IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

DEFENDANTS' BRIEF OPPOSING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

CHRISTOPHER M. CARR 112505
Attorney General

Beth Burton 027500
Deputy Attorney General

TINA M. PIPER 142469
Senior Assistant Attorney General

MEGHAN DAVIDSON 445566
Senior Assistant Attorney General

George M. Weaver 743150
Special Assistant Attorney General

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 656-3355
Facsimile: (404) 463-8864
tpiper@law.ga.gov
srutherford@law.ga.gov

HOLLBERG & WEAVER, LLP
6185 Mountain Brook Way
Sandy Springs, GA 30328
(Telephone) 404-760-1116
(Facsimile) 404-760-1136
gweaver@hw-law.com

Attorneys for Defendants

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I. Introduction

Defendants oppose Plaintiffs' renewed motion for class certification. (Doc. 197). Plaintiffs seek certification of their claims under Title II of the Americans with Disabilities Act (ADA), as amended, 42 U.S. Code § 12131, et seq., Section 504 of the Rehabilitation Act of 1973 (RA), as amended, 29 U.S.C. §§794, et seq., and under the Due Process Clause of the Fourteenth Amendment. (Doc. 1 ¶¶ 58-62).

Analysis of Plaintiffs' motion for class certification and Defendants' pending motion for summary judgment requires continual awareness of two landmarks—the injunction Plaintiffs seek and their proposed class definition. *First*, "[e]very order granting an injunction and every restraining order must…state its terms specifically; and…describe in reasonable detail—and not by referring to the complaint or other

document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). In their complaint, Plaintiffs seek an injunction:

> …permanently enjoining Defendants from engaging in the unlawful discrimination complained of herein; [and] an order granting such other injunctive relief...directing Defendants to immediately provide qualified ASL interpreters, auxiliary aids and services, and reasonable modifications, as determined by each individual's preferred method of communication, to Plaintiffs and to all other deaf and hard of hearing individuals subject to GDCS supervision, including: (i) at every meeting and encounter with a GDCS officer and (ii) to facilitate effective communication of the contents of any written documents related to the terms of these individuals' supervision….

(Doc. 181 at 40, Prayer for Relief) (ECF pagination).[1] All three Plaintiffs allege, based on their preferred methods of communication, that they are entitled to both an in-person live hearing ASL interpreter and an in-person live Certified Deaf Interpreter (CDI) for all meetings with DCS staff. (Doc. 181 ¶¶ 4, 21, 37, 43). Plaintiffs are bound to these allegations.

Second, to journey through the pending motions, we must keep in mind the governing definition of the proposed class. "To maintain a class action, the existence of the class must be pleaded and the limits of the class must be defined with some specificity." Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976)[2]; Hawaii ex rel.

[1]Unless otherwise indicated, court filings are cited by ECF pagination.

[2]The Eleventh Circuit has adopted as binding precedent all decisions of the Fifth Circuit issued before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

Louie v. HSBC Bank Nevada, N.A., 761 F.3d 1027, 1041 (9th Cir. 2014) (quoting Wilson); Costelo v. Chertoff, 258 F.R.D. 600, 604 (C.D. Cal. 2009) ("The Court is bound to class definitions provided in the complaint, and absent an amended complaint, will not consider certification beyond it.").

Plaintiffs submit in their complaint the following class definition:

> "Plaintiffs seek to represent a class of all deaf and hard of hearing people subject to Defendants' supervision." "Plaintiffs use the term 'deaf and hard of hearing' to refer to individuals with hearing levels or hearing loss that qualify as disabilities under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiffs use the term "Deaf" to refer to individuals who self-identify as culturally deaf. Throughout the Complaint, when Plaintiffs use the phrase "deaf and hard of hearing," Plaintiffs intend that phrase to include deaf, hard of hearing, d/Deaf-Disabled, d/DeafBlind, and Deaf individuals."

(Doc. 181 ¶ 2 & n.1). The proposed class definition stated in the complaint governs.

II. Requirements for Class Certification

There are many requirements for a viable class action. The proposed representatives must have standing, i.e., a case or controversy with the defendants. O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

Moreover, Plaintiffs must propose a sufficiently defined and ascertainable class. See Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (plaintiffs must "establish that the proposed class is adequately defined and clearly

ascertainable"); AA Suncoast Chiropractic Clinic, P.A., 938 F.3d 1170, 1174 (11th Cir. 2019).

Additional requirements are expressly stated in Fed. R. Civ. P. 23. Plaintiffs must show that the four criteria of Rule 23(a) are met:

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

Fed. R. Civ. P. 23(a)(1-4).

A further condition must also be met. Rule 23(b) states that "[a] class action may be maintained as a class action if Rule 23(a) is satisfied, and if" one of the 23(b) requirements is met. Plaintiffs argue that 23(b)(2) is applicable. (Doc. 181 ¶ 51). The subsection provides:

(2) "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Fed. R. Civ. P. 23(b)(2). This provision imposes generality and cohesion requirements.

And the burden is on the plaintiff(s) to establish the requirements. See Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997) ("The burden of establishing the [requirements of certification under Rule 23] is on the plaintiff who seeks to certify the suit as a class action."). A court does not lean in favor of class

certification but rather exercises a presumption against it. As the Eleventh Circuit held in Brown v. Electrolux Home Prod., Inc., 817 F.3d 1225 (11th Cir. 2016)

> [T]he district court misstated the law when it said that it "resolves doubts related to class certification in favor of certifying the class." The party seeking class certification has the burden of proof. And the entire point of a burden of proof is that, if doubts remain about whether the standard is satisfied, "the party with the burden of proof loses." All else being equal, the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation. A district court that has doubts about whether "the requirements of Rule 23 have been met should refuse certification until they have been met."

Id. at 1233–34 (citations omitted).

To carry the burden imposed by law, a plaintiff must provide a factual basis for the court to conclude that the class requirements are met. See General Telephone Co. v. Falcon, 257 U.S. 147, 160 (1982) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). This requires a court entertaining a motion for class certification to apply a "rigorous analysis" that may "overlap with the merits of the plaintiff's underlying claim." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011).

