

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

OSCAR SANCHEZ, MARCUS WHITE,  
TESMOND McDONALD, MARCELO  
PEREZ, ROGER MORRISON, KEITH  
BAKER, PAUL WRIGHT, TERRY  
McNICKELS, and JOSE MUNOZ; *on their  
own and on behalf of a class of similarly  
situated persons;*

*Petitioners/Plaintiffs,*

v.

DALLAS COUNTY SHERIFF MARIAN  
BROWN, *in her official capacity*; DALLAS  
COUNTY, TEXAS;

*Respondents/Defendants.*

**Civil Action No. 3:20-cv-00832**

**PLAINTIFFS' REPLY MEMORANDUM OF LAW**  
**IN SUPPORT OF CLASS CERTIFICATION**

## **Introduction**

The proposed plaintiff class is composed of people detained at the large, crowded Dallas County Jail during a deadly global pandemic. Many of those people are especially vulnerable to COVID-19 because of age and underlying medical conditions. Plaintiffs' health and safety are at the mercy of Dallas County and Sheriff Brown, who are legally obligated to safeguard all people in their custody at the Jail from COVID-19 and its grave consequences. Plaintiffs' deliberate indifference claims arise from the Defendants' continued refusal to take the steps needed to protect the health of the proposed class of detained people. While the broader community has made significant strides in fighting the pandemic, Defendants' response within the Jail remains woefully insufficient. Class-wide relief is desperately needed to secure their rights.

Scores of cases have recognized analogous classes, and the Court should do the same here. In arguing otherwise, Dallas County and Sheriff Brown erroneously conflate the standards for permanent injunctive relief and class certification, mischaracterize Plaintiffs' request for relief, and misguidedly claim that because this Court did not issue a preliminary injunction, it cannot certify the class and subclasses. ECF 269 at 24-25. Defendants raise no unique arguments with respect to any of the subclasses, so that if the class is certified, the subclasses should be certified.

### **The Proposed Class Is Sufficiently Numerous**

Surprisingly given the well-established case law, Defendants contest the numerosity of the putative classes (pre- and post-adjudication detainees) and subclasses (medically vulnerable people within each class), in this Jail in which Defendants detain a transient population of some 5,500 people at a time. They cite the advent of COVID-19 vaccinations and a purportedly low COVID-19 case rate (even though Defendants do not conduct any widespread or asymptomatic testing in the Jail), seemingly to contest the numbers of people who remain vulnerable to the virus.

ECF 269 at 11-12. Defendants make the false assertion that “vaccinations are being administered to all jail detainees,” ECF 269 at 12, when in fact Defendants have provided information that only approximately 5% of detainees have yet received vaccines at admission through intake screening, and the total population detained in the Jail still has a dangerously low vaccination rate.<sup>1</sup> Defendants’ citation of COVID-19 case numbers and the current vaccination rate is inapposite to the numerosity inquiry: The classes and subclasses are not limited to those who have tested positive for the virus or are unvaccinated.

As detailed in Plaintiffs’ Amended Motion for Class Certification, ECF 225 at 24-26, the proposed class and subclasses would each contain hundreds or thousands of people. Far from providing no proof of these figures, Plaintiffs’ motion puts forward, among other things, population data from the Texas Commission on Jail Standards, a published journal study on the prevalence of chronic medical conditions among Texas prison inmates (most of whom were previously held in jails), and Defendants’ own list produced in this litigation of 2,212 medically vulnerable detainees.<sup>2</sup> ECF 225 at 25-26. “In such cases, the impracticability of bringing all class members before one court is obvious and the Rule 23(a)(1) requirement is easily met.” 1 Newberg on Class Actions § 3:12 (5th ed.). The other characteristics of the class—including a transient population and unknown future members—also make joinder “certainly impracticable.” *Phillips v. Joint Legislative Comm. on Performance & Expenditure Rev.*, 637 F.2d 1014, 1022 (5th Cir.

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<sup>1</sup> Defendants’ claim that 1,363 people in the Jail have been vaccinated, ECF 269 at 5, is entirely unsubstantiated. Even if all of those people remain incarcerated at the Jail, resulting in a rate of about 25%, the rate is far too low to protect the rest.

