S. Dist. LEXIS 59459 at *20 (M.D. Pa. Mar. 31, 2020*) citing Vasif "Vincent" Basank, et al v. Decker*, 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503 at *4-5 (S.D.N.Y. March 26, 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO"); *Castillo v. Barr*, CV-20-00605-TJH, 2020 U.S. Dist. LEXIS 54425 (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic).

ii. *Banks v. Booth*, 2020 U.S. Dist. LEXIS 68766 at *40 (D.D.C., Apr. 20, 2020) citing *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding irreparable harm from pain, infection, and possible death due to delayed treatment from the reduction of hospital beds).

iii. *Valentine v. Collier*, 2020 U.S. Dist. LEXIS 68644 at *45 (S.D. Tex., Apr. 20, 2020) citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)("irreparable injury is *likely* in the absence of an injunction.").

The painful new reality is that Petitioners live in fear and anxiety of being constantly at risk of contracting a deadly virus. MSOP have dictated to those who consent to treatment, attending therapy during the pandemic is "not optional." *See Att. Aff'd of Brad Stevens at ¶19.* Petitioners are further experiencing living conditions that

fuel its transmission and infections. Petitioners have shown that adequate measures are not in place and improvements to the design of the detention facility cannot be taken to protect them from COVID-19. In light of such, catastrophic results may ensue, both to Petitioners and to the communities surrounding the facilities.

Respondent's lack of appropriate response to the COVID-19 pandemic will quickly overwhelm local hospitals with insufficient ICU beds or ventilators. This will diminish the available health resources for others outside the MSOP during this pandemic. If a preliminary injunction is entered, however, chances for survival is maximized.

Petitioners have met the second prong. *See Sanborn*, 500 N.W.2d at 164 (providing that where there is a strong showing of harm, even a small chance of prevailing on the merits will suffice).

3. Likelihood of Success on the Merit

Writ of Mandamus

Petitioners request Mandamus relief by the Court. In order for the Court to grant such relief Petitioners must show that: 1) MSOP "failed to perform an official duty clearly imposed by law"; 2) Petitioners "suffered a public wrong" and was specifically injured by its failure; and 3) Petitioners have "no other adequate legal remedy." *See N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004). If disputed facts exist, the parties are entitled to have the issues tried before a jury. Minn. Stat. 586.12 (2014).

1. MSOP Failed to Perform an Official Duty Clearly Imposed by Law.

The Civil Commitment And Treatment Of Sex Offenders mandates the "safety and well-being of committed persons, staff, and the public." *See Minn. Stat. 253D.19. The Chapter is further clear by defining—Safety—which* "means protection of persons or property from potential danger, risk, injury, harm, or damage." Minn. Stat. § 253D.02 Subd. 12. *See Att. Aff'd of Pet. at ¶¶1-3.*

Further State Hospital Administrative Rules that govern MSOP facilities require Respondents Harpstead, Berry and Johnston to engage in a process for improvement to prevent abuse and provide a safe environment. *See* Minn. R. 9515.3040, subp. 2 (2015)

Petitioners contend Respondents failed to perform an official duty as mandated by law. Minn. Stat. §253D.02, Subd. 12. Respondents have a duty to protect them from potential danger, risk, injury, harm, or damage that may occur to their residents.

Thus, under the plain language of state law, Respondents are not permitted to place Petitioner's health or safety at risk due to the COVID-19 Pandemic. Petitioner's claim under Minn. Stat. §§ 253D.02 Subd. 19; Subd. 12, is likely to succeed as a matter of law. *See Att. Aff'd of Pet. at ¶¶4-14.*

Petitioner have met the first prong as a matter of law.

2. They Suffered a Public Wrong and was Specifically Injured by MSOP's Failure.

With respect to the second requirement, since filing this action, two deaths have occurred. In addition, one of the Petitioners before the Court has suffered from COVID-19. It is likely that the rest of Petitioners are in fact going to suffer a same or similar

specific injury due to the fact that it is currently impossible to socially distance within the MSOP facility.

Petitioners have suffered and are going to continue to suffer a public wrong from being confined at the MSOP. Even when Petitioners' are vaccinated, the CDC still requires person to wear mask and practice social distancing. *See Att. Aff'd of Brad Stevens at ¶48.* Thus MSOP's facilities from this date on are always going to be unsafe to its clients and pose a significant increase of risk to their health.

