UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DERRICK JONES, JEROME JONES, MARRELL WITHERS and DARNELL RUSAN,	)	
on behalf of themselves and all similarly situated individuals,	)	Cause No. 4:21-cv-600
Plaintiffs,	)	
v.	)	
CITY OF ST. LOUIS *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Over 500 people are currently detained at the St. Louis City Justice Center (CJC). Like most jail facilities, CJC's population fluctuates daily. People are arrested on new charges, transferred, released on bond or after acquittal at trial. But while those individuals are housed at CJC, they are subjected to three pervasive and unconstitutional customs or practices administered by CJC staff: (1) excessive or indiscriminate use of chemical agents, without warning or justification, often while in a cell or restrained; (2) the psychologically and physically torturous practice of water deprivation as a form of punishment; and (3) a qualifying disability that makes them particularly susceptible to serious harm from chemical agents, the complete disregard of their medical condition in the deployment of chemical agents and in their treatment after deployment.

Incarceration at CJC is synonymous with being subject to the excessive or indiscriminate use of chemical agents and punitive water shut-offs. The attached declarations show a pattern and practice that is widespread within CJC and is not limited to particular officers or places within the facility. Numerous detainees describe the same thing: they are restrained, handcuffed or in their cell, and then suddenly without warning or reason they are assaulted with chemical agents, leaving

them in agony and distress. They also describe a common practice of being deprived of access to water when CJC staff punitively shut off the water in their unit, often immediately after being exposed to chemical agents, when access to water is vitally important.

Plaintiffs Derrick Jones, Darnell Rusan, and Marrell Withers have already encountered these issues during their period of detention at CJC and, like all people incarcerated at CJC, remain at risk of being subjected to these practices again. They now move to represent a class of persons who, like them, are subject and will be subject to the same policies, procedures, and customs that violate their well-established constitutional and statutory rights. Plaintiffs, who seek prospective relief, move for certification of a class of similarly situated persons, and one subclass:

- **The CJC Class**: All individuals who currently are or will be detained at the St. Louis City Justice Center.
- **The Medical Subclass**: All members of the CJC Class who have a disability that makes them particularly susceptible to serious harm from chemical agents.

For the reasons stated below, this matter meets the requirements of Rule 23. This case would be most efficiently litigated as a class action and Plaintiffs' Motion for Class Certification should be granted.

LEGAL STANDARD

"By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). Class actions for injunctive relief are favored in civil rights actions and, in particular, to address systemic issues within the criminal justice system. *See* 8 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 25:18 (4th ed. 2002) ("The class action device was specifically designed to aid the court and the parties in resolving certain

difficulties common to criminal justice class suits."). Class action litigation is an appropriate vehicle to address conditions of confinement claims on behalf incarcerated individuals, and in particular, on behalf of detainees in local jails. *See, e.g.*, *Postawko v. Missouri Dept of Corr.*, 910 F.3d 1030 (8th Cir. 2018); *Ahrens v. Thomas*, 570 F.2d 286, 288 (8th Cir. 1978) (upholding certification of a class of "all present and future pretrial detainees" at a county jail); *Moncravie v. Dennis*, 89 F.R.D. 440, 441-42 (W.D. Ark. 1981) (same); *see also Rentschler v. Carnahan*, 160 F.R.D. 114 (E.D. Mo. 1995) (granting class certification to plaintiffs claiming under § 1983 that defendant's policy and practice of running an overcrowded prison led to unlawful conditions); *DeGidio v. Perpich*, 612 F. Supp. 1383 (D. Minn. 1985) (holding that plaintiffs met requirements of FED. R. CIV. P. 23(a) where approximately 160 incarcerated people contracted tuberculosis and alleged it was due to the prison's inadequate treatment procedures). Moreover, it is well established that the requirements of Rule 23 must be "construed in light of the objectives of the rule—to provide for the expeditious handling of disputes and to allow a remedy for those for whom it would be unrealistic to expect to resort to individual litigation." 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1754 (3d ed. 2015) (stating that Rule 23 was enacted in part to "facilitate the bringing of class actions in the civil-rights area.").

To meet the requirements for a class under Federal Rules of Civil Procedure Rule 23, Plaintiffs must make three showings. *First*, Plaintiffs must demonstrate that the proposed class is "adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (citation omitted).

Second, Plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a), namely that:

> (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).

Third, Plaintiffs must demonstrate that the proposed class fits into at least one of the categories identified in Rule 23(b). As relevant here, a class may be maintained if (1) individual actions would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or (2) the party opposing the class acted on grounds that apply generally to the class. Fed. R. Civ. P. 23(b)(1)(A), (2).

In conducting its inquiry, this Court must "liberally construe[]" Rule 23(a) and should not resolve the merits of the dispute. *See Barrett v. Claycomb*, No. 11-CV-04242-NKL, 2011 WL 5822382, at *1 (W.D. Mo. Nov. 15, 2011) (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003)); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011) (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)) ("While disputes about Rule 23 criteria may overlap with questions going to the merits of the case, the district court should not resolve the merits of the case at class certification."). When subclasses are certified, each subclass must meet the requirements of Rule 23 and will be treated as a class. *United States Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 865 (8th Cir. 1978).