<sup>2</sup> Defendants’ statement that this list was provided in connection with the preliminary injunction motion is of no moment. The list indicates the medical vulnerability to COVID-19 of the jail population at issue in this case; moreover, the availability of vaccines (administered to a quite small percentage of detainees) and the currently low case rate does not change detainees’ age and medical conditions which make so many especially at risk during another outbreak of the virus or a variant, or of cases introduced to the jail by staff, new detainees, or visitors.

1981) (citation omitted); *see also* *Murillo v. Musegades*, 809 F. Supp. 487, 502 (W.D. Tex. 1992) (finding 23(a)(1) satisfied because “the putative class contains prospective members,” whose “identities are unknown.”).

### **The Proposed Class Meets the Rule 23(a)(2) Commonality Requirement**

Defendants apply policies uniformly to all members of the proposed class, and Plaintiffs’ claims turn on common questions about whether these policies expose them to a common risk of harm. *See In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014). Commonality is satisfied when 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. *Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017).

This case involves several questions that are common across the class, *see* ECF 225 at 28, but one is central in importance: whether the conditions in the Jail expose the people detained there to an unconstitutional risk of harm. The Ninth Circuit held in a factually analogous case that the exact same factual question satisfies the commonality requirement:

The alleged due process violations exposed *all* [of the facility’s] detainees to an unnecessary risk of harm, not only those who are uniquely vulnerable to COVID-19 . . . . The preliminary injunction afforded class-wide relief that would have remedied the constitutional violations as to all detainees, even though it would have entailed the release or transfer of only some of the detainees.

*Roman v. Wolf*, 977 F.3d 935, 944 (9th Cir. 2020) (emphasis in original). The Fifth Circuit has taken a consistent approach. In *Valentine v. Collier*, the district court certified a class and subclasses, which remain certified today, because it found a common question “whether withholding COVID-19 protections in [the prison] constitutes a condition of confinement that poses a substantial risk of serious harm to the health of all inmates.” No. 4:20-CV-1115, 2020 WL 3491999, at \*11 (S.D. Tex. June 27, 2020) (certifying general class and high-risk subclass); *see*

also 490 F.Supp.3d 1121, 1160 (S.D. Tex. 2020) (certifying mobility-impaired subclass).<sup>3</sup> The Fifth Circuit addressed these common questions, providing a class-wide resolution of the *Valentine* plaintiffs' claims. See *Valentine v. Collier*, 993 F.3d 270, 286-87 (5<sup>th</sup> Cir. 2021) (prison-wide housing policies); *id.* at 287-89 (prison-wide handwashing stations and disinfectant method). Many other courts addressing COVID in detention facilities have found the commonality prong satisfied based on this same common question.<sup>4</sup> This Court should do the same here.

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<sup>3</sup> The *Valentine* court declined to certify a subclass encompassing all people whose disabilities, or their treatment, put them at additional COVID risk. *Valentine*, 490 F.Supp.3d at 1156-57. It reasoned that this subclass grouped together people with a “wide range of disabilities” that “cannot be remedied by a single set of reasonable accommodations” under the Americans with Disabilities Act (“ADA”). *Id.* at 1160. This reasoning does not apply here, where Plaintiffs have not raised ADA claims and seek no reasonable accommodations, let alone individually tailored ones.

