IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OSCAR SANCHEZ, TESMOND MCDONALD, MARCELO PEREZ, ROGER MORRISON, KEITH BAKER, PAUL WRIGHT, TERRY MCNICKELS, JOSE MUNOZ, OLIVIA WASHINGTON, and IDEARE BAILEY, *on their own and on behalf of a class of similarly situated persons,* *Plaintiffs,* v. DALLAS COUNTY SHERIFF MARIAN BROWN, *in her official capacity,* and DALLAS COUNTY, TEXAS, *Respondents/Defendants.*	Civil Action No. 3:20-cv-832

THE *SANCHEZ* PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR AMENDED MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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NECESSITY FOR MOTION

For people outside the Dallas County Jail, the growing access to COVID-19 vaccines is raising their hopes for quick personal immunity and an eventual end to the pandemic. Meanwhile, for the 5,500 persons crowded into dozens of "pods" and "tanks" within the Jail, protection against COVID-19's "objective exposure to a substantial risk of harm" depends entirely on Dallas County and Sheriff Brown. The *Sanchez* Plaintiffs allege that Defendants are failing the constitutional "deliberate indifference" standard by purposely neglecting to assess the seriousness of the COVID-19 outbreak in the jail, deprioritizing vaccination of detainees despite their obvious susceptibility to infection and vulnerability to serious illness, and refusing to take other steps necessary to bring the COVID-19 outbreak in the jail under control. *Valentine v. Collier*, No. 20-2025, 2021 WL 1153097, at *3 (5th Cir. Mar. 26, 2021). Because the *Sanchez* plaintiffs thus assert that Sheriff Brown and Dallas County have "acted or refused to act on grounds that apply to the class [of detainees], so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," this case is a prime candidate for class treatment under Rule 23(b)(2). Fed. R. Civ. P. 23(b)(2).

As the *Sanchez* Plaintiffs demonstrate below, the requirements of Rules 23(a) and 23(b)(2) are amply satisfied in this case, and the Court should certify a pre-adjudication and post-adjudication class and a medically-vulnerable subclass within each, and appoint class counsel to represent them.

CLASS DEFINITIONS

Plaintiffs seek to certify two principal classes and two subclasses:

1. "Pre-Adjudication Class": All current and future detainees in pretrial custody at the Dallas County Jail, including individuals detained for alleged violations of probation or parole;

a. "Medically-Vulnerable Pre-Adjudication Subclass": All current and future detainees in pretrial custody at the Dallas County Jail, including individuals detained for alleged violations of probation or parole, who, according to the Centers for Disease Control and Prevention (CDC), are or may be at increased risk for severe illness or death from COVID-19 due to their age and their health conditions, including individuals with the following conditions[1]:

- Aged 50 years or older[2]
- Cancer
- Chronic Kidney Disease
- Chronic lung diseases, including COPD (chronic obstructive pulmonary disease), asthma (moderate-to-severe), interstitial lung disease, cystic fibrosis, and pulmonary hypertension
- Dementia or other neurological conditions
- Diabetes (type 1 or type 2)
- Down syndrome
- Heart conditions (such as heart failure, coronary artery disease, cardiomyopathies or hypertension)
- HIV infection
- Immunocompromised state (weakened immune system)
- Liver disease
- Overweight (defined as a body mass index (BMI) > 25 kg/m^2 but < 30 kg/m^2), obesity (BMI ≥30 kg/m^{2}but < 40 kg/m^2), or severe obesity (BMI of ≥40 kg/m^2)
- Pregnancy
- Sickle cell disease or thalassemia
- Smoking, current or former
- Solid organ or blood stem cell transplant
- Stroke or cerebrovascular disease, which affects blood flow to the brain

[1] *See People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited April 5, 2021).

[2] The CDC states that the risk for severe illness with COVID-19 increases with age. For example, people 50-64 years old are 25 times more likely to require hospitalization, and 440 times more likely to die than people 17 years old and younger. *See Older Adults*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited April 5, 2021). The Texas Department of State Health Services has recognized that more than 93% of Texas fatalities caused by COVID-19 occur among people 50 and older, with those aged 50-64 accounting for 20% of all fatalities. *See People 50 and older eligible to be vaccinated beginning March 15*, TEXAS DEP'T OF STATE HEALTH SERVS. (Mar. 10, 2021), https://dshs.texas.gov/news/releases/2021/20210310.aspx#:~:text=March%2010%2C%202021,of%20age%20on%20March%2015 (last visited April 5, 2021)

2. "Post-Adjudication Class": All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole;

    a. "Medically-Vulnerable Post-Adjudication Subclass": All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole, who, according to the CDC, are or may be at increased risk for severe illness or death from COVID-19 due to their age and their health conditions, including individuals with the conditions listed in the above definition of the Medically-Vulnerable Pre-Adjudication Subclass.[3]

BACKGROUND

I. Procedural History

Plaintiffs initiated this action against Defendants Sheriff Marian Brown and Dallas County, Texas ("Defendants") on April 9, 2020, seeking relief pursuant to 28 U.S.C. § 1983 from conditions that violate their Eighth and Fourteenth Amendment rights under the United States Constitution, as well as a writ of habeas corpus compelling Defendants to release medically vulnerable detainees. (ECF No. 1.)

On April 12, 2020, Plaintiffs moved to certify the same classes and subclasses whose certification is sought here.[4]: a pre-adjudication class of persons whose relevant rights stem from

[3] *Id.*

[4] Plaintiffs have updated their definitions of the medically vulnerable subclasses to reflect current expert consensus regarding the underlying medical conditions that increase a person's risk of suffering severe illness from the virus that causes COVID-19 according to the CDC. *See People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited April 5, 2021).

the Fourteenth Amendment, a pre-adjudication subclass of medically vulnerable persons, a post-adjudication class of persons whose rights stem from the Eighth Amendment, and a post-adjudication subclass of medically vulnerable persons. (ECF No. 17.) Defendants moved to dismiss the action on April 15, 2020. (ECF No. 35.) Plaintiffs filed a first amended complaint on April 17, 2020, adding three additional named plaintiffs—including the late Kiara Yarborough, who recently passed away at the age of 26[5]—and further factual details concerning the conditions in the Jail and the named Plaintiffs' efforts or ability to exhaust their remedies in state court. (ECF No. 39.) On April 19, 2020, Defendants filed an Amended Motion to Dismiss. (ECF No. 53.)

The Court held a four-day evidentiary hearing on Plaintiffs' request for preliminary injunctive relief from April 21 to 24, 2020. (ECF Nos. 90, 91, 92, 93.) The Court denied that requested relief on April 27, 2020, (ECF No. 85), for the reasons stated in an opinion issued on May 22, 2020 (ECF No. 99).

On August 19, 2020, the Court denied Defendants' original motion to dismiss (ECF No. 35) as moot and, granting in part Defendants' Amended Motion to Dismiss (ECF No. 53), dismissed Plaintiffs' petition for a writ of habeas corpus. (ECF No. 120.) On September 25, 2020, Defendants moved to dismiss on standing and mootness grounds the claims of the named Plaintiffs who have been transferred or released from the Jail, including every named Plaintiff representing the post-adjudication class. (ECF No. 126.) That motion remains pending.[6]

[5] *See* Notice of Death, ECF No. 197.