ARGUMENT

A. The CJC Class and Medical Subclass Are Adequately Defined and Clearly Ascertainable

As a threshold matter, the CJC Class and the Medical Subclass are "adequately defined and clearly ascertainable," as required for certification. *Sandusky Wellness Ctr.*, 821 F.3d at 996. Defendants maintain various internal records identifying all individuals detained at CJC, including records identifying where each individual is housed within the jail. These records include *inter alia* booking records, short profiles, long profiles, classification files, disciplinary records, and medical records. The City also publishes a daily CJC population report, available online: https://www.stlouis-mo.gov/data/dashboards/inmates/by-day.cfm. And the City creates a daily list of every person detained at CJC, a redacted example of which is attached hereto as **Exhibit 39** ("Dec. 27, 2021 Roster"). The Dec. 27, 2021 Roster includes, among other things: the detainees' name, race, sex, and date of birth; uniquely identifying "inmate number" or "IMN"; housing unit and cell assignment; and booking date. *See* Exhibit. 39. CJC also maintains medical records on each person detained at CJC. These records are created upon admittance into CJC and updated at each medical encounter. The medical records clearly identify detainees with underlying medical conditions, like asthma, who might be more susceptible to serious harm from chemical agents and may require reasonable accommodations.

These records make it easy to reliably identify members of the CJC Class (all individuals who currently are or will be detained at the St. Louis City Justice Center) and the Medical Subclass (all members of the CJC Class who have a disability that makes them particularly susceptible to serious harm from chemical agents.). The Class and Subclass are therefore "adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC*, 821 F.3d at 996.

B. The CJC Class Satisfies All Rule 23(a) Requirements

The CJC Class satisfies Rule 23(a) because: (1) the CJC Class is so large and fluid that joinder of all members would be impracticable; (2) the questions of law and fact raised by the suit are common to all members of the CJC Class, and a decision by this Court on those common questions would resolve class claims simultaneously; (3) the named Plaintiffs' claims and interests are aligned with and typical of those of the CJC Class members; and (4) the Plaintiffs and their undersigned counsel will adequately and zealously represent the interests of the CJC Class and Subclass.

1. Numerosity is satisfied: the CJC Class is fluid, includes hundreds of members, and joinder would be impracticable.

Numerosity is easily satisfied here because several hundred individuals are detained at CJC at any given time and will enter and leave the Class as their custody status changes, making joinder of each of the CJC Class members impracticable.

Rule 23(a)(1) requires the proposed class to be "so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), but "[i]mpracticable does not mean impossible," *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). Rule 23(a)(1) sets a "low threshold for numerosity," *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009); *see also Arkansas Ed. Ass'n v. Board of Ed. of Portland,* 446 F.2d 763 (8th Cir. 1971) (upholding class of 17-20 members); *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001) ("No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.") (citations omitted). "Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause." 1 Alba Conte &

Herbert B. Newberg, *Newberg on Class Actions* § 3:5 (4th ed. 2002). This is because numbers alone are not determinative of the numerosity requirement: "In addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982).

Here, the size of the CJC Class makes joinder impracticable. The CJC Class is comprised of over 500 individuals, including future unknown class members: joinder of this many individual plaintiffs would be impracticable, and, moreover, a waste of judicial resources. This is particularly true where, as here:

> [i]t is clear that joining each of the putative plaintiffs individually and trying separate suits for each would be wasteful, duplicative, and time consuming. And, if each of the Plaintiff's claims were tried individually, much of the evidence and many of the witnesses would be the same in each case, constituting a waste of judicial resources.

Van Orden v. Meyers, No. 4:09-CV-00971-AGF, 2011 WL 4600688, at *6 (E.D. Mo. Sept. 30, 2011).

The fluidity of the proposed CJC Class further supports class certification. *See Claycomb*, 2011 WL 5822382, at *2 (individual lawsuits would be impractical where class membership was fluid); *see also J.S.X. Through Next Friend D.S.X. v. Foxhoven*, 330 F.R.D. 197, 206 (S.D. Iowa 2019) (upholding a class of 55 members and noting that joinder is especially impracticable where a class contains "unidentified future class members"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) ("evidence of numerosity, considered in light of the fact that the inmate populations at these facilities is constantly revolving, establishes sufficient numerosity"). The detained population at CJC varies daily. *See* Affidavit of Cynthia West, attached hereto as **Exhibit 40.** New class members are regularly added as individuals are arrested on new charges or alleged parole or probation violations and future class members are unidentifiable. Additionally,

individuals will regularly leave the class because their proceedings have concluded through release or transfer to a state or federal prison.

Finally, there are future CJC class members — individuals will be arrested and sent to CJC after the class is certified. Joinder of future class members is, of course, impossible. *See Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1998) (potential future members made seven-member class sufficiently "numerous"); *Lane v. Lombardi*, No. 2:12-CV-4219-NKL, 2012 WL 5462932, at *2 (W.D. Mo. Nov. 8, 2012) ("Joinder of all members may be impracticable where the class includes individuals who may become members in the future, but are currently unidentifiable."); *see also Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) ("numerosity is met where, as here, the class includes individuals who will become members in the future. As members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable.").

For all these reasons, the CJC class satisfies the numerosity requirement of Rule 23(a)(1).

2. Commonality is satisfied: Defendants' practices and customs regarding the use of chemical agents and punitive water deprivation present common questions of fact and law.

The CJC Class also satisfies the commonality requirement because Plaintiffs' claims for prospective relief present common questions of law and fact regarding Defendants' policies, practices, and customs related to punitive water deprivation and the use of chemical agents against proposed CJC Class members.

