UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No. 20-cv-10949

Hon. Linda V. Parker

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

ARGUMENT

Defendants, faced with a deadly pandemic that literally spreads with viral efficiency, oppose class certification on the grounds that people whose lives are at risk must exhaust the Jail's lengthy grievance procedure before securing their constitutional rights. But that argument is waived, and the procedure is unavailable both because it operates too slowly to provide relief and because the Jail has systematically denied inmates access to it. The law does not require exhaustion of unavailable administrative remedies, and the issues regarding their availability here are capable of class-wide resolution and do not stand in the way of class certification.

I. Defendants' Exhaustion Issues are Waived and Meritless in Any Event.

Defendants' primary argument against class certification is that the named plaintiffs have not exhausted the Jail's administrative remedies. Resp., ECF 82, at 3–6. But Defendants did not raise this defense[1] in response to the motion for preliminary injunction, *see generally* ECF 30, so they have forfeited any argument that non-exhaustion is a barrier to this Court ordering preliminary injunctive relief. And it is well established that the Court can issue class-wide preliminary injunctive relief without deciding the motion for class certification. *See, e.g.*, *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *29 (D. Conn. May 12, 2020) (providing relief to

[1] Failure to exhaust is an affirmative defense that is defendants' burden to prove, and therefore "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007).

putative medically vulnerable class prior to certification); *Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015); *Newberg on Class Actions* § 4:30 & n.8.50 (5th ed.) (collecting cases). Therefore, the exhaustion issue, and class certification overall, need not be addressed at this time.

However, when the Court does decide class certification, "exhaustion should be excused because administrative remedies were unavailable . . . [which] is a question common to all members of the class." *Butler v. Suffolk County*, 289 F.R.D. 80, 99 (E.D.N.Y. 2013) (certifying a class represented by class members who did not exhaust); *see A.T. ex rel. Tillman v. Harder*, 298 F. Supp. 3d 391, 409 (N.D.N.Y. 2018) (same). Thus, Defendants' exhaustion arguments, whether considered now or later, are not "bases to defeat class certification." *A.T.*, 298 F. Supp. 3d at 409.

Furthermore, none of Plaintiffs' claims are exhaustion-barred. The PLRA requires only that prisoners exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a); *Valentine v. Collier*, 590 U.S. ___, 2020 WL 2497541, at *3 (May 14, 2020) (Sotomayor, J., statement respecting application to vacate stay). "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose.'" *Id*. (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016)). "Thus, when a grievance procedure is a 'dead end'—when 'the facts on the ground' indicate that the grievance procedure provides no possibility of relief—the procedures may well be 'unavailable.'" *Id*. (quoting *Ross*, 136 S. Ct. at 1859).

There are no administrative remedies "available" here for two reasons. First, the Jail's grievance procedure is too slow to respond to this pandemic. In the "unprecedented circumstances" posed by this "rapidly spreading pandemic," Justice Sotomayor recently explained, "where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed." *Id*. This is an application of the principle that "[i]f a prisoner has been placed in imminent danger of serious physical injury . . . administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available." *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010).

That is the case here. The Jail's grievance procedure gives Defendants an indefinite amount of time to process grievances, and more than a month to investigate and respond.[2] An inmate must first submit a grievance to a supervisor, who may hold on to it for as long as they please before passing it to a Grievance Coordinator, who similarly has no timeline for action. The Coordinator then passes the grievance to a sergeant, who may take 30 days to investigate. There are additional 5- and 7-day periods for appeals. All told, grievances can be addressed in some period of time between 42 days and never. "Because COVID-19 spreads 'easily and

[2] Defendants' misleadingly provide a partial description of their procedure. The full procedure, previously obtained via FOIA, is enclosed as Exhibit A.

sustainably,' Plaintiffs risk contracting the disease while . . . attempting to exhaust the [Jail's] administrative grievance procedure . . . ." *McPherson v. Lamont*, __ F. Supp. 3d __, 2020 WL 2198279, at *10 (D. Conn. May 6, 2020). Thus, the procedure is, "'practically speaking, incapable of use' for resolving COVID-19 grievances." *Id*. (quoting *Ross*, 136 S. Ct. at 1859).

