UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

OSCAR SANCHEZ, *et al.*,	)	
	)	
v.	)	Civil Action
	)	Case No. 3:20-cv-00832
SHERIFF MARIAN BROWN, *et al.*,	)	

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO AMENDED MOTION FOR CLASS CERTIFICATION

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Plaintiffs' Amended Motion for Class Certification would have the Court ignore reality. As of the date of this response, 136,644,618 Americans have been fully vaccinated against COVID-19.[1] 169,090,262 Americans have received at least one dose.[2] Schools have reopened.[3] Millions of American have returned to work.

The safe and effective, FDA and CDC approved COVID-19 vaccine is available to detainees in the Dallas County Jail for free, at Dallas County's expense, and has been for months. As of the most current data from the last week of May, 1,363 detainees have already been administered the vaccine while detained in the Dallas County Jail.[4] Outside of the Dallas County Jail, 1,171,653 people have been vaccinated in Dallas County as of June 3, 2021, and the number increases every day.[5] Four detainees had an active COVID-19 positive test confirmation as of June 3, 2021. These five active positive cases represent 0.07 percent of the jail's population of 5,430 as of that same date.[6]

The Court denied Plaintiffs' motion for preliminary injunctive relief almost fourteen months ago (Plaintiffs did not appeal). The Court also denied class certification once already, on March 26, 2021. *See* ECF No. 210. Since the Court denied Plaintiffs' original motion for class certification, Plaintiffs have not identified new class representatives, nor have they amended their complaint.

The Court should deny class certification again. Plaintiffs' second bite at the apple presents no information that would give the Court a basis to reconsider its prior decision. Instead, Plaintiffs continue to urge the Court to take a position it has prudently rejected—requesting

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[1] https://covid.cdc.gov/covid-data-tracker/#vaccinations
[2] *Id.*
[3] https://www.dallasnews.com/news/education/2021/05/13/schools-must-be-open-in-person-five-days-a-week-national-teachers-union-leader-says/
[4] *See* Declaration of Patrick Jones, App. at 2.
[5] https://tabexternal.dshs.texas.gov/t/THD/views/COVID-19VaccineinTexasDashboard/Summary?:origin=card_share_link&:embed=y&:isGuestRedirectFromVizportal=y
[6] https://www.dallascounty.org/departments/criminal-justice/jail-population.php

mass-release of Jail detainees and unjustified COVID-19 mitigation measures through setting up a "Mother, May I" system that will result in Plaintiffs or the Court "essentially taking over the jail." *See Sanchez v. Brown*, 2020 WL 2615931, at *17 (N.D. Tex. May 22, 2020).

I. BACKGROUND

A. Procedural History

Plaintiffs brought this action as a putative class action on April 9, 2020. ECF No. 1. They filed a motion asking the Court to certify the case as a class action on April 12, 2020. ECF No. 17. They filed an amended petition adding new class Plaintiffs on April 17, 2020, which remains their live pleading. ECF No. 39.

Plaintiffs' First Amended Petition sets forth the injury of which Plaintiffs complain: contracting and potentially dying from COVID-19. Plaintiffs allege they are at a "substantial risk" of this "serious harm" due to Defendants' actions. ECF No. 39, at ¶ 118. Plaintiffs seek permanent injunctive relief requiring "release via habeas or transfers to home confinement," and other injunctive relief including the imposition of conditions "consistent with CDC and public health guidance." *Id.*, at Request for Relief.

Plaintiffs had an opportunity to amend their petition as of right a second time by September 8, 2020 under the Scheduling Order entered by this Court. *See* ECF No. 121, Scheduling Order. Plaintiffs could also have moved to amend their complaint for good cause after the Court denied their first motion for class certification, adding sufficient Plaintiffs or allegations that were not woefully out of date. They chose not to do either.

Twelve individuals were proposed as class representatives in the First Amended Petition: Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, Jose Munoz, Kiara Yarborough, Olivia Washington, and

Ideare Bailey. There are now seven. Mr. McNickels, Mr. Morrison, Mr. Munoz, and Mr. White have been dismissed with prejudice on April 19, 2021 (ECF No. 242), and Plaintiffs filed a Notice of Death for Kiara Yarborough on January 6, 2021. ECF No. 197. Plaintiffs state the remaining seven proposed representatives are adequate under Rule 23 because they "seek, through this lawsuit, the opportunity to live in safe and constitutional conditions." *See* ECF No. 225 at p. 36. As of the date of this response, only one of the seven remaining class representatives—Ms. Washington—is detained in the Dallas County Jail (although she was also released to a TDCJ facility and only returned to the jail recently on a bench warrant while this suit was still pending). The other six representatives have been released and are not currently detained. *See* Declaration of Jimmy Patterson, App. at 5.

Most of Plaintiffs' Amended Motion is a recitation of "new" facts from depositions taking place in recent months. These "facts" are often out of context and misleading, and sometimes proven false by Plaintiffs' own evidence. As just one example of the latter, Plaintiffs assert that contact tracing "for Jail security staff" is "nonexistent," citing to the depositions of Parkland personnel. ECF No. 225 at p. 14. Plaintiffs conceal the fact that Sheriff Brown, whose entire deposition is attached as evidentiary support to Plaintiffs' motion, testified at length about contact tracing for Jail security staff. ECF No. 225-3, at 118:22-122:7. Plaintiffs' own evidence contradicts itself.

