UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Richard W. DeOtte, et al., Plaintiffs, v. **Alex M. Azar II**, et al., Defendants.	Case No. 4:18-cv-825-O

APPENDIX TO REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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Counsel for Plaintiffs and the Proposed Classes

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Ackerman v. Washington, 2018 U.S. Dist. LEXIS 141456 (E.D. Mich.) 1

Certifies (b)(2) class defined as:

> All Jewish individuals confined with the Michigan Department of Corrections who are designated by the prison system to receive kosher meals.

Ackerman v. Dep't of Corrections, No. 2:11-cv-00883, ECF No. 114 (D. Nev.) ... 2

Certifies (b)(2) class, pursuant to stipulation, defined as:

> All prisoners confined with Nevada Department of Corrections facilities:
>
> (i) Who have been identified to the Department of Corrections through various procedures by Plaintiff (i.e., consultation with independent clergy, declaration of faith responses, observed historical observances) as a practicing Orthodox Jew and are currently receiving the current kosher diet;
>
> (ii) Those individuals who have submitted an affidavit of inclusion in the Class to Counsel for Plaintiff, Law Office of Jacob Hafter & Associates, on or before March 20, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs; and
>
> (iii) Those individuals who are currently receiving a kosher diet pursuant to the United States District Court Order dated February 17, 2012 [#72], whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs, provided such individuals follow an opt-in procedure set by this Court, as more fully described herein;

Arnold v. Washington, 2017 U.S. Dist. LEXIS 189607 (E.D. Mich.) 3

Certifies (b)(2) class defined as:

> All Jewish individuals confined with the Michigan Department of Corrections who are designated by the prison system to receive kosher meals.

Davis v. Abercrombie, 2014 U.S. Dist. LEXIS 139028 (D. Haw.) 4

Certifies (b)(2) class defined as:

> [A]ll persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are and/or will be confined to Saguaro Correctional Center ("Saguaro"); c) in the general population; and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

Dowdy-El v. Caruso, No. 2:06-cv-11765, ECF No. 77 (E.D. Mich.)..... 5

Certifies (b)(2) classes defined as:

> [A]ll current and future Michigan Muslim inmates who desire but have been denied . . . the ability to participate in *Jum'ah* because of a conflicting work, school or similar detail.
>
> [A]ll current and future Michigan Muslim inmates who desire but have been denied . . . a *halal* diet that is free of contamination by foods considered *haram*

Freeman v. Texas Department of Criminal Justice, 369 F.3d 854, 858 (5th Cir. 2004); *Freeman v. Texas Department of Criminal Justice*, No. 2:00-cv-00099-J, ECF No. 19 (N.D. Tex.) 6

Certifies (b)(2) class comprising "TDCJ inmates who subscribe to the Church of Christ faith"

Gartrell v. Ashcroft, 191 F. Supp. 2d 23, 24, 40–41 (D.D.C. 2002) 7

Awarding classwide injunctive relief under RFRA to a class of prisoners "whose avowed religious beliefs forbid them from cutting their hair or shaving their beards"

Ireland v. Anderson, No. 3:13-cv-3, ECF Nos. 394, 518 (D. N.D.) 8

Certifies (b)(2) class defined as:

> [A]ll persons civilly committed to the DHS pursuant to North Dakota Century Code chapter 25-03.3 and confined in the Sex Offender Treatment and Evaluation Program at NDSH during the pendency of this litigation, with subclasses consisting of . . . Class members whose religious exercise has been substantially burdened while civilly committed (Religious Land Use and Institutionalized Persons Act, or "RLUIPA" Class);

Jackson v. District of Columbia, No. 99-03276, ECF No. 20 (D.D.C.) 9

Certifies (b)(2) class defined as:

> [P]risoners who were committed to the custody of the DC Department of Corrections or Federal Bureau of Prisons after sentencing in DC Superior Court or the United States District Court for the District of Columbia, who are presently housed in correctional facilities administered by the Virginia Department of Corrections ("Virginia Corrections"), and who claim that their sincerely held religious beliefs render Virginia Corrections' grooming policy a substantial burden on the free exercise of their religion.

Maston v. Willis, No. 1:09-cv-00815-JMS-DML (S.D. Ind.)..... 10

Certifies (b)(2) class defined as:

> All prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

Catholic Benefits Ass'n v. Azar, No. 5:14-cv-00240 (W.D. Okla.)..... 11

Reaching Souls Int'l v. Azar, No. 5:13-cv-01092 (W.D. Okla.) 12

Little Sisters of the Poor Home for the Aged v. Azar,
No. 1:13-cv-02611 (D. Colo.)..... 13

Tab 1

Ackerman v. Washington

United States District Court for the Eastern District of Michigan, Southern Division

August 21, 2018, Decided; August 21, 2018, Filed

Civil Case No. 13-14137

Reporter
2018 U.S. Dist. LEXIS 141456 *; 2018 WL 3980876

GERALD ACKERMAN and MARK SHAYKIN, Plaintiffs, v. HEIDI WASHINGTON,[1] Defendant.

Prior History: *Arnold v. Heyns, 2014 U.S. Dist. LEXIS 86514 (E.D. Mich., Mar. 4, 2014)*

Core Terms

meals, class certification, kosher, requirements, putative class, parties, class member, commonality, designated, religious

Counsel: **[*1]** For Gerald Ackerman, Mark Shaykin, Plaintiffs: Daniel E. Manville, LEAD ATTORNEY, Civil Rights Clinic, East Lansing, MI; Michael J. Steinberg, LEAD ATTORNEY, American Civil Liberties Union Fund of Michigan, Detroit, MI.

For Heidi Washington, Defendant: Allan J. Soros, Michigan Department of Attorney General, Corrections Division, Lansing, MI; John L. Thurber, MI Dept of Atty Gen, Corrections Division, Lansing, MI.

Judges: Honorable Linda V. Parker, UNITED STATES DISTRICT JUDGE.

Opinion by: Linda V. Parker

Opinion

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF No. 113)

Michael Arnold ("Arnold") filed this action against Michigan Department of Corrections ("MDOC") Director Heidi Washington ("Defendant"), claiming that Jewish inmates requiring a kosher diet are receiving food not prepared or served in a kosher manner. Arnold alleged that this conduct violates the putative class members' *First Amendment* rights and their rights under the *Religious Land Use and Institutionalized Persons Act ("RLUIPA")*, *42 U.S.C. § 2000cc-1*. Arnold sought declaratory and injunctive relief. After Arnold was paroled, the parties stipulated to the substitution of Gerald Ackerman and Mark Shaykin as Plaintiffs and putative class representatives. (ECF **[*2]** No. 155.)

Presently before the Court is Plaintiffs' motion for class certification, filed October 9, 2017.[2] (ECF No. 113.) In the motion, Plaintiffs proposes the following class definition:

> Jewish prisoners who are designated to receive religious meals and have been served Vegan meals prepared in a non-Kosher manner, including, but not limited to, where the utensils used in the preparation of the Vegan meals are not certified as being Kosher; where all the area where the Vegan meals are prepared is not Kosher; and where all the equipment used to clean the utensils is not Kosher are included within this class.

Per the parties' stipulation, Defendant filed a response to the motion on December 1, 2017. (ECF No. 118.) Plaintiffs filed a reply brief on December 14, 2017. (ECF No. 123.) For the reasons set forth below, the Court is granting the motion.

[1] Arnold initially named several additional MDOC officials as defendants in his complaint. However, in his amended complaint, filed June 29, 2017, Arnold identified only Washington as a defendant. (See ECF Nos. 90-1, 106.) The Court therefore is now dismissing the remaining officials as defendants.

[2] The motion initially was filed by Arnold. As Ackerman and Shaykin have been substituted for Arnold, the Court will hereafter refer to the motion as if filed by them.

Applicable Law and Analysis

A party seeking class certification must meet the requirements of *Federal Rule of Civil Procedure 23(a)* and *23(b)(1)*, *(2)*, *or (3)*. The movant bears the burden of "establish[ing] his right" to class certification. *Beattie v. Centurytel., Inc., 511 F.3d 554, 560 (6th Cir. 2007)*. A proposed class must meet four prerequisites before being certified as a class, namely: (1) it must be "so numerous that joinder of all members is impractical;" **[*3]** (2) there must be "questions of law or fact common to the class;" (3) "the claims ... of the representative parties" must be "typical of the claims ... of the class;" and (4) "the representative parties" must be capable of "fairly and adequately protect[ing] the interests of the class." *Fed. R. Civ. P. 23(a)*. In their stipulation regarding the substitution of Ackerman and Shaykin as Plaintiffs, the parties agree that their claims are typical of the claims of the class and that they will fairly and adequately protect the interests of the class. (*See* ECF No. 155 at Pg ID 1828). As such, only the first and second factors for class certification are in dispute.

Numerosity

As to the first requirement, there is no "strict numerical test" that must be met for class certification. *Senter v. Gen. Motors Corp., 532 F.2d 511, 523 n.24 (6th Cir. 1976)*. The requirement can be satisfied with a class size as low as 35 people. *See Afro Am. Patrolmen's League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974)* (finding class sufficiently numerous at 35); *Ham v. Swift Transp. Co., 275 F.R.D. 475, 483 (W.D. Tenn. 2011)* ("Where the number of class members exceeds forty, *Rule 23(a)(1)* is generally deemed satisfied."). Rather, numerosity "requires examination of the specific facts of each case . . .." *Gen. Tel. Co. of the N.W., Inc. v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*. In addition to the number of proposed members, then, courts commonly consider such factors as the ability of the members to bring individual lawsuits **[*4]** and whether class certification would promote judicial economy. *See Gaspar v. Linvatec Corp., 167 F.R.D. 51, 56 (N.D. Ill. 1996)*.

Relying on Defendant's response to their discovery requests, Plaintiffs indicate that there are 193 MDOC inmates who are similarly situated to them—that is, they are Jewish individuals incarcerated in an MDOC facility and are designated to receive a kosher diet. (Pl.'s Reply Br. at 2-3, ECF No. 123 at Pg ID 1407-08.) Plaintiffs contend that their joinder is impractical. This Court agrees, particularly because these individuals are prisoners housed at various MDOC facilities throughout the State of Michigan. The ability of these inmates to bring individual lawsuits is unlikely, particularly in light of the filing fee, which is not waived for indigent prisoners (although it can be paid incrementally). *See 28 U.S.C. § 1915*. Moreover, these individuals are unlikely able to afford counsel to represent them and finding pro bono counsel is difficult. Judicial economy therefore is promoted by joining their claims in one action.

Defendant nevertheless argues that Plaintiffs lack proof that any of the putative class members are dissatisfied with the content of the vegan religious meals or how the meals are prepared. (Def.'s Resp. Br. at 4, **[*5]** ECF No. 118 at Pg ID 1376.) The Court is unsure how Defendant expects Plaintiffs to know this information at this stage of the litigation. Putative class members may not even be aware that their right to receive meals in accordance with their religious beliefs is allegedly being violated by Defendant. Defendant asserts that "[Ackerman's and Shaykin's] desire for a kosher meal and for more stringent controls on food preparation" may not be representative of the putative class as a whole. (*Id.* at 5, Pg ID 1377.) This Court must assume at this juncture, however, that if Jewish prisoners requested and were approved to receive Kosher meals that they, like Plaintiffs, want their meals to comply with the laws of Kashrut. Moreover, this Court is unaware of any precedent requiring as a prerequisite to class certification that the named plaintiffs establish putative class members' desire to join the class.

As such, the Court finds that Plaintiffs meet the numerosity requirement.

Commonality

The commonality requirement of *Rule 23(a)(2)* "simply requires a common question of law or fact." *Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884 (6th Cir. 1997)*. As the Sixth Circuit subsequently explained:

"'The interests and claims of the various plaintiffs need not be identical. Rather, **[*6]** the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 424 (6th Cir. 1998)* (quoting *Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993)*).

The relevant question for all members of the proposed class is the same: Does MDOC provide meals that in fact are kosher to Jewish prisoners designated to receive kosher meals?[3] Plaintiffs allege that MDOC uses non-kosher items in preparing kosher meals and uses non-kosher equipment, utensils, and areas to prepare and serve the meals. Plaintiffs' RLUIPA and *First Amendment* claims are typical of the claims they seek to assert on behalf of the putative class. Therefore, *Rule 23(a)*'s second and third elements are satisfied.

For these reasons, the Court concludes that *Rule 23(a)*'s four requirements for class certification are satisfied.

Rule 23(b)'s Requirements

In addition to satisfying the requirements of *Rule 23(a)*, a party seeking class certification must meet at least one of the requirements of *Rule 23(b)*. Plaintiffs seek certification under *Rule 23(b)(2)*. Pursuant to this provision,

> [a] class action may be maintained if *Rule 23(a)* is satisfied and if: ... (2) 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 **[*7]** relief is appropriate respecting the class as a whole ....

Fed. R. Civ. P. 23(b)(2).

Plaintiffs allege that Defendant fails to provide kosher-certified meals to Jewish prisoners throughout MDOC's facilities, resulting in the systemic violation of their religious rights pursuant to RLUIPA and the *First Amendment*. They seek injunctive relief against any such future violations. This is a "prime example" of a case properly certified as a class under *Rule 23(b)(2)*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2557-58, 180 L. Ed. 2d 374 (2011)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*) ("'Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples[]' of what *(b)(2)* is meant to capture."). The Court concludes that the proposed class meets the standard imposed by *Rule 23(b)(2)*.

Conclusion

For the reasons set forth above, the Court holds that Plaintiffs satisfy all of the prerequisites for class certification under *Rule 23(a)* and *(b)(2)*. Accordingly, the Court **GRANTS** Plaintiffs' motion for class certification (ECF No. 113) and **CERTIFIES** the following class with respect to the claims in Plaintiffs' First Amended Complaint:

> All Jewish individuals confined with the Michigan Department of Corrections who are designated by the prison system to receive kosher meals.

The Court **DESIGNATES** Ackerman and Shaykin as the representative plaintiffs for that **[*8]** certified class and, pursuant to *Federal Rule of Civil Procedure 23(g)*, Daniel E. Manville and Michael Steinberg as lead class counsel.

IT IS SO ORDERED.

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: August 21, 2018

[3] To challenge Plaintiffs' satisfaction of the commonality requirement, Defendant again relies on her argument that Plaintiffs fail to show that any putative class members object to the meals they are receiving. For the same reasons set forth above, the Court finds that this argument does not undermine the commonality of Plaintiffs' claims and those of the putative class.

End of Document

Tab 2

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Attorneys for Defendants
Catherine Cortez Masto, Gregory Cox, Ross Miller, Nevada Department Of Corrections, and Brian Sandoval

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HOWARD ACKERMAN,

Plaintiff,

vs.

DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

Case No. 2:11-cv-00883-GMN-PAL

STIPULATION AND ORDER CERTIFYING CLASS ACTION, TO STAY THE PROCEEDINGS, AND TO DIRECT CLASS NOTIFICATION PROCEDURES PURSUANT TO FED. R. CIV. P. 23(c)(2)(A)

Plaintiff, Howard Ackerman, by and through his counsel Jacob L. Hafter, Esq. and Michael Naethe, Esq., of the Law office of Jacob Hafter & Associates and Defendants, by and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada, William J. Geddes, Senior Deputy Attorney General and Micheline N. Fairbank, Deputy Attorney General, hereby jointly request the certification of the class in this matter as defined below, order a one-hundred and eighty (180) day stay of the proceedings and direct notice to the class as set forth below.

/ / /

/ / /

/ / /

WHEREAS, Plaintiff filed this class action complaint in this matter on June 1, 2012; [#1][1]

WHEREAS, on January 3, 2012, Plaintiff filed his First Amended Complaint – Class Action; [#29]

WHEREAS, Plaintiff defined the Class as:

> [A]ll prisoners confined within the Nevada Department of Correction, including without limitation, the Northern Nevada Correctional Center, who have identified, or who will identify, themselves to the Nevada Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet or would request it if such a diet was available;

WHEREAS, the parties have met and conferred; and for the express and limited purposes of settlement in this matter, the parties agree to certify the Class pursuant to Fed. R. Civ. P. 23(b)(2) as follows:

> All prisoners confined with Nevada Department of Corrections facilities:
>
> (i) Who have been identified to the Department of Corrections through various procedures by Plaintiff (i.e., consultation with independent clergy, declaration of faith responses, observed historical observances) as a practicing Orthodox Jew and are currently receiving the current kosher diet;
>
> (ii) Those individuals who have submitted an affidavit of inclusion in the Class to Counsel for Plaintiff, Law Office of Jacob Hafter & Associates, on or before March 20, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs; and
>
> (iii) Those individuals who are currently receiving a kosher diet pursuant to the United States District Court Order dated February 17, 2012 [#72], whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs, provided such individuals follow an opt-in procedure set by this Court, as more fully described herein;

WHEREAS, in reaching a compromise to certify this matter as a class action, Defendants expressly reserved their right to dispute the inclusion of any individual whose religious beliefs do not command the consumption of a kosher diet and for whom the denial of a kosher meal would not constitute a substantial burden on the exercise of their sincerely-held religious beliefs and to

[1] This number referrers to the docket number of the document.

challenge the sincerity of the expressed religious beliefs any individual requesting inclusion in the Class;

WHEREAS, it is agreed that Plaintiff shall not be obligated to oppose any effort by Defendants to dispute the inclusion of certain individuals in the Class and any absence of an opposition shall not be construed as an admission or consent to the exclusion of the individual under Local Rule 7-2(d);

WHEREAS, the parties have agreed that in challenging the sincerity of a proposed class members religious beliefs and/or an individual whose religious beliefs do not command the consumption of a kosher diet and for whom the denial of a kosher meal would not constitute a substantial burden on the exercise of those sincerely-held religious beliefs, Defendants are permitted to require the compliance with Nevada Department of Corrections Administrative Regulation (AR) 814, or otherwise provide proof, which is satisfactory to this Court, that their religious beliefs do command the consumption of a kosher diet and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of those sincerely-held religious beliefs;

WHEREAS, a listing of individuals who have been recognized and declared as practicing Orthodox Jewish individuals for purposes of subpart (i) of the certified class are attached hereto as Exhibit A;

WHERAS, a listing of individuals whom are recognized as being included in the certified class pursuant to subpart (ii), but were not already included in Exhibit A, are attached hereto as Exhibit B;

WHEREAS, the parties have agreed that counsel for Plaintiff, the Law Offices of Jacob Hafter & Associates, is to be appointed as Class Counsel;

WHEREAS, in reaching the agreement regarding the stipulated Class in this matter, the parties have agreed that for purposes of giving notice, notice must comply with the requirements of Fed. R. Civ. P. 23(c)(2)(A), and that the court may direct that the parties provide appropriate notice to the Class in a manner it deems appropriate, should such proposed notice not be deemed sufficient;

WHEREAS, the parties agree that appropriate notice to the Class will involve written notification to each individual who is currently receiving the current kosher meal plan pursuant to the injunctive relief ordered on February 18, 2012 [#72] and such individual who are not included on Exhibits A or B hereof will have 14 days from the date of distribution of the notice to petition this Court for inclusion in the Class, as certified;

WHEREAS, the parties agree that Defendants shall have the opportunity to challenge the Inclusion of any individual's sincerity of belief and/or claim their religious beliefs command the consumption of a kosher diet and that the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs, and to mandate the compliance with AR 814 for inclusion in the Class, or otherwise provide proof, which is satisfactory to this Court, that their religious beliefs do command the consumption of a kosher diet and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of those sincerely-held religious beliefs;

WHEREAS, the parties agree that upon the expiration of time for individuals to affirmatively petition the court for inclusion in the class, the injunctions dated February 10, 2012 [#64] and February 17, 2012 [#72] shall terminate with respect to anyone who is not included within Exhibits A and B hereof and anyone who has not filed a petition with this Court and Defendants shall only be required to provide the current kosher menu to those individuals who are part of the certified Class, or have otherwise petitioned this Court for inclusion in the Class;

WHEREAS, the parties have agreed that rabbinic kosher ***certification*** by an appropriate and mutually acceptable organization of rabbis[2] of the meals and/or food prepared for consumption by the class members will extinguish the claims that have been asserted in this matter.

WHEREAS, once Defendants obtain rabbinic kosher certification by an appropriate and mutually acceptable organization of rabbis of its facilities and/or meal plan, and demonstrate an ability to maintain such certification, or an equally acceptable certification, Plaintiff agrees to dismiss the claims and allegations of his complaint with prejudice;

[2] Currently, the Scroll K organization has been mutually agreed upon as one of such organizations.

WHEREAS, the parties agree that all proceedings in this matter shall be stayed for a period of one-hundred and eighty (180) days from the date of this Order to permit Defendants sufficient time to accomplish the agreed upon kosher certification of its facilities and/or meal plan;

WHEREAS, the parties request a status conference to be scheduled within ninety (90) days of this order to permit the parties to confer regarding the status of the matters contained within this stipulation;

THEREFORE, the Court Orders as follows:

2. For purposes of this matter, including the giving of Notice, the Class consists of:

All prisoners confined with Nevada Department of Corrections facilities:

(i) Who have been identified to the Department of Corrections through various procedures by Plaintiff (i.e., consultation with independent clergy, declaration of faith responses, observed historical observances) as a practicing Orthodox Jew and are currently receiving the current kosher diet;

(ii) Those individuals who have submitted an affidavit of inclusion in the Class to Counsel for Plaintiff, Law Office of Jacob Hafter & Associates, on or before March 20, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs; and

(iii) Those individuals who are currently receiving a kosher diet pursuant to the United States District Court Order dated February 17, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs, provided such individuals follow an opt-in procedure set by this Court, as more fully described herein;

3. The procedures for giving notice to the Class ordered herein comply with the requirements of due process and Fed. R. Civ. P. 23(c)(2)(A).

4. The Defendants will cause to be served within (10) days of this Court's order to each individual Class member, who is not specifically identified in Exhibits A and B but currently receiving the kosher meal plan pursuant to the February 17, 2012 injunction order [#74], the Notice attached hereto as Exhibit C.

5. Defendants will be permitted to object to the inclusion of any individual class

member whose religious beliefs do not command the consumption of a kosher diet, that a kosher diet is not sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would not constitute a substantial burden on the exercise of their sincerely-held religious beliefs

6. The Notice shall provide that the deadline for any request for inclusion in the class will expire 14 days after the date Notice is distributed to the Class.

7. The Notice shall provide that questions regarding the class action may be directed in writing to counsel for Plaintiff and Defendant through the Warden at each Nevada Department of Corrections facility.