Plaintiffs cannot carry their burden as to several of these conjunctive requirements. They cannot show they have standing to seek the injunctive and declaratory relief they request. Plaintiffs fail the definition and ascertainability requirement. Nor can Plaintiffs meet the Rule 23(a) requirements of commonality,

typicality, adequacy, or the generality and cohesion requirements of Rule 23(b)(2).

In support of their motion, Plaintiffs have filed a list of cases they label, "Selected Certified Classes of People with Disabilities in Systemic Contexts." (Doc. 197-2, Appendix A). This list is inherently misleading because it lists none of the numerous disability cases in which certification was denied. Defendants attach their own Appendix A listing numerous ADA cases in which certification was denied.

Plaintiffs' list also tellingly omits the recent ADA case of Sabata v. Nebraska Department of Correctional Services, 337 F.R.D. 215 (D. Neb. 2020), in which the ACLU and other counsel involved in our case lost a motion for class certification. The court in Sabata ruled that the commonality criterion was not met, "The proposed solutions to the alleged deficiencies in NDCS's healthcare system are likewise diverse, broad, and would require individualized rather than classwide application. Plaintiffs' claims simply do not satisfy the commonality required by the law." Id. at 224. In addition, the district court deferred to federalism concerns,

> In addition, the Court declines to exercise authority over the Nebraska prison system as Plaintiffs request because doing so would be contrary to the idea of federalism outlined in the United States Constitution. The Nebraska prison system is operated by the State of Nebraska, not the federal government, and certainly not by the federal courts.

Id.

Defendants agree with Plaintiffs that their proposed class of some 80 potential members satisfies the numerosity criterion. (Doc. 197-1, at 9-10). See Cox v. Am.

Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) ("while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors"). Defendants also do not dispute that Plaintiffs' counsel are well qualified to act as class counsel, meeting the requirements of Fed. R. Civ. P. 23(g). (Doc. 197-1, at 32).

III. Plaintiffs Lack Standing to Seek Injunctive and Declaratory Relief.

Plaintiffs do not have standing to seek an injunction or declaratory judgment. Standing is a common denominator to both Plaintiffs' motion for class certification and Defendants' motion for summary judgment. Its absence dictates the grant of summary judgment and denial of class certification.

In order not to clutter the record, Defendants incorporate the argument on standing in their pending motion for summary judgment. (Doc. 200, at 11-35). Defendants also incorporate their accompanying argument that federal courts should, based on federalism principles, practice restraint in interfering in the operations of state criminal justice agencies. (Doc. 200, at 10-11). See Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) ("Recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of irreparable injury which is both great and immediate."); O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Rizzo v. Goode, 423 U.S. 362, 607-609 (1976);

Lewis v. Casey, 518 U.S. 343, 347 (1996) (rejecting concept that federal courts may intervene in a state criminal justice agency in the absence of "actual or imminent harm" merely because the "institution [is] not organized or managed properly").

As Defendants have argued, Plaintiffs fail all elements of the conjunctive test of standing prescribed in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). They cannot show: (1) "an injury in fact...which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) caused by the defendant, which means it is "fairly...trace[able] to the challenged action of the defendant," ***and*** (3) "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61.

And Plaintiffs must show that they personally face "a substantial likelihood that he [or she] will suffer injury in the future." AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 938 F.3d 1170, 1179 (11th Cir. 2019). Plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth v. Seldin, 422 U.S. 490, 502 (1975).

"Georgia is well-known as the national leader in probation supervision, with a rate of 5,570 per 100,000 people on felony or misdemeanor probation supervision as of 2015 (the most recent data available)." Sarah Shannon, *Probation and Monetary Sanctions in Georgia: Evidence from A Multi-Method Study*, 54 Ga. L.

Rev. 1213, 1215 (2020) (citation omitted). Since DCS is the busiest probation or parole agency in the country, there are of course occasional problems in communicating with disabled offenders and those who speak foreign languages.

But a sprinkling of past communications problems does not show a substantial or imminent threat of future harm, no more than has showings of occasional past harms in other cases. In JW by & through Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248 (11th Cir. 2018), the Eleventh Circuit recently reversed class certification against the Birmingham Board of Education. In that case, "Student Resource Officers [SROs] employed by the Birmingham Police Department and stationed at schools" had used "Freeze +P, an incapacitating chemical spray, on students under certain circumstances." Id. at 1253.

High school students against whom the chemical spray had been used brought suit asserting individual and class-based claims seeking injunctive and damage relief. They alleged violations of the Fourth Amendment by use of excessive force and failure adequately to decontaminate them after being sprayed. Id. at 1253. In granting class certification, "The district court…found a pattern of incidents in which SROs used pepper spray in response to students who did not pose an immediate threat…and pointed to 11 examples of students who were sprayed solely for verbal noncompliance" over a three-year period. The Eleventh Circuit summarized additional evidence:

> The use-of-force reports and other evidence indicated that from 2006 to 2014 SROs used chemical spray approximately 110 times, impacting roughly 199 students, out of an estimated total of 70,676 students enrolled during that eight-year timespan. So during that eight-year period the spray was deployed an average of only 1.7 times a year at each school. One of the students' experts testified that a Birmingham student has a 0.4%, or 4 out of a 1000, chance of being intentionally sprayed.
>
> Allegations of intentional chemical spraying that also constitutes excessive force were even more rare. In the eight years from 2006 to 2014, there were only 16 complaints alleging that spraying had constituted excessive force because it was an improper use of Freeze +P. The record is silent about exactly how many of those actually involved—instead of only were claimed to involve—the improper use of Freeze +P. If we use as a barometer the 11 times that SROs sprayed students with Freeze +P solely for verbal non-compliance, then out of the 70,676 students there is only a .016%, or 1.6 out of 10,ß000, chance of being unconstitutionally sprayed. And the probability of being unconstitutionally sprayed may even be smaller than that. Of the six instances that were litigated at trial, the district court concluded that excessive force was used in only two of them…. Two students out of 70,676 would mean that there is only a .003%, or 3 out of 100,000, chance of being unconstitutionally sprayed. Either way, those miniscule probabilities mean that the likelihood of future injury is far too speculative to support standing.