[6] The Fifth Circuit's ruling in *Daves v. Dallas County, Texas* confirms that the mootness and standing arguments raised in Defendants' motion are without merit. No. 18-11368, 2020 WL 7693744 at *6 (5th Cir. Dec. 28, 2020) ("The possible mootness of the named Plaintiffs' claims at the time the amended complaint was filed or before the class was certified is of no consequence to this court's jurisdiction over this class action . . . Because the Plaintiffs had standing when they filed their original complaint, the capable-of-repetition-yet-evading-review doctrine precludes mootness.") (citing *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Caliste v. Cantrell*, 937 F.3d 525, 527 n.3 (5th Cir. 2019)).

On December 7, 2020, Dr. Homer Venters, an expert in correctional medicine, epidemiology, and infectious disease,[7] conducted an inspection of the Jail on Plaintiffs' behalf.[8] The parties are engaged in ongoing discovery, scheduled to conclude on April 20, 2021. (*See* Amended Scheduling Order, ECF No. 202.)

II. Statement of Facts

More than a year into the pandemic, Defendants continue to ignore their basic responsibility to keep the Jail community safe from the threat and impact of COVID-19. Starting with their conscious decision not to prioritize vaccine doses for detainees according to their objective eligibility and need, these failures are rooted in systemic policies and practices and are susceptible to class-wide injunctive relief.

Incarcerated people are 5.5 times as likely to be infected with COVID-19 as the general population—and three times as likely to die from it.[9] To date, 391,782 people incarcerated in U.S. prisons have contracted confirmed cases of COVID-19, and at least 2,506 of them have died.[10] Prisons in Texas have fared particularly poorly, behind only California and the Federal prison system in total reported cases.[11] During a deadly pandemic, correctional facilities are uniquely lethal.

The Dallas County Jail is no exception. The Dallas County Jail has maintained a *higher*

[7] Dr. Venters is also a member of the Biden-Harris Administration's COVID-19 Health Equity Task Force. *See* Press Release, The White House (Feb. 10, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/10/president-biden-announces-members-of-the-biden-harris-administration-covid-19-health-equity-task-force/.
[8] *See* Ex. A, Inspection Report of Dr. Homer Venters (Inspection Report).
[9] Benjamin A. Barsky et al., *Vaccination plus Decarceration—Stopping COVID-19 in Jails and Prisons*, NEW ENGLAND JOURNAL OF MED. (March 3, 2021), https://www.nejm.org/doi/full/10.1056/NEJMp2100609.
[10] *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons (last updated April 1, 2021).
[11] *Id.*

population throughout the majority of the pandemic than during the same period in 2019, [12] despite evidence that even modest population reductions correlate with significant decreases in COVID-19 transmission.[13] Numbers of COVID-19 cases reported in the jail[14] significantly underrepresent the scope of the COVID-19 crisis at the Jail. Defendants maintain a deliberately inadequate testing regime, as discussed further *infra* at 7. And Texas jails, including the Dallas County Jail, are known to skirt their legal obligations to report detainee deaths by releasing ill detainees from their custody immediately before they die.[15] Indeed, Defendants did not report on the passing of Channel Lee Greer—who died of COVID-19 in the Jail on June 21, 2020—for nearly *four months*.[16]

At every turn, most recently with the unconscionably slow pace of vaccinations, Defendants' response to the COVID-19 pandemic has served to endanger the detainees in their care. Defendants' policies and practices in at least six broad categories—Lack of Testing; Impossibility of Social Distancing and Inadequate Quarantining; Ineffective Contact Tracing; Inadequate Use of Personal Protective Equipment (PPE) and Hygiene; Poor Training and Education; and Disregard of Medical Vulnerabilities—expose the proposed class members to a substantial risk of serious harm.

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[12] *See* Historical Population Reports, TEXAS COMM'N ON JAIL STANDARDS, https://www.tcjs.state.tx.us/historical-population-reports/#1580454195676-420daca6-0a306.

[13] *See* Noel Vest et al., *Prison Population Reductions and COVID-19: A Latent Profile Analysis Synthesizing Recent Evidence From the Texas State Prison System*, JOURNAL OF URBAN HEALTH (Dec. 18, 2020), https://link.springer.com/article/10.1007/s11524-020-00504-z (last visited April 5, 2021).

[14] *See* Ex. B, Powerpoint Presentation of Dr. Ank Nijhawan (Nijhawan Presentation), at 28.

[15] *See* TEXAS COMM'N ON JAIL STANDARDS, *2019 Self Evaluation Report*, at 84 ("[[O]n multiple occasions, counties have not reported a death because they claim that at the time of death the inmate was not in custody. This is because when the inmate's medical condition became acute, and the jail had either released the inmate abruptly on a Personal Recognizance Bond (PR Bond) without the inmate's signature or immediately transported the inmate to a hospital. . . jail staff then deemed the inmate was free—no longer 'in custody.'"); Arya Sundaram, *How Texas Jails Avoid Investigations of Inmate Deaths*, TEXAS OBSERVER, (Oct. 29, 2020), https://www.texasobserver.org/how-texas-jails-avoid-investigations-of-inmate-deaths/

[16] Nic Garcia, *How a 63 Year-Old Inmate was the First to Die From COVID-19 in the Dallas County Jail*, DALLAS MORNING NEWS (Oct. 16, 2020), https://www.dallasnews.com/news/public-health/2020/10/16/how-a-63-year-old-inmate-was-the- first-to-die-from-covid-19-in-the-dallas-county-jail/.

A. **Only 500 Vaccinations as of March 31, 2021**

At her deposition on March 31, 2021, Sheriff Brown testified that the jail had administered only 500 or fewer vaccine doses to the roughly 5,500 detainees in her custody.[17] She conceded that she was unaware of the CDC's guidance regarding vaccinations in detention and correction facilities.[18] Nor was Sheriff Brown aware of the CDC's guidance that detainees and jail correctional staff should be vaccinated at the same time.[19] The failures of correctional facilities like the Dallas County Jail have already resulted in injunctive orders requiring jails and prisons to prioritize vaccines for detained persons on a par with persons who are not in detention.[20]

B. Lack of Testing

Defendants' testing protocols are drastically out of step with CDC guidance. The Jail does not conduct comprehensive COVID-19 testing.[21] As a result, the Jail has never obtained—or reported—an accurate picture of the COVID-19 prevalence or transmission rate. The CDC recommends that facilities conduct serial screening every 3-7 days for all or a random sample of incarcerated persons, or targeted serial screening of subgroups such as high-risk detainees, those in dormitory units, and those assigned critical work duties.[22] Defendants do none of this.

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[17] *See* Ex. C, Transcript of Deposition of Sheriff Marian Brown (Brown Dep.), at 47:25-48:12.
[18] *Id.* at 12:15-17.
[19] *Id.* at 137:6-138:23.
[20] *E.g.*, *Holden v. Zucker*, No. 801592/2021E, slip op. at 19 (N.Y. Sup. Ct. Bronx Cty. Mar. 29, 2021) ("mandating that Respondents immediately modify current COVID-19 vaccine eligibility category to authorize[] incarcerated individuals for vaccination"); *Maney v. Brown*, No. 6:20-cv-570, 2021 WL 354384, at * (D. Ore. Feb. 2, 2021) (enjoining prison officials to offer detainees "who have not been offered a COVID-19 vaccine, a COVID-19 vaccine as if they had been included in Phase 1A, Group 2, or Oregon's Vaccination Plan"); *see United States v. Groat*, No. 2:17-cr-104, 2021 WL 1238101 (D. Utah Apr. 2, 2021) (reducing term for "unvaccinated" detainee who is at a much greater risk for being at risk of suffering from severe symptoms if he is infected" due to medical vulnerability).
[21] *See* Ex. D ,Transcript of December 9, 2020 Deposition of Dr. Nijhawan (Nijhawan Dep. 1), at 96:22-23.
[22] *Testing in Correctional & Detention Facilities*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html (last accessed April 5, 2021). Although these specific testing recommendations were added to the CDC guidance on February 19, 2021, previous versions of the guidance also recommended "broad-based testing" and directed readers to the CDC's page on "Performing Broad-Based Testing for SARS-CoV-2 in Congregate Correctional, Detention, and Homeless Service Settings," https://www.cdc.gov/coronavirus/2019-ncov/hcp/broad-based-testing.html.