<sup>4</sup> *E.g.*, *Baxley v. Jividen*, No. CV 3:18-1436, 2020 WL 7489759, at \*4-6 (S.D.W. Va. Dec. 21, 2020) (common questions related to “the legality of Defendant[’s] system-wide policies and practices”); *Criswell v. Boudreaux*, No. 1:20-cv-01048-DAD-SAB, 2020 WL 5235675, at \*12 (E.D. Cal. Sept. 2, 2020) (common question because all proposed class members “are subject to the same practices and lack of policies related to social distancing, testing, and legal visits”); *Gayle v. Meade*, No. 20-21553-CIVCOOKE/GOODMAN, 2020 WL 3041326, at \*16 (S.D. Fla. June 6, 2020) (common question “whether ICE’s conduct at the three detention centers amount to deliberate indifference and expose detainees to substantial risk of harm ...”); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 39 (N.D. Cal. Apr. 29, 2020) (common question “whether the people detained at [two] facilities are being exposed to an unreasonable risk of infection in violation of the Due Process Clause”); *Savino v. Souza*, 453 F. Supp. 3d 441, 448-452 (D. Mass. Apr. 8, 2020) (common question “whether the government must modify the conditions of confinement—or, failing that, release a critical mass of Detainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative ‘substantial risk of serious harm’”); *Frahait v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 736-41 (C.D. Cal. 2020) (common question “whether Defendants’ system-wide response—or the lack of one—to COVID-19 violates Plaintiffs’ rights”). Defendants’ authorities do not apply. Both *Money v. Pritzker* and *Wragg v. Ortiz* addressed requests for “highly individualized, inmate-by-inmate form[s] of relief,” *Money*, 453 F. Supp. 3d 1103, 1128 (N.D. Ill. 2020): namely, “an intensive, multi-step, individualized inquiry as to whether each prisoner met criteria for conditional release.” *Wragg*, 462 F. Supp. 3d 476, 515 (D.N.J. 2020). Plaintiffs here seek only Jail-wide relief. *C.G.B. v. Wolf* involved a claim specific to transgender people where Court held plaintiffs “struggle[d] to crystallize precisely what discrete actions or policies of ICE constitute its purported failure to protect transgender detainees.” 464 F. Supp. 3d 174, 202 (D.D.C. 2020).

Defendants do not contest the existence of this common question—or any of the common questions Plaintiffs identified in their opening brief. Instead, Defendants argue that despite these common questions, none is sufficient to show commonality because none of the common answers they generate is “‘apt to drive the resolution of the litigation.’” ECF 269 at 13 (quoting *Wal-Mart v. Dukes*, 563 U.S. 338, 350 (2011)). They are wrong: many common answers would resolve the case.

Common questions about vaccination policies, for example, bear straightforwardly and directly on the relief to which the Plaintiffs are entitled. Vaccination is likely to be a significant issue at trial, as Defendants acknowledge, arguing on this motion that they are already providing adequate protections. ECF 269 at 1. Plaintiffs will argue that vaccinations—now widely available to those outside of the Jail—are a core component of the care that the Defendants must provide to those in their custody but that they have not done so adequately. *See Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384, at \*17 (D. Or. Feb. 2, 2021) (certifying a class and entering a preliminary injunction requiring a state prison system to offer a COVID vaccine to all people incarcerated in the system).

Defendants attest they apply a uniform policy to offer a vaccine to all those booked into the jail from the street, Ex. N, Jones Deposition at 33:7-34:3, but this policy is woefully inadequate as shown by its paltry results – the data Defendants produced show that there were 2799 “Intake Offerings” and only 143 acceptances—an acceptance rate of just 5%. Ex. O, “Vaccination Summary”<sup>5</sup>. Defendants’ medical intake paperwork includes a single question asking whether the

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<sup>5</sup> In contrast, for example, California state prisons have policies that are more robust—making repeat offers of vaccinations and providing materials written specifically for a carceral setting—and enjoy an acceptance rate of 66.5%. Chin, et al., *Covid-19 Vaccine Acceptance in California State Prisons*, \_\_ New Eng. J. Med. \_\_ (May 12, 2021) (attached as Ex. R).

person being booked would like to receive a COVID vaccine. Ex. P, Intake Needs Assessment, at 3-4. This offer is never accompanied by educational materials, *Id.* at 122:17-20, and when a detainee requests information, the materials provided are poor. For example, the Jail’s description states that the vaccine “*may* prevent COVID-19” Ex. Q, Janssen Vaccine Fact Sheet (emphasis added). These structural defects in Defendants’ vaccination policies present common issues, and the answers are apt to drive resolution of the case.

### **Plaintiffs’ Claims are Typical of the Entire Class**

The class representatives’ claims fall well within the bounds of typicality. All class members have been injured by the same class-wide policies, and all make claims contesting those policies under the 8th or 14th Amendments. So long as claims “arise from a similar course of conduct and share a legal theory, factual differences will not defeat typicality.” *James v. Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (citing Moore’s Federal Practice § 23.24[4] (3d ed. 2000)), *abrogated on other grounds by In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012); *see also Dockery v. Fischer*, 253 F. Supp. 3d 832, 855 (S.D. Miss. 2015) (finding typicality where the claims “ar[o]se from the . . . prison officials’ alleged failure to take corrective action, . . . the existence of inhumane conditions of confinement”).

