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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Samuel Luckey and Aaron Dromiack, on behalf of themselves and those similarly situated,

and

Arizona Attorneys for Criminal Justice,

Plaintiffs,

v.

Allister Adel, in her official capacity as County Attorney for Maricopa County

Defendant.

No. CV21-01168-PHX-GMS (ESW)

MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLASS CERTIFICATION

ORAL ARGUMENT AND IMMEDIATE CONSIDERATION REQUESTED

MOTION FOR CLASS CERTIFICATION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs respectfully move the Court to certify two classes:

1) All current and future people whom the Maricopa County Attorney's Office (MCAO) has charged and assigned to Maricopa County's Early Disposition Courts (EDCs) and who are subject to MCAO's blanket policy, practice, or custom of making or threatening to make plea offers harsher in response to people exercising their right to a preliminary hearing and/or trial, but who have not yet made the decision to waive their preliminary hearing or reject their initial plea offer (the "Pre-Waiver Class"); and

2) All current and future people whom the MCAO has charged and assigned to Maricopa County's EDCs and who are subject to MCAO's blanket policy, practice, or custom of making or threatening to make plea offers harsher in response to people exercising their right to a preliminary hearing and/or trial, but who have waived their preliminary hearing and/or rejected their initial plea offer (the "Post-Waiver Class").

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

This action seeks to protect people accused of crimes in the EDCs from Defendant's unconstitutional policy of making plea offers "presumptively harsher" or even "substantially harsher" in retaliation for people asserting their rights to a preliminary hearing and/or trial (hereinafter, the "Retaliation Policy"). Arizonans are guaranteed a right to trial under the U.S. Constitution and guaranteed a preliminary hearing under the Arizona Constitution and Arizona statutes.

In Maricopa County, people charged with felonies by information and not a grand jury are first taken before a magistrate judge for an initial appearance. The initial appearance is a non-adversarial proceeding at which the magistrate, among other things, (1) determines whether the person is indigent for purposes of assigning a public defender, (2) sets dates for

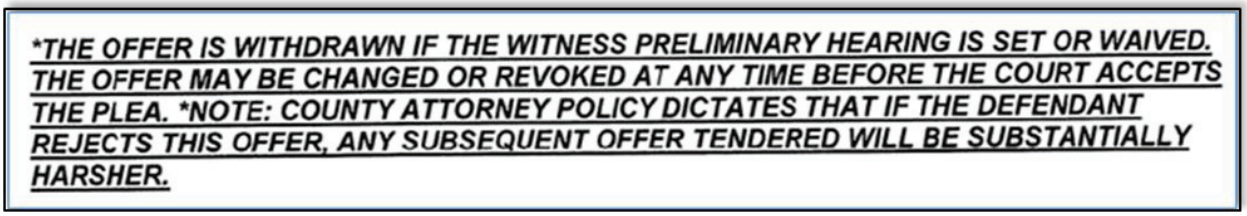
a status conference and follow-up preliminary hearing, and (3) decides whether the person will be detained while awaiting those dates.

If MCAO files a direct complaint against the person within 48 hours of the initial appearance and assigns the case to the EDCs—which it has done with increasing frequency over the years—then the person becomes subject to the Retaliation Policy. As a result, the person must accept any initial plea offer and waive their preliminary hearing, or MCAO will pull the offer and make any subsequent one "substantially harsher."

MCAO has significant incentives to coerce people out of their preliminary hearings. At the preliminary hearing in the EDCs, among other things, a neutral magistrate determines whether MCAO has probable cause to proceed with the case. Witnesses, including police officers, are often cross-examined. Such scrutiny could reveal weaknesses in MCAO's case or lead to outright dismissal. The preliminary hearing is also a point at which pretrial individuals who are detained—often on unaffordable bail—can secure their release via an adversarial hearing. Gaining this opportunity is significant because pretrial detention correlates with higher plea rates. If the case proceeds beyond the preliminary hearing, MCAO could be forced to provide discovery—which it typically refuses to provide, except for police reports, before the hearing. In short, the preliminary hearing is an essential check on MCAO's power to prosecute and convict people without affording them procedural and substantive protections.