8. That upon the expiration of the time for a class member to opt into the Class in this matter, the injunctions dated February 10, 2012 [#64] and February 17, 2012 [#72] shall terminate and Defendants shall only be obligated to provide the current kosher meal diet to those individuals expressly included within the Class, and those who have petitioned this Court to be included within the Class and the Court orders to be so included until a final determination has been made on their petition.

9. That this matter will be stayed for a period of one-hundred and eighty (180) days from the date of this order.

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10. That a status conference will be scheduled in this matter within ninety (90) days of the date of this order.

IT IS SO STIPULATED.

Dated this 23rd day of March, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By _____
WILLIAM J. GEDDES
Deputy Attorney General
MICHELINE N. FAIRBANK
Deputy Attorney General
Bureau of Litigation

Attorneys for Defendants

Dated this 23rd day of March, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By _____
JACOB L. HAFTER, Esq.
MICHAEL NAETHE Esq.
LAW OFFICE OF JACOB HAFTER & ASSOCIATES
7201 W. Lake Mead Boulevard, Suite 210
Las Vegas, Nevada 89128

* * *

ORDER

IT IS SO ORDERED this 2nd day of May, 2012.

_____
Gloria M. Navarro
United States District Judge

EXHIBIT A

EXHIBIT A

Exhibit A

List of Individuals Identified To Plaintiff As Practicing Orthodox Jewish Persons Who Currently Receive The Current Kosher Diet

First Name	Last Name	ID #
Scott	Sloane	21626
Kenneth	Friedman	80952
Michael	Levine	89472
Cody	Leavitt	1030147
Michael	Rabinowitz	69407
Howard	Ackerman	87392
Duffy	Jacobson	53067
Steven	Braunstein	64697
Mark	Rupp	45477
Randolph	Barnum	48388
Ronald	Santos	46019
Vitaly	Zakouto	77564
Florentino	Tapia	69608
Robert	Blue	1034439
Michael	Butwinick	1030046
Jason	Walkup	95603
Ahud	Chaziza	1035380
Matthew	Platshorn	1056476
George	Rosenthal	1028468
Mark	Guth	73475

EXHIBIT B

EXHIBIT B

Exhibit B

List of Individuals Who Have Provided An Affidavit For Inclusion In Class-Action Who Currently Receive The Current Kosher Diet

First Name	Last Name	ID #
Donald	D'Amico	19095
Steven	Broomfield	1015630
Sabin	Barendt	71415
Samaja	Funderburk	95983
George	Rosenthal†	1028468
Ronald	Santos†	46019
Michael	Butwinick†	1030046
Cody	Leavitt†	1030147
Randolph	Barnum†	48388
Thomas	Soria	66082
Steven	Braunstein†	64697
Robert	Blue†	1034439
Michael	Levine†	89472
Vitaly	Zakouto†	77564
Duffy	Jacobson†	53067
Kenneth	Friedman†	80952
Michael	Robinowitz†	69407

† These individuals are duplicates of persons identified in Exhibit A, the list of individuals identified to Plaintiff as practicing Orthodox Jewish persons who currently receive the current kosher diet.

EXHIBIT C

EXHIBIT C

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HOWARD ACKERMAN,

Plaintiff,

vs.

DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

Case No. 2:11-cv-00883-GMN-PAL

NOTICE OF PENDENCY OF CLASS ACTION

TO: ALL PRISONERS CONFINED WITH NEVADA DEPARTMENT OF CORRECTIONS FACILITIES WHO ARE CURRENTLY RECEIVING A KOSHER DIET PURSUANT TO THE UNITED STATES DISTRICT COURT ORDER DATED FEBRUARY 17, 2012, WHOSE RELIGIOUS BELIEFS COMMAND THE CONSUMPTION OF A KOSHER DIET, A KOSHER DIET IS SINCERELY ROOTED IN THEIR SYSTEM OF RELIGIOUS BELIEFS, AND TO BE DENIED A KOSHER DIET WOULD SUBSTANTIALLY BURDENED THE FREE EXERCISE OF THOSE RELIGIOUS BELIEFS.

This Notice is given pursuant to Federal Rule of Civil Procedure 23(c)(2)(A) and an order of the United States District Court for the District of Nevada. This Notice is not an expression of any opinion by the Court as to the merits of any of the claims or defenses asserted by any party to this litigation. The purpose of this Notice is to inform you of the pendency of this lawsuit, how it might affect your rights and what steps you may take in relation to it.

Beginning June 1, 2012, a class action lawsuit was filed on behalf of Howard Ackerman an Orthodox Jewish inmate confined within the Nevada Department of Corrections. On March 20, 2012, the parties stipulated to a class to consist of:

All prisoners confined with Nevada Department of Corrections facilities:

(i) Who have been identified to the Department of Corrections through various procedures by Plaintiff (i.e., consultation with independent clergy, declaration of faith responses, observed historical observances) as a practicing Orthodox Jew and are currently receiving the current kosher diet;

(ii) Those individuals who have submitted an affidavit of inclusion in the

Class to Counsel for Plaintiff, Law Office of Jacob Hafter & Associates, on or before March 20, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs; and

(iii) Those individuals who are currently receiving a kosher diet pursuant to the United States District Court Order dated February 17, 2012, whose religious beliefs command the consumption of a kosher diet, a kosher diet is sincerely rooted in their system of religious beliefs, and for whom the denial of a kosher meal would constitute a substantial burden on the exercise of their sincerely-held religious beliefs, provided such individuals follow an opt-in procedure set by this Court, as more fully described herein;

This Notice is being sent to you because you are a member of subsection (iii) of the Class, as you have been identified as an individual receiving a kosher diet pursuant to the United States District Court Order dated February 17, 2012 and you may be a Class member in this litigation; however, receipt of the Notice should not be construed to indicate that a determination has been made that you are a member of the Class.

The Defendants in this matter have the ability to challenge the inclusion of any individual who is currently receiving a kosher diet and requests inclusion based upon a claim that your religious beliefs do not command that you consume of a kosher diet, a kosher diet is not sincerely rooted in your system of religious beliefs, and the denial of a kosher meal would not constitute a substantial burden on the exercise of your sincerely-held religious beliefs, and/or the sincerity of your asserted religious beliefs.

To remain a Class member, **you must send the attached Kosher Diet Class Action Petition, and cause to be delivered to counsel for the parties a copy of the form NO LATER THAN _____.**

Counsel for Plaintiff

Jacob L. Hafter, Esq.
Law Office of Jacob Hafter & Associates
7201 W. Lake Mead Blvd., Suite 210
Las Vegas, Nevada 89128
702-405-6700 telephone

Counsel for Defendants

William Geddes
Office of the Attorney General
100 N. Carson Street
Carson City, Nevada 89701

If you remain a Class member, you will be bound by any judgment in this Litigation, whether it is favorable or unfavorable. If you choose to remain a Class member, you may not pursue a lawsuit on your own with regard to any of the claims assessed or issues decided in this Litigation. If you wish, you may enter an appearance through your own counsel at your own expense.

If you wish to be excluded from the Class, you are not required to do anything. If you elect to do nothing and be excluded from the Class, you will be entitled to pursue any individual lawsuit, claim or remedy which you may have at your own expense. Failure to elect to be included as a member of the Class, however, will result in an immediate termination of your current kosher meal as of _____.

If you have questions relating to this litigation, you may address those questions in writing for delivery to the Warden of your NDOC facility, which will then be delivered to the attorneys for the Plaintiff, Jacob. L. Hafter, Esq. and Michael Naethe, Esq., of the Law Offices of Jacob Hafter & Associates, and Defendants, The Nevada Office of the Attorney General, in this matter. Your questions may be responded to by means of a written response or through a telephonic conference.

YOU ARE NOT PERMITTED TO TELEPHONE OR CONTACT THE CLERK OF THE COURT REGARDING THIS NOTICE.

Dated this ____ day of _____, 2012.

_____
BY ORDER OF THE COURT
UNITED STATES DISTRICT JUDGE

KOSHER DIET CLASS-ACTION PETITION

Ackerman vs. Department of Corrections, et al.
Case No.: 2:11-cv-00883-GMN-PAL

---

1. Name:_____

2. Inmate No.:_____

3. Address (Please include institution, housing unit and cell) _____
_____
_____

4. Religious/Spiritual Belief -Diet Requested: _____
_____

5. What is your religious/spiritual affiliation? _____
_____

6. Please describe the basic belief systems or tenets of your religion/spiritual belief?
_____
_____
_____
_____
_____
_____
_____

7. How long have you practiced this religion/spiritual belief? _____

8. How did you first come to practice this religion/spiritual belief? _____
_____
_____

9. How did you acquire your knowledge of the requirements, practices, customs, and observances of this religion/spiritual belief? _____
_____
_____

10. What materials do you read or study to deepen your knowledge of the tenets, scriptures, requirements, practices, customs, and observances of this religion/spiritual belief? _____
_____
_____
_____
_____

11. How often do you read or study materials to deepen your knowledge of the tenets, scriptures, requirements, practices, customs, and observances of this religion/spiritual belief? _____

_____

_____

12. Have you taken any religious classes?

☐ YES ☐ NO

Please describe: _____

_____

_____

_____

_____

A. How would you describe the level of your devotion to or interest in this particular religion/spiritual belief?

☐ Very Devout ☐ Devout ☐ Somewhat Devout ☐ Just Curious About it

Please describe: _____

_____

_____

_____

_____

13. Do you attend religious services?

☐ YES ☐ NO

A. If yes, how often do you attend religious services?

☐ Weekly ☐ Bi-Weekly ☐ Monthly ☐ Other:

B. If no, why not? _____

_____

_____

_____

_____

14. Please list all religions/spiritual beliefs you have pursued in the last ten years. _____

_____

_____

_____

_____

15. Please describe what religious/spiritual belief diet you require to practice your faith: _____

16. Do you like the religious/spiritual belief diet you are required to practice according to your faith/spiritual belief?

☐ YES ☐ NO

Please explain: _____

17. Why do you need a religious/spiritual belief diet accommodation to pursue your religion/spiritual belief? _____

18. Have you adhered to this particular religious/spiritual belief diet before?

☐ YES ☐ NO

A. If so, when did you first adhere to this particular religious/spiritual belief diet? _____

B. If so, have you ever abandoned this particular religious/spiritual belief diet?

☐ YES ☐ NO

Please explain: _____

19. What specific dietary rules must you follow, according to your religion/spiritual belief? _____

20. What particular foods or ingredients are you not supposed to eat, according to your religion/spiritual belief? _____

21. What special feasts, holidays, fasting, or other dietary events are observed or required by your religion/spiritual belief? (Please include calendar dates of such events). _____

22. Has the Nevada Department of Corrections or any other penal institution ever challenged the sincerity or the substantial burden of your religion/spiritual belief or any request by you for a religious/spiritual belief - dietary accommodation?

☐ YES ☐ NO

Please explain: _____

23. Have you previously requested religious/spiritual belief diet accommodation?

☐ YES ☐ NO

A. If so, explain (including when, where, type of diet, and for what religion): ____

_____

_____

_____

B. If not, why not?_____

_____

_____

_____

_____

_____

24. Do you eat food items that are not in keeping with your religion?

☐ YES ☐ NO

A. If yes, please explain:_____

_____

_____

_____

_____

B. If no, please explain:_____

_____

_____

_____

_____

_____

I hereby attest under penalty of perjury of the laws of the state of Nevada that:

(1) The information contained in this registration form is true, correct, and complete, to the best of my knowledge; and

(2) My request for inclusion in the Ackerman v. Department of Corrections, et al. class-action is sincere and sincerely needed to pursue my religion beliefs.

Inmate Signature: _____ Date: _____

Tab 3

Arnold v. Washington

United States District Court for the Eastern District of Michigan, Southern Division

November 16, 2017, Decided; November 16, 2017, Filed

Civil Case No. 13-14137

Reporter
2017 U.S. Dist. LEXIS 189607 *; 2017 WL 5507891

MICHAEL ARNOLD, Plaintiff, v. HEIDI WASHINGTON,[1] Defendant.

Prior History: *Arnold v. Heyns, 2014 U.S. Dist. LEXIS 86514 (E.D. Mich., Mar. 4, 2014)*

Core Terms

class certification, kosher, meals, requirements, class member, typicality, commonality, designated

Counsel: **[*1]** For Michael Arnold, Plaintiff: Daniel E. Manville, Civil Rights Clinic, East Lansing, MI; Michael J. Steinberg, American Civil Liberties Union Fund of Michigan, Detroit, MI.

For Michael Martin, Special Activities Coordinator MDOC, Brad Purves, Food Service Director MDOC, Defendants: John L. Thurber, MI Dept of Atty Gen, Corrections Division, Lansing, MI.

For Heidi Washington, Defendant: Allan J. Soros, Michigan Department of Attorney General, Corrections Division, Lansing, MI; John L. Thurber, MI Dept of Atty Gen, Corrections Division, Lansing, MI.

Judges: Honorable LINDA V. PARKER, UNITED STATES DISTRICT JUDGE.

Opinion by: LINDA V. PARKER

Opinion

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION (ECF No. 113)

Plaintiff Michael Arnold ("Arnold") brings this action against Michigan Department of Corrections ("MDOC") Director Heidi Washington, claiming that Jewish inmates requiring a kosher diet are receiving food not prepared or served in a kosher manner. Arnold alleges that this conduct violates the putative class members' *First Amendment* rights and their rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *42 U.S.C. § 2000cc-1*. Arnold seeks declaratory and injunctive relief.

Presently before the Court **[*2]** is his motion for class certification, filed October 9, 2017. (ECF No. 113.) In the motion, Arnold proposes the following class definition:

> Jewish prisoners who are designated to receive religious meals and have been served Vegan meals prepared in a non-Kosher manner, including, but not limited to, where the utensils used in the preparation of the Vegan meals are not certified as being Kosher; where all the area where the Vegan meals are prepared is not Kosher; and where all the equipment used to clean the utensils is not Kosher are included within this class.

The deadline for Defendants to respond to the motion was October 30, 2017. *See E.D. Mich. LR 7.1(e)*. No response has been filed. For the reasons set forth below, the Court is granting Arnold's motion.

Applicable Law and Analysis

[1] Arnold initially named several additional MDOC officials as defendants in his complaint. However, in his amended complaint, filed June 29, 2017, Arnold identifies only Washington as a defendant. (See ECF Nos. 90-1, 106.) The Court therefore is now dismissing the remaining officials as defendants.

A party seeking class certification must meet the requirements of *Federal Rule of Civil Procedure 23(a)* and *23(b)(1)*, *(2)*, *or (3)*. The movant bears the burden of "establish[ing] his right" to class certification. *Beattie v. Centurytel., Inc., 511 F.3d 554, 560 (6th Cir. 2007)*. A proposed class must meet four prerequisites before being certified as a class, namely: (1) it must be "so numerous that joinder of all members is impractical;" (2) there must be "questions of law or fact common to the class;" (3) "the claims ... of the representative **[*3]** parties" must be "typical of the claims ... of the class;" and (4) "the representative parties" must be capable of "fairly and adequately protect[ing] the interests of the class." *Fed. R. Civ. P. 23(a)*.

Numerosity

As to the first requirement, there is no "strict numerical test" that must be met for class certification. *Senter v. Gen. Motors Corp., 532 F.2d 511, 523 n.24 (6th Cir. 1976)*. The requirement can be satisfied with a class size as low as 35 people. *See Afro American Patrolmens League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974)* (finding class sufficiently numerous at 35); *Ham v. Swift Transp. Co., 275 F.R.D. 475, 483 (W.D. Tenn. 2011)* ("Where the number of class members exceeds forty, *Rule 23(a)(1)* is generally deemed satisfied."). Rather, numerosity "requires examination of the specific facts of each case . . .." *Gen. Tel. Co. of the N.W., Inc. v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*. In addition to the number of proposed members, then, courts commonly consider such factors as the ability of the members to bring individual lawsuits and whether class certification would promote judicial economy. *See Gaspar v. Linvatec Corp., 167 F.R.D. 51, 56 (N.D. Ill. 1996)*.

Arnold believes that there are at least 50 to 100 MDOC inmates who are similarly situated to him—that is, they are Jewish individuals incarcerated in an MDOC facility and are designated to receive a kosher diet. Arnold contends that their joinder is impractical. This Court agrees, particularly because these individuals are prisoners housed at various MDOC facilities throughout the State of Michigan. **[*4]** The ability of these inmates to bring individual lawsuits is unlikely, particularly in light of the filing fee, which is not waived for indigent prisoners (although it can be paid incrementally). *See 28 U.S.C. § 1915*. Moreover, these individuals are unlikely able to afford counsel to represent them and finding pro bono counsel is difficult. Judicial economy therefore is promoted by joining their claims in one action. As such, the Court finds that Arnold meets the numerosity requirement.

Commonality and Typicality

Rule 23(a)(2)'s commonality requirement "simply requires a common question of law or fact." *Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884 (6th Cir. 1997)*. As the Sixth Circuit subsequently explained: "'The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 424 (6th Cir. 1998)* (quoting *Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993)*).

Meanwhile, *Rule 23(a)(3)*'s typicality requirement demands that the representative be a member of the class and share at least a common element of fact or law with the class. *Senter, 532 F.2d at 525*. Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical.[2] *Bittinger, 123 F.3d at 884*. The Sixth Circuit **[*5]** has explained the typicality requirement as follows:

> "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the

[2] The Sixth Circuit has recognized that the commonality and typicality requirements "'tend to merge,'" and that "'[b]oth serve as guideposts for determining whether . . . 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.'" *Rutherford v. City of Cleveland, 137 F.3d 905, 909 (6th Cir. 1998)* (quoting *Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*).

> plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory."

In re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996) (quoting 1 Herbert B. Newberg & Alba Conte, Newberg On Class Actions, § 3-13, at 3-76). A representative's claim remains typical, then, even where the evidence relevant to his or her claim varies from other class members, some class members are subject to different defenses, and the members suffer varying levels of injury. *See Bittinger, 123 F.3d at 884-85*.

The common question for all members of the proposed class is the same: Does MDOC provide meals that in fact are kosher to Jewish prisoners designated to receive kosher meals? Arnold alleges that **[*6]** MDOC uses non-kosher items in preparing kosher meals and uses non-kosher equipment, utensils, and areas to prepare and serve the meals. Arnold's RLUIPA and *First Amendment* claims are typical of the claims he seeks to assert on behalf of the putative class. Therefore, *Rule 23(a)*'s second and third elements are satisfied.

Adequacy of Representation

To satisfy the fourth, and final, class-action prerequisite, the Court must find that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. This is a two-pronged inquiry: "1) [t]he representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute interests of the class through qualified counsel." *Senter, 532 F.2d at 525* (citation omitted). As discussed above, the Court finds that Arnold has common interests with the members of the proposed class. With respect to the second criteria, Defendant has not challenged the competency or desire of Arnold or his counsel to prosecute the interests of the class, nor does the Court believe that it would have any basis to do so.

In short, *Rule 23(a)*'s four requirements for class certification are satisfied.

***Rule 23(b)*'s Requirements**

In addition to satisfying **[*7]** *Rule 23(a)*'s requirements, a party seeking class certification must meet at least one of *Rule 23(b)*'s requirements. Arnold seeks certification under *Rule 23(b)(2)*. Pursuant to this provision,

> [a] class action may be maintained if *Rule 23(a)* is satisfied and if: ... (2) 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).

Arnold alleges that Defendant fails to provide kosher-certified meals to Jewish prisoners throughout MDOC's facilities, resulting in the systemic violation of their religious rights pursuant to RLUIPA and the *First Amendment*. He seeks injunctive relief against any such future violations. This is a "prime example" of a case properly certified as a class under *Rule 23(b)(2)*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2557-58, 180 L. Ed. 2d 374 (2011)* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*) ("'Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples[]' of what *(b)(2)* is meant to capture."). The Court concludes that the proposed class meets the standard imposed by *Rule 23(b)(2)*.

Conclusion

For the reasons set forth above, the Court holds that Arnold satisfies all of the prerequisites for class certification under *Rule 23(a)* and *(b)(2)*. Accordingly, the Court **GRANTS [*8]** Arnold's motion for class certification (ECF No. 113) and **CERTIFIES** the following class with respect to the claims in Arnold's First Amended Complaint:

> All Jewish individuals confined with the Michigan Department of Corrections who are designated by the prison system to receive kosher meals.

The Court **DESIGNATES** Arnold as the representative plaintiff for that certified class and, pursuant to *Federal Rule of Civil Procedure 23(g)*, Daniel E. Manville and

Michael Steinberg as lead class counsel.

IT IS SO ORDERED.

/s/ Linda V. Parker

LINDA V. PARKER

U.S. DISTRICT JUDGE

Dated: November 16, 2017

End of Document

Tab 4

Davis v. Abercrombie

United States District Court for the District of Hawaii

September 30, 2014, Decided; September 30, 2014, Filed

CIVIL NO. 11-00144 LEK-BMK

Reporter
2014 U.S. Dist. LEXIS 139028 *; 2014 WL 4956454

RICHARD KAPELA DAVIS, MICHAEL HUGHES, DAMIEN KAAHU, ROBERT A. HOLBRON, JAMES KANE, III, ELLINGTON KEAWE, KALAI POAHA, TYRONE KAWAELANILUA'OLE NA'OKI GALDONES, Plaintiffs, vs. NEIL ABERCROMBIE, in his official capacity as the Governor of the State of Hawaii; TED SAKAI, in his official capacity as the Director of the Hawaii Department of Public Safety; CORRECTIONS CORPORATIONS OF AMERICA, Defendants.

Prior History: *Davis v. Abercrombie, 2011 U.S. Dist. LEXIS 58011 (D. Haw., May 27, 2011)*

Core Terms

Subclass, Damages, prospective relief, inmates, protective custody, administrative segregation, Plaintiffs', Native, religion, certification, numerosity, practitioners, commonality, nominal damages, Declaration, class member, requirements, sacred, class certification, rights, religious, amulet, policies and procedures, set forth, typicality, parties, issues, court finds, spiritual, combined

Counsel: **[*1]** For Richard Kapela Davis, Michael Hughes, Damien Kaahu, Robert A. Holbron, James Kane, III, Ellington Keawe, Kalai K. Poaha, Plaintiffs: Leinaala L. Ley, LEAD ATTORNEY, Andrew B. Sprenger, Moses K.N. Haia, III, Sharla Ann Manley, Native Hawaiian Legal Corporation, Honolulu, HI; Shawn Westrick, Kawahito, Shraga & Westrick LLP, Los Angeles, CA.

For Tyrone K. N. Galdones, Plaintiff: Leinaala L. Ley, Sharla Ann Manley, LEAD ATTORNEYS, Moses K.N. Haia, III, Andrew B. Sprenger, Native Hawaiian Legal Corporation, Honolulu, HI.

