Judge Ronald B. Leighton
Magistrate Judge David W. Christel

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DONALD BANGO and SCOTT BAILEY, individually and on behalf of all others similarly situated, Plaintiffs, v. PIERCE COUNTY, WASHINGTON; PIERCE COUNTY SHERIFF'S DEPARTMENT Defendants.	No. 3:17-cv-06002-RBL-DWC **AMENDED MOTION FOR CLASS CERTIFICATION – ORAL ARGUMENT REQUESTED** **NOTE ON MOTION CALENDAR:** **SEPTEMBER 27, 2018 AT 10AM**

I. INTRODUCTION

This case arises from the systemic failures of the defendants to provide constitutionally adequate mental health care at the Pierce County Jail ("the Jail"). Defendants' policies and practices place all members of the putative class at imminent risk of irreparable harm in the form of physical and psychological injury. Defendants have created and implemented systemic policies and practices that violate constitutional and statutory law, correctional facility

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guidelines, and basic standards of care. The record to date is replete with evidence that Defendants subject all members of the proposed class to these policies and practices; that the harms suffered by named plaintiffs Donald Bango and Scott Bailey are typical of the injuries all other class members are at risk of suffering; that Mssrs. Bango and Bailey are adequate class representatives; and that Defendants' policies and practices are both well-established and present questions regarding their legality that are common to the class.

Plaintiffs seek to represent a class of "all qualified individuals who have mental illnesses that are disabilities as defined in 42 U.S.C. §12102 and 29 U.S.C. §705(9)(B), and who are now, or who will be in the future, incarcerated at the Pierce County Jail." *See* Dkt. #1 at ¶28 ("Complaint"). Plaintiffs seek an order certifying the case as a class action under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

This case presents a prototypical Rule 23(b)(2) class action: Plaintiffs seek no money damages, only prospective equitable relief from policies and practices that Defendants implement on a class-wide basis. As detailed below, the multiple grave deficiencies in the systems of providing mental health care render care constitutionally inadequate. Every individual with a mental health illness is at risk, every day, of substandard care and harm in profound ways. Numerous courts have certified classes challenging similar systemic correctional conditions. The Ninth Circuit has recognized that the certification of these types of conditions cases is "firmly established in our constitutional law." *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014) (affirming certification of class of state prisoners challenging systemic deficiencies in medical, dental, and mental health care). The proposed class satisfies all requirements for Rule 23 certification under Rule 23(b)(2).

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II. FACTUAL BACKGROUND

The record firmly establishes that Defendants have created and implemented policies and practices that apply to all people with mental illness incarcerated at the Pierce County Jail.

A. Defendants' Have Failed to Implement an Adequate Mental Health Identification System

Defendants fail to provide comprehensive mental health screenings for people booked into the Jail. As people enter custody at the Pierce County Jail, they are screened for various health issues during the booking process. During the booking process, medical providers perform a mental health screening using a "Suicide Risk Assessment" form as well as a "General Mental Health Assessment" form. *See* Bango Decl. at ¶ 4; Bailey Decl. at ¶¶ 3–7. These forms include questions about current mental health and mental health history, including suicidal ideation and psychiatric medications. *See id.* Most questions have a check box next to them to designate a positive finding. *See id.* By design, these forms do not allow for negative findings. *See id.* In fact, medical providers routinely fail to ask or document answers to all of the questions on the mental health screening forms. *See* Bailey Decl. at ¶¶ 3–7. As a result, people are not screened for serious psychiatric conditions that require medically necessary treatment.

After the initial screening, Defendants are not required to, nor routinely provide any additional mental health screening to the general jail population. *See* Cho Decl. Ex. A at 47:3-11 ("Rhoton Deposition Excerpts"); Ex. B at 71:18- 72:8 ("Anderson Deposition Excerpts"); Ex. C at 95:7-18 ("Perez Deposition Excerpts"). Defendants have no policy or practice mandating review of inmates' mental health records. *See* Cho Decl. Ex. A at 51:10- 54:15. Defendants also fail to screen for mental illness despite clear signs of mental decompensation and individuals' repeated requests to be seen and evaluated. *See* Bango Decl. at ¶¶ 13-21, 26-28; Bailey Decl. at ¶¶ 8-16.

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Defendants' failure to adequately screen for mental health conditions is unreasonable and violates well-established national standards, including those promulgated by the National Commission on Correctional Health Care ("NCCHC").[1] Both the Medical Director and Mental Health Program Manager are certified by NCCHC, and should have knowledge of the risk of harm from practices that contravene NCCHC standards. *See* Cho Decl. Ex. A at 28:16 – 29:4; Ex. D at 37:1-22 ("Balderrama Deposition Excerpts"). NCCHC's 2014 "Standards for Health Services in Jails" require jails to inquire during the receiving screening into "[p]ast or current mental illness, including hospitalizations," as well as any "[h]istory of or current suicidal ideation[.]" *See* Cho Decl. Ex. E at 71 ("NCCHC Standards for Health Services in Jails 2014"). These inquiries are designed "to ensure that patients with known illnesses and those on medications are identified for further assessment and continued treatment." *See id.* at 72.

