

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
GREENBELT DIVISION**

|                                        |   |          |
|----------------------------------------|---|----------|
| KEITH SETH, <i>et al.</i> ,            | ) |          |
| Individually and on behalf of a class  | ) |          |
| of similarly situated persons,         | ) |          |
|                                        | ) |          |
| Plaintiffs-Petitioners,                | ) |          |
|                                        | ) | Case No. |
| v.                                     | ) |          |
|                                        | ) |          |
| MARY LOU MCDONOUGH,                    | ) |          |
| In her official capacity as            | ) |          |
| Director of the Prince George's County | ) |          |
| Department of Corrections,             | ) |          |
|                                        | ) |          |
|                                        | ) |          |
| Defendant-Respondent.                  | ) |          |

**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 Memorandum in Support of the Motion for Class Certification, filed contemporaneously herewith, certification of the classes and subclass specified therein is warranted under the Rule, and the undersigned is appropriate to serve as class counsel.

Respectfully submitted on April 21, 2020,

By /s/Elizabeth Rossi  
Elizabeth Rossi  
Bar No. 19616  
Katherine Chamblee-Ryan  
*application to the Bar of this Court pending*  
Olevia Boykin  
*application forthcoming*  
Ryan Downer

*application pending*  
CIVIL RIGHTS CORPS  
1601 Connecticut Ave. NW, Suite 800  
Washington, D.C. 20009  
katie@civilrightscorps.org  
610-931-7715

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2020 I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing. This Motion for Class Certification will be served in accordance with the Federal Rules of Civil Procedure.

Date: Apr. 21, 2020

/s/Elizabeth Rossi

Elizabeth Rossi

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

## TABLE OF CONTENTS

|                                                                                                                                                            |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| INTRODUCTION                                                                                                                                               | 5  |
| CLASS DEFINITION                                                                                                                                           | 5  |
| BACKGROUND AND SUMMARY OF ARGUMENT                                                                                                                         | 6  |
| ARGUMENT                                                                                                                                                   | 9  |
| I. Plaintiffs Satisfy Rule 23(a): They Are Numerous and Raise Common Questions, and the Named Plaintiffs Are Adequate Representatives With Typical Claims. | 10 |
| A. Numerosity is Satisfied: The Class and Subclasses Each Include Hundreds of Members.                                                                     | 10 |
| B. Commonality is Satisfied: The Legality of Defendant’s Response to the Pandemic Involves Numerous Common Questions of Fact and Law.                      | 11 |
| C. Typicality is Satisfied: The Named Plaintiffs’ Claims are Representative of Those of the Class at Large.                                                | 15 |
| D. The Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class and Subclasses.                                                      | 16 |
| II. Certification of the Classes and Subclass for Prospective Relief is Appropriate Under Fed. R. Civ. P. 23(b)(2)                                         | 17 |
| CONCLUSION                                                                                                                                                 | 19 |

