

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 20-cv-977

THOMAS CARRANZA;
JESUS MARTINEZ;
RICHARD BARNUM;
THOMAS LEW;
MICHAEL WARD;
COLBY PROPEs; and
CHAD HUNTER

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Thomas Carranza, Jesus Martinez, Richard Barnum, Thomas Lew, Michael Ward, Colby Propes, and Chad Hunter (collectively, the "Plaintiffs"), through counsel, respectively move this Court for entry of an order granting immediate class certification for the purpose of effectuating the temporary injunctive relief requested in Plaintiffs' Motion for Preliminary Injunction.¹ In support of this motion, they state as follows:

CERTIFICATE OF CONFERRAL PURSUANT TO D.C.COLO.LCivR. 7.1 A

¹ When considering a motion for TRO or preliminary injunction, a court may certify a class on a provisional basis for purposes of providing immediate relief, and revisit class certification at later stages of the proceeding if necessary. *See* F.R.C.P. 23(c)(1)(A) (court to rule on class certification "at early practicable time"); F.R.C.P. 23(c)(1)(C) (court retains authority to "alter[] or amend[]" class certification order pretrial); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1040 (9th Cir. 2012) (court may "certify a provisional class for purposes of [a] preliminary injunction"); *DG ex rel. Stricklin v. Devaugh*, 594 F.3d 1188, 1201 (10th Cir. 2010) (court may certify class on a preliminary basis pre-discovery).

The undersigned counsel conferred with counsel for Defendant Reams regarding this Motion. Defendant Reams opposes this Motion.

I. INTRODUCTION

Plaintiffs have moved for interim relief to prevent catastrophic harm to medically vulnerable individuals incarcerated in the Weld County Jail as a result of the Weld County Jail's failure to take adequate preventative measures to address the COVID-19 pandemic. Pursuant to F.R.C.P. 23(b)(2), this motion seeks certification of a class of incarcerated persons who are in desperate need of that interim relief before they suffer substantial – and potentially fatal – harm.

As described in detail in Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Expedited Hearing, people over the age of fifty-five, as well as those with certain underlying conditions, face far greater chances of serious illness or death from COVID-19. The overwhelming consensus of public health authorities and experts is that incarcerated individuals are particularly vulnerable to COVID-19 because of the close spaces in which individuals are confined, the shared use of facilities with lack of adequate hygiene, and facilities such as the Weld County Jail lacking the medical care infrastructure necessary to address the spread of COVID-19 or to treat high-risk individuals in its custody. As a result, experts have warned that “widespread community transmission of COVID-19 within a correctional institution is likely to result in a disproportionately high COVID-19 mortality rate.”² While several counties in Colorado have undertaken measures to reduce their jail populations in an effort to slow the spread of COVID-19, Weld County has thus far refused to take meaningful action to address the risks posed by COVID-

² “COVID-19 in Correctional Settings: Unique Challenges and Proposed Responses” (March 23, 2020), <https://amend.us/wp-content/uploads/2020/03/COVID-in-Corrections-Challenges-and-Solutions1.pdf>; see also “Correctional Facilities In The Shadow Of COVID-19: Unique Challenges And Proposed Solutions,” Health Affairs Blog, March 26, 2020, available at <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> (last visited Apr. 3, 2020).

19 and has failed to implement adequate, system-wide measures to protect incarcerated individuals. This puts the Plaintiffs and the class they seek to represent in mortal jeopardy, and also endangers the larger community in light of the daily movement of both prisoners and staff in and out of the Weld County Jail.

Plaintiffs seek certification of the following class of individuals:

All current and future persons held at the Weld County Jail who are at high risk of complications from COVID-19 because:

- (a) they are age 55 or older; or
- (b) they have the following chronic health conditions: cancer; autoimmune disease (including lupus, rheumatoid arthritis, psoriasis, Sjogren's, Crohn's); chronic lung disease (including asthma, chronic obstructive pulmonary disease, bronchiectasis, idiopathic pulmonary fibrosis or other chronic conditions associated with impaired lung function); history of cardiovascular disease; chronic arthritis; chronic liver or kidney disease; diabetes; hypertension; heart failure; HIV; on chronic steroids or other immunosuppressant medications for chronic conditions;
- (c) they have history of smoking or other substance abuse disorders; or
- (d) they are pregnant.

