UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, *Plaintiffs-Petitioners*, v. QUINCY BOOTH, in his official capacity as Director of the District of Columbia Department of Corrections, *et al.*, *Defendants-Respondents*.	No. 1:20-cv-_____

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Pursuant to Federal Rule of Civil Procedure 23 and Local Rule 23.1, Plaintiffs move the Court to certify this case as a class action and to appoint Plaintiffs' counsel as class counsel. Defendants' counsel has not yet been assigned and therefore cannot be asked about Defendants' position on this motion. Plaintiffs assume the motion will be opposed.

INTRODUCTION

Plaintiffs file this class action to challenge Defendants' reckless and deliberately indifferent treatment of the people in their custody and care at the D.C. Central Detention Facility and the D.C. Correctional Treatment Facility (together, the "D.C. Jail" or the "Jail"), when confronted with the life-threatening COVID-19 pandemic. As alleged in the complaint and demonstrated in Plaintiffs' application for a temporary restraining order and motion for a preliminary injunction, Defendants are utterly failing to take measures necessary to prevent the Jail from becoming a death trap for those confined there.

Plaintiffs' proposed class consists of all persons confined or to be confined in the D.C.

Department of Corrections ("DOC") Central Detention Facility or Correctional Treatment Facility, including as subclasses: (i) persons confined pre-trial, and (ii) persons confined pursuant to a judgment of conviction. That class (along with each of its subclasses) satisfies all of the requirements of Federal Rule of Civil Procedure 23(a). First, the class members are numerous, consisting of more than 1,600 inmates and detainees, making joiner impracticable. Second, the class members share common questions of fact, as they are all subject to the same life-threatening conditions and practices. They also share common questions of law, including whether the Defendants' conduct violates their rights under the Fifth or Eighth Amendments. Third, the class representatives are subject to the same conditions as all class members and therefore assert claims typical of those asserted by the class. Fourth, the class representatives and their experienced counsel will fairly and adequately protect class interests and will vigorously prosecute the action on behalf of the class.

Certification of Plaintiffs' proposed class—and provisional certification, in conjunction with emergency relief—is warranted under both Rule 23(b)(1), because separate actions by class members would risk creating inconsistent outcomes and incompatible standards of conduct for Defendants, and under Rule 23(b)(2), because Defendants are acting in the same matter with respect to the class, such that a declaration and injunction with respect to the whole class is appropriate.

Class members' claims are not dependent on the facts regarding their underlying (alleged or adjudicated) criminal conduct or on any other individualized determinations. The central question is whether Defendants' actions and inactions fall below minimum constitutional standards. More than 1,600 inmates and detainees at the Jail are being or will be subjected to the consequences of those actions and inactions, and are or will be exposed to similar harms as a result.

This Court should therefore certify the proposed class and appoint class counsel.

FACTUAL BACKGROUND

The relevant facts are set out in Plaintiffs' complaint and in their application for a temporary restraining order and motion for a preliminary injunction and declarations in support thereof. Very briefly, COVID-19 poses a substantial threat to the health and the very lives of millions of Americans. Because it is highly infectious, "social distancing" and energetic sanitation practices are essential to preventing its exponential spread. Because people confined at the Jail are kept in close quarters with many others, and because sanitation practices at the Jail are inadequate to the point of uselessness, the Jail is a virtual petri dish for contagion. And the mortality rate for infected individuals is significant, perhaps as high as 3.4%. Absent immediate injunctive relief, being confined at the Jail will result in severe illness, permanent medical consequences, and even death for a significant number of class members.

LEGAL STANDARD

Federal Rule of Civil Procedure 23 sets out the requirements for certification of a class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997); *J.D. v. Azar*, 925 F.3d 1291, 1312 (D.C. Cir. 2019). First, Plaintiffs must satisfy the four Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."). Second, Plaintiffs must demonstrate that the case meets the requirements of one of Rule 23(b)'s subsections. Rule 23(b)(1) requires a showing that "prosecuting separate actions by . . . individual class members would create a risk of . . . varying adjudications . . . that would establish incompatible standards of conduct." Fed. R. Civ. P. 23(b)(2); *see Amchem*, 521 U.S. at 614. Alternatively, Rule 23(b)(2) requires a showing that "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); *see Wal-Mart Stores, Inc.*, 564 U.S. at 360.