## TABLE OF AUTHORITIES

## Cases

|                                                                                                    |        |
|----------------------------------------------------------------------------------------------------|--------|
| <i>Abadia-Piexoto v. United States Dep't of Homeland Sec.</i> , 277 F.R.D. 572 (N.D. Cal. 2011)    | 14     |
| <i>Anderson v. Garner</i> , 22 F. Supp. 2d 1379, 1385 (N.D. Ga. 1997)                              | 16     |
| <i>Areola v. Godinez</i> , 546 F.3d 788, 798 (7th Cir. 2008)                                       | 17     |
| <i>Barragan v. Evanger's Dog &amp; Cat Food Co.</i> , 259 F.R.D. 330, 333 (N.D. Ill. 2009)         | 11     |
| <i>Bradley v. Harrelson</i> , 151 F.R.D. 422, 427 (M.D. Ala. 1993)                                 | 24     |
| <i>Brown v. Plata</i> , 563 U.S. 493, 506 (2011)                                                   | 24     |
| <i>Bruscino v. Carlson</i> , 854 F.2d 162, 164 (7th Cir. 1988)                                     | 24     |
| <i>Bullock v. Sheahan</i> , 225 F.R.D. 227, 230 (N.D. Ill. 2004)                                   | 17     |
| <i>Butler v. Suffolk Cnty.</i> , 289 F.R.D. 80, 98 (E.D.N.Y. 2013)                                 | 14     |
| <i>Coleman v. County of Kane</i> , 196 F.R.D. 505, 507 (N.D. Ill. 2000)                            | 15     |
| <i>Corey H. v. Bd. of Educ. of City of Chi.</i> , 2012 WL 2953217, at *7 (N.D. Ill. Jul. 19, 2012) | 15     |
| <i>De La Fuente v. Stokely-Van Camp, Inc.</i> , 713 F.2d 225, 232 (7th Cir. 1983)                  | 17     |
| <i>Fonder v. Sheriff of Kankakee County</i> , 2013 WL 5644754, at *6 (C.D. Ill. Oct. 15, 2013)     | 16     |
| <i>French v. Owens</i> , 777 F.2d 1250, 1251 (7th Cir. 1985)                                       | 24     |
| <i>Gaspar v. Linvatec Corp.</i> , 167 F.R.D. 51, 57 (N.D. Ill. 1996)                               | 16, 17 |
| <i>Gomez v. St. Vincent Health, Inc.</i> , 649 F.3d 583, 592 (7th Cir. 2011)                       | 18     |
| <i>Green v. Mansour</i> , 474 U.S. 64 (1985)                                                       | 17     |
| <i>Hadi v. Horn</i> , 830 F.2d 779, 781 (7th Cir. 1987)                                            | 24     |
| <i>Hughes v. Judd</i> , 2013 WL 1821077, at *23 (M.D. Fla. Mar. 27, 2013)                          | 14     |
| <i>Ingles v. City of New York</i> , 2003 WL 402565, at *5 (S.D.N.Y. Feb. 20, 2003)                 | 16     |
| <i>Inmates of Attica Corr. Facility v. Rockefeller</i> , 453 F.2d 12, 24-25 (2d Cir. 1971)         | 16     |
| <i>Johnson v. General Motors Corp.</i> , 598 F.2d 432, 435 (5th Cir. 1979)                         | 24     |
| <i>Johnson v. Meriter Health Servs. Emp. Ret. Plan</i> , 702 F.3d 364, 368 (7th Cir. 2012)         | 10     |
| <i>Jones 'El v. Berge</i> , 374 F.3d 541 (7th Cir. 2004)                                           | 24     |
| <i>Jones v. Blinziner</i> , 536 F. Supp. 1181, 1190 (N.D. Ind. 1982)                               | 16     |
| <i>Jones v. Diamond</i> , 519 F.2d 1090, 1097 (5th Cir. 1975)                                      | 24     |
| <i>Jones v. Guzman</i> , 296 F.R.D. 416, 465-66 (E.D. La. 2013)                                    | 14     |
| <i>Kanter v. Casey</i> , 43 F.3d 48, 58 (3d Cir. 1994)                                             | 24     |
| <i>King v. Kan. City S. Indus.</i> , 519 F.2d 20, 25-26 (7th Cir. 1975)                            | 13     |
| <i>M.D. v. Perry</i> , 294 F.R.D. 7, 35 (S.D. Tex. 2013)                                           | 14     |
| <i>Marcera v. Chinlund</i> , 595 F.2d 1231, 1240 (2d Cir. 1979)                                    | 24     |
| <i>Muro v. Target Corp.</i> , 580 F.3d 485, 492 (7th Cir. 2009)                                    | 17     |
| <i>Olson v. Brown</i> , 284 F.R.D. 398, 410-11 (N.D. Ind. 2012)                                    | 14, 16 |
| <i>Parish v. Sheriff of Cook County</i> , 2008 WL 4812875, at *4 (N.D. Ill. Oct. 24, 2008)         | 17     |
| <i>Parsons v. Ryan</i> , 289 F.R.D. 513, 516-23 (D. Ariz. 2013)                                    | 14     |
| <i>Rodriguez v. Swank</i> , 318 F. Supp. 289, 294 (N.D. Ill. 1970)                                 | 18     |
| <i>Rosario v. Livaditis</i> , 963 F.2d 1013, 1017 (7th Cir. 1992)                                  | 10, 13 |
| <i>Rosas v. Baca</i> , 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012)                             | 14     |
| <i>Ross v. Gossett</i> , 2020 WL 1472072, at *3-4 (S.D. Ill. Mar. 26, 2020)                        | 14     |
| <i>Rufo v. Inmates of Suffolk Cnty. Jail</i> , 502 U.S. 367, 374 (1992)                            | 24     |
| <i>Scholes v. Stone, McGuire &amp; Benjamin</i> , 143 F.R.D. 181, 185 (N.D. Ill. 1992)             | 13     |
| <i>Sosna v. Iowa</i> , 419 U.S. 393 (1975)                                                         | 16     |
| <i>Streeter v. Sheriff of Cook Cty.</i> , 256 F.R.D. 609, 612 (N.D. Ill. 2012)                     | 11, 17 |

|                                                                                    |        |
|------------------------------------------------------------------------------------|--------|
| <i>United States ex rel. Morgan v. Sielaff</i> , 546 F.2d 218, 222 (7th Cir. 1976) | 24     |
| <i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338, 351 (2011)                   | 14, 15 |

#### Statutes

|                             |               |
|-----------------------------|---------------|
| 20 Ill. Admin. Code 107.210 | 7, 19, 26     |
| 730 ILCS 5/3-11-1           | 20, 21, 25    |
| 730 ILCS 5/5-8A-3(b)        | 7, 19, 26     |
| 730 ILCS 5/5-8A-3(c)        | 7, 26         |
| 730 ILCS 5/5-8A-3(d)        | 7, 19, 21, 25 |
| 730 ILCS 5/5-8A-3(e)        | 7, 20, 26     |
| 75 ILCS 5/3-11-1            | 6, 18, 19     |

#### Rules

|                                    |               |
|------------------------------------|---------------|
| Federal Rule of Civil Procedure 23 | <i>Passim</i> |
|------------------------------------|---------------|