Additionally, NCCHC standards require jails to provide a more comprehensive mental health screening *for all inmates* within 14 days of admission, including inquiries into psychiatric hospitalization, suicidal behavior and ideation, and psychotropic medications, with further referral for evaluation and treatment for individuals with positive mental illness screens. *See* Cho Decl. Ex. E at 80-81. This process includes compiling and reviewing medical records from community mental health providers to create a complete mental health history, and is designed to identify people with mental illness "soon after admission to prevent deterioration in their level of functioning and to [ensure that they] receive necessary treatment in a timely fashion[.]" *See id.; see also* Cho Decl. Ex. E at 76-79.

[1] Although professional standards like those promulgated by NCCHC do not necessarily set the constitutional floor for minimally adequate mental-health care under the Eighth Amendment, substantial deviations from accepted standards can indicate an Eighth Amendment violation. *See, e.g., Steele v. Shah*, 87 F.3d 1266, 1269 (11th Cir. 1996) (holding that provision of care where the quality was a "substantial . . . deviation from accepted standards constituted deliberate indifference"); *see also Kosilek v. Maloney*, 221 F. Supp. 2d 156, 180 (D. Mass. 2002) (reference to established professional standards is important to determining the adequacy of medical care).

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Defendants' policies, practices, and procedures fail to adequately identify the existence and acuity of inmates' mental illness, endangering the entire class, and placing them at an unreasonable risk of harm and psychological decompensation.

B. Defendants Fail to Provide Meaningful or Adequate Mental Health Treatment to Inmates in Custody

The Pierce County Jail has a "Mental Health Program" that claims to deliver "high quality, cost effective mental health services . . . for the at-risk mentally ill inmate." Pierce County, Mental Health Services, http://www.co.pierce.wa.us/2110/Mental-Health-Services (last accessed Dec. 4, 2017). This Program is managed by Janet Rhoton, and is budgeted for seven "Mental Health Evaluators" ("MHE," also referred to as Mental Health Providers, or "MHP"). *See* Cho Decl. Ex. F at 1 ("Descriptions of Mental Health Staff Positions at Pierce County Jail"). The qualifications to work as an MHE include a Master's Degree in psychology, social work, or a related field, as well as state licensing. *See id.* at 7. No medical degree is required. *See id.* at 5-7. MHEs are responsible for evaluating psychological conditions, developing treatment plans, screening referrals for psychiatric medications, and determining housing needs. *See id.* at 5. MHEs cannot prescribe psychiatric medications and do not provide ongoing counseling. *See id.*; *see also* Cho Decl. Ex. A at 66:2-18; Ex. B at 50:14 – 52:6.

Pierce County Jail only has one doctor on staff, Dr. Miguel Balderrama, who also serves as the Medical Director. *See* Cho Decl. Ex. D at 38:14-22. He and one psychiatric nurse practitioner prescribe the majority of psychiatric medications to people incarcerated in the Jail. *See* Cho Decl. Ex. A at 61:8-15; Ex. B at 97:4-10. No one on staff at the Jail is dedicated to providing mental health counseling. *See* Cho Decl. Ex. A at 79:22-25; Ex. C at 60:7-14, 113:16-25. Psychotropic medication is the only treatment that is available to inmates. The chief of the

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Jail, Patricia Jackson-Kidder has confirmed that the facility "do[es] not provide treatment in jail, outside of medication." Cho Decl. Ex. G at 44:3-25 ("Jackson-Kidder Deposition Excerpts").

1. Pierce County Fails to Timely and Meaningfully Respond to Inmates' Requests for Mental Health Treatment

Referrals to the Mental Health Program are made through requests for evaluation and triage made by deputies, the medical clinic, courts, friends, and family. An inmate can also request a referral by filing a "kite" (a written request) at an electronic kiosk in their unit. *See* Cho Decl. Ex. H at 15 ("PCDCC Mental Health Services Policy and Procedures Manual, Ch. 6"). According to policy, the Mental Health Program must triage referrals "on severity of need and acuity." If someone is "at imminent risk," they must be seen immediately; "high" priority referrals must be seen within 48 to 72 hours. There is no required time frame for responses to those judged to be "moderate" or "low" priority. *See id.* at 13-14.