The public does not have an interest to put others in a greater risk of a potential lethal infection and transmission of the COVID-19. The wrongs are from MSOP failure to improve conditions at the MSOP. *See Affidavits Terry Branson, Kevin Nelson, Richard Fageroos, Nathan Freeman, Brad Stevens, Anthony Green, Chester Grauberger, Michael Perseke, Austin Black Elk in support of TRO* ¶¶1-44

Petitioners have met the second prong for the Court to issue a TRO

3. Petitioners have no other adequate legal remedy.

Petitioners "have no other adequate means' to obtain the relief they seek."[10] It is not reasonable to suggest that Petitioners use the normal reduction in custody procedures, as that process is not plain or speedy and can take several years. Also, the Commissioner's Review Boards and Panels do not have jurisdiction to consider the negative affect of the COVID-19 pandemic on the program.

[10] Petitioners are not challenging their individual treatment. Rather, challenging what they allege to be systemic failures with the overall mental health care program at MSOP that have caused not disappointing results, but have created an unconstitutional risk to Petitioners' health and safety.

This Court has authority to provide Mandamus relief because MSOP does not have the authority to return Petitioners back to their county after being committed to the MSOP. After taking custody of Petitioners, Respondents have assumed the duties to protect their safety and general wellbeing. This is impossible at the MSOP because there is an inability to socially distance.

However, the current confinement puts Petitioner's health and safety at risk and Petitioners will likely suffer a public harm specifically injurious to them. The MSOP and the Commissioner's Review Boards and Panels do not have authority to Order the return of Petitioners back their county for their safety and wellbeing. *See Att. Aff'd of Pet. at* ¶*2*. Therefore, Petitioners do not have any other adequate remedy in the ordinary course of law. Mandamus is the proper remedy to compel the MSOP to return Petitioners back their committing counties. MSOP does not have the authority to make this order. See *Madison Equities, Inc. v. Crockarell*, 889 N.W.2d 568 (Minn. 2017) Holding: Mandamus is the proper remedy to compel the district court to vacate a stay that the court did not have the authority to order.

Based upon Petitioner's factual circumstance, they are entitled to Mandamus Relief for the return to their committing counties for their safety and health.

WRIT OF HABEAS CORPUS

This Court's privilege to issue a Writ of Habeas Corpus is found in Minnesota's Constitution's bill of rights. Minn. Const. art. I, 7. The express terms of the Legislature's grant of power to the District Courts to issue Writs, *see* Minn. Stat. 484.03 (2018). Such courts shall have power to issue writs of habeas corpus, mandamus, and all other writs,

processes, and orders necessary to the complete exercise of the jurisdiction vested in them by law. Any judge thereof may order the issuance of such writs, and direct as to their service and return. *See State ex rel. Ford v. Schnell* , 933 N.W.2d 393, 405 (Minn. 2019) (The express terms of the Legislature's grant of power to the district courts to issue writs, *see* Minn. Stat. 484.03 (2018), is no narrower .)); *State v. Lehn*, 270 Minn. 503, 510-11; 134 N.W.2d 329, 334 (Minn. 1965) (We believe that our statutes are broad enough to authorize the court to issue the writ of habeas corpus ad prosequendum, [] as "necessary as a tool for judicial potency as well as administrative efficiency.")

The Civil Commitment and Treatment Of Sex Offenders mandates the, "safety and well-being of committed persons, staff, and the public." *See Minn. Stat. 253D.19.* The Chapter clearly defines—*Safety*—which "means protection of persons or property from potential danger, risk, injury, harm, or damage." Minn. Stat. § 253D.02 Subd. 12.

State Hospital Administrative Rules that govern MSOP facilities require Respondents Harpstead, Berry and Johnston to engage in a process for improving conditions that would prevent abuse and provide a safe environment. *See* Minn. R. 9515.3040, subp. 2 (2015). Once Petitioners were admitted involuntarily, a constitutional right to a basically safe and humane living environment is required. *See Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978). In addition, when MSOP, "takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)

Petitioners are not actually confined for crimes, but instead for purposes of medical treatment to abate a mental illness. "Without it [mental illness], being hospitalized for mental illness would be equivalent to placement in a penitentiary where one could be held indefinitely for no convicted offense." (emphasis added) *Welsch v. Likins*, 373 F. Supp. 487, 493 (D.C.Minn. 1974), *aff'd*, 525 F.2d 987 (8th Cir. 1975). "[T]he essential test is one of medical necessity and not simply that which may be considered merely desirable." *See Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977). Therefore, Petitioners are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 322, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

Thus, the Court reviews Petitioner's constitutional violations under a pretrial detainee status. Petitioners raise their constitutional violations in two ways: first they show Respondents Harpstead, Berry and Johnston were deliberately indifferent to the foreseeable COVID-19 that posed a substantial risk of serious harm to their residents at the MSOP. See *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 528 (8th Cir. 2009) (deliberately indifferent to a substantial risk to an client's health or safety.)