ARGUMENT

Class actions regarding the treatment of individuals confined in District of Columbia correctional institutions are nothing new to this Court. *See, e.g., Twelve John Does v. District of Columbia*, 841 F.2d 1133 (D.C. Cir. 1988) (Lorton Central facility); *John Doe v. District of Columbia*, No. 79–1726, 1987 WL 13350 (D.D.C. June 30, 1987) (Lorton Maximum Security Institution); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.D.C. 1989) (Occoquan facilities); *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (pretrial detainees at D.C. Jail); *Inmates, D. C. Jail v. Jackson*, 416 F. Supp. 119 (D.D.C. 1976) (post-trial inmates at D.C. Jail); *Bynum v. District of Columbia*, 214 F.R.D. 27 (D.D.C. 2003) (over-incarceration at D.C. Jail). This case equally qualifies for class action treatment, and requires certification and relief even more urgently.

I. The Proposed Class Satisfies the Rule 23(a) Requirements.

A. The Proposed Class Satisfies the Numerosity Requirement.

The proposed class satisfies the requirement that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requirement "imposes no absolute limitations" and is determined on a case-by-case basis. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 51 (D.D.C. 2010) (quoting *Gen. Tele. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)); *see also Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 25 (D.D.C. 2006) ("There is no specific threshold that must be surpassed in order to satisfy the numerosity requirement; rather, each decision turns on the particularized circumstances of the case."). However, this Court has "generally found that the numerosity requirement is

satisfied . . . where a proposed class has at least forty members." *Radosti*, 717 F. Supp. 2d at 51 (citing cases); *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 14 (D.D.C. 2015). "[A] plaintiff need not provide the exact number of potential class members in order to satisfy this requirement," *Bynum v. District of Columbia*, 214 F.R.D. 27, 32–33, "[s]o long as there is a reasonable basis for the estimate provided." *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999).

"Demonstrating impracticability of joinder does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make[s] use of the class action appropriate." *DL v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013) (quotation marks and citation omitted), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). Factors relevant to impracticability include the "financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id.* (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)).

Here, the proposed plaintiff class satisfies the numerosity requirement because it will comprise approximately 1,600 inmates and detainees, with hundreds in each subclass. *See* D.C. Dep't of Corr., *Daily Population Report for March 21st Through March 27th 2020* (March 27, 2020), *available at* https://doc.dc.gov/node/307122. \ Thus, there is more than a "reasonable basis" for estimating that the proposed class will be approximately forty times larger than the general benchmark of forty people.

Joinder is also impractical for other reasons. First, the class seeks relief for future class members. Joinder is inherently impracticable where "the class seeks prospective relief for future class members, whose identities are currently unknown and who are therefore impossible to join." *DL*, 302 F.R.D. at 11. And, of course, the putative class members are incarcerated, making it

extremely difficult for them to institute individual suits. *See, e.g.*, D.C. Code § 12-302 ("Disability of Plaintiff") (tolling statutes of limitations for incarcerated individuals on the ground that imprisonment is a disability to filing a lawsuit). The overwhelming majority of putative class members are also indigent, which raises another barrier to individual suits. *See Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 359 (D. Colo. 1999) (finding joinder impracticable where many class members could not afford to bring individual actions); *Jackson v. Foley*, 156 F.R.D. 538, 54142 (E.D.N.Y. 1994) (finding joinder impracticable where the majority of class members came from low-income households, greatly decreasing their ability to bring individual lawsuits). Furthermore, lawyers practicing social distancing and other measures to stay safe from COVID-19 has made it even more difficult—if not entirely impossible—for many of the proposed class members to secure legal representation to pursue individual suits.