Defendants have a well-documented practice of refusing to permit people with severe mental illness (including hallucinations and suicidal ideations) to see a Mental Health Evaluator in person even when multiple kites are filed. *See* Bango Decl. at ¶¶ 13, 15, 18, 20–23, 26–28; Bailey Decl. at ¶¶ 8–9; Cho Decl. Ex. C at 87:6-22, 104:15 – 108:8, 112:5 – 114:13. Mental Health Evaluators correspond with people suffering from mental illness primarily through written "kites." Evaluators rarely assess mental acuity in person. *See id.* Instead, "kite" responses from Mental Health Evaluators often include "self-help" worksheets on breathing and stress-reduction techniques. *See* Bango Decl. at ¶ 28; Bailey Decl. at ¶ 8-9; *see also* Cho Decl. Ex. A at 62:16 – 63:18; Ex. B at 79:10 – 81:13; Ex. C at 105:10 – 106:10. When a Mental Health Evaluator does provide an in-person evaluation, these interactions are typically brief and do not provide basic mental health services. *See* Bango Decl. at ¶ 6*; see also* Cho Decl. Ex. B at 50:5 –

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52:4; Ex. C at 120:15-20. The only option for treatment is medication. Cho Decl. Ex. G at 46:3-25.

These practices and policies are clearly unreasonable given the likelihood of harm to inmates. Basic mental health services include identification and referral of people with mental health needs, crisis intervention services, psychiatric medication management, individual and group counseling, other mental health programming, and treatment documentation and follow-up. *See* Cho Decl. Ex. E at 116-117.

2. Pierce County Fails to Ensure that Inmates Receive Psychiatric Medications

According to the Jail's website, medical staff is responsible for verifying "with a doctor's office or pharmacy any prescriptions brought in by an incoming arrestee." *See* Pierce County, General Health Services, https://www.co.pierce.wa.us/2109/General-Health-Services (last visited Dec. 4, 2017). But Defendants have a well-established practice of denying class members with current and verifiable prescriptions their medication for weeks or even months. *See* Bango Decl. at ¶¶ 14–16, 18–23, 25, 28–30; Bailey Decl. at ¶¶ 7–15. Defendants have a practice of denying class members without a current prescription their necessary psychiatric medications for the entire length of their stay at the Jail. *See* Cho Decl. Ex. C at 227:4-24; Ex. I at 259:5 – 261:24 ("Sealed Perez Deposition Excerpt"). Defendants also have a practice of refusing to evaluate class members for psychiatric medications, regardless of need or medical history. *Id*. The denial of necessary psychiatric medication significantly increases the risk of psychological decompensation and self-harm.

Defendants' practice of denying necessary psychiatric medications is clearly unreasonable given the risk of harm to inmates. NCCHC standards, for example, require that

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jails provide "prescribed medication in a timely, continuous, and clinically appropriate manner." *See* Cho Decl. Ex. E at 60-61.

Defendants' practice of denying psychiatric medication is compounded by their practice of refusing to provide counseling or other mental health programming of any kind. *See* Bango Decl. at ¶ 28; Bailey Decl. at ¶ 8; *see also* Cho Decl. Ex. A at 79:8-25); Ex. B at 188:19 – 189:14. This failure is clearly unreasonable given the risk of harm posed to class members. NCCHC standards, for example, recognize that "[m]ental health treatment is more than prescribing psychotropic medications." Cho Decl. Ex. E at 116-117.

C. Defendants Have a Written Policy of Locking Inmates with Mental Illness in Solitary Confinement

Defendants have a formal written policy of placing people with "poor behavioral control due to a mental disorder" in "crisis cells" for 23 hours a day. *See* Cho Decl. Ex. J at 29 ("PCDCC Mental Health Policy and Procedures Manual, Ch. 13"). These cells are "one of the most restrictive housing options" available at the Jail and constitute solitary confinement. *See id.* The Mental Health Program staff is responsible for recommending placement in the crisis cells "for safety concerns." *See id.*; *see also* Cho Decl. Ex. A at 90:8-24). Defendants also isolate people with mental illness for 20 to 21 hours a day, albeit not in "crisis cell" units. *See* Cho Decl. Ex. K at 63 ("PCDCC Policy and Procedures Manual, Ch. 3.01"). The Jail also operates a "Mental Health Unit," which is a unit for individuals with mental illness who are considered "more vulnerable if placed in the general population." *See* Cho Decl Ex. J at 29.

Class members who inform staff of their suicidal ideations are placed on "suicide watch," in which they are placed naked in a "suicide smock" in solitary confinement. *See* Cho Decl. Ex. C at 116:9-22. Suicide watch is dehumanizing, and can further destabilize people in mental

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health crisis. *See* Bango Decl. at ¶¶ 5–11; Bailey Decl. at ¶¶ 1, 10; *see also* Cho Decl. Ex. A at 107:11-21.