Id. at 1268. Thus, "miniscule probabilities" (0.4%, .016%, or .003%) of illegal conduct are not enough to support standing for an injunction against a public agency.

Other cases that present Defendants have already discussed support the same conclusion. City of Los Angeles v. Lyons, 461 U.S. 95, 98, 100, 108 (1983) ("numerous injuries" including 15 chokehold deaths did not support injunction against the Los Angeles Police Department); Rizzo v. Goode, 423 U.S. 362, 374-75 (1976) (16 constitutional violations by 7,500 policemen in Philadelphia—a city of three million inhabitants—over a period of one year did not support injunctive

relief); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 19-20 (2008) ("564 physical injuries to marine mammals, as well as 170,000 disturbances of marine mammals' behavior" did not support injunctive relief against U.S. Navy sonar training exercises).

Similarly, a federal district court refused to certify a class action suit against Kohl's Corporation although in several instances disabled persons had trouble navigating its department stores. The court ruled:

> Plaintiffs have not pointed to evidence of systemic policies or procedures. Plaintiffs identify 12 individuals who have reported experiencing difficulty in accessing merchandise in approximately 17 different stores (out of approximately 1,149). However, Plaintiffs have not directed the Court to any evidence that Kohl's, as a practice or policy, routinely required employees to ignore complaints or disregard its Shopability Standards. The Court notes that Plaintiffs admit that the obstructions they encountered could differ depending on the store they visited as well as on which day.
>
> * * *
>
> Plaintiffs do not indicate how an injunction containing such broad and non-specific language could be enforced given that the layout of over 1,100 stores could and do vary on a daily basis.

Equal Rights Ctr. v. Kohl's Corp., 2017 WL 1652589, at **2, 5 (N.D. Ill. May 2, 2017).

Plaintiffs' arguments regarding standing in their renewed motion for class certification inadvertently highlight their lack of standing. Plaintiffs show no more than a sprinkling of past communication problems in a busy criminal justice agency.

As shown by the declaration of DCS Commissioner Michael Nail, approximately 734 home plus approximately 169 office visits are made every year by CSOs with deaf offenders. Thus, during the five years from 2017 through 2021 (inclusive), there have been approximately 4,515 visits.

Defendants have produced to Plaintiffs in discovery 1,916 video recordings of meetings between DCS personnel and deaf or hearing-impaired offenders. These have been recorded by body cameras (bodycams) worn by CSOs during 2017-2022. The 1,916 recordings do not include 244 duplicative video recordings, which were also produced. (Exhibit F (to this Brief) (Weaver Decl.) ¶¶ 2,3 (Attachment 1)).

Having been provided with recordings of 1,916 meetings between DCS personnel and deaf offenders, named Plaintiffs have identified in these recordings no instances of communications problems between any of them and DCS personnel. And they have identified a total of only 11 instances of alleged communications problems between other offenders (absent class members) and DCS personnel. (Doc. 197-1, at 18-19, 24, 26). Defendants do not agree with these contentions, but, assuming for purposes of argument they are correct, this "showing" does not in any sense establish the standing required to obtain permanent injunctive relief against DCS.

Of the 11 videos argued by Plaintiffs to involve communication problems, eight should be excluded because they occurred before DCS adopted its ADA Title

II policy and began providing VRI and other accommodations to deaf offenders. DCS did not fully implement its VRI program until January 31, 2020. (Exhibit G (Smith Decl. 4) ¶ 15). The eight that should be excluded are: February 21, 2018 (Jeffrey Wilson), March 3, 2018 (Ashley Barnett), December 27, 2018 (Brittany Willis), March 20, 2019 (Courtney Phillips), October 21, 2019 (Kathy Bullock), November 7, 2019 (Steven Miller), December 3, 2019 (Ashley Barnett), and January 27, 2020 (Gabriel Cohen).

These leaves only three of the recorded meetings that, according to Plaintiffs, show communications problems. Thus, under Plaintiffs' alleged showing, only .156% of meetings between CSOs and deaf offenders during 2017-2021 involved problems in communications. This means that 1,913 or 99.84% did not involve communications problems. But even if one considers all 11 of the videos Plaintiffs cite, the percentage of problematic communications is miniscule (.57%). "[M]iniscule probabilities mean that the likelihood of future injury is far too speculative to support standing." JW by & through Tammy Williams, 904 F.3d at 1268.

Highlighting the importance of this showing, Plaintiffs chose the 11 instances of allegedly poor communications precisely because their attorneys thought they showed problems. For example, Plaintiffs' counsel selected and furnished 12 video recorded meetings (including several of those they now cite to this Court) to

Plaintiffs' expert Moriarty-Harrelson for this same reason. In other words, counsel did not select any recordings showing good communications and did not provide their expert with a random sample of all recordings. (Doc. 201-3 (Moriarity Dep.), at 98:25-99:6, 133:24-135:2) (internal pagination).

Moreover, any problems that existed at DCS before the adoption of its ADA Title II policy and full implementation of VRI are now moot. DCS appointed Darrell Smith as its first ADA Coordinator on September 2019, first adopted an ADA Title II policy on November 30, 2019, as noted, and did not complete the full rollout of VRI until January 31, 2020. (Exhibit G (Smith Decl. 4) ¶ 15).

Any problems that existed at the agency before these dates have been resolved and do not provide continued standing for Plaintiffs' claims or for them to seek class certification and injunctive relief against Defendants. Defendants adopt the mootness argument in their motion for summary judgment. (Doc. 200, at 18-20). In reversing class certification in JW by & through Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248 (11th Cir. 2018), the Eleventh Circuit ruled that the actions of the school system had to be considered in view of changes in policies that took effect after the allegedly illegal actions:

> By the time of trial, however, the BPD had revised its policies concerning the use of control mechanisms. Significantly, the revised policy, which became effective in 2012, required SROs to consider a number of specific factors when determining the appropriate amount of control for a given situation, including the seriousness of the crime committed by the subject; the subject's size, age, and weight; the apparent physical ability of the

> subject; the number of subjects present; the weapons possessed or available to the subject; the subject's known history of violence; the presence of innocent or potential victims; and the possible destruction of evidence.
>
> The request for declaratory and injunctive relief has to be assessed in light of the revised BPD policies that were in place at the time of trial, and those policies—which permit the use of chemical spray across a broad range of scenarios—are not facially unconstitutional. For example, to the extent they permit the use of Freeze +P on subjects who are trying to use force or weapons against an officer (or others), the policies conform to the Fourth Amendment.