To achieve quick, low-cost convictions and to subvert the equalizing role of the preliminary hearing and pretrial discovery, MCAO threatens the accused with a "presumptively harsher" or even "substantially harsher" plea offer if these individuals reject the initial offer or do not waive the preliminary hearing all together. This retaliatory threat is printed in bold letters on plea offer forms, reiterated in email exchanges, and/or read into the record at status conferences.

For example, some people see this threat at the top of their first written plea offer:


THE OFFER IS WITHDRAWN IF THE WITNESS PRELIMINARY HEARING IS SET OR WAIVED. THE OFFER MAY BE CHANGED OR REVOKED AT ANY TIME BEFORE THE COURT ACCEPTS THE PLEA. *NOTE: COUNTY ATTORNEY POLICY DICTATES THAT IF THE DEFENDANT REJECTS THIS OFFER, ANY SUBSEQUENT OFFER TENDERED WILL BE SUBSTANTIALLY HARSHER.

This policy, practice, and custom is MCAO's Retaliation Policy, and the threat is real—carried out by deputy county attorneys (DCAs) in the EDCs to ensure cases do not move beyond the EDCs and into the trial court, where prosecutors will have to disclose more information and work harder. The threat is also uniform. It is made irrespective of the accused person's circumstances or the facts of the case—even if there is evidence of innocence.

Accordingly, many people *do* waive their rights, often eschewing the preliminary hearing and taking plea deals they would not have taken otherwise, with almost zero discovery. By forcing people into this unconscionable position—whether or not the person ultimately waives their rights and/or pleads guilty—MCAO violates the Sixth and Fourteenth Amendments to the U.S. Constitution.[1]

Plaintiffs request that this Court certify the requested classes pursuant to Federal Rule of Civil Procedure 23(b)(2). Both classes face a substantial and imminent risk of harm because the Retaliation Policy illegally coerces or risks coercing them into waiving their preliminary hearing and/or their right to trial. The Pre-Waiver Class is currently feeling that coercion, while the Post-Waiver Class has already succumbed to it and waived their preliminary hearing. For both classes, any coerced convictions often carry jail or prison time, other losses of liberty like probation or parole, and collateral consequences like losing the right to vote.

Both classes share a core common factual and legal issue: does Defendant's Retaliation Policy unconstitutionally coerce them into foregoing their rights and taking convictions via plea? This question will also yield a common legal answer as to whether

[1] For additional detail, Plaintiffs respectfully refer the Court to the robust facts contained in their First Amended Complaint and supporting documents.

Defendant can continue operating this way, regardless of minor variations in individual criminal cases. Indeed, one major flaw of the Retaliation Policy is that it applies to all putative class members *despite* their individualized circumstances—circumstances that Arizona law and Defendant's own policies recognize should be central considerations in criminal prosecutions. The two classes only materially differ in the injunctive mechanisms that will make them whole, once these common legal and factual questions yield a common legal answer.

Plaintiffs ask this Court to appoint them and their counsel to represent the interests of, and obtain vital relief for, these classes of people.

II. THE PROPOSED CLASSES AND CLASS REPRESENTATIVES

Plaintiffs seek the appointment of one representative per class. They are:

A. Samuel Luckey (Post-Waiver Class)

Samuel Luckey is a 34-year-old Black man currently being prosecuted by Defendant. His case began in the EDC, where he was denied any discovery except a significantly redacted police report and threatened with a harsher plea offer if he affirmed his right to a preliminary hearing under the Arizona Constitution and Arizona law. He eventually succumbed to Defendant's pressure, waived his preliminary hearing, and is awaiting trial in the Superior Court.

He missed the birth of his daughter because he was in jail on this arrest, initially unable to afford his $10,000 bail.

B. Aaron Dromiack (Pre-Waiver Class)

Aaron Dromiack is a 28-year-old Army veteran currently being prosecuted by Defendant. Mr. Dromiack's case is in the EDC, where Defendant has charged him with assaulting a police officer. Mr. Dromiack insists that police attacked him first, but Defendant refuses to produce body worn camera footage that could help settle the matter. Even though Mr. Dromiack struggles with alcohol abuse disorder, Defendant is only offering Mr. Dromiack prison time, in direct contradiction to Defendant's public claims that it seeks to divert people like Mr. Dromiack from the criminal justice system and get them

treatment.