For Corrections Corporation of America, Defendant: Daniel P. Struck, David Lewis, Rachel Love, LEAD ATTORNEYS, PRO HAC VICE, Struck Wieneke & Love, P.L.C., Chandler, AZ; April Luria, Roeca Luria Hiraoka LLP, Honolulu, HI; Jamie Guzman, Struck Wieneke and Love PLC, Chandler, AZ.

For Ted Sakai, in his official capacity as Directory of the Hawaii Department of Public Safety, Defendant: April Luria, LEAD ATTORNEY, Roeca Luria Hiraoka LLP, Honolulu, HI; Daniel P. Struck, LEAD ATTORNEY, PRO HAC VICE, David Lewis, Rachel Love, Struck Wieneke & Love, P.L.C., Chandler, AZ; Jamie Guzman, Struck Wieneke and Love PLC, Chandler, AZ.

For American Civil Liberties Union of Hawaii Foundation, **[*2]** Amicus: Daniel M. Gluck, LEAD ATTORNEY, American Civil Liberties Union Hawaii, Honolulu, HI.

Judges: Leslie E. Kobayashi, United States District Judge.

Opinion by: Leslie E. Kobayashi

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AMENDED SECOND MOTION FOR CLASS CERTIFICATION

On July 1, 2014, Plaintiffs Richard Kapela Davis, Tyrone K.N. Galdones, Robert A. Holbron, Michael Hughes, Damien Kaahu, James Kane, III, Ellington Keawe, and Kalai K. Poaha (collectively "Plaintiffs") filed their Amended Second Motion for Class

Certification ("Motion"). [Dkt. no. 560.[1]] Defendants Ted Sakai, in his official capacity as the Director of the Hawai'i Department of Public Safety ("Defendant Sakai" and "DPS"), and Corrections Corporation of America ("CCA," collectively "Defendants") filed their memorandum in opposition on July 29, 2014, and Plaintiffs filed their reply on August 7, 2014. [Dkt. nos. 589,[2] 614.] The Court finds this matter suitable for disposition without a hearing pursuant to *Rule LR7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawai'i* ("Local Rules"). The Court issued its preliminary ruling on the Motion on August 21, 2014. [Dkt. no. 630.] The instant Order is **[*3]** this Court's decision on the Motion, and this Order supersedes the August 21, 2014 preliminary ruling.

After careful consideration of the Motion, supporting and opposing memoranda, and the relevant legal authority, Plaintiffs' Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the reasons set forth below.

BACKGROUND

The relevant factual and **[*4]** procedural background in this case is set forth in this Court's June 13, 2014 Amended Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment; Granting in Part and Denying in Part Plaintiff Robert Holbron's Counter-motion for Summary Judgment on His Claims; and Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment Against Defendants as to Their Claims under the Religious Land Use and Institutionalized Persons Act ("6/13/14 Summary Judgment Order") and in this Court's July 31, 2014 Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment Re: Sovereign Immunity/Damages ("7/31/14 Summary Judgment Order"). [Dkt. nos. 544, 596.[3]] This Court incorporates the background sections of the 6/13/14 Summary Judgment Order and the 7/31/14 Summary Judgment Order in the instant Order.

In their Motion, Plaintiffs seek certification of two classes, one addressing prospective relief and one addressing damages.

I. Prospective Relief

Plaintiffs seek certification pursuant to *Fed. R. Civ. P. 23(b)(2)* of a class of persons pursuing prospective **[*5]** and declaratory relief against Defendants ("Prospective Relief Class"). Plaintiffs propose the following definition of the Prospective Relief Class:

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are and/or will be confined to Saguaro Correctional Center; (c) in general population; and (d) who declare that Native Hawaiian religion is their faith.

[Motion at 4.] The Prospective Relief Class would pursue the following claims from Plaintiffs' Second Amended Complaint for Damages and for Classwide Declaratory and Injunctive Relief ("Second Amended Complaint") [filed 8/22/12 (dkt. no. 145)]:

• Counts I (federal free exercise), VI (federal equal protection), XI (state free exercise), XVI (state equal protection), and XXII (Religious Land Use and Institutionalized Persons Act, *42 U.S.C. § 2000cc, et seq.* ("RLUIPA")) regarding daily, outdoor, group worship;

• Counts III (federal free exercise), XIII (state free exercise), and XXIV (RLUIPA) regarding lack of daily access to personal amulets and *'ohe hano ihu* (bamboo nose flute); and

---

[1] This Court granted Plaintiffs leave to incorporate by reference the supporting documents that they submitted with their Motion for Class Certification, filed on June 4, 2013 ("2013 Certification Motion"). [Dkt. nos. 310, 311, 312, 314 through 320.] On July 2, 2014, Plaintiffs filed a motion seeking leave to file publicly Exhibits 44 through 55 in support of the Motion, which this Court granted in part and denied in part on August 7, 2014. [Dkt. nos. 563, 613.] Plaintiffs filed the exhibits on August 14, 2014. [Dkt. no. 623, 628 (unredacted version of Exh. 44 filed under seal).]

[2] On July 29, 2014, Defendants filed a motion seeking leave to file publicly their memorandum of law, Table 1, and Exhibits 4 through 11. This Court granted the motion on August 7, 2014. [Dkt. nos. 588, 612.] Defendants filed the documents on August 8, 2014. [Dkt. no. 615.]

[3] The 6/13/14 Summary Judgment Order is available at *2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856*, and the 7/31/14 Summary Judgment Order is available at *2014 U.S. Dist. LEXIS 105006, 2014 WL 3809499*.

• Counts VIII (federal equal protection) and XVIII (state equal protection) regarding lack **[*6]** of daily access to personal amulets, *'ohe hano ihu*, coconut oil, and *malo, kihei*, and *pau* (native garments).

[Motion at 4-5.]

Plaintiffs also propose three *Rule 23(b)(2)* subclasses of persons seeking prospective relief against Defendants (collectively "Prospective Relief Subclasses").

A. Administrative Segregation

Plaintiffs propose the following definition of the "Administrative Segregation Prospective Relief Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are and/or will be confined to Saguaro Correctional Center; (c) in administrative segregation; and (d) who declare that Native Hawaiian religion is their faith.

[Id. at 5.] The Administrative Segregation Prospective Relief Subclass would pursue the following claims from the Second Amended Complaint:

• Counts II (federal free exercise), VII (federal equal protection), XII (state free exercise), XVII (state equal protection), and XXIII (RLUIPA) regarding the observance of Makahiki in administrative segregation;

• Counts III, VIII, XIII, XVIII, and XXIV regarding lack of daily access to sacred items in administrative segregation; and

• Counts V (federal free **[*7]** exercise), X (federal equal protection), XV (state free exercise), XX (state equal protection), and XXVI (RLUIPA) regarding access to a spiritual advisor in administrative segregation.[4]

[Id. at 5-6.]

B. SHIP

Plaintiffs propose the following definition of the "SHIP Prospective Relief Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are and/or will be confined to Saguaro Correctional Center; (c) in the Special Housing Incentive Program ("SHIP"); and (d) who declare that Native Hawaiian religion is their faith.

[Id. at 6.] The SHIP Prospective Relief Subclass would pursue the same claims as the Administrative Segregation Prospective Relief Subclass. [Id.]

C. Protective Custody

Plaintiffs propose the following definition of the "Protective Custody Prospective Relief Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; **[*8]** (b) who are and/or will be confined to Saguaro Correctional Center; (c) in protective custody; and (d) who declare that Native Hawaiian religion is their faith.

[Id. at 7.] The Protective Custody Prospective Relief Subclass would pursue the following claims from the Second Amended Complaint:

• Counts I, VI, XI, XVI, and XXII regarding daily, outdoor, group worship;

• Counts III, XIII, and XXIV regarding lack of daily access to personal amulets and *'ohe hano ihu* and lack of access to communal sacred items; and

• Counts VIII and XVIII regarding lack of access to personal amulets, *'ohe hano ihu*, coconut oil, and *malo, kihei*, and *pau* and lack of access to communal sacred items.

[Id. at 7-8.]

II. Damages

Plaintiffs seek certification pursuant to *Rule 23(b)(3)* of a class of persons pursuing damages against CCA ("Damages Class"). Plaintiffs propose the following

[4] Plaintiffs also include Count XXV in the list of claims regarding access to a spiritual advisor in restricted custody, but that appears to be an error because Count XXV relates to access to a sacred space.

definition of the Damages Class:

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are or were confined to Saguaro or Red Rock Correctional Center at any time within four years prior to the filing of this Complaint until the resolution of this lawsuit; (c) in general population; **[*9]** and (d) who declare that Native Hawaiian religion is their faith.

[Motion at 8.]

Plaintiffs also propose three *Rule 23(b)(3)* subclasses of persons seeking damages against CCA (collectively "Damages Subclasses").

A. Administrative Segregation

Plaintiffs propose the following definition of the "Administrative Segregation Damages Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are or were confined to Saguaro Correctional Center at any time within four years prior to the filing of this Complaint until the resolution of this lawsuit; (c) in administrative segregation; and (d) who declare that Native Hawaiian religion is their faith.

[Id.]

B. SHIP

Plaintiffs propose the following definition of the "SHIP Damages Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are or were confined to Saguaro Correctional Center at any time within four years prior to the filing of this Complaint until the resolution of this lawsuit; (c) in the SHIP; and (d) who declare that Native Hawaiian religion is their faith.

[Id. at 9.]

C. [*10] Protective Custody

Finally, Plaintiffs propose the following definition of the "Protective Custody Damages Subclass:"

> (a) all persons who were convicted of violating crimes under the laws of the state of Hawaii and were residents of the state of Hawaii; (b) who are or were confined to Red Rock at any time within four years prior to the filing of this Complaint until the resolution of this lawsuit; (c) in protective custody; and (d) who declare that Native Hawaiian religion is their faith.

[Id.]

STANDARD

"[T]he district court facing a class certification motion is required to conduct 'a rigorous analysis' to ensure that the Rule 23 requirements are satisfied." *Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011)* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740* L. Ed .2d 740 (1982)). "Parties seeking class certification bear the burden of demonstrating that they have met each of the four requirements of *Federal Rule of Civil Procedure 23(a)* and at least one of the requirements of *Rule 23(b)*." *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 979-80 (9th Cir. 2011)* (citations omitted). In the instant case, Plaintiffs seek certification pursuant to *Rule 23(b)(2)* and *(b)(3)*. *Rule 23* states, in pertinent part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law **[*11]** 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.
>
> (b) Types of Class Actions. A class action may be maintained if *Rule 23(a)* is satisfied and if:
>
> . . . .
>
> (2) 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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) **[*12]** the likely difficulties in managing a class action.

The *Rule 23(a)* requirement are known as: "(1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Parsons v. Ryan, 754 F.3d 657, 674 (9th Cir. 2014)* (footnote omitted).

Where the party also seeks certification of subclasses, each subclass "must **independently** meet Rule 23's prerequisites." *Baker v. Castle & Cooke Homes Hawaii, Inc., Civil No. 11-00616 SOM—RLP, 2014 U.S. Dist. LEXIS 58675, 2014 WL 1669158, at *16 (D. Hawai'i Apr. 28, 2014)* (emphasis in Baker) (citing *Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981)* (noting that a subclass "must independently meet all of rule 23's requirements for maintenance of a class action")).

This district court has recognized that:

> "*Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are **in fact** sufficiently numerous parties, common questions of law or fact, etc." *Wal—Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (emphasis in original). Analyzing whether Rule 23's prerequisites have been met will "frequently entail overlap with the merits of the plaintiff's underlying claim . . . [because] class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." **[*13]** *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)*.

*2014 U.S. Dist. LEXIS 58675, [WL] at *3-4* (alterations in Baker).

DISCUSSION

I. Prejudicial Delay

Defendants first argue that this Court must deny Plaintiffs' Motion because the ruling comes three and a half years after the filing of the original Complaint and only weeks before the September 30, 2014 scheduled trial date. Defendants argue that they have been prejudiced by the delay, and this Court should deny the Motion on that basis without even reaching the analysis of *Rule 23(a)* and *(b)*.

Rule 23(c)(1) states: "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Plaintiffs filed the original Complaint on February 7, 2011 in state court, and Defendants removed the action on March 8, 2011. [Dkt. no. 1.] On March 22, 2012, Plaintiffs filed a Motion to Compel Class Certification. Plaintiffs sought an order compelling Defendants to produce discovery that Plaintiffs argued was indispensable in identifying the putative class. [Dkt. no. 66.] On May 11, 2012, the magistrate judge issued an order granting the motion in part and, on May 25, 2012, Defendants moved to reconsider the order. [Dkt. nos. 85, 89.] The magistrate judge orally denied **[*14]** the motion for reconsideration on July 31, 2012.[5] [Minutes (dkt. no. 122).]

On August 8, 2012, the magistrate judge orally ordered

[5] The magistrate judge issued a written order denying the motion for reconsideration on September 20, 2012. [Dkt. no. 171.]

Plaintiffs to file their motion for class certification by October 31, 2012. [Minutes (dkt. no. 133).] On October 18, 2012, however, the magistrate judge vacated that deadline. [Minutes (dkt. no. 195).] By the November 15, 2012 status conference, Defendants had just sent their production of class discovery to Plaintiffs, and the magistrate judge ordered Defendants to produce, *inter alia*, a privilege log to Plaintiffs by December 6, 2012. [Minutes (dkt. no. 211).] The parties were still addressing issues related to the privilege log in February 2013. [Minutes, filed 2/7/13 (dkt. no. 228).]

As previously noted, Plaintiffs filed their 2013 Certification Motion on June 4, 2013. This Court ruled that, in the interests of judicial economy, the parties should not brief the 2013 Certification Motion until this Court ruled on Defendants' pending motion for summary judgment. [EO, filed 7/31/13 (dkt. no. 364).] This Court later deemed the 2013 Certification **[*15]** Motion withdrawn and gave Plaintiffs leave to re-file it after the hearing on Defendants' motion for summary judgment. [EO, filed 8/21/13 (dkt. no. 373).] On January 27, 2014, this Court held a hearing on, *inter alia*, Defendants' motion for summary judgment, and this Court issued its written order addressing that motion, and others, on March 31, 2014 ("3/31/14 Summary Judgment Order"). [Dkt. no. 497.[6]]

On April 8, 2014, Plaintiffs filed their Second Motion for Class Certification ("2014 Certification Motion"). [Dkt. no. 498.] This Court continued the hearing on the 2014 Certification Motion from June 30, 2014 to August 11, 2014. [Minutes, filed 4/21/14 (dkt. no. 508).] The instant Motion is the amended version of the 2014 Certification Motion to address the 6/13/14 Summary Judgment Order. [Motion at 2.] This Court later vacated the hearing and decided to **[*16]** consider the Motion as a non-hearing motion. [EO, filed 8/4/14 (dkt. no. 603).]

Under the circumstances of this case, the Court finds that Plaintiffs did not unduly delay seeking class certification. Further, a significant portion of Defendants' prejudice argument addresses Plaintiffs' request to certify the Damages Class and the Damages Subclasses. In light of this Court's rulings imposing significant limitations on the damages class and subclasses that this Court ultimately certifies, CCA will not suffer undue prejudice as a result of certification. Defendants also argue that class certification at this time would be prejudicial to them because "the parties have a firm trial set for September 30, 2014," and there will be insufficient time to notify absent class members. [Mem. in Opp. at 6.] Defendants are mistaken. In fact, on August 21, 2014, this Court vacated the September 30, 2014 trial date in light of a criminal case scheduled to begin on September 23, 2014 and expected to conclude at the end of the October. [Dkt. no. 631.] The trial in the instant case is currently scheduled to begin on March 17, 2015. [Second Amended Rule 16 Scheduling Order, filed 8/28/14 (dkt. no. 638), at ¶ 1.] **[*17]** In light of the continuance of the September 30, 2014 trial date, which was unrelated to class certification issues, Defendants have not identified any prejudice that warrants denial of class certification.

This Court therefore finds that this is the earliest practicable time that it could consider whether class certification was appropriate.

II. Class Certification as to Claims for Prospective Relief

This Court first turns to the *Rule 23(a)* analysis.

A. Numerosity

This Court has recognized that:

> The numerosity inquiry "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc. v. E.E.O.C., 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*. Courts, however, have found the numerosity requirement to be satisfied when a class includes at least 40 members. See *Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)* (noting that "numerosity is presumed at a level of 40 members") (citation omitted); *In re Nat'l W. Life Ins. Deferred Annuities Litig., 268 F.R.D. 652, 660 (S.D. Cal. 2010)* (noting that

[6] The 3/31/14 Summary Judgment Order, which is available at *2014 U.S. Dist. LEXIS 43966, 2014 WL 1321006*, is the original version of the 6/13/14 Summary Judgment Order. This Court amended the 3/31/14 Summary Judgment Order after granting in part and denying in part Defendants' motion for reconsideration of the 3/31/14 Summary Judgment Order. [Dkt. nos. 500 (motion), 529 (order).]

"[c]ourts have found joinder impracticable in cases involving as few as forty class members") (citations omitted); *E.E.O.C. v. Kovacevich "5" Farms, No. CV-F-06-165 OWW/TAG, 2007 U.S. Dist. LEXIS 32330, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007)* (noting that "[c]ourts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members"); *Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988)* (noting that "[a]s a general rule, classes of 20 are too small, classes of 20-40 may or may not be big enough **[*18]** depending on the circumstances of each case, and classes of 40 or more are numerous enough").

Davis v. Four Seasons Hotel Ltd., 277 F.R.D. 429, 435 (D. Hawai'i 2011) (alterations in Davis).

1. Prospective Relief Class

As this Court noted in the 6/13/14 Order, there are 179 inmates at Saguaro Correctional Center ("Saguaro") that have registered as practitioners of the Native Hawaiian religion. *2014 WL 2716856, at *23*. Defendants do not challenge the numerosity requirement as to the Prospective Relief Class's claims regarding daily, outdoor, group worship. Defendants, however, argue that the Prospective Relief Class does not meet the numerosity requirement as to their claims regarding access to sacred items. [Mem. in Opp. at 8.]

In support of the instant Motion, Plaintiffs have provided declarations by Plaintiffs Davis, Kane, Hughes, and Keawe, [2013 Certification Motion, Decl. of Sharla Manley ("Manley 2013 Decl."), Exhs. 30, 32-36,[7]] as well as Plaintiff Holbron and more than thirty putative members of the classes and/or subclasses [2013 Certification Motion (dkt. nos. 320, 320-1 to 320-40)]. Defendants argue that the Prospective Relief Class does not meet the numerosity requirement as to the claims regarding access to sacred items because: only five "challeng[e] or complain[] against the **[*19]** denial of a personal amulet[;]" none of the named Plaintiffs or the putative class members who submitted declarations "even mentions coconut oil[;]" and "only eight inmates stated a desire for in-cell daily access to bamboo nose flutes." [Mem. in Opp. at 9-10.]

Plaintiffs argue that their submissions do not represent "an exhaustive list of every incident involving the denial of access to an amulet or another sacred item. Rather, they are illustrative[.]" [Reply at 4.] Plaintiffs argue that the Prospective Relief Class are all "subject to the same discriminatory and unlawful set of policies and face a risk that their rights will be violated." [Id. at 3.] This Court agrees.

In the 6/13/14 Summary Judgment Order, this Court stated that:

> Saguaro has a list of the types of religious items that all inmates are permitted to keep in their cells ("the Retention **[*20]** List"). Pursuant to the Retention List, practitioners of the Native Hawaiian religion may keep the following items in their cells: "sea salt, a ti leaf lei, coconut oil, a lava lava and an amulet." [Thomas Decl. at ¶ 52.] In addition, they may keep "written religious materials to include books, genealogy, chants and prayers. General population Native Hawaiian practitioners may also check out a ukulele from the chapel." [Thomas Reply Decl. at ¶ 122.] Saguaro "is working to identify a vendor for the amulets and is also working to locate a vendor for coconut oil." [Thomas Decl. at ¶ 52.] . . .

*2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *29*.[8] All of Saguaro's inmates who are in the general population and who are practitioners of the Native Hawaiian religion are subject to the Retention List, and the policies, procedures, and practices associated therewith. Plaintiffs allege that Defendants' conduct with regard to the sacred items remaining at issue in this

[7] The Manley 2013 Declaration is docket number 310-3. Exhibits 30 and 33 are declarations by Plaintiff Davis. [Dkt. nos. 318-7, 318-10.] Exhibits 32 and 35 are declarations by Plaintiff Kane. [Dkt. nos. 318-9, 319-1.] Exhibit 34 is a declaration by Plaintiff Hughes, [dkt. no. 319,] and Exhibit 36 is a declaration by Plaintiff Keawe [dkt. no. 319-2].

[8] The document that the 6/13/14 Summary Judgment Order **[*21]** referred to as the "Thomas Decl." is the Declaration of Warden Thomas, submitted with the Concise Statement of Facts in Support of Defendants' Motion for Summary Judgment, filed July 31, 2013. [Dkt. no. 361-23.] The document referred to as the "Thomas Reply Decl." is the Declaration of Warden Thomas, submitted with the reply in support of Defendants' Motion for Summary Judgment, filed January 13, 2014. [Dkt. no. 483-10.]

case is unconstitutional and/or violates RLUIPA. Thus, all of Saguaro's inmates who are in the general population and who are practitioners of the Native Hawaiian religion are arguably at risk of the same violation of their rights.

This Court therefore FINDS that the Prospective Relief Class satisfies the numerosity requirement as to both the remaining claims regarding daily, outdoor, group worship and the remaining claims regarding access to sacred items.

2. Prospective Relief Subclasses

First this Court notes that, although the Motion requests certification of the Administrative Segregation Prospective Relief Subclass, the SHIP Prospective Relief Subclass, and the Protective Custody Prospective Relief Subclass, Plaintiffs' Memorandum in Support of the Motion blurs the distinction between these three subclasses. See, e.g., Mem. in Supp. of Motion at 5 ("segregation and protective custody subclasses should be certified"), 10 ("Common questions arise from the disparate treatment of Native Hawaiian **[*22]** religious practitioners in restrictive custody."). Insofar as Plaintiffs have expressly moved for certification of a subclass for each group, this Court will begin its analysis by examining each proposed subclass separately.

a. SHIP Prospective Relief Subclass

In the Motion, Plaintiffs assert that "[t]he proposed segregation subclass consists of more than 20 inmates." [Mem. in Supp. of Motion at 20 (citing Decl. of Robert A. Holbron, filed 12/20/13 (dkt. no. 436-4) ("Holbron Summary Judgment Decl."),[9] at ¶ 34).] Plaintiff Holbron was in administrative segregation from July 17, 2007, until he was assigned to SHIP around April 10, 2009. Holbron remained in SHIP until February 2012. [Holbron Summary Judgment Decl. at ¶ 9.] He states that, "in all the time that [he] was in segregation/SHIP at Saguaro, [he] can recall only one limited Makahiki Service being permitted for him in segregation. At this Makahiki service, more than 20 other Native Hawaiian inmates gathered in the unit's dayroom." [Id. at ¶ 34.]