Plaintiffs must show that their class claims "depend upon a common contention" that "is capable of class wide resolution," such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Commonality is "typically not difficult for class action plaintiffs to meet." *White v. 14051 Manchester Inc.*, 301 F.R.D. 368, 380 (E.D. Mo. 2014) (citations omitted); *see also Rikard v. U.S. Auto Prot., L.L.C.*, 287 F.R.D. 486, 489–90 (E.D. Mo.

2012) (quoting *Mund v. EMCC, Inc.*, 259 F.R.D. 180, 183 (D. Minn. 2009)) ("[T]he commonality requirement imposes a very light burden on a plaintiff seeking to certify a class and is easily satisfied.").

"Commonality is not required on every question raised in a class action." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). And "the fact that individuals . . . will have . . . claims of differing strengths does not impact on the commonality of the class as structured." *Id*. "Rather, Rule 23 is satisfied when the legal question 'linking the class members is substantially related to the resolution of the litigation.'" *Id*. (quoting *Paxton*, 688 F.2d at 561) (internal quotations omitted). The commonality requirement "does not mean that the claims of the representatives must raise identical questions of law and fact with those raised by the claims of the rest of the class…. [O]ne common question of law or fact can be sufficient if the other pre-requisites are satisfied." *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860 (8th Cir. 1978) (citation omitted); *accord Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (citing 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3.10, at 3-50 (3d ed. 1992)) ("Because the requirement may be satisfied by a single common issue, it is easily met, as at least one treatise has noted."). Commonality may be satisfied, for example, "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Downing v. Goldman Phipps, PLLC*, 4:13-CV-206-CDP, 2015 WL 4255342, at *4 (E.D. Mo. July 14, 2015) (quoting *Paxton*, 688 F.2d at 561).

The CJC Class satisfies the requirement of sharing at least "a single common question." Indeed, here the proposed class members all share two core common questions. This case challenges a systemic practice of using excessive force, via the use of chemical agents, against individuals detained at CJC and the practice of punitively shutting off the water of CJC detainees.

The complaint seeks injunctive and declaratory relief. As such, Plaintiffs bring a textbook example of a case that raises discrete questions of law, the answer to which is "substantially related" to how the case is resolved. *See, e.g.*, *Yates v. Collier*, 868 F.3d 354, 362–63 (5th Cir. 2017); *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (explaining with respect to an injunctive class that "although a presently existing risk may ultimately result in different future harm for different inmates ... every inmate suffers exactly the same constitutional injury when he is exposed to a single ... policy or practice that creates a substantial risk of serious harm"); *Hassine v. Jeffes*, 846 F.2d 169, 178 (3d Cir. 1988); *Scott v. Quay*, 338 F.R.D. 178, 190 (E.D.N.Y. 2021); *Davis v. Baldwin*, No. 3:16-CV-600-MAB, 2021 WL 2414640, at *22–23 (S.D. Ill. June 14, 2021); *Butler v. Suffolk Cty.*, 289 F.R.D. 80, 102 (E.D.N.Y. 2013); *M.D. v. Perry*, 294 F.R.D. 7, 35 (S.D. Tex. 2013) (certifying class of foster children who alleged that defendants created a "systemic deficiency [that] causes an unreasonable risk of harm" in the form of increased sexual abuse and violence); *Jones v. Gusman*, 296 F.R.D. 416, 466 (E.D. La. 2013) (certifying class in jail violence claim); *MacNamara v. City of New York*, 275 F.R.D. 125, 152-53 (S.D.N.Y. 2011); *Flood v. Dominguez*, 270 F.R.D. 413, 420 (N.D. Ind. 2010); *Coleman v. County of Kane*, 196 F.R.D. 505, 507 (N.D. Ill. 2000) ("A class action is … an appropriate vehicle to address what is alleged to be a systemic problem…."); *Rentschler v. Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995).

Here, the common questions of fact and law linking all proposed CJC Class members are whether Defendants have a pattern and practice of using (1) excessive force through deployment of chemical agents without justification or warning, and in unreasonable amounts, and (2) water shut-offs as a form of punishment. Plaintiffs have alleged practices with respect to the use of chemical agents and water shut-offs that create a substantial risk of harm for all CJC Class members. *See* Proposed Second Amd. Compl. (Doc. 69-1) ¶¶ 73-77, 96-118, 151-159. In addition

to the allegations in the Amended Complaint, the declarations filed by Plaintiffs in support of this motion demonstrate that their allegations are far from speculative. These practices have occurred, and continue to occur on a regular basis, and create conditions which subject every current and future detainee at CJC to unlawful risk. Facts alleged and sworn to in the attached declarations detail Defendants' excessive and indiscriminate use of chemical agents and punitive water shut-offs, and highlight several subsidiary common questions of fact including, whether Defendants:

- **Deploy chemical agents on detainees who are not posing a threat or actively resisting.** *See, e.g.*, Declaration of Antonio Carter, Exhibit 10; Declaration of Courtnee Poke, Exhibit 7; Declaration of Darnell Warren, Exhibit 30; Declaration of David Aaron, Exhibit 11; Declaration of Dejuan Allen, Exhibit 1; Declaration of Devon Watson, Exhibit 26; Declaration of Earnest Moore, Exhibit 22; Declaration of Eric Williams, Exhibit 5; Declaration of Honor Johnson, Exhibit 28; Declaration of Isaiah Gholson, Exhibit 16; Declaration of Joshua Amerson, Exhibit 24; Declaration of Kevin Moore, Exhibit 17; Declaration of Leron Harris, Exhibit 12; Declaration of Martin Redmond, Exhibit 18; Declaration of Maurice Owens, Exhibit 32; Declaration of Ovell Smith, Jr., Exhibit 2; Declaration of Reginald Smith, Exhibit 19; Declaration of Robert Judd, Exhibit 29; Declaration of Ronald Roberts, Exhibit 20; Declaration of Stephen Cannon, Exhibit 6; Declaration of Stephen Washington, Exhibit 3; Declaration of Terrion Phillips, Exhibit 21; Declaration of Tevin Collins, Exhibit 34; Declaration of Willie Frazier, Exhibit 25.

