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17 UNITED STATES DISTRICT COURT

18 EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

19
20 Charles Criswell, Levi Johnson, Samuel
Camposeco, Adam Ibarra, and California
21 Attorneys for Criminal Justice,

22 Plaintiffs,

23 vs.

24 Michael Boudreaux, in his official capacity as
Sheriff of Tulare County,

25 Defendant.

Case No. 1:20-cv-01048-DAD-SAB

**NOTICE OF MOTION AND MOTION
FOR CLASS CERTIFICATION**

Filed Concurrently with Motion for
Preliminary Injunction and Supporting
Exhibits

Judge: Hon. Dale A. Drozd
Dept: 5

Submitted for decision without oral argument

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Charles Criswell, Levi Johnson, Samuel Camposeco, Adam Ibarra, and California Attorneys for Criminal Justice will, and hereby do, move for provisional certification of the Provisional Class and a Subclass of Medically Vulnerable Persons, re-appointing Plaintiffs as class representatives, and re-appointing class counsel, pursuant to Federal Rule of Civil Procedure 23 and Local Rule 205.

For purposes of their request for a preliminary injunction, Plaintiffs seek to provisionally certify the following class: “all people who are now, or in the future will be, incarcerated in Tulare County jails” (“Provisional Class”), along with a subclass of “persons whose age or medical conditions put them at increased risk of severe illness from COVID-19 and who are confined pre-trial and pursuant to a judgment of conviction in the Tulare County Jails” (“Medically Vulnerable Subclass”).

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Motion for Preliminary Injunction, the declarations and exhibits filed in support thereof, the Class Action Complaint, the other filings in this action, and any and all evidence, argument, or other matters that may be presented at a hearing.

On October 28, 2020, Amy Gilbert, Lauren Harding, Sara McDermott, Omar Nouredin, and Ariel Teshuva, counsel for Plaintiffs met and conferred with counsel for Defendant by telephone and gave notice of Plaintiffs’ application for provisional class certification. *See* Ex. 1 to PI Motion (Nouredin Decl.) ¶ 2. Counsel advised that Plaintiffs would be moving for a preliminary injunction and would also be seeking to certify the class for purposes of the motion. *Id.* Defense counsel advised that they opposed the motion. *Id.*

On November 2, 2020, Counsel for Defendant advised Plaintiffs that Defendant does not oppose provisional certification of the Provisional Class or the Medically Vulnerable Subclass in the event the Court grants preliminary injunctive relief. *See id.* ¶ 3. Defendant will, however, be opposing any request for preliminary injunctive relief. *Id.*

1 DATED: November 2, 2020

MUNGER, TOLLES & OLSON LLP

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3 By: /s/ Lauren M. Harding

4 Lauren M. Harding

5 *Attorneys for Plaintiffs*
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INTRODUCTION

This Court already has provisionally certified a class of “all people who are now, or in the future will be, incarcerated in Tulare County jails” (“Provisional Class”). *See* Order on Plaintiffs’ Application for Temporary Restraining Order (“TRO”), ECF No. 26, at 21. The Court need not revisit that reasoned decision and should provisionally re-certify the Provisional Class for purposes of Plaintiffs’ present request for preliminary injunctive relief.

In addition, the Court should provisionally certify a subclass of “persons whose age or medical conditions put them at increased risk of severe illness from COVID-19 and who are confined pre-trial and pursuant to a judgment of conviction in the Tulare County Jails” (“Medically Vulnerable Subclass”).¹ Like the Provisional Class, the Medically Vulnerable Subclass readily meets all four requirements of Rule 23(a) and can be maintained as a class under Rule 23(b)(2). Designating a subclass is appropriate to assist in managing Plaintiffs’ requested emergency relief, which asks this Court to order Defendant to adopt policies and procedures to identify and further protect incarcerated individuals who are predisposed to suffering severe illness from COVID-19. *See* Fed. R. Civ. P. 23(c)(5) (“When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”).