Although the declaration is ambiguous, Plaintiff Holbron must have been referring to a Makahiki service for SHIP inmates because SHIP II inmates are permitted to socialize with other SHIP II inmates in a dayroom pod for one hour a day, five times a week. SHIP III inmates also have dayroom pod time for two hours a day, five day times a week (at separate times from the SHIP II inmates). Inmates in administrative segregation, however, are not allowed to gather with inmates from the general population, SHIP, or protective custody, and apparently administrative segregation inmates are not permitted dayroom time when they can gather with one another. Inmates in SHIP I have the same restrictions as the inmates in administrative segregation. [Letter dated 8/28/14 to this Court from Defendants' counsel transmitting the parties' joint descriptions of Saguaro's administrative segregation, SHIP, and protective custody program, filed 9/16/14 (dkt. no. 641).[10]] Further, the Reply clarifies that the twenty inmates that Plaintiffs **[*24]** refer to are inmates in SHIP. [Reply at 5.] Defendants do not contest Plaintiffs' assertion that there are "20 segregation inmates registered as Native Hawaiians." [Mem. in Opp. at 8.] This Court therefore finds, for purposes of the instant Motion, that there are twenty potential members of the SHIP Prospective Relief Subclass.

Defendants argue that a class of twenty is too small to satisfy the numerosity requirement, emphasizing that the United States Supreme Court has indicated that a class of fifteen would be too small. [Id. (citing *Gen. Tel. Co. of Nw. v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)*).] Plaintiffs argue that twenty SHIP inmates is sufficiently numerous to render joinder impractical, particularly because the group of potential class members is fluid. See, e.g., Reply at 5 (stating that, "at any given time, there are at least 20 Native Hawaiian

[9] The Holbron Declaration was part of his Opposition to Defendants' Motion for Summary Judgment and Counter-Motion for Summary Judgment on His Federal Claims. The version of the Holbron Declaration **[*23]** filed on December 20, 2013 was undated and unsigned. Plaintiffs filed the original version on December 27, 2013. [Dkt. no. 456-1.] It is signed and dated December 23, 2013.

[10] This Court will refer to the descriptions, each of which is one page, as the "Administrative Segregation Description," the "SHIP Description," and the "Protective Custody Description." The parties filed these descriptions pursuant to this Court's preliminary ruling on the Motion. [Filed 8/21/14 (dkt. no. 630).]

practitioners" in SHIP).

Other district courts have recognized that the fluidity of **[*25]** a class of inmates supports a finding that joinder is impracticable. See, e.g., *Decoteau v. Raemisch, Civil Action No. 13-cv-3399-WJM-KMT, 2014 U.S. Dist. LEXIS 94398, 2014 WL 3373670, at *2 (D. Colo. 2014)* (citing *U.S. ex rel. Green v. Peters, 153 F.R.D. 615, 618 (N.D. Ill. 1994)*; *Andre H. v. Ambach, 104 F.R.D. 606, 611 (S.D.N.Y. 1985)*; *Arthur v. Starrett City Assocs., 98 F.R.D. 500, 505-06 (E.D.N.Y. 1983)*). According to the SHIP Description:

> SHIP is a pro-social behavioral modification step-down program utilized to transition inmates from administrative segregation to general population. Privileges are introduced as inmates progress from the first to the last step: SHIP I, SHIP II, and SHIP III. Each step lasts six months but an inmate can be returned to a previous step for engaging in rules violations or non-pro-social behavior. . . .

In light of the fact that the intended duration of SHIP is eighteen months, this Court cannot find that the SHIP Prospective Relief Subclass is so fluid as to overcome the fact that there are only twenty potential members. This Court therefore FINDS that the SHIP Prospective Relief Subclass does not meet the numerosity requirement, *i.e.* the subclass is not so numerous that joinder is impracticable.[11]

b. Administrative [*26] Segregation Prospective Relief Subclass

Plaintiffs have not identified any evidence of the number of prospective members of the Administrative Segregation Prospective Relief Subclass. This Court therefore FINDS that Plaintiffs have failed to meet their burden of establishing that the Administrative Segregation Prospective Relief Subclass satisfies the numerosity requirement.

Plaintiffs may argue that a combined subclass of inmate practitioners of the Native Hawaiian religion in both administrative segregation and SHIP would meet the numerosity requirement. Insofar as Plaintiffs have not identified evidence of the number of potential members in the Administrative Segregation Prospective Relief Subclass, this Court cannot determine whether a combined subclass would meet the numerosity requirements. Further, for the reasons set forth *infra* Discussion Sections II.B.2.a., C.2.a., and D.2.a., this Court finds that it is not appropriate to combine the Administrative Segregation Prospective Relief Subclass and the SHIP Prospective Relief Subclass.

c. Protective Custody Prospective Relief Subclass

Plaintiffs assert that the proposed Protective Custody Prospective Relief Subclass consists of at **[*27]** least thirty-seven inmates. The Motion, however, did not cite any evidence for this representation. [Mem. in Supp. of Motion at 20.] In the Reply, Plaintiffs state, again without citing any supporting evidence,[12] that "there were 37-43 inmates who were practicing Native Hawaiian religion at any given time" in protective custody at Red Rock.[13] [Reply at 5.] Defendants, however, do not contest that there are thirty-seven potential members of the Protective Custody Prospective Relief Subclass. Instead, they argue that thirty-seven is not sufficient to meet the numerosity requirement. [Mem. in Opp. at 8.] This Court therefore finds, for purposes of the instant Motion, that there are

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[11] This Court notes that the deadline to add parties has passed. [Second Amended Rule 16 Scheduling Order, filed 8/28/14 (dkt. no. 638), at ¶ 5.] That, however, does not render joinder impracticable for purposes of *Rule 23(a)(1)*.

[12] Although not cited in the Memorandum in Support of the Motion, Ms. Manley's declaration states that she has reviewed the records that Defendants produced in response to a court order compelling class discovery [filed 5/11/12 (dkt. no. 85)]. She states that, according to these records, "there are at least 37 inmates who have participated in Native Hawaiian religious programming at Red Rock" Correctional Center ("Red Rock"). [Motion, **[*28]** Decl. of Sharla Manley ("Manley 2014 Decl.") at ¶¶ 10-11.] Plaintiffs, however, did not attach any of these records as exhibits, and Ms. Manley only identifies the records by bates-stamp numbers because they "have been designated attorneys' eyes only under that order." [Id.] This Court notes that Plaintiffs could have filed a motion for leave to file those exhibits under seal. This Court therefore declines to consider Ms. Manley's representations about the content of the class discovery.

[13] As this Court noted in the 6/13/14 Order, by May 30, 2013, all of the Hawai'i inmates who were assigned to Red Rock were permanently transferred to Saguaro. *2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *2 n.4* (citations omitted).

thirty-seven potential members of the Protective Custody Prospective Relief Subclass.

According to the Protective Custody Description, "[p]rotective custody ('PC') is a housing classification utilized to segregate inmates who require protection from other inmates at the same facility. . . . PC is a non-punitive type of segregation." Because there is no specified duration of time that a protective custody inmate may be in that program, this Court finds that the Protective Custody Prospective Relief Subclass is a fluid class for purposes of the numerosity analysis. This Court also emphasizes that the number of potential members of **[*29]** this subclass is very close to the number that is generally considered presumptively sufficient for the numerosity analysis. This Court therefore FINDS that the Protective Custody Prospective Relief Subclass satisfies the numerosity requirement.

B. Commonality

The United States Supreme Court has stated that, in order to meet the commonality requirement, the proposed class members' claims

> must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is 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.
>
> > "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, *84 N.Y.U. L. Rev. 97, 132 (2009)*).

> Plaintiffs need not show, however, that "every question in the case, or even a preponderance **[*30]** of questions, is capable of class wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of *Rule 23(a)(2)*." Wang [v. Chinese Daily News, Inc.], 737 F.3d [538,] 544 [(9th Cir. 2013)] (quoting *Wal-Mart, 131 S. Ct. at 2556*); see also *Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 589 (9th Cir. 2012)* (noting that "commonality only requires a single significant question of law or fact"). Thus, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1029 (9th Cir. 2012)* (quotation marks and citation omitted).

Parsons v. Ryan, 754 F.3d 657, 675 (9th Cir. 2014) (footnote omitted).

1. Prospective Relief Class

Defendants argue that the Prospective Relief Class does not meet the commonality requirement because "the existence of CCA policies or practices is not in serious dispute," and

> [t]he success or failure of Plaintiffs' RLUIPA and *First Amendment* claims necessarily turns on individual inquiries — whether a Native-Hawaiian practice is sincerely held by a given practitioner, the subject security classification implicated by the practice (whether it is an inmate's desire to retain an amulet despite his history of contraband, or a combative or peaceful inmate's desire to attend outdoor, group worship), and whether the CCA practices are based on compelling security interests without **[*31]** a less-restrictive alternative. . . .

[Mem. in Opp. at 15 (footnote omitted).] The Ninth Circuit, however, has rejected this type of argument.

In Parsons v. Ryan, the defendants - Arizona Department of Corrections ("ADC") officials - appealed the certification of a class and subclass of Arizona prison inmates who alleged that they were subjected to systemic *Eighth Amendment* violations. *754 F.3d 657, 662 (9th Cir. 2014)*. The defendants argued that the plaintiffs did not satisfy the commonality requirement because "a systemic constitutional violation [of the sort alleged here] is a collection of individual constitutional violations, each of which hinges on the particular facts

and circumstances of each case." *Id. at 675* (alteration in Parsons) (footnote, citation, and internal quotation marks omitted). The Ninth Circuit rejected this argument, noting that "[t]he Complaint does not allege that the care provided on any particular occasion to any particular inmate (or group of inmates) was insufficient, but rather that ADC policies and practices of statewide and systemic application expose all inmates in ADC custody to a substantial risk of serious harm." *Id. at 676* (citation omitted).

Similarly, in the instant case, the claims of the proposed Prospective Relief **[*32]** Class - as opposed to the proposed Damages Class - do not allege that a particular inmate's RLUIPA or constitutional rights were violated on a particular occasion. The Prospective Relief Class would litigate claims that Defendants' policies and practices at Saguaro expose all class members to ongoing and/or potential violations of their rights under RLUIPA and the state and federal constitutions.

It is undisputed that, pursuant to Defendants' policies and procedures, inmates in Saguaro's general population who practice the Native Hawaiian religion cannot have daily, outdoor, group worship. It is also undisputed that Saguaro has a Retention List identifying the religious items that inmates can possess. Further, although Saguaro theoretically allows inmates in the general population who practice the Native Hawaiian religion to have a personal amulet in their cells, Saguaro also requires that the amulet be provided by an approved vendor. Saguaro has been unable to identify a vendor for such items. There are questions of law and fact common to the proposed Prospective Relief Class, such as whether the policies are the least restrictive means available and whether Saguaro enforces comparable **[*33]** policies on inmate practitioners of other religions. There may be some factual differences among the potential class members, such as whether Saguaro can impose additional limitations on inmates who are in the general population but who have a history of violent infractions. These differences, however, do not defeat commonality because commonality does not require "complete congruence." See *Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010)* (citation and quotation marks omitted).

This Court therefore FINDS that the claims of the proposed Prospective Relief Class have enough common questions of law and fact to meet the commonality requirement.

2. Subclasses

a. Administrative Segregation and SHIP Prospective Relief Subclasses

Insofar as Plaintiffs have failed to establish the numerosity requirement for the proposed Administrative Segregation Prospective Relief Subclass or the proposed SHIP Prospective Relief Subclass, this Court does not need to address the issue of whether those individual subclasses satisfy the other *Rule 23(a)* requirements. As to the possible subclass of both administrative segregation practitioners and SHIP practitioners, the two programs share the common element that the inmates in each group are not allowed to have communal **[*34]** gatherings with inmates of any other group. SHIP I inmates have the same restrictions as inmates in administrative segregation. However, SHIP II inmates are allowed to "recreate as a group on the SHIP II . . . group recreation yard" in the "dayroom pod," although. SHIP III inmates also have group recreation time, although at different times from the SHIP II inmates. SHIP II inmates and SHIP III inmates are also allowed to participate in educational classes in their housing unit. Thus, a combined subclass of administrative segregation inmates and SHIP inmates would not have common questions of law or fact regarding the claims involving group gatherings.

In addition, although administrative segregation inmates and SHIP inmates who are registered as practitioners of the Native Hawaiian religion may possess the same religious items in their cells, SHIP II and SHIP III inmates have less security risks, and therefore more privileges, regarding the retention of personal items in their cells. Further, because of the SHIP II and SHIP III inmates' ability to engage in group activity, including attending education classes, they may argue in favor of access to communal sacred items. Because of **[*35]** those distinctions, a combined subclass of administrative segregation inmates and SHIP inmates would not have common questions of law or fact as to

claims regarding access to additional sacred items.[14]

According to the Administrative Segregation Description and the SHIP Description, Defendants represent that the policies and procedures for an individual inmate's access to the chaplain or other religious advisors are the same for both groups. As to both groups, however, Plaintiffs dispute what Saguaro actually allows. Thus, it appears that the same policies and practices regarding individual access to a chaplain or other spiritual advisor apply to the administrative segregation inmates and the SHIP inmates. Although there may be some factual issues regarding individual access to a spiritual advisor that differ **[*36]** from one inmate to another, a combined subclass of administrative segregation inmates and SHIP inmates would have common questions of law and fact.

This Court therefore FINDS that a combined subclass of administrative segregation inmates and SHIP inmates would meet the commonality requirement, but only as to the claims regarding individual access to a spiritual advisor.

b. Protective Custody Prospective Relief Subclass

Based on the Protective Custody Description, the members of the proposed Protective Custody Prospective Relief Subclass are all subject to the same policies and procedures affecting their practice of the Native Hawaiian religion. Although there may be some factual issues that differ from one inmate to another, the proposed Protective Custody Prospective Relief Subclass has common questions of law and fact. The common questions are similar to the common questions for the Prospective Relief Class, but a subclass is required because the prospective custody inmates are kept separated at all times from the general population inmates. This Court therefore FINDS that the proposed Protective Custody Prospective Relief Subclass meets the commonality requirement.

[14] This Court also notes that, because of the sharp distinction in the restrictions on SHIP I inmates in comparison to SHIP II inmates and SHIP III inmates, this Court would also find that the proposed SHIP Prospective Relief Subclass, by itself, would not meet the commonality requirement as to the claims involving group gatherings or as to the claims regarding access to sacred items.

C. Typicality

This **[*37]** Court has stated that:

> The typicality requirement 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." *Rodriguez v. Hayes, 591 F.3d 1105, 1124 (9th Cir. 2010)* (citation and quotation marks omitted). Under this standard, the class representatives' claims need only be "reasonably coextensive with those of absent class members;" they need not be "identical or substantially identical to those of the absent class members." *Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003)* (citations and quotation marks omitted).

Davis, 277 F.R.D. at 436-37. Further, the United States Supreme Court has noted 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. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest. *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. . . .

Wal-Mart, 131 S. Ct. at 2551 n.5 (some alterations in Wal-Mart **[*38]**).

1. Prospective Relief Class

In the commonality analysis, this Court noted that the members of the proposed Prospective Relief Class are subject to, *inter alia*, the same prohibition on daily, outdoor, group worship and the same requirement that personal amulets must be purchased from an approved vendor, and Saguaro has been unable to identify one.

The members of the proposed class make the same legal arguments about Defendants' liability based on these, and other related, policies and procedures. There are undoubtedly some differences, based on things like prior history of violence or other rule infractions, affecting the individual class members' abilities to participate in the requested worship sessions or to have the requested access to sacred items. Further, some of the class members may believe certain religious items to be more significant than others. Those factual differences, however, are minor in comparison to the similarities in the class members' legal arguments. The crux of the legal arguments relevant to each member of the proposed Prospective Relief Class is that Defendants' policies and procedures regarding group worship and access to sacred items for practitioners of **[*39]** the Native Hawaiian religion violate their rights under RLUIPA and the federal and state constitutions.

This Court therefore FINDS that Plaintiffs' claims are "reasonably coextensive with those of absent class members," see *Staton*, *327 F.3d at 957*, and that the proposed Prospective Relief Class satisfies the typicality requirement.

2. Subclasses

a. Administrative Segregation and SHIP Prospective Relief Subclasses

As previously noted, there are fewer security risks associated with, and therefore more privileges accorded to, SHIP II inmates and SHIP III inmates, as compared to SHIP I inmates and inmates in administrative segregation. Thus, the policies and procedures regarding group activity and access to additional sacred items that are applicable to SHIP II inmates and SHIP III inmates have significant differences from the policies and procedures on those subjects that are applicable to SHIP I inmates and inmates in administrative segregation. See *supra* Discussion Section II.B.2.a. Because of those distinctions, each member of a combined subclass of administrative segregation inmates and SHIP inmates would not make similar legal arguments as to Defendants' liability regarding claims involving either group activity **[*40]** or access to additional sacred items.[15]

As to individual inmate access to spiritual advisors, for the same reasons as set forth in the commonality analysis, see id., this Court finds that the members of a combined subclass of administrative segregation inmates and SHIP inmates would make similar legal arguments as to Defendants' liability.

This Court therefore FINDS that a combined subclass of administrative segregation inmates and SHIP inmates would meet the typicality requirement, but only as to the claims regarding individual access to a spiritual advisor.

b. Protective Custody Prospective Relief Subclass

Similarly, for the same reasons as set forth in the commonality analysis, see *supra* Discussion Section II.B.2.b., this Court finds that the members of the proposed Protective Custody Prospective **[*41]** Relief Subclass would make similar legal arguments as to Defendants' liability. This Court therefore FINDS that the proposed Protective Custody Prospective Relief Subclass meets the typicality requirement.

D. Adequacy

This Court has stated that:

> In determining whether the named plaintiffs will fairly and adequately protect the interests of the class, courts in the Ninth Circuit ask two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton, 327 F.3d at 957* (citing *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)*). This requirement is satisfied as long as one of the class representatives is an adequate class representative. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las*

[15] This Court also notes that the legal arguments that SHIP I inmates would raise would not be similar to the legal arguments that SHIP II inmates and SHIP III inmates would raise. Thus, this Court would find that the proposed SHIP Prospective Relief Subclass, by itself, would not meet the typicality requirement as to the claims involving group activity or the claims regarding access to sacred items.

Vegas Sands, Inc., 244 F.3d 1152, 1162 n.2 (9th Cir. 2001).

Davis, 277 F.R.D. at 437. "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985 (9th Cir. 2011)* (citations omitted).

This Court will first address the adequacy of the representation that Plaintiffs' counsel would provide, because that analysis is the same for all proposed classes and subclasses.

Plaintiffs' counsel, Sharla Manley, Esq., is a staff attorney **[*42]** with the Native Hawaiian Legal Corporation ("NHLC").[16] She states that NHLC is the only law firm in the country that specializes in cases involving Native Hawaiian rights. [Manley 2014 Decl. at ¶¶ 2, 6.] Ms. Manley also states that co-counsel for Plaintiffs, the law firm of Kawahito, Shraga and Westrick, "has developed an established class action practice." [Id. at ¶ 7.] Specifically, James Kawahito, Esq.,[17] and Shawn Westrick, Esq., "have litigated numerous class action lawsuits, in various stages on both the plaintiff and defense side." [Id.] Over the past five years, Plaintiffs' counsel have conducted extensive interviews at Saguaro and Red Rock, in addition to interviewing Plaintiffs, consulted with experts, and researched a myriad of factual and legal issues. Further, Plaintiffs' counsel has engaged in extensive discovery and dispositve motions practice for this case. Thus, Plaintiffs' counsel have, and will continue to, devote significant resources to this case. [Id. at ¶¶ 3-5, 9.]

Defendants do not challenge the competence of Plaintiffs' counsel, or their zeal for the case. Defendants, however, argue that the "motives and strategies" of Plaintiffs' counsel "present the specter of divergent interests with absent class members," and that counsel have placed their interests and the interests of Plaintiffs ahead of the interests of the other members of the proposed classes and subclasses. [Mem. in Opp. at 22-23.] Defendants argue that Plaintiffs' counsel unduly delayed bringing the instant Motion and in asserting that Plaintiffs were pursuing claims for damages, instead of only declaratory and injunctive relief. This Court, however, has already found that Plaintiffs did not unduly delay seeking class certification. *See supra* Discussion Section I. Further, the Second Amended Complaint clearly prays for an award of compensatory damages for "Plaintiffs and all other class members." [Second Amended Complaint at pg. 129, ¶ 15.]

Defendants also argue that the fact that Plaintiffs' counsel presented some claims **[*44]** and arguments that were unsuccessful proves that counsel's interests have diverged from the class members' interests. Defendants point to: the inclusion of the Governor as a defendant; the inclusion of a claim based on Native Hawaiian gathering rights; and the argument in favor of per-diem damages rates. Although this Court ultimately found that these claims and arguments were without merit,[18] this Court does not find that the mere fact that Plaintiffs' counsel raised these claims and arguments indicates that there are conflicts of interest between counsel and the class members.

Finally, Defendants argue that Plaintiffs' **[*45]** counsel will not adequately represent the proposed classes and subclasses because Plaintiffs' counsel have pursued political agendas in this case. This Court emphasizes that political or legislative questions are beyond the scope of this case. Further, this Court cannot find that Plaintiffs' counsel have engaged in anything improper regarding political or legislative issues that may be related to this case.

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[16] Plaintiffs' counsel, David Keith Kopper, Esq., and Moses Haia, III, Esq., are also with NHLC.

[17] This Court notes that, although Mr. Kawahito is a member of the bar in Hawai'i, and Plaintiffs have listed his **[*43]** name on some of their filings, he has never filed a notice of appearance in this case. He therefore is not listed on the district court's docket as counsel of record.

[18] In this Court's Order Granting Defendant Neil Abercrombie's Motion for Judgment on the Pleadings, this Court dismissed all of the claims against Governor Abercrombie in the Second Amended Complaint and the Supplemental Complaint with prejudice. This Court also dismissed with prejudice Plaintiffs' claim based on gathering rights. *Davis v. Abercrombie, Civil No. 11-00144 LEK-BMK, 2013 U.S. Dist. LEXIS 131525, 2013 WL 5204982, at *23 (D. Hawai'i Sept. 13, 2013)* ("9/13/13 Order"). In the 7/31/14 Summary Judgment Order, this Court ruled that the potentially available damages for Plaintiffs' remaining § 1983 claims and RLUIPA claims are limited to compensatory and nominal damages. *2014 U.S. Dist. LEXIS 105006, 2014 WL 3809499, at *18*.