Together, Mr. Luckey and Mr. Dromiack are referred to below as the Individual Plaintiffs.

III. LEGAL ARGUMENT

"Under Rule 23(a), a party seeking certification of a class or subclass must satisfy four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014). The party's "proposed class or subclass must also satisfy the requirements of one of the sub-sections of Rule 23(b), which defines three different types of classes." *Id*. (internal quotation marks and citation omitted). Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). A party "whose suit meets the specified criteria" of Rule 23(a) and Rule 23(b) has a "categorical" right "to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., Co.*, 559 U.S. 393, 398 (2010).

Because class certification is appropriate whenever the prerequisites set forth in Rules 23(a) and 23(b) are met, the Court's review when considering a motion for class certification is limited only to whether those prerequisites are satisfied. *See, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). Plaintiffs' proposed classes satisfy Rule 23(a) and Rule 23(b)(2), and Plaintiffs are therefore entitled to pursue their claims as a class action.

A. The Proposed Classes Satisfy Rule 23(a)(1)-(4).

1. The Proposed Class Is Sufficiently Numerous.

Numerosity requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). To be impracticable, joinder must be difficult or inconvenient but need not be impossible. *See Harris v. Palm Springs Alpine Estates, Inc.*,

329 F.2d 909, 913-14 (9th Cir. 1964) (noting "impracticability does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class") (internal quotation marks and citation omitted). "In addition to class size, courts consider other indicia of impracticability, such as . . . the size of individual claims, the financial resources of class members, and the ability of claimants to institute individual suits." *Torres v. Goddard*, 314 F.R.D. 644, 654 (D. Ariz. 2010) (citation omitted); *see also Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982) (noting that when a class is not large in numbers, "other factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder" (citing Newberg on Class Actions § 1105 (1977))). Where, as here, the relief sought is "only injunctive or declaratory," the numerosity requirement is somewhat relaxed. *See Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004).

Generally, courts find numerosity satisfied "when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). Where the exact number of class members is unknown, the court may find that numerosity is met if "general knowledge and common sense indicate that joinder would be impracticable." *Knapper v. Cox Commc'ns, Inc*., 329 F.R.D. 238, 241 (D. Ariz. 2019). Here, the exact number and identities of individuals in the class are unknown because this information is more easily obtained from MCAO rather than myriad individual class members and/or defense attorneys. However, it "is precisely in situations such as this that joinder of plaintiffs is impracticable because it is difficult to identify the proposed class members." *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG (DTBx), 2011 WL 11705815, at *8 (C.D. Cal. Nov. 21, 2011).

Reasonable inferences also indicate that the class includes at least 40 and likely hundreds or thousands of members. Counsel's preliminary review of MCAO's own data, collected via a public records request, indicates that MCAO sent roughly 32,000 cases to

the EDCs between January 2017 and January 2021. Maricopa County public defenders also confirm that, since the COVID-19 pandemic started and grand juries were closed, Defendant has filtered an even higher percentage of cases through the EDCs. Grand juries are only just now re-opening. The head of the Maricopa County Office of Public Defender also estimates there are roughly 3,500 active cases pending in EDC on any given day.

Finally, in addition to the sheer volume of the proposed classes, other factors make joinder impracticable. *First*, many class members are incarcerated, and many are indigent, limiting their ability to seek counsel and file individual actions. *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 737 (C.D. Cal. 2020) (finding numerosity met for detained population, in part, because of "the turmoil, expense, and difficulty caused by a piecemeal approach"). *Second*, communicating with people incarcerated in the Maricopa County jails is exceptionally difficult, since it must be done by pre-scheduled, time-limited video-conference sessions. *Third*, joinder takes time, and delay here will increase serious harms, including criminal convictions, loss of liberty, and continued detention in a congregate jail system where COVID-19 is still circulating and staff and detainees have likely not achieved herd immunity. *Fourth*, particularly given the fast-moving nature of the EDCs, the class is inherently transitory[2] and includes unidentifiable future members who will be, but are not yet, subject to Defendant's Retaliation Policy.[3] *See Chief Goes Out v. Missoula Cty.*, No. CV 12-155-M-DWM, 2013 WL 139938, at *2 (D. Mont. Jan. 10, 2013) (finding numerosity met because the "fluid composition of a prison population is particularly well-suited for class status, because, although the identity of the individuals

[2] *Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (remanding to district court to decide class certification before dispositive motions because "Wade purported to represent short-term inmates in a county jail, presenting a classic example of a transitory claim that cries out for a ruling on certification as rapidly as possible.").

