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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

YONNEDIL CARROR TORRES; VINCENT REED; FELIX SAMUEL GARCIA; ANDRE BROWN; and SHAWN L. FEARS, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

vs.

LOUIS MILUSNIC, in his capacity as Warden of Lompoc; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

CASE NO. 2:20-cv-04450-CBM-PVCx

PLAINTIFF-PETITIONERS' REPLY SUPPORTING *EX PARTE* APPLICATION FOR PROVISIONAL CLASS CERTIFICATION

Assigned to Hon. Consuelo B. Marshall
Courtroom 8B

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

Defendant-Respondents ("Respondents") muddy a straightforward class certification inquiry by ignoring controlling Ninth Circuit law and mischaracterizing the relief sought. Plaintiff-Petitioners ("Petitioners") seek policy changes that would apply uniformly to all class members. Petitioners do not ask the Court to make individualized determinations of home confinement or compassionate release. The requested relief, which is injunctive and declaratory in nature, does not require the Court to engage in individual, fact-intensive inquiries. As explained below, with this action properly construed, Petitioners easily meet the requirements of Rule 23.[1]

A. The Proposed Class Meets the Requirements of Rule 23(a).[2]

1. Commonality

"A clear line of precedent, stretching back long before *Wal-Mart* and unquestionably continuing past it, firmly establishes that when inmates provide sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm, Rule 23(a)(2) is satisfied." *Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014). That is what Petitioners have done here.[3] That should be the end of

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[1] Respondents' argument that class certification is inappropriate in habeas proceedings is tied to their Rule 23 analysis and, for that reason, Petitioners will not address it separately. (Dkt. 29 at 9-10.) Respondents also reargue their position regarding the Prison Litigation Reform Act. (*Id.* at 10-12.) That issue is distinct from the application for provisional class certification, was fully briefed by the parties in response to Petitioners' *ex parte* application for a temporary restraining order, and will not be repeated here. (Dkt. 25 at 63-65; Dkt. 32 at 25-27.)

[2] Respondents "do not contest" that the Proposed Class satisfies the numerosity requirement. (Dkt. 29 at 13.)

[3] Respondents attempt to distinguish *Parsons*, in a footnote, on the grounds that in this case, (1) Petitioners "seek *provisional* class certification," whereas *Parsons*

the inquiry. *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 969 (9th Cir. 2019) ("the statewide policies and practices are the 'glue' that holds the class together") (quoting *Parsons*, 754 F.3d at 678).

Respondents contend, however, that the commonality requirement is not met because each putative class member "has different medical needs, some more serious than others," and "differing risk profiles." (Dkt. 29 at 16.) But the Ninth Circuit already has foreclosed that argument: "although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single . . . policy or practice that creates a substantial risk of serious harm." *Parsons*, 754 F.3d at 678; *see also id.* at 680 n.23 ("The defendants' insistence that commonality is defeated by individual variations in preexisting conditions, demand for medical care, and response to treatment is incorrect.").[4]

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involved certification of a class after denial of a motion to dismiss; and (2) Respondents "have presented evidence" that they are complying "with CDC guidelines and considering release of inmates." (Dkt. 29 at 20 n.8.) But the relevant legal framework is the same. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041-43 (9th Cir. 2012). And the Ninth Circuit made clear that plaintiffs need not "show at the class certification stage that they will *prevail* on the merits." *Parsons*, 754 F.3d at 676 n.19. "To hold otherwise would turn class certification into a mini-trial." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). In any event, Petitioners have provided detailed allegations and ample evidence at this stage of the case to support provisional class certification. (*See, e.g.*, Dkt. 16 at ¶¶ 21-80 (factual allegations in corrected complaint); Dkt. 18-1 (policy memoranda, directives, and declarations from attorneys and family members of people incarcerated at Lompoc); Dkt. 18-2 (declaration of counsel detailing conditions reported by Petitioner Shawn Fears).)