Even where there is no suicide danger, Defendants have a policy and practice of using solitary confinement to warehouse people with mental illness and punish them for minor behavioral issues, despite the known detrimental impact of isolation on this population. The Jail's own classification reports, which document decisions about where inmates are housed, routinely list mental illness and non-violent behavior related to mental illness as a reason for a higher custody level. *See* Cho Decl. Ex. L ("Pierce County Jail Inmate Classification Documents"). A 2014 audit of the Jail found "a tendency to increase the custody level of any offender who shows indications of mental health issues." Bill Vetter, Evaluation of Pierce County Corrections Bureau Jail Operations (Sept. 4, 2014), https://www.co.pierce.wa.us/DocumentCenter/View/32482. Defendants have a policy and practice of restricting access for those in solitary to services, programs, and activities provided in the Jail. These include telephone services, hygiene activities, outdoor exercise, administrative, disciplinary, and classification proceedings, the "kite" and grievance systems, library services, access to reading materials, commissary services, and educational, vocational, religious, recreational, and other programming. *See* Cho Decl. Ex. C at 120:4-12.

Defendants' policy and practice of leaving class members in solitary for weeks or months at a time places them at imminent risk of irreparable psychological decompensation and self-harm.[2] Defendants' policies and practices subjecting class members to solitary confinement are

[2] *See, e.g.*, Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997) ("[D]istinctive patterns of negative effects have emerged clearly, consistently, and unequivocally from personal accounts, descriptive studies, and systematic research on solitary and punitive segregation."); Fatos Kaba et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 AM. J. OF PUB. HEALTH 442, 445–46 (2014) (demonstrating a correlation between solitary confinement and self harm in the New York City jail system).

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clearly unreasonable, given the risk of harm to mentally ill inmates. For example, NCCHC standards advise against the use of solitary confinement "of any duration" for people with mental illness because it is "harmful to an individual's health." NCCHC, Solitary Confinement (Isolation) Position Statement, adopted Apr. 10, 2016: http://www.ncchc.org/solitary-confinement (last visited Dec. 4, 2017). Defendants' policies permitting mental health staff to recommend placement of a person with a serious mental illness in solitary also violates ethical standards for the medical profession. According to NCCHC, "health staff must not be involved in determining whether adults or juveniles are physically or psychologically able to be placed in isolation." *Id.* Instead, the proper role of health professionals is to review individuals' health records to determine whether their "mental health needs contraindicate the placement or require accommodation." Cho Decl. Ex. E at 88-89.

D. Defendants Have a Well-Established Practice of Punishing Class Members with Mental Illness with Use of Force and Restraints

In 2016, Pierce County Jail deputies logged nearly 1100 "use of force" reports. *See* Cho Decl. Ex. M ("Spreadsheet Listing Pierce County Jail Use of Force Incidents"). Uses of force included the use of "OC" (oleoresin capsicum spray, also known as "pepper spray," pepperball launchers, and expulsion grenades), restraint chairs (a wheelchair with restraint straps for the arms, torso, and legs), "Lateral Vascular Neck Restraints" (a potentially lethal "blood choke" that restricts blood flow to the brain), and "eyebolts" (metal bolts used to chain a person's hands and feet to the concrete floor). *See* Cho Decl. Ex. N ("PCDCC Policy and Procedures Manual, Ch. 6.11-6.12").

Jail policy dictates that "[p]roper restraints will only be used as a precaution against escape, to prevent self-injury, injury to others or property damage[,]" and that "[i]n no event is physical force justifiable as a punishment." *See id.* at 186. According to Jail policy, a restraint

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chair is "not a medical restraint." *See* Cho Decl. Ex. O at 20 ("PCDCC Mental Health Policy and Procedures Manual, Ch. 9"). It is intended only to restrain a "violent out-of-control" person and not meant to be used as punishment. *See* Cho Decl. Ex. N at 189-191; *see also* Cho Decl Ex. P ("Jackson-Kidder Memo re Use of Eyebolts"). The decision to place a person in a restraint chair is solely at the discretion of corrections deputies, not medical or mental health staff. *See* Cho Decl. Ex. O at 20. Jail policy also states that the eyebolts may be used "when deemed necessary," but are intended for use on "violent, out-of-control prisoners." *See id.* at 48 (Appendix C). According to policy, any use of the eyebolts must be videotaped, up to a maximum of eight hours. *See* Cho Decl. Ex. N at 189-191. A person can be restrained for longer than 8 hours if ordered by Jail administration. *See id.*

In violation of the Jail's written policy, Defendants' own use of force reports reveal that they deploy force and restraints for minor behavioral issues directly attributable to mental illness. Deputies use force and restraints to punish non-violent behavior such as lack of cooperation, kicking and hitting cell doors, covering cell windows, and profanity. For example, when a woman with mental illness began screaming and hitting her cell door, deputies pepper sprayed, handcuffed, and placed her face down on a mattress before shackling her hands and feet to eyebolts, where she was restrained for three hours. *See* Cho Decl. Ex. Q at 1 ("Pierce County Jail Use of Force Reports").