This class easily satisfies the requirements of Rule 23. Indeed, the record evidence, along with Weld County Jail's own policies and practices, demonstrate common COVID-19 policy and planning failures that impact hundreds of members of the proposed class in exactly the same way – all are at risk of serious illness or death due to Weld County Jail's lack of preventative measures. *See* Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Expedited Hearing at p.12-25. To address these common failures, the Court need not make any determination regarding the individual circumstances of any class member; rather, it must determine whether the Weld County Jail's actions (or inactions) are of sufficient severity to warrant interim relief. Class certification is therefore the most appropriate vehicle for the Court to remediate these systemic

defects that subject Plaintiffs and the class to a substantial – and intolerable – risk of serious harm if left unaddressed.

II. THE PROPOSED CLASS REPRESENTATIVES

The seven proposed class representatives all fall within the high risk populations who are particularly vulnerable to COVID-19 and particularly likely to suffer severe illness, life-altering complications, or death as a result of exposure to the virus.

The proposed class representatives are (1) Thomas Carranza, who is 55 years old, suffers from asthma, high blood pressure and an undiagnosed intestinal condition, and has previously been hospitalized for acute asthmatic bronchitis; (2) Jesus Martinez, who is 33 years old, overweight, and suffers from multiple chronic medical conditions including diabetes, asthma, shortness of breath, and high blood pressure; (3) Richard Barnum, who is 54 years old, previously suffered kidney failure, and currently has Hepatitis C, stage two kidney disease, and high blood pressure; (4) Thomas Lew, is who is 60 years old and suffers from vitiligo, an immune deficiency disease; (5) Michael Ward, who is 31 years old and suffers from high blood pressure and arthritis; (6) Colby Propes, who is 44 years old and has a history of smoking as well as diagnosed substance abuse disorders.; and (7) Chad Hunter, who is 46 years old, has a history of smoking and a substance abuse disorder, and is hypoglycemic.

All seven of the proposed class representatives are currently imprisoned at the Weld County Jail and their experiences with the Weld County Jail's policy response to COVID-19 are remarkably similar. None has been provided masks, none has been afforded the benefit of sanitary supplies needed to prevent spread of the disease; none has been given access to food prepared in a hygienic manner consistent with preventing the spread of COVID-19; none has been provided use of lavatory facilities and other common spaces that are maintained with the needed hygiene to

prevent the spread of COVID-19; and none has been afforded the required six-foot radius to ensure proper physical distancing. Thus, similar to members of the proposed class, each of the proposed Class Representatives remains at high risk of serious illness, complications, and death due to the lack of adequate system-wide preventative measures at the Weld County Jail.

III. THE PROPOSED CLASS COMPLIES WITH RULE 23

Class certification is proper under Federal Rule of Civil Procedure 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

In addition, the proposed class must be certifiable under one of the three sub-provisions of Rule 23(b). Here, Plaintiffs seek certification under Rule 23(b)(2), because the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2)

A. The proposed class complies with Rule 23(a)

- i. The proposed class is so numerous that joinder would be impracticable.

A class must be sufficiently numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). The impracticability of the joinder requirement does not require that joinder is impossible, but only that the plaintiffs “will suffer a strong litigational hardship or inconvenience if joinder is required.” *Cook v. Rockwell Intern. Corp.*, 151 F.R.D. 378, 384 (D. Colo. 1993). “In determining whether a proposed class meets the numerosity requirement, ‘the exact number of potential members need not be shown, ‘and a court ‘may make common sense assumptions to

support a finding that joinder would be impracticable.” *In re Thornburgh Mortgage, Inc. Sec. Litig.*, 812 F. Supp. 2d 1178, 1221 (D. N. M. 2012) (internal quotation omitted).