[4] Respondents' suggestion that the putative class is overbroad because it extends beyond the "medically vulnerable" (Dkt. 29 at 17-19) also fails because, as explained in Petitioners' application, even healthier people who contract COVID-19 are susceptible to severe strokes, and preliminary evidence suggests that the disease may render lasting organ damage in even minimally symptomatic or completely asymptomatic patients. (Dkt. 22 at 5.) Respondents do not respond to this argument.

The district court's decision in *Ahlman v. Barnes*, No. 20-835, 2020 WL 2754938 (C.D. Cal. May 26, 2020) (appeal pending), is instructive. There, the district court granted provisional certification of, among other things, a class of "[a]ll current and future post-conviction prisoners incarcerated at the Orange County Jail from the present until the COVID-19 pandemic has abated." *Id.* at *6. The district court rejected defendants' argument "that commonality is not satisfied because '[e]ach individual has a specific medical profile.'" *Id.* at *7 (internal citation omitted); *see also Fraihat v. U.S. Immigration and Customs Enforcement*, No. 19-1546, 2020 WL 1932570, at *18 (C.D. Cal. Apr. 20, 2020) (rejecting defendants' argument "that the proposed classes 'flunk' the commonality requirement due to the factual variation . . . between the degree of COVID-19 threat to each individual"). The district court instead concluded: "Plaintiffs challenge Defendants' institution-wide response and seek institution-wide injunctive relief. Accordingly, the relevant questions such as deliberate indifference will be decided on a classwide, rather than individual, basis." *Ahlman*, 2020 WL 2754938, at *7.

In arguing against commonality, Respondents mischaracterize the relief sought here. (Dkt. 29 at 17.) Petitioners do not ask the Court to decide or review whether each putative class member is in fact eligible for home confinement or compassionate release. Petitioners ask only that the Court put in place an expedited process—one that would apply to all class members—for *Respondents* to make

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(Dkt. 29 at 13-19.) Respondents assert without citation that "not all risk profiles necessitate the same precautions." (*Id.* at 16.) But "either each of the policies and practices is unlawful as to every inmate or it is not. That inquiry does not require [the Court] to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination." *Parsons*, 754 F.3d at 678. Indeed, the Interim Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and Detention Facilities issued by the Centers for Disease Control and Prevention is not limited only to those deemed "medically vulnerable" and does not set forth different standards for so-called "recovered" people (however defined). (Dkt. 18-1 at 12-37.)

those decisions. Those individual determinations could be challenged on an individual basis, not through the class vehicle. *See Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) ("Individual claims for injunctive relief related to medical treatment are discrete from the claims for systemic reform addressed in [an existing class action]. Consequently, where an inmate brings an independent claim for injunctive relief solely on his own behalf for medical care that relates to him alone, there is no duplication of claims or concurrent litigation."). The Court's oversight over the process would be limited to allegations of a pattern or practice of making such decisions improperly.

Petitioners also seek improved conditions that would be applied to all class members, in the form of policies that would effectively allow for social distancing; provision of sanitary and personal protective equipment; improved sanitation practices; and adequate testing, contact tracing, and isolation measures. To deny class relief would weigh down the court system with over a thousand individual lawsuits, with judges being asked to (re-)adjudicate what public health measures are constitutionally required in the prison and then to order them on a building-by-building (or, in some cases, cell-by-cell) basis.

Even assuming the requested relief involved the Court's consideration of individual medical and custody risk factors (which it does not), under Ninth Circuit precedent, Petitioners "need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *See Parsons*, 754 F.3d at 675 (internal quotation marks and citation omitted). This is true when there "is a common core of salient facts coupled with disparate legal remedies within the class." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (quotation marks and citation omitted).

2. Typicality

Respondents' typicality argument rests on the same flawed reasoning as their commonality argument. (Dkt. 29 at 20.) For the same reasons, it must be rejected. The Ninth Circuit's decision in *Parsons* again provides the appropriate framework:

> Where the challenged conduct is a policy or practice that affects all class members, the underlying issue presented with respect to typicality is similar to that presented with respect to commonality, although the emphasis may be different. In such a case, because the cause of the injury is the same . . . the typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class. We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct.