#### Other Authorities

|                                                                                                                                                                                                                                                                                                                                                                                                                              |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| A. Conte & H. Newberg, <i>Newberg on Class Actions</i> § 25.20 (4th ed. 2002)                                                                                                                                                                                                                                                                                                                                                | 24 |
| Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart,<br><a href="https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/">https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/</a> (date analysis<br>based on WHO-China Joint Mission Report)                                                                                                                        | 13 |
| Elizabeth M. Vigilanto et al., <i>Mass Incarceration and Pulmonary Health: Guidance for<br/>Clinicians</i> , 15 Ann. Am. Thoracic Soc. 409, 409 (2019)                                                                                                                                                                                                                                                                       | 12 |
| Gov. Pritzker, Executive Order 2020-13 (Mar. 26, 2020), <i>available at</i><br><a href="https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf">https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf</a> (last<br>visited Apr. 1, 2020).                                                                                                                                       | 9  |
| Ill. Dep't of Corrs., Agency Overview,<br><a href="https://www2.illinois.gov/idoc/aboutus/Pages/IDOCOverview.aspx">https://www2.illinois.gov/idoc/aboutus/Pages/IDOCOverview.aspx</a> (last visited Mar. 31,<br>2020)                                                                                                                                                                                                        | 11 |
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| Laura M. Marushack et al., <i>Medical Problems of State and Federal Prisoners and Jail Inmates</i> ,<br>2011-12, U.S. Dept. of Justice (2014)                                                                                                                                                                                                                                                                                | 12 |
| Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World<br>Health Organization (Feb. 28, 2020), at 12, <i>available at</i> <a href="https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf">https://www.who.int/docs/default-<br/>source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf</a> (last visited Apr. 1,<br>2020) | 12 |
| William B. Rubenstein, et al., <i>Newberg on Class Actions</i> , § 3:12 (5th ed. 2011)                                                                                                                                                                                                                                                                                                                                       | 11 |

Plaintiffs, on behalf of themselves and the classes they seek to represent, hereby respectfully request that this Court grant their motion for class certification, appoint them as named plaintiffs in this litigation, and appoint their undersigned attorneys as class counsel.

### **INTRODUCTION**

The spread of COVID-19 has created an unprecedented health crisis. Public health officials throughout the country have implored the general public to take protective measures to curb its the virus's spread. But the people in Defendant McDonough's custody cannot protect themselves; only Defendant McDonough can ensure that they have the basic means to protect themselves, including hygiene products, cleaning materials, and a means to distance themselves from people who may be infected.

The Prince George's County Jail (the "Jail")<sup>1</sup> has not taken reasonable measures to protect the people in its custody from infection. There is already an outbreak of COVID-19 at the Jail. Moreover, the Jail's inadequate care for those with symptoms or confirmed cases increases the likelihood that those infected will suffer serious illness, permanent physical damage, and death. Every single person in Defendant McDonough's custody faces a risk of death or serious harm as a result.

### **CLASS DEFINITION**

This federal class action seeks to require Defendant McDonough to implement procedures that keep Plaintiffs reasonably safe from contracting communicable disease while in custody and provide reasonable medical care for those who do contract the virus. However, due to age or pre-existing medical conditions, some people are so vulnerable to COVID-19 that no adequate policies

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<sup>1</sup> Since Defendant McDonough is being sued in her official capacity, "Defendant McDonough" and "the Jail" are used interchangeably in this motion.

and procedures could be implemented quickly enough to protect them. These people, as a subclass, seek a writ of habeas corpus under 28 U.S.C. § 2241.

Plaintiffs, therefore, seek to certify two classes with one subclass as follows:

- The Pretrial Class is defined as “all people detained in the Prince George’s County Jail who are not detained pursuant to a judgment of conviction.”
- The Post-Conviction Class is defined as “all people detained in the Prince George’s County Jail who *are* detained pursuant to a judgment of conviction.”
- The Medically Vulnerable Subclass is defined as “all Pretrial Class members whose medical condition renders them especially vulnerable to COVID-19 as determined by guidelines promulgated by the Centers for Disease Control and Prevention.”<sup>2</sup>

Named Plaintiffs Keith Seth, David Smith, Mario Burch, John Doe. No. 1, John Doe. No. 3, John Doe No. 4, and John Doe No. 5 represent the Pretrial Class. Compl.¶¶ 14–17, 19–21. Named Plaintiff John Doe No. 2 represents the Post-Conviction Class. Compl.¶ 18. And Named Plaintiffs Seth, Smith, John Doe No. 1, John Doe No. 3, and John Doe No. 5 represent the Medically Vulnerable Subclass. Compl.¶¶ 14–15, 17, 19, and 21.

### **BACKGROUND AND SUMMARY OF ARGUMENT**

Plaintiffs’ suit for injunctive relief under the Eighth and Fourteenth Amendments, and the Medically Vulnerable Subclass’s petition for habeas corpus, arise from Defendant McDonough’s failure to protect them from the severe risk of death or serious physical harm. Those risks affect

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<sup>2</sup> See U.S. Centers for Disease Control and Prevention, *People Who Are At Higher Risk* (last reviewed Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

each Class and Subclass member identically. This Court should therefore certify the Classes and Subclass.<sup>3</sup>

The claims of the Classes and Subclass are suited to proceed as a class action under Federal Rule of Civil Procedure 23(b)(2).<sup>4</sup> In the Fourth Circuit, the procedure and analysis for certifying class action habeas petitions is the same as any other class action. *See Diaz v. Hott*, 297 F. Supp. 3d 618, 628 (E.D. Va. 2018) (certifying class action habeas), *aff'd sub nom. Guzman Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019).<sup>5</sup> Thus, to certify a class, each of the requirements of Rule 23 must be met. Plaintiffs here satisfy Rule 23 because: (a) every member of the Classes and Subclass

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<sup>3</sup> In addition to maintaining dangerous conditions, the Jail is detaining COVID-positive prisoners when it has no legal authority to do so because they are COVID-positive. Since everyone in the Jail is both at great risk for infection with COVID-19 and actively seeking to be legally entitled to release (whether by paying bail, through acquittal, requesting early release, or by some other means), all are also in danger of being unlawfully detained. Accordingly, the Pretrial and Post-conviction Classes will also challenge this practice under the Fourteenth Amendment.

