IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00977-PAB-SKC

THOMAS CARRANZA;
JESUS MARTINEZ;
RICHARD BARNUM;
THOMAS LEWIS;
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.

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [ECF 2]

Defendant Sheriff Steven Reams ("Sheriff"), by and through counsel, Matthew J. Hegarty, Esq., Andrew D. Ringel, Esq., and John F. Peters, Esq., of Hall & Evans, L.L.C., now submits his Response to Plaintiffs' Motion for Class Certification [ECF 2], as follows:

I. INTRODUCTION

Plaintiffs ask this Court to certify a class of inmates to address alleged deficiencies in the handling of COVID-19 by the Weld County Jail even though this Court has rejected the proposed class definition. The class also cannot readily be delineated, and injunctive relief for the class would be unworkable and unmanageable. Plaintiff, put forth multiple parties for class representatives, most of whom are no longer housed within the Jail and

thus no longer possess a stake in this case. Plaintiffs' attempt at class certification does not meet the requirements of Fed.R.Civ.P. 23 and must, therefore, be denied.

II. RELEVANT FACTUAL BACKGROUND

Plaintiffs bring this lawsuit against the Sheriff in his official capacity and ask the Court to grant injunctive and declaratory relief to address contended deficiencies in the Weld County Sheriff's Office's ("WCSO") response to COVID-19 in the Weld County Jail ("WCJ"). [*See* ECF 7 at 27-28; ECF 2 at 10-11]. Plaintiffs ask the Court to certify a class of all "medically vulnerable" inmates, which Plaintiffs define broadly. [*See* ECF 2 at 3 (providing Plaintiffs' proposed class definition)]. Notably, this Court adopted a separate, narrower definition of "medically vulnerable" in its Order partially granting and otherwise denying Plaintiffs' Motion for Preliminary Injunction. [*See* ECF 55 at 5-6, 30, 37-38].

Plaintiffs Carranza, Martinez, Barnum, Lewis, and Ward were all pretrial detainees when this case was filed. [*See* ECF 7 at 7-9]. Of those five, only Martinez remains a pretrial detainee. Plaintiffs assert Plaintiff Propes pleaded guilty but was not sentenced. [ECF 7 at 10]. In fact, Mr. Propes was issued a court-ordered release on April 7, 2020, the day before the Complaint was filed. [*See* ECF 26-10 at 7].[1] Plaintiff Hunter was serving a 90-day jail sentence when the Complaint was filed and Plaintiffs expected his release on April 26, 2020; he was in fact released on April 15, 2020. [*Compare* ECF 7 at 10 *with* ECF 26-10 at 9 *and* Third Suppl. Decl. of Matthew Turner, attached as **Exh. A** (release date of April 15, 2020)]. Mr. Barnum was released on bond on May 20, 2020. [**Exh. A**].

[1] Mr. Propes was arrested on June 5, 2020, after he failed to appear for a hearing in connection with the charges respecting which he was released on April 7, 2020. He is currently housed in the WCJ pending state court judicial proceedings. [*See* **Exh. A**].

III. ARGUMENT

For the below reasons, Plaintiffs failed to carry their burden under Fed.R.Civ.P. 23, and this Court should deny Plaintiffs' Motion for Class Certification [ECF 2].

A. Standard of Review

"Put simply, before a district court certifies a class it must ensure that the requirements of Rule 23 are met." ***Vallario v. Vandehey***, 554 F.3d 1259, 1266 (10th Cir. 2009). Rule 23 allows for a civil action to be certified as a class action if, and only if, multiple requirements are all satisfied concurrently. First,

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all members only 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). Second, and in addition to the requirements of Rule 23(a), Plaintiffs must also show the proposed class meets the requirements of one of the subsections of Rule 23(b). Here, Plaintiffs are moving for class certification under Rule 23(b)(2), which requires them to show the Sheriff as the party opposing the class "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2).