[3] Moreover, the inclusion of future members in the class is a factor in favor of certification as it weighs in favor of numerosity. *See, e.g.*, *Parsons*, 754 F.3d at 672 (affirming class certification of class of "[a]ll prisoners who are now, or will in the future be, subjected to the medical, mental health, and dental care policies and practices of the [Ariz. Dep't of Corrections]").

involved may change, the nature of the wrong and the basic parameters of the group affected remain constant") (quotations and citation omitted). *Fifth*, the very nature of the Retaliation Policy is to punish people for asserting their trial rights; this makes filing and joinder of individual suits even more impracticable. *See, e.g.*, *Buttino v. F.B.I.*, C-90--1639SBA, 1992 WL 12013803, at *2 (N.D. Cal. Sept. 25, 1992) (finding joinder impracticable in part because, "assuming the existence of an anti-gay policy toward FBI employees, many individual claimants would have difficulty filing individual lawsuits out of fear of retaliation").

2. The Proposed Classes Satisfy Commonality.

Commonality requires plaintiffs to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality requires plaintiffs to assert claims that "depend upon a common contention . . . capable of classwide resolution—which means 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). Federal courts routinely find that commonality exists for classes of people who allege system-wide law enforcement misconduct. *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 989 (D. Ariz. 2011) ("In a civil rights suit, 'commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'"), *aff'd sub nom. Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (citations omitted); *see also Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D. Ariz. 2016) ("In the civil rights context, commonality is satisfied 'where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'") (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)).

Commonality "does not . . . mean that every question of law or fact must be common to the class." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013). To the contrary, "even a single common question" may satisfy Rule 23(a)(2). *Parsons*, 754 F.3d at 675; *see also Dukes,* 564 U.S. at 350 (recognizing that "commonality" is satisfied where there is a "common contention" that is "capable of classwide resolution"). "The existence

of shared legal issues with divergent factual predicates is sufficient [to satisfy commonality], as is a common core of salient facts coupled with disparate legal remedies within the class." *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003) (quoting omitted).

Here, all class members share a common fact: they are subject to the Retaliation Policy from the moment MCAO assigns them to EDC. All class members are also subject to the same constrained statutory timelines and the same basic lack of discovery (beyond a police report) prior to waiving their preliminary hearing. They also do not receive an adversarial detention review prior to the preliminary hearing. *See Unknown Parties*, 163 F. Supp. 3d at 640 (holding that "claims involving overall conditions that affect the rights of all putative class members are sufficient to satisfy commonality" and that whether "such conditions result from Defendants' stated policies or from their alleged failure to create or adhere to those policies does not change the commonality analysis"); *cf. Parsons*, 754 F.3d at 678 (finding commonality where "all members of the putative class and subclass have in common . . . their alleged exposure, as a result of specified statewide ADC policies and practices . . . , to a substantial risk of serious future harm").

Class members also present common questions of law. Each class member asks whether the Retaliation Policy violates the Constitution under at least one of the following theories: (1) prosecutorial vindictiveness in violation of due process; (2) a blanket policy that penalizes or chills the exercise of the right to trial; and/or (3) violation of a federally protected liberty interest arising out of Ariz. R. Crim. P. 5 and Article II, Section 30 of the Arizona Constitution, both of which guarantee a hearing as to whether the prosecution has probable cause to proceed.[4]

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[4] The commonality of facts and law is further confirmed by a recent ruling within the Ninth Circuit. In *Ahlman v. Barnes*, 445 F. Supp. 3d 671 (C.D. Cal. 2020), a U.S. District Court in the Central District of California court provisionally certified classes and subclasses of pre-trial and post-conviction detainees seeking judicial relief upon allegations that they were at serious COVID-19 risk due to their correctional facility's inability to comply with relevant guidelines. Plaintiffs argued that "commonality is satisfied because all class members are incarcerated in Defendants' Jail during the COVID-19 pandemic and all are subject to the same policies that they now argue are unconstitutional," with the Court

These shared questions of fact and law make clear the existence of "a common contention . . . capable of classwide resolution," for which the "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." *Dukes*, 564 U.S. at 350.