Accordingly, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

B. The Proposed Class Satisfies the Commonality Requirement.

Rule 23(a)(2), which requires that there be "questions of law or fact common to the class," is likewise satisfied. The key to commonality is that class members' claims "must depend upon a common contention . . . 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." *Wal-Mart*, 564 U.S. 338, 350 (2011). "Even a single common question" will support a commonality finding, *id.* at 359 (alterations omitted), so long as its resolution will "generate common answers for the entire class," *Thorpe v. District of Columbia*, 303 F.R.D. 120, 146-47 (D.D.C. 2014).

Commonality is satisfied where there is a single or "uniform policy or practice that affects all class members." *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013). "[F]actual

variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Bynum,* 214 F.R.D. at 33. Thus, in *Bynum,* Judge Lamberth explained that a proposed class challenging over-detention at the Jail satisfied the commonality requirement because "despite the fact that some of the plaintiffs might have been detained past their release date for a longer time period than other plaintiffs, there are questions of law and fact that are common to the class." *Id*. at 34.

The same is true here. Proposed class members have, at least, the following key *factual issues* in common:

- Whether Defendants knew, or should have known, about the risks of COVID-19 to members of the proposed class;
- Whether Defendants have exposed, and are continuing to expose, members of the proposed class to a grave risk of serious harm, including death;
- Whether Defendants have denied members of the proposed class the ability to practice socially distancing;
- Whether Defendants have denied members of the proposed class the ability to engage in adequate personal sanitary practices.

In addition, the following *legal* questions are common to all proposed class members:

- Whether Defendants have recklessly failed to act with reasonable care to mitigate the risk of COVID-19 to members of the proposed class;
- Whether Defendants have acted with deliberate indifference towards members of the proposed class by failing adequately to safeguard their health and safety in the face of a known serious danger.

The Jail's practices with respect to COVID-19 affect all class members; they do not arise out of circumstances unique to each member. Those practices will also result in "common harms," *DL*, 860 F.3d at 724. And all class members seek the same declaratory and injunctive relief. The Court's determination of the legality of Defendants' actions and inactions on one or more of the grounds alleged by class members will resolve all class members' claims "in one stroke." *Wal-Mart*, 564 U.S. at 350.

Accordingly, the proposed class satisfies the commonality requirement of Rule 23(a)(2).

C. The Proposed Class Satisfies the Typicality Requirement.

Plaintiffs' claims are also "typical of the claims . . . of the class. Fed. R. Civ. P. 23(a)(3). "The typicality requirement is satisfied 'if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability.'" *Radosti*, 717 F. Supp. 2d at 52 (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001)). The typicality and commonality requirements "often overlap because both serve as guideposts" in determining "whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (internal quotations and citations omitted).

The typicality requirement "has been liberally construed." *Bynum*, 214 F.R.D. at 34. As with commonality, "[t]ypicality is not destroyed merely by 'factual variations.'" *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (internal quotations and citations omitted). "Rather, if the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Bynum*, 214 F.R.D. at 35; *see also*

Richardson v. L'Oreal USA, Inc., 991 F. Supp. 2d 181, 196 (D.D.C. 2013) ("[C]ourts have found the typicality requirement satisfied when class representatives suffered injuries in the same general fashion as absent class members.") (internal quotation marks and citation omitted).

The named Plaintiffs claims are typical of the proposed class claims. As explained above, their claims arise from the same response—or non-response—to the COVID-19 pandemic by Defendants that provides the basis for all class members' claims. They therefore "arise from the same course of conduct that gives rise to the other class members' claims," *Bynum*, 214 F.R.D. at 35, and are based on the same legal theories as all class members' claims. Moreover, the injuries that Plaintiffs have suffered, will continue to suffer, and may suffer—namely, exposure to a deadly virus and potential serious illness, permanent disability, and death—arise from this same course of conduct and are typical of the injuries of the class as a whole. Notwithstanding any individual differences that may exist between the Plaintiffs and other members of the proposed class, Plaintiffs' claims "are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R*, 80 F. Supp. 3d at 181.