There is no evidence that Plaintiffs' counsel have a conflict of interest with the members of any of the proposed classes or subclasses. This Court therefore FINDS that Plaintiffs' counsel would provide adequate representation to any class or subclass certified in this case. This Court now turns to the question of whether Plaintiffs are adequate representatives for the proposed Prospective Relief Class and Subclasses.

1. Prospective Relief Class

The proposed representatives of the Prospective Relief Class are Plaintiffs Davis, Galdones, Hughes, Kane, and Keawe. [Motion at 2.] In the 6/13/14 Summary Judgment Order, however, this Court noted that it previously dismissed Plaintiff Keawe's federal claims based on daily religious congregation for failure to exhaust his administrative remedies. **[*46]** *2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *10 n.15* (citing *Davis v. Abercrombie, Civil No. 11-00144 LEK-BMK, 2013 U.S. Dist. LEXIS 52479, 2013 WL 1568425, at *13 (D. Hawai'i Apr. 11, 2013)*).[19] Because Plaintiff Keawe cannot pursue the RLUIPA and § 1983 claims regarding daily group worship, this Court finds that his interests are distinct from the interests of Plaintiffs Davis, Galdones, Hughes, and Kane, and from the interests of the other members of the proposed Prospective Relief Class. This Court therefore finds that Plaintiff Keawe would not be an adequate representative of the Prospective Relief Class.

Defendants first argue that Plaintiffs Davis, Galdones, Hughes, and Kane would not be adequate representatives of the Prospective Relief Class because they "have divergent interests from one another and the class, as evidenced by the 40-page 'Tentative Settlement Agreement' 16 inmates (including 4 Plaintiffs) proposed." [Mem. in Opp. at 20 (footnote omitted).] Sixteen Saguaro inmates, who declared themselves to be practitioners of the Native Hawaiian religion, signed a notice stating that the Tentative Settlement Agreement

> presents a comprehensive compilation of the Native Hawaiian Religious programs [they] seek to have established at all CCA and PSD facilities **[*47]** to protect [their] State and Federal Constitutional Rights to freely express [their] religious beliefs and present [them] with the opportunity to practice the Native Hawaiian religion within correctional facilities while balancing the legitimate penalogical interests of Administrations with these rights.

[Mem. in Opp., Decl. of Rachel Love ("Love Decl."), Exh. 1 at PLAINTIFFS_0000320.[20]] The Tentative Settlement Agreement was transmitted with a memorandum dated March 19, 2009 to "Interested Native Hawaiian Religious Authority, Kapuna and Na Kahu" from "Native Hawaiian Religious, Spiritual and Cultural Group, Saguaro Correctional Center." [Id. at PLAINTIFFS_0000318.] It is signed by Myles S. Breiner, and it asks the recipients to "evaluate and critique the attached proposal." [Id.]

Defendants have not identified any specific part of the Tentative Settlement Agreement that indicates that Plaintiffs Galdones and Hughes's interests diverge from the interests of Plaintiffs Davis and Kane or the members of the **[*48]** proposed Prospective Relief Class. Nor have Defendants presented any evidence that the Tentative Settlement Agreement was ever memorialized into an agreement that is legally binding upon Plaintiffs Galdones and Hughes. In addition, this Court emphasizes that the Tentative Settlement Agreement was not prepared in connection with the instant case, and it was apparently drafted approximately two years before Plaintiffs filed this action. This Court therefore cannot find that anything that in the Tentative Settlement indicates that Plaintiffs Galdones and Hughes's interests in the instant case diverge from the interests of Plaintiffs Davis and Kane or the proposed Prospective Relief Class.

In a related argument, Defendants assert that Plaintiffs Davis and Galdones are not adequate representatives of the Prospective Relief Class because: they previously filed other legal actions challenging Saguaro's programming for the practitioners of the Native Hawaiian religion;[21] and Plaintiff Galdones is pursuing

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[19] This Court will refer to the April 11, 2013 order as the "4/11/13 Exhaustion Order."

[20] Plaintiffs Galdones and Hughes, proposed representatives of the Prospective Relief Class, signed the notice, as did Plaintiffs Kaahu and Poaha. [Love Decl., Exh. 1 at PLAINTIFFS_0000320.]

[21] Defendants raise this argument regarding Plaintiffs Davis and Holbron. [Mem. in Opp. at 20 n.14 (some citations omitted) (citing

a retaliation claim in this action. Defendants claim that the prior actions show that Plaintiffs Davis and Galdones each "have his own agenda," and Plaintiff Galdones's retaliation claim shows **[*49]** that "he might be motivated to abandon class members to pursue his own interests." [Mem. in Opp. at 20 n.14.] Again, Defendants do not identify any specific aspect of those prior cases or Plaintiff Galdones's retaliation claim that conflicts with the interests of the other proposed representatives or the members of the proposed Prospective Relief Class.

The Ninth Circuit has stated that:

> a district court retains the flexibility to address problems with a certified class as they arise, including the ability to decertify. "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; see also *Rodriguez v. West Publ'g Corp., 563 F.3d 948, 966 (9th Cir. 2009)* ("A district court may decertify a class at any time."); Cummings [v. Connell], 316 F.3d [886,] 896 [(9th Cir. 2003)] (finding **[*50]** "the district court's approach [to be] entirely appropriate" where the court determined that a potential class "conflict was too speculative at the time [of the certification motion] to prevent finding the named plaintiffs to be adequate representatives," but "remained willing to reconsider and decertify the class if . . . there was evidence of an actual conflict"); *Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir. 2001)* ("*Federal Rule of Civil Procedure 23* provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court."). What a district court may not do is to assume, *arguendo*, that problems will arise, and decline to certify the class on the basis of a mere potentiality that may or may not be realized. . .
>
> . .
>
> *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 593 F.3d 802, 809-10 (9th Cir. 2010)* (some alterations in United Steel).

This Court finds that Defendants' arguments about the conflict among Plaintiffs Davis, Galdones, Hughes, and Kane and between one or more of them and the members of the proposed Prospective Relief Class are too speculative to warrant denial of certification based on a failure to identify an adequate class representative. If, after certification of any class or subclass in this case, an actual conflict arises between **[*51]** the appointed representatives or between one or more of the appointed representatives and the class or subclass, Defendants may bring a motion for decertification.

Defendants also argue that Plaintiffs Davis, Galdones, Hughes, and Kane are not adequate representatives of the proposed Prospective Relief Class because

> Plaintiffs appear to have relinquished complete control of this litigation to Plaintiffs' counsel[,] . . . lack[] even a basic understanding of their duties as representative parties, [and] hav[e] little to no understanding of significant rulings made by the Court during the litigation or the claims that remain in this case after summary judgment rulings.

[Mem. in Opp. at 21.] This district court, however, has recognized that:

> It is true that "class representative status may properly be denied where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 61 (2d Cir. 2000)* (internal quotation omitted). However, "[i]t is hornbook law . . . [that] in a complex lawsuit, [when] the defendant's liability can be established only after a great **[*52]** deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative." *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 430 (4th Cir. 2003)*. While the named Plaintiffs do not appear to know either the

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Davis v. Hawaii, CV09-1081-PHX-PGR (LOA) (D. Ariz. Sept. 24, 2009); *Bush v. Hawaii, No. 04-00096 DAE-KSC, 2011 U.S. Dist. LEXIS 12528, 2011 WL 563564 (D. Haw. Jan. 20, 2011)*).] The adequacy argument regarding Plaintiff Holbron relates to the combined subclass. Plaintiff Galdones was also one of the plaintiffs in Bush, and this Court assumes that Defendants also wish to apply this argument to him.

> technical aspects of plumbing construction or the legal elements of some of their claims, the record does not suggest that they "have abdicated any role in the case beyond that of furnishing their names as plaintiffs." *Pryor v. Aerotek, 278 F.R.D. 516, 529-530 (C.D. Cal. 2011)*. . . .

*Baker v. Castle & Cooke Homes Hawaii, Inc., Civil No. 11-00616 SOM-RLP, 2014 U.S. Dist. LEXIS 58675, 2014 WL 1669158, at *10-11 (D. Hawai'i Apr. 28, 2014)* (some alterations in Baker). The district court emphasized that the proposed representatives were "sincere in their desire to explore any misconduct by [Defendant Castle & Cooke Homes Hawaii, Inc.]." *2014 U.S. Dist. LEXIS 58675, [WL] at *11* (citations omitted).

In arguing that Plaintiffs' counsel will not provide adequate representation because they are focused on obtaining monetary relief, Defendants state that "Plaintiffs' primary goal is to achieve greater religious practices" at Saguaro. [Mem. in Opp. at 24.] Thus, even Defendants concede that Plaintiffs Davis, Galdones, Hughes, and Kane have a sincere desire to obtain the relief sought by the proposed Prospective Relief Class. **[*53]** This Court therefore finds that their lack of understanding of the legal and procedural aspects of this case is not a barrier to their service as class representatives.

This Court FINDS that Plaintiffs Davis, Galdones, Hughes, and Kane are adequate representatives of the proposed Prospective Relief Class.

2. Subclasses

a. Administrative Segregation and SHIP Prospective Relief Subclasses

Plaintiff Holbron is the proposed representative of both the Administrative Segregation Prospective Relief Subclass and the SHIP Prospective Relief Subclass. [Motion at 3.] According to the Administrative Segregation Description and the SHIP Description, no Plaintiff is currently assigned either to administrative segregation or SHIP. Plaintiff Holbron was in administrative segregation from the date he was admitted to Saguaro, on or around July 17, 2007, until he moved to SHIP. He was in SHIP from approximately April 10, 2009 to February 2012. [Holbron Summary Judgment Decl. at ¶¶ 8-9.] Thus, Plaintiff Holbron has not been in administrative segregation in over five years, and he has not been in SHIP for over two years. This Court therefore cannot find that he has shared interests with inmates in either administrative **[*54]** segregation or inmates in SHIP.

Moreover, in the 6/13/14 Order, this Court stated:

> Plaintiff Holbron is apparently no longer in any form of restricted housing at Saguaro. Viewing the current record in the light most favorable to Plaintiff Holbron, this Court finds that there are genuine issues of material fact as to the existence of a reasonable expectation that he may be placed in a form of restricted custody at Saguaro in the future. If this Court ultimately finds that there is no reasonable expectation of such placement, Plaintiff Holbron's claims seeking prospective declaratory and injunctive relief regarding restricted custody at Saguaro will be moot.

*2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *5*. Plaintiff Holbron may not be able to pursue any claims for prospective relief regarding the practice of the Native Hawaiian religion in administrative segregation or SHIP.

This Court therefore FINDS that Plaintiff Holbron would not be an adequate representative of: the proposed Administrative Segregating Prospective Relief Subclass; the proposed SHIP Prospective Relief Subclass; or a combined Prospective Relief Subclass of administrative segregation inmates and SHIP inmates.[22]

b. Protective Custody Prospective Relief Subclass

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[22] This Court will not allow Plaintiffs additional time to identify **[*55]** other potential representatives from administrative segregation and SHIP. Plaintiff Holbron has not been in either administrative segregation or SHIP since February 2012, and Plaintiffs have known that he may not be able to prosecute any claims for prospective declaratory and injunctive relief since this Court filed the 3/31/14 Summary Judgment Order, *2014 U.S. Dist. LEXIS 43966, 2014 WL 1321006*. Thus, Plaintiffs have had ample time to identify an alternative representative for each of those proposed subclasses.

Plaintiffs Kane and Keawe are the proposed representatives of the Protective Custody Prospective Relief Subclass. [Motion at 3.] The parties' Protective Custody Description confirms that both are currently assigned to Saguaro's protective custody pod. For the reasons set forth supra Discussion Section II.D.1., this Court: finds that Plaintiff Keawe would not be an adequate representative of the Protective Custody Prospective Relief Subclass; and rejects Defendants' arguments challenging Plaintiff Kane's ability to serve as the representative of the subclass. This Court therefore FINDS that Plaintiff Kane would be an adequate representative of the proposed **[*56]** Protective Custody Prospective Relief Subclass.

E. Summary of the Court's *Rule 23(a)* Findings

This Court FINDS that the proposed Prospective Relief Class, with Plaintiffs Davis, Galdones, Hughes, and Kane as the class representatives and Sharla Manley, David Keith Kopper, Moses Haia, Shawn Westrick, and James Kawahito[23] as class counsel, meets the requirements of *Fed. R. Civ. P. 23(a)*. Further, this Court FINDS that the proposed Protective Custody Prospective Relief Subclass, with Plaintiff Kane as the representative of the subclass and Ms. Manley, Mr. Kopper, Mr. Haia, Mr. Westrick, and Mr. Kawahito as counsel for the subclass, meets the requirements of *Rule 23(a)*.

This Court also FINDS that the proposed Administrative Segregation Prospective Relief Subclass and the SHIP Prospective Relief Subclass do not meet the requirements of *Rule 23(a)*. This Court therefore DENIES Plaintiffs' Motion insofar as this Court declines to certify either the proposed Administrative Segregation Prospective Relief Subclass or the SHIP Prospective Relief Subclass. Further, this Court FINDS that a combined Prospective Relief Subclass **[*57]** of administrative segregation inmates and SHIP inmates would not satisfy the requirements of *Rule 23(a)*.

This Court therefore turns to the *Rule 23(b)* analysis for the proposed Prospective Relief Class and the proposed Protective Custody Prospective Relief Subclass.

[23] Mr. Kawahito's appointment as class counsel would be conditioned upon his filing of a formal notice of appearance in this case.

F. *Rule 23(b)* Analysis

Plaintiffs' proposed class and subclass may satisfy *Rule 23(b)* by meeting the criteria in either *Rule 23(b)(1)*, *(b)(2)*, or *(b)(3)*. Plaintiffs argue that both the proposed Prospective Relief Class and the proposed Protective Custody Prospective Relief Subclass satisfy *Rule 23(b)(2)*. [Motion at 2-3.] This district court has stated:

> "Class certification under *Rule 23(b)(2)* requires that the primary relief sought is declaratory or injunctive." *Rodriguez v. Hayes, 578 F.3d 1032, 1051 (9th Cir. 2009)* (internal quotations omitted) *superseded on other grounds by Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010)*. "The rule does not require [a court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez, 591 F.3d at 1125*. "[I]t is sufficient to meet the requirements of *Rule 23(b)(2)* that 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" Id. (quoting *Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998)*). . . .

R.P.-K. ex rel. C.K. v. Dep't of Educ., Hawaii, 272 F.R.D. 541, 551 (D. Hawai'i 2011) (alterations in R.P.-K.).

1. Prospective Relief Class

The parties opposing class **[*58]** certification - CCA and Defendant Sakai on behalf of DPS - have acted on grounds that uniformly apply to all inmates in the general population at Saguaro who have registered as practitioners of the Native Hawaiian religion. Plaintiffs seek prospective declaratory and injunctive relief addressing Defendants' policies and procedures. Thus, the relief that Plaintiffs seek would be appropriate for the proposed class as a whole. This Court therefore FINDS that the proposed Prospective Relief Class meets the criteria set forth in *Rule 23(b)(2)*.

Insofar as this Court has found that the proposed Prospective Relief Class satisfies both *Rule 23(a)* and *Rule 23(b)*, this Court GRANTS Plaintiffs' Motion as to the proposed Prospective Relief Class.

2. Protective Custody Prospective Relief Subclass

Similarly, CCA and DPS have acted on grounds that uniformly apply to all inmates in protective custody at Saguaro who have registered as practitioners of the Native Hawaiian religion. Plaintiffs seek prospective declaratory and injunctive relief addressing Defendants' policies and procedures. Thus, the relief that Plaintiffs seek would be appropriate for the proposed subclass as a whole. This Court therefore FINDS that the proposed Protective **[*59]** Prospective Relief Subclass meets the criteria set forth in *Rule 23(b)(2)*.

Insofar as this Court has found that the proposed Protective Custody Prospective Relief Subclass satisfies both *Rule 23(a)* and *Rule 23(b)*, this Court GRANTS Plaintiffs' Motion as to the proposed Protective Custody Prospective Relief Subclass.

This Court now turns to Plaintiffs' request to certify a class and subclasses addressing damages.

III. Class Certification as to Claims for Damages

At the outset, this Court emphasizes that, in the 7/31/14 Summary Judgment Order, it ruled that: Plaintiffs' remaining § 1983 claims and RLUIPA claims for damages are limited to compensatory damages and nominal damages; and Plaintiffs cannot seek damages for their remaining claims based on the state constitution. *2014 U.S. Dist. LEXIS 105006, 2014 WL 3809499, at *18*. The 7/31/14 Summary Judgment Order also stated:

> Although this Court by no means minimizes the importance of the federal rights that Plaintiffs allege were violated, it is well established that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases." *Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986)*. This Court finds that the spiritual injuries that Plaintiffs allege in this case are comparable to humiliation, embarrassment, **[*60]** or disappointment and are therefore mental or emotional injuries subject to [*42 U.S.C.] § 1997e(e)*. Plaintiffs cannot pursue claims for damages based on their spiritual injuries without a prior showing of physical injury.

*2014 U.S. Dist. LEXIS 105006, [WL] at *10* (some alterations in 7/31/14 Summary Judgment Order). This Court also ruled that Plaintiffs could not seek damages for their alleged spiritual injuries because they have not made the required showing of physical injury. Id. Thus, this Court could not certify class or subclass seeking damages for spiritual injury, or any other form of mental or emotional injury, because no Plaintiff would be an adequate representative. This Court will only address whether it is appropriate to certify the proposed Damages Class and/or the proposed Damages Subclasses to seek compensatory and nominal damages.

A. Compensatory Damages

Even assuming, *arguendo*, that Plaintiffs could satisfy the numerosity and adequacy requirements for the proposed Damages Class and/or the proposed Damages Subclasses, Plaintiffs could not satisfy the commonality and typicality requirements. The determination of entitlement to, and the amount of, compensatory damages would require examination of an individual inmate's alleged deprivation **[*61]** of rights on specific occasions. For example, examining whether an inmate was entitled to compensatory damages for the denial of access to a personal amulet would require the consideration of: the character of the individual amulet at issue; and whether there were case-specific reasons for its confiscation, such as history of violent use of the amulet or hiding contraband in the amulet. See, e.g., Mem. in Opp. at 9 (noting that Plaintiff Davis's personal amulet was a kukui nut, and potential class members' personal amulets included hooks, niho mano, shells, kukui nut lei, and a necklace made of the inmate's hair (citing Doc. 466-1, ¶¶ 30-42; Doc. 320-9, ¶ 15; Doc. 320-2, ¶ 17; Doc. 320-4, ¶ 8; Doc. 320-39, ¶ 15)).[24] Such inquiries are not capable of class-wide resolution, and the inmate's arguments, as a general rule, will not be

[24] Docket number 466-1 is the Declaration of Richard Davis attached to the Amended Separate Concise Statement of Facts in Opposition to Defendants' Motion for Summary Judgment, filed January 6, 2014 ("Plaintiffs' Responsive CSOF"). Docket numbers 320-9, 320-2, 320-4, and 320-39 are declarations in support of the 2103 Certification **[*62]** Motion by, respectively: John DeCambra; Kekona Anthony; William Jackson Barnes; and Richard Taylor.

reasonably coextensive with each other.

This Court therefore FINDS that Plaintiffs could not satisfy the commonality and typicality requirements as to any class or subclass seeking compensatory damages. In light of this finding, this Court need not conduct a detailed analysis of whether the proposed Damages Class and each of the proposed Damages Subclasses satisfies each of the *Rule 23(a)* requirements as to the claims for compensatory damages. This Court emphasizes that, although class certification is unwarranted as to compensatory damages, the named Plaintiffs may pursue their claims for compensatory damages on an individual basis, unless precluded by a prior order of this Court.

B. Nominal Damages

This Court begins its analysis of whether Plaintiffs are entitled to certification of a damages class (and/or subclasses) by reviewing the nature and purpose of nominal damages. The Ninth Circuit has stated that:

> As distinguished from punitive and compensatory damages, nominal damages are awarded to vindicate rights, the infringement of which has not caused actual, provable injury.
>
> > Common-law courts traditionally have vindicated deprivations **[*63]** of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of right.
>
> *Carey[v. Piphus], 435 U.S. [247,] 266, 98 S. Ct. 1042[, 55 L. Ed. 2d 252 (1978)]*. Nominal damages, as the term implies, are in name only and customarily are defined as a mere token or "trifling." See, e.g., *id. at 267, 98 S. Ct. 1042*; *Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973)* (per curiam). Although the amount of damages awarded is not limited to one dollar, the nature of the award compels that the amount be minimal. See *Romano v. U—Haul Intern., 233 F.3d 655, 671 (1st Cir. 2000)*. Nominal damages serve one other function, to clarify the identity of the prevailing party for the purposes of awarding attorney's fees and costs in appropriate cases. Cf. *Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)* (stating that "a plaintiff who wins nominal damages is a prevailing party under [*42 U.S.C.] § 1988*").

Cummings, 402 F.3d at 942-43. In Cummings, the Ninth Circuit held that "when nominal damages are awarded in a civil **[*64]** rights class action, every member of the class whose constitutional rights were violated is entitled to nominal damages." *Id. at 940*. In other words, "[w]here a plaintiff proves a violation of constitutional rights, nominal damages must be awarded as a matter of law." *Id. at 944* (citation omitted).

Plaintiffs' proposed Damages Class would include all inmate practitioners of the Native Hawaiian religion at either Saguaro or Red Rock at any time during the period from four years prior to the filing of this action through the resolution of this case. As stated *supra* Discussion Section III.A., the determination of whether an inmate's rights were violated in a particular instance - such as the confiscation of a sacred item or the exclusion from a specific religious activity - requires the determination of issues that are not suitable for class determination. Thus, to the extent that the proposed Damages Class and the proposed Damages Subclasses would seek nominal damages based on specific incidents that allegedly violated the proposed members' rights under RLUIPA or the United States Constitution, Plaintiffs would not be able to satisfy the commonality and typicality requirements.

Plaintiffs, however, can also **[*65]** argue that all inmate practitioners of the Native Hawaiian religion at Saguaro or Red Rock within the relevant time period were subjected to the same CCA **policies and procedures** that allegedly violated their rights under RLUIPA and/or the United States Constitution. In this respect, the analysis of Plaintiffs' proposed Damages Class and proposed Damages Subclasses is the same as the analysis of Plaintiffs' proposed Prospective Relief Class.

