

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, and Jose Munoz; *on their own and on behalf of a class of similarly situated persons;*

*Petitioners/Plaintiffs,*

v.

DALLAS COUNTY SHERIFF MARIAN BROWN, *in her official capacity*; DALLAS COUNTY, TEXAS;

*Respondents/Defendants*

Civil Action No. 3:20-cv-00832-E-BH

**Motion for Class Certification**

**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs respectfully move this Court to certify a class and appoint undersigned counsel as class counsel under Rule 23 of the Federal Rules of Civil Procedure. For the reasons stated in the Brief in Support of the Motion for Class Certification, filed contemporaneously herewith in accordance with Local Civil Rule 7.1, Plaintiffs respectfully request that the Court grant their Motion by entering the undersigned as class counsel and certifying the following classes and subclasses:

1. "Pre-Adjudication Class": All current and future detainees in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, at the Jail;
  - a. "Medically-Vulnerable Pre-Adjudication Subclass": All persons who are in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, and who, by reason of age or medical condition, meet the CDC criteria for being as particularly vulnerable to injury or death if they were to contract COVID-

19. A person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy;
2. “Post-Adjudication Class”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole;
  - a. “Medically-Vulnerable Post-Adjudication Subclass”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole. A person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c)

chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy.

Dated: April 12, 2020

Respectfully submitted,

/s/ Andrea Woods

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 12, 2020.

/s/Andrea Wood

Andrea Woods

**UNITED STATES DISTRICT COURT  
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Civil Action No. 3:20-cv-00832-E-BH

CLASS ACTION

**[PROPOSED] ORDER GRANTING CLASS CERTIFICATION  
AND APPOINTMENT OF CLASS COUNSEL**

Upon consideration of Plaintiffs' Motion for Class certification and Appointment of Class Counsel, and for the reasons stated in Plaintiffs' memorandum of Law in Support thereof, the Motion for Class Certification and Appointment of Class Counsel is GRANTED, the action is hereby CERTIFIED as a class action on behalf of the following classes and subclasses:

1. "Pre-Adjudication Class": All current and future detainees in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, at the Jail;
  - a. "Medically-Vulnerable Pre-Adjudication Subclass": All persons who are in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, and who, by reason of age or medical condition, meet the CDC criteria for being as particularly vulnerable to injury or death if they were to contract COVID-19. A person shall be deemed "Medically-Vulnerable" if the person is over the age

of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy;

2. “Post-Adjudication Class”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole;

a. “Medically-Vulnerable Post-Adjudication Subclass”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole. A person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d)

diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy.

Counsel listed in Plaintiffs' Motion as counsel for the class is hereby APPOINTED.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_  
U.S. District Judge Ada Brown

**UNITED STATES DISTRICT COURT  
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Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, and Jose Munoz; *on their own and on behalf of a class of similarly situated persons;*

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Civil Action No. 3:20-cv-00832-E-BH

**Memorandum in Support of Motion for Class Certification**

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
FOR CLASS CERTIFICATION**

Plaintiffs Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, and Jose Munoz hereby move this Court to certify this case as a class cation under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

**I. INTRODUCTION**

This case is about Defendants' failure to act to protect the lives of people detained in the Dallas County Jail from novel coronavirus and its resulting disease, COVID-19. Defendants have failed to respond to the urgent threat posed to people confined in the jail by this growing pandemic, making it impossible for these individuals to observe the precautionary steps necessary to keep themselves safe, such as social distancing, increased personal hygiene, sanitizing one's environment, access to testing, and wearing protective clothing. Defendants' disregard of the known risks of illness and death exposes jail detainees to a highly fatal, infectious disease in violation of their rights under the Eighth and Fourteenth Amendments. Named Plaintiffs challenge

these unconstitutional conditions and now move for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(2). Named Plaintiffs also move for appointment of the undersigned as class counsel under Rule 23(g).

## **II. CLASS DEFINITION**

Plaintiffs propose the following classes and sub-classes:

1. “Pre-Adjudication Class”: All current and future detainees in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, at the Jail;
  - a. “Medically-Vulnerable Pre-Adjudication Subclass”: All persons who are in pretrial custody at the Dallas County Jail, including alleged violations of probation or parole, and who, by reason of age or medical condition, meet the CDC criteria for being as particularly vulnerable to injury or death if they were to contract COVID-19. A person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy;

2. “Post-Adjudication Class”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole;
  - a. “Medically-Vulnerable Post-Adjudication Subclass”: All current and future detainees in post-adjudication custody at the Dallas County Jail, including those serving a term of incarceration pursuant to an adjudicated violation of probation or parole. A person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy.

### III. STATEMENT OF FACTS

#### **A. Plaintiffs’/Petitioners Challenge Defendants’ Inadequate Policies and Practices to Combat the COVID-19 Virus which Places all Putative Class Members at Serious Risk in Violation of the Constitution.**

Texas and the nation are in the midst of the most significant global pandemic in generations.<sup>1</sup> COVID-19 is a highly contagious and deadly respiratory disease caused by a novel

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<sup>1</sup> John M. Barry, *The Single Most Important Lesson from the 1918 Influenza*, New York Times (March 17, 2020), <https://cutt.ly/PtQ5uAZ> (Opinion piece by author of “The Great Influenza: The

coronavirus (SARS-CoV-2). No one is safe. The lethality rate of COVID-19 is estimated to be between one and six percent: several times more than the common flu that kills thousands a year.<sup>2</sup> All age groups including some children have contracted the disease,<sup>3</sup> and the World Health Organization estimates that one in five people who contract the disease require hospitalization.<sup>4</sup>

On March 13, 2020, the President declared a national state of emergency.<sup>5</sup> As of April 7, 2020, confirmed cases of COVID-19 in the United States were more than double the number in any other country.<sup>6</sup> On the same day, Illinois, Louisiana, New Jersey, New York reported their highest daily death tolls from COVID-19.<sup>7</sup> As of April 7, 2020, the Texas Health and Human Services reported 8,262 COVID-19 cases and 154 deaths from the disease state-wide,<sup>8</sup> and Dallas

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Story of the Deadliest Pandemic in History,” noting comparison between current COVID-19 outbreak and the 1918 influenza outbreak widely considered one of the worst pandemics in history).

<sup>2</sup> As of April 7, 2020, there were 1,428,428 confirmed cases globally, with 82,020 deaths and 300,198 recoveries. Johns Hopkins University of Medicine, *Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering at Johns Hopkins University*, <https://cutt.ly/StEyn2U>; see also “Coronavirus disease 2019 (COVID-19)”, UpToDate, <https://cutt.ly/GtJYSkj> (as of April 4, 2020, estimated overall fatality rate of 2.3 percent globally).

<sup>3</sup> Robert Verity, PhD., et al., *Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis*, *Lancet Infect Dis* (March 30, 2020), 6.

<sup>4</sup> World Health Organization, *Q&A on Coronaviruses (COVID-19)*, “Should I Worry About COVID-19?,” <https://cutt.ly/YtEyrxl>.

<sup>5</sup> Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, (March 13, 2020), <https://cutt.ly/EtJLZQZ>.

<sup>6</sup> Jennifer Calfas, Chong Koh Ping, and Drew Hinshaw, *Global Coronavirus Death Toll Passes 81,000 as Some Lockdowns Tighten*, *The Wall Street Journal* (Apr. 7, 2020), <https://cutt.ly/ztJLM0q>.

<sup>7</sup> Johns Hopkins University, Coronavirus Resource Center, available at <https://coronavirus.jhu.edu/map.html>; see also Brittany Shammass, et al., *Trump says Quarantine for New York Area “Will not be Necessary;” U.S. Coronavirus-related Deaths Double in Two Days*, *Wash. Post* (March 28, 2020, 11:27 p.m.), <https://cutt.ly/ktRo8u0>.

<sup>8</sup> Texas Health and Human Services, Texas Case Counts COVID-19, (Apr. 7, 2020), <https://cutt.ly/rtJL7NJ>.

County Health and Human Services reported 1,261 COVID-19 cases with 19 deaths.<sup>9</sup> The Dallas County Jail accounted for 23—almost two percent—of the COVID-19 cases in Dallas County.<sup>10</sup> On April 5, 2020, approximately 25 percent of all new confirmed COVID-19 cases in Dallas County were in the Dallas County Jail.<sup>11</sup>

There is no vaccine or cure for COVID-19. The best course according to public health experts is to slow and prevent transmission, primarily through a practice known as “social distancing.”<sup>12</sup> Social distancing requires everyone to stay at least six feet away from all other people to control the spread of the virus. This measure is particularly important because the virus spreads aggressively, and people can infect others even if they do not feel sick or exhibit any symptoms.<sup>13</sup> The only effective way to curb the pandemic is through dramatically reducing contact for all.<sup>14</sup> Consequently, every American institution—from schools<sup>15</sup> to places of worship,<sup>16</sup> from

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<sup>9</sup> Dallas County Health and Human Services, 2019 Novel Coronavirus (COVID-19) Summary at 1, (Apr. 7, 2020), <https://cutt.ly/ztJZwXa>.

<sup>10</sup> *Id.* Table 4.

<sup>11</sup> *COVID-19 Live Updates*, KERA News (quoting Director of Dallas County Health and Human Services on April 5, 2020 as saying “the jail has 24 cases, which includes 22 inmates and two detention officers,” presenting approximately 25% of all new cases in Dallas County that day), <https://cutt.ly/itJSsiy>.

<sup>12</sup> World Health Organization, *Coronavirus*, <https://cutt.ly/ztWYf7e> (“At this time, there are no specific vaccines or treatments for COVID-19.”); *Dawson v. Asher*, 20-cv-409 (W.D. Wash.) at Doc. No. 4, Declaration of Dr. Robert B. Greifinger, MD, ¶ 8 (“Social distancing and hand hygiene are the only known ways to prevent the rapid spread of COVID-19.”).

<sup>13</sup> Center for Disease Control, *How Coronavirus Spreads*, <https://cutt.ly/CtYRkkC>.

<sup>14</sup> Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and how to “Flatten the Curve,”* Wash. Post. (March 14, 2020), <https://cutt.ly/etYRnkz>.

<sup>15</sup> Centers for Disease Control, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, <https://cutt.ly/ItRPq5n>.