Another example: Sheriff Brown (who is not a doctor) had not reviewed the CDC guidance that "detainees and correctional staff should be vaccinated at the same time." ECF No. 225 at p. 7. Plaintiffs omit that correctional staff in the Dallas County Jail were administered COVID-19 vaccines along with other first responders as early as December. App. at 321-322. Dallas County has consistently and undisputedly made a priority of vaccinating the incarcerated

and the homeless and has been vaccinating Dallas County Jail detainees since before the first week of March. App. at 294. Plaintiffs' reference to cases from Oregon and New York City where local governments chose to do otherwise simply underlines Dallas County's superior approach. ECF No. 225 at p. 7.

Finally, Plaintiffs make much of the testing protocols in place at the Jail. Plaintiffs' position is that more COVID-19 testing would create more cases. ECF No. 225 at p. 8 (implying that the Jail is "teeming with asymptomatic infection" that is not captured by testing).[7] But the Dallas County Jail's own testing strategy has been stunningly effective in what actually matters—preventing the spread of COVID-19 among the detainees in its care. Automatic testing offered to persons on intake, housing in diagnostic tanks, and subsequent isolation of anyone who tests positive, combined with practical mitigation measures, have led to sustained active confirmed cases in the low single digits since early 2021. *See* Declaration of Patrick Jones, App. at 2-3 (discussing intake testing and diagnostic tanks for new arrestees); Declaration of Jimmy Patterson, App. at 183-277 (reflecting numbers of inmates with active positive test confirmations from the months of March, April, May, and June 2021 to date).

B. <u>The Named Plaintiffs</u>

Plaintiffs had an opportunity to amend their petition as a matter of course by the scheduling order's deadline of September 8, 2020, and again for good cause after the Court denied their original motion for class certification. They did not do so, and their failure to do so is fatal.

Of the Plaintiffs still party to the lawsuit, Mr. McDonald, Ms. Washington, and Mr. Bailey tested positive for COVID-19 while detained in the Dallas County Jail. Mr. Baker, Mr.

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[7] Plaintiffs are not the first to make this argument. *See* Chris Cillizza, *You won't believe what Donald Trump just said about coronavirus testing*, CNN Politics, (July 14, 2020), https://www.cnn.com/2020/07/14/politics/donald-trump-coronavirus-testing/index.html

Sanchez, Mr. Wright, and Mr. Perez each tested negative for COVID-19 during their detention. All have at one point or another been released from the Dallas County Jail through the normal operation of the criminal justice system.

Oscar Sanchez – released from Dallas County Jail, now in prison

Mr. Sanchez was detained in the Dallas County Jail from March 10, 2020, to December 3, 2020, on charges of Manufacture or Delivery a Controlled Substance in Penalty Group 1 (x2), Manufacture or Delivery of a Controlled Substance in Penalty Group 3 or 4, Unauthorized Use of a Motor Vehicle, Evading Arrest or Detention, Accident Involving Damage to a Vehicle, and Possession of Marijuana (while incarcerated, Mr. Sanchez was also charged with Possession of a Prohibited Substance/Item in a Correctional Facility). *See* Exhibit A to Declaration of Jimmy Patterson, App. at 8-36. He has not returned to the Jail since his release to a TDCJ facility. *Id.*

Mr. Sanchez was tested for COVID-19 around April 8, having asked for a COVID-19 test because he was familiar with the symptoms from watching the news. *See* Transcript of Sanchez Deposition, App. at 413. He received his negative test result a "day or two" later. *Id.* He was kept in quarantine, in a single cell, for "at least two weeks" after being tested. *Id.,* App. at 414. Mr. Sanchez made efforts to sleep head to toe and was given a mask which he wore at all times. *Id.,* App. at 415. He was provided with soap, a shower, and cleaning supplies. *Id.,* App. at 416-417. Mr. Sanchez made efforts to practice social distancing personally, like staying away from crowds and eating in his bunk area. *Id.,* App. at 420. As relief in this litigation, Mr. Sanchez would like to change how problems get "formally resolved" and would "change the social distancing." *Id.,* App. at 419. As of the date of his deposition on May 13, 2021, he had not yet been offered a vaccine by prison officials but stated he would accept it when offered. *Id.,* App. at 418.

<u>Ideare Bailey - released</u>

Mr. Bailey was released on April 20, three days after Plaintiffs filed their First Amended Petition. He was booked into the Dallas County Jail on from April 6, 2020 on a charge relating to theft of an ATM. *Sanchez*, 2020 WL 2615931, at * 6. His prior convictions include felony Aggravated Assault with a Deadly Weapon, felony Robbery, and felony Burglary of a Building. *Id.* at *6, n. 15. His wife testified for him at the preliminary injunction hearing, notwithstanding that he had been released, since he was too weak from COVID-19 to testify almost two weeks after having contracted it. *Id.* at *6. In denying Plaintiffs' preliminary injunction, the Court noted that Mr. Bailey's experience was evidence of the work Dallas County was doing in reducing the jail population, as "those inmates Dallas County would not object to releasing" (like Mr. Bailey) had already been let go. *Id.* at *11. The Court also cited Ms. Bailey's testimony as evidence of the availability of state court remedies to obtain release, since Ms. Bailey had "been able to meet with both the elected District Attorney and her husband's judge to secure her husband's release from jail." *Id.* at * 13.

Mr. Bailey provided more information about his brief time in the jail at his deposition in December 2020. While detained, Mr. Bailey was given a mask. Transcript of Bailey Deposition, App. at 425. He learned about the virus from watching the news on TV. *Id.*, App. at 430. Cleaning supplies were provided to him in his housing area, and he used them to clean the area he slept in as well as the telephones he used. *Id.*, App. at 424. Based on his two weeks in the jail at the very beginning of the pandemic, Mr. Bailey testified that he wants more masks, more information about the virus, hand sanitizer, and "any other measures they can take that they know about in the jail, to get [their] stuff cleaned in there." *Id.*, App. at 426-429.