<sup>4</sup> Although the Supreme Court has not squarely decided whether Rule 23 of the Federal Rules of Civil Procedure “is applicable to petitions for habeas corpus relief,” on several occasions the Court has decided class action habeas petitions. *Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984) (declining to address the issue and accepting district court’s certification of the class; reversing lower courts’ holding that preventive detention of juveniles was unconstitutional); *Middendorf v. Henry*, 425 U.S. 25, 30 (1976) (declining to decide whether class action habeas petitions are cognizable; refusing to grant relief).

<sup>5</sup> Some other circuits have adopted “a representative analogous to the class action provided for in Rule 23.” *Bijeol v. Benson*, 513 F.2d 965, 968 (7th Cir. 1975) (holding that such a procedure “may be appropriate in a habeas corpus action under some circumstances.”). The Fourth Circuit, in keeping with the practices of the Second, Eighth, and Ninth Circuit, simply applies the procedure of Rule 23. *See also Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (“the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus.”) (citing *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987)); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973) (“under certain circumstances a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions, holding multiple hearings, and writing multiple opinions.”); *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 24 (2d Cir. 1971) (finding a class action habeas “properly maintainable” when the Rule 23 factors are met); *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972) (holding that a petition for a writ of habeas corpus can be brought as a class action).

have the same legal theory as to why their federal rights are being violated; (b) the Jail's failure to take reasonable measures to protect them violates the rights of every Class member; (c) every Class member will use similar or overlapping evidence in support of his or her cause of action; and (d) every member of the Class seeks a uniform injunction or writ of habeas corpus requiring Defendant McDonough to take immediate action to protect them from a grave risk of death or harm. In other words, each representative shares all legal claims with the Class or Subclass he seeks to represent, each Class or Subclass's evidence will be identical in support of those claims, and the Class representatives seek the same relief as the Class or Subclass they seek to represent.

In addition to commonality, the Classes and Subclass satisfy the other requirements of Rule 23(a), as well as the requirements of Rule 23(b)(2). Joinder is impracticable because the number of people in the Jail's custody exceeds hundreds of people on any given day, and the Subclass also likely contains hundreds of people. The claims of the named Plaintiffs are typical of those of the class as a whole. That typicality stems from their claim that the Jail has placed them at significant risk of harm by failing to take appropriate steps to address the risk of COVID-19. Named Plaintiffs have no conflicts with the unnamed members of the proposed classes. Their lawyers are experienced in federal-court civil-rights class actions, particularly those involving prisons and jails. Thus, named Plaintiffs and their counsel will adequately represent the interests of the proposed Classes and Subclass. Finally, Defendant McDonough has refused to act in a manner that applies generally to the class as a whole, rendering class-wide injunctive relief appropriate under Federal Rule of Civil Procedure 23(b)(2), and a class-wide writ of habeas corpus appropriate under *Diaz*.

## ARGUMENT

For a district court to certify a class action, the proposed class must satisfy the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) and at least one requirement of Rule 23(b). *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015). Because the proposed Classes and Subclass meet all four Rule 23(a) requirements and the requirements of Rule 23(b)(2), this Court should certify Plaintiffs’ proposed Classes. 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. As demonstrated below, each subclass additionally meets all requirements of Rule 23(a) and Rule 23(b) and this Court should similarly certify Plaintiffs’ proposed subclass.

Class certification is particularly favored when, as here, the named plaintiffs assert civil rights claims that are transitory in nature, such that mootness concerns would make it difficult or impossible for individuals to litigate the issues outside of the class context. *See Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (noting that class-action treatment was “particularly important” in a case where the claims of the individual plaintiffs ran “the risk of becoming moot” because the “[t]he class action vehicle . . . provides a mechanism for ensuring that a justiciable claim is before the Court”) (quotation marks and citation omitted)). Indeed, class-action treatment is favorable here given the relatively brief nature of incarceration in county jail. *See, e.g., Hiatt v. Cty. of Adams*, 155 F.R.D. 605, 608–09 (S.D. Ohio 1994) (explaining that given the “short term nature of incarceration in a county jail,” a class should be certified when it is the “only vehicle whereby the legality of [a jail’s] operation can be reviewed”).

**I. Plaintiffs Satisfy Rule 23(a): They Are Numerous and Raise Common Questions, and the Named Plaintiffs Are Adequate Representatives with Typical Claims**

**A. Numerosity is Satisfied: The Class and Subclasses Each Include Hundreds of Members.**

First, the proposed Classes and Subclass are sufficiently numerous to make joinder impracticable. Fed. R. Civ. P. 23(a)(1). In determining whether the numerosity requirement is met, “[n]o specified number is needed to maintain a class action.” *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (citation and quotation omitted). In fact, even eighteen people can be sufficient. *See Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass’n.*, 375 F.2d 648, 653 (4th Cir. 1967); *see also Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995) (“[A] class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable.”).

Numerosity is easily satisfied here. Defendant McDonough is currently holding approximately 600 people in his custody. The majority are presumptively innocent and held pretrial. Roughly 100 or so are held post-conviction. The threat posed by COVID-19 is such that every person in the Jail’s custody faces the risk of significant harm. Everyone is at risk of infection. And everyone who is infected is at risk of inadequate medical care that intensifies the risk of serious illness, long-term permanent physical damage, and death. COVID-19 is therefore potentially lethal for any person in the jail.