When a man with mental illness yelled and kicked his cell door, deputies placed him face down on a mattress, and shackled his legs and arms to eyebolts. A deputy then struck the man with a "hammer strike to the right side of [his] jaw" because he believed the man was trying to bite him. The man was restrained and shackled for approximately eight hours. *See id.* at 2. On another occasion, Deputies tied down a man on suicide watch in a restraint chair for placing a

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mattress and toilet paper against his window and "yelling unintelligibly" after urinating on himself. Deputies decided the restraint chair was necessary to help the man "cool off," despite the fact that the man complied with commands. While restrained, the man informed deputies that he was not receiving his proper medication. *See id.* at 3–4.

Defendants' overuse of force and restraints on class members is clearly unreasonable, violates Defendants' own written policies and common decency, and places class members at imminent risk of serious irreparable injury.

III. AUTHORITY AND ARGUMENT

In order to qualify for class certification, Plaintiffs must demonstrate that that they satisfy the four requirements under Fed. R. Civ. P. 23(a): "(1) the class is so numerous that joinder of all members is impracticable ['numerosity']; (2) there are questions of law or fact common to the class ['commonality']; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ['typicality']; and (4) the representative parties will fairly and adequately protect the interests of the class ['adequacy of representation']." Under Fed. R. Civ. P. 23(a)(4) and Fed. R. Civ. P. 23(g), the Court must appoint class counsel to "fairly and adequately represent the interests of the class." Plaintiffs must also establish that the putative class qualifies under one of the types of class actions listed under Fed. R. Civ. P. 23(b). Putative classes seeking declaratory and/or injunctive relief are typically certified under Fed. R. Civ. P. 23(b)(2), which 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[.]"

Plaintiffs and the putative class they seek to represent satisfy all requirements for class certification. The putative class is defined to include all qualified people who have mental

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illnesses that are disabilities as defined in 42 U.S.C. § 12102 and 29 U.S.C. § 705(9)(B) who are incarcerated, or who will be incarcerated in the future, at the Pierce County Jail. *See* Dkt. #1 at ¶ 28. Defendants' policies and practices of failing to provide adequate mental health screening and mental health treatment, and using solitary confinement, force and restraints to punish behavior caused by untreated mental illness, places all class members at imminent risk of irreparable injury. This proposed class meets "the four threshold requirements" of Fed. R. Civ. P. 23(a): "numerosity, commonality, typicality, and adequacy of representation." *Levya v. Medline Indus.*, 716 F.3d 510, 512 (9th Cir. 2013). Plaintiffs also satisfy the requirements of Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds that apply generally to the class, making injunctive and declaratory relief appropriate for the class as a whole.

A. Plaintiffs Satisfy the Requirements for Class Certification Under Rule 23(a) and 23(g)

The putative class satisfies the numerosity, commonality, typicality, and adequacy requirements under Fed. R. Civ. P. 23(a), and undersigned class counsel satisfy the appointment requirements of Fed. R. Civ. P. 23(g).

1. The Class Satisfies the Numerosity Requirement

The proposed class satisfies the numerosity requirement under Fed. R. Civ. P. 23(a)(1). Rule 23(a)(1) does not "demand that the class be so numerous that joinder is impossible but rather simply that joinder of the class members is impracticable." *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp.2d 1324, 1340 (W.D. Wash. 1998) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964)). Whether joinder would be impracticable does not require a specific minimum number of class members. *See id.* (internal citations omitted).

"[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met,

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regardless of class size." *Nat'l Ass'n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986) (internal quotations and citations omitted); *see also Jordan v. Cty. of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982), *vacated on other grounds by Cty. of Los Angeles v. Jordan*, 459 U.S. 810 (1982) ("The joinder of unknown individuals in inherently impracticable."). Further, the numerosity requirement is "relaxed" when plaintiffs seek only injunctive and declaratory relief, and "plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members of [the proposed class] is sufficient to make joinder impracticable." *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004) (unpublished); *see also Civil Rights Educ. and Enforcement Ctr. v. Hosp. Props. Trust.*, 317 F.R.D. 91, 100 (N.D. Cal. 2016) (quoting *Sueoka*). When a plaintiff "seeks only declaratory and injunctive relief, [they do] not need to establish the precise number of class members to demonstrate numerosity." *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1327–28 (W.D. Wash. 2015) (citations omitted). "In general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Fecchia*, 380 Fed. App'x 646, 651 (9th Cir. 2010) (unpublished) (collecting cases).

Here, the proposed class includes all people with mental illness who are currently incarcerated in the Jail, as well as those who will be incarcerated in the Jail in the future. Defendants' own records show that there were approximately 70–90 "mental health beds" in use every day, on average, in 2017. *See* Cho Decl. Ex. R ("Pierce County Jail Occupied Mental Health Bed Statistics"). Further, approximately a quarter of people at the Pierce County Jail on psychiatric medications, which corresponds to roughly 266 people at any given time.[3] *See*

[3] This estimate is based on the average daily population of the Jail in July 2018. *See* Legal Information Network Exchange, "Jail Population,"

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League of Women Voters of Tacoma-Pierce County, Study of Mental Health in Pierce County 35 (Feb. 2016), http://www.piercecountywa.org/DocumentCenter/View/42628. The class is estimated to number in the thousands every year.[4] Further, because joinder of the unknown future class members is impracticable, the numerosity requirement is presumptively satisfied. It is impracticable to join all individual class members— particularly future class members—in the same suit absent class certification. Numerosity is met.