J W by & through Tammy Williams, 904 F.3d at 1267–68 (citing Kerr v. City of West Palm Beach, 875 F.2d 1546, 1549 n.8 (11th Cir. 1989)) (other citations omitted). See also Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1333-1334 (11th Cir. 2005) (quoting Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320, 1328-29 (11th Cir. 2004)) ("governmental entities and officials [are] given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities").

The district court's refusal to find mootness in Harris v. Georgia Department of Corrections, 2021 WL 6197108 (M.D. Ga., December 29, 2021), is not significant here. In Harris, Judge Self found that GDOC was not following its own policy regarding deaf prison inmates:

> Defendants claim that their current policies and practices mandate that qualified ASL interpreters are available for deaf and hard of hearing prisoners during orientation services. However, Plaintiffs have provided evidence showing that members of their class are still denied these interpreters.
>
> Upon review of the evidence, the Court cannot conclude that Defendants have shown an unambiguous termination of their alleged illegal

> conduct to render Plaintiffs' claims moot. Therefore, Plaintiffs clearly still have standing to pursue their claims.

Id. at **8-9. Obviously, then, the court in Harris could not conclude that GDOC's adoption of a corrective policy mooted the prisoners' claims. There is no such genuinely disputed issue of material fact in our case. As discussed in this brief, Plaintiffs have falsely claimed that DCS is not following its own policy.

As Defendants have argued in their pending motion for summary judgment, Plaintiffs fail not only the "injury in fact" ("(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical") requirement of the Lujan test for standing but also the traceability and redressibility elements. Lujan, 504 U.S. at 560-61. (Doc. 200, at 29-35). Plaintiffs cannot meet satisfy these elements because state actors other than DCS have responsibilities to communicate conditions of supervision to offenders and Plaintiffs have not sued these other actors. Thus, Plaintiffs cannot show that the harm they allege (failure to inform of supervision conditions) is traceable solely to DCS and would be redressed by an injunction only against DCS.

Supporting these arguments, Defendants attach to this brief the declaration of Bryan Wilson, Deputy General Counsel, Georgia Department of Corrections (DOC). This declaration shows that deaf persons who serve time in prison before probation or parole, such as Plaintiffs Cobb and Nettles, are informed of the conditions of supervision before release. This is called by DOC its "Re-entry" program. (Exhibit

H (Bryan Wilson Decl. ¶¶ 3-5 (Attachments 1,2)).

Thus, named Plaintiffs in our case lack standing for their claims. Occasional communications problems at a busy agency do not show "a substantial likelihood that he [or she] will suffer injury in the future." AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 938 F.3d 1170, 1179 (11th Cir. 2019). As a result, they also do not have standing to seek an injunction or class certification.

IV. Plaintiffs' Proposed Class Definition Does not Meet Identification and Ascertainability Requirements.

After establishing standing, a plaintiff seeking class certification must identify a class that can be properly defined. The Eleventh Circuit has held, "[T]he plaintiff must demonstrate that the proposed class is adequately defined and clearly ascertainable." Moreover, "An identifiable class exists if its members can be ascertained by reference to objective criteria." And the analysis of the objective criteria also should be administratively feasible, [which] means that identifying class members is a manageable process that does not require much, if any, individual inquiry." Bussey v. Macon Cty. Greyhound Park, Inc., 562 Fed. Appx. 782, 787-88 (11th Cir. 2014). See also Adashunas v. Negley, 626 F.2d 600, 603-04 (7th Cir. 1980) (upholding denial of certification for class consisting of all learning disabled children in Indiana since it was not adequately defined or ascertainable); 1 Newberg on Class Actions § 3:3 (5th ed.).

In a federal case from Georgia, the court considered the plaintiffs' request to certify a class including "[a]ll persons who have sustained personal injuries, have specifically evidenced a keratosis, and who have been exposed to the chemicals released from and emanating from the Southern Wood Piedmont facility in Richmond County, Georgia." Newton v. Southern Wood Piedmont Co., 163 F.R.D. 625, 632 (S.D. Ga. 1995). The court found the proposed class too vague and amorphous because identification of members required a medical diagnosis and highly individualized inquiry into the length of time a plaintiff resided in the area, the duration of exposure of each plaintiff to the chemicals, the dosage of the exposure of the chemicals received by the plaintiff, the method of exposure by each plaintiff, and the individual health and medical histories. The court concluded that "[b]ecause there exists no uniform exposure by all putative class members, all of these elements are incapable of common proof." Id. at 632.

The identification of class members should not require individualized hearings. Accordingly, cases involving individual communications are particularly ill-suited for class treatment. Sprague v. Gen. Motors Corp., 133 F.3d 388, 398 (6th Cir. 1998) (claims dependent on individual communications, including "one-on-one meeting[s]," not "susceptible to class-wide treatment"); Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 597-98 (7th Cir. 1993) (proposed class representatives' claims not typical since "it is not known whether the

communications were uniformly made" to city employees); In re LifeUSA Holding Inc., 242 F.3d 136, 145-46 (3d Cir. 2001) (reversing class certification, "plaintiffs assert claims arising not out of one single event or misrepresentation, but claims allegedly made to over 280,000 purchasers by over 30,000 independent agents" that were "neither uniform nor scripted"); Kline v. Security Guards, Inc., 196 F.R.D. 261, 266-67 (E.D. Pa. 2000) (proposed class of "all persons whose communications were intercepted by electronic surveillance" in the employee entrance of their work in violation of Pennsylvania law required "mini-hearings," making it inappropriate for class action).

Plaintiffs offer, as quoted earlier, the following class definition or description:

> "Plaintiffs seek to represent a class of all deaf and hard of hearing people subject to Defendants' supervision." "Plaintiffs use the term 'deaf and hard of hearing' to refer to individuals with hearing levels or hearing loss that qualify as disabilities under the Americans with Disabilities Act and the Rehabilitation Act. Plaintiffs use the term "Deaf" to refer to individuals who self-identify as culturally deaf. Throughout the Complaint, when Plaintiffs use the phrase "deaf and hard of hearing," Plaintiffs intend that phrase to include deaf, hard of hearing, d/Deaf-Disabled, d/DeafBlind, and Deaf individuals."

