

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP _____

DISABILITY RIGHTS MONTANA,

Petitioner

v.

MONTANA JUDICIAL DISTRICTS 1-22, MONTANA COURTS OF LIMITED JURISDICTION,
MONTANA DEPARTMENT OF CORRECTIONS, AND THE MONTANA BOARD OF PARDONS
AND PAROLE,

Respondents.

**EMERGENCY PETITION FOR EXTRAORDINARY WRIT,
MANDAMUS RELIEF AND WRIT OF SUPERVISORY CONTROL**

EXPEDITED CONSIDERATION REQUESTED

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Spreadsheet detailing correctional facility capacity and daily populations

EXHIBIT 2

Court Actions Across the Country to Reduce Incarceration in Light of Covid-19

INTRODUCTION

This petition seeks extraordinary relief for extraordinary circumstances. Only one body – the Montana Supreme Court – has the authority to address this crisis moment. To mitigate the mortal harm that the COVID-19 pandemic will inflict upon incarcerated people with disabilities, this petition asks the Court to exercise its powers under Mont. Const. art. VII, Section 2(2), Mont.R.App.P. 14 and its mandamus powers under Mont. Code Ann. § 27-26-101 *et seq.*, to immediately reduce the numbers of people who are now in or who will enter Montana jails, prisons, and houses of correction.

Petitioner acknowledges (and applauds) that this Court has already taken bold action and provided sound guidance to the lower courts. Unfortunately, without supervision from this Court there is no guarantee that Respondents will uniformly act with the urgency this moment demands.

PETITIONER SEEKS AN ORDER FROM THIS COURT FOR FURTHER BRIEFING AND ARGUMENT, OR IN THE ALTERNATIVE, APPOINTMENT OF A SPECIAL MASTER TO IMPLEMENT THIS COURT’S STATED GOAL OF REDUCING THE NUMBER OF PEOPLE IN CUSTODY DURING THIS CRISIS.

FACTS AND JURISDICTION

Montana is under a state of emergency.¹ COVID-19 spreads “easily and sustainably” from person-to-person.² Both symptomatic and asymptomatic people can spread COVID-19. A single person can infect hundreds more. Individuals with disabilities or underlying medical conditions are particularly susceptible to COVID-19. Further, containment measures, such as social distancing and self-isolation, may be impossible for those who rely on the support of others to eat, dress and bathe.

COVID-19 can cause “severe respiratory illness, as well as damage to other major organs.”³ Treating serious cases therefore “requires significant advanced support, including ventilator assistance for respiration and intensive care support.”⁴ For high-risk patients who survive, the effect of contracting this virus can be permanent and debilitating, and can include “profound deconditioning, loss of digits, neurologic damage, and loss of respiratory capacity.”⁵

¹ See Mont. Exec. Order No. 2-2020591 (Mar. 12, 2020), https://governor.mt.gov/Portals/16/docs/2020EOs/EO-02-2020_COVID-19%20Emergency%20Declaration.pdf?ver=2020-03-13-103433-047.

² See Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), How it Spreads, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

³ Declaration of Dr. Marc Stern, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16, 2020), at ¶ 6.

⁴ *Id.*

⁵ Declaration of Dr. Jonathan Golob, *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Mar. 16 2020), at ¶ 4.

At present, the World Health Organization estimates that the overall case fatality rate is 3.4%. The fatality rate increases with age and for those with conditions that make them particularly susceptible to the virus. But this disease “can kill healthy adults in addition to elderly people with existing health problems.”⁶

There are only two ways to prevent the spread of COVID-19: social distancing and hygiene. This makes jails and prisons especially ill-suited to the prevention of outbreaks. Almost 4,000 people are incarcerated in DOC facilities, and another 1,800 are in county jails and houses of correction.⁷ An estimated 32% of prisoners and 40% of jail inmates report having at least one disability.⁸ These disabilities make them particularly susceptible to COVID-19. Further, when the outbreak reaches Montana correctional facilities, it is likely that care rationing programs that discriminate against prisoners with disabilities will be implemented, such as has already occurred in Washington State.⁹

⁶ Bill Gates, *Responding to Covid-19 – A Once-in-a-Century Pandemic?*, New Eng. J. of Med. (Feb. 28, 2020), [nejm.org/doi/full/10.1056/NEJMp2003762](https://doi.org/10.1056/NEJMp2003762).