The parties seeking class certification bear "a strict burden of proof" to ensure each prerequisite is satisfied. ***Reed v. Bowen***, 849 F.2d 1307, 1309 (10th Cir. 1988). This involves a "careful certification inquiry," considering the facts of the particular matter at hand. ***Vallario***, 554 F.3d at 1269 (citing ***Unger v. Amedisys Inc.***, 401 F.3d 316, 319 (5th Cir. 2005), and ***Trevizo v. Adams***, 455 F.3d 1155, 1163 (10th Cir. 2006)). "The district

court must engage in its own 'rigorous analysis' of whether 'the prerequisites of Rule 23(a) have been satisfied.'" ***Shook v. El Paso Cnty.***, 386 F.3d 963, 968 (10th Cir. 2004) ("***Shook I***") (quoting ***Gen. Tel. Co. of the S.W. v. Falcon***, 457 U.S. 147, 161 (1982)).

B. Plaintiffs Fail to Meet the Requirements of Fed.R.Civ.P. 23(a).

1. Fed.R.Civ.P. 23(a)(1): Numerosity

To establish numerosity, Plaintiffs must show "the class is so numerous as to make joinder impracticable." ***Peterson v. Okla. City Housing Auth.***, 545 F.2d 1270, 1273 (10th Cir. 1976). Under Plaintiffs' expansive proposed class which the Court rejected, 390 inmates, or 87%, of the WCJ population would be class members as of May 18, 2020. [*See* ECF 60 at 2-3 n.2]. In the interest of efficiency, the Sheriff acknowledges this number of potential class members. Regardless, Plaintiffs cannot shoulder the remainder of their burden to show any certification of Plaintiffs' proposed class by the Court is appropriate.

2. Fed.R.Civ.P. 23(a)(2): Commonality

Next, Plaintiffs must demonstrate "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Rule 23(a)(2)'s commonality requirement 'is easy to misread.'" ***Harrel's LLC v. Chaparral Energy, LLC (Naylor Farms, Inc.)***, 923 F.3d 779, 789 (10th Cir. 2019) (quoting ***Wal-Mart Stores, Inc. v. Dukes***, 564 U.S. 338, 349 (2011)). A plaintiff cannot just point to "a common contention"; rather, the "common contention ... must be of such a nature that it is capable of classwide 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." ***Dukes***, 564 U.S. at 350 (concluding class certification should be denied). "In other words, the focus of Rule 23(a)(2)'s commonality requirement

is not so much on whether there exist common ***questions***, but rather on 'the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation.'" ***Harrel's***, 923 F.3d at 789 (quoting ***Dukes***, 564 U.S. at 350).

However, as discussed at greater length below in connection with Rule 23(b)(2), Plaintiffs' requested injunctive relief is incapable of resolving their claims "in one stroke" as the United States Supreme Court requires. Plaintiffs ask for an injunction applicable to the whole proposed class, comprising almost 90% of the WCJ population. But the constraints of housing assignments, classification, jail security, the WCJ's physical plant, and other similar concerns, as this Court recognized in ECF 55, signal any injunctive relief must inevitably be tailored to unique considerations of each inmate and will not provide a classwide resolution. That is, Plaintiffs' claims lack the "capacity ... to generate common ***answers*** apt to drive the resolution of the litigation." ***Dukes***, 564 U.S. at 350.

3. Fed.R.Civ.P. 23(a)(3): Typicality

Plaintiffs must also establish typicality—their claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Provided the claims of 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 v. Devaughn***, 594 F.3d 1188, 1198-99 (10th Cir. 2010). But Plaintiffs' own claims defeat typicality because they contend different legal theories apply within the proposed class.

Plaintiffs' argument against the Sheriff is divided into two separate legal standards, one—Plaintiffs assert—applicable to pretrial detainees, and a second applicable to convicted inmates. [*See* ECF 1 at 32 n.62 (Plaintiffs' argument); ECF 55 at 18 n.9 (Court's

Order discussing the argument)]. While the Sheriff disagrees a separate standard exists for pretrial detainees' jail condition claims [*see* ECF 26 at 16-17], Plaintiffs' class certification burden requires Plaintiffs to explain how their asserted claims are "typical" when Plaintiffs themselves contend their proposed class contains divergent claims. In addition, as further discussed below regarding the named Plaintiffs' appropriateness (or lack thereof) as class representatives, most of the named Plaintiffs have been released from custody and their claims are therefore moot. A moot claim, being jurisdictionally invalid, is inherently not "based on the same legal or remedial theory" as the live claim of a potential class member. Plaintiffs cannot satisfy their burden for typicality.