In certifying this subclass, this Court will find itself in good company, as federal courts within the Ninth Circuit have granted class certification for purposes of entering preliminary injunctive relief for medically vulnerable incarcerated individuals. *See, e.g., Torres v. Milusnic*, No. 20-cv-4450 CBM PVCx, 2020 WL 4197285, at *23 (C.D. Cal. July 14, 2020) (provisionally certifying class of persons with medical vulnerabilities); *Ahlman v. Barnes*, 445 F. Supp. 3d 671,

¹ The conditions that increase the risk of severe illness from COVID-19 include: type 2 diabetes mellitus; chronic kidney disease; cancer; COPD (chronic obstructive pulmonary disease); immunocompromised state, weakened immune system from solid organ transplant; obesity (body mass index of 30 or higher); serious heart conditions such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; asthma (moderate to severe); cerebrovascular disease; liver disease; cystic fibrosis; hypertension (high blood pressure); compromised immune system (immunosuppression) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; neurological conditions, such as dementia; pregnancy; pulmonary fibrosis (having damaged or scarred lung tissues); overweight (BMI > 25kg/m², but <30kg/m²); thalassemia; type 1 diabetes mellitus; people aged 55 or older. *See* Ex. 4, Harawa Decl. at ¶ 36.

687 (C.D. Cal. 2020) (same); *Alcantara v. Archambeault*, No. 20CV0756 DMS (AHG), 2020 WL 2315777, at *7 (S.D. Cal. May 1, 2020) (same). Defendant does not oppose certification of the Provisional Class or the Medically Vulnerable Subclass in the event that the Court grants preliminary injunctive relief; however, Defendant plans to oppose Plaintiffs' request for preliminary injunctive relief.

ARGUMENT

This Court has previously provisionally certified the Provisional Class because it met all four requirements under Rule 23(a) and could be maintained as a class under Rule 23(b)(2). TRO at 21. Because Defendant's policies or lack of policies at the Jails continue to pose a substantial threat to all incarcerated persons' health and lives, the Court should provisionally re-certify the Provisional Class for purposes of Plaintiffs' request for a preliminary injunction.

Like the Provisional Class, the Medically Vulnerable Subclass meets each Rule 23(a) requirement: (1) by Defendant's own admission, at least 40 residents of Tulare County Jails are medically vulnerable, rendering joinder of individual claims to be impracticable; (2) members of the proposed Medically Vulnerable Subclass are subject to the same common questions as to whether or not Defendant must enact policies that accommodate their particular medical conditions; (3) Plaintiffs Levi Johnson and Charles Criswall, who each suffer from comorbidities with COVID-19, are medically vulnerable and thus have claims typical of the class; (4) this Court already has determined Plaintiffs are adequate class representatives, and Plaintiffs Johnson and Criswall would be adequate representatives for the Subclass. The Medically Vulnerable Subclass can also be maintained under Rule 23(b)(2) because, among other reasons, members would directly benefit from any injunctive relief this Court orders for medically vulnerable persons.

I. THE COURT SHOULD RE-CERTIFY THE PROVISIONAL CLASS FOR PURPOSES OF THE PRELIMINARY INJUNCTION

This Court should provisionally certify the Provisional Class again for purposes of the preliminary injunction, which the Court has previously determined meets the requirements of Rule 23(a) and Rule 23(b)(2). As Plaintiffs previously argued in connection with the TRO, the Provisional Class meets all four requirements of Rule 23(a): (1) numerosity is satisfied because,

1 according to data reported by Defendant, as of August 1, 2020, there were approximately 1,086
2 people incarcerated in the Jails; (2) there are common questions pertaining to the entire class
3 because class members are subject to the same policies or lack of policies related to social
4 distancing, testing, and legal visits; (3) Plaintiffs' claims are typical of class members' claims
5 because they are all currently incarcerated in the Jails and their claims arise from the same alleged
6 failures of Defendant to adequately respond to COVID-19; (4) Plaintiffs are adequate class
7 representatives because there is no conflict between the named Plaintiffs and members of the
8 Provisional Class and Plaintiffs will vigorously prosecute this action; and the law firm of Munger,
9 Tolles & Olson LLP and the ACLU of Northern California have extensive experience litigating
10 class action lawsuits, including representing incarcerated people and in cases related to conditions
11 of confinement during COVID-19. TRO at 22-26 (summarizing Plaintiffs' arguments). Based on
12 those arguments, the Court provisionally certified the Provisional Class in connection with
13 Plaintiffs' request for a TRO. *Id.* This Court also certified the class in response to Plaintiffs'
14 argument that the Provisional Class could be provisionally maintained as a class under Rule
15 23(b)(2) because Plaintiffs seek uniform injunctive relief and Defendant's actions and omissions
16 in failing to adequately respond to COVID-19 violate the rights of all proposed class members.
17 *See id.* at 26-27 (citing *Parsons v. Ryan*, 754 F.3d 657, 688–89 (9th Cir. 2014)).

