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12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Jason Fenty, Brian Stepter, Douglas
16 Crough, Edward Reason, Jesus
17 Tequida, Ramon Avenenti, Anthony
18 Scroggins, Dale Perez, and Tamara
19 Ochoa on behalf of themselves and
20 those similarly situated,

21 Plaintiff-Petitioners,

22 Puente Human Rights Movement,

23 Plaintiff,

24 v.

25 Paul Penzone, in his official capacity,
26 and Maricopa County, a municipal
27 entity,

28 Defendants.

Case No. 2:20-cv-01192-SPL-JZB

**REPLY IN SUPPORT OF PLAINTIFF-
PETITIONERS' MOTION FOR CLASS
CERTIFICATION**

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1 **I. INTRODUCTION**

2 Although styled as an opposition to class certification, Defendants’ brief opposes
3 very little that is relevant to class certification, and the Court has already addressed most
4 of what Defendants purport to oppose. Defendants concede the classes are sufficiently
5 numerous and then ignore Plaintiffs’ evidence regarding the expected size of the
6 subclasses. Defendants raise no specific objection to the adequacy and typicality of all
7 but one of the proposed class representatives, nor do they raise any specific objection to
8 the adequacy and typicality of four of the proposed subclass representatives (Crough,
9 Perez, Ochoa, and Tequida). Defendants do not challenge the adequacy of class counsel.
10 Nor do they directly challenge any of the class or subclass definitions.

11 Instead, Defendants spend most of their brief rearguing issues this Court has
12 already rejected in denying their motion to dismiss. Defendants continue to suggest that
13 this case arises out of individualized disputes against the specific facilities in which each
14 class member is housed, ignoring this Court’s ruling that “Plaintiffs’ claims are not about
15 the specific facilities where each is housed, but about Defendants’ policies and practices
16 with respect to COVID-19 at all Maricopa County jails.” Doc. 52 at 11. They again
17 assert that the class representatives failed to exhaust available administrative remedies
18 even though this Court already rejected that argument “at this early stage of the
19 litigation.” *Id.* at 14. They reargue that the single claim seeking habeas relief should be
20 dismissed, not certified—an argument the Court’s ruling forecloses. *See* Doc. 32 at 24-25
21 (asserting argument); Doc. 52 at 14 (denying motion to dismiss).

22 The claims Plaintiffs assert here are precisely the type that should be certified as
23 class claims under Rule 23(b)(2). *See, e.g., Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir.
24 2014) (“courts have repeatedly invoked [Rule 23(b)(2)] to certify classes of inmates
25 seeking declaratory and injunctive relief for alleged widespread Eighth Amendment
26 violations in prison systems.”). It is for this reason that other courts have repeatedly
27 certified nearly identical classes seeking to challenge prison policies regarding COVID-
28 19. *See, e.g., Hernandez Roman v. Wolf*, No. 20-00768 TJH (PVCx) (C.D. Cal. Apr. 23,

1 2020), ECF No. 52; *Fraihat v. U.S. Immigration & Customs Enf't*, No.
2 EDCV191546JGBSHKX, 2020 WL 2759848 (C.D. Cal. Apr. 15, 2020); *Ahlman v.*
3 *Barnes*, --F. Supp. 3d--, No. SACV 20-835 JGB, 2020 WL 2754938 (C.D. Cal. May 26,
4 2020). Despite Defendants' best efforts to reargue a motion they already lost, the class
5 certification analysis is straightforward. Plaintiffs need only satisfy each element of Rule
6 23(a) and one element of Rule 23(b), which they easily do.

7 **II. PLAINTIFFS EASILY SATISFY ALL RULE 23 REQUIREMENTS.**

8 Class certification is a procedural device that Plaintiffs have a "categorical right" to
9 invoke so long as their claims meet the "specified criteria" of Rule 23(a) and one of the
10 subsections of Rule 23(b). *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., Co.*,
11 559 U.S. 393, 398 (2010). Rule 23(a) includes four requirements: (1) numerosity;
12 (2) commonality; (3) typicality; and (4) adequacy of representation." *Parsons*, 754 F.3d
13 at 674. Rule 23(b)(2) requires that "the party opposing the class has acted or refused to
14 act on grounds that apply generally to the class, so that final injunctive relief or
15 corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R.
16 Civ. P. 23(b)(2). Except where essential to the consideration of these specific factors, no
17 further consideration of the merits is necessary or appropriate at this time. *See, e.g.*,
18 *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Merits
19 questions may be considered to the extent—but only to the extent—that they are relevant
20 to determining whether the Rule 23 prerequisites for class certification are satisfied.")
21 (citation omitted); *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974) ("In
22 determining the propriety of a class action, the question is not whether the plaintiff or
23 plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the
24 requirements of Rule 23 are met.") (citation omitted).