Defendants have not even adopted the narrower approach of testing the detainees most likely to be asymptomatic carriers: those under quarantine. Asymptomatic individuals transmit more than half—59 percent—of all cases of COVID-19.[23]

Defendants' policy against testing asymptomatic close contacts of persons with COVID-19 appears calculated to suppress the ugly fact that the Jail is teeming with asymptomatic infection. Defendants conducted an experiment in June 2020: they tested fifteen quarantined tanks. "When we tested that group," Dr. Nijhawan recalled, "high numbers -- high proportions of those groups would test positive for COVID."[24] Dr. Nijhawan documented the results of that experiment in the chart below, which she prepared for a presentation she delivered at an academic conference at Massachusetts General Hospital.[25]

COVID Testing of Quarantined Tanks

Tank #	Day of quarantine	Date screened	Total in tank	Capacity	% capacity	Total patients screened	# symptoms	# with symptoms COVID+	# aysmpto matic	# asympto matic COVID+	% asymptomatic COVID positive
4E3	1	5/27/20	29	30	0.97	28	3	2	25	19	0.76
5W7	14	5/29/20	25	34	0.74	24	1	0	23	1	0.04
3E1	1	6/2/20	33	34	0.97	32	4	3	28	20	0.71
4p14	1	6/2/20	11	24	0.46	10	0	0	10	0	0.00
K2D-5W5	13	6/2/20	22	24	0.92	21	0	0	21	2	0.10
K2D-5W6	14	6/3/20	22	28	0.79	21	0	0	21	4	0.19
K1F	15	6/3/20	9	64	0.14	8	0	0	8	2	0.25
7W7	2	6/3/20	18	34	0.53	17	0	0	17	9	0.53
K1E- 5W10	1	6/5/20	33	64	0.52	32	1	1	31	11	0.35
7W4	2	6/5/20	22	24	0.92	21	1	1	20	13	0.65
7W3	3	6/8/20	23	28	0.82	22	3	2	19	15	0.79
5K1F-5W8	17	6/8/20	27	30	0.90	26	0	0	26	2	0.08
6W5	2	6/8/20	19	24	0.79	18	0	0	18	5	0.28
4E1	2	6/16/20	33	34	0.97	32	3	3	29	25	0.86
K1D	1	6/30/20	58	64	0.91	57	0	0	55	16	0.29

High % asymptomatic positive: early in quarantine, close to capacity

[23] Michael A. Johansson et al., *SARS-CoV-2 Transmission From People Without COVID-19 Symptoms*, JAMA NETWORK OPEN (Jan. 7, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774707?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=010721

[24] Ex. D (Nijhawan Dep. 1), at 46:19-23.

[25] *Id.* at 90:10-17; Ex. B (Nijhawan Presentation), at 31.

The chart illustrates staggering rates of asymptomatic COVID-19.[26] In 10 of the 15 tested tanks, at least 25% of the healthy-appearing detainees were found to have COVID-19. In one tank, nearly every person—28 out of 32—tested positive, and 25 of those detainees were asymptomatic; 86% of the people in the tank with no COVID-19 symptoms were actually infected with the disease. In another, 17 out of 22 detainees tested positive, 15 of whom were asymptomatic; 79% of the people in the tank with no COVID-19 symptoms were actually infected with the disease. In another, 21 out of 28 detainees tested positive, 19 of whom were asymptomatic; 76% of the people in the tank with no COVID-19 symptoms were actually infected with the disease. And in yet another, 23 out of 32 detainees tested positive, 20 of whom were asymptomatic; 71% of the people in the tank with no COVID-19 symptoms were actually infected with the disease.

Defendants responded to this alarming information by burying their heads in the sand, thereafter declining to test asymptomatic detainees in quarantine.[27] Dianne Urey stated that it "proved not worthy of all the time."[28] Dr. Nijhawan suggested that finding more positive cases prolonged quarantine periods, which was apparently regarded as an inconvenience.[29]

COVID-19 testing is an essential infection control tool. Defendants' calculated refusal to institute a testing regime minimally capable of identifying and reducing transmission exposes every member of the Jail community to a constant risk of serious harm.

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[26] The right-most column in this chart presents data in a potentially confusing or misleading fashion and warrants brief clarification. Although the column header ("% asymptomatic COVID positive") would suggest that the numbers in the column are expressed as percentages, they are in fact expressed as decimals. Thus, the first entry in the column should read 76 or 76%, rather than .76. The second should read 4 or 4%, and so on. These figures reflect the proportion of asymptomatic individuals who test positive for COVID-19 ("# asymptomatic COVID+") out of the total number of asymptomatic individuals in a tank ("# asymptomatic"). Thus, in the first row, for example, 19 of 25 asymptomatic individuals tested positive for COVID-19, or 76%.

[27] *See* Ex. E, Transcript of Deposition of Patrick Jones (Jones Dep.), at 135:17-25.

[28] *See* Ex. F, Transcript of Deposition of Dianne Urey (Urey Dep.), at 128:6.

[29] Ex. D (Nijhawan Dep. 1), at 111:16-23.

C. Impossibility of Social Distancing and Inadequate Quarantining

It would be difficult to conceive of an environment more conducive to spreading COVID-19—and enabling its worst outcomes—than the Dallas County Jail. Dr. Venters concluded that "The lack of social distancing efforts throughout the housing areas and common spaces of the Dallas County Jail represents a basic deficiency in the COVID-19 response, especially in medication lines when the most vulnerable Detainees queue to receive their daily medications."[30]

Defendants have not attempted to promote social distancing through even the most obvious, if limited means; for example, in his inspection of the facility, Dr. Venters observed no "officers asking people to spread apart, nor were there any six-foot markings on the floor or at tables."[31]

Most detainees in the Dallas County Jail live in open, dormitory-style "pods" or "tanks," which house as many as 64 people. According to Dr. Nijhawan, social distancing is these housing units is nearly impossible.[32] This makes them breeding grounds for disease. As Dr. Nijhawan described, "[W]hen people are housed together, for example, in one of those 64-person units, it is a very efficient way to spread COVID. People are close together. They're sleeping together. They're eating together. Even if they're wearing masks and washing hands. I would say it's closer than household contacts in your own home."[33]

When a person living in one of those pods or tanks falls ill with COVID-19, Defendants impose a "quarantine" on the unit—which means that the unit is shut off from the rest of the jail, leaving the detainees who have just been in "closer than household" proximity to the sick person

[30] Ex. A (Inspection Report), at 21.
[31] *Id.* at 10.
[32] *See* Ex. D, (Nijhawan Dep. 1), at 119:7-8.
[33] *See* Ex. G, Transcript of December 14, 2020 Continued Deposition of Dr. Nijhawan (Nijhawan Dep. 2), at 65:16-25.

to go on living together and efficiently spreading COVID-19 through their shared, crowded, recently infected space.[34] This strategy all but ensures that one case in a housing unit will quickly multiply.