4. Fed.R.Civ.P. 23(a)(4): Class representatives and adequacy of representation

Plaintiffs must also meet Rule 23(a)'s final requirement: the proposed class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Sheriff has no reason to believe Plaintiffs' class ***counsel*** are unable to prosecute this claim. Plaintiffs themselves, though, cannot serve as class representatives.

Even if the first three requirements of Rule 23(a) were met (which they are not), Plaintiffs are not the proper representatives for the putative class. With only two exceptions, Plaintiffs' claims for injunctive relief are moot, as all named Plaintiffs except Martinez were released from the WCJ and Propes is back in.[2] *See* ***Green v. Branson***,

[2] In ECF 37, the parties agreed the Sheriff "will not argue any mootness issue," in any Response to ECF 2, "that is brought about solely by a proposed class representative being released from custody on or after the current response due date (April 28, 2020) and on or before the date the Sheriff's Response to ECF 2 is filed." [ECF 37 at 2]. In candor, the Sheriff does not contend this argument applies to Richard Barnum, but notes the Court can consider *sua sponte* whether it has subject matter jurisdiction.

108 F.3d 1296, 1299-1300 (10th Cir. 1997) (inmate's injunctive relief claim moot once inmate released from subject facility); ***Clark v. State Farm Mut. Auto. Ins. Co.***, 590 F.3d 1134, 1138 (10th Cir. 2009) (in general, suit brought as class action "'must be dismissed for mootness when the personal claims of the named plaintiffs are satisfied and no class has been properly certified.'" (quoting ***Reed v. Heckler***, 756 F.2d 779, 785 (10th Cir. 1985)); *but cf.* ***Gerstein v. Pugh***, 420 U.S. 103, 110 n.11 (1975) (because pretrial custody length "cannot be ascertained at the outset, and it may be ended at any time" for multiple reasons, existing pretrial detainees qualify as an exception to the mootness doctrine).

Martinez and Propes are currently being held as pretrial detainees.[3] No other named Plaintiff is now in the WCJ, and no convicted inmate proposed as a class representative is within the WCJ as a convicted inmate. Plaintiffs' claims as to convicted inmates are therefore moot and no class of such inmates can be certified. While ***Gerstein*** carved out a narrow mootness exception for pretrial detainees, it did not for convicted inmates. This distinction is sensible, as pretrial detainees can be released at any time for several reasons, but convicted inmates have known sentencing and release dates.

Plaintiffs here chose as their "convicted inmate" class representatives Mr. Propes, who was in fact released the day before the Complaint was filed, and Mr. Hunter, whom they expected would complete his sentence on April 26, 2020, before the Sheriff was even required to file a response to ECF 2. Having chosen inmates whose claims Plaintiffs

[3] Plaintiffs neither filed a Fourteenth Amendment claim on behalf of Mr. Propes nor listed him as a representative for a putative class for any Fourteenth Amendment claim. *See* ***Ellsworth v. People***, 987 P.2d 264, 266 (Colo. 1999) ("This rule makes it clear that the sentence is an essential component of a 'judgment.'").s

knew would be moot, Plaintiffs cannot now ask the Court to resuscitate those claims via a class action. *Cf.* ***Vallario***, 554 F.3d at 1269-70 (cautioning district court against giving undue weight to claim plaintiffs cannot get judicial review of jail practices absent certifying requested class and to view their "bald assertions in this regard with some skepticism").

Plaintiffs cannot meet the weighty requirements of Fed.R.Civ.P. 23(a)(1)-(4), and the Court should deny certification of Plaintiffs' proposed class on this basis alone.