18 As explained further in Plaintiffs' concurrently filed Motion for Preliminary Injunction,
19 not enough has changed in the Jails since this Court's September 2, 2020 TRO to justify departure
20 from the Court's previous decision to provisionally certify the class. Regarding numerosity, to
21 Plaintiffs' knowledge, Defendant has not reduced the number of incarcerated individuals in the
22 Jails in response to the Court's Order. And Defendant continues to operate the Jails in a manner
23 that violates the constitutional rights of incarcerated people, including by (1) failing to implement
24 an effective testing policy that would identify and help isolate persons infected with the virus,
25 (2) failing to identify and adequately protect the Medically Vulnerable Subclass, and (3) in
26 response to this Court's TRO, implementing a punitive "social distancing" policy in which
27 incarcerated individuals are allowed out of their cells for only three hours per week. Those policies
28 (or lack of policies) raise questions common to the entire class, such as whether defendant has

1 implemented effective testing protocols to prevent the spread of COVID-19 in the Jails. *See* TRO
 2 at 23. Defendant’s post-TRO conduct also poses new common questions, such as whether
 3 Defendant’s “social distancing” policy is punitive and whether it interferes with class members’
 4 right to exercise under the U.S. Constitution. As before, Plaintiffs’ claims are typical of the class
 5 because they all relate to the same alleged failures of Defendant to respond adequately to COVID-
 6 19. *See* TRO at 24-25. Finally, Plaintiffs, who are still incarcerated in the Jails, are adequate class
 7 representatives because they remain committed to zealously prosecuting this case on behalf of all
 8 class members.

9 In short, the conditions at the Jails have not changed enough to justify departing from this
 10 Court’s earlier, well-reasoned decision that the Provisional Class should be provisionally certified.
 11 This Court should thus re-certify the Provisional Class for purposes of the preliminary injunction.

12 **II. THE PROPOSED SUBCLASS MEETS THE REQUIREMENTS OF RULE 23(A)**

13 **A. The Subclass Is Too Numerous Such That Joinder Is Impracticable**

14 This Court already has determined that the Provisional Class, totaling approximately 1,086
 15 persons as of August 1, 2020, is too numerous such that joinder of individual parties would be
 16 impracticable. *See* TRO at 22. The Medically Vulnerable Subclass is also sufficiently numerous.
 17 For purposes of Rule 23(a)(1), although no specific number is needed, “forty or more members
 18 will generally satisfy the numerosity requirement.” *Arroyo v. United States Dep’t of Homeland*
 19 *Sec.*, No. SACV 19-815 JGB, 2019 WL 2912848, at *9 (C.D. Cal. June 20, 2019).

20 There are significantly more than 40 persons residing in Tulare County Jails who have a
 21 medical condition that render them predisposed to suffering severe illness from COVID-19: In
 22 response to a Public Records Act request, Defendant has acknowledged that at least 46 of his
 23 residents have diabetes, 31 have chronic lung disease or moderate to severe asthma, 30 have
 24 severe obesity, and 60 have liver diseases. *See* ECF 11-7 (Verner-Crist Decl.), Ex. F. As explained
 25 by Dr. Nina Harawa, each of these conditions predisposes the individual to suffering severe illness
 26 from COVID-19. *See* Ex 4, Harawa Decl. ¶ 36. Accordingly, by Defendant’s own admission, over
 27 40 persons in Tulare County Jails have conditions qualifying them for the Medically Vulnerable
 28 Subclass.

1 And there is reason to believe Defendant’s reported figures grossly underestimate the
 2 figures of people with vulnerable medical conditions. *See Inland Empire-Immigrant Youth*
 3 *Collective v. Nielsen*, No. EDCV 17-2048 PSG, 2018 WL 1061408, at *7 (C.D. Cal. Feb. 26,
 4 2018) (numerosity satisfied when “general knowledge and common sense indicate that [the class]
 5 is large”) (quotations omitted). The Centers for Disease Control (“CDC”) estimates that 33.2% of
 6 adults over 20 have hypertension, 15% of the population has diabetes, 7.7% of adults over 18 have
 7 asthma.² Furthermore, incarcerated individuals are more likely to have health problems from
 8 COVID-19 than the general population. *See Harawa Decl.* ¶ 35. If the population of the Tulare
 9 County Jails is representative of those statistics, as many as 300 or more persons have
 10 hypertension, 150 or more have diabetes, and 70 or more have asthma. The Medically Vulnerable
 11 Subclass plainly satisfies Rule 23(a)’s numerosity requirement.