<sup>16</sup> Centers for Disease Control, *Interim Guidance for Administrators and Leaders of Community-and Faith-Based Organizations to Plan, Prepare, and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://cutt.ly/KtRPk1k>.

businesses<sup>17</sup> to legislatures<sup>18</sup>—has been exhorted to reduce the number of people in close quarters, if not empty entirely. They have also been told to undertake aggressive sanitation measures, such as cleaning and disinfecting all surfaces for exacting periods of time with products with particular alcohol contents, and closing off any areas used by a sick person.<sup>19</sup> These imperatives apply with special force to jails, where the government controls almost entirely a person’s ability to avoid others and to maintain adequate sanitation.

The impact of COVID-19 on the Dallas County Jail is dire and a clear public health emergency. In just a week’s time the number of people infected by COVID-19 in the jail jumped from 5 infections of detainees and Jail employees to almost 30 as of April 7, 2020,<sup>20</sup> Yet the Defendants have failed to implement adequate policies and practices to combat the virus and prevent unacceptable risk of contracting the disease for the entire putative class, including medically vulnerable prisoners and detainees and the entire jail population. Because of the Defendants’ failed policies and practices no one can protect themselves adequately from the disease in the Dallas County Jail and preventable deaths will occur. These enormous harms and

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<sup>17</sup> Centers for Disease Control, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://cutt.ly/stRPvg4>.

<sup>18</sup> Nat’l Conf. of State Legislatures, *Coronavirus and State Legislatures in the News*, <https://cutt.ly/4tRPQne.a>

<sup>19</sup> Centers for Disease Control, *Cleaning and Disinfecting Your Facility*, <https://cutt.ly/atYE7F9>.

<sup>20</sup> Dallas County Health and Human Services, 2019 Novel Coronavirus (COVID-19) Table 4, (Apr. 7, 2020), <https://cutt.ly/QtJZbmS>; Editorial, *COVID-19 spreads with close contact, so what do we do about those in jail?*, The Dallas Morning News (Apr. 5, 2020), <https://cutt.ly/8tJOi67> (“At the time of this writing, 20 inmates had tested positive for the virus, along with six detention officers and one deputy.”); Ashley Paredez, *Confirmed COVID-19 cases at Dallas County Jail now up to 28*, Fox 4 (April 4, 2020), <https://cutt.ly/0tJSenr> (“The number of coronavirus cases at the Dallas County jail has increased from five cases last week, to now a total of 28,” and “six [of those testing positive] are detention officers and two are clerks”); COVID-19 Live Updates, KERA News, *supra* note 11 (quoting Director of Dallas County Health and Human Services on April 5, 2020 as saying “the jail has 24 cases, which includes 22 inmates and two detention officers”).

risks are a direct result of Defendants' failure to implement adequate policies and practices to address the virus through prevention and treatment -- despite the ubiquity of clear guidance on how to combat the virus, the Texas Governor's order requiring people to "minimize in-person contact with people who are not in the same household",<sup>21</sup> the stay at home order issued by the County Judge of Dallas County,<sup>22</sup> and City of Dallas regulations implementing the Texas and Dallas County orders.<sup>23</sup> Through its policies and practices the Dallas County Jail has failed to provide critical safeguards to prevent the spread of COVID-19, including:

- failure to release medically vulnerable individuals despite the known lethal risks of COVID-19 for these individuals and the need to lower the jail population to allow for greater social distancing; Compl. ¶¶ 59-64; Declaration of Dr. Robert Cohen, 4/9/20 ¶¶ 30–31 (Doc. 3-2).
- a lack of COVID-19 testing for detainees at intake, during detention, or upon release, Compl. ¶51; Cohen Dec. ¶¶ 33, 35.
- failure to begin "checking the temperatures of employees assigned to the jail" or asking detainees during the intake process "a set of preliminary questions recommended by Dallas County's healthcare partners" until March 27, 2020.<sup>24</sup>
- a shortage of Jail employees to report for work; Compl. ¶ 62; Cohen Dec. ¶ 23.
- routine use by Jail employees of single-use disposable surgical masks for a week or more; Compl. ¶¶ 6, 54; Cohen Dec. ¶ 38.
- failure to educate detainees about the virus and prevention methods; Compl. ¶ 53; Cohen Dec. ¶¶ 40–41.

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<sup>21</sup> Office of the Tex. Gov., Press Release: *Governor Abbott Issues Executive Order Implementing Essential Services and Activities Protocols* (March 31, 2020), <https://cutt.ly/stJUKfc>.

<sup>22</sup> See Amended "Safer at Home" Order, (Apr. 6, 2020), <https://cutt.ly/otJlI2m>.

<sup>23</sup> See Shelter in Place: Stay Home Stay Safe, City of Dallas, <https://cutt.ly/TtJlvcg>.

<sup>24</sup> Dallas County Sheriff's Office, "COVID-19 Initiatives," (March 27, 2020), <https://cutt.ly/NtJO7zY>; see also Cohen Dec. at ¶¶ 12, 15, 29.

- failure to institute appropriate social distancing practices, including in dorm bunk arrangements, waiting lines, staff gatherings, and meals; Compl. ¶¶ 49-50; Cohen Dec. ¶ 45.
- failure to segregate detainees with symptoms and illness from other detainees and guards; Compl. ¶ 52; Cohen Dec. ¶¶ 20–21, 24.
- failure to provide staff with adequate personal protective equipment and to require the use and regular replacement of such equipment; Compl. ¶ 54; Cohen Dec. ¶¶ 27, 38.
- failure to provide detainees with adequate PPE; Compl. ¶ 55; Cohen Dec. ¶¶ 27, 38.
- failure to ensure sufficient stocks of hygiene and cleaning supplies and to provide detainees with no-cost access to these supplies. Compl. ¶¶ 56-57; Cohen Dec. ¶¶ 27, 39–40.

These unified policies and practices apply to all members of the putative class and sub-classes and put all of them at risk of serious harm and even death.

The failure of Dallas County Jail to prevent and mitigate the spread of COVID-19 endangers not only all those within the institution, but the entire community. *See* Declaration of Dr. Eric Lofgren, Ph.D., 4/9/20 ¶¶ 22–28 (Doc. 3-1) (discussing increased infections, hospitalizations, and deaths among incarcerated persons, jail staff, and broader community if sufficient measures not taken at the jail). Hence, swift release of the most vulnerable to the disease and implementation of public health and education protocols in the jail, are the only mitigation efforts that the Dallas County Jail can undertake to comport with public health guidance and to prevent a catastrophic outbreak at the facility that will also endanger the community at large. Lofgren Dec. ¶¶ 29–31; Cohen Dec. ¶¶ 30–32.

#### **B. The Petitioner/Plaintiffs**

The Petitioners/Plaintiffs are:

Petitioner Oscar Sanchez is detained in the Dallas County Lew Sterrett Jail West Tower. He is a 28-year-old man. He has a history of severe chronic asthma and has begun to show symptoms that are consistent with COVID-19. He has been incarcerated since March 10, 2020 and is being held pretrial on multiple charges, some of which are indicted, some of which are not. His cases are not currently set for trial. His next court date is April 28, 2020 for an announcement setting. He is presumptively innocent of all charges. Compl. ¶ 13.

Petitioner Marcus White is a 37-year-old man who booked into the Dallas County Jail on November 27, 2019 and is held on \$111,000 bond for multiple charges, mostly drug-related. He suffers from hypertension, for which he takes medication in the jail, as well as a serious seizure disorder for which he has not received his medication in the jail. Mr. White contracted and tested positive for COVID-19 in the jail and is being held on the 9<sup>th</sup> floor of the Dallas County Lew Sterrett West Tower Jail. He is presumptively innocent of all charges. Compl. ¶ 14.

Petitioner Tesmond McDonald is a 32-year-old man with asthma and high blood pressure who is being held (since September 27, 2019) in the Dallas County Jail, currently in the Lew Sterrett West Tower Jail 9<sup>th</sup> floor. He is being held pretrial for three Dallas County charges of aggravated robbery, possession with intent to deliver drugs, and evading arrest. Mr. McDonald contracted COVID-19 inside the jail and learned on April 3 that he tested positive for the virus. **His condition is very serious and he may require immediate medical attention.** He is presumptively innocent of all charges. Compl. ¶ 15.

Petitioner Marcelo Perez is a 43-year-old man who has been held in the Dallas County Jail since January 7, 2020 on an allegation that he violated probation by committing a new drug offense. Mr. Perez is medically vulnerable in that he has hypertension and diabetes. He has been

denied the ability to maintain social distancing, proper hygiene, and he is exposed continuously to people who show symptoms consistent with COVID-19. Compl. ¶ 16

Petitioner Roger Morrison is a 49-year-old man, medically vulnerable to COVID-19 because of his pre-existing conditions of high blood pressure, hepatitis C, and cirrhosis of the liver among other issues. He was booked in on March 9, 2020 and is being held on drug possession and evading arrest charges in the Dallas County Jail South (Kays) Tower C3 medical pod. He has been unable to protect himself within the jail from exposure to other inmates and guards who have potentially been exposed to COVID-19. He has begun to exhibit flu-like symptoms. Compl. ¶ 17.

Petitioner Keith Baker is a 25-year-old man. He booked in on March 7, 2020 on an unindicted allegation of aggravated assault, as well as some misdemeanor offenses. He is currently detained in the Dallas County Lew Sterrett Jail West Tower, 9<sup>th</sup> floor. He has severe asthma and is being held adjacent to three people who have tested positive for COVID-19. Mr. Baker has developed symptoms consistent with COVID-19 but has not been tested for the virus. He is presumptively innocent of all charges. Compl. ¶ 18.

Petitioner Paul Wright is a 48-year old man who is being held in the Dallas County Jail South (Kays) Tower 3<sup>rd</sup> floor. He booked in on February 21, 2020 and is being held awaiting transport to the Texas Department of Criminal Justice to serve the remainder of a two-year sentence for felony assault, a sentence for which he has backtime credit for 14 months. He has hepatitis C and has been unable to protect himself within the jail from exposure to other inmates and guards who have potentially been exposed to COVID-19. Compl. ¶ 19.

Petitioner Terry McNickles is a 58-year-old man being held in the Dallas County Jail South (Kays) Tower on a parole violation. He was booked into the jail on March 16, 2020. He was taken to a parole hearing, but the hearing was cancelled because of the pandemic, and he was not told

when he might have a chance to have a new hearing date. Mr. McNickles is medically vulnerable because he had a kidney removed last year due to cancer. He has been unable to protect himself within the jail from exposure to other inmates and guards who have potentially been exposed to COVID-19. Compl. ¶ 20.