(Doc. 181 ¶ 2 & n.1).

As the above-discussed case law establishes, Plaintiffs must show that identification of prospective class members is ascertainable by means that do not require a "mini-trial." But their definition does not contain "objective criteria that allow for class members to be identified in an administratively feasible way." Karhu v. Vital Pharms., Inc., 621 Fed. Appx. 945, 946 (11th Cir. 2015). "Identifying class

members is administratively feasible when it is a manageable process that does not require much, if any, individual inquiry." Id.

In their proposed definition, Plaintiffs state that self-identification applies only to the recognition of offenders who are "culturally deaf." They do not propose that their more general definition of "all deaf and hard of hearing people subject to Defendants' supervision" be recognized by self-identification. So how are these offenders to be identified?

Unlike DCS, the Georgia Department of Corrections (DOC), which operates the state prison system, does have custody of inmates and must provide for their health care, including hearing issues. Estelle v. Gamble, 429 U.S. 97, 103 (1976) (recognizing "the government's obligation to provide medical care for those whom it is punishing by incarceration"). The court in Harris, ruled that with respect to DOC ascertainability was not a barrier to certification because identifying absent class members was only an "administrative "feasibility" challenge. Judge Self ruled, "[S]ince the [Georgia Department of Corrections'] medical professionals send every prisoner with a perceived hearing impairment to Dr. Bohannon for further evaluation—where he assesses hearing loss in accordance with objective medical criteria—the GDC has the requisite medical information readily available." 2021 WL 6197108, at *11.

The same is not true here. Declarations of DCS ADA Coordinator Darrell

Smith show that the agency does not have any means of administratively identifying members of the proposed class other than through self-identification, voluntary disclosure of medical records, or obvious difficulties in communication. (Docs. 67-1 ¶ 14, 200-3 ¶ 23). Because DCS does not have custody of offenders under supervision and is not responsible for their medical care, it cannot require offenders to be screened for hearing, sight, or other disabilities. Moreover, DCS does not as part of its regular operations maintain records of the hearing status of offenders.[3] (Doc. 200-3 ¶ 23; Exhibit G (to this Brief) (Smith Decl. 4) ¶ 10).

DCS makes entries in its Portal computer system, of disability status (including deafness) when it comes to the attention of DCS personnel. (Exhibit G (Smith Decl. 4) ¶¶ 4 (Attachment 1, Policy 6.340(IV)(C)). This is not equivalent to the medical records that DOC and other organizations maintain.

That the claims of Plaintiffs and other hearing-impaired offenders involve one-on-one communications with DCS officers is another signpost pointing away from class certification. As shown by the case law discussed above, the contents and legal merits of individual communications are not suited for class handling.

[3]Unlike in our case, the definition and ascertainability requirements may, in some cases, be met by medical records showing medical conditions. See Taylor v. CSX Transp., Inc., 264 F.R.D. 281, 286 (N.D. Ohio 2007) (holding class sufficiently defined consisting of "all persons who worked for Defendant railroads within the class period as engineers and conductors and who, at any time, have been diagnosed with asthma, COPD, or emphysema by a medical doctor").

Importantly, communications with hearing impaired offenders are necessarily different since they are not all subject to the same supervision conditions.

Moreover, Plaintiffs' proposed class is not sufficiently definite and ascertainable for other reasons. A large percentage of the U.S. population has some hearing impairment. This includes age-related hearing deterioration. According to a recent article by Johns Hopkins Medical School Professor Frank Lin,

> Using the World Health Organization's definition for hearing loss (not being able to hear sounds of 25 decibels or less in the speech frequencies), the researchers found that overall, about 30 million Americans, or 12.7 percent of the population, had hearing loss in both ears. That number jumps to about 48 million, or 20.3 percent, for people who have hearing loss in at least one ear. These numbers far surpass previous estimates of 21 to 29 million.

(https://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss) (visited April 2, 2022).

A workable definition of hearing impairment for ADA purposes would specify those persons who are unable to communicate effectively due to hearing impairment. One source contains the following objective criteria:

> Normal hearing (threshold)—10-15 decibels (db)
> Slight hearing loss—16-25 db
> Mild hearing loss—25-40 db
> Moderate hearing loss—41-55 db
> Moderately severe hearing loss—56-70 db
> Severe hearing loss—71-90 db
> Profound hearing loss— >91 db

Waleed B. Alshuaib, et al., *Classification of Hearing Loss*, Update on Hearing Loss

(Fayez Bahmad, Jr. ed., 2015), at 36.

But Plaintiffs' proposed definition does not provide any mechanism for separating persons with common hearing loss from those with hearing loss serious enough to interfere significantly in their ability to communicate, e.g., offenders unable to hear sounds below 71 db. By simply stating that the class would include "all individuals with hearing levels or hearing loss that qualify as disabilities," Plaintiffs offer no method for identifying class members.[4] As noted, unlike DOC, DCS does not have records allowing it administratively to identify offenders in that category. (Doc. 200-3 (Smith Decl. 3) ¶ 23; Exhibit G (Smith Decl. 4) ¶ 14). Because Plaintiffs offer no other solution, the Court would be required to hold mini-trials and hear evidence on every offender who may be hearing impaired.

Thus, the proposed class definition does not describe an identifiable and ascertainable class. For this additional reason, the motion should be denied.

V. Plaintiffs' Proposed Class Fails the Commonality, Typicality, and Adequacy Requirements of Rule 23(a).

Plaintiffs also fall short of the commonality, typicality, and adequacy requirements of Rule 23(a). Defendants will discuss them together since they "tend

[4]As argued in the next section of this brief, Plaintiffs' proposed class also does not under Supreme Court authority, satisfy the commonality requirement. Mere claims that Plaintiffs "have all suffered a violation of the same provision of law" do not support a finding of commonality. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Obviously, simply saying that all members of a proposed class have experienced a violation of the same law does nothing to identify those persons.

to merge." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) ("[t]he commonality and typicality requirements of Rule 23(a) tend to merge . . . [and] also tend to merge with the adequacy-of-representation requirement").