Defendants’ invocation of a Pennsylvania case, *Thakker v. Doll*, 336 F.R.D. 408, 417 (M.D. Pa. 2020), is unavailing. The proposed class in *Thakker* encompassed people detained in separate immigration detention facilities that had different policies for social distancing, masking, testing, screening, quarantine, and cleaning. 336 F.R.D. at 416-20. Here, by contrast, all proposed class members reside or resided in a single facility subject to the same overall policies, and Defendants do not contend that any relevant COVID-related policy differs among class members. Defendants attempt to argue that differences among the named plaintiffs’ vaccination status, other

health factors, and criminal histories defeat typicality. ECF 269 at 18-20. But these differences are immaterial because the claims in this case address the substantial risk of harm, shared by all. See *Baxley*, 2020 WL 7489759 at \*6 (“[T]he fact that the individual class members may have different medical conditions, or may experience different ‘specific’ injuries, does not defeat typicality. . . . [T]he claimed injury is the exposure to policies and practices that place both the named and unnamed class members at a substantial risk of harm.”).

### **The Class Representatives Will Adequately Represent the Class**

Defendants’ adequacy argument is, as they concede, based on many of the same theories as their typicality argument, ECF 269 at 20-23. Plaintiffs have common interests with the class, sharing the same legal claims and being subject to the same harmful and deficient policies and practices as the other class members. There is no conflict between the interests of the class representatives and other class members as to the relief sought – namely, to secure an appropriate court order safeguarding their health and lives during a deadly pandemic. And every class member, like the Plaintiffs, has been, is or will be locked inside a large jail complex in close quarters with many other people.

Defendants’ allegation that certain Class Representatives do not care about risks to the health of all detainees and thus have a conflict, ECF 269 at 21, is simply offensive. Defendants posit a confusing argument that two of the proposed class representatives “take a different position” on the risks of COVID-19 and thus have a conflict. ECF 269 at 21. They claim falsely that Mr. Wright stopped wearing a mask because he is not worried about himself contracting COVID and that Ms. Washington – whom Defendants acknowledge already became ill from COVID while locked up at the Jail – might be concerned about possible side effects from the vaccine. *Id.* Neither of these Plaintiffs’ concerns pose any conflict that arises to the level of having



an “insufficient stake in the outcome or interests antagonistic to the unnamed members.” *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986). Instead, both Mr. Wright and Ms. Washington remain zealous advocates for the class and testified at length about the grossly inadequate conditions in the Jail that they seek to improve. The fact that these Plaintiffs may have responded differently to certain situations, such as mask wearing or timing of the vaccine, is an expression of understandable worries voiced during a deposition by human beings who are jailed in crowded conditions with limited access to educational materials on the disease and vaccination, where it is impossible to follow public health guidelines and maintain their health and safety at all times amid a global pandemic. It is entirely consistent to both express concerns in this way on an individual basis and also be fully committed, as they both are,<sup>6</sup> to holding Defendants to their constitutional responsibility to keep all detainees at the Jail as safe and healthy as possible. To that end, the Class Representatives have been actively involved in the prosecution of the case, conferring with counsel, making themselves available for depositions despite the pandemic and other difficulties, and still suffering the same risks to their lives and health as the entire class while in the Jail and afterward.

Defendants contend that all but one of the remaining named Plaintiffs would be inadequate representatives because they have been released since the filing of the amended Complaint. ECF

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<sup>6</sup> Defendants misrepresent Mr. Wright’s testimony. Like most people, Mr. Wright acknowledged not following every COVID protocol for every second in the Jail, but his exasperation was primarily based on a loss of hope and feelings of futility based on the Jail’s inadequate policies and keeping detainees in such close quarters. When asked why he did not always wear his single-ply mask at every moment, Mr. Wright testified, “we could not practice social distancing in there. We couldn’t avoid each other.” ECF 269-1 at 461 (lines 20-21). Mr. Wright also described a hopelessness that intensified the longer he spent in the Jail: “As time went on and just kind of watching how they were dealing with it, it made me angry . . . if I get COVID and die, maybe, you know, something can be done about this.” ECF 269-1 at 462 (lines 16-20).