⁷ See https://www.prisonpolicy.org/reports/correctionalcontrol2018_data_appendix.html

⁸ <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5500>

⁹ Guidance distributed by the WA DOH last week recommends that triage teams consider transferring hospital patients with “loss of reserves in energy, physical ability, cognition and general health” to outpatient or palliative care.” Sheri Fink, “The Hardest Questions Doctors May Face: Who Will Be Saved? Who Won’t?”, New York Times (March 21, 2020), <https://www.nytimes.com/2020/03/21/us/coronavirus-medical-rationing.html>

Physical distancing is impossible in correctional facilities. Many, if not most facilities across the state are already overcrowded.¹⁰ Without an immediate reduction in the prisoner population, it will be virtually impossible to control the inevitable spread of the virus, and disabled prisoners will be particularly impacted.

Given this reality, many states are taking bold and dramatic action.¹¹ At least eight state and local court systems have already taken steps to limit incarceration during this crisis. Similar petitions are pending in Massachusetts, Pennsylvania and Hawai'i. The South Carolina Supreme Court ordered that everyone held on bond in a non-capital case be released with certain exceptions.¹² Just last week a federal district court in Nevada suspended confinement as a condition of probation, noting, “the time is now to take action to protect vulnerable populations and the community at large.” *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev., March 17, 2020). New Jersey officials agreed to create an immediate presumption of release for every person serving a county jail sentence.¹³

To be sure, many branches of state and local government are undertaking heroic efforts to protect the incarcerated population, first and foremost this Court.

¹⁰ *Locked in the Past: Montana's Jails in Crisis* (2015); See Appendix 1.

¹¹ See attached Appendix 2.

¹² Memorandum from Donald W. Beatty, Chief Justice of South Carolina Supreme Court, to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) [hereinafter Chief Justice Beatty Memorandum], <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>.

¹³ See *In re Request to Commute or Suspend County Jail Sentences*, No. 084230, Consent Order (S. Ct. N.J. Mar. 22 2020) see also *In re Request to Commute or Suspend Certain County Jail Sentences*, No. 084230, Order to Show Cause, (S. Ct. N.J. Mar. 20, 2020). <https://www.njcourts.gov/public/assets/COVIDproposedOTSC.pdf?c=PkD>.

Chief Justice McGrath has encouraged appropriate measures to “flatten the curve” by analyzing the “potential danger of congregate care.”¹⁴ He further noted “However, it is only a matter of time. Due to the confines of these facilities, it will be virtually impossible to contain the spread of the virus.”¹⁵

Unfortunately, there has not been a uniform response across the state. Cascade County, for example, has refused to release any individuals because of the COVID-19 pandemic.¹⁶ The Montana Department of Corrections has listed “actions” it is undertaking, none of which included a review of individuals that could potentially be released.¹⁷ These actions are inadequate to address the inevitable spread of COVID-19 within the state prisons.

As this Court noted, “[t]he increasingly aggressive spread of COVID-19 across Montana requires a uniform, coordinated response from Montana courts to prevent further outbreak and to maintain consistent and equitable access to justice.”¹⁸ The only body vested with the authority to order a uniform response across all correctional facilities is this Court.

Petitioner DRM is a nonprofit Montana corporation and the authorized protection and advocacy agency for Montana. DRM is authorized by law to pursue

¹⁴ Letters to District Court Judges *et al.* from Chief Justice Mike McGrath (Mar. 13, 2020, March 17, 2020).

¹⁵ Letter to courts of limited jurisdiction from Chief Justice Mike McGrath (Mar. 20, 2020).

¹⁶ <https://www.krtv.com/news/great-falls-news/sheriff-no-release-of-inmates-from-cascade-county-jail-due-to-covid-19>

¹⁷ Letter from Department of Corrections to ACLU-MT, March 17, 2020.