C. Plaintiffs Also Do Not Satisfy Fed.R.Civ.P. 23(b)(2)

Plaintiffs must also satisfy the standards of Fed.R.Civ.P. 23(b)(2), their chosen section of Rule 23(b) [*see* ECF 2 at 2], but they do not. The Court should deny class certification based on Rule 23(b)(2) for at least three reasons. First, Plaintiffs have made essentially no argument as to Rule 23(b)(2). [*See generally* ECF 2]. Second, "difficulties in identifying characteristics of the class [] prevent plaintiffs from carrying their burden of showing that 'final injunctive relief ... is appropriate respecting the class as a whole.'" ***Shook v. Bd. of Cnty. Comm'rs***, 543 F.3d 597, 612 (10th Cir. 2008) ("***Shook II***") (quoting Rule 23(b)(2)). And third, Plaintiffs' requested classwide relief is totally unmanageable.

Rule 23(b)(2) allows for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In ***Shook II***, the Tenth Circuit analyzed this rule in a case highly similar to this one, reviewing denial of class certification for inmates in a Colorado jail claiming a Sheriff's Office was deliberately indifferent and deprived the proposed class of adequate mental health treatment. 543 F.3d at 600-01. The appellate court explained

Rule 23(b)(2) creates two requirements. First, "the defendants' actions or inactions must be based on grounds generally applicable to all class members." ***Id.*** at 604. Second, "the final injunctive relief must be appropriate for ***the class as a whole***. The rule therefore authorizes an inquiry into the relationship between the class, its injuries, and the relief sought, and we have interpreted the rule to require that a class must be 'amenable to uniform group remedies.'" ***Id.*** (emphasis in original) (quoting ***Shook I,*** 386 F.3d at 973).

Rule 23(b)(2) "demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification." ***Id*.** This cohesiveness "has at least two aspects." Initially, the class must be cohesive enough for a classwide injunction to "'state its terms specifically; and describe in reasonable detail ... the act or acts restrained or required.'" ***Id.*** (quoting Fed. R. Civ. P. 65(d)(1). Moreover,

> "[a] class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant." So, if redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, "the suit could become unmanageable and little value would be gained in proceeding as a class action." ... In short, under Rule 23(b)(2) the class members' injuries must be sufficiently similar that they can be addressed in a single injunction that need not differentiate between class members.

Id. (quoting 5 *Moore's Fed. Prac.* § 23.43(2)(b) at 23-195 (3d. ed. 2000) and ***Barnes v. Am. Tobacco Co.***, 161 F.3d 127, 143 (3d Cir. 1998)). Applying these holdings here reveals the inadequacy of Plaintiffs' arguments and of Plaintiffs' proposed class.

First, Plaintiffs make virtually no argument on Rule 23(b)(2), and what little argument they do make does not satisfy their burden. Plaintiffs assert: 23(b)(2) is meant for civil rights cases; and the single injunction they seek would give "system-wide,

process-based relief…[and] would benefit all members of the proposed class – and falls squarely within the purview of Rule 23(b)(2) as a result." [ECF 2, pp. 10-11]. Plaintiffs provide no further explanation for this conclusory argument.

Simply putting to paper a civil rights claim does not talismanically satisfy Rule 23(b)(3). As ***Shook II*** noted, "'[t]he mere fact that a complaint alleges [violation of a civil right] does not in itself ensure' that Rule 23's requirements are satisfied." ***Id.*** at 610 (quoting ***E. Tex. Motor Freight Sys. Inc. v. Rodriguez***, 431 U.S. 395, 405 (1977)). The bare assertion Rule 23(b)(2) is meant for civil rights claims similarly is not enough here.

Next, Plaintiffs offer only a cursory, conclusory argument about Rule 23(b)(2)'s two separate requirements. Plaintiffs do not explain either how the Sheriff here "has acted or refused to act on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2), or why relief to the "class as a whole" would be appropriate here. ***Id.*** Plaintiffs have given this Court no guidance or support for how to make the "inquiry into the relationship between the class, its injuries, and the relief sought," ***Shook II***, 543 F.3d at 612, in order to determine whether the proposed class is "amenable to uniform group remedies." ***Shook I***, 386 F.3d at 973. Plaintiffs have in no way carried their burden for Rule 23(b)(2).