12 **B. There Are Common Questions of Law and Fact to the Subclass**

13 The Medically Vulnerable Subclass also raises “questions of law or fact common to the
 14 [sub]class.” *See Fed. R. Civ. P. 23(a)(2)*. This requirement has “been construed permissively,” *see*
 15 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011), and can be satisfied with even
 16 a single common issue. *See e.g., Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir.
 17 2013) (commonality “does not . . . mean that *every* question of law or fact must be common to the
 18 class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact.”) (citations and
 19 internal marks omitted) (emphasis in original). Stated differently, commonality requires plaintiffs
 20 to demonstrate only that their claims “depend upon a common contention . . . [whose] truth or
 21 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
 22 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

23
 24 _____
 25 ² *See* National Center for Health Statistics, *FastStats: Hypertension* (Oct. 30, 2020),
 26 <https://www.cdc.gov/nchs/fastats/hypertension.htm>; National Center for Health Statistics,
 27 *FastStats: Diabetes* (Oct. 30, 2020), <https://www.cdc.gov/nchs/fastats/diabetes.htm>; National
 28 Center for Health Statistics, *FastStats: Asthma* (Oct. 30, 2020), <https://www.cdc.gov/nchs/fastats/asthma.htm>. The Court may also take judicial notice of publicly
 accessible information displayed on government websites. *See King v. Cnty. of L.A.*, 885 F.3d 548,
 555 (9th Cir. 2018).

1 This Court has already determined that there are questions of law and fact common to the
 2 Provisional Class to satisfy the requirements under Rule 23(a)(2). *See* TRO at 24. Many of the
 3 same questions pertaining to the Provisional Class also apply to the Medically Vulnerable
 4 Subclass. Namely, all members of the Medically Vulnerable Subclass are subject to the same
 5 practices and policies (or lack thereof) as non-medically vulnerable individuals. Whether or not
 6 members of the Medically Vulnerable Subclass should be subject to *additional* practices and
 7 policies that accommodate their increased risk of contracting COVID-19 is a question common to
 8 the subclass. This question has several components that are also common to the class—for
 9 instance, (a) if the Medically Vulnerable Subclass should be housed separately from the general
 10 population; (b) if the Subclass should eat with, bathe with, and use the same facilities as the
 11 general population; and (c) if the Subclass should receive additional testing and/or medical care.

12 Commonality is readily satisfied where, as here, a lawsuit challenges “systemic policies
 13 and practices that allegedly expose inmates to a substantial risk of harm,” even if there may be
 14 “individual factual differences among class members.” *Parsons v. Ryan*, 754 F.3d 657, 681-82
 15 (9th Cir. 2014) (collecting cases and affirming certification of class and subclass of inmates
 16 challenging Eighth Amendment violations in Arizona’s prison system); *see also Armstrong v.*
 17 *Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*,
 18 543 U.S. 499 (2005), (“[C]ommonality is satisfied where the lawsuit challenges a system-wide
 19 practice or policy that affects all of the putative class members.”).

20 **C. The Plaintiffs’ Claims Are Typical of Subclass Members’ Claims**

21 Named Plaintiffs’ claims are also typical of those of both the Provisional Class and
 22 proposed Medically Vulnerable Subclass. *See* Fed. R. Civ. P. 23(a)(3) (requiring “the claims . . .
 23 of the representative parties [be] typical of the claims . . . of the class”). The test of typicality is
 24 “‘whether other members [of the class] have the same or similar injury, whether the action is
 25 based on conduct which is not unique to the named plaintiffs, and whether other class members
 26 have been injured by the same course of conduct.’” *Parsons*, 754 F.3d at 685 (citation omitted).
 27 Typicality is satisfied “when each class member’s claim arises from the same course of events,
 28 and each class member makes similar legal arguments to prove the defendant’s liability.”

1 *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quotation and citation omitted). “[T]he
 2 typicality requirement is permissive and requires only that the representative’s claims are
 3 reasonably co-extensive with those of absent class members; they need not be substantially
 4 identical.” *Id.* (quotation marks and citation omitted).

5 In its September 2, 2020 Order, the Court found that the named Plaintiffs’ claims were
 6 typical of the Proposed Class. *See* TRO at 25. Similarly, the claims of Plaintiff Levi Johnson, who
 7 suffers from congenital heart failure, hypertension, and respiratory breathing problems, and
 8 Plaintiff Charles Criswell, who suffers from diabetes and hypertension, are typical of those of the
 9 Medically Vulnerable Subclass. *See* Decl. of Johnson, ECF 11-17 at ¶ 3; Decl. of Criswall, ECF
 10 11-13. Like Plaintiffs Johnson and Criswall, the Medically Vulnerable Subclass’s claims all arise
 11 from the same failure of Defendant to create adequate policies and procedures to protect the
 12 unique vulnerabilities of those who are at increased risk of severe illness from COVID-19.
 13 Without this Court’s intervention, all persons in the Medically Vulnerable Subclass will suffer the
 14 same harm: The significant and avoidable risk of serious illness and even potential death from
 15 COVID-19.