The proposed Subclass also meets the numerosity threshold. The Medically Vulnerable Subclass is comprised of people who are particularly vulnerable to COVID-19 because of underlying medical conditions or age. People of any age who suffer from certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, compromised immune systems (such as from

cancer, HIV, or autoimmune disease), severe obesity, and asthma, are at elevated risk higher risk for developing more serious complications from COVID-19 illness. So too people over the age of 65. 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 people with diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.<sup>6</sup>

A sizeable percentage of the jail population is likely medically vulnerable to COVID-19. According to one study, “asthma prevalence is 30%–60% higher among individuals with a history of incarceration as compared with the general population.”<sup>7</sup> Another 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>8</sup> Based 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 several hundred people.

The classes and subclass are too numerous for joinder to be considered practicable.

**B. Commonality is Satisfied: The Legality of Defendant’s Response to the Pandemic Involves Numerous Common Questions of Fact and Law.**

Rule 23(a)(2) requires that “there [be] questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality requires that class members’ claims “depend on a common contention” of facts *or* law such that “determination of its truth or falsity will resolve an issue that

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<sup>6</sup> Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, *available at* <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last visited Apr. 1, 2020).

<sup>7</sup> Elizabeth M. Vigilanto et al., *Mass Incarceration and Pulmonary Health: Guidance for Clinicians*, 15 Ann. Am. Thoracic Soc. 409, 409 (2019).

<sup>8</sup> Laura M. Marushack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dept. of Justice (2014).

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).

In other words, the commonality requirement of Rule 23(a)(2) “does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist.” *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff’d*, 6 F.3d 177 (4th Cir. 1993); *see also Wal-Mart*, 564 U.S. at 369 (“[E]ven a single [common] question will do.” (citation omitted)). For this reason, factual differences among the claims of putative class members do not defeat certification. Indeed, “Rule 23 does not require precise, mirror-image identity respecting the injuries caused by a single practice or policy.” *Int’l Woodworkers of Am. AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1270 (4th Cir. 1981).

Rather, commonality requires Plaintiffs to demonstrate that there is “some glue” holding the claims together; that a common question or questions “generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 351, 349–50 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (emphasis in original). These “common answer[s]” must “relate[] to the actual theory of liability in the case.” *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015). Civil rights cases often easily demonstrate commonality because the defendant’s actions are “central to the claims of all class members[,] irrespective of their individual circumstances and the disparate effects of the conduct.” *Baby Neal ex. rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (citing 7A Charles A. Wright, et al., *Fed. Prac. & Proc.* § 1763 at 219 (1986)).

Accordingly, courts in the Fourth Circuit have certified class actions in such cases as where a class of people in pretrial detention sought to challenge the state’s practice of transferring pretrial detainees from local jails to state institutions, *see Epps v. Levine*, 457 F. Supp. 561, 563 (D. Md.

1978), and where a class of people unable to afford the traffic offense-related fines and court costs sought to challenge the state’s practice of revoking their driver’s licenses as a consequence of their inability to pay, *see Johnson v. Jessup*, 381 F. Supp. 3d 619, 637 (M.D.N.C. 2019). And many district courts have found that systemic constitutional challenges to prison and jail conditions provide the “glue” necessary to hold a class together.<sup>9</sup>

As the Supreme Court explained in *Wal-Mart*, “for purposes of Rule 23(a)(2) [e]ven a single [common] question will do . . .” 564 U.S. at 359 (citation and internal quotations omitted; alterations in original). Here, Plaintiffs allege that all members of the proposed Class are at significant risk of contracting a fatal illness due to the Jail’s systemic failure to implement policies and practices necessary to protect them. The core questions of law and fact common to the classes and subclass include the following:

- (1) Do the Jail’s conditions create a substantial risk that the people in its custody will be infected with COVID-19?
- (2) Do the Jail’s conditions create a substantial risk that the people in its custody who are infected with COVID-19 will face serious illness, long-term physical damage, or death?

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<sup>9</sup> *E.g.*, *Olson v. Brown*, 284 F.R.D. 398, 410–11 (N.D. Ind. 2012) (jail policies and conditions); *Ross v. Gossett*, 2020 WL 1472072, at \*3–4 (S.D. Ill. Mar. 26, 2020) (unconstitutional practices regarding shakedowns); *Rosas v. Baca*, 2012 WL 2061694, at \*3 (C.D. Cal. June 7, 2012) (jail violence case); *Jones v. Guzman*, 296 F.R.D. 416, 465–66 (E.D. La. 2013) (jail violence case); *Hughes v. Judd*, 2013 WL 1821077, at \*23 (M.D. Fla. Mar. 27, 2013) (unconstitutional conditions for juvenile detainees); *M.D. v. Perry*, 294 F.R.D. 7, 24–25 (S.D. Tex. 2013) (foster children facing abuse); *Parsons v. Ryan*, 289 F.R.D. 513, 515–16 (D. Ariz. 2013) (inadequate medical and mental health care in state prisons); *Butler v. Suffolk Cnty.*, 289 F.R.D. 80, 96 (E.D.N.Y. 2013) (jail sanitation case); *Abadia-Peixoto v. United States Dep’t of Homeland Sec.*, 277 F.R.D. 572, 576 (N.D. Cal. 2011) (shackling of detainees during judicial proceedings).