¹⁸ https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/covid19/shelter_in_place_032720.ord.pdf

legal remedies to ensure that disabled individuals in state institutions are protected from abuse and neglect. Because disabled prisoners are DRM’s constituents, DRM has associational standing to bring claims on behalf of prisoners with disabilities. Those prisoners, who will be disproportionately affected by the coming wave of infections, currently or will exist in every correctional facility in the state – from county jails to state prisons.

LEGAL QUESTIONS

- I. Whether subjecting non-dangerous prisoners with disabilities to a likely outbreak of COVID-19 violates those prisoners’ right to be free from cruel and unusual punishment and right to individual dignity;
- II. Whether subjecting non-dangerous prisoners with disabilities to a likely outbreak of COVID-19 violates those prisoners’ due process rights; and
- III. Whether the relief requested below is appropriate in order to mitigate these constitutional concerns.

ARGUMENT

This Court has broad authority to take jurisdiction of original proceedings seeking extraordinary writs. Mont.R.App.P. 14(2). In addition, this Court has authority to exercise supervisory control when, as in this case, “urgency or emergency factors exist making the normal appeal process inadequate” and

“constitutional issues of statewide importance are involved.” *Stokes v. Montana Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 5, 361 Mont. 279, 281, 259 P.3d 754, 756; Mont.R.App.P. 14(3).

Moreover, a writ of mandamus is also appropriate. Respondents have a clear legal duty to reduce the population of incarcerated individuals to protect disabled prisoners. Mont. Code Ann. § 27-26-102(1). Unfortunately, at present Respondents have failed to uniformly and adequately satisfy this duty.

In addition, there is no speedy and adequate remedy that exists in the ordinary course of the law. Mont. Code Ann. § 27-26-102(2). If Petitioner sought the relief in the lower courts and awaited appeal, COVID-19’s inevitable spread within correctional systems would have already occurred. An ounce of prevention is worth a pound of cure; this is doubly true where there is no cure. The only way to prevent this disease from spreading within correctional facilities is to separate these prisoners and do it now.

I. Subjecting non-dangerous disabled prisoners to an inevitable outbreak of COVID-19 violates the Eighth Amendment and Article II, Section 22 of the Montana Constitution.

Conditions that pose an unreasonable risk of future harm violate the constitutional protections of the Eighth Amendment. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition”). The Supreme Court has explicitly recognized

that the risk of contracting “serious contagious diseases” may constitute such an “unsafe, life-threatening condition” that threatens “reasonable safety.” *McKinney*, 509 U.S. at 33-34,

“[I]t is cruel and unusual punishment to hold convicted criminals in unsafe conditions.” *Youngberg v. Romeo*, 457 U.S. 307, 315–316 (1982). The Eighth Amendment does not tolerate “exposure of inmates to a serious, communicable disease.” *McKinney*, 509 U.S. at 33. Further, “[t]he plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated.” *Walker v. State*, 2003 MT 134, ¶ 82, 316 Mont. 103, 68 P.3d 872.

Courts have found claims of future harms cognizable under the Eighth Amendment. *McKinney*, 509 U.S. at 35; *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001); *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. 1995); *Crawford v. Coughlin*, 43 F. Supp. 2d 319, 325-325 (W.D.N.Y. 1999). A potential COVID-19 outbreak poses similar risk of serious harm to every incarcerated person with disabilities in Montana.

The Montana Constitution provides Montana citizens with greater protections from cruel and unusual punishment than does the federal constitution. *Quigg v. Slaughter*, 2007 MT 76, ¶ 20, 336 Mont. 474, 480, 154 P.3d 1217, 1222. *See also, Walker* ¶ 75. “[I]n certain instances where Montana's constitutional right

to individual dignity ...is also specially implicated, we must, of necessity, consider and address the effect of that constitutional mandate on the question before us.”