And the strategy fails to stem the spread of disease even *beyond* the quarantined unit because many dormitories contain open airways to adjacent living spaces. Droplets carrying the virus that causes COVID-19 "can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours)," according to the CDC.[35] In fact, studies show that a person with respiratory illness can send clouds of pathogen-bearing droplets as far as 8 meters, or 26 feet.[36] As Dr. Venters observed, "the placement of both quarantine and medical isolation patients into units with open airways to adjacent units is a very problematic approach because it allows for passage of COVID-19 virus in aerosolized droplets from one unit to another, which can enable the spread of infection. It also can render meaningless the assumptions made in an individual quarantine unit about the source of new cases."[37]

The CDC strongly cautions against the approach to "quarantine" Defendants employ. The CDC advises that "Facilities should make every possible effort to individually quarantine close contacts of individuals with confirmed or suspected COVID-19. Cohorting multiple quarantined close contacts could transmit SARS-CoV-2 from those who are infected to those who are uninfected."[38]

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[34] *See* Ex. D (Nijhawan Dep. 1), at 122:1-20.
[35] *See Science Brief: SARS-CoV-2 and Potential Airborne Transmission*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-sars-cov-2.html (last visited April 5, 2021).
[36] Mahesh Jayaweera et al., *Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy*, ENV'T. RSCH. (June 13, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/.
[37] Ex. A (Inspection Report), at 21.
[38] *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited April 5, 2021) ("CDC Interim Guidance").

The CDC also specifies certain measures that facilities should undertake "if cohorting close contacts is absolutely necessary."[39] Defendants adhere to none of them.

First, the CDC recommends being "especially mindful of those who are at increased risk for severe illness from COVID-19" and states that "they should not be cohorted with other quarantined individuals."[40] Defendants make no attempt to consider medical vulnerability in implementing quarantine. Asked whether a detainee with a chronic condition or an elderly detainee would remain in a quarantined tank that is close to capacity, Dr. Nijhawan responded, "Sure. . . people were housed where we had housing available."[41]

The CDC also states that "all cohorted individuals should be monitored closely for symptoms COVID-19."[42] According to Patrick Jones, Vice President for Operations of Parkland Correctional Health Services, Defendants provide monitoring for only five days; detainees are left to self-report any symptoms for the remaining nine days of their quarantine.[43] And according to Dianne Urey, former interim Medical Director of Parkland Correctional Health Services, when the number of detainees under quarantine increased, Defendants stopped providing monitoring altogether.[44] Detainees with whom Dr. Venters spoke during his inspection also stated that symptom and temperature screenings had ceased.[45]

Finally, the CDC advises testing all close contacts of persons with COVID-19, re-testing all individuals in a quarantine cohort every 3-7 days, and testing those individuals at the end of the 14-day quarantine period before releasing them from quarantine.[46] As discussed in greater detail

[39] *Id.*
[40] *Id.*
[41] Ex. D (Nijhawan Dep. 1), at 120:8-13.
[42] *See CDC Interim Guidance.*
[43] *See* Ex. E, (Jones Dep.), at 58:19-25.
[44] *See* Ex. F, (Urey Dep.), at 38:16-39:23.
[45] *See* Ex. A (Inspection Report), at 16, 20.
[46] *CDC Interim Guidance.*

above, Defendants do not test *any* individuals under quarantine, even *once*, unless they exhibit symptoms of COVID-19.[47]

Defendants take little care to inform Jail staff about where these hazardous housing units are found and what precautions they warrant. Dr. Nijhawan reported "a fair amount of confusion" among correctional staff regarding "the difference between isolation, which is for people who have COVID . . . versus quarantine, which is people who are under monitoring because they've been exposed to somebody with known COVID," as well as regarding "the duration of quarantine, or which tank was quarantined, et cetera."[48] Dr. Venters similarly observed during his inspection "a lack of knowledge about which units house people with active COVID-19 by all security staff" in a particular area of the Jail.[49] As a result, staff come and go from units housing detainees with confirmed or suspected COVID-19 without appropriate PPE.[50] He reported that this situation "represents a true emergency" and "the most flagrant disregard for the health of staff [he had] observed in recent months conducting COVID-19 assessments."[51] At the time of his inspection, Dr. Venters had assessed the COVID-19 response in 19 different detention facilities.[52]

Defendants' Jail-wide quarantine policies and practices render housing units incubators of uncontrolled and undetected disease, and staff unwitting and uninhibited vectors of transmission.

D. Ineffective Contact Tracing

Defendants' contact tracing policy for detainees is de minimis, and for Jail security staff nonexistent. For detainees, contact tracing consists only of a "tank history": a record of the recent

[47] *See* Ex. E (Jones Dep.), at 130:15-17.
[48] Ex. D (Nijhawan Dep. 1), at 45:2-15.
[49] Ex. A (Inspection Report), at 20.
[50] *Id.* at 22.
[51] *Id.*
[52] *Id.* at 3-4.

housing units in which a detainee has resided.[53] But no effort is made to trace a COVID-19-positive detainee's movement and contacts outside of the detainee's living quarters—for example, in the course of performing job duties or receiving medical care.[54]

During his inspection, Dr. Venters was informed by Jail leadership that Parkland Correctional Health Services performs contact tracing for Jail security staff. But, asked if there was any contact tracing for Jail security staff, Patrick Jones answered "No, there's not."[55] Dr. Barry-Lewis Harris, Medical Director of Parkland Correctional Health Services, stated that he had "no idea" who conducts contact tracing for Jail staff, and was "not aware" of any taking place.[56]

Defendants' deficient contact tracing practices leave them unprepared to detect and contain COVID-19 outbreaks and reflect glaring disregard for the safety of the detainee population.

E. Inadequate Use of Personal Protective Equipment (PPE) and Hygiene

Dr. Venters noted with alarm that Defendants maintain no PPE carts or donning and doffing stations, nor educational signage about PPE use, outside the housing areas being used for quarantine or isolation.[57] The CDC advises correctional facilities to "ensure that PPE donning/doffing stations are set up directly outside spaces requiring PPE."[58] Those stations should include a dedicated trash can for used PPE disposal, a hand washing station or hand sanitizer, and a poster demonstrating correct PPE donning and doffing procedure.[59] "The Dallas County Jail displays ongoing disregard for basic CDC recommendations by failing to identify units that require full PPE or to take measures to ensure staff entering those units are trained to wear adequate PPE,"

[53] *See* Ex. E (Jones Dep.), at 80:6-10.
[54] *Id.* at 80:17-20.; *see also* Ex. F, (Urey Dep.), at 66:19-20.
[55] Ex. E (Jones Dep.), at 80:17-20.
[56] Ex. H, Transcript of Deposition of Dr. Barry-Lewis Harris (Harris Dep.), at 72:18-73:12.
[57] Ex. A (Inspection Report), at 14, 15, 20, 22.
[58] *See CDC Interim Guidance.*
[59] *Id.*

Dr. Venters found.[60] These conditions represent "the type of gross failure [he] encountered sporadically in March and April, but is extremely rare after 10 months of outbreak response."[61]

Dr. Venters also identified significant hygiene concerns during his inspection. For example, "[e]very person [he] spoke with reported interruption of laundry services during quarantine and medical isolation."[62] This "lack of basic laundry services . . . represents a punitive response to a serious public health concern, and is not only a breach of basic correctional standards, but is also causing significant hardship for Detainees and security concerns in the facility."[63] In December, the situation was so unbearable that it sparked a protest; women took off their soiled uniforms and waited naked or in undergarments for Jail staff to hear their pleas for clean clothes.[64]