(3) Is Defendant McDonough acting with deliberate indifference to these risks?

(4) Is the risk of harm posed by the Jail's conditions so severe and so immediate that the only adequate remedy is release?

Resolving these questions will yield exactly the kind of “common answers” to Plaintiffs’ Eighth and Fourteenth Amendment claims that the Supreme Court requires.<sup>10</sup> See *Wal-Mart*, 564 U.S. at 351.

An injunctive challenge to a systemic failure to protect class members from significant harm is a textbook example of a case that satisfies the commonality requirement and warrants class certification. Indeed, “this is precisely the type of case for which class certification pursuant to Rule 23(b)(2) was intended.” *Scott v. Clarke*, 61 F. Supp. 3d 569, 591 (W.D. Va. 2014); see *Thorn v. Jefferson–Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006). Plaintiffs here challenge Defendant’s systemic failure to respond reasonably to the deadly threat of COVID-19. The commonality requirement is therefore easily met. See *Scott*, 61 F. Supp. at 590 (W.D. Va. 2014) (certifying a 23(b)(2) class where “Plaintiffs’ amended pleadings allege that the Defendants have provided deficient medical care, or failed to provide medical care under circumstances in which it is plainly warranted and needed, on a systemic basis that jeopardizes the continuing health and well-being of Plaintiffs and all other prisoners residing or who will reside at [the prison].”)

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<sup>10</sup> To answer these core questions, the Court will need to consider specific fact questions common to the classes, including: what measures Defendant McDonough is taking in response to COVID-19; whether conditions at the Jail comply with CDC guidelines; whether Defendant McDonough knew of and disregarded the risk of COVID-19. And ultimately, the Court will determine the legal question of whether Defendant McDonough’s conduct rises to the requisite level of deliberate indifference for a constitutional violation. The answers to these questions will be common to all members of the putative classes at issue.

**C. Typicality is Satisfied: The Named Plaintiffs' Claims Are Representative of Those of the Class at Large.**

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The threshold requirements of . . . typicality are not high,” *Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009) (quotation omitted)). Class representatives must “be part of the class and possess the same interest and suffer the same injury as the class members.” *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

Under the typicality requirement, the Court does not require “members of the class [to] have identical factual and legal claims in all respects.” *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). In this respect, “factual differences will not render a claim atypical,” so long as the class representative’s claim “arises from the same event or practice or course of conduct that gives rise to the claims of the class members” and is “based on the same legal theory,” *Casey*, 43 F.3d at 58. In other words, “[t]he essence of the typicality requirement is captured by the notion that ‘as goes the claim of the named plaintiff, so go the claims of the class.’” *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (quotation omitted).

In this case, the claims of the Plaintiffs are typical of the Classes and Subclass that they represent. Every member of the class faces a substantial risk of contracting COVID-19 if immediate measures are not implemented. Some people, like the medically vulnerable plaintiffs, are at imminent risk of death or severe harm if they are not transferred to a safer environment. The overarching nature of the threat of COVID-19 to every person confined in Defendant McDonough’s custody is sufficient to satisfy typicality for the two Classes. For the Medically Vulnerable Subclass, each person claims that he must be released because his health is at imminent and immediate risk from the same virus and same policy failures as each other person in the

subclass. The claims of the Class Representatives are therefore typical of the claims of those they seek to represent.

**D. The Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Classes and Subclass.**

Finally, the Named Plaintiffs also meet the final requirement under Rule 23(a): they “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequate representation requirement is met where: “1) plaintiff’s interests are [not] antagonistic to the interest of other members of the class and 2) plaintiff’s attorneys are qualified, experienced and able to conduct the litigation.” *Longo v. Trojan Horse Ltd.*, 208 F. Supp.3d 700, 711 (E.D.N.C. 2016) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)); *see also Olvera-Morales v. Int’l Labor Mgmt. Corp. Inc.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007) (“To establish adequacy, ‘the representative must have common interests with unnamed members of the class’ and ‘it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.’”) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996)).

In this case, the Named Plaintiffs do not have interests that conflict with those of the rest of the class. To the contrary, as laid out above in the commonality and typicality discussions, the Named Plaintiffs here pursue claims common to the class as a whole in an effort to advance a common interest in ensuring they receive adequate protection from COVID-19. The injunctive relief they seek would benefit the entire class equally. The Named Plaintiffs and their fellow class members thus share a common interest and are not conflict with each other.

The Named Plaintiffs also meet the requirement that they will “vigorously prosecute the interests of the class through qualified counsel.” *Olvera-Morales*, 246 F.R.D at 258. They are

represented here 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 Civil Rights Corps have extensive experience litigating complex class action cases and civil rights cases, including cases concerning unconstitutional pretrial systems. Exhibit 1, Declaration of Counsel. As discussed in further detail below, *infra* Part III, Plaintiffs' counsel are qualified and experienced counsel with a history of zealous advocacy on behalf of their clients. Rule 23(a)(4)'s adequacy requirement is met.