2. The Class Presents Common Questions of Law and Fact

Plaintiffs can also demonstrate that there are questions of law and fact common to the class. *See* Fed. R. Civ. Pro. 23(a)(2). Rule 23 does not require that all questions of law and fact be common to all class members—indeed, only one question of law or fact is sufficient. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Class actions "for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1763 (3d ed. 2018).

Class members' claims must "depend upon a common contention" so 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 at 350. Key to class certification "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to

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https://linxonline.co.pierce.wa.us/linxweb/Reports/ReportsList.cfm?report_type=jail_pop (last accessed Aug. 17, 2018).

[4] The Jail booked 33,161 individuals for the month of July 2018. *See* Legal Information Network Exchange, "Jail Population," https://linxonline.co.pierce.wa.us/linxweb/Reports/ReportsList.cfm?report_type=jail_pop (last accessed Aug. 17, 2018). The Federal Bureau of Justice Statistics estimates that approximately 64 percent of individuals in jails nationwide have a mental health issue, *see* U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report: Mental Health Problems of Prison and Jail Inmates, (revised Dec. 14, 2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf, and one in four jailed individuals meet the criteria for "serious psychological distress." *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011– 12 (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf?utm_source=newsfrombjs&utm_medium=email&utm_content=imhprpji1112_report_pdf&utm_campaign=imhprpji1112&ed2f26df2d9c416fbddddd2330a778c6=xbawkckbsa-xearbiza.

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generate common *answers* apt to drive the resolution of the litigation." *Id.* (emphasis in the original) (internal citation and quotation marks omitted). "[T]he commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose inmates to a substantial risk of harm." *Parsons*, 754 F.3d at 681; *see also Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005) ("[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members."). Systemic policies and practices are "the 'glue'" that holds together the putative class because "either each of the policies and practices is unlawful as to every [class member] or it is not." *Parsons*, 754 F.3d at 678.

In order to assess commonality, this Court must identify the elements of the class members' case-in-chief. *Id.* at 676. Here, Plaintiffs have alleged that Defendants' systemic policies and practices violate the Eighth and Fourteenth Amendments of the Constitution, Title II of the Americans with Disabilities Act, and the Rehabilitation Act. *See* Dkt. #1 at ¶¶ 160–173. This motion will address the elements of the constitutional and statutory claims in turn.

In order to prove their constitutional claims, Plaintiffs must show (1) that they were exposed to a substantial risk of harm and (2) that Defendants were objectively and deliberately indifferent to their health, safety, or serious medical needs, *i.e.*, that Defendants were actually or constructively on notice that their policies or customs would result in a constitutional violation. *See Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1248–49 & n.11 (9th Cir. 2016) (elements of an Eighth Amendment claim against a municipal defendant); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1078 (9th Cir. 2016) (en banc) (elements of a Due Process claim against a municipal defendant). "In class actions challenging the entire system of mental or medical health care,

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courts have traditionally held that deliberate indifference can be shown by proving either a pattern of negligent acts or serious systemic deficiencies in the prison's health care program." *Madrid v. Gomez*, 889 F. Supp. 1146, 1256 (N.D. Cal. 1995). The Ninth Circuit has recognized that these types of "systemic, future oriented Eighth Amendment claim[s]" are "firmly established in our constitutional law." *Parsons* 754 F.3d at 676-77.

Here, the putative class members have "set forth numerous common contentions whose truth or falsity can be determined in one stroke: whether the specified . . . policies and practices to which they are all subjected [by Defendants] expose them to a substantial risk of harm." *Id.* at 678. Those alleged policies and practices are:

- Failing to adequately screen for mental illness during the booking process or during incarceration.
- Refusing to provide necessary mental health treatment, including ignoring requests for care, delaying or denying access to psychiatric medications, and refusing to provide counseling, mental health programming, and other basic mental health care.
- Locking people with mental illness in solitary confinement, despite the clinically proven negative impacts of isolation on people with mental illness.
- Punishing class members with mental illness for non-violent behaviors directly related to their mental illness through uses of force and restraints, including restraint chairs and "eyebolts."