Second, "difficulties in identifying characteristics of the class [] prevent plaintiffs from carrying their burden of showing that 'final injunctive relief ... is appropriate respecting the class as a whole.'" ***Shook II***, 543 F.3d at 612 (quoting Rule 23(b)(2)). Plaintiffs already made this point better than the Sheriff ever could by means of their own filings. Merely ten days after the Court issued its Order after the preliminary injunction hearing, Plaintiffs already commenced arguing the WCSO is not adequately identifying

all inmates who are "medically vulnerable" as defined by the Court in ECF 55. [*See* ECF 62 at 8-9].[4] In the context of a jail, the ***only*** way to identify whether inmates qualify as medically vulnerable is to ask them; the WCJ generally does not have pre-incarceration medical records. [*See* Transcript, Apr. 30, 2020, at 116:17-117:7 & 185:7-186:25]. But given Plaintiffs revealed their belief additional inmates are "medically vulnerable" beyond those identified by the WCSO and, in fact, beyond those identified by this Court, delineating the proposed class certainly will result in protracted litigation. Concerns with issues "associated with identifying ***characteristics*** of the class essential to determining whether class-wide relief is appropriate" constitute a legitimate basis to deny class certification due to "concern with how ***the Jail***, not the court, would be able to identify members of the class ... in a way that would allow the Jail to comply with any relief obtained or the court to monitor the Jail's compliance with such relief." ***Shook II***, 543 F.3d at 612 (emphasis in original). Plaintiffs already showed the same concerns apply here.[5]

Finally, the classwide relief Plaintiffs seek implicates classification and housing determinations within the WCJ, as well as security issues, movement of inmates, the limitations of the WCJ's physical plant, and various other considerations which "require[]

[4] It bears repeating: the Court's definition of "medically vulnerable" substantially differs from Plaintiffs' definition of the proposed class. [*Compare* ECF 2 at 3 *with* ECF 55 at 5-6, 30, 37-38]. In fact, Plaintiffs' definition is much broader which means more disputes about whether inmates were properly included in the class. *See* ECF 60-1 ¶ 20 (providing data from WCJ medical screening, conducted in response to this Court's May 11, 2020, Order, as of May 13, 2020, 19% of WCJ population was medically vulnerable under this Court's definition while 83% was medically vulnerable under Plaintiffs' broader definition)].

[5] Given the clear applicability of ***Shook II*** to this case, any reliance by Plaintiffs on ***Parsons v. Ryan***, 754 F.3d 657 (9th Cir. 2014), is quite misplaced. Likewise, Plaintiffs' reliance on ***Kerns v. Spectralink Corp.***, 2003 U.S. Dist. LEXIS 11711 (D. Colo July 1, 2003), is misplaced too because ***Kerns*** involved multiple defendants acting in common.

time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members, [so] 'the suit could become unmanageable and little value would be gained in proceeding as a class action.'" ***Id.*** at 604 (quoting ***Barnes v. Am. Tobacco Co.***, 161 F.3d 127, 143 (3d Cir. 1998)). The Court's Order requires the WCSO to socially distance "medically vulnerable" inmates "to the maximum extent possible considering the Jail's physical layout, population level, and classification needs." [ECF 55 at 38]. The Order also requires the WCSO to single-cell or socially distance "medically vulnerable" inmates in the intake unit "to the maximum extent possible considering the Jail's physical layout and classification needs." *Id.* This Order applies to medically vulnerable inmates, who, as defined by the Court, comprise less than 20% of the WCJ population. [*See* ECF 60 at 3 (current on May 18, 2020); ECF 60-1 ¶ 24]. Applying this or a similar order—as sought by Plaintiffs—to the proposed class would be unmanageable.