Tesmond McDonald – vaccinated by Defendants and released

Mr. McDonald was detained in the Dallas County Jail from September 27, 2019, to May 20, 2021, for felony charges of Aggravated Robbery and Evading Arrest or Detention with a Vehicle (while incarcerated, Mr. McDonald was also charged with Manufacture or Delivery of a Controlled Substance in Penalty Group 1). Exhibit C to Declaration of Jimmy Patterson, App. at 55-63.

While detained, Mr. McDonald contracted and recovered from COVID-19. Defendants administered the Johnson and Johnson vaccine to Mr. McDonald while he was detained in the Dallas County Jail, about "two weeks" before his deposition on May 14, 2021. Transcript of Deposition of Tesmond McDonald, App. at 434. Mr. McDonald would like the judge to order "more cleaning supplies" than what is already provided, as well as hand sanitizer. *Id.*, App. at 435-436.

Marcelo Perez – released and vaccinated by Defendants in a different facility

Mr. Perez was detained in the Dallas County Jail from January 7, 2020, to January 7, 2021, on a probation violation (Mr. Perez was released during this period, but was re-arrested and booked back into the Jail in November following a subsequent probation violation for Possession of a Controlled Substance in Penalty Group 1). Exhibit D to Declaration of Jimmy Patterson, App. at 64-76. He is currently detained in the Judge John C. Creuzot Judicial Treatment Center in Wilmer, TX (the "JJCCJTC"), a Dallas County-operated inpatient treatment facility for substance abuse treatment and supportive services.[8] Transcript of Deposition of Marcelo Perez, App. at 441-442. Mr. Perez was recently vaccinated by Dallas County, which administers the JJCCJTC, while housed there. *Id.*, App. at 445-446.

[8] https://www.dallascounty.org/departments/cscd/programs.php

Having been booked back into the Jail near the end of 2020, Mr. Perez is the prototypical example of how the Jail's process works effectively. He achieved the precise relief Plaintiffs seek in this suit—transfer to home confinement in May 2020 pursuant to court order. *Id.*, App. at 441-442. He was booked back into the jail in November, where he went through the diagnostic tank process where he was housed for "about a week," "tested for COVID," and then moved into "regular population." *Id.*, App. at 443-444 He never tested positive for COVID-19, and has since been released again and has been vaccinated by Dallas County in his current rehabilitation facility. *Id.*, App. at 445-446. The relief he seeks from the Court is more masks to be provided and more social distancing in food and pill lines. *Id.*, App. at 446-448.

Keith Baker – released

Mr. Baker was detained in the Dallas County Jail from March 7, 2020, to April 30, 2020, on a charge of Aggravated Assault with a Deadly Weapon-Family Violence. Exhibit F to Declaration of Jimmy Patterson, App. at 91-96. Mr. Baker did not contract COVID-19 after being moved into an eight-man quarantine tank after being exposed to COVID-19 (nor did any of the other seven individuals quarantined with him). Transcript of Deposition of Keith Baker, App. at 452-453. He was released shortly after coming off quarantine. When asked what he wanted the Court to order in this case, Mr. Baker stated "I haven't really thought about that. Well, basically, I don't know. I haven't thought about that, really." *Id.*, App. at 454-455. And when pressed on what specifically he would want the Jail to do to help prevent COVID, he asked for hand sanitizer, more soap, more access to hot water, and more space. *Id.*, App. at 455.

Paul Wright – released

Mr. Wright was detained in the Dallas County Jail from February 21, 2020, to September 23, 2020, and again from October 11, 2020, to October 28, 2020, relating to a parole violation.

Exhibit G to Declaration of Jimmy Patterson, App. 99-103. He did not test positive for COVID-19 while in the Dallas County Jail.

Plaintiffs allege "Defendants denied [Mr. Wright] the ability to protect himself" from COVID-19. ECF No. 225 at p. 21. This is false by his own admission. Mr. Wright refused to practice basic COVID-19 mitigation measures while detained, testifying that "[i]f I got COVID, so be it, you know." Transcript of Deposition of Paul Wright, App. at 459. Even though Defendants provided him with a mask, he did not "want[] to walk around with that thing on my face constantly," and eventually "got to a point where I just didn't [wear a mask], you know." *Id.* Mr. Wright also testified that although Defendants posted "sheets" telling detainees to sleep head to toe, he did not do that himself because "it didn't seem like enough." *Id.*, App. at 460-461. When asked if he agreed that he was not doing everything he personally could to prevent himself from getting COVID, he agreed. *Id.*, App. at 462. And when asked if other detainees at least wore their masks, he testified that although the "concern of COVID was high" at the beginning of the pandemic, over time "a lot of people just kind of grew apathetic about it and just, you know, you know, okay, if I get COVID, well, then maybe I'll get sick and maybe they'll transfer me out of here, you know." *Id.*, App. at 458. Fortunately, Mr. Wright's apathy was not universally shared by the fellow detainees whose health he blatantly disregarded—although he himself did not wear his mask, he testified that "some people were diligent in that." *Id.*

Olivia Washington – released, booked in again on bench warrant, refuses vaccine

Ms. Washington is currently detained in the Dallas County Jail. Declaration of Jimmy Patterson, App. at 5. She was released in September of 2020 to a TDCJ facility, but was booked back into the Dallas County Jail on a probation bench warrant "a couple weeks" before her May

13, 2021 deposition. Transcript of Deposition of Olivia Washington, App. at 467. She tested positive for COVID-19 in June 2020 and has recovered.