Courts in this circuit have routinely found commonality and certified classes alleging similar unconstitutional correctional policies and practices. *See, e.g.*, *id.* at 664 (affirming class certification where plaintiffs alleged policies and practices including "substandard mental health care;" "denial of medically necessary mental health treatment, including psychotropic medication, therapy, and inpatient treatment;" "denial of basic mental health care to suicidal and self-harming prisoners;" and "failure to provide adequate mental health care staffing and treatment" to individuals in isolation) (internal quotation marks omitted); *Hernandez v. City of*

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Monterey, 305 F.R.D. 132, 142 (N.D. Cal. 2015) (finding commonality where plaintiffs alleged inadequate mental health services, the isolation of inmates with mental illness, and the inappropriate use of safety cells and restraints); *Gray v. Cty. of Riverside*, No. EDCV 13099444-VAP, 2014 WL 5304915 at *41 (C.D. Cal. 2014) (certifying a class that alleged, *inter alia*, inadequate policies and procedures related to mental health staff, access to mental health care, management of mental health medication, suicide prevention, and restraint chairs). The Court should similarly find that Plaintiffs have proffered sufficient "proof of the existence of systemic policies and practices that allegedly expose inmates to a substantial risk of harm," thus satisfying commonality for their constitutional claims. *Parsons*, 754 F.3d at 681.

To bring a successful claim under Title II of the ADA, Plaintiffs must prove that they (1) are "qualified individual[s] with a disability," (2) that they were excluded from or denied the benefits of the Pierce County Jail's services, programs, or activities, or were otherwise discriminated against, (3) on the basis of their disability. *See* 42 U.S.C. § 12132. The elements of a Rehabilitation Act claim are largely the same, with the added requirement that the defendant entity must receive federal funding. *See* 29 U.S.C. § 794(a); *see also Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act."). Defendants Pierce County and Pierce County Sheriff's Department are public entities as defined in 42 U.S.C. § 12131(1)(A), and also receive federal funding, as that term is defined in 29 U.S.C. § 794, from the U.S. Department of Justice's State Criminal Alien Assistance Program (SCRAAP). *See* Cho Decl. Ex. S ("Pierce County Jail State Criminal Alien Assistance Program Contract 2015").

Plaintiffs and the putative class members are all qualified individuals with a disability, as that term is defined in 42 U.S.C. § 12102(2). They suffer from a mental impairment that

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substantially limits one or more "major life activities," including, *inter alia*, caring for oneself, eating, sleeping, speaking, learning, reading, concentrating, thinking, communicating, and working. *See* 42 U.S.C. § 12102(2)(A); *see also* 29 U.S.C. § 705(9)(B). Bango Decl. at ¶¶ 2–3; Bailey Decl. at ¶¶ 1–2. Plaintiffs have alleged that Defendants' policies and practices discriminate against putative class members by denying them access to services, programs, and activities available to other inmates in the Pierce County Jail on the basis of their disability. *See* Dkt. #1 ¶¶ 71–80, 167–68, 173; *see also* 28 C.F.R § 35.152(b)(2) (under the ADA, jails must "ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals"); *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999) (the "unjustified isolation" of the mentally ill constitutes discrimination under the ADA).

Plaintiffs have also alleged that Defendants' use of force and restraint polices and practices are discriminatory, and that Defendants have failed to make "reasonable modifications" to these polices and practices in violation of the ADA. Dkt. #1 ¶¶ 81–90, 167–68, 173; *see also* 28 C.F.R. § 35.130(b)(7). Several courts have recognized that, like cases challenging systemic constitutional deficiencies in correctional settings, systemic disability discrimination claims in this setting are well-suited for class-wide resolution. *See, e.g.*, *Hernandez*, 305 F.R.D. at 151; *Henderson v. Thomas*, 289 F.R.D. 506, 511 (N.D. Ala. 2012) (finding commonality for ADA claims in correctional context).

The Court need not resolve the merits of Plaintiffs' claims at this juncture: "whether class members could actually prevail on the merits of their claims is not a proper inquiry in determining the preliminary question whether common questions exist." *Stockwell v. City and Cty. of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) (internal citations and quotations omitted). The purpose of class certification is simply to "select the metho[d] best suited to

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adjudication of the controversy fairly and efficiently." *Id.* (quoting *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 460 (2013) (internal quotation marks omitted)). Plaintiffs have satisfied their burden of showing that a class wide proceeding would "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (emphasis in original). Plaintiffs have set forth "common contentions" through their allegations of systemic policies and practices. *See Wal-Mart*, 564 U.S. at 350. The determination of whether these policies and practices are unlawful "will resolve an issue that is central to the validity of each one of the claims in one stroke," *id.*, because "each of the policies and practices is unlawful as to every [class member] or it is not." *Parsons*, 754 F.3d at 678. Commonality is satisfied.

3. Plaintiffs' Claims Are Typical of the Class

Plaintiffs' claims are typical of the claims of the putative class. *See* Fed. R. Civ. P. 23(a)(3). The U.S. Supreme Court has recognized that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "[T]he typicality inquiry involves comparing the injury asserted in the claims raised by the named plaintiffs with those of the rest of the class." *Armstrong*, 275 F.3d at 869.