- **Deploy chemical agents against detainees who are handcuffed or detained in a secure cell, and not posing a security threat**. *See, e.g.*, Declaration of Andrew Bell, Exhibit 9; Declaration of Antonio Carter, Exhibit 10; Declaration of Courtnee Poke, Exhibit 7; Declaration of David Aaron, Exhibit 11; Declaration of Dejuan Allen, Exhibit 1; Declaration of Devon Watson, Exhibit 26; Declaration of Eric Williams, Exhibit 5; Declaration of Honor Johnson, Exhibit 28; Declaration of Isaiah Gholson, Exhibit 16; Declaration of Kevin Moore, Exhibit 17; Declaration of Leron Harris, Exhibit 12; Declaration of Martin Redmond, Exhibit 18; Declaration of Maurice Owens, Exhibit 32; Declaration of Reginald Smith, Exhibit 19; Declaration of Robert Judd, Exhibit 29; Declaration of Rodney Roberson, Exhibit 4; Declaration of Ronald Deandre Fisher, Exhibit 37; Declaration of Stephen Cannon, Exhibit 6; Declaration of Stephen Washington, Exhibit 3; Declaration of Terrion Phillips, Exhibit 21; Declaration of Tevin Collins, Exhibit 34.

- **Utilize large, "riot" cans of mace or excessive bursts of mace disproportionate to any purported need for force[1].** *See, e.g.*, Declaration of Andrew Bell, Exhibit

[1] Throughout this memo, "Mace" refers to chemical agents as that term is defined in City Division of Corrections policy no. 3.2.15

9; Declaration of Dejuan Allen, Exhibit 1; Declaration of Devion Gordon, Exhibit 15; Declaration of Honor Johnson, Exhibit 28; Declaration of Isaiah Gholson, Exhibit 16; Declaration of John Thomas Albert, Exhibit 33; Declaration of Joshua Amerson, Exhibit 24; Declaration of Joseph Demetrius, Exhibit 38; Declaration of Leron Harris, Exhibit 12; Declaration of Marcus Ausler, Exhibit 13; Declaration of Martin Redmond, Exhibit 18; Declaration of Montrell Tickens, Exhibit 35; Declaration of Ovell Smith, Jr., Exhibit 2; Declaration of Reginald Smith, Exhibit 19; Declaration of Robert Judd, Exhibit 29; Declaration of Ronald Deandre Fisher, Exhibit 37; Declaration of Stephen Cannon, Exhibit 6; Declaration of Stephen Washington, Exhibit 3; Declaration of Terrion Phillips, Exhibit 21; Declaration of Tevin Collins, Exhibit 34.

- **Deploy chemical agents without adequate forewarning**. *See, e.g.*, Declaration of Alex Hudson, Exhibit 8; Declaration of Andrew Brummell, Exhibit 27; Exhibit 8; Declaration of Antonio Carter, Exhibit 10; Declaration of Courtnee Poke, Exhibit 7; Declaration of David Aaron, Exhibit 11; Declaration of Dejuan Allen, Exhibit 1; Declaration of Devon Watson, Exhibit 26; Declaration of Hector Alejandro, Exhibit 23; Exhibit 24; Declaration of Kevin Moore, Exhibit 17; Declaration of Martin Redmond, Exhibit 18; Declaration of Ovell Smith, Jr., Exhibit 2; Declaration of Reginald Smith, Exhibit 19; Declaration of Rodney Roberson, Exhibit 4; Declaration of Stephen Cannon, Exhibit 6; Declaration of Stephen Washington, Exhibit 3; Declaration of Terrion Phillips, Exhibit 21.

- **Use chemical agents for the malicious purpose of inflicting pain and punishment.** *See, e.g.*, Declaration of Courtnee Poke, Exhibit 7; Declaration of Dejuan Allen, Exhibit 1; Declaration of Devon Watson, Exhibit 26; Declaration of Isaiah Gholson, Exhibit 16; Declaration of Martin Redmond, Exhibit 18 Declaration of Ovell Smith, Jr., Exhibit 2; Declaration of Reginald Smith, Exhibit 19; Declaration of Ronald Deandre Fisher, Exhibit 37.

- **Obstruct or disregard grievance-related documents and complaints related to instances of force.** *See, e.g.*, Declaration of Courtnee Poke, Exhibit 7; Declaration of DeWight Williams, Exhibit 36; Declaration of Eric Williams, Exhibit 5; Declaration of Isaiah Gholson, Exhibit 16; Declaration of Tevin Collins, Exhibit 34; Declaration of Willie Frazier, Exhibit 25.