Ms. Washington refuses to take the Johnson and Johnson vaccine offered at the Dallas County Jail due to her concern about the risk of blood clots which she learned about from watching the news. *Id.*, App. at 469. She has seen information posted around the jail regarding the vaccine, and stating that persons who get the vaccination will get a free honey bun. *Id.*, App. at 473. Although she does not want the vaccine herself, Ms. Washington commends Defendants for "y'all wanting us to have the vaccine, I appreciated that," and "commend[s] the initiative to want us to take the vaccine." *Id.*, App. at 474. She testified that since being booked back into the jail in April of this year, she has noticed an improvement in how seriously officers are taking COVID-19 compared to her detention over the summer and early fall of 2020. *Id.*, App. at 471.

II. Argument and Authorities

Plaintiffs devote most of their motion to misstating the testimony elicited to date and make only conclusory arguments regarding the necessary Rule 23 factors. For this reason, and others set forth below, they fail to carry their burden to show that a class should be certified.

A. Legal Standard

The Court has already denied class certification once in this case. ECF No. 210. To successfully show that a class should be certified on their second attempt, Plaintiffs must satisfy each of Rule 23(a)'s requirements and one of Rule 23(b)'s requirements. *Ward v. Hellerstedt*, 753 Fed.Appx. 236, 243 (5th Cir. 2018).

Plaintiffs have the burden of establishing that each of these requirements are met. *See Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (noting that "Rule 23 does not set forth a mere pleading standard" and that "[a]

party seeking class certification must affirmatively demonstrate his compliance with the Rule."). Plaintiffs must therefore "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" and to satisfy at least one of Rule 23(b)'s provisions "through evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks and citation omitted).

Additionally, the district court "must conduct a rigorous analysis of the Rule 23 prerequisites," including "look[ing] beyond the pleadings" if necessary. *Ward*, 753 Fed.Appx. at 244. To grant the motion, the Court "must detail with sufficient specificity how the plaintiff has met the requirements of Rule 23." *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (2004). Merits questions may be considered to the extent "that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

B. Plaintiffs fail to show that there are in fact sufficiently numerous parties.

Plaintiffs propose a class of everyone in the jail pre-adjudication, current or future (not past), and a second class of everyone in the jail post-adjudication, current or future (not past). Each class includes a sub-class only of those defined as "medically vulnerable." ECF No. 225, at pp. 7-9. As support for their definition of "medically vulnerable," Plaintiffs cite to the CDC's guidance on "People With Certain Medical Conditions." *Id.* at 8. Plaintiffs also assert that a person "aged 50 years or older" would fall into their class, although the CDC guidance speaks only generally to the fact that "older adults" are at higher risk from COVID-19[9] (Plaintiffs do not address whether a person who is medically vulnerable by this definition, but has been vaccinated, would actually be part of this class or not).

[9] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

Plaintiffs rely heavily on what they characterize as the "presumption" that joinder is impracticable here. *See* ECF No. 225 at p. 25 (citing 1 Newberg on Class Actions § 3.05, at 3-25 (ed ed. 1992). However, they make no effort to establish, "through evidentiary proof," that there are in fact, sufficiently numerous medically vulnerable persons before the Court to warrant certification. *Comcast Corp.*, 569 U.S. at 33. Plaintiffs instead cite to two sources that have nothing to do with the Dallas County Jail, discussing the prevalence of certain health conditions among prison inmates. ECF No. 225 at p. 26. Plaintiffs also refer to "a list of 2,212 medically vulnerable detainees" produced by Defendants for the preliminary injunction hearing. ECF No. 225 at p. 26. That fourteen-month old list, however, was generated to match Plaintiffs' initial criteria for "medically-vulnerable," which as the Court has already observed was "significantly broader" than the CDC's guidance—and it did not distinguish between pre- and post-adjudication detainees. *Sanchez*, 2020 WL 2615931, at *2.

Particularly at this very late stage in this litigation, where vaccinations are being administered to all jail detainees (including the medically vulnerable and upon intake) and the Jail is registering low single-digit confirmed COVID cases, Plaintiffs should be held to their burden on numerosity. But, simply put, Plaintiffs have provided no evidence to support any reasonable estimate of the number of potential class members for either of the proposed subclasses. Even if Plaintiffs had provided evidence showing a reasonable estimate, Plaintiffs still fail to provide any evidence showing why joining the potential class members would be impracticable. *See, e.g. Simms v. Jones*, 296 F.R.D. 485, 497 (N.D. Tex. 2013) (finding no numerosity because "[o]ther than pointing to the numbers alone, Plaintiffs have not presented any evidence relevant to the fundamental inquiry: is joinder impracticable?").[10] Plaintiffs' failure

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[10] *See also Moore v. Payson Petroleum Grayson, LLC*, No. 3:17-CV-1436-S-BH, 2018 WL 3845193, at *4 (N.D. Tex. Aug. 13, 2018) (no numerosity for proposed class of more than 150 investors where plaintiffs failed to provide

to even attempt to provide sufficient "evidentiary proof" of numerosity, particularly with regards to the medically vulnerable subclasses, is fatal. *Comcast Corp.*, 569 U.S. at 33.

C. Plaintiffs fail to show the class members' claims depend upon a common contention.

Commonality requires that a plaintiff show that "there are questions of law or fact common to the class." *Wal-Mart Stores, Inc. v Dukes*, 563 U.S. 338, 346 (2011) (citing Fed. R. Civ. P. 23(a)(2)). *Wal-Mart* reiterated that merely reciting "common questions" is insufficient: "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." *Id.* at 350 (citations omitted).