It is not necessary "that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Id.* "It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may

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currently have different health care needs; Rule 23(a)(3) requires only that their claims be 'typical' of the class, not that they be identically positioned to each other or to every class member." *Parsons*, 754 F.3d at 686. That Plaintiffs may have different mental health care needs is irrelevant to the typicality analysis, which "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Defendants' policies and practices place Plaintiffs and the putative class members at the same substantial risk of irreparable future harm.[5] Dkt. #1 at ¶¶ 160–173. Because the named Plaintiffs and putative class members allege the same risk of harm, the typicality requirement is satisfied. *See, e.g., Hernandez*, 305 F.R.D. at 159 (finding typicality where "[e]ach named Plaintiff declares exposure, like all other members of the putative class and subclass, to a substantial risk of serious harm due to the challenged policies and practices."); *Armstrong*, 275 F.3d at 869 (finding typicality where the plaintiffs "are objects of discriminatory treatment on account of their disabilities," in violation of the ADA).

4. The Named Plaintiffs will Fairly And Adequately Protect the Interests of the Class

Plaintiffs will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). This element of class certification is required to satisfy due process concerns that "absent class members must be afforded adequate representation before entry of judgment which binds them." *Hanon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Hansberry v.*

[5] Plaintiff Donald Bango is still incarcerated at the Pierce County Jail. *See* Bango Decl. at ¶ 1. Although Plaintiff Scott Bailey is no longer incarcerated at the Pierce County Jail, *see* Bailey Decl. at ¶ 1, his standing to seek injunctive relief relates back to the time of the filing of the complaint on December 4, 2017, when he was incarcerated in the Pierce County Jail. *See* Cho Dec. Ex. T ("Bailey Kites Dec. 2017"); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (in class actions, standing relates back to the time of the filing of the complaint if the class claims are "inherently transitory"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (recognizing that the claims of pretrial detainees fall within this "inherently transitory" category.").

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Lee, 311 U.S. 32, 42–43 (1940)). Determining adequacy of representation requires a two-prong test: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* Because this case seeks only declaratory and injunctive relief, there is no conflict of interest between the Plaintiffs, their counsel, and the putative class: they all share the common goal of eliminating Defendants' discriminatory policies and practices. *See Hernandez*, 305 F.R.D. at 160 (N.D. Cal. 2015) ("Class representatives have less risk of conflict with unnamed class members when they seek only declaratory and injunctive relief."). Further, Plaintiffs recognize the weight of their duties as class representatives and have undertaken this litigation in order to protect the rights of the class as a whole. *See* Dkt. #1 at ¶ 32; Bango Decl. at ¶ 46; Bailey Decl. at ¶ 18. Adequacy is thus satisfied.

5. Plaintiffs' Counsel are Qualified to Litigate this Action

In certifying a class, the Court must also appoint class counsel. *See* Fed. R. Civ. P. 23(g). In appointing counsel, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]" *See id.* at 23(g)(1)(A). Class counsel must also "fairly and adequately represent the interests of the class." *Id.* at 23(g)(4). In cases involving jail conditions, "class counsel with experience with class action lawsuits, class action lawsuits regarding conditions in correctional facilities, criminal justice issues and commitment of resources are likely to adequately represent the class." *Hernandez*, 305 F.R.D. at 161.

Here, class counsel satisfy the requirements of Fed. R. Civ. P. 23(g). Counsel have

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extensive experience with class action lawsuits, including class action lawsuits concerning conditions in correctional facilities. *See* Chiang Decl.; Mungia Decl. Further, counsel have long focused on issues intersecting mental health and criminal justice. *See id.* Lastly, class counsel have committed and will continue to commit significant resources to the prosecution of this litigation. *See id.*

B. This Action Satisfies the Requirements for Class Certification Under Rule 23(b)(2)

The class is properly certified under Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds that apply generally to the class and injunctive and declaratory relief is appropriate respecting the class as a whole. "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of a 23(b)(2) class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (noting that Fed. R. Civ. P. 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions."). "Cases challenging an entity's policies and practices regarding access for the disabled represent the mine run of disability rights class actions certified under Rule 23(b)(2)." *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008). The requirements of 23(b)(2) "are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688.

Here, Plaintiffs challenge Defendants' policies and practices of failing to provide adequate mental health screening and mental health treatment in addition to warehousing inmates with mental illness in solitary confinement and punishing them with uses of force and restraints. Dkt. #1 at ¶¶ 160–173. Plaintiffs have alleged that Defendants have a singular policy and practice that applies to all class members. Further, Plaintiffs seek a uniform injunction

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prohibiting this policy and practice as well as corresponding declaratory relief for the class as a whole. *See id.* at Prayer for Relief. Accordingly, this action satisfies the requirements of Fed. R. Civ. P. 23(b)(2).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the Proposed Order Granting Plaintiffs' Motion for Class Certification.

DATED this 29th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing and attached Proposed Order with the Clerk of the Court using the CM/ECF system, causing a notice of filing to be served upon the following counsel of record:

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