25 **A. The Classes and Subclasses Are Sufficiently Numerous.**

26 *1. Defendants Concede Numerosity For Both Classes.*

27 Defendants do not contend that either the Pretrial or Post-Conviction Classes are
28 insufficiently numerous. Their only argument as to numerosity relates to the two

1 Medically Vulnerable Subclasses and the two Disability Subclasses. Thus, at the outset,
2 this Court can conclude that the numerosity of the two primary classes is not in dispute.

3 2. *Common Sense, Reasonable Inferences, and Evidence Ignored By*
4 *Defendants Dictate That The Subclasses Are Sufficiently Numerous.*

5 The Medically Vulnerable Subclasses include incarcerated persons who are 50
6 years or older or who have medical conditions that place them at heightened risk of severe
7 illness or death from COVID-19, such as (a) lung disease, (b) heart disease, (c) chronic
8 liver or kidney disease (including hepatitis and dialysis patients), (d) diabetes, (e)
9 hypertension, (f) compromised immune systems (such as from cancer, HIV, or
10 autoimmune disease), (g) blood disorders (including sickle cell disease), (h)
11 developmental disability, (i) severe obesity, and/or (j) moderate to severe asthma. The
12 Disability Subclasses include all current and future pretrial incarcerated persons who are
13 people with disabilities as defined under the ADA and Section 504, and whose disabilities
14 put them at increased risk of serious illness or death if they contract COVID-19. This
15 includes all Medically Vulnerable Subclass members except those who are deemed
16 Medically Vulnerable solely because of their age or obesity. Although Defendants are
17 uniquely capable of identifying precisely how many incarcerated persons fall within these
18 categories—and notably make no affirmative argument that any subclass is insufficiently
19 numerous—Defendants instead suggest that Plaintiffs have provided insufficient evidence
20 to prove numerosity. Doc. 54 at 5-6. Defendants are incorrect.

21 “Plaintiffs are not required to establish the precise number of class members, as
22 long as common sense and reasonable inferences from the available facts show that the
23 numerosity requirement is met.” *Ely v. Saul*, No. CV-18-0557-TUC-BGM, 2020 WL
24 2744138, at *13 (D. Ariz. May 27, 2020) (quoting *Lowe v. Maxwell & Morgan PC*, 322
25 F.R.D. 393, 399 (D. Ariz. 2017)). Here, Defendants concede that there are 4,685
26 incarcerated persons in the five jails as of August 11, 2020. *See* Doc. 51-1 at ¶ 3.
27 Plaintiffs’ complaint asserted that more than 300 people met the definition of “Medically
28 Vulnerable” based solely on being over the age of 50. *See* Doc. 1 at ¶ 33. Demonstrating

1 that the subclasses are sufficiently numerous, Plaintiffs cite a study conducted by the
 2 Department of Justice that found that “half of state and federal prisoners and local jail
 3 inmates reported having a chronic condition.” Doc. 11 at 12.¹ Plaintiffs also cite the
 4 Centers for Disease Control (“CDC”) guidance for detention facilities, recognizing that
 5 “incarcerated/detained populations have higher prevalence of infectious and chronic
 6 diseases and are in poorer health than the general population, even at younger ages.” *Id.*²
 7 Defendants provide no response to these studies. Defendants cannot simply ignore the
 8 cited evidence and then claim none was provided. From this undisputed information
 9 about the number of class members, and the statistical prevalence of significant medical
 10 conditions amongst those class members, “common sense and reasonable inferences”
 11 suggest that the subclasses are sufficiently numerous. *Ely*, 2020 WL 2744138, at *13; *see*
 12 *also Rannis v. Recchia*, 380 F. App’x 646, 651 (9th Cir. 2010) (numerosity generally
 13 satisfied where “a class includes at least 40 members.”) (citation omitted).³

14 Defendants similarly attempt to evade any direct argument as to joinder. “In
 15 addition to class size, courts consider other indicia of impracticability, such as . . . the size
 16 of individual claims, the financial resources of class members, and the ability of claimants
 17 to institute individual suits.” *Torres v. Goddard*, 314 F.R.D. 644, 654 (D. Ariz. 2010)
 18 (citation omitted). To be impracticable, joinder must be difficult or inconvenient but need
 19 not be impossible. *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14
 20 (9th Cir. 1964) (noting “impracticability does not mean impossibility, but only the

21 _____
 22 ¹ U.S. Dep’t of Just., *Special Report NCJ 248491: Medical Problems of State and
 Federal Prisoners and Jail Inmates, 2011-2012* (revised Oct. 4, 2016), available at
<https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>.