The proposed class, based on Plaintiffs' definition of "medically vulnerable," would include roughly 87% of the WCJ population, or 390 inmates. [*See* ECF 60 at 3-4 n.2 (current as of May 18, 2020); ECF 60-1 ¶ 25]. It will be effectively impossible to socially distance almost 90% of the WCJ population, so there will be ongoing litigation about what factors the WCSO considered in making individual housing decisions for inmates, relative to whether each such inmate was socially distanced "to the maximum extent possible"—an ***inherently*** fact-specific and individualized inquiry into the bases for a decision and available alternatives. Rather than classwide injunctive relief, certifying the proposed class will convert this Court effectively into a "super-warden" reviewer of all classification and housing assignment decisions at the WCJ. *See* ***Vallario***, 554 F.3d at 1268

("Respondents cannot demonstrate, without more, that 'injunctive relief—relative to the class—is conceivable and manageable without embroiling' the district court 'in disputes over individualized situations and constantly shifting class contours.'" (quoting ***Shook II***, 543 F.3d at 608)); *see also* ***Bell v. Wolfish,*** 441 U.S. 520, 548 (1979) ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); ***Peterson v. Shanks,*** 149 F.3d 1140, 1144 (10th Cir. 1998) ("[I]t is not the role of the federal judiciary to scrutinize and interfere with the daily operations of a state prison."); ***Banning v. Looney,*** 213 F.2d 771, 771 (10th Cir. 1954) (federal courts have no power "to supervise prison administration or to interfere with the ordinary prison rules or regulations").

The injunctive relief Plaintiffs seek—to socially distance nearly 90% of the WCJ—is totally unmanageable and completely inappropriate for classwide relief. Plaintiffs do not, and cannot, carry their burden under Rule 23(b)(2).

D. <u>In Any Event, This Court Already Repudiated Plaintiffs' Proposed Class</u>

Plaintiffs' proposed class still includes all "medically vulnerable" inmates under Plaintiffs' expansive definition. [*See* ECF 2, p. 3]. This Court has already rejected this definition of "medically vulnerable" in its Order. [*Compare* ECF 2 at 3 (giving Plaintiffs' proposed definition of "medically vulnerable, to define the proposed class), *with* ECF 55 at 5-6, 30, 37-38 (adopting a narrower definition of "medically vulnerable" than Plaintiffs proposed)]. Since the Court issued its Order on May 11, 2020, Plaintiffs have not sought leave to amend either their Complaint or their Motion for Class Certification to modify their proposed class to be coterminous with the Court's adopted, narrow definition of "medically

vulnerable." Instead, Plaintiffs elected not to modify their request for the Court to certify the proposed class of "medically vulnerable" inmates as understood from ECF 2.[6]

Absolutely no reason exists for this Court to reverse course and adopt Plaintiffs' proposed class definition. It would also be wholly improper for this Court to certify a class based on this Court's definition of "medically vulnerable" in ECF 55, relief for which Plaintiffs neither asked nor offered support and to which the Sheriff has had no opportunity to specifically respond. Plaintiffs simply cannot meet their "strict burden of proof" for their proposed class. ***Reed***, 849 F.2d at 1309. What's more, "the district court does not 'bear the burden of constructing subclasses. That burden is upon the [party seeking certification] and it is he who is required to submit proposals to the court.'" ***Shook II***, 543 F.3d at 607 (quoting ***United States Parole Comm'n v. Geraghty***, 445 U.S. 388, 408 (1980)). Plaintiffs made no argument in support of subclasses, let alone met their burden.

This Court must hold Plaintiffs to their burden, a burden Plaintiffs cannot meet for their proposed class. The Court chose not to address the propriety of certifying Plaintiffs' proposed class in its prior Order, [*see* ECF 55 at 14 n.5], leaving the issue for another day. That day has come and Plaintiffs have not met their burden.

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[6] Further, the Court must disregard any argument or shift in strategy in Plaintiffs' Reply to this Response attempting to adopt the Court's definition of "medically vulnerable" to define Plaintiffs' proposed class or arguing for subclasses, unless the Court also permits the Sheriff a surreply. *E.g.,* ***Menge v. AT&T, Inc.***, 2013 U.S. Dist. LEXIS 20008, at *2 (D. Colo. Feb. 13, 2013) (Brimmer, C.J.) ("Granting leave to file a surreply is part of the 'supervision of litigation' and thus falls within the discretion of the district court. However, the Court's discretion is limited insofar as it may not deny the non-movant's motion to file a surreply unless it disregards any new arguments in the moving party's reply."). In addition, allowing Plaintiffs to again metastasize their requested relief on Reply will represent yet another effort by Plaintiffs to "shift[] over the course of this case" the relief they seek, which is improper. [*See* ECF 55 at 30 n.16].

