IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No._____

David Clay;
Matthew Deherrera;
Lamont Morgan;
William LaFontaine; and
Cynthia Shaw-Pierce, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Joe Pelle, in his official capacity as Boulder County Sheriff, and
Larry R. Hank, in his official capacity as administrator of the Boulder County Jail and Division Chief of the Boulder County Sheriff Office,

Defendants.

PLAINTIFFS' MOTION TO CERTIFY CLASS AND APPOINT CLASS COUNSEL

D.C.Colo.LR 7.1 Conference

Plaintiffs' counsel has not consulted opposing counsel with respect to this motion because no counsel has yet appeared.

INTRODUCTION

Plaintiffs are prisoners in the Boulder County Jail in Boulder, Colorado. They bring this action to challenge a new jail policy under which, with narrow exceptions, all outgoing mail sent by prisoners must be written on postcards supplied by the jail (hereinafter the "postcard-only policy"). Plaintiffs allege that this policy violates their rights under the First and Fourteenth Amendments to the United States Constitution and

Article II, Sections 10 and 25 of the Colorado Constitution. They seek injunctive and declaratory relief only; no damages are sought.

Plaintiffs now move this Court to certify, pursuant to Fed. R. Civ. P. 23(b)(2), a class comprising "all current and future prisoners in the Boulder County Jail who are subject to or affected by the defendants' postcard-only policy." Plaintiffs also ask the Court to appoint the undersigned as class counsel pursuant to Fed. R. Civ. P. 23(g). For the reasons set forth below, the motion should be granted.

ARGUMENT

I. Principles applicable to class certification.

In ruling on a motion for class certification, "the district court must determine whether the four threshold requirements of Rule 23(a) are met. If the court determines that they are, it must then examine whether the action falls within one of three categories of suits set forth in Rule 23(b)." *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988) (footnote omitted).

Class certification is solely a procedural issue, and the court's inquiry is limited to determining whether the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982). In ruling on the motion for class certification, the court must take the substantive allegations of the complaint as true. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). If the court has some doubt, it should err in favor of certification, since the decision is subject to later modification. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *see also Anderson v. Boeing Co.*, 222 F.R.D.

521, 531 (N.D. Okla. 2004) (same, citing *Esplin*); *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 508-09 (D.N.M. 2004) (same).

II. The requirements of Rule 23(a) are satisfied.

In order for a class to be certified, the following requirements must be satisfied:

> (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). As plaintiffs demonstrate below, all four requirements of Rule 23(a) are easily met in this case.

A. Impracticability of Joinder – Rule 23(a)(1).

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." There can be no doubt that the proposed class satisfies this requirement.

The jail's average daily population is about 400 prisoners, all of whom are subject to the postcard-only policy. Thus, based only on the number of class members in the jail at any one time, the requirements of Rule 23(a)(1) are satisfied. *See Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978) ("Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class"); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76 (10th Cir. 1977) (trial court erred in denying class certification on numerosity grounds where class consisted of between 41 and 46 persons).

Moreover, the proposed class includes not only current prisoners, but future prisoners as well. In any given year, the jail books thousands of prisoners, some of whom stay for only a relatively short time. The fluid nature of the class, and the

inclusion in the class of future prisoners, whose identities obviously cannot now be ascertained, makes joinder of all class members not just impracticable but literally impossible. *See Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future prisoners seeking injunctive relief; "[a]s members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable"). The requirements of Rule 23(a)(1) are satisfied.[1]

B. Commonality – Rule 23(a)(2).

Rule 23(a)(2) "requires only a single question of law or fact common to the entire class." *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010). For that reason, the commonality requirement is "easily met." 1 Herbert B. Newberg, Newberg on Class Actions § 3.10, at 274 (4th ed. 2002) (hereinafter "Newberg").

In this case, the members of the proposed class are all housed in a single facility, and all of them are subject to defendants' postcard-only policy. Accordingly, there are questions of fact that are common to the class, including (but not limited to) the following:

1. The scope and nature of defendants' postcard-only policy.
2. The scope, criteria, and process for invoking the alleged "legal mail" exception to defendants' postcard-only policy.

[1] *See also Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999) (fluidity of class of criminal defendants makes certification particularly appropriate); *Dean v. Coughlin*, 107 F.R.D. 331, 332 (S.D.N.Y. 1985) ("the fluid composition of a prison population is particularly well-suited for class status"); *Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population ... is constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving").

3. The scope, criteria, and process for invoking the alleged "official mail" exception to defendants' postcard-only policy.

Questions of law common to the class include (but are not limited to) the following:

1. Whether the application of the jail's postcard-only policy violates prisoners' rights under the First and Fourteenth Amendments to the United States Constitution.
2. Whether the application of the jail's postcard-only policy violates prisoners' rights under Article II, Sections 10 and 25 of the Colorado Constitution.

While class members will inevitably be affected in different ways by the postcard-only policy, "[f]actual differences between class members' claims do not defeat certification where common questions of law exist." *Stricklin*, 594 F.3d at 1195.

Plaintiffs have alleged that the injuries and threatened injuries detailed in the Complaint—both those of the named plaintiffs and those of the class—stem from a single written policy of the defendants: the postcard-only policy. This fact alone requires a finding of commonality. *See Skinner*, 209 F.R.D. at 488 (commonality requirement satisfied where "this case revolves around a common nucleus of operative facts, namely the policies and customs of the prison regarding inmate-on-inmate violence").