23 ² Centers for Disease Control & Prevention, CS 316182-A, *Interim Guidance on
 24 Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention
 Facilities* (March 23, 2020), available at <https://stacks.cdc.gov/view/cdc/86821>.

25 ³ Defendants also make the incredible argument that the subclasses are insufficiently
 26 numerous because there are only seven proposed class representatives with medical
 27 vulnerabilities and seven is not sufficient to establish numerosity. Doc. 54 at 6. That is
 28 not the standard, nor can it be. The entire point of a class action is to have a limited
 number of representatives represent a larger class. Even a single class representative can
 be sufficient. Requiring the number of class representatives to meet the numerosity
 requirement would defeat the entire purpose of a class action.

1 difficulty or inconvenience of joining all members of the class”) (internal quotation marks
2 and citation omitted); *see also Knapper v. Cox Commc’ns, Inc.*, 329 F.R.D. 238, 241 (D.
3 Ariz. 2019) (numerosity is met if “general knowledge and common sense indicate that
4 joinder would be impracticable.”).

5 Rather than address the reasons set forth for the impracticability of joinder in
6 Plaintiffs’ motion, Defendants argue impracticability should be “considered only when
7 they have provided evidence of a specific number of putative class members to determine
8 whether it is sufficiently numerous.” Doc. 53 at 6. In other words, Defendants say
9 impracticability should only be considered if the class is already sufficiently numerous
10 based on size, which is a determination that would moot any need to consider
11 impracticability. Defendants’ only citation for this backwards proposition is *Jordan v.*
12 *Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), which expressly rejects their
13 argument. In *Jordan*, the Ninth Circuit held that the class was not sufficiently numerous
14 based purely on its size but held that numerosity was satisfied anyway because “the
15 presence of other indicia of impracticability persuade us that the requirement has been
16 met.” *Id.*

17 Here, numerosity is satisfied for both reasons: common sense and reasonable
18 inferences demonstrate that the classes and subclasses are sufficiently numerous and that
19 joinder of individual claims would be impracticable.

20 **B. This Court Already Ruled That Plaintiffs’ Claims Raise Common**
21 **Questions of Law and Fact.**

22 The second Rule 23(a) factor requires a demonstration that “there are questions of
23 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “A clear line of precedent . . .
24 firmly establishes that when inmates provide sufficient evidence of systemic and
25 centralized policies or practices in a prison system that allegedly expose all inmates in that
26 system to a substantial risk of serious future harm, Rule 23(a)(2) is satisfied.” *Parsons*,
27 754 F.3d at 684. Commonality requires plaintiffs to assert claims that “depend upon a
28 common contention . . . capable of classwide resolution—which means that determination

1 of its truth or falsity will resolve an issue that is central to the validity of each one of the
2 claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

3 Here, this Court has already ruled that “Plaintiffs’ claims are not about the specific
4 facilities where each is housed, but about Defendants’ policies and practices with respect
5 to COVID-19 at all Maricopa County jails.” Doc. 52 at 11. Thus, as has been recognized
6 by other recent rulings, broad determinations about whether system-wide policies violate
7 the rights of incarcerated persons are precisely the type of common issues that can be
8 resolved “in one stroke” and are ripe for determination on a class basis. *See e.g.*,
9 *Hernandez Roman*, No. 20-00768 TJH (PVCx), Doc. 52 (certifying class because: “The
10 issue before the Court is whether the manner of their detention—the conditions of their
11 confinement—violates their Fifth Amendment substantive due process rights.”); *Fraihat*
12 *v. U.S. Immigration and Customs Enforcement*, No. EDCV 19-1546, 2020 WL 1932570,
13 *18 (C.D. Cal. April 20, 2020) (“Despite Plaintiffs’ admitted differences, each putative
14 class member finds herself in [a] similar situation As a result, the factual differences
15 are not of the sort that likely affect entitlement to relief or that are likely to change the
16 outcome of the legal analysis.”) (citations omitted; *Ahlman*, 2020 WL 2754938; *see also*
17 *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 989 (D. Ariz. 2011), *aff’d*, 695 F.3d
18 990 (9th Cir. 2012) (“In a civil rights suit, ‘commonality is satisfied where the lawsuit
19 challenges a system-wide practice or policy that affects all of the putative class
20 members.’”) (citations omitted).⁴ Since Plaintiffs filed their motion for class certification,
21 the Central District of California certified a class of 2,000 detained persons based, in part,
22 on a finding that commonality was satisfied because: all of the “class members have been
23 subjected to significant exposure to COVID-19” and there were multiple common facts
24 about how prison policies and procedures were generally applied. *Torres v. Milusinic*,
25 No. 20-cv-04450-CBM-PVC, 2020 WL 4197285, at *22 (C.D. Cal. July 14, 2020).