Second, the Jail is not actually *following* its grievance procedure and is instead thwarting COVID-19 grievances. A grievance procedure is unavailable if "prison administrators thwart inmates from taking advantage of [it] through machination, misrepresentation, or intimidation." *Ross*, 136 S. Ct. at 1860; *Does 8–10 v. Snyder*, 945 F.3d 951, 965–66 (6th Cir. 2019). The record here establishes that people in the Jail routinely experience intimidation, retaliation, and outright denials when they try to protect themselves or raise grievances about COVID-19 conditions. Two named Plaintiffs who raised concerns, through proper channels, about performing work that exposed them to coronavirus were shipped off to the tanks—the most crowded and dirty cells in the Jail—and into cells directly adjoining a cell of quarantined people. ECF 5-3 ("J. Cameron Decl.") ¶¶ 8–9; ECF 5-5 ("Lee Decl.") ¶¶ 9–17; *see also* ECF 55 ¶ 6. When Lee filed a grievance over being threatened, the grievance was given to the supervisor who had threatened him, who then transferred Lee to the tank. Lee Decl. ¶¶ 13–17. Briggs was similarly threatened with transfer to the tank for requesting a grievance to protest his poor medical care. ECF 5-4 ("Briggs Decl.") ¶

8; *see also* ECF 5-7 ¶ 22 (guards refused to provide grievance forms to non-plaintiff declarant Kucharski after learning he intended to grieve COVID-related conditions). These widespread threats and abuses are well known to other detainees. ECF 5-6 ¶ 15. Thus, "improper actions of prison officials render the administrative remedies functionally unavailable" to Plaintiffs and the class more generally. *Does 8–10*, 945 F.3d at 966 (citation omitted). The Jail—which, again, bears the burden of proof on exhaustion, *see Jones*, 549 U.S. at 216, has not rebutted this showing.[3]

II. Defendants' Other Arguments Against Class Certification Also Fail.

Defendants' remaining arguments fare no better. Their arguments about numerosity and adequacy are just restatements of their exhaustion argument and fail for the same reasons. *See* Resp. at 7, 11. They also rely on basic misrepresentations, asserting that "none of the class representatives are pre-trial detainees." *Id.* at 11. In fact, both Saunders and Briggs are. Briggs Decl. ¶ 1; ECF 5-8 ¶ 1.

Defendants' arguments regarding commonality, typicality, and Rule 23(b) also fail. They argue that class treatment is inappropriate because there are certain differences between class members. Resp. at 8–9, 14. But Defendants provide no authority for the proposition that *any* of these differences are relevant to the common factual or legal questions about the constitutionality of their confinement. Instead,

[3] For similar reasons, state-remedy exhaustion is no barrier to the class's habeas claims. Plaintiffs have already explained why exhaustion is both futile and excusable, ECF 33 at 25–30; ECF 86 at 4–5, and those arguments apply class-wide.

Defendants rely on *Money v. Pritzker*. That case was wrongly decided for the other reasons stated herein, but is also distinguishable. In *Money*, the plaintiff class stretched across the entire Illinois state prison system, raising numerous complex individualized questions. 2020 WL 1820660, at *13–*15. The plaintiffs here, in contrast, have provided a thorough list of common questions of law and fact, all pertaining to one facility, that require no individualized inquiry. Class Cert. Mot., ECF 6, at 12–14. Defendants simply ignore these questions, each of which "will resolve an issue that is central to the validity of" claims in this litigation and "drive the resolution of the litigation." *Wal-Mart v. Dukes*, 564 U.S. 338, 349–50 (2011).

Even if some of the factual distinctions Defendants raise are relevant, variation among the class does not defeat the commonality. "Commonality simply means that 'there are questions of law or fact common to the class,'" and "[n]ot all questions of law and fact raised in the complaint need be common." *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 334 F.R.D. 96, 105 (E.D. Mich. 2019) (citation omitted). The standard "is not demanding and does not require identicality." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997).