- **Punitively shut off detainees' access to water.** *See, e.g.*, Alex Hudson, Exhibit 8; Declaration of Andrew Bell, Exhibit 9; Declaration of Antonio Carter, Exhibit 10; Declaration of Devon Watson, Exhibit 26; Declaration of Deandre Wilkins, Exhibit 14; Declaration of Eric Williams, Exhibit 5; Declaration of John Thomas Albert, Exhibit 33; Declaration of Joseph Demetrius, Exhibit 38; Declaration of Joshua Amerson, Exhibit 24; Declaration of Marcus Ausler, Exhibit 13; Declaration of Ovell Smith, Jr., Exhibit 2; Declaration of Robert Judd, 29; Declaration of Ronald Deandre Fisher, Exhibit 37; Declaration of Steven Washington, Exhibit 3; Declaration of Tevin Collins, Exhibit 34.

- **Fail to train on or supervise the use of chemical agents.** *See* Proposed Second Amd. Compl. ¶¶ 77, 79-80, 90, 93-95, 116, 158, 192.

These instances of unwarranted and excessive force and water shut-offs are not rare or isolated. They are not isolated to certain correctional officers, housing units, or time periods. *See e.g.*, Declaration of Willie Frazier; Declaration of Stephen Washington; and Declaration of Dejuan Allen. These practices are systemic. Every individual who is incarcerated at CJC is at risk of being subjected to these practices.[2] Notably, this Court agreed that the facts alleged in the First Amended Complaint stated a claim as to the widespread unlawful use of chemical agents and water shut-offs at CJC. ECF 52 at 11-12.

Resolving whether there is a pattern of excessive force that puts detainees at a substantial risk of serious harm and a practice of improper, punitive water shut-offs will yield "common answers" to Plaintiffs' constitutional claims, as required by Rule 23 and *Wal-Mart*, 564 U.S. at 350. *See also Sandusky Wellness Ctr., LLC*, 821 F.3d at 998. Courts have certified similar classes finding common questions and answers were presented by allegations of a pattern and practice of excessive use of force by correctional officers against detainees. *Rosas v. Baca*, No. CV 12-00428, 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012) (allegations that "a pattern or practice of deputies using or threatening violence against inmates" making all class members "at significant risk of excessive violence at the hands of deputies" presented common questions likely to yield a common

[2] Of course, at this stage, the merits of Plaintiffs' claims are not at issue. *See Barrett*, 2011 WL 5822382 at *1 (citing *Gunnells*, 348 F.3d at 424); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d at 617 ("While disputes about Rule 23 criteria may overlap with questions going to the merits of the case, the district court should not resolve the merits of the case at class certification.") (citing *Blades*, 400 F.3d at 567); *Postawko*, 910 F.3d at 1037 ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.") (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013)). The evidence above is put forward at this stage only to show that the risk of harm faced by the CJC Class, and Defendants' knowledge of such risk, present "questions of law or fact common to the class," FED. R. CIV. P. 23(a)(2), that lend themselves to common answers, therefore making class-wide adjudication appropriate.

answer); *Von Colln v. County of Ventura*, 189 F.R.D. 583, 594 (C.D.Cal. 1999)(finding plaintiffs' cause of action addressing "whether the Ventura County practice of using the Pro-straint chair violates an arrestee's constitutional and statutory rights" raised common questions of law and fact).

Similarly, whether Defendants have been deliberately indifferent to that risk can be answered in a way that is applicable to all class members. The fact that "the physical symptoms eventually suffered by each class member may vary" does not defeat commonality. *DeBoer*, 64 F.3d at 1038-39. And neither does that fact that class members do not face "the exact same risk" of being harmed by Defendants' practices. *See Postawko*, 910 F.3d at 1038-39 (affirming certification of class of prisoners with chronic hepatitis C, noting that while "the physical symptoms eventually suffered by each class member may vary…the question asked by each class member is susceptible to common resolution.")(citing *Yates*, 868 F.3d at 363); *Parsons*, 754 F.3d at 678 (explaining that "although a presently existing risk may ultimately result in different future harm for different inmates ... every inmate suffers exactly the same constitutional injury when he is exposed to a single ... policy or practice that creates a substantial risk of serious harm").

3. Typicality is satisfied: Derrick Jones, Darnell Rusan, and Marrell Withers' claims are representative of those of the CJC Class.

Typicality is satisfied here because the named Plaintiffs' claims are typical of other members of the proposed CJC Class. "Typicality under Rule 23(a)(3) means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)). This requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer*, 64 F.3d at 1174.

Like the numerosity and commonality requirements, Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"

is a "low threshold" requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) ("The threshold requirements of commonality and typicality are not high."); *Paxton*, 688 F.2d at 562 ("The burden of showing typicality is not an onerous one"). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims and gives rise to the same legal or remedial theory." *Alpern*, 84 F.3d at 1540.

The named Plaintiffs' claims and the claims of the proposed CJC Class arise from the same course of conduct. The named Plaintiffs, like all members of the proposed class, are incarcerated at CJC. The named Plaintiffs, like all members of the proposed class, are subject to the Defendants' same pattern and practice of using excessive force through deployment of chemical agents without sufficient warning or justification and punitive water shut-offs. For example, both Derrick Jones and Darnell Rusan were sprayed with chemical agents multiple times without any prior warning. *See, e.g.*, Proposed Second Amd. Compl. ¶¶ 23, 51. Derrick was maced twice while on the ground and in handcuffs and not actively resisting. *Id.* ¶¶ 24-26. That same day, he was maced a third time without warning, this time while detained in a secured cell. *Id.* ¶¶ 28-29.