26 _____
27 ⁴ Defendants address only one of these cases in their response, *Ahlman*, and do so
28 only to suggest that that ruling is currently under review and has been stayed by the U.S.
Supreme Court. Doc. 53 at 16. *Ahlman* has not been overruled and Defendants do not
cite that any of the other cases, for which they offer no response at all, are under review.

1 Defendants ignore the Court’s prior ruling, which was issued before they filed their
2 response and is cited therein. Instead, they simply regurgitate the argument that
3 commonality does not exist because “Plaintiffs acknowledge there are differences among
4 the confinement conditions at each of the five MCSO jails.” Doc. 53 at 11. But the Court
5 already rejected that exact argument in holding that this case is about system-wide
6 policies. *See* Doc. 52 at 11.

7 Notwithstanding its irrelevance to the issue of class certification, Defendants
8 reargue their defenses on the merits, contending that there is insufficient evidence of “a
9 systematically deficient policy or practice that is deliberately indifferent to inmates at all
10 five MCSO Jails.” Doc. 53 at 12.⁵ But “Rule 23 grants courts no license to engage in
11 free-ranging merits inquiries at the certification stage.” *Amgen*, 568 U.S. at 466; *see also*
12 *Eisen*, 417 U.S. at 178 (“In determining the propriety of a class action, the question is not
13 whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the
14 merits, but rather whether the requirements of Rule 23 are met.”). For class certification,
15 Plaintiffs do not need to establish that Defendants’ system-wide policies are deficient;
16 they merely need to establish that such policies exist. *See Parsons*, 754 F.3d at 681
17 (“numerous courts have concluded that the commonality requirement can be satisfied by
18 proof of the existence of systemic policies and practices that allegedly expose inmates to a
19 substantial risk of harm.”) (citation omitted). If the policies exist, it is sufficient for
20 Plaintiffs merely to allege that they are insufficient. *See Unknown Parties v. Johnson*, 163
21 F. Supp. 3d 630, 640 (D. Ariz. 2016) (holding that “claims involving overall conditions
22 that affect the rights of all putative class members are sufficient to satisfy commonality”

23 ⁵ Defendants also assert that the fourteen declarations submitted by Plaintiffs in
24 support of their motion should be discarded solely because they are “unsworn.” Doc. 53
25 at 12. The strength of Plaintiffs’ evidence, which will be supported further by discovery
26 to be obtained from Defendants, is not currently at issue because the commonality
27 analysis asks only whether Plaintiffs’ allegations raise common questions of law or fact.
28 However, Plaintiffs note that Defendants provide no authority for the assertion that
unsworn statements cannot be relied upon by the Court, instead citing a single case where
a court took issue with “anecdotal evidence.” *Id.* Plaintiffs’ fourteen declarations
detailing systemic violations of their rights are more than mere “anecdote[s]” and will be
fully supported by, and consistent with, additional evidence to be collected in discovery.

1 and that whether “such conditions result from Defendants’ stated policies or from their
2 alleged failure to create or adhere to those policies does not change the commonality
3 analysis.”); *cf. Parsons*, 754 F.3d at 678 (finding commonality where “all members of the
4 putative class and subclass have in common . . . their alleged exposure, as a result of
5 specified statewide ADC policies and practices . . . , to a substantial risk of serious future
6 harm to which the defendants are allegedly deliberately indifferent.”). The existence of
7 such policies is not disputed, and this Court has already recognized that Plaintiffs have
8 mounted a substantial enough challenge to those policies to survive a motion to dismiss.
9 Rule 23(a)(2) requires nothing more.⁶

10 Defendants also argue that “individualized inquiry defeats commonality and/or
11 Rule 23(b)(2) where, as here, the inmates seek classwide release due to COVID-19,” and
12 they cite out-of-circuit district court cases to support this proposition. Doc. 53 at 17.
13 While there is a circuit split regarding whether habeas relief may be pursued on a class-
14 wide basis, the Ninth Circuit has expressly recognized that although “the usual habeas
15 corpus case relates only to the individual petitioner and to his unique problem[,] . . . there
16 can be cases . . . where the relief sought can be of immediate benefit to a large and
17 amorphous group. In such cases, it has been held that a class action may be appropriate.”
18 *Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972) (citation omitted); *see also Cox*
19 *v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987) (“This court has held that a class action
20