Petitioner Jose Munoz is a 37-year-old man, detained in the Dallas County Jail South (Suzanne Kays) Tower 3<sup>rd</sup> floor. He has been held since October 4, 2019. He is currently on probation for drug possession but is awaiting transportation to a drug treatment facility in Wilmer, Texas which was ordered as a condition of his probation. Because of the COVID-19 pandemic, however, the facility is not taking new patients, so his wait in jail is indefinite. He has been unable to protect himself from exposure to the COVID-19 virus through social distancing or protective measures of any kind. Compl. ¶ 21.

### **C. The Defendants**

The Defendants in this action, sued in their official capacities, are the Dallas County Sheriff, Marian Brown and Dallas County, Texas (“Dallas County”) is a municipal corporation organized under the laws of the State of Texas. Compl. ¶¶ 22-23

## **IV. LEGAL ARGUMENT**

Plaintiffs’ suit for injunctive relief under the Fourteenth Amendment, and the Medically Vulnerable Subclasses’ petition for habeas corpus, arise from Defendants’ failure to protect them from the severe risk of death or serious physical harm. Those risks affect each Class and Subclass member identically. This Court should, therefore, certify the Classes and the Medically-Vulnerable Subclasses.

The claims of the Classes and Subclasses are ideally suited to proceed as a class action under Federal Rule of Civil Procedure 23(b)(2) and as an analogous class habeas proceeding. *See*,

*e.g. Ibrahim v. Acosta*, 326 F.R.D. 696, 699 (S.D. Fla. 2018) (certifying class of plaintiffs seeking habeas relief). Rule 23(c)(5) further allows for a class to be divided into subclasses, where the subclasses are treated as a class under Rule 23. Defendants are subjecting Named Plaintiffs and putative Class and Subclass members to the same injury: confinement in conditions that they know present a high risk of infection of a deadly disease in violation of Class members' rights under the Eighth and Fourteenth Amendments. The Named Plaintiffs and the proposed Class and Subclass meet Rule 23(a)'s prerequisites for class certification: joinder of all proposed class members in this numerous and transient class is impracticable; the questions of law and fact necessary for resolution of this claim are common to all members of the proposed classes; the Named Plaintiffs' claims are typical of the classes; and the Named Plaintiffs and their counsel are dedicated to vindicating the constitutional rights of the proposed classes. Additionally, as Rule 23(b)(2) requires, Defendants' unconstitutional acts apply to every member of the Class and Subclass, such that the requested final declaratory and injunctive relief is appropriate for the class as a whole.

#### **D. The Requirements of Rule 23(a) Are Satisfied**

Plaintiffs seeking class certification must meet four factors under Rule 23(a):

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These class action prerequisites, known respectively as numerosity, commonality, typicality, and adequacy, are each met in this case.

##### **1. Numerosity**

Plaintiffs' proposed Classes are sufficiently numerous to make joinder impracticable. Fed. R. Civ. P. 23(a)(1). There is no fixed number of class or subclass members required for a finding of numerosity. Instead, the key question is "whether joinder of all members is practicable in view

of the numerosity of the class and all other relevant factors.” *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5<sup>th</sup> Cir. 1981). These other relevant factors include “the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff’s claim.” *Id.*; William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed.). Courts also consider “judicial economy arising from the avoidance of a multiplicity of actions.” *Id.* Finally, “the fact that the class includes unknown, unnamed future members also weighs in favor of certification.” *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000). The Fifth Circuit has held that “[t]he general rule encouraging liberal construction of civil rights class actions applies with equal force to the numerosity requirement of Rule 23(a)(1).” *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975), *abrogated by Gardner v. Westinhouse Broad Co.*, 437 U.S. 478 (1978). Joinder is presumptively impracticable when a class consists of forty members or more. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing *Newberg on Class Actions* § 3.05 (3d ed.))

Joinder of the proposed members of each Class is impracticable. The Dallas County Jail’s Daily Jail Population Statistics show that on April 2, 2020, 5309 people were detained in the jail, all of whom are members of a proposed Class. This number will likely increase as additional people are arrested in the future and detained in the jail. Because the proposed Classes contain well over forty members, they satisfy the numerosity requirement. *See Ex. 1, Dallas County Criminal Justice Management Committee Information Statistics, Detention Early Warning Report, 4/2/20.*

Moreover, because the proposed Classes include future members, traditional joinder is not practicable. Future Class Members will suffer the same injury absent injunctive relief from Defendants’ deliberate indifference to the unsafe conditions in the jail. Class relief targeting these unconstitutional conditions is therefore appropriate because, regardless of the size of the Class,

traditional joinder is not practicable. See *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review of State of Miss.*, 637 F.2d 1014, 1022 (5th Cir. 1981) ([T]he alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for ‘joinder of unknown individuals is certainly impracticable.’” (citation omitted); Moore’s Federal Practice—Civil § 23.22(f) (“Class-action plaintiffs seeking injunctive or declaratory relief frequently seek to define a class to include people who might be injured in the future. Courts in these cases often find that joinder of separate suits would be impracticable because those who have not yet been injured, or who do not know that they have been injured, are unlikely to join a lawsuit.”); Newberg on Class Actions § 25:4 (4th ed.) (“Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause.”); see also *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding impracticability of non-class joinder for a class including future members, who necessarily could not yet be identified). In such cases, the numerosity requirement is satisfied because the putative class seeks declaratory and injunctive relief against an ongoing policy, a resolution will affect numerous people in the future, and the composition of the class is fluid and unknown. *Jones*, 519 F.2d at 1100 (granting liberal construction of numerosity prong in a case seeking injunctive relief on behalf of future class members because “[t]he general rule encouraging liberal construction of civil rights class actions applies with equal force to the numerosity requirement of Rule 23(a)(1).”); see also, e.g., *Walker v. City of Calhoun, Georgia*, No. 4:15-cv-170-HLM, 2016 WL 361580, at \*6 (N.D. Ga. Jan. 28, 2016) (“[T]here is a future stream of class members who would suffer the same injury absent injunctive relief. Under those circumstances, the Court agrees with Plaintiff that joinder is impracticable.”).

The proposed Subclasses also easily meet the numerosity threshold. The Medically-Vulnerable Subclasses are comprised of people who are medically vulnerable to COVID-19 because of underlying medical conditions—a person shall be deemed “Medically-Vulnerable” if the person is over the age of 50, and/or has or experiences (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (within the last two weeks) pregnancy. The WHO-China Joint Mission Report indicates that the mortality rate from COVID-19 for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.<sup>25</sup>

According to one study, “asthma prevalence is 30%–60% higher among individuals with a history of incarceration as compared with the general population.”<sup>26</sup> One study estimates that up to 15% of people who are in custody have asthma, 10% of people in custody live with a heart condition that requires medical care, 10% live with diabetes, and 30% have hypertension.<sup>27</sup> Based

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<sup>25</sup> Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, <https://cutt.ly/atBJsEW>; Cohen Dec. ¶26.

<sup>26</sup> Elizabeth M. Vigilanto et al., *Mass Incarceration and Pulmonary Health: Guidance for Clinicians*, 15 Ann. Am. Thoracic Soc. 409, 409 (2019).

<sup>27</sup> Laura M. Marushack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dept. of Justice (2014).

on these estimates and assuming some overlap in these diagnoses, a fair estimate of the number of people who live with one or more of these medical vulnerabilities exceeds one thousand.

A class action does not present any insurmountable difficulties in management—the Classes and Subclasses are easily ascertainable from records in the Defendants’ possession *and* are limited in geographic scope, as opposed to a nationwide, multi-district class of millions. Requiring separate individual lawsuits against Defendants would likely result in far greater manageability problems, such as duplicative discovery (including numerous depositions of the same County officials and repetitive production of documents), repeated adjudication of similar controversies in this Court (with the resultant risk of inconsistent judgments), and excessive costs for all involved.

In sum, the number of potential and future Class and Subclass members, the difficulty in immediately identifying these potential Class and Subclass members, and the addition of future, unknown Class and Subclass members make joinder impracticable. Additionally, judicial economy will be significantly better served by resolving the central factual and legal issues concerning the unconstitutional conditions of confinement, as opposed to requiring multiple proceedings as Defendants continue to detain individuals in unsafe conditions. Rule 23(a)(1) is thus satisfied.

## **2. Commonality**

The claims asserted on behalf of the proposed Classes and Subclasses include “questions of law or fact common to the class” that satisfy Rule 23(a)(2). Commonality requires that the class members’ claims “depend on a common contention” such 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 Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The threshold for satisfying the commonality

prerequisite is “not demanding.” *Mullen*, 186 F.3d at 625; *Lightbourn v. Cty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997). “To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member’s claims.” *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014). Courts generally “find[] common questions of law to be at a high level of generality . . . and questions of fact similarly broad . . . .” Newberg on Class Actions § 3:19 (5th ed.) (citations omitted). Commonality also requires these common questions “to generate common *answers* apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350 (emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) ). These “common answers” may be answers about the “defendant’s injurious conduct.” *Deepwater Horizon*, 739 F.3d at 811. Traditionally, the Rule asks whether the disputed questions are capable of class-wide proof or resolution, and claims need not be identical to satisfy this requirement. *Simms v. Jones*, 296 F.R.D. 485, 497 (N.D. Tex. 2013) (“Even a single common question of law or fact can suffice.”) (citing *Dukes*, 564 U.S. at 359); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000).

Although there need only be common issues of law *or* fact under Rule 23(a), this case presents numerous issues of both law and fact that are common to the Classes and Subclasses.

Among the most important common questions of fact are:

- what measures Defendants implemented in the Dallas County Jail in response to the COVID-19 crisis;
- whether the conditions in the Dallas County Jail comply with the Centers for Disease Control and Prevention’s guidelines for preventing the spread of COVID-19;
- whether Defendants’ practices during the COVID-19 pandemic exposed people jailed at the Dallas County Jail to a substantial risk of serious harm;
- whether Defendants knew of and disregarded a substantial risk of serious harm to the safety and health of the class; and

- whether COVID-19 presents a risk of harm so severe to some people that the only constitutionally permissible way to protect them is to release them from custody immediately.

Among the most important common questions of law are:

- whether Defendants are liable under the Eighth and Fourteenth Amendments for their deliberate indifference to conditions of confinement that create a risk of serious illness, needless suffering, and death.