Secondly, Petitioners can show Respondents' policies are not rationally related to a legitimate nonpunitive governmental purpose under the Due Process clause of the Fourteenth Amendment. *See Attached Banks v. Booth*, 2020 U.S. Dist. LEXIS 68766 at *17 (D.D.C., Apr. 20, 2020) citing *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 192 L. Ed. 2d 416 (2015) relying on *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

Together, *Kingsley* and *Bell* provide persuasive authority that a pre-trial detainee need only show that [MSOP] conditions are objectively unreasonable in order to state a claim under the due process clause.

The loss of Fourteenth Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury. (emphasis added) *Elrod v. Burns,* 427 U.S. 347, 373 (1976). *See Att. Aff'd of Pet. at ¶¶1-44.*

Courts have held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights. See *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984)

1. Respondents were Deliberately Indifferent to Petitioner's Health or Safety

In the Eighth Circuit, the Due Process clause of the Fourteenth Amendment is applied to deliberate indifferent claims under an Eighth Amendment analysis. *See Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994).[11]

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[11] Being mindful of the Petitioners' legitimate concern shared by society in general over minimizing exposure to the novel coronavirus. An increasing number of courts that have addressed pleas for release because of the fear of COVID-19 infection have ruled both ways, denying relief when the concern is too generalized, and granting relief when specific and heightened risks of exposure to complications have been shown. Courts have been more inclined to grant relief where the detention facility has reported confirmed cases of COVID 19 or where the petitioners fall into one of the high-risk categories for COVID-19. *See decisions granting relief*: *Jones*, 2020 U.S. Dist. LEXIS 58368, 2020 WL 1643857 (W.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a detention facility with no confirmed COVID-19 cases); *Basank*, 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503 (S.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a facility with confirmed cases of COVID-19); *Coronel*, 2020 U.S. Dist. LEXIS 53954, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (same); *Malam v. Adducci*, F. Supp. 3d , No. 20-10829, 2020 U.S. Dist. LEXIS 59407, 2020 WL 1672662, at *1 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (granting relief for petitioner in high-risk category but held in facility with no confirmed cases); *and see decisions denying relief*: *Dawson v. Asher*, No. 20-0409, 2020 U.S. Dist. LEXIS 47891, 2020 WL 1304557 (W.D. Wash. Mar. 19, 2020) (denying

Therefore, in order to support a Fourteenth Amendment claim for relief, Petitioners must allege and prove that Respondents were deliberately indifferent to Petitioner's need for health or safety, and that they were aware of facts from which an inference could be drawn that a substantial risk of serious harm existed. (emphasis added) *See Perkins v. Grimes*, 161 F.3d 1127, 1130 (8th Cir. 1998).

Here Respondents Harpstead, Berry and Johnston were deliberately indifferent when they knew of and disregarded the substantial risk to Petitioner's health or safety through their failure to reduce the population. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A claim of deliberate indifference has both an objective and a subjective component. *Id.* at 838-39. Thus, the relevant questions before this Court are: (1) whether a substantial risk to Petitioners health or safety existed, and (2) whether Respondents had knowledge of such substantial risk to Petitioners health or safety but nevertheless disregarded it. *See Id.* at 842.

Respondents were deliberately indifferent to Petitioner's health or safety by not reducing the population to allow social distancing practices and not following quarantine and isolation procedures. *See Affidavits of Branson, Nelson, Fageroos, Freeman, Stevens, Green, Grauberger, Perseke, Black Elk in support of TRO* ¶¶1-44

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petition where petitioners were not in high-risk group and no detainees or staff at the facility at issue tested positive{2020 U.S. Dist. LEXIS 20} for COVID-19); *Sacal-Micha v. Longoria*, No. 20-37, 2020 U.S. Dist. LEXIS 53474, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020) (same); *Xuyue Zhang v. Barr*, 2020 U.S. Dist. LEXIS 54424, 2020 WL 1502607, at *4 (C.D. Cal. Mar. 27, 2020) (denying relief for petitioners in highrisk categories held a detention facility with no confirmed cases of COVID-19). That pattern is consistent with a deliberate indifference analysis. Objectively, the health risks posed by COVID-19 are abundantly clear.