This case will not generate common answers. For example, one of the "common questions" Plaintiffs assert is "[w]hat 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?" ECF No. 225 at p. 28. And as relief, Plaintiffs seek a "permanent injunction and/or writ of habeas corpus"[11] requiring Defendants to release detainees via "transfers to home confinement" as well as Court-ordered specific mitigation efforts to be overseen by a qualified public health expert. *See* ECF No. 39, First Amended Petition, at p. 48-49; ECF No. 84-1, Second Amended Proposed Order, at p. 6. The Court has already discussed at length how the answer Plaintiffs propose—mass-release of all detainees or a top-down, micromanaging injunction—is an individualized, case- and fact-specific inquiry.

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evidence to support the estimated number of potential class members); *Mallory v. Lease Supervisors, LLC*, No. MO:16-CV-00248-DAE-DC, 2017 WL 1281555, at *3-4 (W.D. Tex. Jan. 13, 2017) (no numerosity where plaintiff failed "to demonstrate that joinder is in fact impracticable); *Tolbert v. RBC Capital Markets Corp.*, Civil Action No. H-11-0107, 2016 WL 3034497, at *4-5 (S.D. Tex. May 26, 2016) (no numerosity where plaintiffs failed to produce evidence to support an estimated number of potential class members).

[11] Defendants believe that the Court, in denying Plaintiffs' application for a writ of habeas corpus, precluded any possibility of release to be ordered by this Court as a remedy in this litigation. But because Plaintiffs request release via "a permanent injunction and/or writ of habeas corpus," Defendants will take them at their word.

When the Court dismissed Plaintiffs' petition for a class-wide writ of habeas corpus, the Court noted that the "mass-release" component of Plaintiffs' requested relief is highly individualized, involving questions about individual inmates' criminal history, safety of their victims, potential holds or "blue warrants" that might apply, and so on. *See Sanchez*, 2020 WL 2615931, at *17-18. Answering these questions would necessarily involve the Court placing itself in a monitoring role and directing Defendants to "make discretionary decisions under state law" about how to handle thousands of individual relief decisions which, by definition, would not involve common answers. *Id.*, at *18 (citing *Money v. Pritzker*, 453 F.Supp.3d 1103, 1129 (N.D. Ill. 2020)).

The *Money* court, which denied class certification along with a request for preliminary injunction in a similar case, focused on this "key" language of whether the answer to the allegedly common questions is "apt to drive the resolution of the litigation." *Money*, 453 F.Supp.3d at 1127. In finding that commonality was not met for a similar proposed class, *Money* cited the unique and divergent situation of the putative class members, and the inability of the "class device" to fashion the remedy that Plaintiffs sought: "[A]ny attempt to use the class device even to formulate standards is destined to fail, because those standards largely are governed by the various state statutes authorizing different forms of release, which then are subject to wide discretion in their application." 453 F.Supp.3d at 1128.[12]

Even if Plaintiffs had abandoned their claim for widespread release of class members, an inability to fashion cognizable, non-discretionary standards for specific COVID-19 mitigation efforts would persist. Plaintiffs have previously sought an order based on the CDC guidance

[12] *Money* involved petitioners housed in multiple facilities, unlike the Plaintiffs here who are housed in a single facility. But the focus of the *Money* court's analysis was not primarily on distinctions between facilities, but the analysis on which this Court has already relied regarding the lack of any commonality between members of a mass-release class and the impossibility of fashioning a common approach to a common request for injunctive relief to be applied pursuant to discretionary standards.

requiring Defendants to, for example, "[c]lean and sanitize common surfaces in housing areas, bathrooms, day rooms, recreational areas, the booking area, kitchen, and any dining areas no fewer than [seven] times between 7 a.m. to 10 p.m. with bleach-based cleaning agents or comparable anti-viral cleaning agents, including table tops, telephones, door handles, kiosks, and restroom fixtures." *See* ECF No. 84-1, Second Amended Proposed Order, at p. 6. The Court declined to enter this order and questioned "the appropriateness of using its power to turn what are now CDC recommendations into orders that must be complied with under threat of contempt." *Sanchez*, 2020 WL 2615931, at *18; *see also id. at* *16 (noting that the Fifth Circuit rejected an injunction "which provided a cleaning schedule for the prison down to the half-hour interval" as not compliant with the PLRA). But Plaintiffs continue to insist they are entitled to relief for Defendants' alleged failure to do anything less than fully comply with the CDC's non-mandatory, non-binding, facility-specific guidance. *See* ECF No. 225 at p. 7 ("Defendants' testing protocols are drastically out of step with CDC guidance); p. 11 ("The CDC strongly cautions against the approach to 'quarantine' Defendants employ"); p. 12 ("The CDC also specifies certain measures that facilities should undertake…"); p. 14 ("The CDC also advises correctional facilities to 'ensure that PPE donning/doffing stations are set up directly outside spaces requiring PPE.'").

As Plaintiffs and their expert know, the CDC guidance expressly contemplates that it can and will "be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions."[13] The relief Plaintiffs seek, in the form of rigid adherence to the CDC guidelines, would be impossible by those guidelines' own terms, since the guidelines are (like the state law standards that would govern release) "subject to wide discretion

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[13] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html

in their application." *Money*, 2020 WL 1820660, at *15. A "follow the guidelines" injunction therefore runs headlong into the same uniformity problem as a class seeking relief in the form of mass-release. *Money*, 2020 WL 1820660, at *15. For example, even an order as facially simple as requiring a COVID-19 test and vaccination to be offered to every inmate in the jail would necessarily involve a ripple effect of unintended consequences impacting jail resources, staffing, population, and housing. *See* ECF No. 225-4, Transcript of Deposition of Dr. Ank Nijhawan, at pp. 111-112 (explaining the impact on housing and quarantine durations arising from non-clinical testing).