This case exemplifies the Supreme Court's explanation of commonality in *Wal-Mart Stores, Inc. v. Dukes*. The Court clarified that it is not just the existence of hypothetical common questions that justify class treatment. *Id.* at 349–50. Rather, there must be common answers that resolve the factual or legal claims presented by the plaintiffs. *Id.* at 350. In this case, the answers to the fundamental common questions of fact and law listed above are dispositive in determining Defendants' liability to all Class and Subclass members. If the conditions in the Dallas County Jail expose people jailed therein to a substantial risk of serious harm, then this litigation turns on whether Defendants knew of and disregarded such a risk.

Although there may be factual variations in some details of Classes and Subclass Members' cases, such as whether they are pretrial or sentenced, these differences are immaterial to the merits and "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 v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003); *see also Dukes*, 564 U.S. at 350 (commonality satisfied if one can resolve an issue central to Plaintiffs' claims "in one stroke."). The claims raised by the Class and Subclass Members are independent of issues like specific arrest charges; instead, the claims are based solely on the conditions to which each and every person detained in the jail are subjected.

### **3. Typicality**

The named Plaintiffs in this case have claims typical of people who are subject to Defendants' post-arrest policies and practices. "[T]he test for typicality is not demanding." *Mullen*, 186 F.3d at 625. To meet the typicality requirement, the named plaintiffs' claims must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3) . "Typicality does not require a complete identity of claims." *James v. Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001), *abrogated on other grounds in In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012). In analyzing typicality, "the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id.* (citing Moore's Federal Practice § 23.24[4] (3d ed. 2000)).

Here, the Named Plaintiffs' legal claims are the same as the legal claims of the other members of the proposed Classes and Subclasses they represent. The Named Plaintiffs and Class and Subclass Members they represent are all injured in the same way: Defendants are keeping them in conditions of confinement that put them at substantial risk of serious harm. For the Subclasses, each person claims that she must be released because her health is at imminent and immediate risk from the same virus and same policy failures as each other person in the Subclasses. Thus, the ongoing and future injury of the Classes and the Classes' representatives arise from the same policy and practice. *See* Newberg on Class Actions § 23:4 (4<sup>th</sup> ed.) ("[T]he typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members."). The claims of the Named Plaintiffs also rely on the same legal theories as the claims of all other Class and Subclass members concerning whether Defendants' deliberate indifference to the risk of serious harm is unconstitutional. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) ("The typicality requirement may be satisfied

despite substantial factual differences . . . when there is a ‘strong similarity of legal theories.’” (citation omitted). The proof concerning whether Defendants have acted with deliberate indifference in the face of the COVID-19 pandemic and the legal argument about whether this inaction is unlawful are critical for each Class and Subclass member in this case to establish the liability of Defendants.

Thus, if the Named Plaintiffs succeed in proving that Defendants’ deliberate indifference to the risk of severe harm as alleged in the Complaint is unlawful, then that ruling will necessarily benefit every other member of the Class and Subclass. That is the essence of Rule 23(a)’s typicality requirement.

#### 4. Adequacy

It is clear that the class representatives will “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy analysis encompasses two separate inquiries: (1) whether the named Plaintiffs have common interests with the other class members, and (2) whether the representatives will adequately prosecute the action through qualified counsel. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005); *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 562–63 (8th Cir. 1982). “Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs’ interests and the class members’ interests.” *Mullen*, 186 F.3d at 625–26. The Fifth Circuit has specified that, while courts should consider class representatives’ “willingness and ability . . . to take an active role in and control the litigation,” the representatives “need not be legal scholars and are entitled to rely on [class] counsel.” *Feder*, 429 F.3d at 130-132 n.4. “The representative class members are entitled to work with, and rely upon, their counsel in pursuing their claims and navigating the complicated legal and factual issues associated with”

complex litigation. *Stoffels v. SBC Commc'ns, Inc.*, 238 F.R.D. 446, 455 (W.D. Tex. 2006). An example of an adequate class representative is one with “commendable familiarity with the complaint and with the concept of a class action.” *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982).

Regarding the first inquiry, the Named Plaintiffs are adequate representatives of the Classes they represent because their interests in the vindication of the legal claims that they raise are completely aligned with, and are not antagonistic to, the interests of the other Class Members. The Named Plaintiffs, like other Class Members, have a strong interest in no longer being detained in unsafe conditions. The Named Plaintiffs who represent the Medically-Vulnerable Subclass share the Subclass’s interest in release because of the particular danger that the virus presents for them. There are no known conflicts of interest among Members of the proposed Class and Subclass, all of whom have a similar interest in vindicating their constitutional rights in the face of their unlawful treatment by Defendants. Moreover, the declaratory and injunctive relief sought by Named Plaintiffs will benefit the entire class equally.

Regarding the second inquiry, the Named Plaintiffs also meet the requirement that they will adequately prosecute the action. They are represented in this case by highly qualified and experienced civil rights attorneys who are able and willing to conduct this litigation on behalf of the class. Plaintiffs’ counsel from Susman Godfrey L.L.P., the ACLU, the ACLU of Texas Foundation, Civil Rights Corp, and Next Generation Action Network collectively have extensive experience litigating complex class action cases and civil rights cases. As discussed in greater detail below, *infra* Part III, Plaintiffs’ counsel are qualified and experienced counsel with a history of zealous advocacy on behalf of their clients, and Rule 23(a)(4)’s adequacy requirement is thus met.

### E. The Requirements of Rule 23(b)(2) Are Met<sup>28</sup>

In addition to satisfying the requirements of Rule 23(a), the proposed Classes and Subclasses satisfies Rule 23(b)(2). A putative class action must meet the requirements of either Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3). *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b)(2) provides for class certification when “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). . “This is a simple inquiry in most cases.” Newberg on Class Actions § 4:28 (5th ed.) . The requirement of a generally applicable set of actions “ensures that the class’s interests are related in a manner that makes aggregate litigation appropriate . . . and therefore efficient.” *Id.* Thus, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.” *Dukes*, 564 U.S. at 360.

As the Supreme Court has recognized, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of cases in which class certification is proper under Rule 23(b)(2). *Amchem*, 521 U.S. at 614; *see also Holmes v. Cont’l Can Co.*, 706

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<sup>28</sup> At least with respect to a Damages Class under Rule 23(b)(3) (Plaintiffs do not seek to certify a Damages class because they have not brought a damages claim), courts have held that “ascertainability” is, in essence, a fifth Rule 23 prerequisite. A class must be “adequately defined and clearly ascertainable.” *De Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). “In other words, the class must meet a minimum standard of definiteness which will allow the trial court to determine membership in the proposed class[.]” although “it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained.” *Earnest v. GMC*, 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quoting *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970)). Although it is doubtful that such a requirement should exist with respect to a purely injunctive class under Rule 23(b)(2), *see, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012) (noting that the rule has been applied to Rule 23(b)(3) damages classes), that requirement is easily met here. The Defendants already have in their possession the identity of each and every person in the class. Also, by necessity, the Defendants will come to know the identity of each future person detained in the jail.

F.2d 1144, 1152 (11th Cir. 1983) (“Civil rights class actions . . . are generally treated under subsection (b)(2) of Rule 23.”); Newberg on Class Actions, *supra*, § 1:3 (“Rule 23(b)(2) . . . is typically employed in civil rights cases and other actions not primarily seeking money damages. The (b)(2) class action is often referred to as a ‘civil rights’ or ‘injunctive’ class suit.”). This is because “[t]he 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.’” *Dukes*, 564 U.S. at 360 (citation omitted). Thus, “Rule 23(b)(2) has been liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities.” *Braggs v. Dunn*, 317 F.R.D. 634, 667 (M.D. Ala. 2016) (citation omitted).

This case is exactly the kind of class action that Rule 23(b)(2) is meant to capture. *Id.*; see also Newberg on Class Actions § 4:40 (5th ed.) (“While civil rights cases are often maintained against public and private defendants under civil rights *statutes*, many (b)(2) class actions challenge government actions on *constitutional* grounds as well.”) (emphasis in original). The Classes’ interests are sufficiently related to warrant aggregate litigation, as are the interests of the members of the Subclasses. The Defendants have acted on grounds that apply generally to the Classes and Subclasses. Injunctive and declaratory relief are appropriate to the Classes and Subclasses precisely because the only adequate relief is enjoining Defendants’ unconstitutional policies.

Furthermore, it is far more efficient for this court to grant injunctive and declaratory relief protecting all of the class members than to extend that relief piecemeal through individual suits. Because the putative Classes and Subclasses challenge the Defendants’ scheme as unconstitutional through declaratory and injunctive relief that would apply the same relief to every member of the

class, Rule 23(b)(2) is appropriate and necessary. *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) (“Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury”).<sup>29</sup> As the Supreme Court explained recently:

When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.

*Dukes*, 564 U.S. at 362-363. In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the Fifth Circuit stated that the underlying premise of a Rule 23(b)(2) class action is that class “members suffer from a common injury which is properly addressed by class-wide relief.” *Id.* at 413. “Thus, if the plaintiffs [seek] only injunctive and declaratory relief, [the] case [can] readily be certified as a class action under Rule 23(b)(2).” *Id.* at 411. As the Fifth Circuit recognized, “[s]uch relief may often be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member’s individual case.” *Id.* at 414.

This case falls squarely within this requirement of the appropriateness of declaratory or injunctive relief to the class as a whole, because Defendants have acted with deliberate indifference to the health and safety of all members of the Classes by failing to take the necessary action to avoid an outbreak of COVID-19 in the jail. The only way to remedy the injury to the Classes is to enjoin Defendants’ conduct as to all of the class members.

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<sup>29</sup> Rule 23(b)(2) arose out of experience “in the civil rights field,” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted), in which the government typically treats a whole class in an unconstitutional manner based on law or government policy. “Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions.” Moore’s Federal Practice § 23.43; *see also* Newberg on Class Actions § 1:3 (5th ed.) (“Rule 23(b)(2) authorizes a class action when a party has taken or refused to take action with respect to a class, and final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole. This category is typically employed in civil rights cases and other actions not primarily seeking money damages. The (b)(2) class action is often referred to as a ‘civil rights’ or ‘injunctive’ class suit.”).