We also learn from Dukes, "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." Id. at 349-50. The Supreme Court explained:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 350.

"Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff[s] in relation to the class." Piazza v. Ebsco Indus., 273 F.3d 1341, 1346 (11th Cir. 2001). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under rule 23(a)(3)." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). While factual differences alone do not prevent typicality, so long as "there is a strong similarity of legal theories," here Plaintiffs' injuries depend on an individual assessment of their impairment and an individual assessment of the accommodation required for effective communication. Id. Such questions of individualized assessment "are best

suited to a case-by-case determination." Chandler v. City of Dallas, 2 F.3d 1385, 1396 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994) (explaining that the "question whether an impairment constitutes a substantial limitation to a major life activity is best suited to a case-by-case determination").

Because Plaintiffs have not sufficiently defined the proposed class, it is difficult to determine whether there are common facts and issues, whether Plaintiffs' claims are typical of the proposed class, and whether Plaintiffs are adequate representatives.

Plaintiffs urge that their broad attacks on DCS policies and practices form common questions of law and fact. Plaintiffs propose the following, with various subparts, as "common questions" warranting class certification:

> 1) Whether DCS policies fail to provide class members equally effective communication;
> 2) Whether DCS fails to employ effective communication methods when trying to communicate with class members;
> 3) Whether DCS's policies and practices deny class members adequate and equal access to programs, activities, and services; and
> 4) Whether DCS is denying class members due process by failing to provide adequate notice of supervision rules and conditions.[5]

[5]As Defendants have argued, Plaintiffs' contentions regarding alleged due process violations are entirely illusory. Due process compliance is not under the control of DCS but rather the state courts, which are not a party to this case. Georgia criminal procedure provides ample due process for probation and parole revocation proceedings. O.C.G.A. §§ 42-8-34.1, 42-9-48, et seq. And Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons.

(Doc. 53-1, at 14-23). But these do not describe an alleged common injury, as required. Moreover, as noted above, contentions that Plaintiffs "have all suffered a violation of the same provision of law" do not support a finding of commonality. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. at 350.

Instead of presenting a "common question," Plaintiff's quarrels with DCS are highly individualized. The six named Plaintiffs state that they and their proposed class have a wide variety of communications wishes and needs. Some may want or need a single in-person ASL interpreter, the three named Plaintiffs now (not originally) seek a team of both an in-person hearing and an in-person deaf ASL interpreter, some do not know ASL and wear hearing aids, some do not know ASL and want text-based communications (such as Communication Access Realtime Translation (CART)), and they have different levels of abilities to read and write English. (Doc. 181 ¶¶ 3-4, 23-25, 34, 37, 42-45).

In their second amended complaint, Plaintiffs describe very well the individualized determinations that would be required should a class be certified here:

> Not all deaf people have the same communication methods or communication needs. The appropriate method(s) of ensuring effective communication depend on the particular needs of the deaf or hard of hearing individual, and depend on the particular preferences expressed by that person. To ensure that it is providing effective communication, GDCS must conduct an ***individualized*** communication needs assessment and determine what communication methods ensure effective communication. GDCS must then provide auxiliary aids and services, which may include qualified interpreters, teams of deaf and hearing interpreters, real-time captioning, amplification devices, or a combination of these, that ensure effective communication for that

individual.

(Doc. 181 ¶ 34) (emphasis added). Indeed, Plaintiffs specifically state that "individualized" determinations will be required. Plaintiffs' experts paint the same picture. Karen Peltz Strauss testified:

> So, again, ***every deaf person is different***. And I think the people that aren't familiar with the deaf community -- understandably, if you're not working in a particular field, you're going to group everybody kind of together. And so if that person's deaf, that person signs, anybody can communicate with them if they sign. But it's actually not like that. Again, every person is different. ***Every person has different capabilities, different educational backgrounds***, different income levels.

(Strauss Dep. (Oct. 4, 2019), at 15) (emphases added).

Under Wal-Mart Stores, Inc. v. Dukes, Plaintiffs must "demonstrate that the class members have suffered the same injury" in order to establish commonality. 564 U.S. at 349-50. This is necessary in order for a class action lawsuit "to generate common answers." And, as the Court explained in Dukes, "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Id. at 350.

In their efforts to show common questions, Plaintiffs misstate many facts. These include:

Plaintiff's Misstatement	**Actual Fact**
DCS "policy makes provision of needed aids and services discretionary"	The DCS policy states the agency "shall provide equal access to its programs, services, and activities as required by Title II of the ADA. DCS will provide Reasonable Accommodations to supervisees who

Plaintiff's Misstatement	Actual Fact
	have disabilities to provide an equal opportunity to participate in programs, services, and activities outlined in required conditions of supervision." The language quoted by Plaintiffs is intended by the agency only to limit its provision of accommodations to those that do not impose an undue burden to DCS or cause a fundamental alteration in its services. The policy is applied in a manner consistent with this understanding. DCS does not believe it can deny all reasonable accommodations to a disabled person, although it does have some discretion in deciding which accommodations to provide. In many cases, there are multiple accommodations that would adequately address the needs of a disabled person. (Exhibit G (Smith Decl. 4) ¶¶ 4, 11 (Attachment 1 (Policy 6.340(IV)).[6]
DCS "policy does not require DCS to assess communication needs for supervisees"	Although there is no written policy, DCS in practice assesses communication needs of offenders. (Doc. 200-3 (Smith Decl. 3) ¶¶ 12, 13)
DCS "imposes multiple inaccessible procedures" including "up to [24] business days" to decide a request for an accommodation	The section of the policy cited by Plaintiffs does not mean that an offender must wait 24 days for an accommodation to be considered. Rather, it means only that if an offender is not satisfied with the accommodation provided by DCS (such as VRI, live ASL interpreter, CART, etc.) the offender may request some other reasonable accommodation using the ADA Reasonable Accommodation Request Form 2 and receive a decision on that request within 24 days. (Depending on the response time of the vendor providing the service.) (Exhibit G (Smith Decl. 4) ¶¶ 4, 12 (Attachment 1 (Policy 6.340(IV)(G)).