Darnell's experience was nearly identical. After being physically assaulted by staff, Darnell was placed in a secure cell, and sprayed with excessive amounts of chemical agents. *Id.* ¶¶ 55-57. Guards did not warn him before deploying the mace and he was not actively resisting. *Id.* Both Derrick and Darnell were verbally threatened during these instances—evidence of staff's malicious intent behind the deployment of chemical agents. Jail staff told Darnell "we'll kill your little ass in here," *id.* ¶ 177, and when Lt. Fowlkes left Derrick in a mace-filled cell, he remarked, "Let him marinate," *id.* ¶ 29.

Derrick Jones has alleged that the water to his cell and to the entire unit has been shut off, multiple times, for the purpose of punishing him and other detainees. *See, e.g.*, *id.* ¶ 110. Correctional officers also shut off the water to Marrell's cell as a form of punishment. *Id.* ¶ 109. Darnell, also, alleged suffering through many punitive water shut-offs while detained at CJC, most recently in November 2021. *Id.* ¶ 110. The named Plaintiffs have plausibly demonstrated that the injustices they suffered, like the injuries that have been and may be inflicted on other members of the CJC Class, stem directly from Defendants' policies, practices, and customs concerning use of chemical agents.

These claims are the same as those that could be raised by any member of the proposed CJC Class, and every member of the class could seek the same prospective relief: that this court enjoin Defendants from continuing their practice and custom of excessively and indiscriminately using chemical agents on people detained at CJC and from continuing their practice of punitive water shut-offs. Plaintiffs' claims are thus typical of the class as a whole and meet the requirements of Rule 23(a)(3).

4. The named Plaintiffs and counsel will adequately protect the interests of the CJC Class.

The named Plaintiffs satisfy both requirements of Rule 23(a)(4): (1) Plaintiffs' attorneys are "qualified, experienced, and generally able to conduct the proposed litigation"; and (2) Plaintiffs do not "have interests antagonistic to those of the class." *U.S. Fid. & Guar. Co.*, 585 F.2d at 873; *see also Paxton*, 688 F.2d at 562-63. In reaching a conclusion, courts look to, *inter alia*, whether the class representatives' interests "will be at the expense of other class members," and whether class representatives "have demonstrated a willingness to prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63; *see also In re Milk Products Antitrust Litigation*, 195 F.3d 430, 437 (8th Cir. 1999). "In the absence of proof to the contrary,

courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the class action." *Morgan v. United Parcel Serv. of America, Inc.*, 169 F.R.D. 349, 357 (E.D. Mo. 1996).

Plaintiffs are represented by counsel from ArchCity Defenders, MacArthur Justice Center, Rights Behind Bars, and St. Louis University School of Law Legal Clinics. They have qualified, experienced, and well-resourced counsel in the present case. Undersigned counsel have significant litigation experience in state and federal courts, including as class counsel in various civil rights actions seeking prospective relief in courts in the Eighth Circuit. *See Postawko*, 910 F.3d at 1030 (prison conditions class action); *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 3118185 (W.D. Mo. June 25, 2018); *Gasca v. Precythe*, No. 17-cv-04149, 2019 WL 112789 (W.D. Mo. Jan. 4, 2019); *David v. State of Missouri*, No. 20AC-CC00093 (Cole County Cir. Ct.) (class certified July 14, 2020); *Jenkins et al v. Jennings*, 4:15-cv-252 (E.D. Mo. 2015); *Dixon v. City of St. Louis*, 4:19-cv-0112-AGF (E.D. Mo. 2019) (class certified June 11, 2019); *Webb v. City of Maplewood*, 4:16-cv-01703 (E.D. Mo. 2017)(class certified Nov. 18, 2021); *Cody v. City of St. Louis*, 4:17-cv-2707 (E.D. Mo. 2018); *Fant v. City of Ferguson*, 4:15-CV-00253-AGF (E.D. Mo. 2015) (includes jail conditions claims); *Walker v. St. Ann*, 4:18-cv-01699 (E.D. Mo. 2018) (jail conditions class action). Counsel also have experience handling complex class action matters outside of Missouri and the Eighth Circuit. *See, e.g., Hudson v. Preckwinkle* 13-cv-8752 (N.D. Ill.); *Jones v. Guzman*, 12-cv-0859 (E.D. La.); *Morales v. Findley*, Case No. 13-cv-07572 (N.D. Ill.); *Savino et al v. Souza*, 459 F. Supp. 3d 317 (D. Mass. 2020) (facility-wide conditions class action); *K.O. et al. v. Sessions*, Case No. 18-cv-40149 (D. Mass 2020).

In addition, the named Plaintiffs' interests are not antagonistic to those of the proposed CJC Class. Plaintiffs and fellow class members seek to be free from excessive and punitive force

during their detention at CJC. The proposed class representatives in this case are committed to protect not only their own rights, but the rights of all class members.

C. The Medical Subclass Satisfies all Rule 23(a) Requirements

Plaintiffs also seek certification of a subclass consisting of those individuals who are detained at CJC at present and in the future, and who have a disability that makes them particularly susceptible to serious harm from chemical agents, requiring reasonable accommodation by Defendants. This "Medical Subclass" independently satisfies the requirements of Rule 23(a) because: (1) the size and fluidity of the Medical Subclass is such that joinder of all members would be impracticable; (2) the questions of law and fact raised by the suit are common to all members of the Medical Subclass, and a decision by this Court on those common questions would resolve class claims simultaneously; (3) plaintiffs Marrell Withers' and Darnell Rusan's claims and interests are aligned with and typical of those of the Medical Subclass members; and (4) Mr. Withers, Mr. Rusan and their undersigned counsel will adequately and zealously represent the interests of the Medical Subclass.