The Classes and Subclasses therefore seek declaratory and injunctive relief to require Defendants to take the necessary steps to prevent an outbreak of COVID-19 in the jail. The relief sought—a declaration that Defendants violate Class Members’ constitutional rights by failing to adequately safeguard their health and safety in the midst of a potential outbreak of a deadly infectious disease and an injunction requiring them to release the Subclasses and take the steps necessary to prevent such an outbreak—would apply equally to the all members of the Classes and Subclasses. *See Holmes*, 706 F.2d at 1155 (Rule 23(b)(2) applies to “claims resting on the same grounds and applying more or less equally to all members of the class.”). Therefore, certification under Rule 23(b)(2) is appropriate. *See Allison*, 151 F.3d at 411 (stating that the requirements of Rule 23(b)(2) are satisfied because “the predominant relief sought is injunctive or declaratory.”); *Baby Neal*, 43 F.3d at 58 (noting that the requirements of Rule 23(b)(2) are “almost automatically satisfied in actions primarily seeking injunctive relief” for common legal claims.).

#### **F. Undersigned Counsel Should Be Appointed Class Counsel Under Rule 23(g)**

Federal Rule of Civil Procedure 23(g) requires that the court appoint class counsel for any class that is certified. Fed. R. Civ. P. 23(g)(1). Class counsel must “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In determining whether this requirement is met, courts must consider: (1) “the work counsel has done in identifying or investigating potential claims in the actions;” (2) “counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;” (3) “counsel’s knowledge of the applicable law;” and (4) “the resources that counsel will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(A).

Undersigned Counsel satisfy these four requirements. The Plaintiffs and proposed Classes are represented by attorneys who have experience litigating complex civil rights matters and class

action lawsuits in federal court and extensive knowledge of both the conditions in the jail and the relevant constitutional law. *See* Declaration of Amy Fettig, April 12, 2020 (Ex. 2). Class Counsel have conducted an extensive investigation into the conditions in Dallas County Jail and the sanitation and social distancing requirements that are necessary to prevent an outbreak of COVID-19. *See* Fettig Dec. ¶ 6. In addition, Class counsel has sufficient financial and human resources to litigate this matter. *Id.* In sum, Plaintiffs’ attorneys are experienced advocates; possess “sufficient vigor” along with sufficient resources, to adequately represent the Class and prosecute this action; and are appropriate counsel for the matter. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (citations omitted).

## V. CONCLUSION

For the reasons stated above, the Named Plaintiffs respectfully asks this Court to certify the Classes and Subclasses described in this Motion.

Dated: April 12, 2020

Respectfully submitted,

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1601 Connecticut Ave NW, Suite 800  
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(202)894-6126  
*katherine@civilrightscorps.org*  
*elizabeth@civilrightscorps.org*

SUSMAN GODFREY L.L.P.  
Barry Barnett  
Texas Bar No. 01778700  
8115 Preston Road, Suite 575  
Dallas, TX 75225  
(866)754-1900  
*bbarnett@susmangodfrey.com*

Michael Gervais\*  
N.Y. Bar No. 5122890  
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Los Angeles, CA 90067  
(310)789-3100  
*mgervais@susmangodfrey.com*

NEXT GENERATION ACTION  
NETWORK LEGAL ADVOCACY FUND  
Alison Grinter-Allen  
Texas Bar 24043476

Kim T. Cole  
Texas Bar No. 24071024  
1808 South Good Latimer Expressway  
Dallas, TX 75226  
(214)704-6400  
*agrinter@thengan.com*  
*kcole@thengan.com*

ATTORNEYS FOR PETITIONERS/PLAINTIFFS

*\*pro hac vice application forthcoming*

*\*\*N.D. Texas admission application forthcoming*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 12, 2020.

/s/Andrea Wood  
Andrea Woods

# Exhibit 1



DALLAS COUNTY CRIMINAL JUSTICE MANAGEMENT COMMITTEE INFORMATION STATEMENT

4/2/2020  
7:00:30 AM



# Exhibit 2

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

Oscar Sanchez, Marcus White, Tesmond McDonald, Marcelo Perez, Roger Morrison, Keith Baker, Paul Wright, Terry McNickels, and Jose Munoz; *on their own and on behalf of a class of similarly situated persons;*

*Petitioners/Plaintiffs,*

v.

DALLAS COUNTY SHERIFF MARIAN BROWN, *in her official capacity*; DALLAS COUNTY, TEXAS;

*Respondents/Defendants*

Civil Action No. 20-cv—832-E

**DECLARATION OF AMY FETTIG IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION**

I, AMY FETTIG, DECLARE:

1. I am an attorney admitted to practice before courts of the District of Columbia and the state of New York and am admitted *pro hac vice* as counsel in this matter. I am a Deputy Director of the ACLU's National Prison Project. I make this Declaration based on my personal knowledge and based on a review of the records maintained by my office and the office of my co-counsel in the ordinary course of business.

2. I have nearly twenty years of complex, class action experience, including over fifteen years serving as counsel in class action prisoner rights cases in federal courts. A true and correct copy of my *curriculum vitae* is attached hereto as **Exhibit A**.

3. The ACLU has nearly five decades of experience in complex prisoner rights class actions and has represented prisoners in five cases before the U.S. Supreme Court. Since its

founding, the ACLU has litigated challenges to conditions of confinement in almost every U.S. state, as well as the District of Columbia. The ACLU is one of a handful of offices in the nation that litigate prisoners' rights cases such as this action. Litigating prisoners' rights cases requires specialized knowledge and skills as well as considerable resources. Federal courts have long recognized the special expertise of ACLU staff. *See, e.g., Plyler v. Evatt*, 902 F.2d 273, 278 (4<sup>th</sup> Cir. 1990); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Duvall v. O'Malley*, No. CV ELH-94-2541, 2016 WL 3523682, at \*9 (D. Md. June 28, 2016); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 856 (S.D. Miss. 2015); *Riker v. Gibbons*, No. 3:08-CV-00115-LRH, 2010 WL 4366012, at \*4 (D. Nev. Oct. 28, 2010); *Diaz v. Romer*, 801 F. Supp. 405, 410 (D. Colo. 1992), *aff'd*, 9 F.3d 116 (10th Cir. 1993). ACLU counsel on this case also includes Andrea Woods and Henderson Hill. Both Ms. Woods and Mr. Hill have considerable experience with criminal and civil law. Ms. Woods is a Staff Attorney for the ACLU's Criminal Law Reform Project and litigates extensively in pretrial civil matters. A true and correct copy of her *curriculum vitae* is attached hereto as **Exhibit B**. Mr. Hill is a Senior Counsel for the ACLU Capital Punishment Project. He has decades of experience representing clients in criminal and civil rights litigation. A true and correct copy of his *curriculum vitae* is attached hereto as **Exhibit C**.

4. I attach a true and correct copy of the public profile of Barry Barnett, a Partner at Susman Godfrey L.L.P. in Dallas, Texas, as **Exhibit D**. Mr. Barnett is a Fellow in the American College of Trial Lawyers, for example, an Elected Member of the American Law Institute, and an honors graduate of Yale University and Harvard Law School. With three decades of trial work representing both plaintiffs and defendants in complex litigation matters, including antitrust, energy, or intellectual property. Mr. Barnett is class counsel in this case.

5. I attach a true and correct copy of the public profile of Michael Gervais, a Partner at

Susman Godfrey L.L.P. in Los Angeles, California, as **Exhibit E**. Mr. Gervais has extensive litigation experience as counsel for both plaintiffs and defendants in complex litigation. In the field of criminal justice he worked alongside Civil Rights Corp and the Texas Fair Defense Project in a landmark case challenging the money bail scheme in Harris County, Texas that secured a sweeping preliminary injunction in federal court.

6. Class Counsel have conducted an extensive investigation into the conditions in Dallas County Jail and the sanitation and social distancing requirements that are necessary to prevent an outbreak of COVID-19. In addition, Class counsel has sufficient financial and human resources to litigate this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 2020 at Washington, DC.

/s Amy Fetting \_\_\_\_\_  
Amy Fetting

# Exhibit 2-A

## AMY FETTIG

2120 Vermont Ave., NW #309, Washington, D.C. 20001

202-360-5316; amyfettig@yahoo.com

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### WORK EXPERIENCE

**American Civil Liberties Union, National Prison Project**, Washington, D.C.

*Deputy Director*: June 2016 – present; *Director, Stop Solitary Campaign*: January 2011 – present; *Senior Staff Counsel*: April 2011 – June 2016; *Staff Counsel*: January 2007 – March 2011; *Litigation Fellow*: October 2001 – January 2004.

- Manage and oversee work of attorneys, experts, consultants, fellows, law clerks, paralegals and support staff in all aspects of litigation, legislative and policy advocacy and public education/research.
- Target strategic prisoner rights cases for jurisprudential development nationwide. Investigate prison, jail and juvenile detention conditions and file impact litigation cases in federal court. Draft, edit and argue briefs, motions, reports, and other pleadings.
- Found, direct, and lead nation-wide *Stop Solitary* campaign to reduce the use of solitary confinement in prisons, jails and juvenile detention centers through a blend of litigation and non-litigation tools, including public education, research and report writing, policy reform, coalition-building, legislative action and strategic case filing. Oversee campaigns in 15 states and work with advocacy leaders in several other jurisdictions. Oversee federal level campaign for youth and adults.
- Design and implement campaign strategic planning process. Establish campaign priorities and overall vision. Spearhead strategic communications planning.
- Build and oversee diverse coalitions supporting *Stop Solitary* reform efforts.
- Responsible for catalyzing national discourse on solitary confinement reform through engagement with multiple governmental and non-governmental stakeholders and the media.
- Fundraise for *Stop Solitary* campaign. Engage with ACLU donors and support affiliate fundraising opportunities.
- Serve on founding Steering Committee of the *Unlock the Box* campaign and its Jurisdiction-Based Fund, a grant-giving mechanism to support local solitary confinement reform campaigns nationwide with an emphasis on investing in survivor and impacted community leadership and engagement.
- Facilitate and manage collaborative work across departments and disciplines within and outside the ACLU, including federal level advocacy work with executive agencies and the U.S. Congress.
- Spearhead and lead the ACLU's national and state-level work to end the practice of shackling pregnant women prisoners, including successful passage of over 17 state laws; develop legislative and policy reform models; and provide ongoing technical assistance to affiliates monitoring implementation of anti-shackling laws and policies.
- Serve as counsel for class of all prisoners in Arizona state prisons (approximately 33,000 people in 9 facilities); monitor implementation of court order covering medical, mental health, dental, and isolation housing provisions, including specific provisions for individuals with serious mental illness.
- Served as counsel for all detained and adjudicated youth in Rhode Island; monitored conditions and compliance with consent decree; successfully negotiated with State leaders to implement population reduction mechanisms, adopt best practice standards, and eliminate lock-down unit.
- Provide technical assistance and training to lawyers and advocates on legal and policy issues in criminal and juvenile justice reform nationwide, specializing in juvenile justice, solitary confinement, sexual violence in detention settings, LGBT prisoners, mental health issues, youth in adult prisons, and the incarceration of women and girls.
- Serve as ACLU spokesperson for prison reform issues and engage in extensive public speaking and media work with the *New York Times*, *Washington Post* and other major news outlets.