The claims pursued by the proposed Prospective Relief Class, however, were limited to prospective declaratory and injunctive relief because Plaintiffs bring those claims against CCA and Defendant Sakai. Plaintiffs cannot pursue claims for damages or other retrospective relief against Defendant Sakai because he is not a person for purposes of § 1983 claims seeking damages or other retrospective relief. However, the proposed Damages Class and the proposed Damages Subclasses would pursue claims against only CCA, and the prospective relief limitation would not apply. Plaintiffs, and any damages class or subclass certified, may also seek retrospective relief and nominal damages against CCA based on prior policies and procedures that are no longer in effect. **[*66]** [25] Whether the CCA policies and procedures violated RLUIPA or were unconstitutional are issues that are capable of class-wide resolution, and the class members' (or subclass members') arguments, as a general rule, would be reasonably coextensive with each other. It is arguably possible for the proposed Damages Class and the proposed Damages Subclasses to satisfy the commonality and typicality requirements. This Court therefore turns to the analysis of whether the proposed Damages Class and each of the proposed Damages Subclasses meets each of the *Rule 23(a)* requirements.

1. Damages Class

a. Numerosity

As previously noted, there are 179 inmates at Saguaro that have registered as practitioners of the Native Hawaiian religion. *2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *23*. In addition, the Damages Class would include inmate practitioners who were previously incarcerated at Saguaro or Red Rock but are no longer at either facility. Thus, the Damages Class clearly satisfies the numerosity requirement.

b. Typicality

To the extent that the claims of the proposed Damages Class are limited to claims arising from the policies and procedures applicable at each facility, the proposed class members who are or were housed at Saguaro present common questions of law or fact, and the proposed class members who were housed at Red Rock presents common questions of law or fact. This Court, however, cannot say that the Damages Class as a whole present common questions of law or fact. Thus, separate damages classes **[*68]** - one class of inmates who are or were housed at Saguaro ("Saguaro Damages Class") and one class of inmates who were housed at Red Rock ("Red Rock Damages Class") - would meet the commonality requirement.

A separate Saguaro Damages Class would also satisfy the numerosity requirement. Based on the existing record, however, this Court cannot find that a separate Red Rock Damages Class would satisfy the numerosity requirement. When Red Rock housed Hawai'i inmates, the average number was approximately fifty. [Defs.' Reply in Supp. of Motion for Summary Judgment (Doc. 361), Decl. of Warden Stolc, filed 1/13/14 (dkt. no. 483-17), at ¶ 4.] Plaintiffs have not identified evidence establishing how many Red Rock inmates (from Hawai'i or otherwise) registered as practitioners of the Native Hawaiian religion. A Red Rock Damages Class would not satisfy *Rule 23(a)*.

c. Commonality

Insofar as this Court has limited the claims at issue for the Saguaro Damages Class to claims asserting that Saguaro's policies and procedures violated RLUIPA or the United States Constitution, the claims of the representative Plaintiffs would be typical of the class's claims. Thus, a Saguaro Damages Class would satisfy the commonality **[*69]** requirement.

[25] With the exception of Count XXI (which was dismissed with prejudice), this Court has not issued any rulings as to the ultimate merit of any of Plaintiffs' claims for damages. To the extent that this Court granted Defendants' Motion for Summary Judgment, [filed 7/31/13 (dkt. no. 361),] those rulings were limited to Plaintiffs' claims for prospective declaratory and injunctive relief. See 6/13/14 Summary Judgment Order, *2014 U.S. Dist. LEXIS 81780, 2014 WL 2716856, at *3* ("To the extent that any of the pending motions seek summary judgment as to any claims seeking damages or any claims seeking retrospective equitable relief, the motions are DENIED WITHOUT PREJUDICE." **[*67]** (emphasis in original)). Further, the 7/31/14 Summary Judgment Order limited the type of damages available and ruled that damages were only available against CCA in Plaintiffs' claims alleging violation of RLUIPA or the United States Constitution. That order did not contain any ruling on the merits of those claims.

d. Adequacy

Plaintiffs were all proposed representatives of the Damages Class. [Motion at 3.] Each is, or was previously, incarcerated at Saguaro. [Manley 2013 Decl., Exh. 33 (Davis Decl.) at ¶ 3, Exh. 34 (Hughes Decl.) at ¶ 3, Exh. 35 (Kane Decl.) at ¶ 3, Exh. 36 (Keawe Decl.) at ¶ 3;[26] 2013 Certification Motion, Decl. of Robert Holbron at ¶ 4; Pltfs.' Responsive CSOF, Decl. of Tyrone Galdones at ¶ 3, Decl. of Damien Kaahu at ¶ 3, Decl. of Kalai Poaha at ¶ 3.]

This Court previously dismissed, for failure to exhaust his administrative remedies, Plaintiff Keawe's federal claims based on: 1) daily religious congregation; and 2) access to an outdoor altar. 4/11/13 Exhaustion Order, *2013 U.S. Dist. LEXIS 52479, 2013 WL 1568425, at *13*. This Court also dismissed Plaintiffs Davis, Galdones, Hughes, Kaahu, and Poaha's federal claims regarding access to a spiritual advisor on exhaustion grounds. Id. This Court has ruled that Plaintiff Keawe's inability to pursue RLUIPA and § 1983 claims **[*70]** regarding daily group worship rendered him an inadequate class representative for the Prospective Relief Class. See *supra* Discussion Section II.D.1. The analysis of who is an adequate representative of the Saguaro Damages Class, however, is distinguishable. The Prospective Relief Class will seek relief that is specific and unique to each group of claims (worship and access to sacred items). Thus, a proposed representative who cannot pursue one group of claims has very distinct interests from the proposed representative, and the members, of the proposed class who are pursing both types of claims.

In contrast, the Saguaro Damages Class will seek nominal damages for violation of their rights under RLUIPA and/or the United States Constitution. If Plaintiffs prevail and establish a violation or multiple violations, Plaintiffs and each class member will be entitled to an award of nominal damages. The award, however, will be a general nominal damages award recognizing the violation their rights. They will not receive an award of nominal damages for each established violation. See *Cummings, 402 F.3d at 936* (analyzing the plaintiffs' argument that the district court erred in awarding a general nominal damages award, **[*71]** affirming the district court's award of $1.00, and rejecting the plaintiffs argument that the district court should have awarded "separate nominal damages of $1.00 for each of the seventeen acts that resulted in a constitutional violation"). Thus, proposed class representatives who are not pursuing all of the claims that the other representatives - and the class members - are pursuing, have different interests. But, due to the nature of the relief sought, those differences are not significant and do not prevent them from being adequate class representatives.

For these reasons, and for the reasons set forth *supra* Discussion Section II.D.1., Plaintiffs would be adequate representatives of a Saguaro Damages Class. Further, for the reasons set forth *supra* Section II.D., Plaintiffs' counsel would be adequate class counsel for a Saguaro Damages Class.

This Court therefore FINDS that a Saguaro Damages Class would satisfy the requirements of *Rule 23(a)*.

2. Administrative Segregation Damages Subclasses

The Motion does not specifically address the *Rule 23(a)* factors as they apply to the proposed Damages Class and Damages Subclasses. Instead, Plaintiffs rely on their *Rule 23(a)* analysis of the proposed Prospective Relief Class **[*72]** and Prospective Relief Subclasses. [Mem. in Supp. of Motion at 31-32.] Plaintiffs have not identified any evidence of the number of inmate practitioners of the Native Hawaiian religion who are, or were, in administrative segregation at Saguaro or Red Rock. Thus, neither a Saguaro Administrative Segregation Damages Subclasses nor a Red Rock Administrative Segregation Damages Subclasses would meet the numerosity requirement.

This Court FINDS that neither a Saguaro Administrative Segregation Damages Subclass nor a Red Rock Administrative Segregation Damages Subclass would satisfy the requirements of *Rule 23(a)*.[27]

[26] Kane's Declaration and Keawe's Declaration, both dated in February 2013, each states that he is incarcerated at Red Rock. As previously noted, by May 30, 2013, all of the Hawai'i inmates at Red Rock were transferred to Saguaro. See *supra* note 13.

[27] In the analysis of the Proposed Prospective Relief Subclasses, this

3. SHIP Damages Subclass

a. Numerosity

This Court has found that there are twenty potential members **[*73]** of the SHIP Prospective Relief Subclass, *i.e.* there are twenty inmate practitioners of the Native Hawaiian religion currently in SHIP. See *supra* Discussion Section II.A.2.a. In light of the fact that the intended duration of that program is eighteen months, this Court can reasonably infer that there were more than forty inmate practitioners of the Native Hawaiian religion in SHIP over the course of the relevant time period (four years prior the filing of this case until the resolution of the case). Thus, the SHIP Damages Subclass would satisfy the numerosity requirement.

b. Commonality and Typicality

For the same reasons set forth *supra* Discussion Sections II.B.2.a. and C.2.a., the proposed SHIP Damages Subclass would only meet the commonality requirement and the typicality requirement as to the claims regarding individual access to a spiritual advisor.

c. Adequacy

Plaintiff Holbron is the proposed representative of the SHIP Damages Subclass. He was in SHIP from approximately April 10, 2009 to February 2012. [Holbron Summary Judgment Decl. at ¶¶ 8-9.] For this reason, and for the reasons set forth *supra* Discussion Section II.D.1., Plaintiff Holbron would be an adequate representative of **[*74]** the SHIP Damages Subclass. Further, for the reasons set forth *supra* Section II.D., Plaintiffs' counsel would provide adequate representation for the SHIP Damages Subclass.

This Court therefore FINDS that the SHIP Damages Subclass would satisfy the requirements of *Rule 23(a)*, but only as to the claims regarding individual access to a spiritual advisor.

4. Protective Custody Damages Subclasses

a. Numerosity

Again, Plaintiffs failed to identify any evidence of the number of inmate practitioners of the Native Hawaiian religion who are, or have been, in protective custody at Saguaro or Red Rock. Based on Defendants' concession, this Court has found that there are thirty-seven potential members of the Protective Custody Prospective Relief Subclass. See *supra* Discussion Section II.A.2.c. This Court can reasonably infer that there were more than forty inmate practitioners of the Native Hawaiian religion in protective custody at Saguaro over the course of the relevant time period, which spans over seven years. Thus, the Saguaro Protective Custody Damages Subclass would satisfy the numerosity requirement. The Red Rock Protective Custody Damages Subclass, however, would not satisfy the numerosity requirement. **[*75]**

b. Commonality and Typicality

For the same reasons set forth *supra* Discussion Sections II.B.2.b. and C.2.b., the proposed Saguaro Protective Custody Damages Subclass would meet the commonality and typicality requirements.

c. Adequacy

Plaintiffs Kane and Keawe are the proposed representatives of the Saguaro Protective Custody Damages Subclass. The parties' Protective Custody Description confirms that Plaintiffs Kane and Keawe are currently housed in protective custody at Saguaro. For this reason, and for the reasons set forth *supra* Discussion Section II.D.1.d., Plaintiffs Kane and Keawe would be an adequate representatives of the Saguaro Protective Custody Damages Subclass. Further, for the reasons set forth *supra* Section II.D., Plaintiffs' counsel would provide adequate representation for the Saguaro Protective Custody Damages Subclass.

Court discussed the possibility of a combined subclass of administrative segregation practitioners and SHIP practitioners. The combination would not be appropriate for the proposed Damages Subclasses. Because SHIP is a Saguaro program, there is no Red Rock SHIP Damages Subclass to combine with the Red Rock Administrative Segregation Damages Subclasses. Further, the SHIP Damages Subclass for Saguaro is sufficiently numerous by itself.

This Court therefore FINDS that the Saguaro Protective Damages Subclass satisfies the requirements of *Rule 23(a)*.

This Court next turns to the issue of whether the proposed Saguaro Damages Class, SHIP Damages Subclass, and Saguaro Protective Custody Damages Subclass also meet the *Rule 23(b)* requirements.

C. *Rule 23(b)* Requirements

Plaintiffs seek certification of the proposed Damages Class **[*76]** and the proposed Damages Subclasses pursuant to *Rule 23(b)(3)*. The two requirements of *Rule 23(b)(3)* are predominance and superiority. Defendants raise the same objections as to all of the proposed Damages Class and Damages Subclasses.

1. Predominance

This district court has stated:

> "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. "Though there is substantial overlap between the [commonality and predominance] tests, the [predominance] test is far more demanding" Wolin [v. Jaguar Land Rover N. Am., LLC], 617 F.3d [1168,] 1172 [(9th Cir. 2010)] (internal quotation omitted). A class cannot meet the predominance standard if questions relevant to individual claims "will inevitably overwhelm questions common to the class." *Comcast Corp. [v. Behrend], 133 S. Ct. [1426,] 1433, 185 L. Ed. 2d 515 [(2013)]*.

*Baker v. Castle & Cooke Homes Hawaii, Inc., Civil No. 11-00616 SOM-RLP, 2014 U.S. Dist. LEXIS 58675, 2014 WL 1669158, at *11 (D. Hawai'i Apr. 28, 2014)* (some alterations in Baker).

Defendants argue that neither Plaintiffs' proposed Damages Class nor the proposed Damages Subclasses can satisfy the predominance requirement because the individualized issues of, for example, sincerity of belief and extent of the burden upon the religious exercise, will predominate over the common issues subject to generalized proof. This Court has ruled that the Saguaro Damages Class, the **[*77]** SHIP Damages Subclass, and the Saguaro Protective Custody Damages Subclass would be limited to pursuing the portions of Plaintiffs' claims alleging that Saguaro's policies and procedures violated RLUIPA or the United States Constitution. Further, the recovery by the members of the class and subclasses will be limited to nominal damages. In light of those limitations, the issues that would otherwise require individualized evidence - such as sincerity and burden - can be established through generalized or representative proof. While it is true that the class (or subclass) members may differ in degree of sincerity and/or burden, those issues will not dominate the action in light of the limitations that this Court has placed on the damages class and subclasses.

The Saguaro Damages Class, the SHIP Damages Subclass, and the Saguaro Protective Custody Damages Subclass "are sufficiently cohesive to warrant adjudication by representation." See *Amchem, 521 U.S. at 623*. This Court therefore FINDS that they meet the predominance requirement.

2. Superiority

Rule 23(b)(3) "provides a nonexhaustive list of factors relevant to the superiority inquiry." *Baker, 2014 U.S. Dist. LEXIS 58675, 2014 WL 1669158, at *16*. Again, the limitations that this Court has placed on the damages class and subclasses **[*78]** are critical. The limitation to only nominal damages for the class members might suggest that individual members would have an interest in controlling the prosecution of separate actions. Even in separate actions, those individuals would still be limited to only compensatory damages and nominal damages, unless they can prove physical injury. See *supra* Discussion Section III.A. The relatively small amount of damages that individual plaintiffs could recover in separate actions and the complexities of this type of case would be strong disincentives against pursing individual actions. Similarly, although the limitation of the class and subclasses to issues of policies and procedures that violate RLUIPA or the United States Constitution might suggest that individual inmates would have an interest in presenting their individual violations in separate actions, it would be

difficult for individual inmates to litigate cases similar to this one. Thus, it is desirable to concentrate these claims in a class action.

This Court does not find that managing the damages class/subclasses would be unusually difficult in this case because Plaintiffs' counsel are knowledgeable and experienced in class action **[*79]** litigation. Defendants object that they cannot cross-examine affidavits of class members who cannot be physically present at trial, and that they will not have had the opportunity to depose class members other than the named Plaintiffs. First, as noted in the predominance analysis, individual issues - such as degree of sincerity, burden, and prior history - have a limited role in light of the limitations that this Court has placed on the damages class and subclasses. Further, the parties can make other arrangements, such as having other inmates testify at trial through video-conference. In light of the fact that the trial date in this case has been continued to March 17, 2015, the parties may stipulate to, or seek leave from the magistrate judge, to conduct a reasonable amount of discovery - including depositions - necessary because of class certification.

This Court recognizes that Plaintiffs filed this action more than three years ago, and the litigation made substantial progress prior to the consideration of this Motion. These facts weigh slightly against certification. This Court, however, has already found that Plaintiffs did not engage in undue delay in seeking class certification. **[*80]** The procedural history of this case therefore does not preclude a finding of superiority.

Based upon this Court's analysis of the relevant factors, a class action is superior to other available methods to fairly and efficiently adjudicate the claims of the Saguaro Damages Class, the SHIP Damages Subclass, and the Saguaro Protective Custody Damages Subclass. See *Fed. R. Civ. P. 23(b)(3)*. This Court therefore FINDS that they meet the superiority requirement.

D. Summary

This Court GRANTS Plaintiffs' Motion as to the Saguaro Damages Class, the SHIP Damages Subclass, and the Saguaro Protective Custody Damages Subclass. The class and subclasses, however, are limited to claims seeking nominal damages on the grounds that CCA's policies and procedures at Saguaro violate RLUIPA and/or the United States Constitution. In addition, the SHIP Damages Subclass is limited to claims regarding individual access to a spiritual advisor.

This Court DENIES all of Plaintiffs' other requests to certify a class or subclass as to damages.

CONCLUSION

On the basis of the foregoing, Plaintiffs' Amended Second Motion for Class Certification, filed July 1, 2014, is HEREBY GRANTED IN PART AND DENIED IN PART. This Court GRANTS Plaintiffs' Motion **[*81]** as follows:

1) This Court CERTIFIES a class, seeking prospective declaratory and injunctive relief, as to Plaintiffs' remaining claims regarding daily, outdoor, group worship and the remaining claims regarding access to sacred items ("the Prospective Relief Class"). The Prospective Relief Class is defined as:

> a) all persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are and/or will be confined to Saguaro Correctional Center ("Saguaro"); c) in the general population; and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

The representatives of the Prospective Relief Class shall be Plaintiffs Richard Kapela Davis, Tyrone K.N. Galdones, Michael Hughes, and James Kane, III. The class counsel shall be Sharla Manley, Esq., David Keith Kopper, Esq., Moses Haia, Esq., Shawn Westrick, Esq., and James Kawahito, Esq.[28]

2) This Court CERTIFIES a subclass, seeking prospective declaratory and injunctive **[*82]** relief, with regard to: 1) the same claims described *supra* as to the Prospective Relief Class; and 2) the remaining state and federal claims regarding lack of access to communal sacred items in protective custody ("the Prospective Relief Subclass"). The Prospective Relief Subclass is

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[28] Mr. Kawahito's appointment as class counsel is conditioned upon his filing of a formal notice of appearance in this case by no later than **October 6, 2014**.

defined as:

> a) all persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are and/or will be confined to Saguaro; c) in protective custody; and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

The representative of the Prospective Relief Subclass shall be Plaintiff Kane. The class counsel shall be the counsel described *supra*.

3) This Court CERTIFIES a class, seeking nominal damages and other retrospective relief, as to Counts I through X, and XXII through XXVI ("the Damages Class"). The Damages Class is defined as:

> a) all persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are or were confined to Saguaro at any time within four years prior to February 7, 2011 until the resolution **[*83]** of this lawsuit; c) in the general population; and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

The representatives of the Damages Class shall be Plaintiffs Davis, Galdones, Hughes, Kane, Damien Kaahu, Robert A. Holbron, Ellington Keawe, and Kalai K. Poaha. The class counsel shall be the counsel described *supra*.

4) This Court CERTIFIES a subclass, seeking nominal damages and other retrospective relief, as to Counts I, II, III, V, VI, VII, VIII, X, XXII, XXIII, XXIV, and XXVI ("the SHIP Damages Subclass"). The SHIP Damages Subclass is defined as:

> a) all persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are or were confined to Saguaro at any time within four years prior to February 7, 2011 until the resolution of this lawsuit; c) in the Special Housing Incentive Program ("SHIP"); and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

The representative of the SHIP Damages Subclass shall be Plaintiff Holbron. The class counsel shall be the counsel described *supra* **[*84]** .

5) This Court CERTIFIES a subclass, seeking nominal damages and other retrospective relief, as to Counts I through X, and XXII through XXVI ("the Protective Custody Damages Subclass"). The Protective Custody Damages Subclass is defined as:

> a) all persons who were convicted of violating crimes under the laws of the State of Hawai'i and were residents of the state of Hawai'i; b) who are or were confined to Saguaro at any time within four years prior to February 7, 2011 until the resolution of this lawsuit; c) in protective custody; and d) who have, according to Saguaro's established procedures, declared that the Native Hawaiian religion is their faith.

The representatives of the Protective Custody Damages Subclass shall be Plaintiffs Keawe and Kane. The class counsel shall be the counsel described *supra*.

Plaintiffs' Motion is DENIED in all other respects. All other remaining claims shall be prosecuted on behalf of the named Plaintiffs only.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, September 30, 2014.

/s/ Leslie E. Kobayashi

Leslie E. Kobayashi

United States District Judge

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Tab 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC DOWDY-EL, AVERIS X. WILSON, AMIRA SALEM, TOM TRAINI, and ROGER HUNT

Case Number: 06-11765

Plaintiffs,

HON. AVERN COHN

v.

PATRICIA L. CARUSO, MICHAEL MARTIN, and DAVE BURNETT,

Defendants.
_____/

MEMORANDUM AND ORDER
ADOPTING REPORT AND RECOMMENDATION (Doc. 73)
AND
GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Doc. 56)

I. Introduction

Plaintiffs are Muslim[1] inmates housed by the Michigan Department of Corrections ("MDOC") who challenge the defendant prison officials' alleged failure to accommodate their requests to observe three distinct Islamic religious practices: (1) attending *Jum'ah* prayer services; (2) receiving a *halal* diet; and (3) participating in the Eid ul-Fitr and Eid ul-Adha Feasts (the "*Eid* Feasts"). Plaintiffs challenge each alleged failure to accommodate under: (1) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (2) the Free Exercise Clause of the First Amendment of the United States Constitution, (3) the Michigan Constitution's counterparts to the United States Constitution's Equal Protection and Free Exercise

[1]The magistrate judge has separately recommended that the sole non-Muslim plaintiff's claims be dismissed. (Doc. 70 at 2, fn. 1)

Clauses, Article 1 §§ 2 and 4, respectively; and (4) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq, "RLUIPA"). The matter has been referred to a magistrate judge, before whom plaintiffs filed a motion for class certification.[2]

The magistrate judge issued a report and recommendation ("MJRR"), recommending that the motion be granted. Neither party has filed objections to the MJRR and the time for filing objections has passed. Accordingly, the MJRR will be adopted and plaintiffs' motion for class certification will be granted.