21 ⁶ Defendants argue without citation that the fact that some incarcerated persons will
22 not develop symptoms upon being exposed to COVID-19 somehow defeats commonality.
23 Doc. 53 at 14. But differences in the specific symptoms experienced by any particular
24 class member do not change the fact that all class members assert a common challenge to
25 common practices and procedures that put all class members at risk. Additionally,
26 someone infected with COVID-19 but asymptomatic during the infection period can still
27 be at substantial risk of serious harm. *See, e.g., Robert Glatter MD, Covid-19 Can Cause*
28 *Heart Damage—Even If You Are Asymptomatic*, FORBES (August 17, 2020 3:24 PM),
available at <https://cutt.ly/ud6dw9X> (discussing “a new study published in JAMA last
month, demonstrating that even if you are unaware of having any symptoms after
recovery from Covid-19, there is the possibility that the virus may cause heart damage or
inflammation that could put you at risk for complications including heart arrhythmias,
heart failure and sudden cardiac death”); *see also, e.g., Pien Huang, We Still Don’t Fully*
Understand The Label ‘Asymptomatic’, NPR (June 23, 2020 10:31 AM), available at
<https://cutt.ly/wd6dsXD> (noting high rates of lung damage in asymptomatic patients).

1 may lie in habeas corpus.”) (citation omitted). *See also Zepeda Rivas v. Jennings*, No. 20-
2 CV-02731-VC, 2020 WL 2059848, at *1 (N.D. Cal. Apr. 29, 2020) (certifying class of
3 detainees challenging COVID-19 conditions of confinement and holding: “There is
4 nothing about the procedural posture of this lawsuit—such as the fact that it seeks habeas
5 relief . . . that precludes provisional class certification.”). Accordingly, controlling
6 precedent establishes that the individualized inquiry that may eventually be required to
7 identify class members for which release would be appropriate is not a bar to class
8 certification.⁷ In a recent decision within the Ninth Circuit, a district court expressly
9 rejected the same argument that individualized issues regarding release should preclude
10 certification because the proper inquiry, “whether Respondent’s existing process with
11 respect to home confinement and compassionate release, as applied to medically
12 vulnerable inmates, amounts to deliberate indifference,” is a common one. *Torres*, 2020
13 WL 4197285, at *22, at 46 n. 63 (quotation omitted).

14 **C. The Class Representatives Are Adequate and Typical.**

15 Defendants combine the typicality and adequacy factors. Doc. 53 at 6-9. But the
16 relevant legal standards are not disputed. Typicality exists if “the claims or defenses of
17 the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ.
18 P. 23(a)(3). The “requirement is permissive and requires only that the representative’s
19 claims are reasonably co-extensive with those of absent class members; they need not be
20 substantially identical.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010)
21 (internal quotation marks and citation omitted). Adequacy is satisfied when “the
22 representative parties will fairly and adequately protect the interests of the class.” Fed. R.
23 Civ. P. 23(a)(4). “Whether the class representatives satisfy the adequacy requirement
24 depends on ‘the qualifications of counsel for the representatives, an absence of
25 antagonism, a sharing of interests between representatives and absentees, and the
26

27 ⁷ Notably, only a single claim asserted by a single subclass (Claim 4, asserted by the
28 Pretrial Medically Vulnerable Subclass) seeks habeas relief. This argument has no
bearing on any other claim or any other form of relief that Plaintiffs seek.

1 unlikelihood that the suit is collusive.” *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir.
2 1998) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)).

3 *I. Reconsideration Of Defendants’ Failed Exhaustion Affirmative*
4 *Defense Is Inappropriate and Does Not Bar Class Certification.*

5 The only argument that Defendants provide regarding adequacy or typicality that
6 purportedly applies to all eight class representatives is that, according to Defendants, their
7 intention to assert an affirmative defense of non-exhaustion somehow renders all eight
8 Plaintiffs either inadequate or atypical. Defendants provide no explanation how this is
9 relevant to an adequacy or typicality analysis, and they cite no authority holding that their
10 affirmative defense is relevant to either analysis under Rule 23.⁸ Moreover, this is also a
11 repeat of yet another argument this Court has already rejected. *See* Doc. 52 at 7. The
12 Court held that resolution of Defendants’ exhaustion argument should not be addressed
13 until the summary judgment stage of proceedings, *i.e.* after both sides have had an
14 opportunity to conduct discovery and provide evidence in support of their positions.⁹ *Id.*
15 Defendants’ efforts to reargue that affirmative defense here, in connection with an
16 inapplicable test under Rules 23(a)(3)&(4), is entirely inappropriate. *See, e.g., Medearis*
17 *v. Oregon Teamster Employers Trust*, No. Cv. 07–723–PK, 2008 WL 4534108, at *2 (D.
18 Or. Oct. 1, 2008) (declining to address exhaustion prior to class certification because “the

19 _____
20 ⁸ Regarding typicality, Defendants do not explain how a need to satisfy the exhaustion
21 requirements under the PLRA, which applies to *all* incarcerated persons, would make the
22 class representatives atypical of the Classes and Subclasses they seek to represent.
23 Plaintiffs allege that no administrative remedies are realistically available to the class
24 members, thus waiving any exhaustion requirement, and the resolution of that issue is
25 certainly of interest to every member of the class and not just the class representatives.