The proposed class easily satisfies the numerosity requirement. Weld County Jail has a current population of approximately 575 inmates and is the sixth most populous jail in Colorado. Although the exact number of people at the Weld County Jail who fall within the high risk populations groups is unknown, that number can be reasonably approximated. Based on recent jail rosters, approximately 44 of Weld County Jail’s current inmates are over age 55 and older. Additionally, approximately 35 percent of Colorado’s prison population have moderate to severe medical issues.³ Even assuming significant overlap between these two population groups, upwards of 150 individuals fall within the proposed Class. Given these numbers, joinder is impracticable and numerosity is satisfied. *See Helmer v. Goodyear Tire & Rubber Co.*, 2014 WL 1133299 at *3 (D. Colo. Mar. 21, 2014). (finding numerosity was met where class consisted of 132 members).

Joinder is also impracticable here due to the population at issue and the extraordinary current circumstances. The members of the class include both individuals currently incarcerated and those individuals who may be incarcerated in the coming weeks and months as COVID-19 continues to spread. Because the class includes individuals who will suffer the same injury in the future, traditional joinder is particularly difficult. *See Newberg on Class Actions* § 25:4 (4th ed. 2016) (“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.”); *Jack v. Am. Linen Supply Co.*, 498 F.2d

³ *Departmental Reports and Statistics*, Colorado Department of Corrections, www.colorado.gov/pacific/cdoc/departamental-reports-and-statistics; *Statistical Report FY 2018*, Colorado Department of Corrections, drive.google.com/file/d/1Sbiu6bl7NVZ7BL-ij3u_TyrmbUOAoWKS/view.

122, 124 (5th Cir. 1974) (finding numerosity requirement satisfied when class included “unknown, unnamed future” class members rendering joinder “certainly impracticable”). Moreover, incarcerated individuals at Weld County Jail are, by definition, held in custody with limited access to information at the best of times. Under the extreme and unique circumstances of COVID-19, these individuals are also currently unable to meet with anyone outside the facility except for attorneys in very narrow situations and are limited in their ability to bring individual lawsuits due to court closures in Weld County and throughout Colorado more generally.

- ii. The proposed class representatives present issues of fact and law in common with the class.

To satisfy commonality, the “[p]laintiff must allege a ‘common contention of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “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.* (internal quotation omitted). For the purposes of commonality, “even a single common question will do.” *Id.* at 359. Courts have repeatedly found commonality is met where the class’s claims arise from a uniform course of conduct on the part of the defendant. *See Kerns v. Spectralink Corp.*, 2013 WL 27380785 at *2 (D. Colo. July 1, 2003). And in civil rights lawsuits challenging conditions of detention, commonality is satisfied where the lawsuit challenges “systemic policies and practices that allegedly expose inmates to a substantial risk of harm,” even where there are “individual factual differences among class members.” *Parsons v. Ryan*, 754 F.3d 657, 681-681 (9th Cir. 2014) (collecting cases across the country).

In this case, there are multiple common questions of law and fact pertaining to the Weld County Jail's policies and practices regarding COVID-19. These include questions of whether the Weld County Jail's course of conduct has exposed the class to harm and/or a substantial risk of harm due to its deliberate indifference to the risks of COVID-19, and whether the Weld County jail has failed to take appropriate preventative measures on a system-wide basis. All members of the class are subject to the same action (or inaction) by the Weld County Jail, and all have a right to receive adequate COVID-19 prevention, testing and treatment. Because proper preventative measures have not been taken, all members of the class face potential imminent harm and are vulnerable to severe illness or death if exposed to COVID-19.

- iii. The proposed class representatives' claims are typical of those of the class.

Rule 23(a)(3) requires that the putative class representatives' claims are typical of those of the class. Fed. R. Civ. P. 23(a)(3). "A named plaintiff's claim is 'typical' when it arises out of the same event, practice or course of conduct of the defendant, and is based on the same legal theory on which the class claims are predicated." *Murphy v. Lenderlive Network, Inc.*, 2014 WL 5396165 at *4 (D. Colo. Oct. 22, 2014). "Provided the claims of the Named Plaintiffs and class members are based on the same legal or remedial theory, differing fact situations of the class members do not defeat typicality." *DG ex rel. Stricklin v. Devaugh*, 594 F.3d 1188, 1198-99 (10th Cir. 2010). For the same reason that there are overwhelmingly common issues of fact and law, the Plaintiffs' claims are typical of the class. *See Wal-Mart*, 564 U.S. at 349 n.5 ("The commonality and typicality requirements of Rule 23(a) tend to merge.").