Respondents were fully aware of the potential risk posed by COVID-19. Petitioners know this because Respondents disbursed facility memos as early as March of 2020, informing Petitioners they had knowledge of the substantial risk of COVID-19. They further identified that the CDC guidelines recommended everyone to wear a mask, wash their hands, and practice social distancing. Also, MSOP had plans in place to quarantine those who present symptoms of COVID-19. They also had plans to test and treat clients if necessary. However, Respondents Harpstead, Berry and Johnston chose not to follow these guidelines, quarantine and isolation procedures outlined by the CDC.

Respondents Harpstead, Berry and Johnston made a choice not to make structural improvements so Petitioners could socially distance as recommended by the CDC while confined for discretionary therapy. Harpstead, Berry and Johnston also chose not to reduce the heavily populated facilities although they have all the statutory authority to reduce the number of clients in their facilities. As a result, there has been two deaths and numerous infections and transmissions among staff and clients. This is due to deliberate indifference in relation to socially distancing as medically necessary to provide healthy and safe environment.

Due to such deliberate indifference, Petitioners are in a toxic environment that fails to protect them and the Court has to restrain those behaviors that affect Petitioner's health and safety.

2. Respondent's Services Provided During a COVID-19 Pandemic are not Rationally Related to a Legitimate Nonpunitive Governmental Purpose.

In asserting Petitioner's second claim, current conditions of their confinement is protected by the Due Process Clauses of the Fourteenth Amendments. *See Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (stating, in the context of involuntary civil commitment, that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause" and "that right is not extinguished by lawful confinement" (quoting *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)).

These protections are at least as robust as those of the Eighth Amendment because "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed who may not be punished at all in unsafe conditions." *Id.* at 315-16. *Cf. Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (holding that pretrial detainees "retain at least those constitutional rights that we have held are enjoyed by convicted prisoners").

Thus, Petitioners who have been civilly committed "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22 (addressing persons subjected to involuntary civil commitment for mental health reasons). *Cf. Bell*, 441 U.S. at 536-37 (holding that pretrial detainees may be held in custody "so long as those conditions and restrictions [of confinement] do not amount to punishment"). Protections for individuals confined by the state, whether civilly or criminally, include the right to reasonable safety and adequate medical care. *See Youngberg*, 457 U.S. at 315-16l.

The Supreme Court has made it clear in relation to reasonable safety that the Eighth Amendment "protects against future harm," including a "condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Under this principle, constitutional violations could arise from "the exposure of clients to a serious, communicable disease" even if "the complaining client shows no serious current symptoms" and "even though the possible infection might not affect all those exposed." *Id. see Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (finding no error in the trial court's conclusion that the conditions of a state prison violated the Eighth Amendment where those conditions included, among other things, daily, random redistribution of mattresses to clients, some of whom suffered from communicable diseases such as hepatitis and venereal disease); *see also DeGidio v. Pung*, 920 F.2d 525, 526, 533 (8th Cir. 1990) (upholding a district court's ruling that prison officials' response to a tuberculosis outbreak, including their screening and control procedures, was inadequate and violated the Eighth Amendment).

More recently, Sexual Violent Predator commitment programs in the States of Washington and North Dakota have significantly reduced their population. In addition, MSOP's site at Moose Lake's Correctional Facility has been closed due to COVID-19. *See Att. Aff'd of Pet. at ¶14.* The circumstance and facts are similar to Petitioners.

Respondents Harpstead, Berry and Johnston continued confinement of Petitioners pose a serious risk harm to Petitioner's current health and safety. Even when Petitioners are vaccinated, the CDC still requires person to wear mask and practice social distancing.

See Att. Aff'd of Brad Stevens at ¶48. Thus MSOP's facilities are always going to be unsafe to its clients and pose a significant increase of risk to their health.

This is not "rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." See *Banks*, 2020 U.S. Dist. LEXIS 68766 at *17 .