Accordingly, Plaintiffs' claims satisfy the typicality requirement of Rule 23(a)(3).

D. The Proposed Class Satisfies the Adequacy Requirement.

The class representatives also "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To establish adequacy, "(1) the named representative must not have antagonistic or competing interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does*, 117 F.3d at 575 (quoting *Nat'l Ass'n of Regional Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)).

Plaintiffs satisfy both criteria. First, Plaintiffs' interests are not antagonistic to those of the class. Plaintiffs and class members are suffering the same harms. They assert the same legal claims, seek the same litigation outcomes, and would benefit from the same declaratory and injunctive relief. Moreover, Plaintiffs are not seeking monetary relief, so no financial conflict can arise between the claims of Plaintiffs and those of other class members. Thus, there is no conflict between Plaintiffs and unnamed class members.

Second, Plaintiffs' counsel are competent to represent the class and are prepared to vigorously defend the interests of the class as a whole. They have extensive experience litigating cases involving criminal defendants and inmates, and in litigating civil rights class actions. *See* Exh. A, Declaration of Jonathan W. Anderson; Exh. B, Declaration of Arthur B. Spitzer.

Accordingly, the proposed class satisfies the adequacy requirement of Rule 23(a)(4).

II. Class Certification is Appropriate Under Rule 23(b)(1), Rule 23(b)(2), or Both.

In addition to satisfying the four criteria of Rule 23(a), the proposed class must also fall into one of the three categories outlined in Rule 23(b). This class action qualifies for certification under either Rule 23(b)(1) or Rule 23(b)(2). *See Wal-Mart*, 564 U.S. at 361-62 ("Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class.") (footnote omitted).

Rule 23(b)(1) permits class certification where "prosecuting separate actions by or against individual class members would create a risk of (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . . ." Certification under Rule 23(b)(1)(A) "is appropriate when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either

legal or illegal as to all members of the class." *Adair v. England*, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 Moore's Fed. Practice § 23.41[4] (3d ed. 2000)).

Plaintiffs easily satisfy this standard. If each of approximately 1,600 individual class members were to bring separate suits making the allegations made in the complaint in this case, the adjudication of these actions would risk creating inconsistent decisions that would establish varying standards to which Defendants would have to adhere. Plaintiffs seek declaratory and injunctive relief that is applicable to all class members, and certification pursuant to Rule 23(b)(1) is therefore appropriate.

Additionally, Rule 23(b)(2) permits 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." The Supreme Court has explained that

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

Wal-Mart, 564 U.S. at 360 (quotation marks and citation omitted). Courts in this District have interpreted Rule 23(b)(2) to impose two requirements: "(1) the defendant's action or refusal to act must be generally applicable to the class, and (2) plaintiff must seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Steele v. United States*, 159 F. Supp. 3d 73, 81 (D.D.C. 2016) (quotations and citations omitted); *Bynum*, 214 F.R.D. at 37; *R.I.L.-R*, 80 F. Supp. 3d at 182. To satisfy Rule 23(b)(2), "it is enough to show that a defendant has acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity." *Bynum*, 214 F.R.D. at 37 (internal citation omitted).

Those requirements are easily satisfied. As already explained, Defendants' challenged practices are not tailored to individual inmates or detainees, but apply to the Jail population as a whole. They apply to all class members simply by virtue of their status as persons held at the Jail, without regard to the individual circumstances of their underlying criminal cases or any other differences among them. For the same reason, all class members seek the same declaratory and injunctive relief. Certification pursuant to Rule 23(b)(1) is therefore also appropriate.