16 **D. Plaintiffs’ Representation Is Adequate**

17 This Court already has ruled that the named Plaintiffs met the adequacy requirement under
 18 Rule 23(a)(4) because Plaintiffs were adequate class representatives and class counsel. *See* TRO at
 19 26. The Court appointed the ACLU Foundation of Northern California and the law firm Munger,
 20 Tolles & Olson as class Counsel. *Id.* at 27. The Court need not revisit those rulings for purposes of
 21 this provisional class certification request and should reaffirm its ruling that named Plaintiffs and
 22 their counsel are adequate representatives. In addition, because Plaintiffs Levi Johnson and
 23 Charles Criswall have medical vulnerabilities and would be subject to any injunctive relief this
 24 Court orders for the Subclass, they are adequate representatives for the Medically Vulnerable
 25 Subclass.

26 **III. THE PROPOSED SUBCLASS MEETS THE REQUIREMENTS OF RULE 23(B)(2)**

27 In addition to satisfying the four prerequisites of Rule 23(a), the Medically Vulnerable
 28 Subclass qualifies for class treatment under Rule 23(b)(2). Rule 23(b)(2) requires Plaintiffs to

1 establish that “the party opposing the class has acted or refused to act on grounds that apply
2 generally to the class, so that final injunctive relief or corresponding declaratory relief is
3 appropriate respecting the class as a whole.” Rule 23(b)(2) was adopted precisely for
4 circumstances such as these—namely, to “permit the prosecution of civil rights actions.” *Walters*
5 *v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Accordingly, Rule 23(b)(2) is satisfied when, as
6 here, “class members complain of a pattern or practice that is generally applicable to the class as a
7 whole.” *Rodriguez*, 591 F.3d at 1125-26 (citations omitted) (holding that class of noncitizens
8 bringing writs of habeas corpus claims relating to detention met Rule 23(b)(2) criteria because “all
9 class members’ [sought] the exact same relief as a matter of statutory or, in the alternative,
10 constitutional right”). That some class members “have suffered no injury or different injuries from
11 the challenged practice does not prevent the class from meeting the requirements of Rule
12 23(b)(2).” *Id.*

13 In its September 2, 2020 Order, the Court found the Provisional Class “clearly satisfie[s]
14 the requirements of Rule 23(b)(2).” TRO at 27 (citing *Parsons v. Ryan*, 754 F.3d 657 (9th Cir.
15 2014)). Like the Provisional Class, the Medically Vulnerable Subclass meet the requirements of
16 Rule 23(b)(2) for at least two reasons. *First*, Defendant’s actions and omissions are generally
17 applicable to the Medically Vulnerable Subclass as a whole because his failure to develop policies
18 and procedures that accommodate the unique vulnerabilities of persons who are at greater risk of
19 illness from COVID-19 significantly increases the risks for all of the members of the proposed
20 Medically Vulnerable Subclass. *Second*, Plaintiffs’ requested injunctive relief, if enacted, would
21 apply uniformly to each Subclass member and would benefit each member of the Medically
22 Vulnerable Subclass. For example, an order requiring the Jail to provide routine medical checks to
23 the Medically Vulnerable Subclass would apply to each Subclass member uniformly—regardless
24 of whether or not any class member has contracted COVID-19 and regardless of what medical
25 condition they have (e.g., diabetes or asthma).

26 In short, this Court’s decision to grant Plaintiffs’ request for preliminary injunctive relief
27 would afford all Subclass members constitutionally adequate protection from COVID-19.
28 Certification under Rule 23(b)(2) is appropriate under such circumstances. *See Parsons*, 754 F.3d

1 at 689 (holding declaratory and injunctive relief proper as to class where “every [member] . . . is
2 allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every
3 class member by uniform changes in . . . policy and practice”).

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiffs respectfully request that the Court (1) provisionally re-
6 certify the Provisional Class for purposes of granting preliminary injunctive relief and (2)
7 provisionally certify the Medically Vulnerable Subclasses.

8
9 DATED: November 2, 2020

MUNGER, TOLLES & OLSON LLP

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11 By: /s/ Lauren M. Harding

12 Lauren M. Harding

13 Attorneys for Plaintiffs
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