The Court has already declined to turn the CDC's recommendations into binding orders. *Sanchez*, 2020 WL 2615931, at *18 ("Using this Court's power to order the jail to follow what are now just recommendations from the CDC would turn this district court into a lawmaking body."). And the Court has noted that elected officials, like Dallas County's Criminal Court at Law Judges, Dallas County's Criminal District Judges, Dallas County's District Attorney, and Commissioners Court, are best equipped to conduct individualized analyses and account for the specific characteristics of the Dallas County Jail and its population. *See id*, 2020 WL 2615931, at *18 (citing *Money v*, 453 F.Supp.3d at 1129, stating that "the judiciary is ill-equipped to make decisions about how to best manage any inmate population."). Other courts have held likewise in denying motions for preliminary injunctive relief and class certification. *Money*, 453 F.Supp.3d at 1128; *Wragg v. Ortiz*, 462 F.Supp.3d 476, 515 (D.N.J. 2020) (no commonality where the issues in common would be incapable of class-wide resolution "in one stroke" short of ordering Defendants to "throw open the gates of Fort Dix"); *C.G.B. v. Wolf*, 464 F.Supp.3d 174, 201-02 (D.C.D.C. 2020) (declining to certify a class for failure of commonality where "there are multiple subsidiary issues involved in resolving [Plaintiffs' contention that Defendants' policies

placed them at elevated risk of contracting COVID-19] that render the case incapable of classwide resolution").

The Court is on firm ground denying class certification again, as have various courts around the country in similar cases. Whether in the form of mass-release or uniform application of flexible guidelines that allow for tailoring to a specific facility, answering Plaintiffs' alleged common questions involves a multitude of factors, individualized consideration of unique detainees, consideration of space, staffing, and resources, and other issues that preclude a class-wide approach. Significantly, this will not be an obstacle to any individual defendant seeking to be released and no longer subject to conditions of confinement in the Dallas County Jail. The named Plaintiffs themselves are evidence of this—each has been released through the normal operation of the criminal justice system throughout the course of the lawsuit.

D. <u>Plaintiffs cannot show typicality</u>

Typicality 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). Typicality and adequacy of representation, while distinct factors, are "closely related" in that "demanding typicality on the part of the representative helps ensure his adequacy as a representative." *Ward*, 753 Fed.Appx. at 246 (citation omitted). The claims of proposed class members should therefore "arise from a similar course of conduct" and involve "similar[] legal and remedial theories behind their claims." *Id.* at 247 (citations omitted) (emphasis added).

The Fifth Circuit has not had occasion to consider the propriety of a class certification in a COVID-19 case on appeal.[14] However, another court to have considered class certification in

[14] To Defendants' knowledge, the only other COVID-19 case involving correctional facilities brought in the Fifth Circuit was the *Valentine* case. In *Valentine*, the district court early on certified a "General Class" and a "High-Risk Subclass," later certifying an additional "Mobility-Impaired Subclass" but declining to certify a "Disability Subclass" for lack of commonality. *See Valentine v. Collier*, 490 F.Supp.3d 1121, 1160 (S.D. Tex. 2020). In

COVID-19 cases examined two specific characteristics of each proposed class representative when considering typicality: medical conditions and criminal history. *See Thakker v. Doll*, 336 F.R.D. 408, 417 (M.D. Penn. 2020) (citing *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 327-28 (3d Cir. 2020) (vacating two orders for preliminary injunctive relief upon "considering all the responsive measures specifically implemented to detect and to prevent spread of the virus, the challenges of facility administration during an unprecedented situation, and the purposes served by detention.").

The Plaintiffs here suffer from distinct medical concerns. Of the Plaintiffs who have not been dismissed, Mr. McDonald has asthma and high blood pressure, and contracted and recovered from COVID-19 while inside the Jail. ECF No. 225 at p. 18. Mr. Bailey has type 2 diabetes. *Id.* at p. 19. Mr. Sanchez has "severe chronic asthma," and Mr. Baker has "severe asthma." *Id.* at p. 20. Mr. Wright has hepatitis C. *Id.* at p. 21. Mr. Perez has hypertension and diabetes. *Id.* at p. 22. Others, like Ms. Washington, have no underlying medical conditions at all.

The Plaintiffs' criminal history is similarly diverse. Some have extensive criminal histories, like Mr. Sanchez. *See* App. at 13-17. Others, like Mr. Baker, may be less extensive. App. at 94. As the Court has already noted, the individual criminal history of each Defendant would be a significant factor in determining how to implement the remedy Plaintiffs seek I this matter. *Sanchez*, 2020 WL 2615931, at *10. An individual like the since-dismissed Mr. Morrison, who was being held on a felony with nine prior criminal convictions, is not comparable to a person with no criminal history when considering a class-wide remedy that could include release.

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vacating the district court's permanent injunction and reversing and rendering judgment, the Fifth Circuit acknowledged these classes had been certified but was silent on the appropriateness of class certification. *See Valentine v. Collier*, 993 F.3d 270, 277 (5th Cir. 2021).

Plaintiffs claim this factor is met because "the named Plaintiffs and the class and subclass members they represent are all injured in the same way"—specifically, by being exposed to a "substantial risk of serious harm" of contracting or dying from COVID. ECF No. 225 at p. 29. Perhaps this contention would have been sufficient to justify certifying a class when Plaintiffs first brought this suit. But over a year later, after the Court has already once denied class certification, Plaintiffs' own experiences have disproved their complaints. *See Valentine v. Collier*, 993 F.3d 270, 282 (5th Cir. 2021) ("When there is a possible constitutional violation that is likely to continue over time as in a prison injunction case, we consider the evidence from the time suit is filed to the judgment.").