269 at 21-23. But the nature of detention in a jail is short-term and may recur, thus detainees' claims are "inherently transitory" and an exception to mootness. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *see also City of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980).

### **Plaintiffs' Counsel Will All Adequately Represent the Class**

Defendants contend that Alison Grinter and Kim Cole of Next Generation Action Network (NGAN) would be inadequate as class counsel<sup>7</sup>, based on not being named in the Declaration of Henderson Hill.<sup>8</sup> But neither Federal Rule 23 nor the Local Rules requires a Declaration that specifically discusses the qualifications of every member of a team of proposed class counsel, and each attorney here is clearly qualified to represent the class. Ms. Cole is an experienced civil rights attorney in Dallas and General Counsel for NGAN, a nonprofit human and civil rights organization based in Dallas. Ms. Grinter is an experienced Dallas criminal defense and civil rights attorney, board certified in criminal law, with more than 15 years of practice experience. The Civil Rights Corps attorneys, also co-counsel for Plaintiffs and the proposed class, similarly fulfill the requirements of Rule 23(g) as experienced civil rights and class action litigators who have identified the claims, know the law, have devoted substantial resources to representing the class, and will represent the proposed class fairly and adequately<sup>9</sup>. *See also* ECF 225 at 33.

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<sup>7</sup> Defendants do not oppose the adequacy or appointment, if the Court grants class certification, of counsel at Susman Godfrey, the ACLU Foundation, and Weil, Gotshal & Manges.

<sup>8</sup> Defendants also complain that Ms. Grinter shared portions of public deposition testimony with others who care about the well-being of people detained at the Jail. ECF 269 at 24. This has no bearing whatsoever on her adequacy as class counsel.

<sup>9</sup> The number of Plaintiffs' attorneys who have appeared on the case (or observed depositions), ECF 269 at 23, is irrelevant. Instead, the adequacy of counsel is underscored by the fact that four civil rights organizations and well-respected private law firms have consistently devoted highly qualified staff and resources for more than a year to pursuing these claims.

### **Class Certification is Appropriate Under Rule 23(b)(2)**

Defendants have consistently “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.” Fed. R. Civ. P. 23(b)(2). As Defendants acknowledge, Rule 23(b)(2) is satisfied where class members were “subject to the same allegedly wrongful policy.” *Ward v. Hellerstedt*, 753 Fed. Appx. 236 (5<sup>th</sup> Cir. 2018); *see* ECF 269 at 24. Individual class members’ own “approach to mitigating (or not mitigating) their personal risk of contracting COVID-19,” emphasized by Defendants, *see* ECF 269 at 24,<sup>10</sup> are irrelevant. Instead, the relevant inquiry is whether the Defendants’ conduct has harmed class members “in essentially the same way,” *Yates*, 868 F.3d at 366 (citation omitted) and whether the injunctive remedy warranted is “indivisible,” meaning that the Defendants’ “conduct is such that it can be enjoined ... only as to all of the class member or as to none of them.” *Wal-Mart*, 564 U.S. at 360. As Plaintiffs explain, ECF 225 at 31-32, Defendants’ policies and practices regarding the COVID-19 pandemic in the Jail apply uniformly to every person detained there. Likewise, the injunctive remedy, which need not be determined “precise[ly]” at class certification, *Morrow v. Washington*, 277 F.R.D. 172, 198 (E.D.Tex. 2011),<sup>11</sup> would enjoin Defendants’ conduct as to all class and subclass members. *See Valentine*, 2020 WL 3491999, at \*13 (in COVID-19 detention context, any injunction would necessarily “affect[] all class members”).

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<sup>10</sup> Defendants misrepresent language in *Thakker*, *supra*, 336 F.R.D. 408, to be a finding regarding Rule 23(b)(2), but that portion of the opinion concerns typicality instead. The case is easily distinguishable in any event; it is an immigration detention case in which putative class members were held in varying facilities with varying COVID-19-related rules, and decided under the Third Circuit’s different and specific standard.

<sup>11</sup> Defendants contend that Plaintiffs “are incapable” of identifying enforceable and meaningful injunctive relief, while in the same paragraph acknowledging that Plaintiffs have requested several types of relief that they contend would not violate the Fifth Circuit’s *Valentine* parameters. ECF 269 at 25.

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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 June 16, 2021.

/s/ Barry Barnett  
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