1. The size and fluidity of the Medical Subclass satisfies numerosity.

The size and fluidity of the Medical Subclass satisfies Rule 23(a)'s numerosity requirement. For example, 11 of 38 declarants speak of disabilities that make them more vulnerable to serious injury from the use of chemical agents, representing approximately 29% of the attached declarations. *See Declarants with Asthma* Declaration of Tevin Collins, Exhibit 34; Declaration of DeWight Williams, Exhibit 36; Declaration of Reginald Smith, Exhibit 19; Declaration of Kevin Moore, Exhibit 17; Declaration of David Aaron, Exhibit 11; Declaration of Devion Gordon, Exhibit 15; Declaration of Ovell Smith Jr., Exhibit 2; Declaration of Ronald Roberts, Exhibit 20. *See also Declarants with Other Disabilities* Declaration of Antonio Carter, Exhibit 10, Declaration of Martin Redmond, Exhibit 18, Declaration of Samuel Bailey, Exhibit

31. Of course, this represents only a fraction of those detained in CJC with disabilities. 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:5 (4th ed. 2002) ("Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause."). These declarations are not exhaustive but are representative of the proportion of the population at CJC with such conditions. Indeed, CJC detainees are predominately Black St. Louisans, who are disproportionately more likely to have asthma on account of exposure to poor air quality, among other reasons. *See* Sarah Fenton, *Black Children In St. Louis Far More Likely To Visit The ER For Asthma Than Whites*, St. Louis Public Radio, Jan. 14, 2019, https: news.stpublicradio.org/health-science-environment/2019-01-14/black-children-in-st-louis-far-more-likely-to-visit-the-er-for-asthma-than-whites. Further, Plaintiffs have alleged that the number of people in CJC with asthma and other qualifying disabilities is numerous and CJC has records in their custody that will easily confirm this allegation.

Joinder of all these different individuals would be impracticable, especially given the fluid nature of the Subclass. *See Claycomb*, 2011 WL 5822382, at *2 (individual lawsuits would be impractical where class membership was fluid); *see also Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) ("evidence of numerosity, considered in light of the fact that the inmate populations at these facilities is constantly revolving, establishes sufficient numerosity"). Individuals enter and leave CJC based on adjudications in their criminal proceedings making this class, like the CJC class, particularly fluid and amenable to class treatment.

2. The Subclass' claims are capable of class-wide resolution, and therefore commonality is satisfied.

The Medical Subclass satisfies the requirements of commonality because the subclass' claims "depend upon a common contention" that "is capable of class wide resolution," such that

"determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. This Subclass consists of a subset of the CJC Class who, because of their disabilities, are particularly vulnerable to the use of chemical agents and who have unique legal claims that arise out of: (a) the increased harm that CJC practices have on them; and (b) Defendants' failure to reasonably accommodate their conditions with their custom and practice, for example by conducting a medical conditions inquiry before planned use of chemical agents. *See* Proposed Second Amd. Compl. ¶¶ 152, 158, 200-213. That members of the proposed subclass might have different disabilities or suffer varying harms as a result of exposure to mace does not defeat commonality. *Lambertz-Brinkman v. Reisch*, No. 07–3040, 2008 WL 4774895, at *2 (D.S.D. 2008) ("Although each individual member of the class may have had different experiences with regard to medical and mental health care at the . . . prison, this does not defeat commonality as the legal question 'linking the class members'—whether an illegal policy or practice exists — 'is substantially related to the resolution of the litigation.'"). This is particularly true here where, uniformly, CJC officers disregard medical conditions when using chemical agents, conduct no inquiry into medical conditions, and have a practice of categorical non-accommodation of any detainees needs.

The legal question they ask is common to the subclass: does the CJC custom and practice of excessively spraying detainees in complete disregard of their medical condition, including without any practice or policy of conducting medical conditions inquiries to determine whether a reasonable accommodation is necessary, violate the constitutional and statutory rights of those detainees? And the relief they all seek is common: an end to the custom and practice of subjecting people with disabilities to chemical agents without consideration of their medical conditions, and an order requiring Defendants to accommodate their disabilities in the administration of any

planned use of chemical agent. Plaintiffs have filed declarations from detainees with qualifying disabilities supporting these allegations. *See, e.g.*, *supra* at Section C(1). They show a uniform practice that all members of the subclass are subjected to: excessive use of chemical agents against detainees with qualifying disabilities, and a failure to accommodate their medical conditions in administering CJC's practice regarding use of chemical agents.

For these reasons, the Medical Subclass satisfies the requirements of commonality.

3. The Medical Subclass satisfies typicality.

Typicality is satisfied for the Medical Subclass because plaintiff Marrell Withers' and Darnell Rusan's claims are typical of other members of the proposed Medical Subclass. Marrell suffers from asthma, and he notified CJC Correctional Officers of his asthma before they attacked him with chemical agents. Proposed Second Amd. Compl. ¶¶ 2, 68. Nonetheless, CJC officers used chemical agents against Mr. Withers and he suffered particularized health consequences as a result. *Id.* at ¶¶ 2, 68. Darnell Rusan suffers from epilepsy and epilepsy-related seizures. *Id.* at ¶ 46. Furthermore, CJC officers used chemical agents against Mr. Withers and Mr. Rusan consistent with CJC practice: no evaluation of their particular medical needs was made and there was no attempt to reasonably accommodate their needs. Because Plaintiff Withers' and Rusan's claims and interests match those of the members of the subclass, the typicality requirement of Rule 23(a) is met for the Medical Subclass.