The Texas Commission on Jail Standards also recently drew attention to Defendants' failures to maintain adequate hygiene practices. This year, the Jail failed the Commission's annual inspection for the first time in a decade.[65] The Commission's Jail Inspection Report states that "indigent inmates held over 48 hours were not receiving the required personal care items. It was also determined that complaints received by the commission concerning personal hygiene items for indigent inmates were founded."[66] The Commission also determined "that inmates housed in the West Tower on suicide watch were not afforded access to the dayroom for at least one hour each day and had not had the opportunity to shower anywhere from 2 to 15 days as a result."[67]

Although it is possible to point to areas of the Jail where PPE nonadherence and sanitation

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[60] *Id.* at 20.
[61] *Id.*
[62] *Id.* at 16
[63] *Id.*
[64] Tyler Hicks, *Women in Dallas County Jail Say They Endured Nearly Two Weeks Without Clean Clothes*, DALLAS OBSERVER (Jan. 4, 2021), https://www.dallasobserver.com/news/female-inmates-in-dallas-county-jail-say-they-were-denied-clean-clothes-and-care-11974827.
[65] *See Jail Inspection Report*, TEX. COMM'N ON JAIL STANDARDS, https://www.tcjs.state.tx.us/wp-content/uploads/2021/03/Dallas_NC_02-12-2021.pdf (last accessed April 5, 2021).
[66] *Id.*
[67] *Id.*

concerns are particularly acute, these breakdowns reflect pervasive policy failures whose effects radiate to every corner of the Dallas County Jail.

F. Poor Training and Education

Apart from posting signs, Defendants have taken no steps to inform detainees about ways to protect themselves from COVID-19 in the Jail. According to Patrick Jones, the jail has never conducted any live trainings about PPE or sanitation for detainees' benefit.[68] Nor has the Jail made use of the "inmate channel" to broadcast video guidance.[69] And when Jail staff announce that a housing unit is under quarantine—arguably the most critical moment of intervention—they make no effort to train detainees about safety measures such as social distancing and PPE use.[70]

Defendants' approach to training staff is similarly passive. Dianne Urey could not recall any COVID-19 trainings or education materials offered to correctional officers apart from generic CDC handouts.[71] Patrick Jones was not aware of any training for correctional staff on correct PPE use.[72] Not once did Defendants engage Dr. Nijhawan, their infectious disease consultant, to train correctional staff or to contribute to training materials.[73] After Defendants tested a sample of quarantined housing units in June 2020 and found soaring asymptomatic positive COVID-19 rates, Dr. Nijhawan determined that it was urgent to educate correctional staff about infection control measures and explicitly offered to help administer training.[74] Defendants declined.[75] They have purposefully shunned lifesaving information; the Jail is a more dangerous place as a result, and every detainee faces a substantial risk of serious harm.

[68] Ex. E (Jones Dep.), at 82:15-18.
[69] *Id.* at 82:19-24.
[70] *Id.* at 74:14-75:3.
[71] Ex. F (Urey Dep.), at 27:9-28:10.
[72] Ex. E (Jones Dep.), at 68:22-69:2.
[73] Ex. D (Nijhawan Dep. 1), at 114:11-25.
[74] *Id.* at 113:9-114:14.
[75] *Id.* at 11:14.

G. Disregard of Medical Vulnerabilities

Defendants' approach to managing detainees at increased risk from COVID-19—like their approach to quarantine, social distancing, testing, contact tracing, PPE, hygiene, training, and education—is marked by inaction and indifference. 83% of deaths from COVID-19 occur in patients with pre-existing co-morbidities.[76] At any given time, Defendants have the ability to generate an updated list of all medically vulnerable detainees, but they choose not to.[77] Dr. Venters reported that "the Dallas County Jail does not appear to have any plan in place to create special protections for [medically vulnerable detainees]. Protections would include consideration for release, cohorting in specialized housing areas, or increased clinical surveillance either through daily COVID-19 screenings or through increased frequency of chronic care encounters."[78] Patrick Jones confirmed that Defendants do not attempt to take medical vulnerability into account in making housing decisions, do not provide medically vulnerable detainees any different or additional forms of PPE or sanitation supplies, and do not offer medically vulnerable detainees regular COVID-19 screenings.[79] Dr. Harris could not think of "any special protections" provided to medically vulnerable detainees.[80]

Defendants could take simple steps to protect the individuals in the Jail most likely to become severely ill or die from COVID-19; instead, they refuse to so much as learn their names. Defendants' manufactured ignorance exposes these detainees, and everyone else in the Jail, to a substantial risk of contracting COVID-19 and suffering its most dire effects.

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[76] Robin Gelburd, *Contributor: Links Between COVID-19 Comorbidities, Mortality Detailed in FAIR Health Study*, AJMC (Nov. 11, 2020), https://www.ajmc.com/view/contributor-links-between-covid-19-comorbidities-mortality-detailed-in-fair-health-study.
[77] *See* Ex. F (Urey Dep.), at 78:10-13.
[78] Ex. A (Inspection Report), at 21.
[79] *See* Ex. E (Jones Dep.), at 87:9-88:13.
[80] *See* Ex. H (Harris Dep.), at 68:2-9.

III. The Named Plaintiffs

Plaintiffs' experiences in the Dallas County Jail evidence Defendants' deliberate indifference in the health and safety of every detainee in their care.

Pre-adjudication Plaintiffs and Putative Medically Vulnerable Subclass Representatives:

Tesmond McDonald is a 33-year-old man whose asthma and high blood pressure make him medically vulnerable.[81] He was booked into the Dallas County Jail on September 27, 2019 and has remained in the Jail throughout the COVID-19 pandemic.[82] Defendants moved Mr. McDonald to a cell in the West Tower after four people in his dormitory-style housing unit tested positive for COVID-19.[83] Defendants denied him clean clothes for a week after transferring him to the West Tower.[84] The walls of his single cell were so dirty that he was afraid to touch them.[85] Defendants allowed him just one shower per week."[86]

Mr. McDonald contracted COVID-19 inside the Jail, testing positive on April 3, 2020. His condition was very serious.[87] A year later, Mr. McDonald does not know the COVID-19 status of other detainees in his tank or of other people he has been in contact with.[88] He has not been tested again after his initial positive result.[89]

Conditions have not changed significantly since Mr. McDonald first entered the Jail.[90] He receives laundry inconsistently.[91] Dirty food trays are presented with the remains of the previous

[81] *See* Amended Complaint, ECF No. 39 (Am. Compl.) ¶ 15.
[82] *Id.*
[83] Am. Compl. Ex. 3.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See* Ex. I, Declaration of Henderson Hill on behalf of Tesmond McDonald (McDonald Dec.) ¶ 2.
[89] *Id.*
[90] *Id.* ¶ 3
[91] *Id.*

meal.[92] Mops offered for cleaning are smelly and merely smear filth around.[93] Mr. McDonald saw a professional cleaning crew only once, many months ago.[94] Hand sanitizer that was provided briefly has disappeared again.[95] Jail officials deny detainees access to recreation and Mr. McDonald is concerned about the impact of his weight gain on his health.[96] Mr. McDonald reports that Jail security staff do not react well to complaints and grievances, and if detainees makes too much noise about their poor living conditions, they risk violent retaliation.[97]

Petitioner Ideare Bailey is a 36-year-old man who was booked into the Dallas County Jail on April 6, 2020.[98] His Type 2 Diabetes makes him medically vulnerable.[99] Twice a day, Defendants required Mr. Bailey to stand in a crowded pill line with approximately fifteen others.[100] During meals, Mr. Bailey had no choice but to sit elbow-to-elbow at the table in the day room.[101] Mr. Bailey developed a fever, cough, and headaches, and tested positive for COVID-19.[102] Defendants transferred Mr. Bailey to the infirmary.[103] Defendants delayed Mr. Bailey's release from Dallas County Jail even after Mr. Bailey's wife paid his bond because the Jail refused to fit him with an electronic monitor while he was COVID-19-positive.[104] When Defendants ultimately released Mr. Bailey from the Jail's infirmary, they provided him with no new face mask and no instructions on how to keep his family safe from the virus.[105]

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at ¶ 4.
[97] *Id.* at ¶ 5.
[98] Am. Compl. Ex. 3. ¶ 24.
[99] *Id.*
[100] Ex. J, Deposition of Ideare Bailey (Bailey Dep.) at *59:6-13.*
[101] *Id.* at 60:2-14.
[102] *Id.* at 35:22-23; 37:7-8.
[103] *Id.* at 27:19-20.
[104] Am. Compl. ¶ 24.
[105] *See* Ex. K, Plaintiffs' Responses to Defendants' First Interrogatories (1st Interrogs.) at No. 7.