754 F.3d at 685 (quotation marks and citation omitted).

Respondents again reference "each inmate's unique factors," including "the severity of his offense, his age, and his health conditions." (Dkt. 29 at 21.) But "[i]t does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each other or to every class member." *Parsons*, 754 F.3d at 686. It is enough that "[e]ach declares that he or she is being exposed, like all other members of the putative class, to a substantial risk of serious harm by the challenged . . . policies and practices." *Id.* at 685. Similarly, although criminal history likely will be relevant to determination of whether a putative class member is eligible for release, it has no bearing on the typicality analysis. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) ("Petitioner's aggravated felon status is similarly of no significance to the typicality analysis. The claims of Petitioner and the class on the whole are that they are entitled to a bond hearing in which dangerousness and risk of flight are evaluated. While Petitioner's criminal history . . . will almost certainly be relevant to any bond hearing determination, the determination of whether Petitioner

is *entitled* to a bond hearing will rest largely on interpretation of the statute authorizing his detention.") (emphasis added).[5]

Respondents observe that "numerous federal inmates are having their cases for release heard on an individualized basis," with "some" obtaining release. (Dkt. 29 at 21.) But Respondents do not explain the relevance of these general observations to a typicality inquiry. Nor could they. As the district court in *Fraihat* explained, "the fact that some detainees have started down one avenue [of separate actions] should not prevent [defendant] from exploring more expeditious paths to relief. In addition, some of those individuals have been or will be denied relief, and will still require safe conditions of confinement." 2020 WL 1932570, at *28 (internal citation omitted). And Respondents provide no information on whether any of the people seeking release are housed at FCI Lompoc or USP Lompoc (collectively, "Lompoc"), what the basis for their individual actions are, what the governing standard is, and whether and how many people have in fact been granted release. (Dkt. 29 at 21-22.)

3. Adequacy of Representation

Respondents contend that Petitioners will not be adequate class representatives. (Dkt. 29 at 22-23.) In support of this argument, Respondents state

[5] Respondents provide an incomplete history of *Rodriguez*. (Dkt. 29 at 21.) In *Rodriguez*, the Supreme Court did not disturb the Ninth Circuit's typicality analysis but instead disagreed with the Ninth Circuit's later construction of certain immigration statutes. The Court then directed the Ninth Circuit to consider, "[n]ow that we have resolved th[e statutory] challenge," whether a class action still was the appropriate vehicle. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). The Ninth Circuit in turn did not disturb its prior decision finding that the proposed class met the requirements of Rule 23, and instead remanded to the district court to consider whether the class "should remain certified for consideration of the constitutional issues and available class remedies." *Rodriguez v. Marin*, 909 F.3d 252, 257 (9th Cir. 2018). The district court later denied respondents' motion to decertify the class. *See* Dkt. 555, *Rodriguez v. Marin*, No. 07-03239 at 5 (C.D. Cal. May 28, 2020).

that "release is not possible for all inmates," and that Petitioners do not "appear to be eligible for release." (*Id.* at 22.) On that basis alone, Respondents suggest that the interests of Petitioners "are adverse to those putative class members who may be released to home confinement." (*Id.*) That is a peculiar argument. This is not a zero-sum game. Petitioners (and their counsel, whom Respondents do not object to) have every incentive to prosecute this case vigorously and to argue for, among other things, a robust, expedited, and fair process for release; regardless of whether Petitioners themselves are released, reduction of the prison population allows for increased social distancing, fewer opportunities for transmission of COVID-19, and improved access to prison resources and services.[6]

Respondents' next argument—that some putative class members may prefer to remain in prison or may have "other avenues of release available to them"—also is meritless. (*See* Dkt. 29 at 22-23.) "The fact that some members of the class may be personally satisfied with the existing system and may prefer to leave the violation of their rights unremedied is simply not dispositive of a determination under Rule 23(a)." *Wilder v. Bernstein*, 499 F. Supp. 980, 993 (S.D.N.Y. 1980); *see Morgan v. United States Soccer Fed'n, Inc.*, No. 19-1717, 2019 WL 7166978, at *8 (C.D. Cal. Nov. 8, 2019) (rejecting defendants' argument that "the proposed class representatives are inadequate because there might be a conflict between those members of the putative class who prefer the . . . current compensation model and those who prefer to adopt [a different] compensation model") (citing *Wilder*).