The Courts have been aware of Petitioner's affidavits showing their hospitalization is not medically justified, and is only a tactic used by MSOP to strengthen their criminal sentence. *See Att. Aff'd of Pet. at ¶24.*

Respondents Harpstead, Berry and Johnston provide a service that has no objective purpose other than to continue detaining Petitioners in an unsafe environment. There is currently no programing occurring at the MSOP and if there was, it would increase the risk to petitioners because they are not able to socially distance in rooms for programing and in common areas. *See Att. Aff'd of Pet. at ¶¶14-20.* During this pandemic, where lives are at stake, heightened scrutiny is required by the Court as two residents have died unnecessarily.[12]

Respondents never considered the need to reduce the population of its DHS facilities which would increase the need for social distancing to increase physical separation. *See Brown v. Plata*, 563 U.S. 493, 531-32 (2011) (explaining that all prisoners, even those that remain detained, benefit from the release of some clients to

[12] It should be clearly noted MSOP is not medically justified, as the program is not designed to treat a serious medical need. If it were, Respondents could not have lawfully closed the MSOP program at MCF-ML. Although the nature of this actions is civil in nature, however during the investigation into the duties of Respondents that may find their actions appear to be criminal, this may change the posture of theses proceeding and balance of harm before this court.

counter overcrowding because the detained clients "are that system's next potential victims").

Respondents have not taken any of the necessary measures to reduce its population and instead continue allowing Petitioners to be confined in extremely dangerous conditions were their current and future health and safety are at a greater risk of harm and possible death. This cannot be rationally related to a legitimate governmental objective.

Respondent's only objective measures in place are to lock Petitioners in a locked unit or locked rooms. This is insufficient with an HVAC system that does not mitigate air borne pathogens for extended periods of times (i.e. weeks/months). *See Att. Aff'd of Pet. at ¶18-19.* As therapy is now suspended due to outbreaks from COVID-19, these policies currently in place are not rationally related to a legitimate governmental objective and only amounts to punishment. *See Att. Aff'd of Pet. at ¶43.* This violates Petitioner's Fourteenth Amendment due process rights.

Accordingly, in *Bell v. Wolfish*, a pretrial detainee can prevail by simply providing objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective. A Fourteenth Amendment due process claim can prevail if Petitioners show that their conditions of confinement "amount[ed] to punishment of the detainee." *Bell*, 441 U.S. at 535. [13]

[13] *see also Kingsley*, 135 S. Ct. at 2473-74 (clarifying that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose").

Here, considering the facts and circumstances noted above, there is no rational relationship between a legitimate government objective to keep non-mentally ill Petitioners detained. Petitioners are locked in their room for 14 days – 4 days longer than the 10 day recommendation by the CDC. *See Att. Aff'd of Pet. at ¶¶30-31*

Further, Respondents provide an unsanitary, undisinfected, tightly-packed, over crowed, environment and by doing so their actions constitute punishment to Petitioners. The Court does not need to find that the facilities had the "express intent" to punish Petitioners with the conditions alleged. Instead, Petitioners ask the Court whether the conditions are rationally related to a legitimate government objective.

Thus, under the Fourteenth Amendment Clauses of deliberate indifference and the fact that the action is not rationally related to a legitimate governmental objective, Petitioner's constitutional claims are likely to succeed on the merits.

4. Balancing the Public Interest and (5) Administrative Burdens in Enforcing a Temporary Decree.

The fourth and fifth factors require the Court to determine whether the public interest and administrative burdens in enforcing a temporary decree.

Public policy weighs in favor of the issuance of a temporary injunction order. The Court has been made aware of Respondents "non public" policies which interest weighs heavily in Petitioner's favor.

First, and as described above, Petitioners face irreparable harm, despite that their statutory rights are intended to protect their health and safety from the potential dangers

of COVID-19, ensured by their federally protected constitutional rights. Second, the potential harm to the Respondents is limited.

These equities at issue and public interest "weigh heavily" in Petitioners' favor. *Thakker*, 2020 U.S. Dist. LEXIS 59459 at *25. Petitioners' safety and health face a very real risk of being infected by COVID-19. Respondents face very little potential harm from Petitioner's return to the County of Commitment wherein better ensuring Petitioner's health and safety.