This Court applies a two-part test to determine an Eighth Amendment violation: The prisoner must demonstrate that he suffered (1) a serious deprivation that results in the denial of the “minimal civilized measure of life's necessities,” and (2) that a prison official acted with deliberate indifference to the inmate's health and safety. *Quigg*, ¶ 19 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

Both parts of this test are satisfied here.

(1) By failing to act appropriately in light of the COVID-19 pandemic, a serious deprivation resulting in the denial of the “minimal civilized measure of life's necessities” has occurred or will occur.

All Montanans have been ordered to shelter in place and/or remain quarantined to avoid contact with others. However, these basic minimal protections are not available to disabled prisoners.

Because this state’s disabled prisoners cannot social-distance or self-quarantine, they are deprived of the minimal and most basic of protections. In sum, there is no way for disabled prisoners to protect themselves from this deadly pandemic while they are incarcerated.

(2) Failing to act appropriately in light of the COVID-19 pandemic amounts to deliberate indifference to prisoners’ health and safety.

Deliberate indifference requires that prison officials “consciously disregarded a substantial risk of serious harm to an inmate’s health or safety.” *Walker*, 2003 MT 134, ¶ 56. Second, deliberate indifference requires that the correctional institution “knew the risk to inmate health” and “acted with disregard for this risk.” *Id.*

Failure to take action is “conscious” disregard, as it is impossible to be unaware of the dangers posed by COVID-19. Further, failure to take the action requested herein satisfies the requisite “substantial risk” factor. To the extent possible and practicable, the incarcerated population needs to abide by the same precautions that govern the conduct of the rest of this state’s populace. For the safety of the prisoners and us all, the significant risk posed by COVID-19 in prisons and jails must be addressed. Respondents’ conduct to date is constitutionally deficient.

II. Continuing customary detention during this crisis violates due process rights under the Fourteenth Amendment and Mont. Const. Art. II, Section 17.

Inaction under the current circumstances would violate the Due Process Clauses of the Fourteenth Amendment and Article II, §17 of the Montana Constitution. Due process is “flexible and calls for such procedural protections as the particular situation demands.” *In re Mental Health of E.T.*, 2008 MT 299, ¶ 25, 345 Mont. 497, 503, 191 P.3d 470, 474.

The criminal process does not authorize deprivations “qualitatively different from the punishment characteristically suffered by a person convicted of crime.” *Vitek v. Jones*, 445 U.S. 480, 493 (1980). Incarcerated people have a constitutionally protected liberty interest in avoiding “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). “Whether a particular restraint imposes an ‘atypical and significant hardship’ depends, in turn, on its ‘duration and degree.’” *Id.*

A serious threat of contracting a severe, life-threatening illness is “a dramatic departure from the basic conditions” of prison life. *Id.* at 485. Contraction of COVID-19 was not “within the sentence imposed” prior to the pandemic. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

These additional burdens implicate substantive and procedural due process rights. To comport with substantive due process, the governmental interest in pretrial detention must outweigh its curtailment of an individual’s fundamental rights. *United States v. Salerno*, 481 U.S. 739, 748, 750 (1987). Even if a prisoner survives the disease, it would be unconscionable to expose a person to a severe disease without taking precautions to mitigate the risk of acquiring it.

REQUESTS FOR RELIEF

Rapid reduction of the overall incarcerated population will immediately benefit prisoners with disabilities. The only way for this Court to grant effective relief to Petitioner – and the disabled community they represent – is to immediately reduce the number of individuals currently confined in correctional facilities.

I. Limit the Number of People in Custody

This petition asks this Court to address the impending COVID-19 pandemic's impact on disabled prisoners by ordering the Respondents to:

- 1) consider the serious health risks posed by detention in probation detention, bail determination, reconsideration and dangerousness hearings;
- 2) temporarily vacate all bench warrants, and cease issuing new bench warrants, for failures to appear or failures to pay outstanding fees and fines;
- 3) temporarily vacate all provisions of probation orders, and cease issuing new provisions in probation orders, that require the immediate instigation of probation violation proceedings upon an alleged violation;
- 4) suspend all probation or pretrial conditions—including drug testing, employment requirements and education requirements—whose adherence would require the individual to violate physical isolation instructions;
- 5) order the relevant custodians to immediately release, with or without conditions, the following categories of individuals currently held pretrial:
 - a. individuals held for no other reason than that they cannot afford bail;
 - b. individuals held on a bail revocation for a technical violation of their conditions of release;