The controlling questions of fact and law in this case are common to the entire class. Accordingly, the commonality requirement of Rule 23(a)(2) is satisfied.

C. Typicality – Rule 23(a)(3).

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." In this case, the claims asserted by the class representatives coincide precisely with the claims asserted on behalf of the class.

Although the challenged policies and practices may affect different class members in different ways, that does not defeat a finding of typicality. According to the leading treatise on class actions:

> Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.

1 Newberg, § 3.15, at 335. The Tenth Circuit has often reiterated the well-settled principle that individual factual differences do not defeat typicality. "[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances." *Stricklin*, 594 F.3d at 1199; *see also Adamson*, 855 F.2d at 676 ("differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory"). That is precisely the case here. All class members are at risk of being subjected – indeed, are subjected – to defendants' postcard-only policy. The claims of the class representatives are based on the same legal theory as the claims of the class members – that the policy violates the free expression guarantees of the United States and Colorado Constitutions. The typicality requirement is met.

D. Adequacy of Representation – Rule 23(a)(4).

Adequacy of representation involves two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Willbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1187-88 (10th Cir. 2002) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011 (9th Cir. 1998)). These criteria are clearly satisfied in this case. There is no conflict between plaintiffs or their counsel and other class members. Plaintiffs are represented by attorneys associated with the ACLU of Colorado and the National Prison Project of the ACLU Foundation, who are experienced in class action cases in general and class action challenges to prison and jail practices in particular.

III. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2).

Certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) 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). "The writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights." *Baby Neal v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994). Recognizing these principles, the Tenth Circuit has explained that Rule 23(b)(2) is "well suited" to cases in which "plaintiffs attempt to bring suit on behalf of a shifting prison population." *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) (*Shook I).*

The Tenth Circuit recently summarized the requirements of Rule 23(b)(2):

> Rule 23(b)(2) imposes two independent, but related requirements upon those seeking class certification. First, plaintiffs must demonstrate defendants' actions or inactions are based on grounds generally applicable to all class members. Second, plaintiffs must also establish the injunctive relief they have requested is appropriate for *the class as a whole.* Together these requirements demand cohesiveness among class members with respect to their injuries[.]
>
> This cohesiveness, in turn, has two elements. First, plaintiffs must illustrate the class is sufficiently cohesive that any classwide injunctive relief satisfies Rule 65(d)'s requirement that every injunction "state its terms specifically; and describe in reasonable detail ... the act or acts restrained or required." Second, cohesiveness also requires that class members' injuries are sufficiently similar that they can be remedied in a single injunction without differentiating between class members. Rule 23(b)(2)'s bottom line, therefore, demands at the class certification stage plaintiffs describe in reasonably particular detail the injunctive relief they seek such that the district court can at least conceive of an injunction that would satisfy Rule 65(d)'s requirements, as well as the requirements of Rule 23(b)(2).

Stricklin, 594 F.3d at 1199-1200 (internal quotation marks, citations, brackets omitted).

These requirements are amply satisfied in this case. All class members have suffered the same injury: a limitation on their ability to send outgoing correspondence that is restricted or prohibited by defendants' postcard-only policy.[2] Plaintiffs have described an injunction that would remedy all class members' injuries, and that satisfies the strictures of Rule 65(d). See Complaint, Prayer for Relief (asking

[2] Of course it is not required that all class members have actually been denied the ability to send a specific piece of outgoing correspondence:

> Rule 23(b)(2) does not require Named Plaintiffs to prove [defendant's] controverted policies or practices actually harm or impose a risk of harm upon every class member at the class certification stage. … [C]ertification is appropriate even if the defendant's action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds* which have general application to the class." Fed. R. Civ. P. 23(b)(2), 1966 Amendment advisory committee note (emphasis added).

Stricklin, 594 F.3d at 1201.

that the Court "[p]ermanently enjoin the defendants from continuing to enforce the challenged postcard-only policy, or any other policy that limits outgoing mail to postcards, thus restoring the status quo that existed before this controversy began"). This is not a case in which "redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members," *Shook v. El Paso County*, 543 F.3d 597, 604 (10th Cir. 2008) (*Shook II*), or in which plaintiffs request injunctive relief "that simply prescribes 'adequate' or appropriate' levels of services," *Id*. at 606. Rather, consistent with other cases in which (b)(2) certification has been approved by the Tenth Circuit, plaintiffs here "concretely ask[] that the defendants be ordered to cease certain behaviors." *Id*. at 609. The requirements of Rule 23(b)(2) are satisfied.

IV. The Court should appoint the undersigned as class counsel.

Fed. R. Civ. P. 23(g)(1) provides that "unless a statute provides otherwise, a court that certifies a class must appoint class counsel."

> Factors relevant to the appointment of class counsel are the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; counsel's knowledge of the applicable law; and the resources that counsel will commit to representing the class.

Maez v. Springs Automotive Group, LLC, ___ F.R.D. ___, 2010 WL 2543553, at *6 (D. Colo. 2010).

All of these factors militate in favor of appointing the undersigned as class counsel. As already noted, the undersigned counsel are associated with the ACLU of Colorado and the ACLU National Prison Project. They are thoroughly familiar with the applicable law and have extensive experience in handling class action, civil rights, and

prisoners' rights litigation. In addition, the undersigned have already done substantial work investigating and identifying the claims of the plaintiff class.

CONCLUSION

For all the reasons set forth above, the motion should be granted.

Respectfully submitted,

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