IV. CONCLUSION

In the final analysis, this Court should deny certification of Plaintiffs' proposed class because the Court already rejected Plaintiffs' definition of "medically vulnerable" and because Plaintiffs cannot carry their burden. They do not meet the strict requirements of Fed.R.Civ.P. 23(a), and their argument regarding Fed.R.Civ.P. 23(b)(2) also is deficient. Other legitimate concerns about class definition and manageability also weigh heavily against certifying this class under Fed.R.Civ.P. 23(b)(2); the relief Plaintiffs seek is not workable for the nearly 90% of the WCJ population to which they seek to apply it and will result in ongoing litigation over who is a proper class member. Granting Plaintiffs' proposed class would also embroil this Court in individual, highly fact-specific classification and housing decisions as de facto supervisor of all such decisions at the WCJ, and otherwise render classwide relief unmanageable. As a result, Defendant Sheriff Steven Reams requests this Court enter an Order: denying Plaintiffs' Motion for Class Certification in its entirety, with prejudice, and entering all other relief deemed just.

Dated and respectfully submitted this 8th day of June, 2020.

s/ Matthew J. Hegarty
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 8th day of June, 2020, a true and correct copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [ECF 2]** was electronically filed with the Clerk of Court which will send notification of such filing to the following email addresses:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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Defendant.

THIRD SUPPLEMENTAL DECLARATION OF CAPTAIN MATTHEW TURNER

I, Captain Matthew Turner, being of lawful age and duly sworn under penalty of perjury pursuant to 28 U.S.C. § 1746, and for my Third Supplemental Declaration in the above-captioned case ("Declaration"), hereby declare as follows:

1. I have personal knowledge of the matters in this Declaration.

2. I currently serve as the Jail Captain for the Weld County Jail ("WCJ") in the County of Weld, State of Colorado. I have served in this position for six months.

3. Before beginning my tenure as the WCSO Jail Captain on January 1, 2020, I was employed with the Weld County Sheriff's Office ("WCSO") for eight (8) prior years and served in many positions: Corrections Officer (what is now called Detentions Deputy) and separately earned my Peace Officer Standards Training ("POST") certification; Public

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Information Officer Corporal; Detentions Division Shift Sergeant; Civil Unit Sergeant in charge of civil service processors, animal control, and victim advocates; and Detentions Division Lieutenant. Of my eight years working for the WCSO, I have spent a total of 5.5 years working in the WCJ.

4. I also earned an Associate of Arts degree in education from Front Range Community College in 2011 with a future goal to attain a Bachelor of Science in Criminal Justice from the University of Northern Colorado.

5. In my role as Jail Captain, I am familiar with how to access and review records from the WCJ showing what inmates are detained currently and were detained at earlier dates, the reasons for detention, when inmates were released from detention, and the reason for the release. All of this information is maintained by the WCSO in the normal course of operating the WCJ.

6. Regarding Plaintiffs Chad Hunter, Colby Propes, and Richard Barnum, I personally reviewed WCSO records to determine whether they were released from the WCJ, when they were released, and the reasons for the release. After completing this review, I located the following information:

a. Chad Hunter was released from the WCJ on April 15, 2020 to serve the remainder of his court-imposed sentence on home detention.

b. Colby Propes was released on bond from the WCJ on April 7, 2020, pending sentencing. He subsequently failed to appear for his sentencing hearing and was arrested on June 5, 2020, on warrants issued due to that failure to appear. He is now housed in the WCJ pending sentencing.

EXHIBIT A

c. Richard Barnum was released on bond from the WCJ on May 20, 2020.

I understand the statements written in this Declaration are given under penalty of perjury. All of the foregoing statements are true and correct to the best of my knowledge. Pursuant to 28 U.S.C. § 1746 I declare, under penalty of perjury under the laws of the United States of America, the foregoing is true and correct.

FURTHER DECLARANT SAYETH NAUGHT.

Dated and executed this 8th day of June, 2020.

s/ Matthew Turner
Matthew Turner, Jail Captain,
Weld County Sheriff's Office