- c. individuals over the age of 60 and thus at increased risk of severe COVID-19 complications and death; and
 - d. individuals who have a condition or disease that puts them at increased risk of severe COVID-19 complications and death.
- 6) order the relevant custodians to immediately release, with or without conditions, the following categories of individuals serving sentences of incarceration:
- a. individuals who are eligible for parole as a matter of law under Mont. Code Ann. § 46-23-201 and who are incarcerated solely for an offense or offenses not appearing in Mont. Code Ann. § 45-5;
 - b. individuals who will complete their sentences and be entitled to release within six-months;
 - c. individuals who are incarcerated as a result of a finding of a violation of probation or parole that does not include the allegation of a new criminal offense (which may not include “compliance violations”);
 - d. individuals who are over the age of 60 and thus at increased risk of severe COVID-19 complications and death, and are incarcerated solely for an offense or offenses not appearing in Mont. Code Ann. § 45-5;
 - e. individuals who have been diagnosed with a disability, condition or disease that puts them at increased risk of severe COVID-19 complications and death;
 - f. individuals who qualify for medical parole under Mont. Code Ann. § 46-23-210;
 - g. individuals serving a sentence in a house of correction for an offense not appearing in Mont. Code Ann. § 45-5; and
 - h. any other individual for whom a release or stay is appropriate.

II. Limit the Number of Individuals Taken Into Custody

Adding new incarcerated individuals exacerbates the risks of transmission that already exist in jails and prisons, and in particular the risks to disabled individuals. This Court should implement three types of measures to limit the number of individuals entering state custody.

A. Issue guidance for the lower courts' detention analysis.

(i) Violations of probation

This Court should instruct the lower courts that the risk that a probationer, if detained, may either contract COVID-19 or infect others, constitutes an important factor that weighs against detention. Under this interpretation, technical violations of probation—i.e. violations other than an allegation of a new criminal offense—can *never* outweigh the public health risk of incarceration to justify detention. And any other probation violation could result in incarceration in only *limited* circumstances.

(ii) Pretrial detention

This Court should instruct the lower courts that individuals cannot be incarcerated for inability to pay bail during this public health emergency. This action will significantly reduce crowding and lessen the speed of the virus's spread

through the vulnerable prison population. This Court should also order that the government's interest in ensuring community safety can outweigh risk posed to a particularly vulnerable segment of society only when that individual presents the most serious danger to the community.

B. Require the lower courts to suspend practices that detain criminal defendants for minor infractions.

To further reduce crowding, *first*, this Court should instruct all lower courts to temporarily vacate all bench warrants during this crisis, and to cease issuing new bench warrants for failures to appear or failures to pay outstanding fees and fines until the crisis is over. At least two court systems have already taken similar actions. Last week, Maine trial courts vacated more than 12,000 warrants in these exact categories, and the Supreme Court of South Carolina directed that “bench warrants for failure to appear shall not be issued at this time.”¹⁹ This Court can and should issue a similar order as an exercise of its authority under Mont.R.App.P. 14(3).

Second, this Court should instruct the lower courts to vacate all provisions in probation orders, and to cease issuing new provisions in probation orders, requiring the immediate instigation of probation violation proceedings upon an alleged violation during this crisis. Judges typically can choose whether to include in their

¹⁹ Chief Justice Beatty Memorandum, *supra* n.20.

probation orders a condition that proceedings must occur for any allegation of probation. Eliminating automatic hearings could decrease the number of individuals brought into court on technical probation violations.

Third, this Court should instruct lower courts to suspend all probation or pretrial conditions, including drug testing, employment requirements, and education requirements, whose adherence requires violating the physical isolation instructions applicable to the rest of the citizens of Montana.