II. The MJRR and Class Certification

The magistrate judge recommends that a class be certified under Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b)(2). With respect to the attendance at *Jum'ah* services, plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied …the ability to participate in *Jum'ah* because of a conflicting work, school or similar detail. With respect to the provision of a *halal* diet, plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied …a *halal* diet that is free of contamination by foods considered *haram*," i.e., non-*halal* meats and/or vegetarian foods that have been "contaminated" by

[2]The parties also filed cross motions for summary judgment. The magistrate judge issued a report and recommendation that the motions be granted in part and denied in part. (Doc. 70). The parties have objected. (Docs. 71, 72) The cross motions for summary judgment and objections to the report and recommendation will be the subject of a separate order.

coming into contact with such meats.[3]

III. Legal Standard

The failure to file objections to the MJRR waives any further right to appeal. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to the MJRR releases the Court from its duty to independently review the motions. Thomas v. Arn, 474 U.S. 140, 149 (1985). However, the Court has reviewed the MJRR and agrees with the magistrate judge.

IV. Conclusion

Accordingly, the findings and conclusions of the magistrate judge are ADOPTED as the findings and conclusions of the Court. Plaintiffs' motion for class certification is GRANTED. The class is certified as indicated above under Rule 23(a) and Rule 23 (b)(2), as further explained in the MJRR.

SO ORDERED.

Dated: December 20, 2012

S/Avern Cohn
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, December 20, 2012, by electronic and/or ordinary mail.

S/Sakne Chami
Case Manager, (313) 234-5160

[3]The magistrate judge did not address participation in the *Eid* feasts, noting that he recommended the plaintiffs' motion for summary judgment be granted on this issue. The magistrate judge then correctly noted that should the Court adopt this recommendation, the class certification issue becomes moot. Conversely, as the magistrate judge noted, should the Court reject this recommendation, defendants will have prevailed, also rendering the class certification issue moot.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC DOWDY-EL, AVERIS X. WILSON, AMIRA SALEM, TOM TRAINI and ROGER HUNT,
Plaintiffs,

Case No. 06-11765

Hon. Avern L. Cohn
Magistrate Judge David R. Grand

v.

PATRICIA L. CARUSO, MICHAEL MARTIN, and DAVE BURNETT,

Defendants.
_____/

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [56]

Before the court is the Plaintiffs' Motion for Class Certification [56], which has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, **IT IS RECOMMENDED** that Plaintiffs' motion be **GRANTED**.

I. BACKGROUND

Plaintiffs are Muslim[1] inmates housed by the Michigan Department of Corrections ("MDOC") who challenge the defendant prison officials' alleged failure to accommodate their requests to observe three distinct Islamic religious practices: (1) attending *Jum'ah* prayer services; (2) receiving a *halal* diet; and (3) participating in the *Eid ul-Fitr* and *Eid ul-Adha* Feasts (the "*Eid* Feasts").[2] On July 24, 2012, this court issued a Report and Recommendation (the "R&R")

1 This court has recommended that the sole non-Muslim plaintiff's claims be dismissed. Doc. #70 at 2, fn. 1.

2 Plaintiffs challenge each alleged failure to accommodate under: (1) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (2) the Free Exercise Clause of the First Amendment of the United States Constitution, (3) the Michigan Constitution's

regarding the parties' cross-motions for summary judgment. Doc. #70. The R&R discussed the factual background behind the Plaintiffs' claims and the Defendants' defenses, R&R at 1-6, and the court incorporates that discussion by reference here. The court will nevertheless briefly describe Plaintiffs' claims as they relate to the instant motion for class certification.

1. *Jum'ah* Claims

Jum'ah is a weekly congregational prayer service that begins on Fridays at about noon and lasts for approximately one hour. MDOC Policy Directive 05.03.150 (the "Policy Directive") provides in pertinent part:

> V. Staff shall not make special provisions for the observance of religious holidays except as authorized and specifically provided for by Department policy.
>
> * * * *
>
> BB. Prisoners shall not be released from work or school assignments to attend group religious services or activities, consistent with restrictions on attending other personal interest activities. Religious services and activities should be scheduled when the majority of prisoners have leisure time (e.g., evening and weekend hours)…

Policy Directive, ¶¶ V, BB (collectively, the "Work Release Policy" or the "Policy").

Under the Policy, observant Muslim inmates who are assigned to work and/or school duty that conflict with *Jum'ah* services are simply unable to attend those services. The parties agree, however, that Defendants employ an unwritten, un-defined, and "sporadic" "policy of granting permission to attend religious services on a case by case basis." R&R at 4. Plaintiffs request either that they not be assigned to work or school duties that conflict with *Jum'ah*, or that they be freely (as opposed to sporadically) given "call-outs" to attend those services. Defendants argue

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counterparts to the United States Constitution's Equal Protection Clause and Free Exercise Clause, Article I, §§ 2 and 4, respectively; and (4) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S .C. § 2000cc *et seq*. ("RLUIPA").

that the Policy is lawful in light of security concerns that would exist if inmates could self-select a portion of their schedules.

This court recommended dismissing Plaintiffs' related constitutional claims. R&R at 29-31, 35-37. However, RLUIPA imposes a greater burden on Defendants than does the First or Fourteenth Amendments, and requires them to show the Work Release Policy is the least restrictive means of addressing their safety concerns. *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010) ("The constitutional protection afforded [to inmates] under § 1983 is less strong" than those afforded under RLUIPA). *See also* R&R at 27. This court found that material questions of fact existed regarding the "least restrictive means" issue, and, as a result, recommended denying summary judgment on the *Jum'ah* RLUIPA claim. R&R at 18-21.

Plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied …the ability to participate in *Jum'ah* because of a conflicting work, school or similar detail. [56 at 20].

2. Halal Diet Claims

Plaintiffs allege that their faith requires adherence to dietary restrictions that prohibit the consumption of any food that is not "*halal*". Compl., ¶24. In other words, they desire a diet comprised of *halal* meats and/or vegetarian foods that have not been "cross-contaminated" by coming into contact with non-*halal* meats. Defendants contend that they are unable to provide a special *halal* diet due to cost constraints, but claim that they take measures to ensure that cross-contamination does not occur. This court recommended granting Defendants' summary judgment motion as to Plaintiffs' *halal* diet claim under the First Amendment's Free Exercise Clause (and related Michigan constitutional provision), but permitting their other *halal* diet claims to proceed. R&R at 40.

Plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied …a halal diet that is free of contamination by foods considered haram," *i.e.*, non-halal meats and/or vegetarian foods that have been "contaminated" by coming into contact with such meats. [56 at 20].

3. *Eid Feast* Claims

Plaintiffs also challenge the Defendants' alleged failure to accommodate their observance of the *Eid* Feasts. However, after this action was filed, the MDOC issued a Memo which made clear that observant Muslim inmates would be allowed to participate in the *Eid* Feasts. R&R at 6, 37. Defendants argued that the Memo rendered Plaintiffs' *Eid* Feast claims moot. This court found that Plaintiffs' claims were not moot because the Memo's contents had not been sufficiently incorporated into the Policy Directive as other allowable religious observances had been. R&R at 37-39. However, recognizing that Defendants do not dispute observant inmates' right to participate in the *Eids*, this court recommended granting summary judgment in Plaintiffs' favor on those claims. *Id*.

Whether or not this court's recommendation is ultimately adopted by the district court, the class certification question on Plaintiffs' *Eid* feasts claims is clearly moot; if the district court accepts the recommendation, the claims will have been resolved in the Plaintiffs' favor, and if the court rejects the recommendation, the Defendants will have prevailed. Accordingly, the class certification issue on those claims need not be addressed further.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (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).

"Although Rule 23(a)(2) refers to common questions of law or fact, in the plural, there need only be one question common to the class-though that question must be a 'common issue the resolution of which will advance the litigation.' Ultimately, the class may only be certified if, "after a rigorous analysis," the district court is satisfied that these prerequisites have been met. The burden is on the plaintiff "to establish his right" to class certification." *Alkire v. Irving*, 330 F.3d 802, 820 (6th Cir. 2003) (citations omitted).

In addition to satisfying the Rule 23(a) criteria, the proposed representative plaintiffs must also meet one of the criteria listed in Rule 23(b). Here, Plaintiffs claim they satisfy Rule 23(b)(2) [56 at 10], which provides 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).

III. ANALYSIS

A. Rule 23(a)(1) – Numerosity

Defendants do not dispute that Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement with respect to either of the proposed classes for their *Jum'ah* or *halal* diet claims. Doc. #62 at 2. The court also finds that Plaintiffs easily satisfy this requirement for both sets of claims. Plaintiffs allege (and Defendants do not dispute) that as of December 31, 2009, the MDOC housed

in excess of 1,800 Muslim inmates. *Id*.; Doc. #56 at 12. Plaintiffs have also shown that the each of the religious practices they seek to observe are sufficiently central to their faith that there are likely to be at least many hundreds of Muslim inmates in the proposed classes. Doc. #56 at 12. Such numbers, particularly considering their status as inmates, easily satisfies Rule 23(a)(1)'s numerosity requirement. *See Glover v. Johnson*, 85 F.R.D. 1 (E.D. Mich. 1977); *Johnson v. Martin*, 2002 U.S. Dist. LEXIS 12550 at *13 (W.D. Mich. Apr. 29, 2002); *Roman v. Korson*, 152 F.R.D. 101, 105 (W.D. Mich. 1993) (noting the "modern trend is to require a minimum of between 21 and 40 members" to meet the numerosity requirement).

B. Rule 23(a)(2) – Commonality

Rule 23(a)(2)'s "commonality" requirement "deals with shared questions of law or fact," and requires the representative plaintiffs to show that "there are questions of law or fact common to the class." *Sprague v. General Motors Corp*., 133 F.3d 388, 397 (6th Cir. 1998); Fed. R. Civ. P. 23(a)(2). As noted above, there "need only be one question common to the class" for the representative Plaintiffs to satisfy this "commonality" requirement. *Alkire*, 330 F.3d at 820; *In re. Whirlpool Corp. Front-Loading Washer Products*, 678 F.3d 409, 419 (6th Cir. 2012) ("There need only be one question common to the class…") (quoting *Sprague*, 133 F.3d at 397). However, not every "common question" of law or fact will suffice; "[w]hat we are looking for is a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397.

"[C]ases involving enforcement of a uniform policy or procedure, including those relating to prisoners, are often approved as class actions because they involved questions of fact and law common to all members." *Johnson,* 2002 U.S. Dist. LEXIS 12550 at *14 *(citing inter alia, Armstrong v. Davis,* 275 F.3d 849, 868-69 (9th Cir. 2001) ("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…")). *See also Jones v. Goord*, 190 F.R.D. 103, 111 (S.D.N.Y. 1999) ("The requirement that there be common questions of law and fact is satisfied in an action by prison inmates when 'inmates have a common interest in preventing the recurrence of the objectionable conduct.'") (citations omitted). As the court in *Glover* explained:

> Clearly each individual member of the class has a unique situation and has been affected in diverse ways by the alleged discriminatory policy. That there are differences in situation and effect does not preclude a finding by this Court of commonality. That each class member's case is in other ways unique does not affect the commonality of the action, as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation.

Glover, 85 F.R.D. at 4-5 (quoting *Sweet v. General tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976)). The court examines each of Plaintiffs' two sets of claims separately in this regard.

i. *Jum'ah* Claims

Plaintiffs' *Jum'ah* claims present issues common to every prospective class member. The Work Release Policy prohibits inmates from being "released from work or school assignments to attend group religious services or activities, consistent with restrictions on attending other personal interest activities." Policy Directive, ¶BB. Thus, all prospective Plaintiffs who wish to attend *Jum'ah* but who are unable to do so because they have a conflicting work or school assignment, face the same strict impediment to attending those religious services. *Glover,* 85 F.R.D. at 4-5.

As this court found in its R&R, even if the decision on whether to grant any particular accommodation turns on case-by-case analysis, that alone would not resolve the legal issues in this case because the Policy, at least on its face, prevents such accommodations. R&R at 21. The salient question in this case is whether the Work Release Policy is the least restrictive means of addressing the Defendants' security concerns, because with that Policy in place, an inmate may never obtain the individualized case-by-case consideration. R&R at 18-21. Thus, the Policy's

underlying legality is a question that is common to all members of the proposed class, and achieving a final answer to that question will certainly advance this litigation. *Sprague*, 133 F.3d at 397.

Defendants' merged the entirety of their "commonality" and "typicality" arguments into one single paragraph:

> It is the Defendants position that the Plaintiffs cannot satisfy prerequisites 2 and 3 because the various faiths represented by the Plaintiffs it is unclear whether there are questions of law common to all of the potential class members and whether the Plaintiffs' claims are typical of the potential class. The Plaintiffs are members of three different faiths, Sunni Islam (Salem and Traini), the Nation of Islam (Wilson), and the Moorish Science Temple of America (Dowdy-El). While all three of the aforementioned faiths share some common beliefs, in practice, they may have very different belief systems. It is unclear whether the injunctive relief the individual Plaintiffs seek would satisfy the membership of three separate faiths. For example, members of the Nation of Islam (NOI) often choose to follow a diet prescribed by Elijah Muhammad. The diet set forth Elijah Muhammad is far more restrictive than a standard halal diet. For example, NOI members who follow Elijah Muhammad's diet cannot eat meat or potatoes. Consequently, any relief this Court might order with respect to halal diets might not satisfy many members of the NOI. Any relief this Court might order that satisfies mainstream Sunni Muslims might not satisfy Shi'a Muslims, the Nation of Islam, or the Moorish Science Temple of America. Accordingly, the Defendants submit that this Court should deny class certification.

Doc. #62 at 3.

Defendants' vague response does not alter the above analysis. Defendants focused solely on Plaintiffs' *halal* diet claim, and made no specific argument with respect to their *Jum'ah* claims. And, as discussed above, while individual circumstances might be relevant to a case-by-case consideration of accommodation denials, they are irrelevant to the initial question of the Policy's overall legality.

In sum, the Work Release Policy's legality under RLUIPA presents a question of law common to each proposed class member, and Rule 23(a)(2)'s commonality requirement is satisfied. *See Mayweathers v. Newland*, 258 F.3d 930, 933 (9th Cir. 2001) (noting that the district court had certified a class of Muslim inmate plaintiffs who had sought relief similar to what the Plaintiffs seek in this case).

ii. *Halal* Diet Claims

Because the MDOC has a policy of not providing a *halal* diet to observant Muslim inmates, Doc. #55 at 9, Plaintiffs' claims challenging that policy satisfy Rule 23(a)(2)'s commonality requirement. *Glover,* 85 F.R.D. at 4-5. Here, common questions of both law and fact underscore Plaintiffs' *halal*-diet claims, including: (1) whether Defendants are, in general, legally required to provide inmates with a special *halal* diet under any circumstances; (2) whether, if that question is answered in the affirmative, Defendants have shown that such a requirement ought not to apply with respect to them due to their alleged financial condition; and (3) whether, regardless of the answer to the initial question, Defendants do, in fact, provide a diet that is *halal*-compliant. *See* R&R at 21-26; *Glover,* 85 F.R.D. at 4-5.

As noted above, Defendants' only response to the "commonality" question was to note that the three different forms of Islam practiced by the instant Plaintiffs "***may have*** very different belief systems" and that it was "***unclear*** whether the injunctive relief [requested] would satisfy" their respective faiths. Doc. #62 at 3 (emphasis added). Defendants' assertions are equivocal on their face, and were not supported by references to any record evidence. Instead, Defendants offered an equally unsupported hypothetical regarding the types of foods that are allowable under the different forms of Islam. *Id.* Moreover, even if there are some individual discrepancies in the types of foods that Defendants believe would be allowed under the different forms of Islamic

practice, those differences are immaterial here where the proposed class is narrowly defined as including only: "all current and future Michigan Muslim inmates who desire but have been denied …a halal diet that is free of contamination by foods considered haram." Doc. #56 at 20. *See Abdul-Malik v. Coombe*, 1996 WL 706914, at *2 (S.D.N.Y. Dec. 6, 1996) ("Clearly, the determination of whether [RLUIPA's precursor and constitutional provisions] mandate the provision of a Halal diet for Muslim inmates is a question of law common to all potential class members.")

C. Rule 23(a)(3) – Typicality

In *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007), the Sixth Circuit explained Rule 23(a)(3)'s commonality requirement as follows:

> Under Rule 23(a)(3), "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." In *Sprague*, the Court explained that "[t]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." On the other hand, the *Sprague* Court explained, the typicality requirement is not satisfied when a plaintiff can prove his own claim but not "necessarily have proved anybody's else's claim." Lastly, for the district court to conclude that the typicality requirement is satisfied, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law."

Here, again, the court conducts a separate analysis for each of Plaintiffs' two sets of claims.

i. *Jum'ah* Claims

In considering whether Plaintiffs have met Rule 23(a)(3)'s "typicality" requirement, it is first helpful to focus on the Defendants' perspective. If Defendants' position is correct, then they could, for no reason other than the verbiage in the Work Release Policy, deny any Muslim

inmate's request for a work/study release so that he could attend *Jum'ah*. In other words, it is the Policy itself which puts ***all*** inmates' religious-based scheduling requests on equal footing with each other.

Plaintiffs here are challenging the legality of that specific Policy, including the fact that any request to attend *Jum'ah* is entitled to no more consideration than would be an inmate's request to watch a television program. Work Release Policy, ¶BB. As a precursor to success, any aggrieved class member would be required to overcome the Policy's facial ban on religious-based "call-outs." Thus, at least at this stage, the Plaintiffs' claims arise from the same "practice or course of conduct that gives rise to the claims of other class members…" *Beattie*, 511 F.3d at 561. *See also Mayweathers*, 258 F.3d at 933.

ii *Halal* Diet Claims

The "typicality" issue in this case is on all fours with the one at issue in *Abdul-Malik*, 1996 WL 706914, at *3. The *Abdul-Malik* court was considering a Muslim plaintiff inmate's motion to certify a class of all "Muslims [who] are now or will be incarcerated in [State of New York correctional facilities" who desire a *halal* diet. *Id*. at *1. The defendant in that case raised almost precisely the same typicality argument that Defendants raise here, *i.e*., that Plaintiffs "are members of three different faiths" and that "[w]hile all three [] share some common beliefs, in practice they may have very different belief systems. It is unclear whether the injunctive relief the individual Plaintiffs seek would satisfy the membership of three separate faiths." Doc. #62 at 3. The *Abdul-Malik* court resoundingly rejected that argument:

> The typicality requirement is satisfied when each class member's claim arises from the same events as give rise to the named representative's claims and each class member will make the same legal arguments to prove liability. The typicality requirement is not defeated by minor variations in the fact patterns of individual class member's claims.

> The defendant contends that the plaintiff's claims are not typical of the proposed class because there is no evidence in the record that all Muslims follow the same dietary practices as the plaintiff. He points to the fact that members of the Nation of Islam feel that their religion is distinct from other Muslim sects. The defendant does not, however, contend that members of the Nation of Islam would not follow a Halal diet. Moreover, the defendant does not dispute that a Halal diet is a known dietary practice….the speculation that some Muslim sects may impose stricter dietary restrictions than those contained in a Halal diet does not render plaintiff atypical of other Muslim inmates.

Abdul-Malik, at *3.

The same rationale compels a finding that Plaintiffs here satisfy Rule 23(a)(3)'s "typicality" requirement. Plaintiffs have narrowly defined a proposed class comprised of "all current and future Michigan Muslim inmates who desire but have been denied …a halal diet that is free of contamination by foods considered haram." Regardless of the minor dietary differences identified by Defendants (which differences were unsupported, speculative, and lacking in relevance[3]), the class members' claims arise from the same "practice or course of conduct that gives rise to the claims of other class members…" – the MDOC's policy of not providing *halal* meals to its Muslim inmates. *Beattie*, 511 F.3d at 561. *See also Abdul-Malik*, at*3. Accordingly, the typicality requirement is met as to the *halal* diet claims.

D. <u>Rule 23(a)(4) – Fair and Adequate Protection of Class Members' Interests</u>

Rule 23(a)(4) requires that the that "the representative parties will fairly and adequately protect the interests of the class." That requirement has two components: "(1) the representative

[3] The only particular dietary difference referenced by Defendants is that Nation of Islam members supposedly do not eat meat or potatoes. Doc. #62 at 3. However, Defendants themselves have taken the position that they meet those inmates' religious dietary needs by providing vegetarian foods that are not contaminated. Thus, unless Defendants are suggesting that the court might order the MDOC to provide those or other inmates with a meat-only or potato-only diet, the Defendants have failed to meaningfully differentiate between the proposed class members' claims in a way that would impact this court's analysis of the typicality question.

must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). There is no dispute that both of those prongs are satisfied here. First, the Defendants do not argue otherwise. Second, the representative Plaintiffs clearly have common interests with the unnamed class members, each of whom (by definition) will be an inmate who desires the accommodations being sought by the current Plaintiffs. Moreover, for the reasons stated above, the claims and issues involved are common and typical to all of the proposed plaintiffs. *Johnson,* 2002 U.S. Dist. LEXIS 12550, at *25-26. Finally, the representative Plaintiffs have personally experienced the alleged burdens imposed by the restrictions they challenge, have testified, and have vigorously pursued this action over a lengthy period of time through qualified counsel, the Dickinson Wright law firm and the ACLU. They have also engaged experts who have provided cogent expert reports in support of their positions. In sum, there is no dispute that Rule 23(a)(4) is satisfied.

E. Rule 23(b)(2) is Satisfied

As noted above, in addition to satisfying the Rule 23(a) criteria, representative plaintiffs must also meet one of the criteria listed in Rule 23(b). Here, Plaintiffs claim they satisfy Rule 23(b)(2), which provides 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). As noted in *Johnson*, 2002 U.S. Dist. LEXIS 12550, at *28:

> [P]rison section 1983 suits involving an allegedly illegal or unconstitutional prison policy are well situated for certification under Rule 23(b)(2) because the plaintiff classes seek to enjoin the operation of the policy and the grounds for relief depend on the general legality or constitutionality of the policy and on the applicability of common defenses to the entire class.

That is precisely the case here with respect to both Plaintiffs' *Jum'ah* and *halal* diet claims. With respect to each of those claims, the Defendants have adopted a policy – which they believe to be legal – that applies generally to all Muslim inmates seeking the type of relief sought by the Plaintiffs here. Those with a conflicting work or school assignment are prohibited by the Work Release Policy from obtaining a call-out to attend *Jum'ah*, and those seeking a *halal* diet cannot obtain one because the MDOC has a policy of not providing them (Doc. #55 at 9), or at least a professed financial inability to do so. Because Plaintiffs' case as to each claim rises or falls on the general legality of those respective issues, any final injunctive or declaratory relief given to them will necessarily be "appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Accordingly, Plaintiffs here satisfy Rule 23(b)(2).

IV. CONCLUSION

For the foregoing reasons, the court **RECOMMENDS** that Representative Plaintiffs' Motion for Class Certification [56] be **GRANTED**.