**James & Hoffman**, Washington, D.C.

*Associate Attorney*: January 2004 – January 2007.

- Litigated cases in federal and state courts, and before arbitral bodies and government agencies, such as the Equal Employment Opportunity Commission (EEOC).
- Represented and counseled labor organizations and labor leaders under federal, state, and local laws governing collective bargaining, organizing, contract enforcement, working conditions, and internal union affairs.

**Women's Law and Public Policy Fellow, Georgetown University**, Washington, D.C.

*National Association of Women Judges*: May 2001 – September 2001.

- Participated in intensive gender training and advocacy post-graduate fellowship.
- Developed training materials and coordinated training sessions for judges on the impact of the *Violence Against Women Act* (VAWA) on immigrant and undocumented women and the potential impact of genetic research advances on discrimination cases.

**Legal Aid Society, Special Litigation Unit**, New York, New York

*Summer Associate*: June 2000 – August 2000.

- Developed legal strategies and drafted state law complaints for individual incarcerated children's cases.
- Conducted investigatory tour of youth facility and co-wrote report on facility conditions.

**Koob & Magoolahan**, New York, New York

*Summer Associate*: June 1999 – August 1999.

- Researched legal issues and wrote memos for civil rights law firm specializing in prisoners' rights and other civil rights cases. Assisted in client interviews, expert depositions, discovery review, and trial preparation.
- Evaluated potential new cases and presented cases to legal team for review.

**Women's Prison Association**, New York, New York

*Program Development Associate*: November 1996 – August 1998.

- Managed foundation and corporate fundraising campaign; wrote grant proposals and reports. Strategized funding approaches; prepared annual campaign goals; and monitored project performance. Facilitated donor meetings.
- Worked in conjunction with field staff and administration to develop new projects and monitor achievement of goals for existing programs. Developed monitoring and evaluation tools. Co-managed full-scale evaluation of \$1.3 million family reunification program.

**United Nations Development Fund for Women**, New York, New York

*Monitoring and Evaluation Intern*: May 1995 - December 1995.

- Researched, co-wrote and edited paper on the evolution of UNIFEM's development approach for the Fourth World Conference on Women.
- Assisted in the preparations for comprehensive evaluation of UN agency. Created data matrix to facilitate access to project information. Evaluated projects for use of participatory methodologies in monitoring of project impact on grassroots women.

**Center for the Study of Human Rights**, New York, New York

*Program Coordinator, China and Constitutionalism Project*: September 1994 - May 1995.

- Oversaw logistical implementation of joint Center, Law School, and East Asian Institute project at Columbia University.

- Worked with Chinese dissidents, scholars, lawyers, judges, and Communist Party members and coordinated joint constitutionalism workshops, Annual Spring Conference, and graduate seminar.

**Institute of International Education**, Washington, D.C.

*Program Associate, Professional Exchange Program*: September 1993 - August 1994.

- Assisted in the research, design and implementation of short-term educational and cross-cultural exchange projects for the USIA International Visitor Program.
- Acted as liaison between international grantees, local networks and government agencies.
- Developed and wrote project proposals for competitive USIA/USAID grants.

**TEACHING EXPERIENCE**

**Georgetown University Law School**, Washington, D.C.

*Adjunct Professor of Law*: Spring 2007; Spring 2008.

- Taught *Public Interest Advocacy* seminar course for second and third-year law students geared to help students build entrepreneurial problem-solving skills to address social problems through strategic legal advocacy.

**VOLUNTEER EXPERIENCE**

**Free Minds Book Club & Writing Workshop**, Washington, D.C.

*Board Chair/Member*: April 2015 – present.

- Serve as board chair for local agency serving young men and youth charged as adults during detention, after conviction, and upon re-entry to the community.
- Responsible for governance, policy development, financial review and budgeting, executive director review, fundraising, and program monitoring and evaluation.
- Spearheading Racial Equity Evaluation and Strategic Planning process for board and organization.

**Our Place, DC**, Washington, D.C.

*Board Member*: March 2010 – October 2013.

- Served as board member for local agency serving women prisoners, returned citizens, and their families.
- Spearheaded fundraising, hiring of new executive director, and budget review.

**EDUCATION**

**Georgetown University Law School**, Washington, D.C.

Juris Doctor (2001). New York State Bar (2002). District of Columbia Bar (2004).

- Awarded 1 of 8 competitive fellowships in the *Public Interest Law Scholars Program*.
- Participated in year-long Criminal Defense Clinic representing indigent misdemeanor clients.
- Founding Board Member and Symposium Editor, *Georgetown Journal of Gender and the Law*.

**Columbia University, School of International and Public Affairs**, New York, New York

Masters of International Affairs, Concentration in Human Rights and Humanitarian Affairs (1996).

- Awarded academic fellowship (1995 – 96).

**Carleton College**, Northfield, Minnesota

Bachelor of Arts in Political Science and East Asian Studies (1993).

- Awarded Distinction in the major and for senior thesis.
- Doshisha University, Kyoto, Japan, (September 1991 – May 1992).

# Exhibit 2-B

## ANDREA WOODS

2310 41st Ave Apt. 4J Long Island City, NY 11101 | (425) 205-1969 | andrea.woods.aw@gmail.com

### EDUCATION

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UNIVERSITY OF WASHINGTON SCHOOL OF LAW | Seattle, Washington | Juris Doctor, 2014

**GPA:** 3.91, top 5% of class (high honors), individually ranked #5 in graduating class

**Selected Honors:**

Gates Public Service Law Scholar (full tuition for three years; awarded annually to five students)

Vivian Carkeek Award for Outstanding Contribution to the *Washington Law Review*

2L/3L Mock Trial Competition Champion and 3<sup>rd</sup> Place Best Speaker Award

Student Service Award for Leadership and Service to the Law School

Selected by Peers as Commencement Speaker

CALI Awards for top grades in Civil Procedure, Contracts, Criminal Procedure, Law and Economics, and Post-Conviction Review

**Activities:**

President, Student Bar Association

Managing Editor, *Washington Law Review*

President, Innocence Project Northwest Student Chapter

GONZAGA UNIVERSITY | Spokane, Washington | B.A., English and Psychology, *summa cum laude*, May 2009

**Selected Honors:** Rhodes Scholarship Finalist | *Ignatian Spirit Award* given by Student Life VP to top graduate

Concerto & Aria competition winner, flute | *Top Sophomore* academic award | Washington Scholar Award

Member of University Honors Program (24 students selected)

OXFORD UNIVERSITY | Oxford, UK

Completed studies in English Literature and Social Behavior

### LEGAL EXPERIENCE

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AMERICAN CIVIL LIBERTIES UNION CRIMINAL LAW REFORM PROJECT | Sept. 2016-present | New York, NY

**Staff Attorney (Sept. 2018-present):** Staff attorney supporting anti-mass incarceration litigation, specifically on issues related to bail and pretrial practice. Involved at all levels of several pieces of complex federal litigation. Served as class counsel in four matters: *Mock v. Glynn* (18-cv-25, S.D.Ga.) (as lead counsel); *Daves v. Dallas* (18-cv-154, N.D. Tex.), *Schultz v. State*, 17-cv-270 (N.D. Ala.); and *Edwards v. Cofield*, 17-cv-321 (M.D. Ala).

**Equal Justice Works Fellowship Attorney (Sept. 2016-2018):** As a fellow, working full time on bail reform issues. Responsibilities included assisting in litigation, consulting on policy-related advocacy, and workshopping questions related to pretrial justice within ACLU Nationwide. Facilitated a nationwide bail reform working group, drafted strategic vision documents, and led the organization's work on algorithmic pretrial risk assessments and racial equity.

CHAMBERS OF HON. JOHN C. COUGHENOUR | October 2014–August 2016 | Seattle, WA

**Law Clerk:** Assisted Judge Coughenour with one third of his civil and criminal caseload, supervised law students, and managed daily administrative tasks as one of three law clerks.

METROPOLITAN PUBLIC DEFENDER | January–March 2014 | Portland, OR

**Certified Law Student:** Worked as part of the misdemeanor unit with a small caseload. Assisted with trials, motions, and hearings as needed. Represented a client at a jury trial from investigation through sentencing.

ALASKA PUBLIC DEFENDER AGENCY | June 2013–September 2013 | Anchorage, AK

**Criminal Defense Intern:** Represented clients at bail hearings, arraignments, and change of plea hearings. Assisted with trials and cases throughout the summer. Successfully collected data and lobbied the bench to change a portion of its bail-setting procedures.

INNOCENCE PROJECT NORTHWEST | September 2012–June 2014 | Seattle, WA

***Clinic Member:*** Worked with a partner on a client’s case for post-conviction relief. Workload included client visits, investigation, research, document review, and motion drafting.

U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION | June 2012–September 2012 | Washington, DC

***Housing and Civil Enforcement Intern:*** Assisted at various stages of litigation. Tasks included legal research, client interviews, and drafting memoranda (including a “J-Memo” reviewed by the Assistant Attorney General).

## OTHER WORK EXPERIENCE

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JOSEPH’S HOUSE | August 2010–September 2011 | Washington, DC

***Companion/Assistant (as Jesuit Volunteer):*** Cared for formerly homeless men and woman terminal with AIDS or cancer by cooking meals, administering medication, assisting with bathing and other basic needs.

WITNESS TO INNOCENCE | August 2009–July 2010 | Philadelphia, PA

***Program Assistant (as Jesuit Volunteer):*** Organizer for exonerated ex-death row survivors within the anti-death penalty movement: by coordinating speaking events, arranging semi-annual retreats for organization members, and collaborating with other activist organizations and legislative campaigns.

GONZAGA UNIVERSITY | May 2008–May 2009 | Spokane, Washington

***Student Body President:*** Hired, trained, and managed a staff of 27 student employees. Served as the student representative to administrators, trustees, and staff members. Successfully implemented an anti-bottled water campaign and created an advisory council for ‘stewardship and sustainability.’