Similarly, Defendants' arguments regarding Rule 23(b) are unpersuasive. Plaintiffs are not seeking to certify the class under 23(b)(3), so they need not meet the predominance and superiority requirements that Defendants spend several pages discussing. *See* Fed. R. Civ. P. 23(b); Resp. at 15–18. As for the requirements of

23(b)(2), it is clearly the case that Defendants have "acted or refused to act on grounds that apply generally to the class," making injunctive and declaratory relief appropriate for the class as a whole. Fed. R. Civ. P. 23(b)(2). Members of the proposed class face a common set of conditions in the Jail as a result of Defendants' policies and practices. *See* Class Cert. Mot. at 10–14. Certification under 23(b)(2) is often proper in prisoners' rights cases, and this is no exception. *Id.* at 19–21.

Finally, contrary to Defendants' arguments, the medically vulnerable subclass is defined by "objective criteria." Resp. at 11–13. It is defined as those who have a set of medical conditions based largely on the CDC's list of groups at high risk from COVID-19. ECF No. 1-6 at 2–3. Whether an inmate has a disease on the list is the kind of objective determination that courts make routinely, and is an appropriate basis for class certification. *See, e.g.*, *Wilson v. Williams*, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22, 2020). This is no less true just because some terms encompass multiple diseases, such as "inherited metabolic disorders" or "chronic conditions associated with impaired lung function." The need to determine if some individuals belong in the class does not defeat certification. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012) (affirming certification although "additional, even substantial, review of files" might be needed to establish class membership).

CONCLUSION

The plaintiffs' motion for class certification should be granted.

Respectfully submitted,

/s/ Krithika Santhanam
Krithika Santhanam (DC Bar No. 1632807)
Thomas B. Harvey (MBE #61734MO)
Advancement Project National Office
1220 L Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 728-9557
Ksanthanam@advancementproject.org
Tharvey@advancementproject.org

/s/ Cary S. McGehee
Cary S. McGehee (P42318)
Kevin M. Carlson (P67704)
Pitt, McGehee, Palmer,
Bonanni & Rivers, PC
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
248-398-9800
cmcgehee@pittlawpc.com
kcarlson@pittlawpc.com

/s/ Philip Mayor
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org
dkorobkin@aclumich.org

/s/ Allison L. Kriger
Allison L. Kriger (P76364)
LaRene & Kriger, PLC
645 Griswold, Suite 1717
Detroit, MI 48226
(313) 967-0100
Allison.kriger@gmail.com

/s/ Alexandria Twinem
Alexandria Twinem (D.C. Bar No. 1644851)
Civil Rights Corps
1601 Connecticut Ave NW, Suite 800
Washington, DC 20009
Tel: 202-894-6126 Fax: 202-609-8030
alexandria@civilrightscorps.org

Attorneys for Plaintiffs/Petitioners

Dated: May 18, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above cause was served via the ECF filing system on May 18, 2020.

Signature: /s/ Carrie Bechill
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
(248) 398-9800
cbechill@pittlawpc.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No. 20-cv-10949

Hon. Linda V. Parker

INDEX OF EXHIBITS

Exhibit A – Oakland County Jail Grievance Policy

Exhibit A

OAKLAND COUNTY SHERIFF'S OFFICE

Policies and Procedures

NUMBER	DATE
249	October 22, 2012

SUBJECT: INMATE GRIEVANCE PROCEDURE

DISTRIBUTION: A,D,E,J - Chaplain

REFERENCE: Rescinds & Replaces Policies & Procedures No. 101 dated February 27, 2004

POLICY

It is the policy of the Oakland County Sheriff's Office to provide inmates a means for resolving complaints regarding institutional matters. Inmate grievances may be filed for alleged violations of civil rights or statutory laws, alleged violations of the Sheriff's Office policy, appeal a disciplinary decision, and alleged unsafe or unsanitary living conditions. Periodic reviews of grievances will be conducted by the Jail Administration to identify any patterns of problem areas and take corrective action, if appropriate.

PROCEDURE

1.0 **INSTITUTIONAL COMPLAINTS**

1.1 The *Oakland County Jail Inmate Grievance* form will be available upon request by an inmate from all staff, sworn and civilian. The forms will be kept throughout the Corrections system at all workstations and on the I:Drive in the Miscellaneous Jail Forms and Documents folder.