To the extent differences between the constitutional standards applicable to pre-trial and post-conviction detainees could be relevant—although plaintiffs do not think they are—the proposed subclasses would address that issue. As discussed in Plaintiffs' memorandum in support of their application for a temporary restraining order and a preliminary injunction, pre-trial detainees are protected by the Fifth Amendment, while post-conviction detainees are protected by the Eighth Amendment. Because Defendants' conduct here falls below the standard set by each Amendment, certification of a single class would be appropriate. But because there is a theoretical possibility that the different legal standards could lead to different determinations, subclasses of pre-trial and post-conviction detainees would also be appropriate. Differing legal standards have been recognized as a basis for subclasses, although generally in cases in which class members seek monetary relief. *See, e.g.*, *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 174 (D.S.C. 2018) (creating subclasses "to address variations in the applicable law"); *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997) (creating subclasses of class members from states that do not require present physical injury to recover for medical monitoring and from states that do require present physical injury in order to recover for medical monitoring). Each such subclass would satisfy all of Rule 23's requirements, for the same reasons, explained above, that the main class does.

III. The Court Should Designate Plaintiffs' Counsel as Class Counsel.

Upon certifying the class, the Court must also appoint class counsel. Fed. R. Civ. P. 23(c)(1)(B); 23(g). Rule 23(g) requires the Court to consider the following four factors: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. *Id*. at 23(g)(1)(A)(i)–(iv). The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Id*. at 23(g)(1)(B).

Plaintiffs' counsel satisfy all four criteria. Counsel from the D.C. Public Defender Service and the American Civil Liberties Union of the District of Columbia jointly represent Plaintiffs. Counsel from both organizations are experienced federal litigators, some of whom have specific expertise in representing criminal defendants and incarcerated persons, and some of whom have specific experience in class action litigation. *See* declarations of Jonathan W. Anderson and Arthur B. Spitzer

As reflected in the complaint and preliminary injunction papers filed in this matter, Plaintiffs' counsel have already devoted substantial time investigating the factual and legal issues in this case, and will continue to do so throughout the pendency of the litigation. *See, e.g., Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010) ("The plaintiffs have shown that they will adequately represent the class. . . . Counsel have already committed substantial time and resources to identifying and investigating potential claims in the action.").

Accordingly, the Court should appoint Plaintiffs' counsel as class counsel in this case.

IV. Alternatively, the Court Should Provisionally Certify the Class.

The early stage of this litigation should not deter the Court from certifying the Plaintiff class, because the propriety of class treatment here is apparent. No consideration of the merits is required, because, "[a]s the Supreme Court has long held, courts may not examine whether 'plaintiffs have stated a cause of action or will prevail on the merits' in order to determine whether class certification is appropriate." *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974)).

Nevertheless, should the Court not be prepared to certify the class at this time, it should certify the class provisionally, subject to later reconsideration or amendment. Courts in this district have done so many times. *See, e.g.*, *Kirwa v. U.S Dep't of Defense*, 285 F. Supp. 3d 21, 44 (D.D.C. 2017) (granting provisional class certification in context of granting preliminary injunction); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (same); *Chang v. United States*, 217 F.R.D. 262, 274 (D.D.C. 2003) (granting provisional class certification before defendants had filed their opposition to certification); *Bame v. Dillard*, No. 05-cv-1833, 2008 WL 2168393 at *9 (D.D.C. May 22, 2008) (provisionally certifying class "without prejudice to Defendant's renewed objections after the close of discovery"); *Kifafi*, 189 F.R.D. at 178 (granting provisional class certification and noting that Rule 23(c)(1) "provid[es] that class certification may be granted provisionally and subsequently altered or amended").

CONCLUSION

For the reasons stated above, Plaintiffs' motion should be granted. Plaintiffs respectfully request that the Court:

(1) certify the proposed class, consisting of all persons confined or to be confined in D.C. Department of Corrections ("DOC") correctional facilities, including as subclasses: (i) persons confined pre-trial, and (ii) persons confined pursuant to a judgment of conviction; and

(2) appoint undersigned counsel to represent the class.

DATED: March 30, 2020
Washington, D.C.

Respectfully submitted,

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