And, as the Ninth Circuit has long held, "[m]ere speculation as to conflicts

[6] Respondents' argument as to adequacy of representation also is in tension with their acknowledgement, made earlier in their opposition, that Petitioners in fact represent a wide range of people in Lompoc, with convictions "varying in severity," "different terms" of imprisonment, "different propensities for recidivism," "different ages," "different health histories," and "different circumstances should they be released." (Dkt. 29 at 1.) Together, Petitioners easily represent the diverse interests of the putative class.

that may develop at the remedy stage is insufficient to support denial of initial class certification." *Soc. Servs. Union, Local 535, Serv. Employees Int'l Union, AFL-CIO v. Santa Clara Cty.*, 609 F.2d 944, 948 (9th Cir. 1979); *see also Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("this circuit does not favor denial of class certification on the basis of speculative conflicts"); *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975) ("courts have generally declined to consider conflicts . . . sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit").

B. The Proposed Class Meets the Requirements of Rule 23(b)(2).

Respondents contend that the Proposed Class does not meet the requirements of Rule 23(b)(2). Again, Respondents ignore controlling Ninth Circuit law and grossly mischaracterize the relief sought by Petitioners. (Dkt. 29 at 23-24.) As the Ninth Circuit explained in *Parsons*, the requirements of Rule 23(b)(2) "are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." 754 F.3d at 688 (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010)). That is what Petitioners seek here.

Respondents continue their chorus of "different criminal histories" and "different medical conditions." (Dkt. 29 at 24.) *Parsons* again provides the response: "Contrary to the defendants' assertion that each inmate's alleged injury is amenable only to individualized remedy, every inmate in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . [defendants'] policy and practice." 754 F.3d at 689. The relief Petitioners seek here—improved conditions in the prison and an expedited process to review eligibility for release—applies to all putative class members.

It is true, of course, that not all putative class members ultimately will be found eligible for release. But that is not relevant here, as the Ninth Circuit

explained in *Rodriguez*. There, the petitioner sought "a writ of habeas corpus on behalf of himself and a class of aliens detained in the Central District of California for more than six months without a bond hearing while engaged in immigration proceedings." 591 F.3d at 1111. The petitioner requested "injunctive and declaratory relief providing individual bond hearings to all members of the class." *Id.* Respondents challenged certification under Rule 23(b)(2), noting that putative class members were "detained pursuant to different statutes." *Id.* at 1125. The Ninth Circuit noted that this argument "miss[es] the point of Rule 23(b)(2)." *Id.* The Court held that although "[t]he particular statutes controlling class members' detention may impact the viability of their individual claims for relief," that did "not alter the fact that relief from a single practice is requested by all class members." *Id.*

Respondents do not try to distinguish (or even cite) *Parsons* or *Rodriguez*. (Dkt. 29 at 23-24.) Instead, Respondents rely on two decisions from other circuits. The first decision is inapposite because it did not involve Rule 23(b)(2); instead, it focused entirely on Rule 23(b)(3), which is not relevant here. *See Wragg v. Ortiz*, No. 20-5496, 2020 WL 2745247, at *29-30 (D.N.J. May 27, 2020). The second decision is inapposite because it turned entirely on the fact that plaintiffs sought money damages, which Petitioners do not seek here. *See Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000).[7]

II. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court provisionally certify the Proposed Class.

[7] Respondents may have cited *Lemon* in error. The language in their opposition that is attributed to *Lemon* does not in fact appear in that decision. (Dkt. 29 at 24.)

Local Rule 5-4.3.4(a)(2)(i) Compliance: Filer attests that all other signatories listed concur in the filing's content and have authorized this filing.

DATED: June 11, 2020

Respectfully submitted,

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