[6]Unless otherwise indicated, court filings are cited by ECF pagination.

Plaintiff's Misstatement	Actual Fact
DCS grievance "policy does not provide that any auxiliary aids or services will be provided to supervisees attempting to comply with this process"	At all DCS offices, which are where offenders report for intake, there is a formal posting regarding contacting me as DCS ADA Coordinator regarding any need, question, or concern. DCS also provides needed accommodations in order for offenders to understand and use these procedures. (Exhibit G (Smith Decl. 4) ¶¶ 4, 14 (Attachment 1 (Policy 6.340(IV)(G)); Doc. 200-3 ¶ 21).
DCS overuses VRI without regard to video screen size and internet connection quality	DCS does not have a policy for the size of a screen, because training is provided by the VRI vendor to show the correct way to use the service. In March 2021, DCS sent an email to all District Directors CSOs emphasizing that screen size should be adequat(Exhibit G (Smith Decl. 4) ¶¶ e for communication over VRI. (Exhibit G (Smith Decl. 4) ¶¶ 4, 16(c), Attachment 3 (to this Decl.) (Bates No. D-013327)). In addition, Plaintiffs' experts have themselves all used remote virtual platforms such as Zoom Communications, which is equivalent to VRI, to communicate with the individual Plaintiffs and assess their communications needs. (Doc. 201-3 (Harrelson Dep.), at 37:17-38:15).
DCS never uses live ASL interpreters in field meetings	As shown by the fourth declaration of Darrell Smith, DCS has used live ASL interpreters on numerous occasions with offenders under supervision. (Exhibit G (Smith Decl. 4) ¶ 17).
DCS never provides deaf interpreters (CDIs)	DCS has never used a CDI in a meeting with an offender but it has the capability to provide a CDI where needed—although there are very few CDIs in this area and they are extremely difficult to schedule. DCS has never found the need to retain a CDI. (Doc. 200-3 (Smith Decl. 3) ¶ 22; Exhibit G (Smith Decl. 4) ¶ 18).
DCS relies on family members or friends for	Under 28 C.F.R. § 35.160, the use of accompanying adults is permitted at the request of a deaf person.

Plaintiff's Misstatement	Actual Fact
interpretation	DCS does not encourage reliance on accompanying adults but respects the wishes of the deaf offender. If an offender refuses VRI, a live ASL interpreter, or other accommodation, DCS has him or her sign a declination form. (Exhibit G (Smith Decl. 4) ¶ 20).
DCS "routinely relies on interpreters who otherwise are 'not qualified ASL interpreters' "	This is false. DCS has a contract with a vendor who has qualified interpreters across the state. DCS can also use other vendors if the need arises. (Doc. 200-3 (Smith Decl. 3) ¶¶ 15-16; Exhibit G (Smith Decl. 4) ¶ 16(d)).
DCS "requires many supervised individuals to participate in programs (such as counseling) as a condition of supervision, but routinely excludes Plaintiffs and class members because of their hearing disabilities"	DCS does not provide these programs and services. Offenders select vendors who provide them. DCS does not manage the operations of these vendors but requires that all contractors and vendors comply with the ADA. (Exhibit G (Smith Decl. 4) ¶¶ 4, 8 (Attachment 2) (specimen contracts)).
Defendants have "repeatedly refused to provide Plaintiffs and class members with auxiliary aids and services and reasonable modifications and has denied them adequate notice of the rules and requirements of their supervision"; Plaintiffs cite the single case of Mary Hill on November 3, 2020	There have been no communications breakdowns at DCS with deaf offenders other than the incident with Mary Hill on November 5, 2020. (Doc. 200-3 ¶ 21) as has CSO Adam Roper in his declaration. (Doc. 200-5 ¶ 4-13).

(Doc. 197-1, at 12-27).

Plaintiffs' misguided attack in their motion on the DCS Title II policy

deserves further comment. The policy, which Plaintiffs now apparently want this Court to rewrite, was developed in consultation with the Georgia ADA Coordinator's Office and its officials including Stacey Peace, Esq. (Georgia ADA Coordinator) and Cheryl Ann Frazier (Assistant Georgia ADA Coordinator). (Exhibit G (Smith Decl. 4) ¶ 7). And Plaintiffs' experts have not addressed the adequacy of the DCS ADA Title II policy, leaving the opinion of Defendants' expert that the policy is adequate uncontradicted. (Doc. 201-3 (Erin Moriarty Harrelson Dep.), at 99:7-25; Doc. 201-5 (Barry Marano Dep.), at 233:6-233:18, 235:7-236:11, Dep. Exhibit 130).

The Eleventh Circuit has confirmed that where, like here, differences among the class members will result "in numerous mini-trials" on the merits, class certification should be denied. Truesdell v. Thomas, 889 F.3d 719, 726 (11th Cir. 2018). The plaintiff sued for violation of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, based on the defendant's accessing the plaintiff's personal information and that of potential class members. Because the defendant's "reasons for accessing each putative class member's personal information may vary for each class member, . . . resulting in numerous mini-trials," the plaintiff did not satisfy the commonality and typicality requirements. Id. at 722.

As noted above, Plaintiffs' complaint and declarations map their widely-varying communications needs and abilities. These differences defeat Plaintiffs'

commonality, typicality, and adequacy arguments. Thus, Plaintiffs cannot show that there are "questions of law or fact common to the class." Rule 23(a).

Regarding typicality, "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). But, for the same reasons, Plaintiffs here cannot show that their personal claims are typical of those of the proposed class.

Because, as discussed, Plaintiffs claims are not typical of claims of other offenders and there are no common questions of law or fact, Plaintiffs also cannot show that they "will fairly and adequately protect the interests of the class." Rule 23(a)(4). Thus, Plaintiffs do not meet the commonality, typicality, and adequacy requirements of Rule 23(a)(1-4).