## **II. Certification of the Classes and Subclass for Prospective Relief is Appropriate Under Fed. R. Civ. P. 23(b)(2)**

In addition to satisfying Rule 23(a), the proposed class in this case satisfies Rule 23(b)(2). A court may certify a class under Rule 23(b)(2) if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); *see also Zimmerman v. Bell*, 800 F.2d 386, 389–90 (4th Cir. 1986) (“[S]ubsection (b)(2) [is] limited to claims where the relief sought [is] primarily injunctive or declaratory.”); *Bumgarner v. NCDOD*, 276 F.R.D. 452, 457–58 (E.D.N.C. 2011) (“The essential consideration is whether the complaint alleges that the plaintiffs have been injured by defendants’ conduct which is based on policies and practices applicable to the entire class.”) (citation omitted).

Courts have repeatedly held that civil-rights class actions are the paradigmatic 23(b)(2) suits, “for they seek classwide structural relief that would clearly redound equally to the benefit of each class member.” *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other grounds*, 442 U.S. 915 (1979). As stated in the leading treatise on class actions:

Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory

and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

A. Conte & H. Newberg, *Newberg on Class Actions* § 25.20 (4th ed. 2002).

Injunctive challenges to prison and jail conditions routinely proceed as class actions. *See, e.g., Brown v. Plata*, 563 U.S. 493, 506 (2011); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 374 (1992); *Jones 'El v. Berge*, 374 F.3d 541 (7th Cir. 2004); *Jones v. Diamond*, 519 F.2d 1090, 1097 (5th Cir. 1975) (“Realistically, class actions are the only practicable judicial mechanism for the cleansing reformation and purification of these penal institutions.”); *Casey*, 43 F.3d at 58 (noting that subsection (b)(2) “is almost automatically satisfied in actions primarily seeking injunctive relief”); *Scott v. Clarke*, 61 F. Supp. at 591; *Bradley v. Harrelson*, 151 F.R.D. 422, 427 (M.D. Ala. 1993) (stating that subsection (b)(2) “is particularly applicable to suits such as the one *sub judice* which involve conditions of confinement in a correctional institution”). Here, high-level officials failing to take reasonable measures to abate the deadly threat posed by COVID-19 places all class members at risk of serious illness or death. Rule 23(b)(2) is satisfied.

### **III. 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 from Civil Rights Corps, 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. Class counsel have conducted an extensive investigation into the conditions in the Jail and the sanitation and social distancing requirements that are necessary to prevent or mitigate an outbreak of COVID-19. In addition, Class counsel has sufficient financial and human resources to litigate this matter. In sum, Plaintiffs' attorneys are experienced advocates; possess "sufficient vigor" along with sufficient resources, to adequately represent the Classes and prosecute this action; and are appropriate counsel for the matter. *See Kirkpatrick J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (citations omitted).

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the Classes and Subclass as defined in this Motion and appoint the undersigned as class counsel.

Respectfully submitted on April 21, 2020,

By /s/Elizabeth Rossi  
Elizabeth Rossi  
Bar No. 19616  
Katherine Chamblee-Ryan  
*application to the Bar of this Court pending*  
Olevia Boykin  
*application forthcoming*  
Ryan Downer  
*application pending*  
CIVIL RIGHTS CORPS  
1601 Connecticut Ave. NW, Suite 800  
Washington, D.C. 20009  
katie@civilrightscorps.org  
610-931-7715

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
GREENBELT DIVISION**

|                                       |   |          |
|---------------------------------------|---|----------|
| KEITH SETH, <i>et al.</i> ,           | ) |          |
| Individually and on behalf of a class | ) |          |
| of similarly situated persons,        | ) |          |
|                                       | ) |          |
| Plaintiffs-Petitioners,               | ) |          |
|                                       | ) | Case No. |
| v.                                    | ) |          |
|                                       | ) |          |
| MARY LOU MCDONOUGH,                   | ) |          |
| In her official capacity as           | ) |          |
| Director of the Prince George's       | ) |          |
| County Department of Corrections,     | ) |          |
|                                       | ) |          |
|                                       | ) |          |
| Defendant-Respondent.                 | ) |          |

**DECLARATION OF PLAINTIFFS' COUNSEL**

1. Counsel for Plaintiffs-Petitioners and the putative Class members in this case, Elizabeth Rossi, Katherine Chamblee Ryan, Olevia Boykin, and Ryan Downer, on behalf of Civil Rights Corps, submit this Declaration in support of the motion for class action treatment.

2. Elizabeth Rossi is a senior attorney at Civil Rights Corps, a nonprofit civil rights law office in Washington, D.C. She has worked there since its founding in 2017. Prior to her time at Civil Rights Corps, she worked at Equal Justice Under Law and in the appellate division in the Maryland Office of the Public Defender. She clerked for Judge Paul Barbadoro on the United States District Court for New Hampshire, and for Judge Martha Craig Daughtrey on the Sixth Circuit Court of Appeals.

3. Elizabeth serves as counsel in a number of lawsuits in which a class has been certified, including *Russell, et al. v. Harris County* (S.D. Tex.), *ODonnell v. Harris County* (S.D. Tex.), *McNeil v. Community Probation Services, Inc.* (M.D. Tenn.), and *Daves v. Dallas County* (N.D. Tex.). She also served as counsel on *Rodriguez v. Providence Community Corrections, Inc.*, (M.D. Tenn. 2015), in which final classwide settlement was approved on July 15, 2018.

4. Katherine Chamblee Ryan is a senior attorney and the coordinator of the Prosecutor's Project at Civil Rights Corps. Before coming to Civil Rights Corps in spring 2018, she spent four years as an attorney in the capital unit at Southern Center for Human Rights in Atlanta, GA. She also clerked for Judge Myron Thompson of the U.S. District Court for the Middle District of Alabama.