Petitioner Keith Baker is a 26-year-old man who was booked into the Dallas County Jail on March 7, 2020.[106] He has severe asthma.[107] Defendants never tested Mr. Baker for COVID-19 during his time at the Jail, despite housing him adjacent to several people who tested positive for COVID-19.[108] Conditions at the Jail made it impossible for Mr. Baker to stay six feet apart from other detainees.[109] Defendants did not provide Mr. Baker with a face mask until after the filing of this action. When officials eventually gave Mr. Baker a mask, he was forced to use the same one for over two weeks, at which point both straps broke.[110] Defendants did not provide him sufficient soap.[111] Defendants denied Mr. Baker the ability to shower for up to ten days when he was housed in the West Tower.[112] Defendants provided Mr. Baker with a roll of toilet paper once a week that he was expected to use for the toilet and blowing his nose, and he would regularly run out.[113]

Petitioner Oscar Sanchez is a 29-year-old man who was booked into the Dallas County Jail on March 10, 2020.[114] He has a history of severe chronic asthma and developed COVID-19 symptoms while at the Dallas County Jail.[115] On April 5, 2020, Mr. Sanchez told medical staff that he had chest pains and difficulty breathing, but the medical staff told him there was nothing that could be done.[116] The next day, Mr. Sanchez asked the nurse if she could check his temperature because he felt feverish, had a sore throat, cough, body chills, and a throbbing headache.[117] The

[106] Am. Compl. ¶ 18
[107] *Id.*
[108] 1st Interrogs. At No. 8.
[109] *Id.* at No. 11.
[110] *See* Ex. L, Plaintiffs' Responses to Defendants' First Requests for Admission (1st RFAs) at Nos. 14, 16.
[111] *Id.* at No. 23.
[112] *Id.* at No. 24.
[113] *Id.* at No. 26.
[114] Am. Compl. Ex. 1.
[115] *Id.*
[116] *Id.*
[117] *Id.*

nurse responded that fever and sore throat are not symptoms of COVID-19.[118] Mr. Sanchez was denied a test when he asked for one on April 7, 2020.[119]

Post-adjudication Plaintiffs and Putative Class Representatives:

Petitioner Oliva Washington is a 27-year-old woman who was booked into the Dallas County Jail on February 6, 2020.[120] Ms. Washington tested positive for COVID-19 in June 2020 and experienced chest and throat pain.[121] Before testing positive for COVID-19, Defendants never checked Ms. Washington's temperature and did not provide her with a new mask when hers broke.[122] Defendants denied her laundry services for the duration of her time in quarantine.[123]

Petitioner Jose Munoz is a 37-year-old man who was booked into the Dallas County Jail on October 4, 2019.[124] He was at the Jail awaiting transportation to a drug treatment facility in Wilmer, Texas, ordered as a condition of his probation. Because of the COVID-19 pandemic, however, the facility was not taking new patients.[125] Defendants denied Mr. Munoz regular access to soap and did not make efforts to facilitate social distancing.[126]

Post-adjudication Plaintiffs and Putative Medically Vulnerable Subclass Representatives:

Petitioner Paul Wright is a 49-year-old man with hepatitis C who was booked into the Dallas County Jail on February 21, 2020.[127] Defendants denied him the ability to protect himself from close contact with other detained people and guards who had been potentially exposed to COVID-19.[128] Wright noticed that guards were inconsistent in their mask-use and provided

[118] *Id.*
[119] *Id.*
[120] Am. Compl. ¶ 23.
[121] 1st Interrogs. At No. 1.
[122] *Id.* at No. 16
[123] *Id.* at No. 5.
[124] *Id.* ¶ 21.
[125] *Id.*
[126] Am. Compl. Ex. 9.
[127] Am. Compl. ¶ 19.
[128] *Id.*; 1st RFAs at No. 11.

inconsistent instructions to detained people on PPE practices.[129]

Petitioner Marcelo Perez is a 44-year-old man who was booked into Dallas County Jail on January 7, 2020.[130] Mr. Perez has hypertension and diabetes, making him medically vulnerable.[131] On March 22, 2020, Defendants moved Mr. Perez and two other detainees to a disfavored housing unit as punishment for inappropriate laughter.[132] Defendants did not take their temperatures or test them for the virus before moving them.[133] Mr. Perez developed a cough a week later. Mr. Perez could not afford the $10 required to see the nurse at the beginning of the pandemic, but noticed that even those who could afford it had to wait two to three weeks to see a nurse.[134] Mr. Perez observed only one out of approximately every six guards wearing a mask and noticed that they gathered in large groups and even shared from a single bag of chips.[135]

Petitioner Terry McNickles is a 57-year-old man who was booked into the Dallas County Jail on March 16, 2020.[136] Mr. McNickles is medically vulnerable because he had a kidney removed in 2019 due to cancer.[137] He also takes medication for high blood pressure.[138] Defendants' lack of social distancing protocols forced Mr. McNickles to stand in tight proximity with other detained people when waiting to receive his meal tray and waiting in line to receive medicine.[139]

Petitioner Roger Morrison is a 49-year-old man who was booked into the Dallas County Jail on March 9, 2020.[140] Mr. Morrison is medically vulnerable; he suffers from high blood

[129] 1st Interrogs. at No. 6.
[130] Am. Compl. Ex. 4.
[131] *Id.*
[132] Am. Compl. Ex. 4.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Am. Compl. ¶ 20.
[137] *Id.*
[138] *Id.* Ex. 8.
[139] Am. Compl. Ex. 8.
[140] Am. Compl. ¶ 17.

pressure, hepatitis C, and cirrhosis of the liver, among other issues.[141] He began to exhibit flu-like symptoms during his time at the Jail.[142] Defendants provided Mr. Morrison with only occasional access to hand soap.[143] His bunk was one foot away from another bunk on one side and three feet away from another bunk on the other side.[144]

ARGUMENT

I. The Proposed Classes Meet the Requirements for Class Certification Under Rule 23(a) and Rule 23(b)(2)

Plaintiffs' claims for injunctive relief under the Eighth and Fourteenth Amendments arise from Defendants' systemic failure to protect detainees from the substantial risk of serious harm posed by COVID-19. Plaintiffs' claims are ideally suited to proceed as a class action. Dozens of federal courts across the country have certified similar classes of detainees bringing conditions claims associated with the COVID-19 pandemic. *See, e.g.*, *Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384, at *8 (D. Or. Feb. 2, 2021) (collecting cases).