VI. Plaintiffs' Proposed Class Does not Satisfy the Requirements of Rule 23(b)(2).

For similar reasons, Plaintiffs do not meet the requirements of Fed. R. Civ. P. 23(b). The Court need not reach this question inasmuch as Plaintiffs cannot satisfy the above-discussed prerequisites, including those of Rule 23(a). But, putting aside their failure to meet 23(a) and other requirements, Plaintiffs also fail to satisfy 23(b).

Plaintiffs seek class certification under Rule 23(b)(2). Rule 23(b)(2) requires an "act" or "refusal to act" by the defendant "on grounds that apply generally to the class" in such a manner that "final injunctive relief or corresponding declaratory

relief is appropriate respecting the class as a whole."

Reversing certification of a Title VII class under Rule 23(b)(2) class, the Supreme Court underscored in Dukes that "claims for *individualized* relief . . . do not satisfy the rule." Id. at 360 (emphasis original). The Court ruled:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011). The Court also emphasized that the proposed class should not interfere in the defendant's ability "to litigate its statutory defenses to individual claims." Id. at 366-67.[7]

Thus, Rule 23(b)(2) imposes an element of cohesiveness among class members. The Eleventh Circuit has recognized:

> Subsection (b)(2) by its terms, clearly envisions a class defined by the ***homogeneity and cohesion*** of its members' grievances, rights and interests. Rule 23 itself provides for (b)(2) certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class. The import of this language is that the claims contemplated in a (b)(2) action are class claims, claims resting on the same grounds and applying more or less equally to all members of the class.

Holmes v. Cont'l Can Co., 706 F.2d 1144, 1155 (11th Cir. 1983); id. at 1158 ("the

[7]Some courts have recognized that "unique defenses" which threaten to become a "major focus" of a proposed class action count against certification. See Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (collecting cases).

cohesive characteristics of the class are the vital core of a (b)(2) action"); Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001) (" 'While 23(b)(2) class actions have no predominance ... requirements, it is well established that the class claims must be cohesive.' ") (quoting Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3rd Cir. 1998)).

The cohesion requirement assures that the class action will be manageable. Shook v. Bd. of Cty. Commissioners of Cty. of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J.) (" 'A class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant.' So, if redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, 'the suit could become unmanageable and little value would be gained in proceeding as a class action.' . . . In short, under Rule 23(b)(2) the class members' injuries must be sufficiently similar that they can be addressed in an single injunction that need not differentiate between class members.") (*first quotation* 5 Moore's Fed. Prac. § 23.43(2)(b) at 23–195 (3d.2000); *second quotation* Barnes, 161 F.3d at 143).

Our Plaintiffs cannot clear the Rule 23(b)(2) hurdles. Their disparate communications needs and abilities preclude "a single injunction or declaratory judgment" that "would provide relief to each member of the class," as required for

a Rule 23(b)(2) class. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. at 360. In our case, Rule 23(b)(2) "does not authorize class certification [because] each individual class member would be entitled to a different injunction or declaratory judgment against the defendant[s]." Id. Unlike Rule 23(b)(3), which contains the predominance and superiority components, Rule 23(b)(2) does not allow for a "case-specific inquiry." Id. at 362-63.

The problems with Plaintiffs' proposed class can be seen through the prism of this question: What single order could the Court enter that would meet Plaintiffs' divergent demands? As focused by Dukes and the cohesion element recognized in Holmes, Plaintiffs do not seek, and cannot be satisfied by, a single order providing specific class-wide relief. Rather, they seek a splintered order or series of orders with multiple variables based on the communications wishes, abilities, and perceived needs of various criminal offenders. Because there is no such single order, Plaintiffs cannot meet the requirements of Rule 23(b)(2).

VI. CONCLUSION

For these reasons, the Court should deny the motion for class certification.[8]

[8]This brief has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

Respectfully Submitted,

CHRISTOPHER M. CARR 112505
Attorney General

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
Telephone: (404) 656-3355
Facsimile: (404) 463-8864
tpiper@law.ga.gov
srutherford@law.ga.gov

Beth Burton 027500
Deputy Attorney General

TINA M. PIPER 142469
Senior Assistant Attorney General

MEGHAN DAVIDSON 445566
Senior Assistant Attorney General

s/George M. Weaver
George M. Weaver 743150
Special Assistant Attorney General

HOLLBERG & WEAVER, LLP
6185 Mountain Brook Way
Sandy Springs, GA 30328
(Telephone) 404-760-1116
(Facsimile) 404-760-1136
gweaver@hw-law.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the DEFENDANTS' BRIEF OPPOSING PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Sean J. Young, Esq.
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF GEORGIA,
INC.
P.O. Box 77208
Atlanta, GA 30357
SYoung@acluga.org

Claudia Center, Esq., *pro hac vice*
Susan Mizner, Esq. *pro hac vice*
Zoe Brennan-Krohn, Esq. *pro hac vice*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
DISABILITY RIGHTS PROGRAM
39 Drumm Street
San Francisco, CA 94111
Zbrennan-krohn@aclu.org
CCenter@aclu.org
SMizner@aclu.org

Brittany Shrader, Esq.
NATIONAL ASSOCIATION FOR THE
DEAF LAW AND ADVOCACY
CENTER
8630 Fenton Street, Suite 820
Silver Spring, MD 20910
brittany.shrader@nad.org

Stephanna F. Szotkowski, Esq.
ARNOLD & PORTER KAYE
SCHOLER LLP
70 West Madison Street, Suite 4200
Chicago, Illinois 60602
Stephanna.Szotkowski@arnoldporter.com

Talila A. Lewis, Esq., *pro hac vice*
PO Box 1160
Washington, DC 20013
talila.a.lewis@gmail.com

West Resendes, Esq.
Disability Rights Program
American Civil Liberties Union
39 Drumm Street
San Francisco, CA 94111
wresendes@aclu.org

Brian L. Dimmick, Esq.
Senior Staff Attorney, Disability Rights Program
American Civil Liberties Union
915 15th St NW
Washington, DC 20005
bdimmick@aclu.org

This 4th day of April 2022.

s/George M. Weaver
George M. Weaver 43150
Attorney for Defendants

HOLLBERG & WEAVER, LLP
6185 Mountain Brook Way
Sandy Springs, GA 30328
(Telephone) 404-760-1116
(Facsimile) 404-760-1136
gweaver@hw-law.com