26 ⁹ The Ninth Circuit requires that plaintiffs be given an opportunity to conduct
27 precertification discovery when doing so is “likely to substantiate the class allegations.”
28 *See Perez v. Safelite Group, Inc.*, 553 F. App’x 667, 668-69 (9th Cir. 2014). To the extent
that the Court believes resolution of Defendants’ affirmative defense based on exhaustion
is relevant to class certification, Plaintiffs request an opportunity to take discovery to
support their allegation that administrative remedies are not reasonably available. *Id.*
 (“Failing to allow precertification discovery where it is necessary to determine the
existence of a class is an abuse of discretion.”) (citation omitted). In the alternative, this
Court could provisionally certify the class and then readdress that certification, if
necessary, after discovery on the merits has occurred. However, Plaintiffs believe they
have presented a more than sufficient basis to certify the class based solely on the papers.

1 merits of an affirmative defense . . . are not properly determined at the class certification
2 stage”); *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) (the court should not
3 “advance a decision on the merits to the class certification stage”) (citations omitted).

4 In any event, Plaintiffs Perez and Stepter did exhaust their administrative remedies
5 (see Doc. 40 at 19-20). And there is substantial evidence that administrative remedies are
6 not available to many Plaintiffs, and that no emergency grievance procedure exists. *Id.* at
7 20-22; *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010) (the PLRA “does not require
8 exhaustion when circumstances render administrative remedies ‘effectively
9 unavailable.’”) (citation omitted). It was Defendants’ burden to refute these allegations,
10 and this Court has already ruled that Defendants did not provide a sufficient basis for the
11 Court to determine at the motion to dismiss stage that Plaintiffs had failed to exhaust
12 available remedies. See Doc. 52 at 7; see *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir.
13 2014) (holding that “the ultimate burden of proof remains with the defendant[s]” to
14 “prove that there was an available administrative remedy”). Defendants concede that,
15 under the doctrine of vicarious exhaustion, Plaintiffs need only establish that the
16 exhaustion requirements are satisfied for a single class representative. Doc. 53 at 9, n. 7;
17 see also *Chandler v. Crosby*, 379 F.3d 1278 (11th Cir. 2004); *Gates v. Cook*, 376 F.3d
18 323, 329-30 (5th Cir. 2004); *Barfield v. Cook*, No. 3:18-cv-1198, 2019 WL 3562021, at
19 *8 (D. Conn. Aug. 6, 2019); *Lewis v. Washington*, 265 F. Supp. 2d 939, 942 (N.D. Ill.
20 2003). Thus, exhaustion presents no hurdle to class certification.

21 2. *Defendants Do Not Assert Any Other Argument Against Appointing*
22 *Class Representatives For All Classes and Subclasses.*

23 Defendants’ remaining objections to typicality and adequacy are limited almost
24 entirely to disputing some class representatives’ ability to represent specific subclasses.
25 Most importantly, aside from the exhaustion argument, Defendants do not raise any
26 specific adequacy or typicality challenge to Plaintiffs Crough, Perez, Ochoa, and Tequida.
27 If the Court does not accept Defendants’ invitation to reconsider the Court’s ruling—
28 issued just one week ago—on the same exhaustion arguments that Defendants reassert

1 here, there is concededly at least one adequate and typical representative for each class
2 and subclass. Defendants do not dispute Crough’s capability to represent the Pretrial
3 Class, Pretrial Medically Vulnerable Subclass, or the Pretrial Disability Subclass. Nor do
4 they dispute Perez’s or Ochoa’s capability to represent the Pretrial Class, or Tequida’s
5 capability to represent the Post-Conviction Class, Post-Conviction Medically Vulnerable
6 Subclass, or Post-Conviction Disability Subclass. Thus, every class and subclass has at
7 least one representative even without consideration of the remaining four proposed
8 representatives.¹⁰

9 3. *Plaintiffs Fenty, Stepter, and Scroggins Are Typical and Adequate*
10 *Representatives.*

11 Defendants claim that Plaintiffs Fenty, Stepter, and Scroggins cannot represent the
12 Medically Vulnerable or Disability Subclasses because they do not meet Defendants’
13 definition of “medically vulnerable.” Doc. 53 at 8. This argument implicitly makes two
14 critical concessions. First, Defendants do not argue that Fenty, Stepter, or Scroggins are
15 somehow incapable of representing the Pretrial Class (as opposed to the subclasses within
16 the Pretrial Class). Second, by changing the definition of “medically vulnerable” and then
17 arguing that Fenty, Stepter, and Scroggins do not meet this new definition, Defendants
18 implicitly concede that Fenty, Stepter, and Scroggins do meet the definition of “medically
19 vulnerable” that Plaintiffs have requested that this Court use when it certifies the class—a
20 definition that Defendants do not directly challenge.