C. Encourage prosecutors and police to exercise discretion to decrease the number of people taken into custody.

Finally, this Court should inform the exercise of discretion by prosecutors and police departments during the COVID-19 pandemic. These actors have significant power to decrease the number of individuals entering the criminal system.

This Court should urge prosecutors to exercise their discretion to reduce substantially the number of criminal defendants.

This Court should likewise urge police departments and county sheriffs to exercise their discretion to limit the numbers of custodial arrests. Arrests themselves may threaten public safety, because they require physical interaction at arrest and booking. Each of these interactions could risk the health of arrestees, law enforcement officers, and the community. The Superior Court for the District of

Columbia has issued an order enabling law enforcement to release an individual not otherwise eligible for release under D.C. law, upon approval of the prosecuting authority.²⁰ This Court should follow suit.

III. This Court Should Exercise its Powers to Reduce the Pretrial Detained Population

This Court should grant a writ of habeas corpus for the immediate release of the following categories of individuals²¹ currently held pretrial:

- Individuals who have a disability condition or disease that puts them at increased risk of severe COVID-19 complications;
- Individuals held for no other reason than that they cannot afford bail under Mont. Code Ann. § 46-9-111;
- Individuals held on a bail revocation for a technical violation of their conditions of release; and
- Individuals over the age of 60 and thus at increased risk of severe COVID-19 complications and death.²²

This Court has noted the “growing population of faceless, powerless, voiceless, warehoused people whose rights are paid lip service but rarely taken seriously by the institutions responsible for their custody. The only check on that indifference is the judiciary.” *Walker*, 2003 MT 134, ¶ 83. Forcing every pretrial

²⁰ See Order, D. C. Sup. Ct. (Mar. 16, 2020), https://www.dccourts.gov/sites/default/files/Order_3-16-20.pdf.

²¹ Should an individual, knowing the risks, wish to remain incarcerated, they should be permitted to do so.

²² See World Health Organization, *Coronavirus Disease 2019 (COVID-19) Situation Report – 51* (Mar. 11, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf>, at 2.

detainee to risk serious illness or death during a public health emergency is a punishment not related to any legitimate government interest. Pretrial detention should not be a death sentence.

IV. Reduce the Sentenced Prisoner Population.

This Court should direct the lower courts and relevant custodians to release the following categories of individuals, and in particular individuals with disabilities, with or without conditions:

- Individuals who have been diagnosed with a disability condition or disease that puts them at increased risk of severe COVID-19 complications and death;
- Individuals who qualify for medical parole under Mont. Code Ann. § 46-23-210;
- Individuals who are eligible for parole as a matter of law and who are incarcerated solely for an offense or offenses not appearing in Mont. Code Ann. § 45-5;
- Individuals who will complete their sentence and be entitled to release within six months;
- Individuals incarcerated as a result of a finding of a violation of probation or parole that does not include the allegation of a new criminal offense (which may not include “compliance violations”);
- Individuals who are over the age of 60 and thus at increased risk of severe COVID-19 complications and death, and are incarcerated solely for an offense or offenses not appearing in Mont. Code Ann. § 45-5;

- Individuals serving a sentence in a house of correction for an offense not appearing in Mont. Code Ann. § 45-5;
- Any other individuals for whom a release or stay is appropriate.

Finally, this Court should order the Respondents to immediately cease interstate and intrastate transport and transfer of any and all prisoners in detention facilities. This is the most obvious means by which the COVID-19 virus can spread among facilities.

CONCLUSION

There are over 5,000 human beings in our prisons and jails, and many suffer disabilities. None of them have been sentenced to illness or death. To protect these individuals and the surrounding communities this Court should order the release of individuals whose continued incarceration cannot be justified. Time is of the essence. This Court is the only entity that can act in time to mitigate the coming catastrophe. It should do so.

Respectfully submitted,

/s/ Alex Rate

Alex Rate, Legal Director
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/s/ Justin Stalpes

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CERTIFICATE OF COMPLIANCE

The undersigned, Alex Rate, certifies that the foregoing complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 4,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Alex Rate
Alex Rate