# Exhibit 2-C

## **HENDERSON HILL**

8119 Anzack Lane, Charlotte, NC 28269  
(H) 704-947-9145 (C) 704-502-1145  
hhill3663@gmail.com

### **EDUCATION**

#### **Harvard Law School**

J.D., 1981

#### **John F. Kennedy School of Government**

Harvard University

[M.P.P.] (course work completed; thesis outstanding)

#### **Lehman College, City University of New York**

B.A., Economics, 1977

### **EMPLOYMENT**

**November 2019  
to Present**

**Senior Counsel, ACLU Capital Punishment Project  
201 W. Main Street, Suite 402, Durham, N.C. 27701**

**April 2019 to  
Present**

**Co-director, RedressNC, Charlotte, N.C.**

<http://redressnc.org/>

Start-up initiative to encourage collaboration with reform-minded prosecutors in North Carolina (using post-conviction remedies and community engagement, to seek the early release of prisoners from extreme sentences issued during the decades of NC administration of mass-incarceration policies.)

**May 2014 to  
March 2019**

**Executive Director, 8th Amendment Project, Center for Death  
Penalty Litigation, Durham, N.C.**

Provide strategic leadership to the national campaign to abolish the death penalty. Lead a small staff and a larger circle of grantees and consultants (policy advocates, litigation offices, organizers, communications experts and legal and social science researchers.)

**September 2011 to  
January 2014**

**Executive Director, Federal Defenders of Western North  
Carolina Charlotte, NC**

-- Led a staff of 15 attorneys and 34 total full time employees in providing indigent representation in the four federal courthouses in the Western District of North Carolina.  
-- Managed budget of \$7 million.

**1996 to 2011**

**Ferguson Stein Chambers Gresham & Sumter, P.A. Charlotte, NC**

-- Partner in general litigation practice with concentration in criminal defense, capital post-conviction, civil rights litigation, and civil litigation.

**1995 to 1996**

**Director, Center for Death Penalty Litigation  
Durham, NC**

-- Founded non-profit law office providing direct representation and consultation services in capital defense at trial, post-conviction and federal habeas corpus stages.

**1991 to 1995**

**Director, North Carolina Resource Center Office of the Appellate  
Defender  
Durham, NC**

-- Director of state agency receiving state funds and federal Criminal Justice Act grants to provide direct and consultation services in capital cases throughout North Carolina, at the trial, post-conviction and federal habeas corpus stages.

**1981 to 1991**

**Public Defender Service, District of Columbia  
Washington, DC**

-- Positions included Staff Attorney, Special Litigation Counsel, Special Litigation Counsel, Deputy Chief, Appellate Division, and Training Director.

#### **TEACHING POSITIONS**

**1991 to 1997**

**Adjunct Assistant Professor  
University of North Carolina School of Law  
Chapel Hill, NC**

-- Taught trial advocacy course.

|             |                                                                                                                                                                                                                                                                                          |
|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>1998</b> | <b>Lecturer</b><br>Duke University School of Law<br>Durham, NC<br>-- Taught death penalty seminar                                                                                                                                                                                        |
| <b>2011</b> | <b>Practitioner-in-Residence</b><br>Thelton E. Henderson Center for Social Justice<br>Berkeley School of Law<br>University of California—Berkely<br>Ruth Chance Lecture: The North Carolina Racial Justice Act and<br>the Georgia Execution of Troy Davis                                |
| <b>2018</b> | <b>Witness in Residence</b><br>University of North Carolina-Charlotte<br>-- week long series of class lectures and public talks regarding the<br>death penalty throughout the university.                                                                                                |
| <b>2019</b> | <b>Faculty, Makwanyane Institute</b> , Franschoek, South Africa<br>Center on the Death Penalty World-wide, Cornell Law School<br>--Training the trainers program; teaching trial and policy advocacy<br>skills to practitioners from Common Law countries engaged in<br>capital defense. |

#### **RELATED PROFESSIONAL ACTIVITIES**

|                        |                                                                            |
|------------------------|----------------------------------------------------------------------------|
| <b>2009 to Present</b> | Member, Advisory Board, Common Justice, Brooklyn, NY                       |
| <b>2009 to 2012</b>    | Member, Steering Committee (Funders)                                       |
| <b>2009</b>            | Member, American College of Trial Lawyers, State Committee                 |
| <b>2008 to 2012</b>    | Commissioner, NC Indigent Defense Services Commission                      |
| <b>2008 to 2012</b>    | Member, Board of Directors, Center for Death Penalty Litigation            |
| <b>2007</b>            | Fellow, American College of Trial Lawyers                                  |
| <b>2004</b>            | Member, Mecklenburg County Bar, Federal Judiciary Recognition<br>Committee |

|                     |                                                                                                                            |
|---------------------|----------------------------------------------------------------------------------------------------------------------------|
| <b>2003 to 2006</b> | Member Mecklenburg County Bar, Grievance Committee                                                                         |
| <b>2003 to 2004</b> | Member, North Carolina Bar Association, Tort Reform Committee                                                              |
| <b>2001 to 2003</b> | President, John S. Leary Bar Association, Charlotte, NC                                                                    |
| <b>2001 to 2003</b> | Member, ABA Advisory Committee on Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases |
| <b>1998 to 2002</b> | Member, Board of Governors, NC Academy of Trial Lawyers                                                                    |
| <b>1998 to 2001</b> | Member, Board of Directors, Community Justice Development Center, Raleigh, NC                                              |
| <b>1996 to 2003</b> | Member, Board of Directors, Center for Death Penalty Litigation                                                            |
| <b>1992 to 1998</b> | Member, Board of Directors, Carolina Justice Policy Center, Durham, NC                                                     |
| <b>1992 to 1998</b> | Faculty, NITA-based Trial Advocacy Training, Black Lawyers Association, Johannesburg, South Africa                         |
| <b>1992 to 1996</b> | Member, All Bar Conference on Death Penalty Representation, Raleigh, NC                                                    |

#### **COMMUNITY ACTIVITIES**

|                        |                                                                                                                                                                                                                                                                                                                                                                         |
|------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2011 to Present</b> | Member, Board of Directors, Supportive Housing Communities, Charlotte, NC                                                                                                                                                                                                                                                                                               |
| <b>2007 to Present</b> | Founder, Neighborhood Advocacy Center, Charlotte, NC<br>-- Non-profit organization established to provide parent representation in Abuse, Neglect and Dependency matters in Mecklenburg County.<br>-- Established clinical program with Charlotte School of Law and Johnson C. Smith University (Social Work) to involve clinical students in therapeutic law practice. |
| <b>2000</b>            | Convener, The Great Aunt Stella Center, Conference on Restorative Justice, Charlotte, NC                                                                                                                                                                                                                                                                                |
| <b>1999 to Present</b> | Founder, Charlotte Coalition for Community Justice (formerly                                                                                                                                                                                                                                                                                                            |

"Charlotte Coalition for Moratorium Now")

-- Grassroots non-profit organized to advocate for restorative, effective and humane solutions to the dangers and stresses in our community, such as poverty, crime, homelessness, and mental illness.

## **AWARDS**

|                        |                                                                                                          |
|------------------------|----------------------------------------------------------------------------------------------------------|
| <b>2010 to Present</b> | North Carolina Super Lawyer                                                                              |
| <b>2009</b>            | Award, Outstanding Legal Services Award, National Coalition to Abolish the Death Penalty, Harrisburg, PA |
| <b>2000</b>            | Paul Green Award, ACLU and the Paul Green Foundation                                                     |
| <b>1999</b>            | Lawyer of the Year, North Carolina Association of Black Lawyers                                          |
| <b>1996</b>            | Lawyer of the Year, George H. White Bar Association, Durham, NC                                          |

## **LECTURES & CLE PRESENTATIONS**

Lecture widely on trial advocacy skills, criminal defense, the death penalty, and restorative justice. Keynote speaker and frequent presenter at the Life in the Balance Seminars, NAACP-LDF's Airlie House Conferences, and the California Association of Criminal Defense Attorneys' Monterey Conferences.

# Exhibit 2-D

## SUSMAN GODFREY L.L.P.



### Barry Barnett Partner

Houston  
(713) 653-7891  
bbarnett@susmangodfrey.com

### Overview

An “incredibly gifted lawyer” (Chambers and Partners), Barry Barnett is the go-to choice of sophisticated business clients facing high-stakes business disputes. Colleagues call him “magic in the courtroom” (Who’s Who Legal) and in 2017 and 2019 voted him the Best Lawyers Lawyer of the Year for Bet-the-Company Litigation in Houston. With offices in Dallas, Houston, and New York, he has successfully navigated complex matters across the United States for more than three decades.

### Trial counsel

Barnett’s credentials match his knowledge and skill. He is a Fellow in the American College of Trial Lawyers, for example, an Elected Member of the American Law Institute, and an honors graduate of Yale University and Harvard Law School. With three decades of trial work representing both plaintiffs and defendants, he is master strategist in commercial litigation.

Barnett focuses on complex matters, especially ones involving antitrust, energy, or intellectual property. He has represented major corporations like Alaska Airlines, Cisco Systems, KKR, Neiman Marcus Group, and Texas Instruments. He’s also battled for clients against behemoths like Abbott Labs, Apple, AT&T, Comcast, JPMorgan Chase, Samsung, and Visa.

Barnett projects a compelling courtroom presence. His performance before the Supreme Court in *Comcast Corp. v. Behrend* prompted the Court to withdraw the question on which it had granted review. The judge in a patent infringement trial called him “one of the best” and his opening statement the finest he had ever seen. Another trial judge told Barnett minutes after a jury returned a favorable verdict that he was one of the two best trial lawyers he’d ever come across—adding that the other one was dead.

### Complete package

Barnett can handle a case from start to finish. He’s tried cases to verdict and then briefed and argued them when they went before appellate courts, including the Third, Fifth, and Tenth Circuits, the Supreme Court of Louisiana, and even (in the case of *Comcast Corp. v. Behrend*) the Supreme Court of the United States.

Barnett is a sought-after public speaker, serving on panels and talking on topics like the hottest claims, trial of class actions, and techniques for streamlining litigation. He also comments on trends in commercial litigation and the implications of major rulings for outlets such as NPR, Reuters,

Law360, [Corporate Counsel](#), and The Dallas Morning News. He’s even appeared on [Frontline](#).

### Hard-graders

Clients and other hard graders have praised Barnett for his courtroom skills and legal acumen.