21 According to Defendants, Fenty, Stepter, and Scroggins are not “medically
22 vulnerable” because they are each under the age of 65 and do not have medical conditions
23 that would place them in the category of persons who are “at increased risk of a severe
24 illness from COVID-19,” according to the CDC. Doc. 53 at 8-9. Defendants exclude
25

26 ¹⁰ As this Court has already held, “Plaintiffs’ claims are not about the specific
27 facilities where each is housed, but about Defendants’ policies and practices with respect
28 to COVID-19 at all Maricopa County jails.” Doc. 52 at 11. Plaintiffs are not asserting
facility-specific claims and thus have no need for a representative for each class from each
facility.

1 from their own definition of “medically vulnerable,” which is not the one Plaintiffs seek
2 to certify, anyone older than 50 but younger than 65, as well as anyone with medical
3 conditions that would place them in the CDC’s category of persons who “might be at an
4 increased risk of severe illness from COVID-19.” *Id.*¹¹ Regarding Scroggins, this
5 assertion is simply incorrect. Defendants concede that a person with “a body mass index
6 of 30 or higher” falls within the CDC’s category of people who “are at an increased risk”
7 and their own medical doctor and declarant, Dr. Phillips, has conceded that “Mr.
8 Scroggins has a BMI above 30.” Doc. 49 ¶ 16; Doc. 53 at 8.

9 More importantly, Plaintiffs have presented substantial evidence that it is
10 inappropriate to exclude people falling in the CDC’s “might be at an increased risk”
11 category and people aged 50-64 from the definition of “medically vulnerable” in this case.
12 As explained by Dr. Cohen, the CDC’s distinction between conditions that cause an
13 increased risk and those that “might” caused an increased risk is based on the quality and
14 quantity of data currently available in a rapidly shifting environment. Doc. 41-1 Ex. 11
15 ¶ 15. Even for conditions that fall in the “might be” category, “there is consistent
16 evidence of heightened risk but from a smaller number of studies, or where multiple
17 studies may have been conducted with different conclusions about the risk.” *Id.* Dr.
18 Cohen further explains that, given “the constant evolution of science’s understanding of
19 COVID-19, people with medical conditions on either list should be deemed medically
20 vulnerable.” *Id.* ¶ 16. “The CDC’s own data strongly suggests the increased risk from
21 COVID-19 faced by those with chronic conditions in the second category.” *Id.*
22 Additionally, sound scientific evidence indicates that the increased risk based on age
23 begins at age 50, as demonstrated by numerous studies cited in Dr. Cohen’s initial
24 declaration. *See* Doc. 12 ¶¶ 24. For these reasons, Plaintiffs’ definition of the Medically
25 Vulnerable Subclasses—which includes anyone over the age of 50 and anyone possessing
26 medical conditions such as those conditions that are now listed in either of the CDC’s two

27 ¹¹ As noted previously, Fenty has hypertension, Scroggins has asthma, and Stepter is 61
28 years old.

1 categories—is reasonable and consistent with CDC guidance.

2 Again, although Defendants purport that Fenty, Stepter, and Scroggins are
3 inadequate or atypical class representatives, they do not assert any challenge to the actual
4 definitions of the classes or subclasses. Defendants could have objected to a particular
5 class or subclass definition as overbroad, but they chose not to do so. Defendants prove
6 nothing by arguing that Fenty, Stepter, and Scroggins would be unable to represent
7 hypothetical subclasses that are narrower than the ones they actually seek to represent.

8 *4. Plaintiff Reason Can Maintain His Claims.*

9 “Individuals with mooted claims can maintain claims for injunctive relief where
10 they ‘are challenging an ongoing government policy.’” *Fraihat*, 2020 WL 2759848, at
11 *10 (quoting *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007)). Likewise,
12 “where a plaintiff’s claim becomes moot while he seeks to certify a class, his action will
13 not be rendered moot if his claims are ‘inherently transitory’ (such that the trial court
14 could not have ruled on the motion for class certification before his or her claim expired),
15 as similarly-situated class members would have the same complaint.” *Id.* (citing *Pitts v.*
16 *Terrible Herbst, Inc.*, 653 F.3d 1081, 1090-91 (9th Cir. 2011)). “The justification for this
17 rule is that such claims fall into [the] class of cases ‘capable of repetition, yet evading
18 review.’” *Id.* These factors apply here, as Plaintiff Reason’s claims only became
19 potentially moot after the motion for class certification was filed, Doc. 42 at 33, and he is
20 “challenging an ongoing government policy.” As such, he should be allowed to proceed
21 as a class representative.