3. The Individual Plaintiffs' Claims are Typical of the Claims of the Classes.

Typicality exists if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The "requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal quotation marks and citation omitted). "The test of typicality is 'whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Parsons*, 754 F.3d at 685 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Typicality is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citation omitted). Variations among individual plaintiffs' circumstances, or the extent of their injuries, will not defeat typicality as long as the named plaintiffs' injuries arise "from the same event or practice or course of conduct that [gives] rise to the claims of other class members," and the named plaintiffs' claims are "based on the same legal theory" as the class's claims. *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1033 (9th Cir. 2020) (quotations and citations omitted).

Both Individual Plaintiffs assert substantively identical claims that arise from MCAO's blanket application of the Retaliation Policy.

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finding that because "Plaintiffs challenge Defendants' institution-wide response and seek institution-wide injunctive relief . . . , the relevant questions such as deliberate indifference will be decided on a classwide, rather than individual, basis." *Id.* at 685.

4. The Individual Plaintiffs Are Adequate Class Representatives and Have Retained Adequate Class Counsel.

Adequacy is satisfied when "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)). The adequacy requirement "tend[s] to merge with the commonality and typicality criteria of Rule 23(a)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (alteration in original) (citation and quotation marks omitted). The adequacy requirement is met here because Plaintiffs and their counsel will adequately represent the interests of both classes, which are aligned and intertwined.

Class counsel are "qualified" when they can establish their experience in previous class actions and cases involving the same area of law. *Lynch v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984). Here, class counsel are attorneys from the American Civil Liberties Union Foundation ("ACLU") and the ACLU of Arizona. *See* Exhibit 1 (Declaration of Victoria Lopez); Exhibit 2 (Declaration of Somil Trivedi). These attorneys have participated as class counsel and have extensive subject-matter expertise in numerous civil-rights related cases before this Court and others, including in other cases against this Defendant. Ex. 1 (Lopez Decl.) ¶¶ 5-6 (citing experience in *Fenty v. Penzone,* No. CV-20-01192-PHX-SPL (D. Ariz.); *Parsons v. Ryan*, No. CV-12-00601-PHX-ROS (D. Ariz.); *Romero-Lorenzo v. Koehn,* CV-20-00901-PHX-DJH (D. Ariz.); *Puente v. City of Phoenix*, No. CV-18-02778-PHX-JJT (D. Ariz.); *Doe v. Nielsen*, No. CV-15-00250-TUC-DCB (D. Ariz.); *Teneng v. Trump*, No. 5:18-CV-01609-JGB-KK (C.D. Cal.)); Ex. 2 (Trivedi Decl.) ¶¶ 5-7 (citing experience in *Fenty*; *Romero-Lorenzo*; *Ahlman v. Barnes*, No. SACV 20-835 JGB (SHKx) (C.D. Cal. 2020); *Livas v. Myers*, 2:20-cv-00422-TAD-KK (W.D. La.); and *P.E.O.P.L.E. v. Rackauckas*, 30-2018-00983799-CU-CR-

CXC (Ca. Sup. Ct.), among others)). Counsel know of no conflicts among the proposed class members or between counsel and the proposed class members, and counsel will vigorously represent the proposed classes.

The Individual Plaintiffs have the requisite personal interest in the outcome of this case, which they share with all class members, and they will fairly and adequately protect the interests of the proposed classes. The Individual Plaintiffs and all class members generally seek the same relief—namely, declaratory and injunctive relief requiring Defendant to protect all respective class members. *See Unknown Parties*, 163 F. Supp. 3d at 642 (holding adequacy satisfied despite "a lack of individual medical ailments while in [government] custody" among the named plaintiffs, where the named plaintiffs generally "suffered harms typical of the class" under the conditions of confinement). The Individual Plaintiffs aim to secure relief that will protect both themselves and all members of the class they represent from Defendant's illegal policy. Their interests are thus aligned with those of the other respective class members and no conflict is present.