1.2 All completed, signed grievance forms received shall be submitted to the supervisor and reviewed. The supervisor's review shall determine whether it is a grievable issue. If not, the form shall be returned to the inmate with a written notation on the front of the form indicating it was reviewed, found to be a nongrievable issue, and identified with the supervisor's signature. Example: Reviewed/nongrievable issue- Supv. Smith #001.

1.3 If it is determined to be a grievable issue, the supervisor shall forward it to the Corrections Grievance Coordinator. The Corrections Grievance Coordinator shall log all grievances in the Grievance Tracking Database. The Corrections Grievance Coordinator shall review the grievance and ensure it has been filed within fifteen (15) days of the alleged event/condition and that it is, in fact, a grievance issue. If the time frame has expired or the issue is not a grievable matter, the form shall be returned to the inmate with a notation of the reason it was returned without being processed and the Grievance Coordinator's signature. If it was submitted properly, the grievance will be given to the appropriate shift lieutenant or the supervisor in the appropriate area (i.e. Jail Clinic, Kitchen, Commissary, etc.) to be assigned for investigation.

1.4 The Corrections Shift Sergeant shall have seven (7) working days to respond to the grievance. If additional time is necessary to conduct a formal investigation, the inmate shall be notified via the *Oakland County Jail Inmate Grievance Response* form that the grievance is in the process of being reviewed, and the response time shall be extended to thirty (30) days.

1.5 The Corrections Shift Sergeant shall provide written notification to the inmate indicating the resolution, remedy, or disposition of an actual grievance using the *Oakland County Jail Inmate Grievance Response* form. This response shall be submitted to the Lieutenant for review and signature before being given to the inmate.

1.6 Inmates unsatisfied with the resolution of a grievance by the Corrections Shift Sergeant shall have five (5) working days after receipt of the response to appeal the decision to the Corrective Services Captain.

1.7 The Corrective Services Captain shall have seven (7) working days to review the appeal and notify the inmate, in writing, of the decision using the *Oakland County Jail Grievance Appeal Response* form. The inmate must sign to indicate receipt of the appeal decision before receiving the appeal form.

1.8 All appeal decisions made by the Corrective Services Captain are final.

1.9 A copy of the signed Inmate Grievance Response and Grievance Appeal Response forms shall be filed in the inmate's booking file and with the Grievance Coordinator. The original grievance form shall be submitted to the Captain's Office for filing.

1.10 The Corrective Services Grievance Coordinator shall keep a record of grievances noting the date, inmate, subject of grievance, disposition, and appeal decision, if relevant.

Michael J. Bouchard

Michael J. Bouchard
Sheriff

MJB/CAS/AMR/DH/vmd/raa

Attachment

Oakland County Jail Operations

INMATE GRIEVANCE FORM

Inmate Name: _____ #_____ Cell: _____ Date: _____

Received By: _____ Date: _____ Time: _____
Staff Print Your Name and Badge Number

Nature of Grievance:

_____

_____

_____

_____

_____

_____

_____

_____

Inmate Effort to Resolve with Staff (Explain):

_____

_____

_____

(Attach Additional Sheets if Necessary)

Inmate Signature: _____ Date: _____ Supv.Initial/Date: _____
Reviewed/Processed

Grievance Response

Referral To: _____ Date: _____

Answer:

_____

_____

_____

_____

_____

_____

_____

Responder's Signature: _____ Date: _____

Lieutenant's Signature: _____ Date: _____

Grievance Coordinator's Signature: _____ Date: _____

( ) Appeal to Captain or Designee Date: _____

Response to Appeal: _____

_____

By: _____ Date: _____ (Revised 08/20/12)

Oakland County Sheriff's Office
Oakland County Jail Operations

CORRECTIVE SERVICES CAPTAIN

INMATE GRIEVANCE APPEAL RESPONSE

To Inmate Name: # Cell:

Date of Grievance:

Response:

Captain's Signature: _____ Date: _____ Time: _____

The captain's decision is final and not grievable

Inmate's Signature: _____ Date: _____