Here, the named Plaintiffs have the same claims and face the same harms as members of the proposed class. Named Plaintiffs, similar to members of the class, all fall within the high risk population that places them in danger of severe illness or death if they are exposed to COVID-19.

All challenge Weld County Jail's failure to take adequate preventative measures – a failure that places them in substantial risk of serious harm. Named Plaintiffs' claims are therefore sufficiently coextensive with those of the class to satisfy typicality.

iv. The proposed class representatives and class counsel can adequately represent the case.

Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy requirement ensures that there are no potential “conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). “Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) with the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002) (internal citation omitted). Adequate representation is usually presumed absent contrary evidence. *See* 1 Newberg on Class Actions § 3:72 (5th Ed. 2019).

First, there is no conflict between the named Plaintiffs and the members of the class. As described above, the named Plaintiffs and class members have the same injury and seek the same relief. Likewise, Plaintiff's counsel, consisting of Hutchinson, Black and Cook, LLC in cooperation with the ACLU of Colorado and Kilmer, Lane & Newman, LLP, are well-qualified and highly experienced in class action and civil rights matters, and have done extensive work investigating this action. Counsel are exceptionally well versed in class actions and constitutional law, with decades of experience litigating such cases, and have sufficient resources to vigorously prosecute this case.

B. The proposed class is appropriate under Rule 23(b)(2)

Certification under Rule 23(b)(2) is appropriate where, as here, defendants “acted or refused to act on grounds that apply generally to the class. . . .” Fed. R. Civ. P. 23(b)(2). A court may certify a Rule 23(b)(2) class where “a single injunction or declaratory judgment would provide relief to each member of the class.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 851-52 (2018) (internal citation and quotation omitted).

The claims raised and the relief sought by Plaintiffs in this action are precisely the sort that Rule 23(b)(2) was designed to facilitate: “[c]ivil rights cases against parties charged with unlawful, class based discrimination are prime examples,” of proper (b)(2) actions. *Amchem Prods.*, 521 U.S. at 614. In their motion for an interim injunction, Plaintiffs seek a Court order implementing a single, system wide process to rectify the violation of Plaintiffs’ constitutional rights and protect them from the threat of COVID-19 exposure, including:

- (1) Physically distancing all inmates from one another and staff within the Weld County Jail, which necessitates at least six feet of distances between individuals at all times;
- (2) Thoroughly and professionally disinfecting and sanitizing the Weld County Jail on a daily basis;
- (3) Providing hygiene supplies, including supplies to wash hands and disinfect common areas, to inmates at all times and free of charge;
- (4) Providing personal protective equipment including, but not limited to masks, to all staff members and inmates;
- (5) Taking particularly heightened precautions with respect to food handling and delivery, such as ensuring that people who come into contact with food are not displaying any potential symptoms of COVID-19, have not recently been in contact with people displaying potential symptoms of COVID-19, and wear appropriate personal protection

- at all times when in contact with food (including but not limited to appropriate masks and gloves);
- (6) Implementing appropriate policies and protocols to identify inmates who are possibly carrying COVID-19 and quarantine those inmates from other individuals; and
 - (7) Providing accurate up-to-date educational and informational materials regarding sanitation and prevention of COVID-19, the status of how COVID-19 is affecting the facility including the number of infected inmates and staff, and daily access to news reports regarding COVID-19.

This system-wide, process-based relief is exactly the type of single injunction that would benefit all members of the proposed class – and falls squarely within the purview of Rule 23(b)(2) as a result.

IV. CONCLUSION

Plaintiffs respectfully request that the Court grant class certification, at a minimum on a provisional basis, contemporaneously with providing interim relief pursuant to Fed. R. Civ. P. 65 as set forth in Plaintiffs’ motion for temporary restraining order and preliminary injunction.

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Respectfully submitted,

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