In this case, some of the named Plaintiffs, like Mr. McDonald, contracted COVID and recovered. Others, like Mr. Sanchez, never contracted COVID at all despite being detained for months. Still others, like Mr. Wright, deliberately refused to practice the most basic of COVID-19 mitigation measures because he did not take COVID-19 seriously (notably, Mr. Wright *still* did not contract COVID-19). Even though Defendants provided him with a mask, he did not "want[] to walk around with that thing on my face constantly," and eventually "got to a point where I just didn't [wear a mask], you know. If I got COVID, so be it, you know." App. at 459. Mr. Wright also testified that although Defendants posted "sheets" telling detainees to sleep head to toe, he did not do that himself because "it didn't seem like enough." App. at 460. When asked if he agreed that he was not doing everything he could to prevent himself from getting COVID, Mr. Wright agreed. App. at 462. Plaintiffs' hyperbole about conditions of confinement in the Dallas County Jail is contradicted by the testimony of their own class representatives.

Mr. Wright is not the only Plaintiff whose testimony contradicts their pleadings. Despite being exposed to an allegedly substantial risk of serious harm just by virtue of being in the Jail as

Plaintiffs claim, Ms. Washington has elected not to take the vaccine that Defendants have made freely available to her and all other inmates. App. at 469. She commended Defendants for their efforts in promoting vaccination for jail inmates, but testified that she is more concerned about the risk of a blood clot from the Johnson and Johnson vaccine and "what the vaccination can cause later on in life" than she is of COVID. *Id.;* App. at 474. Any injury Ms. Washington would incur from conditions of confinement could not, at this point, arise from Defendants' deliberate indifference—Defendants have undisputedly made the vaccine available to her and she has exercised her freedom of choice not to take it.

Plaintiffs also fail to show typicality due to the different lengths and terms of their individual detentions. For example, Plaintiffs' live pleading complains of the lack of any vaccine for COVID-19—true when the named Plaintiffs were detained and filed their complaint, but obviously untrue for members of the proposed class now. Plaintiffs have only one proposed representative who is part of the "current" jail population, subject to the same policies and practices as the current jail population. And she has declined the COVID-19 vaccination offered to her by Defendants because she is more worried about the vaccine than COVID-19.

Plaintiffs had an opportunity to identify and present new class representatives to the Court after the Court denied their first motion for class certification. They did not. Their class representatives from the First Amended Complaint present unique and different claims even from just each other, let alone the remainder of the entire "current or future" jail population. Plaintiffs' motion for class certification fails for typicality.

E. Plaintiffs' proposed class representatives are inadequate

Adequacy encompasses three inquiries: (1) "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of

absentees"; (2) the risk of "conflicts of interest between the named plaintiffs and the class they seek to represent"; and (3) "the zeal and competence of the representative[s'] counsel."; *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005). Plaintiffs fail to carry their burden to show adequacy for many of the same reasons they fail to show typicality.

1. Adequacy of the Named Plaintiffs

The adequacy inquiry "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *Feder*, 429 F.3d at 130. Defendants undisputedly agree that COVID-19 presents a risk to detainees' health. The detainees proposed as class representatives here take a different position—one that places them in conflict with the class members they propose to represent.

For example, Mr. Wright and Ms. Washington have glaring conflicts of interest with the classes they seek to represent. Mr. Wright got bored and stopped wearing a mask because he was not worried about contracting COVID-19. Ms. Washington (who has already contracted and recovered from COVID-19) is too concerned about the future risks of vaccination to take the vaccine that Defendants offer to her freely. Neither is an adequate representative for a class of detainees complaining of a substantial risk of serious harm from COVID-19.

The remaining representatives are similarly inadequate, for other reasons. First, each remaining class representative has, at one point or another, already achieved the release they seek in their First Amended Petition through the normal operation of the criminal justice system. App. at 4. Only Ms. Washington is currently detained in the Dallas County Jail, and only after being booked back in on a bench warrant after her release in September 2020. App. at 5. Because each class representative has already obtained the relief they seek in this case, there is no case or controversy between these representatives and Defendants—they either are, or were, released as

they seek in their live pleading, and (if currently released) are not subject to the conditions of which they complain.

Second, the proposed class representatives are unable to "protect the interests" of absentees. *Feder*, 429 F.3d at 130. When asked what he wanted the Court to do in this lawsuit, Mr. Baker (who by the time of his December 29, 2020 deposition had been released from the Dallas County Jail for over seven months) said "I haven't really thought about that. Well, basically, I don't know. I haven't thought about that really." App. at 454-455. When pressed, like the other detainees, he asked for "more"—more soap, more hot water, more space. App. at 455. "More" of what is already being provided is not evidence of "wanton disregard" that Mr. Baker and the other class representatives must prove in order to obtain relief. *Valentine*, 993 F.3d at 281. And Mr. Wright and Ms. Washington, who have admittedly not availed themselves of the protective COVID-19 mitigation measures which Defendants have made available, are not willing to "protect the interests" of a class that seeks those measures and more via court order.

Third, what Mr. Baker and the other class representatives say they want from this Court—more soap, hand sanitizer, and the like—is radically different from what Plaintiffs' counsel want. Plaintiffs' counsel has stated in a sworn declaration that the "minimum" they will accept is institution of a testing and vaccination program of Plaintiffs' counsel's design.[15] *See* ECF No. 235-1, at Exhibit F. Not a single proposed class representative has ever stated that the relief Plaintiffs' counsel and their experts seek is relief that the named Plaintiffs actually want. The named representatives instead seek quality-of-life adjustments and "more" than what Defendants are already providing them in terms of masks, soap, cleaning supplies and the like. Some, like Mr. Wright, do not even want that. The mismatch between what the named Plaintiffs

[15] Mr. Perez, for example, was asked if he had seen the "COVID-19 Framework" which Plaintiffs' counsel state is the minimum Plaintiffs will accept. Mr. Perez testified he had never seen that document. App. at 445.

want and what their counsel seeks is itself an indication of inadequacy and conflict. *See, e.g. Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (the decision "as to the course to be followed . . . cannot rest entirely with either the named plaintiffs or with class counsel.").