5. Katherine is counsel for the plaintiffs in *Briggs v. Montgomery*, a complex civil rights lawsuit filed in the U.S. District Court for Arizona. This case is currently in classwide discovery, and plaintiffs will move for class certification in May. At Southern Center, Katherine represented clients who had been sentenced to the death penalty in post-conviction proceedings in state in federal court. In 2015, she served as co-counsel in *Foster v. Chatman*, 578 U.S. \_\_ (2016), a case in which the U.S. Supreme Court reversed the conviction and death sentence of her client, Timothy Foster, because of the racial discrimination in his jury selection.

6. Olevia Boykin is an Arthur Liman fellow at Civil Rights Corps. She has worked at Civil Rights Corps since fall 2018. She earned her J.D. from Yale Law School in 2017. Olevia clerked for Judge Myron Thompson for the U.S. District Court for the Middle District of Alabama.

7. Olevia is counsel in *Briggs v. Montgomery*.

8. Ryan Downer is the director of litigation at Civil Rights Corps. Before this, he was counsel at Relman, Dane & Colfax, a civil rights firm in Washington, D.C. Prior to that, he served as assistant counsel at the NAACP Legal Defense Fund in New York City. He also previously served as a law clerk to Judge Martha Craig Daughtrey on the United States Court of Appeals for the Sixth Circuit.

9. As litigation director, Ryan supervises and serves as counsel in a number of Civil Rights Corps' ongoing class action lawsuits. *See e.g., Graff v. Aberdeen Enterprizes II, Inc.*, (N.D. Okla. 2017); *Fant et al. v. City of Ferguson*, (E.D. Mo. 2015). He also litigated complex civil rights cases, including class actions, in his roles at Relman, Dane & Colfax and the Legal Defense Fund. Two of these class actions *Thompson v. HUD* and *Lewis v. Chicago*—resulted in groundbreaking precedent and multimillion dollar settlements for the plaintiffs.

10. Civil Rights Corps has investigated and served as lead counsel in many constitutional civil rights class action lawsuits challenging various aspects of the criminal legal system, with an emphasis on challenging money bail and user-funded schemes. A small sampling of these cases includes: *ODonnell v. Harris County*, 2017 WL 1542457, at \*7-8 (S.D. Tex. Apr. 28, 2017); *Daves v. Dallas County*, No. 3:18-CV-0154-N, 2018 U.S. Dist. LEXIS 160742 (N.D. Tex. Sep. 20, 2018); *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2019 U.S. Dist. LEXIS 97327 (E.D. Mo. June 11, 2019); *Schultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018); *Edwards v. Cofield*, 265 F. Supp. 3d 1344 (M.D. Ala. 2017); *Caliste v. Cantrell*, No. 17-6197, 2018 U.S. Dist. LEXIS 43338 (E.D. La. Mar. 16, 2018); *Jones on behalf of Varden v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. 2015); *Pierce et al. v. City of Velda City*, 2015 WL 10013006 (E.D. Mo. 2015); *Walker v. City of*

*Calhoun*, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016); *Rodriguez v. Providence Community Corrections, Inc.*, 2015 WL 9239821 (M.D. Tenn. 2015); *Cooper v. City of Dothan*, 2015 WL 10013003 (M.D. Ala. 2015); *Snow v. Lambert*, 2015 WL 5071981 (M.D. La. 2015); *Thompson v. City of Moss Point*, 2015 WL 10322003 (S.D. Miss. 2015).

11. Further, Civil Rights Corps is currently engaged in several cases materially identical to this one, which concern the outbreak of COVID-19 in local jails. See e.g. *Swain v. Junior*, No. 1:20-CV-21457 (S.D. Fla. 2020); *Mays v. Dart*, No. 1:20-CV-2134 (N.D. Ill. 2020); *Sanchez v. Brown*, No. 3:20-CV-832 (N.D. Tex. 2020). Its advocacy in three of these cases has already resulted in the issuance of temporary restraining orders requiring Cook County, Illinois; Oakdale, Michigan; and Miami-Dade County, Florida to, inter alia, comply with the guidelines issued by the Centers for Diseases Control.

12. Civil Rights Corps has conducted an investigation into the current COVID-19 containment strategies and conditions of confinement at the Prince George's County Jail. This investigation has included interviews with witnesses, including people detained in the jail, local attorneys, community members, physicians, and experts in disease control and the effects of solitary confinement. Plaintiffs' counsel has become familiar with the Centers for Disease Control's COVID-19 guidelines for correctional settings. Plaintiffs' counsel has therefore dedicated significant time and resources to becoming familiar with the health crisis in Prince George's County and with all of the relevant state and federal laws and procedures that can and should govern it.

13. Civil Rights Corps is prepared to contribute significant resources to litigating this case. Plaintiffs' counsel have paid all costs associated with the investigation and litigation to date and will continue to do so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: April 21, 2020

/s/Elizabeth Rossi

Elizabeth Rossi

Bar No. 19616

Katherine Chamblee-Ryan

*application to the Bar of this Court pending*

Olevia Boykin

*application forthcoming*

Ryan C. Downer

*application pending*

CIVIL RIGHTS CORPS

1601 Connecticut Ave. NW, Suite 800

Washington, D.C. 20009

katie@civilrightscorps.org

610-931-7715

Attorneys for Plaintiffs