Rule 23 of the Federal Rules of Civil Procedure governs motions for class certification. Under Rule 23(a), a party seeking certification must demonstrate that: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are question of law or fact that are common to the class ("commonality"); (2) the claims of the representative parties are typical of the claims of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a). Once the party satisfies these four prerequisites, the party must meet one of the requirements set forth in Rule 23(b). Here, Rule 23(b)(2) supplies the relevant standard: Defendants have acted or refused to act

[141] *Id.*
[142] *Id.*
[143] Am. Compl. Ex. 5.
[144] *Id.*

on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole. *See* Fed. R. Civ. P. 23(b)(2).[145]

Plaintiffs bear the burden of proving that a proposed class meets all requirements of Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The trial court must conduct a "rigorous analysis" of the Rule 23(a) prerequisites before certifying a class. *Id.* at 350–51. That analysis may "overlap" with analysis of the merits of a plaintiff's claims, *id.* at 351, but "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). Merits questions may be considered only to the extent that they are relevant to certification. *Id.*

A. The Proposed Classes Meet the Rule 23(a)(1) Numerosity Requirement

Under Rule 23(a)(1), class certification is appropriate where a class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although the number of

[145] In the context of damages classes certified under Rule 23(b)(3), courts have held that Rule 23(a) carries an implicit fifth requirement of definiteness or "ascertainability." *See, e.g.*, *Conrad v. Gen. Motors Acceptance Corp.*, 283 F.R.D. 326, 328 (N.D. Tex. 2012). A class must be "adequately defined and clearly ascertainable." *De Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). "In other words, the class must meet a minimum standard of definiteness which will allow the trial court to determine membership in the proposed class[,]" although "'it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained.'" *Earnest v. GMC*, 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)). It is doubtful that such a requirement should apply with respect to a purely injunctive class under Rule 23(b)(2). *See Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("The nature of Rule 23(b)(2) actions, the Advisory Committee's note on (b)(2) actions, and the practice of many of other federal courts all lead us to conclude that ascertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief"); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief"); *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) (ascertainability is not required for a (b)(2) class action, as the composition of the class in such cases often is not readily ascertainable – e.g., where plaintiffs attempt to bring suit on behalf of a shifting prison population).; *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) ("notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited"); see also Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (illustrative examples of a Rule 23(b)(2) class "are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"). The Fifth Circuit has acknowledged, but not decided, this question. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004). In any event, the requirement is easily met here. The Defendants already have in their possession the identity of each and every person in the class. Also, by necessity, the Defendants will come to know the identity of each future person detained in the Jail.

members in a proposed class is not determinative of the numerosity inquiry, the Fifth Circuit has cited with approval Professor Newberg's treatise suggesting "that any class consisting of more than forty members 'should raise a presumption that joinder is impracticable.'" *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (quoting 1 Newberg on Class Actions § 3.05, at 3–25 (3d ed.1992)). The key question is "whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. July 1981). Those other factors may include the class's "geographical dispersion," the "ease with which class members may be identified," and the "the nature of the action." *Id.* In the jail context, where a detainee population is "constantly in flux," the fact that "the class includes unknown, unnamed future members also weighs in favor of certification." *See Jones v. Gusman*, 296 F.R.D. 416, 465 (E.D. La. 2013) (citing *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n. 11 (5th Cir. 2000)); *Newberg on Class Actions* § 25:4 (4th ed. 2002) ("Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause.").

The classes and subclasses proposed here more than meet the numerosity standards. The principal pre-adjudication class contains approximately 4,042 people, in addition to an unknown number of future members.[146] The principal post-adjudication class contains approximately 983 people, in addition to an unknown number of future members.[147] In total, the Dallas County Jail

[146] *Abbreviated Population Report for 03/01/21*, TEX. COMM'N ON JAIL STANDARDS, available at https://www.tcjs.state.tx.us/wp-content/uploads/2021/03/AbbreRptCurrent.pdf (last visited April 5, 2021)
[147] *Id.*

currently houses 5,704 detainees.[148] Even without accounting for unknown future members, the pre-adjudication and post-adjudication classes are sufficiently large to establish numerosity.

The medically vulnerable subclasses are likewise numerous. Incarcerated people have high rates of chronic illness.[149] Approximately 40 percent of people incarcerated at state and federal prisons and in jails report having a chronic health condition.[150] A study of individuals in the Texas prison system estimated the prevalence of asthma at 18.8 percent.[151] Defendants produced a list of 2,212 medically vulnerable detainees for purposes related to this litigation.

The large number of current class and subclass members, the fluidity of the population that makes up these groups, and the impossibility of ascertaining future members make joinder impracticable. The proposed classes and subclasses satisfy the numerosity requirement.

B. The Proposed Classes Meet the Rule 23(a)(2) Commonality Requirement

To meet the commonality requirement, plaintiffs must demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality test demands "merely a single common contention that enables the class action 'to generate common *answers* apt to drive the resolution of the litigation.'" *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014) (quoting *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012)) (emphasis in original). Although these "common answers" may relate to injurious effects experienced by class members, "they may also relate to the defendant's injurious conduct." *Id.*

[148] *Id.* Note that, because the Texas Commission on Jail Standards makes use of certain ambiguous categories, such as "Total Others," the pre-adjudication or post-adjudication status of a small portion of the population cannot be readily discerned from the Abbreviated Population Report. However, the pre-adjudication class and post-adjudication class together make up the total population of the Jail.
[149] *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Feb. 2015), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.
[150] *Id.*
[151] Amy J. Harzke et al., *Prevalence of chronic medical conditions among inmates in the Texas prison system*, 87 J. Urban Health 486 (2010).

Thus, the focus of the commonality inquiry may properly lie with the risk of harm a defendant has created, rather than with any harm class members have actually suffered.

Commonality is satisfied where all class members are exposed to systemic policies or practices that create a substantial risk of serious harm, even if the challenged policies or practices affect specific class members in different ways. *See, e.g.*, *Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017); *Parsons v. Ryan*, 754 F.3d 657, 681 (9th Cir. 2014) (collecting cases, finding commonality is met where a lawsuit challenges "systemic policies and practices that allegedly expose inmates to a substantial risk of harm," regardless of "individual factual differences among class members"). The common, shared risk is the relevant constitutional injury—not how that risk may manifest on an individual level. *See Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016) (finding commonality "because being subjected to a substantial risk of serious harm is an actionable constitutional injury, even when a prisoner's physical or mental condition has not yet been detrimentally impacted."). In *Yates v. Collier*, for example, the Fifth Circuit affirmed the certification of a class consisting of all individuals confined in an overheated prison—even though the heat affected them differently based on their underlying health—because the prison's "heat-mitigation measures . . . were ineffective to reduce the risk of serious harm to a constitutionally permissible level for any inmate, including the healthy inmates." 868 F.3d at 363.

Here too, even healthy detainees face a substantial risk of serious harm from Defendants' failure to adequately protect them from COVID-19. Thus, whether the conditions in the Jail expose detainees to an unconstitutional risk of harm is amenable to a common answer.

While even "a single common question of law or fact can suffice" to show commonality, *Simms v. Jones*, 296 F.R.D. 485, 497 (N.D. Tex. 2013) (citing *Wal-Mart*, 564 U.S. at 359), this

case presents many issues of both law and fact common to the classes and subclasses. Among the most important common questions are:

- What policies or practices have Defendants implemented in the Dallas County Jail in response to the COVID-19 crisis?
- What measures are feasible and appropriate to adequately reduce the serious health risks that COVID-19 poses to the people detained at the Dallas County Jail?
- Do Defendants' policies or practices expose people detained at the Dallas County Jail to a substantial risk of serious harm?
- Are Defendants aware of the risks the people detained at the Dallas County Jail face due to COVID-19?
- Have Defendants disregarded the substantial risk of serious harm to the safety and health of the people detained at the Dallas County Jail?
- Are Defendants liable under the Eighth and Fourteenth Amendments for their deliberate indifference to the conditions of confinement that expose the people detained at the Dallas County Jail to a risk of serious illness and death?