Finally, the public interest strongly encourages Petitioners return to their counties. As mentioned, Petitioners are not being hospitalized for any medical justification. Instead, they are being confined for psycho-educational therapy under the pretext that the criminal sentence imposed by the courts was insufficient to address their criminal behaviors. This reasoning now poses a serious risk of harm to Petitioner's health and safety and therefore is not rationally related to a legitimate governmental objective. *See Banks,* 2020 U.S. Dist. LEXIS 68766 at *17 relying on *Bell v. Wolfish*, 441 U.S. at 535.

Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of aging or ill civil detainees does not serve the public's interest." *Thakker*, 2020 U.S. Dist. LEXIS 59459 at *26 (*citing Basank*, 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503, *6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH, 2020 U.S. Dist. LEXIS 54425 (C.D. Cal. 2020)). *Id.*

Returning Petitioners to their committing counties provides more space for effective social distancing within the MSOP facilities, which will clearly benefit the surrounding communities. Rural hospitals will be less overwhelmed by potential detainee COVID-19 cases and there will be less of a risk that facility staff will carry the virus into their homes and communities.

Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest. The return of these Petitioners from confinement is one step further in a positive direction. *Thakker*, 2020 U.S. Dist. LEXIS 59459 at *27.

The balance of equities and public interest sharply incline in Petitioners' favor, as it is always in the public interest to prevent the violation of a party's constitutional rights. *State v. Gartenberg,* 488 N.W.2d 496, 498 (Minn. App. 1992) *Crowley Co. v. Metropolitan Airports Comm'n,* 394 N.W.2d 542, 544-45 (Minn. App. 1986). Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest, and the return of Petitioners promotes public safety.

Administrative Burdens

The District Court should find that the administrative burdens associated with granting the injunction would not be excessive. Petitioners believes this factor weighs in favor of granting the temporary injunction.

For Petitioners who desire to transfer, minimal oversight would be necessary on the part of Administrative and Court bodies. Transfers would also not impose any significant Administrative burdens upon this court.

The irreparable harm is supported by the record and factors in favor of Petitioners.

CONCLUSION

Based on the foregoing reasoning, the Court should grant Petitioners' motion and:

(1) Order MSOP to cease from providing services that they have deemed not medically justified and that place clients at a higher risk to exposure or infection;

(2) Order Respondents to provide single occupancy rooms and use available space for living arrangements so clients and staff can socially distance at the facility;

(3) Order Respondents to make timely accommodations for clients willing to return to their County of Commitment for their own safety and wellbeing. Also order Respondents to offer information on post-return planning, which clients may assist in providing;

(4) Order Respondents cannot use MSOP facilities as a means to strengthen weaker older criminal sentences. Doing so would not be rationally related to a legitimate governmental objective and violates Petitioners Fourteenth Amendment;

(5) Take judicial notice of precedent case law as applied to Petitioners Writ.

In the alternative;

(1) Order during peace time emergencies MSOP Health Care providers performing examinations, testing, treatment, or vaccination related to

COVID-19, shall notify the individual of the right to refuse the examination, testing, treatment, or vaccination, and the consequences, including individualized isolation or quarantine upon their refusal applicable to Minn. Stat. §12.39 subd. 1, subd 2.;

(2) Order Respondents to restrain from allowing clients from different units to work along-side each other to minimize potential cross infections and contaminations that may cause another outbreak;

(3) Order Respondents to assign trained staff to frequently clean high touch areas, such as furniture, doors, hand rails, desks, work stations and any other areas that can be identifiable as a high transmission site for spreading of the virus to others;

(4) Order Respondents to immediately open cleaning closets for clients to clean their rooms without there being an unnecessary need to contact staff;

(5) Order Respondents to supply client rooms with soap or non-alcoholic hand sanitizer for frequent hand washing;

(6) Order Respondents to supply client with two face masks, as it is necessary to frequently wash masks;

(7) Order MSOP give way to new measures, such as tela-health technology, which is necessary to protect potential dangers, risks, injuries, harms, loss or damages from COVID-19 for psycho-education therapy on an outpatient basis.

(8) Order Respondents to stop entering client's rooms to perform window checks or room inspections unless a specific security threat is identified;

Dated: December 21, 2020

Respectfully Submitted,

Terry Branson

Kevin Nelson

Richard Fageroos

Nathan Freeman

/s/ Brad Stevens
Brad Stevens

Anthony Green

Chester Grauberger

Michael Perseke

Austin Black Elk
1111 Highway 73
Moose Lake, MN 55767