Finally, for many of the same reasons these representatives are not typical of the classes they seek to represent, they are not adequate. *See Thakker*, 336 F.R.D. at 420. A plaintiff who may not pose a risk of flight (assuming one of the current representatives meets that criteria) would not be an adequate representative for a putative class member who does, in considering Plaintiffs' request for relief. Likewise, a plaintiff who was detained only very briefly at the beginning of the pandemic and subject to different conditions would have different claims (and therefore not be an adequate representative) of a person detained currently who would be subject to different conditions.

2. <u>Adequacy of the Proposed Class Counsel</u>

In support of their obligation to show that class counsel will adequately represent the class, Plaintiffs offer the declaration of Henderson Hill, who attaches to his declaration the resumes of four of Plaintiffs' counsel—Mr. Hill, Mr. Barnett, Ms. Woods, and Mr. Safwat. *See* ECF 225-13. Defendants do not dispute that these attorneys have demonstrated commitment to this case, zealously advocated for their clients, and individually meet the Rule 23(g) factors.

However, by Defendants' best estimate, no less than twenty-one counsel have formally entered appearances for Plaintiffs in this matter. Others have appeared at depositions without entering appearances on the docket. Some of these lawyers belong to organizations that are not referenced in Mr. Hill's declaration. For example, Plaintiffs are also represented by Alison Grinter and Kim T. Cole from the Next Generation Action Network. Mr. Hill's declaration does

not speak to the qualifications of these attorneys or of their organization. Ms. Grinter's recent involvement in this litigation, from Defendants' perspective, has consisted entirely of sharing out-of-context and misleading portions of testimony from Defendants' depositions with outside groups through email listservs and social media posts. App. at 477-479.

If the Court finds Plaintiffs have carried their burden to show a class should be certified on their second attempt, Defendants request that the Court appoint as class counsel only the lawyers and organizations whose qualifications and commitment to ethically and zealously prosecuting this litigation are attested to in Mr. Hill's declaration: specifically, Mr. Hill and his colleagues at the American Civil Liberties Foundation; Mr. Barnett and his colleagues at Susman Godfrey; and Mr. Safwat and his colleagues at Weil, Gotshal & Manges LLP.

F. <u>Rule 23(b)(2) is not met</u>

Rule 23(b)(2) certification is warranted if three requirements are all satisfied: "(1) class members must have been harmed in the same way; (2) injunctive relief must predominate over monetary damage claims; and (3) the injunctive relief sought must be specific." *Ward*, 753 Fed.Appx. at 249. The first factor might be satisfied in a case where class members were subject to the same allegedly wrongful policy. *Id.* The second factor is not in controversy here. And the third factor requires Plaintiffs to describe in "reasonable detail" the acts the seek to enjoin, such that "a court could define or enforce meaningful injunctive relief." *Id.*

First, all class members have not been harmed in the same way. Individual issues are pervasive in this case, such as each class representative's specific approach to mitigating (or not mitigating) their personal risk of contracting COVID-19. *See also Thakker*, 336 F.R.D. at 421 (finding certification inappropriate under Rule 23(b)(2) due to individual considerations like each petitioner's medical issues and criminal history). The passage of time has also shown that

each of these representatives either never contracted COVID-19, or contracted and recovered from it.

Second, as discussed above, Plaintiffs are incapable of identifying a means by which the court could define or enforce meaningful injunctive relief.[16] The Fifth Circuit has squarely foreclosed a "micromanaging" order that would involve addressing Plaintiffs' requests for "more" of things that are already being provided. *Valentine*, 993 F.3d at 277. And an order that is simply "follow the CDC guidelines" cannot, by those guidelines' own terms, be complied with—the guidelines are not rules. *Sanchez*, 2020 WL 2615931, at *18. They contemplate significant discretion and adaptation in their implementation, and mandate only "consideration" of many of their recommendations. The Court has already rejected Plaintiffs' request for preliminary injunctive relief to require Plaintiffs to follow those guidelines in a specific way. The governing law remains unchanged, and in light of that governing law, Plaintiffs' request for relief (also unchanged from over a year ago) reinforces the inappropriateness of the class sought to be certified here.

III. CONCLUSION

Plaintiffs would be entitled to the class-wide permanent mass-release and jail management injunctive relief they seek only if they carried their burden not only to establish Defendants' deliberate indifference, but also that a proper class is before the Court. Their Amended Motion fails to carry this burden. Defendants respectfully request the Court again deny Plaintiffs' request for class certification.

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[16] Plaintiffs may contend in reply that they have abandoned their request for relief in the form of mass-release. But Plaintiffs are bound to the injunction they have pled and repeatedly declined to amend. "If [Plaintiffs] wanted the court to consider injunctions other than the specific one they pleaded in their complaint for purposes of Rule 23(b)(2) certification, then, at a minimum, they should have so argued in their motion and not left the issue to their reply." *Juarez v. Asher*, C20-0700JLR-MLP, 2020 WL 5746875, at *5 (W.D. Wash. Sept. 25, 2020) (denying class certification brought by one of the same counsel as represents the Plaintiffs in this matter where "only in their reply memorandum in support of their class certification do Petitioners first retreat from their insistence that immediate release is the only means to protect them from COVID-19 and to safeguard their Fifth Amendment rights.").

Dated: June 4, 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 on June 4, 2021.

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