Answers to these common questions of fact and law are dispositive of Defendants' liability with respect to all current and future detainees who are subject to the Jail's challenged policies and practices. There exist factual and legal questions in this case whose resolution will advance the legal claims of all class members. Commonality is satisfied.

C. The Proposed Classes Meet the Rule 23(a)(3) Typicality Requirement

The typicality requirement ensures that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[T]he test for typicality is not demanding." *Mullen*, 186 F.3d at 625. "Typicality does not require a complete identity of

claims." *James v. Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001), *abrogated on other grounds by In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012). In analyzing typicality, "the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id.* (citing Moore's Federal Practice § 23.24[4] (3d ed. 2000)). Generally, once a party satisfies the commonality requirement, satisfying typicality "will follow as a matter of course." *M.D. v. Perry*, 294 F.R.D. 7, 29 (S.D. Tex. 2013).

Here, the named Plaintiffs' legal claims are the same as the legal claims of the members of the proposed classes and subclasses they represent. Defendants' policies and practices regarding COVID-19 affect all the proposed class and subclass members, including the named Plaintiffs. And accordingly, the named Plaintiffs and the class and subclass members they represent are all injured in the same way: Defendants are incarcerating them in conditions of confinement that put them at substantial risk of serious harm. The same evidence and legal theories that establish Defendants' liability with respect to the named Plaintiffs also establish Defendants' liability with respect to each class and subclass member. The named Plaintiffs' claims are typical of the claims of the classes and subclasses.

D. The Proposed Classes Meet the Rule 23(a)(4) Adequacy of Representation Requirement

The adequacy requirement concerns the representative parties' ability to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy analysis involves two distinct inquiries: (1) whether the named Plaintiffs have common interests with the other class members, and (2) whether the representatives will adequately prosecute the action through qualified counsel. *See Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005).

The first inquiry turns principally on whether there exist any "intraclass conflicts" between the class representatives and others in the class. *In re Heartland Payment Sys., Inc*. v. *Customer Data Sec. Breach Litg.*, 851 F. Supp. 2d 1040, 1056 (S.D. Tex. 2012). "Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625–26. Although courts evaluating adequacy should also consider class representatives' "willingness and ability . . . to take an active role in and control the litigation," the representatives "need not be legal scholars and are entitled to rely on [class] counsel." *Feder*, 429 F.3d at 130-132 n.4.

Here, the named Plaintiffs are adequate class representatives because their interests in the vindication of the legal claims they raise are wholly aligned with the interests of their fellow class and subclass members. The named Plaintiffs seek, through this lawsuit, the opportunity to live in safe and constitutional conditions. This relief will benefit all class and subclass members equally. The deposition testimony of Ideare Bailey and Keith Baker—to date the only named Plaintiffs whom Defendants have deposed—is illustrative of the "sufficient level of knowledge and understanding" that enables the named Plaintiffs to serve as active stewards of the litigation. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482 (5th Cir. 2001).

Plaintiffs also satisfy the requirement that they will adequately prosecute the action. They are represented in this case by highly qualified and experienced attorneys. Plaintiffs' counsel from Susman Godfrey LLP, the American Civil Liberties Union (ACLU), the ACLU of Texas Foundation, Weil Gotshal and Manges LLP, Civil Rights Corps, and Next Generation Action Network have extensive experience litigating complex class action cases. As discussed in greater detail, *infra* at 32, Plaintiffs' counsel are knowledgeable and practiced attorneys with a history of

zealous advocacy on behalf of their clients. Plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement.

E. Class Certification is Appropriate Under Rule 23(b)(2)

Rule 23(b)(2) authorizes a class action where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "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." *Wal-Mart*, 564 U.S. at 360. The Fifth Circuit has held that the Rule 23(b)(2) certification requires that "(1) class members must have been harmed in essentially the same way; (2) injunctive relief must predominate over monetary damage claims; and (3) the injunctive relief sought must be specific." *Yates*, 868 F.3d at 366 (internal quotations omitted) (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007)). "The precise terms of the injunction need not be decided at [the class certification] stage, only that the allegations are such that injunctive and declaratory relief are appropriate and that the class is sufficiently cohesive that an injunction can be crafted that meets the specificity requirements." *Morrow v. Washington*, 277 F.R.D. 172, 198 (E.D. Tex. 2011).

Civil rights cases present precisely the types of systemic legal and factual issues for which class certification under Rule 23(b)(2) was designed. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of cases fitting the Rule 23(b)(2) standards). Indeed, 23(b)(2)'s requirements are "almost automatically satisfied in actions primarily seeking injunctive relief." *Dunn v. Dunn*, 318 F.R.D. 652, 667 (M.D. Ala. 2016) (citing *Baby Neal ex rel. Kanter*, 43

F.3d 48, 58 (3d Cir. 1994). Thus, "Rule 23(b)(2) has been liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities." *Braggs*, 317 F.R.D. at 667 (citation omitted); *see also Bradley v. Harrelson*, 151 F.R.D. 422, 427 (M.D. Ala. 1993) (subsection (b)(2) "is particularly applicable to suits . . . involv[ing] conditions of confinement in a correctional institution.").

Here, Defendants' policies and practices apply generally to all people detained in the Dallas County Jail, and the injunctive and declaratory relief Plaintiffs seek would provide relief to all class and subclass members. In fact, the only remedy capable of redressing the injury of which Plaintiffs complain is one that enjoins Defendants' conduct as to every class and subclass member. *See Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 3491999, at *13 (S.D. Tex. June 27, 2020) (finding that, due to the nature of COVID-19 transmission, any injunction sufficient to address its spread would necessarily "occur on a unit-wide level, thus affecting all class members"). COVID-19 threatens the wellbeing of everyone in Defendants' custody, and no one is excepted from Defendants' deliberate indifference. These circumstances make a prototypical case for class treatment under Rule 23(b)(2).

II. Plaintiffs' Counsel Meet the Requirements of Rule 23(g) and Should Be Appointed Class Counsel

Fed. R. of Civ. P. 23(g) requires courts to appoint class counsel for any certified class. Fed. R. Civ. P. 23(g)(1). In appointing class counsel, courts must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources that counsel will commit to

representing the class." Fed. R. Civ. P. 23(g)(1)(A). Class counsel has a duty to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

The undersigned counsel fulfill the requirements of Rule 23(g). The Plaintiffs are represented by attorneys who have extensive experience litigating complex civil rights and class action lawsuits in federal courts. (*See* Ex. M, Declaration of Henderson Hill.) Plaintiffs' attorneys have a thorough understanding of the conditions in the Jail and the relevant constitutional law. Plaintiffs' attorneys have demonstrated their steadfast commitment to the case throughout its year-long lifespan. They have exhaustively investigated it, engaged in voluminous discovery, filed numerous briefs, and participated in argument. They have built strong relationships with the named Plaintiffs and many class and subclass members. They have retained highly qualified experts. Finally, they have the necessary financial and human resources to litigate this matter. *Id.* In sum, Plaintiffs' attorneys are experienced advocates with the zeal, skill, and means to prosecute this action. They qualify for appointment as class counsel under Rule 23(g).

CONCLUSION

Systemic conditions of confinement at the Dallas County Jail amidst the COVID-19 pandemic place all detainees at substantial risk of serious harm and call for systemic remedies. For all the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Amended Motion for Class Certification and Appointment of Class Counsel.

Dated: April 6, 2021
Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 6, 2021.

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