4. Plaintiffs' counsel, Mr. Withers, and Mr. Rusan will adequately represent the Medical Subclass.

Adequacy for the Medical subclass is satisfied for the same reasons that it is satisfied for the CJC Class as a whole. *See supra* at Section B(4). Named Plaintiffs are represented by experience counsel with extensive experience litigating class actions, particularly in the context of jail and prison conditions. *Id.* Additionally, Plaintiffs are represented by counsel that has experience

litigating claims on behalf of people with disabilities inside correctional facilities. *See e.g. Tillman v. City of St. Louis et al*, 4:21-cv-00299-RLW (E.D. Mo. 2021); *Barker v. Osemwengie*, No. 20-15503 (9th Cir. 2022); *Dunsmore v. San Diego County*, No. 20-56135 (9th Cir. 2021); *Epley v. Gonzalez*, No. 19-10781 (5th Cir. 2021); *Hamilton v. Westchester County DOC*, No. 20-1058 (2d. Cir. 2021). Further, Plaintiffs' interests are not antagonistic to those of the proposed Medical Subclass. Plaintiffs, like their fellow subclass members, seek to be free from the custom and practice of being subject to CJC's excessive or indiscriminate use of chemical agents. The amended complaint seeks specific relief for the Medical Subclass that is applicable to the whole subclass and the proposed class representatives are committed to advancing their rights and those of all class members.

D. The CJC Class and Medical Subclass Satisfy All Applicable Rule 23(b) Requirements.

Finally, a class must satisfy at least one of the requirements of Rule 23(b). Here, two independent subsections of Rule 23(b) are satisfied: 23(b)(1)(A) and 23(b)(2).

1. Rule 23(b)(1)(A)

This case meets the requirements of Rule 23(b)(1)(A), which allows for certification of a class when not doing so would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). "Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)

(quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 388 (1967)).

This case is about Defendants' unconstitutional practices and customs at CJC—specifically, their excessive and indiscriminate use of chemical agents, use of water deprivation as punishment, and failure to accommodate the needs of detainees with qualifying disabilities. Members of the CJC Class, including members of the Medical Subclass, are equally entitled to be free from cruel and unusual punishment during their detention at CJC. Litigating the class members' claims individually would present a risk of varying outcomes in what standards of conduct should apply when deploying chemical agents against detainees at CJC, in determining under what circumstances water can be withheld (whether as a form of punishment or otherwise), or in determining when—if ever—it is appropriate to use chemical agents against individuals with disabilities that make them particularly susceptible to serious harm from chemical agents.

2. Rule 23(b)(2)

The CJC Class (and its subclass) also satisfies all requirements of Rule 23(b)(2). Rule 23(b)(2) allows for certification of a class where "[t]he 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). "Because one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule 'must be read liberally in the context of civil rights suits'" such as this one. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (citation omitted); *see also Amchem Prods., Inc.*, 521 U.S. at 614; 5-23 *Moore's Federal Practice - Civil* § 23.43(1)(b) (2018) ("Rule 23(b)(2) was promulgated . . . essentially as a tool for facilitating civil rights actions.").

Here, Plaintiffs' proposed class meets the plain text of Rule 23(b)(2): Defendants have "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." This is evidenced by Defendants' continued use of excessive mace and water shut-offs against detainees, and the positions set forth by Defendants in this lawsuit thus far. FED. R. CIV. P. 23(b)(2). The City's Division of Corrections maintains Division-wide policies or procedures, including those related to the use of force, which apply equally to every person detained at CJC. Likewise, the Division of Corrections is responsible for the training, supervision, and discipline of the correctional officers responsible for the use of chemical agents and water shut-offs.

The CJC Class is "cohesive," and a single injunction or declaratory judgment would provide relief to each member of the class. The Medical Subclass is similarly cohesive, as all members are subject to the same custom and practice and the same violation of law, and thus a single injunction or declaration from this Court would provide relief to all Subclass members. This Court should therefore certify the CJC Class and Medical Subclass under Rule 23(b)(2). *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016).

Absent an order from this Court, (1) all members of the CJC Class will be subjected to the same unconstitutional practices and customs regarding the use of force, and will suffer the same constitutional harm; (2) all class members of the CJC Class will be subjected to the same unconstitutional practice of depriving detainees of water for punishment (not for security or maintenance reasons), and thus will suffer the same constitutional harm; and (3) all members who have qualifying disabilities will be subject to the same unlawful practice of failing to accommodate those disabilities in administration of CJC's practices. Because Defendants continue to act on grounds that apply to the entire CJC Class and Medical Subclass, respectively, final injunctive relief and corresponding declaratory relief is appropriate for the CJC Class and Medical Subclass as a whole.

CONCLUSION

For the foregoing reasons, Plaintiffs Derrick Jones, Darnell Rusan, and Marrell Withers respectfully request that this Court: (i) certify a Plaintiff class of all individuals who currently are or will be detained at the St. Louis City Justice Center (the "CJC Class"); (ii) certify a Subclass consisting of all individuals who are detained or will be detained at CJC and have qualifying disabilities (the "Medical Subclass"); (iii) appoint Derrick Jones, Darnell Rusan, and Marrell Withers as class representatives; and appoint undersigned counsel as class counsel.

Dated: March 15, 2022

Respectfully submitted,

By: */s/ Shubra Ohri*

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RIGHTS BEHIND BARS

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