The Individual Plaintiffs and class counsel satisfy Rule 23(a)(4)'s adequacy requirement.

B. The Proposed Classes Satisfy Rule 23(b)(2) and (b)(1).

"Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Amchem*, 521 U.S. at 614 (quoting Fed. R. Civ. P. 23(b)(2)). This action—a civil rights claim seeking purely equitable relief—falls squarely within Rule 23(b)(2). That is because "the primary role of this provision has always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686 (citation omitted). "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) actions]." *Amchem*, 521 U.S. at 614 (citations omitted); *see also Walters*, 145 F.3d at 1047 (Rule 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions."); *see also Ahlman v. Barnes*, 445 F. Supp. 3d 671, 686 (C.D. Cal. 2020) (Rule 23(b)(2) is met because plaintiffs "allege that the conditions of confinement violate their federal

constitutional and statutory rights" and so "a single injunction would provide relief to each class member") (citation omitted).

In the Ninth Circuit, "it is sufficient to meet the requirements of Rule 23(b)(2) [when] class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez*, 591 F.3d at 1125-26 (internal quotation marks and citations omitted) (finding certification under Rule 23(b)(2) proper where "proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government"); *see also Ahlman*, 445 F. Supp. 3d at 686-87 (finding Rule 23(b)(2) met because plaintiffs "seek uniform injunctive relief: an order compelling Defendants to release members of the [] subclasses and mitigate the dangers of COVID-19 within the Jail") (citations omitted). The critical inquiry is "whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125.

That inquiry is satisfied here. *First*, MCAO subjects every person they assign to the EDCs to the Retaliation Policy; indeed, the policy's inherent purpose is to eliminate individualized case considerations to process cases more quickly. *Second*, the injunctive relief that Plaintiffs request is appropriate for their classes as a whole. The entire Pre-Waiver Class seeks an injunction ending the Retaliation Policy. The Post-Waiver Class seeks that same injunction as well as one facilitating class members' return to a litigation position prior to the unconstitutional coercion. In both cases, to comply with the requested injunctions, Defendant would have to implement office-wide changes applicable to, and for the benefit of, all members of both classes. Thus, Rule 23(b)(2) is satisfied.

Alternatively, Plaintiffs' proposed classes satisfy Rules 23(b)(1)(A) and (B). Under 23(b)(1)(A), class certification is appropriate if individual members of the class bringing separate actions would create the 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). A "core example" of such an action is a "situation in which many individuals, all challenging a single government policy, bring

separate suits for injunctive relief." Newberg on Class Actions § 4:11 (5th ed.). Certification under 23(b)(1)(B) is appropriate when prosecuting "separate actions by or against individual class members would create a risk of … adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). Rules 23(b)(1)(A) and (B) are both satisfied here. Two likely voluminous classes of people are challenging a single government policy, and separate actions by class members would risk MCAO applying different Sixth and Fourteenth Amendment standards in different criminal cases, creating inconsistent law across individuals and within this jurisdiction. *See, e.g.*, *Hernandez v. Lynch*, EDCV1600620JGBKKX, 2016 WL 7116611, at *19 (C.D. Cal. Nov. 10, 2016), *aff'd sub nom. Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

IV. CONCLUSION

Plaintiffs' proposed classes satisfy every requirement of Rules 23(a) and 23(b)(2) (or 23(b)(1)). Accordingly, a class action is the appropriate procedural device for addressing the common claims asserted by potentially thousands of individuals who are subject to Defendant's unconstitutional Retaliation Policy in the EDCs.

Plaintiffs respectfully request that the Court certify the proposed classes.

DATED: September 8, 2021

Respectfully submitted,

/s/ Jared G. Keenan
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Victoria Lopez (330042)
American Civil Liberties Union Foundation of Arizona

Somil Trivedi (*pro hac vice*)
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021 I electronically transmitted the attached document to the Clerk's office using the CM/ECF system for filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Jared G. Keenan
Jared G. Keenan