22 *5. Defendants Do Not Dispute The Adequacy Of Class Counsel.*

23 The adequacy inquiry under Rule 23(a)(4) also requires a determination that class
24 counsel are “qualified.” *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff’d*, 747
25 F.2d 528 (9th Cir. 1984). Defendants raise no objection to the qualifications of class
26 counsel, so this factor is satisfied.

27 **D. Rule 23(b)(2) Is Satisfied.**

28 Rule 23(b)(2) is specifically designed for the type of claims that Plaintiffs assert.

1 “Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party
2 opposing the class has acted or refused to act on grounds generally applicable to the
3 class.’” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Fed. R. Civ.
4 P. 23(b)(2)). Indeed, “the primary role of this provision has always been the certification
5 of civil rights class actions.” *Parsons*, 754 F.3d at 686 (citation omitted). “Civil rights
6 cases against parties charged with unlawful, class-based discrimination are prime
7 examples [of Rule 23(b)(2) actions].” *Amchem*, 521 U.S. at 614 (citations omitted); *see*
8 *also Walters*, 145 F.3d at 1047 (Rule 23(b)(2) “was adopted in order to permit the
9 prosecution of civil rights actions.”). Thus, “courts have repeatedly invoked” Rule
10 23(b)(2) “to certify classes of inmates seeking declaratory and injunctive relief for alleged
11 widespread Eighth Amendment violations in prison systems.” *Parsons*, 754 F.3d at 686;
12 *cf. Carrillo v. Schneider Logistics, Inc.*, No. CV 11-8557 CAS (DTBx), 2012 WL 556309,
13 at *9 (C.D. Cal. Jan. 31, 2012), *aff’d*, 501 F. App’x 713 (9th Cir. 2012) (noting that courts
14 “routinely grant provisional class certification for purposes of entering injunctive relief”)
15 (citation omitted). *See also Ahlman*, 2020 WL 2754938, at *8 (Rule 23(b)(2) is met
16 because plaintiffs “allege that the conditions of confinement violate their federal
17 constitutional and statutory rights” and so “a single injunction would provide relief to
18 each class member”) (citation omitted). Defendants do not dispute any of this authority.

19 In fact, aside from a threadbare commonality argument addressed above, which
20 this Court already rejected, Defendants offer no argument suggesting that Rule 23(b)(2) is
21 not satisfied. Plaintiffs thus satisfy every element of Rule 23(a) and one required element
22 of Rule 23(b), rendering class certification appropriate.

23 **III. THIS COURT CAN CERTIFY A CLASS TO OBTAIN HABEAS RELIEF.**

24 Defendants’ final argument merely rehashes their theory that this Court is
25 somehow barred from certifying a class to pursue release. Again, the Pre-Trial Medically
26 Vulnerable Subclass is the only class or subclass in this case seeking habeas relief, and
27 that subclass only seeks such relief in connection with a single claim predicated on a
28 single set of facts. Litigants in the Ninth Circuit plainly can pursue habeas relief on a

1 class-wide basis. *See Cox*, 829 F.2d at 804 (“This court has held that a class action may
2 lie in habeas corpus.”) (citation omitted); *Mead*, 464 F.2d at 1112-13. Defendants have
3 already asserted every argument they now reassert on this point. The Court held that “the
4 pandemic and the possibility of irreparable harm to the medically vulnerable Pretrial
5 Plaintiffs who are at high risk of contracting and dying from COVID-19 is an
6 extraordinary circumstance potentially warranting this Court’s intervention.” Doc. 52 at
7 14. That holding should control here, and Defendants offer no sound basis for revisiting it
8 in the context of this procedural motion. Indeed, regardless of the ultimate merits of the
9 sought habeas relief, the unique circumstances that give rise to the claim here mean that it
10 is it is appropriate for certification under 23(b)(2).

11 **IV. CONCLUSION**

12 Because Plaintiffs have met all the requirements of Rule 23, the class should be
13 certified.

14 DATED: August 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I caused the foregoing document to be filed electronically with the Clerk of the Court through ECF, and served the counsel of record via the Court's CM/ECF System.

/s/ Kathleen Kaupke _____