"Barry Barnett was magnificent in trying this case," said Energy Future Holdings' general counsel after Barnett led a trial team that defeated \$500 million claims relating to power plants, a lignite mine, and an aluminum smelter. "We couldn't ask for more able trial counsel."

A client in a \$100 million oil and gas case, which Barnett's team won at trial and held on appeal, said Barnett and his team "presented a rare combination of strong legal intellect, common sense about right and wrong, and credibility in the courtroom."

Chambers and Partners calls him "an incredibly gifted lawyer" who earns "widespread praise from peers", "particularly [for] his notable courtroom skills." Who's Who Legal says he does "a fantastic job for his clients". And Best Lawyers named him the 2017 and 2019 Lawyer of the Year for Bet-the-Company Litigation in Houston.

### Keeping perspective

Barnett appreciates that clients face many pressures. Managing the stress is important, especially in matters that take years to resolve. He encourages clients to call him whenever they have a question or concern and to keep the inevitable ups and downs in perspective. He wants them to know that he will do his level best to help them achieve their legitimate goals. He also strives to foster trust and to make working with him a pleasure. Winning makes that easier.

### Superb clients

A wide range of business clients have entrusted their critical matters to Barnett, including the ones you see below.

#### Public Companies:

- Alaska Airlines
- Cisco Systems
- EMC
- Encana Oil & Gas
- International Securities Exchange
- KKR & Co.
- Neiman Marcus
- Trammell Crow Company
- Texas Instruments
- Vistra Energy
- Whiting Petroleum

#### Private Companies:

- Duane Reade
- Energy Future Holdings
- Firth Rixson
- Innovative Sonic
- Insight Equity
- INVESHARE
- Luminant Generation
- Mewbourne Oil & Gas
- Morris & Dickson Co.
- Oak Hill Capital
- Olympia Minerals
- RainTree Oncology
- TXU Energy
- Valor Equity
- Wagner & Brown

### Personal

Barnett knows how to get along with all sorts of people. A son of a roughneck and a Texas native, he grew up in Nacogdoches, the oldest town in Texas. While co-captaining his high school varsity football team, he also served as the Editor of Key Club's Texas-Oklahoma District and sang in the East Texas All Region Choir. His wide-ranging experience helps him connect with clients, judges, jurors, witnesses, and even opposing counsel.

Barnett is steady and loyal. He has practiced at Susman Godfrey his entire career – 34 years. He and his wife Nancy live in Dallas and enjoy spending time in Houston and New York. Their daughter works in Houston, and their son is a student at Columbia Law School.

As a member of Ivy League championship football teams in his junior and senior years at Yale and a parent of two Yalies, Barnett has no trouble choosing sides for The Game in November. And he knows how important fighting until the end is. On his last play from scrimmage, during the waning minutes of The Game on Nov. 22, 1980, he recovered a Crimson fumble.

Yale won, 14-0.

## Education

- Yale University (B.A., Economics and History (honors), magna cum laude, 1981)
- Harvard Law School (J.D., cum laude, 1984).

## Clerkship

Law Clerk to The Honorable Jerre S. Williams, United States Court of Appeals, Fifth Circuit (1984-85).

## Trials

To see a list of the cases Barnett has tried and get contact information for judges, arbitrators, and opposing counsel, click on this [List of Trials](#).

## Honors and Distinctions

[Academy of American Legal Writers](#), Board Member (2012-2019).

[American College of Trial Lawyers](#), Fellow (2014-2019).

[American Law Institute](#), Elected Member (2007-2019).

[The Best Lawyers in America](#), Lawyer of the Year in Bet-the-Company Litigation (2017 and 2019), Bet-the-Company Litigation (2010-2019), Class Actions (2015-19), Commercial Litigation (2003-2019), Litigation – Antitrust (2012-2019), Litigation – Intellectual Property (2012-2019), and Litigation – Patent (2012-2019) (Copyright by Woodward White Inc.).

[Chambers USA: America's Leading Lawyers for Business](#) in Antitrust and [General Commercial Litigation](#) (2007-2019).

[Martindale-Hubbell AV \(highest\) rating](#) (1995-2016).

[Texas Super Lawyer](#) in Business Litigation, Antitrust Litigation, Class Action/Mass Torts, and Energy & Natural Resources (variously 2003-2019), Law & Politics Magazine (Thomson Reuters).

## Articles and Speeches

[Barry Barnett — NPR "Marketplace" Report](#)

[Oral argument in Comcast Corp. v. Behrend](#)

## Articles

- Creator and blogger-in-chief, *The Contingency*, one of the top 10 law blogs in LexBlog.
- Interviews by and articles for NPR's "[Marketplace](#)" report, [Law Blog](#) of The Wall Street Journal, Texas Lawyer, [ABA Journal](#), business torts "Hot Topics" by the Litigation Section of the Texas Bar Association, [Global Competition Review](#), Kansas City Business Journal, The Dallas Morning News, [Blawg Review](#), Texas Cable News, [D CEO](#), and [Dallas Business Journal](#).
- Author and speaker at continuing legal education seminars, including "The Hottest Oil & Gas Claims" at the [66th Annual Oil & Gas Law Conference](#), Current Issues in Multidistrict Litigation and Class Actions" at the Third Circuit Judicial Conference; "Daubert in Class Certification Hearings: The Standard After Comcast" for ABA Section of Antitrust Law; and "Current Developments in Business Litigation", American Bar Association.

## Professional Associations and Memberships

### Bar Memberships

State Bar of New York.

State Bar of Texas.

Bar of the Supreme Court of the United States of America.

Bars of the United States Courts of Appeals for the Third, Fifth, and Tenth Circuits.

Bars of the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas; the Eastern and Southern Districts of New York; the District of Arizona; and the District of Colorado.

### Professional and Civic Associations

American Bar Association; Section of Litigation and Section of Antitrust Law; American Association for Justice; Dallas Bar Association; Federal Bar Association Houston Bar Association.

[Center for American and International Law](#), Executive Committee (2016-19) and Trustee (2011-2019). Yale Club of Dallas; Harvard Club of Dallas; Yale Club of New York City.

[Greenhill School](#), Addison, Texas, Trustee (2007-2013).

New-York Historical Society, Trustee (2016-2019) and Chairman's Council (2012-2019).

Life Fellow, American Bar Foundation, Texas Bar Foundation, Dallas Bar Foundation, and Houston Bar Foundation.

# Exhibit 2-E

## SUSMAN GODFREY L.L.P.



### Michael Gervais Partner

Los Angeles  
(310) 789-3130  
mgervais@susmangodfrey.com

#### Overview

Michael Gervais is a skilled and accomplished trial lawyer who represents both plaintiffs and defendants in all types of high stakes commercial litigation. Gervais has amassed an impressive collection of litigation victories and favorable settlements for clients who vary from Fortune 500 industry leaders to classes of unfairly treated plaintiffs in several national high profile lawsuits.

Gervais worked alongside Managing Partner, Neal Manne, Partner Lexie White, and Partner Joseph Grinstein representing a class of indigent misdemeanor arrestees pro bono in a landmark case to challenge the money bail scheme in Harris County, Texas. Along with Civil Rights Corps and the Texas Fair Defense Project, Gervais's work helped secure a sweeping preliminary injunction from a Houston federal judge, who struck down Harris County, Texas' money bail system. The decision focused national attention on the countrywide practice of jailing poor people because they are unable to afford bail when arrested for minor offenses and has been covered by national outlets such as [\*The New York Times\*](#), [\*The Houston Chronicle\*](#), and [\*Lawdragon\*](#).

In another high profile class action, Gervais worked alongside Partners Kalpana Srinivasan, Steven Sklaver and Steve Morrissey representing Flo & Eddie, members of the 1960's rock group The Turtles, in addition to a class of copyright owners in a case against Sirius XM. In this landmark case it was established under California law, that these owners of sound recordings from before 1972 have the exclusive right to perform those recordings. Under a groundbreaking settlement, Sirius XM agreed to pay at least \$25.5 million (over \$16 million after fees and expenses) and royalties under a 10-year license that is valued up to \$62 million (over \$41 million after fees and expenses) as compensation for publicly performing without a license Pre-1972 sound recordings. The settlement was [\*approved by the Court\*](#), and has received widespread media coverage from publications such as [\*The New York Times\*](#), [\*Billboard\*](#), [\*The Hollywood Reporter\*](#), [\*Law360\*](#), [\*Rolling Stone\*](#), [\*Variety\*](#), [\*Reuters\*](#) and [\*Managing IP\*](#).

Before joining Susman Godfrey, Gervais served as a clerk at both the Supreme Court of the United States and in the Ninth Circuit U.S. Court of Appeals. These experiences have given him a unique perspective and a valuable background that supports the success he brings his clients in federal, district and state courts as well as in arbitration and at every level of litigation.

*Admitted only in New York; not admitted in California.*

*Practicing under the supervision of the partnership of Susman Godfrey L.L.P.*

## Education

- Yale Law School (J.D.)
- American University (B.A., International Studies, *summa cum laude*)

## Clerkship

Law Clerk to the Honorable Stephen Breyer, Supreme Court of the United States

Law Clerk to the Honorable Alex Kozinski, United States Court of Appeals for the Ninth Circuit

## Honors and Distinctions

Senior Editor, Yale Journal of International Law

Research Assistant to Professor W. Michael Reisman

## Current Representations

### ***ODonnell et al. v. Harris County, et al.***

In this landmark constitutional case coming out of Harris County, Texas, Gervais was part of a team that won a landmark ruling in 2017, and was later affirmed in 2018, by the U.S. Court of Appeals for the Fifth Circuit, that the system of cash bail used in Harris County, Texas, violated the Due Process and Equal Protection rights of the thousands of misdemeanor arrestees. Gervais served on this case pro bono and was an active and critical part of the team leading up to and during trial.

### ***PDVSA US Litigation Trust v. Lukoil Pan Americas LLC et al.***

Along with Neal Manne, Alex Kaplan and Michael Kelso, Gervais is currently defending energy-trading companies Vitol Inc. and Vitol S.A. against statutory claims brought by the PDVSA US Litigation Trust.

## Previous Representations

### ***Flo & Eddie v. Sirius XM***

Gervais served on a team from Susman Godfrey that was co-lead counsel to Flo & Eddie (the founding members of 70's music group, The Turtles) along with a class of owners of pre-1972 sound recordings for copyright violations by music provider Sirius XM. Flo & Eddie settled with Sirius XM on behalf of the class in a deal worth up to \$73 million and approved by the Court in May 2017.

## Professional Associations and Memberships

New York State Bar