Dated: August 15, 2012
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

Within 14 days after being served with a copy of this Report and Recommendation and Order, any party may serve and file specific written objections to the proposed findings and recommendations and the order set forth above. *See* 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d)(1). Failure to timely file objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, (1985); *United States v. Sullivan,* 431

F.3d 976, 984 (6th Cir. 2005). Only specific objections to this Report and Recommendation will be preserved for the Court's appellate review; raising some objections but not others will not preserve all objections a party may have. *See Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987); *see also Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006). Copies of any objections must be served upon the Magistrate Judge. *See* E.D. Mich. LR 72.1(d)(2).

A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on August 15, 2012.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager

Tab 6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

WILLIAM R. FREEMAN, CARLOS PATTERSON, SIDNEY MONTGOMERY, ELISELLO De La'O, TRAVIS SMITH, MICHAEL CUEVAS, RAY MASON, DAVID F. VELA, OSCAR FORTZ, De'SHONA WILLIAMS, Individually and on behalf of all others similarly situated.	§
Plaintiffs	§
	§ **CIVIL ACTION NO. 2-00-099-J**
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, TEXAS DEPARTMENT OF CRIMINAL JUSTICE - INSTITUTIONAL DIVISION, TDCJ Executive Director WAYNE SCOTT, GARY JOHNSON, JERRY GROOM, T. J. MEDART, RICHARD LOPEZ, DAVID SWEETEN, WAYNE HORTON, J. D. SMITH, KEITH PRICE, and ROY MURPHY	§
Defendants	§

ORDER ON MOVANT'S MOTION FOR CLASS CERTIFICATION

On May 7, 2000, the Court considered MOVANT, CARLOS PATTERSON'S, MOTION FOR CLASS CERTIFICATION. After considering the motion, the response, and after a hearing, the Court

GRANTS the Motion and orders that the portion of Civil Action No. 2-00-099-J requesting injunctive relief proceed as a class action pursuant to FED.R.CIV.P. 23 and that MOVANT, CARLOS PATTERSON, be designated as class representative.

SIGNED on May 7, 2000.

Mary Lou Robinson
U.S. DISTRICT JUDGE

APPROVED & ENTRY REQUESTED:

R.L. PETE McKinney


KeyCite Yellow Flag - Negative Treatment
Distinguished by Asgeirsson v. Abbott, 5th Cir.(Tex.), September 25, 2012

369 F.3d 854
United States Court of Appeals,
Fifth Circuit.

William R. FREEMAN, Individually and on behalf of all others similarly situated; Carlos Patterson, Class Representative Individually and on behalf of all others similarly situated; Sidney Montgomery, Individually and on behalf of all others similarly situated; Elisello De La'O, Individually and on behalf of all others similarly situated; Travis Smith, Individually and on behalf of all others similarly situated; Michael Cuevas, Individually and on behalf of all others similarly situated; Ray Mason, Individually and on behalf of all others similarly situated; David F. Vela, Individually and on behalf of all others similarly situated; Oscar Fortz, Individually and on behalf of all others similarly situated; De'Shona Williams, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE; Texas Department of Criminal Justice, Institutional Division; Wayne Scott, Texas Department of Criminal Justice Executive Director; Gary L. Johnson, Texas Department of Criminal Justice, Institutional Division Director; Jerry Groom, Texas Department of Criminal Justice, Former Administrator of Chaplaincy Program; T.J. Medart, Texas Department of Criminal Justice, Institutional Division Former Warden, Price Daniel Unit; Richard Lopez, Texas Department of Criminal Justice, Institutional Division Administrator of Chaplaincy Program; David Sweeten, Texas Department of Criminal Justice, Institutional Division Former Assistant Warden, Price Daniel Unit; Wayne Horton, Texas Department of Criminal Justice, Institutional Division Former Chaplain, Price Daniel Unit; Keith Price, Texas Department of Criminal Justice, Institutional Division Warden, Bill Clements Unit; Roy Murphy, Texas Department of Criminal Justice, Institutional Division Chaplain, Bill Clements Unit; J.D. Smith, Defendants-Appellees.

No. 03-10443.
|
May 7, 2004.

Synopsis

Background: Inmates brought class action alleging that Texas Department of Criminal Justice (TDCJ) failed to provide them adequate opportunity to practice their faith, in violation of the Free Exercise and Equal Protection Clauses of the Constitution, and one inmate also asserted retaliation claim. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., entered summary judgment in favor of TDCJ. Inmates appealed.

Holdings: The Court of Appeals, Edith H. Jones, Circuit Judge, held that:

[1] prison policy under which inmates belonging to certain church could attend weekly services only with "Christian/non-Roman Catholic" sub-group did not violate inmates' free exercise rights;

[2] policy did not violate inmates' equal protection rights; and

[3] prison officials did not violate inmate's free speech rights in transferring him to another unit after he criticized chaplain during church service.

Affirmed.

West Headnotes (19)

[1] **Federal Civil Procedure** Weight and Sufficiency

A summary judgment nonmovant cannot satisfy its burden of setting forth specific facts showing a genuine issue for trial with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

270 Cases that cite this headnote

[2] **Constitutional Law**Religious Services and Ceremonies; Study and Prayer Groups
PrisonsServices, Ceremonies, Texts, Study, and Prayer

Prison policy of providing weekly religious services for five "major faith sub-groups," such that inmates belonging to certain church could attend weekly services only with "Christian/non-Roman Catholic" sub-group, did not violate inmates' free exercise rights, where regulation was neutral, policy was rationally related to staff, space, and financial concerns, policy was reasonable, and inmates had alternative means of exercising religion, including supplemental services conducted by volunteers from their faith, which, unlike weekly services, might include communion and a cappella singing. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[3] **Prisons**Regulation and Supervision in General; Role of Courts

Prison regulations that impinge on fundamental constitutional rights are reviewed under the deferential standard of *Turner v. Safley,* under which such a prison regulation is valid if it is reasonably related to legitimate penological interests.

18 Cases that cite this headnote

[4] **Prisons**Regulation and Supervision in General; Role of Courts

A four-factor test is used to review prison regulations that impinge on fundamental constitutional rights: (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced; (2) whether the inmates have available alternative means of exercising the right; (3) the impact of the accommodation on prison staff, other inmates, and the allocation of prison resources generally; and (4) whether there are ready alternatives to the regulation.

66 Cases that cite this headnote

[5] **Prisons**Management and Operation

A prison policy that impinges on fundamental constitutional rights may be struck down on the basis that it is not rationally related to legitimate government objectives only if its relationship to the government objective is so remote as to render the policy arbitrary or irrational.

14 Cases that cite this headnote

[6] **Prisons**Regulation and Supervision in General; Role of Courts
PrisonsCosts of Incarceration

Staff and space limitations, as well as financial burdens, are valid penological interests, for purposes of determining whether there is a rational relationship between a prison regulation and the legitimate government interest advanced, as required to uphold a regulation that impinges on a fundamental constitutional right.

22 Cases that cite this headnote

[7] **Constitutional Law**Prisons and Pretrial Detention

The pertinent question in determining whether inmates have available alternative means of exercising a right, for purposes of reviewing a prison regulation that impinges on inmates' free exercise rights, is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith. U.S.C.A. Const.Amend. 1.

72 Cases that cite this headnote

[8] **Constitutional Law** Prisons and Other Confinement
Prisons Services, Ceremonies, Texts, Study, and Prayer

Prison policy of providing weekly religious services for five "major faith sub-groups," such that inmates belonging to certain church were required to attend weekly services with "Christian/non-Roman Catholic" sub-group, did not violate inmates' equal protection rights, where policy was neutral, and there was little or no evidence that similarly situated faiths were afforded superior treatment, or that policy was product of purposeful discrimination. U.S.C.A. Const.Amend. 14.

15 Cases that cite this headnote

[9] **Constitutional Law** Prisons and Other Confinement

The Equal Protection Clause of the Fourteenth Amendment does not demand that every religious sect or group within a prison, however few in numbers, must have identical facilities or personnel. U.S.C.A. Const.Amend. 14.

16 Cases that cite this headnote

[10] **Constitutional Law** Prisons and Pretrial Detention

Prison administrators must provide inmates with reasonable opportunities to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments. U.S.C.A. Const.Amends. 1, 14.

21 Cases that cite this headnote

[11] **Constitutional Law**Prisons

Turner v. Safley, under which a prison regulation that impinges on a fundamental constitutional right is valid if it is reasonably related to legitimate penological interests, applies to equal protection claims. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[12] **Civil Rights**Government Agencies and Officers
Civil Rights Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General

Federal courts employ a two-step inquiry to determine whether individual officers are entitled to qualified immunity: first, whether the facts alleged, taken in the light most favorable to the plaintiff, establish that the officers' conduct violated a constitutional right, and, second, if a violation of a constitutional right occurred, whether the right was clearly established at that time.

82 Cases that cite this headnote

[13] **Civil Rights**Acts or Conduct Causing Deprivation

To sustain a § 1983 retaliation claim, a plaintiff must establish: (1) the existence of a specific constitutional right; (2) the defendant's intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. 42 U.S.C.A. § 1983.

31 Cases that cite this headnote

[14] **Prisons** Status, Rights, and Disabilities in General
Prisons Regulation and Supervision in General; Role of Courts

In considering whether an inmate's constitutional right has been violated, the Court of Appeals is cognizant that inmates do not forfeit all constitutional rights when they pass through the prison's gates, but it is equally cognizant of the inherent demands of institutional correction, the deference owed to prison administrators, and the subjugation of individual liberty that lawful incarceration necessarily entails.

10 Cases that cite this headnote

[15] **Constitutional Law** Prisons

A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. U.S.C.A. Const.Amend. 1.

30 Cases that cite this headnote

[16] **Constitutional Law** Discipline in General
Prisons Services, Ceremonies, Texts, Study, and Prayer

Prison officials did not violate inmate's free speech rights in transferring him to another unit after he criticized chaplain during church service, where his remonstration concerning chaplain's alleged "departure from the faith" amounted to public rebuke of member of prison administration's staff, and incited about 50 other prisoners in walkout from the church service. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[17] **Constitutional Law** Grievances in General

Under the First Amendment, an inmate retains, in a general sense, a right to criticize prison officials. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[18] **Constitutional Law** Prisons and Pretrial Detention

To succeed on a claim of a free speech violation, an inmate must do more than point to the existence of a generic First Amendment right; he must also establish that he exercised that right in a manner consistent with his status as a prisoner. U.S.C.A. Const.Amend. 1.

29 Cases that cite this headnote

[19] **Constitutional Law** Discipline in General

Prison officials may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of Texas.
Before JONES, MAGILL* and SMITH, Circuit Judges.

* Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Opinion

EDITH H. JONES, Circuit Judge:

This lawsuit arises from a longstanding dispute regarding the adequacy of Church of Christ religious services afforded Texas prisoners. A class of disaffected inmates ("the class") filed a civil rights suit alleging that the Texas Department of Criminal Justice ("TDCJ") religious accommodations policy violates the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[1] Also, William R. Freeman, ***858** a member of the class, alleges that he was transferred to another unit in retaliation for exercising his First Amendment right to free speech. The district court granted the defendants' motion for summary judgment and dismissed the suit. We AFFIRM.

1 Surprisingly, the class chose not to bring a cause of action under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Under RLUIPA, TDCJ would have been required to show that its regulation: "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a)(2000). Hence, the RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impinge on inmates' free exercise of religion. *See Turner v. Safley,* 482 U.S. 78, 90, 107 S.Ct. 2254, 2262, 96 L.Ed.2d 64 (1987) (explicitly rejecting the application of the "least restrictive means" standard to inmates' First Amendment free exercise claims); *but see Madison v. Riter,* 355 F.3d 310, 315 n. 1 (4th Cir.2003) (recognizing that "[t]he deferential test that courts customarily apply to prison regulations, however, does not operate to prevent legislative bodies from adopting a more searching standard").

I. BACKGROUND

Freeman, a former law enforcement officer, began serving a life sentence for murder in 1987 and was eventually placed in the Price Daniel Unit in Snyder, Texas, where he joined the local 37th Street Church of Christ.[2] TDCJ assigned Chaplain Wayne Horton, a Church of Christ member, to the Price Daniel Unit. However, according to Freeman, Chaplain Horton's teachings were "too ecumenical" and departed from established Church of Christ doctrine.

2 In 1997, Freeman was transferred to the Neal Unit, but was returned to the Price Daniel Unit in 1998, apparently at the behest of a Texas state legislator.

On February 3, 1998, Freeman filed an administrative grievance criticizing Chaplain Horton's performance of the Church of Christ services and TDCJ's decision to reduce the Church of Christ's two-hour service by one half-hour. In his grievance, Freeman requested, inter alia, that the elders from the 37th Street Church of Christ oversee the inmates' religious services, that Church of Christ members be permitted to conduct their services free from Chaplain Horton's interference, and that TDCJ restore their worship time to two hours. TDCJ rejected the grievance and Freeman's administrative appeal.

Freeman later circulated a statement to fellow inmates and non-incarcerated Church of Christ leaders in which he denounced Chaplain Horton as having "departed from the faith" and requested that Chaplain Horton be removed from his leadership position over Church of Christ members in the prison. In his statement, Freeman announced that he, and other inmates, were withdrawing "spiritual fellowship" from Chaplain Horton.[3]

3 According to the class's complaint, " '[w]ithdrawing fellowship' is making a congregational denunciation of an individual's transgression after having gone first one-on-one in an attempt to resolve the issue [.]" The class draws this biblical explanation from *Matthew* 18:15-17.

Freeman asked for, and received, permission to read the statement during a Church of Christ service in the prison.[4] Sometime after Freeman began reading the statement, Chaplain Horton ordered him to stop. Freeman complied and was escorted out of the chapel, followed by approximately 50 inmates. The incident was written up as a major disciplinary infraction for causing a disturbance, but was later reduced to a minor

disciplinary case. Shortly afterward, Freeman was transferred to the high-security Allred Unit.

4 The record is uncertain whether Chaplain Horton was aware of the statement's content when he granted Freeman permission to read the letter.

Freeman and Carlos Patterson filed this class action suit on behalf of themselves and others against TDCJ.[5] A class was certified, comprising TDCJ inmates who subscribe to the Church of Christ faith. In the complaint, the class alleges that TDCJ's failure to provide them an adequate opportunity to practice the Church ***859** of Christ faith violates the Free Exercise and Equal Protection clauses of the Constitution. The class seeks, inter alia, a permanent injunction requiring TDCJ to provide additional religious accommodations.[6] Additionally, Freeman filed a personal 42 U.S.C. § 1983 claim alleging that he was transferred in retaliation for exercising his First Amendment right to criticize Chaplain Horton publicly.

5 Patterson was designated as the class representative. TDCJ is not challenging the propriety of the class.

6 Specifically, the requested injunction would: (1) order TDCJ to recognize the Church of Christ as a Christian religion separate and apart from other faiths; (2) enjoin TDCJ prison officials from violating Church of Christ members' right to worship; (3) order prison officials to allow Church of Christ members to have one hour of separate worship time each Sunday according to tenets "essential to their salvation," *i.e.,* a service that offers communion and a cappella singing; (4) order TDCJ prison officials to list Church of Christ on the schedule of available religious services; (5) order TDCJ prison officials to allow Church of Christ ministers and teachers, from outside the prison, to conduct individual Bible studies and/or assist with religious services; and (6) order TDCJ prison officials to allow these outside Church of Christ ministers and teachers to perform baptism by full immersion at an inmate's request.

TDCJ provides weekly religious services for what it considers to be the five "major faith sub-groups" in its prisons: Roman Catholic; Christian/non-Roman Catholic; Jewish; Muslim; and Native American.[7] Under the TDCJ policy, the Church of Christ falls within the Christian/non-Roman Catholic sub-group. TDCJ offered evidence that it attempts to place each individual worshiper with the designated sub-group he would choose on his own, while recognizing that not all elements of the individual faiths will be accommodated.

7 These "major faith sub-groups" are selected on the basis of a survey of prisoners indicating their faith preferences (140 were indicated), and an analysis of the commonality among those faiths. The survey revealed that there are about 1,743 Church of Christ members in the Texas prison population, comprising roughly one percent of the total. In contrast, there are about 47,318 Baptists, 31,211 Roman Catholics, and 8,370 Muslims.

TDCJ also offers a variety of supplemental devotional opportunities for Church of Christ members. In 41 TDCJ units, worship services are conducted by Church of Christ volunteers, who are often able to tailor the services to include communion and a cappella singing. Immersion baptism may be arranged for and performed by a Church of Christ minister at the inmate's request. Finally, TDCJ permits inmates to meet with an approved spiritual advisor twice a month.

The district court denied the class's request for a permanent injunction, finding that TDCJ policy does not violate the Supreme Court's interpretation of inmate free exercise rights.[8] The district court also held that the prison officials were entitled to qualified immunity on Freeman's § 1983 retaliation claim.[9] The district court granted the defendants' motion for summary judgment, and this appeal followed.

8 The district court rejected the equal protection claim without elaboration. However, the district court did conclude, without directly addressing the equal protection claim, that similarly situated faiths were treated alike.

9 The district court further determined that Freeman's retaliation claim against the prison officials, in their official capacity, was barred by the Eleventh Amendment and that Freeman could not sue TDCJ, a state agency, under § 1983. Freeman has not appealed these adverse rulings.

II. STANDARD OF REVIEW

[1] We review the district court's summary judgment decision de novo. *Chriceol v. Phillips,* 169 F.3d 313, 315 (5th Cir.1999). Summary judgment is warranted ***860** "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party meets this initial burden, the nonmoving party is required to set forth specific facts showing a genuine issue for trial. FED.R.CIV.P. 56(e). However, the nonmovant cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc).

III. DISCUSSION

This appeal raises three challenges to the district court's summary judgment ruling: the dismissal of the class's free exercise claim; the dismissal of the class's equal protection claim; and the dismissal of Freeman's retaliation claim. We address each in turn.

A. Free Exercise Claim

[2] The class alleges that TDCJ's religious accommodation policy unconstitutionally impinges on the free exercise of their chosen faith. TDCJ counters that its policy is the product of legitimate penological concerns: (1) staff supervision requirements; (2) unit and individual security concerns; (3) the availability of TDCJ-approved religious volunteers to provide assistance; (4) limited meeting time and space; and (5) the percentage of the offender population that the requesting faith group represents. Thus, TDCJ argues that its decision to designate five major religious sub-groups, while providing supplemental Church of Christ services when feasible, should be sustained.

[3] [4] Prison regulations that impinge on fundamental constitutional rights are reviewed under the deferential standard set forth in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Under *Turner,* "a prison regulation that impinges on inmates' constitutional rights ... is valid if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254. *Turner* employs a four-factor test to resolve this inquiry: (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced; (2) whether the inmates have available alternative means of exercising the right; (3) the impact of the accommodation on prison staff, other inmates, and the allocation of prison resources generally; and (4) whether there are "ready alternatives" to the regulation. *Id.* at 89-91, 107 S.Ct. 2254; *see also O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50, 107 S.Ct. 2400, 2405, 96 L.Ed.2d 282 (1987). A court "must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh v. Abbott,* 490 U.S. 401, 414-15, 109 S.Ct. 1874, 1882, 104 L.Ed.2d 459 (1989); *see also Scott v. Miss. Dept. of Corr.,* 961 F.2d 77, 81 (5th Cir.1992) (a

court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard).

The undisputed summary judgment evidence shows that TDCJ's policy satisfies *Turner* and passes constitutional muster. Foremost, TDCJ's regulation is neutral-it "operate[s] ... without regard to the content of the expression." *Turner,* 482 U.S. at 90, 107 S.Ct. at 2262; *Green v. Polunsky,* ***861** 229 F.3d 486, 490 (5th Cir.2000) (beard prohibition neutral because it affected "all inmates, regardless of their religious beliefs"). There is no evidence that TDCJ's policy is targeted toward the Church of Christ or favors one religious group over another.

[5] TDCJ's policy is rationally related to legitimate government objectives. The policy may be struck down, on this basis, only if its relationship to the government objective is "so remote as to render the policy arbitrary or irrational." *Turner,* 482 U.S. at 89-90, 107 S.Ct. at 2262.

[6] First, we agree with TDCJ that staff and space limitations, as well as financial burdens, are valid penological interests. *See Ganther v. Ingle,* 75 F.3d 207, 211 (5th Cir.1996). "Prison administrators, like most government officials, have limited resources to provide the services they are called upon to administer." *Al-Alamin v. Gramley,* 926 F.2d 680, 686 (7th Cir.1991).[10]

10 The class disputes TDCJ's reliance on financial considerations, arguing that under *Smith v. Sullivan,* 553 F.2d 373, 378 (5th Cir.1977), inadequate resources can *never* be a justification for depriving an inmate of his constitutional rights. *Smith,* however, primarily concerned an Eighth Amendment challenge to prison confinement conditions. 553 F.2d at 375. The court held that financial considerations are not a vehicle for circumventing the dictates of the Eighth Amendment, especially those embodied in prior court orders. But, such a conclusion in no way detracts from the legitimate place financial resources, or the lack thereof, hold in the *Turner* First Amendment equation.

Additionally, the decision to offer worship services to five broad faith sub-groups, augmented by supplemental religious services to the other groups, including the Church of Christ, is eminently reasonable. Although some Church of Christ prisoners may not be able to attend a service perfectly suited to their faith, this limitation is dictated by the demands of administering religious services to tens of thousands of inmates representing widely divergent faiths. TDCJ's policy provides the flexibility needed to accommodate the religious needs, to some degree, of the entire prison population. Thus, it satisfies the "rational relationship" test-the paramount inquiry under *Turner.*

The TDCJ policy also fulfills the remaining *Turner* elements. Many of the Church of Christ inmates are given "alternative means" of exercising their religious beliefs.

Turner, 482 U.S. at 90, 107 S.Ct. at 2262. The class argues that the policy effectively bars the exercise by many Church of Christ inmates of their constitutional right to attend a Sunday service that includes communion, singing without instruments, teaching, and an opportunity for baptism by full immersion. Their evidence suggests that these elements represent tenets of their faith. In their view, the imposition on some of the class of participating in a "generic 'Protestant' service" is not a reasonable accommodation. Moreover, the class contends that if TDCJ is able to offer a distinctive Church of Christ service in 41 units, then it must do so in all of them.

[7] This argument is without merit. The pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith. *See* *Goff v. Graves,* 362 F.3d 543, 549 (8th Cir.2004) ("The critical question for *Turner* purposes is whether the prison officials' actions deny prisoners their free-exercise rights without leaving open sufficient alternative avenues for religious exercise."). The quintessential rebuttal of the class's position rests in *O'Lone,* where the Supreme Court upheld a regulation that prohibited Muslim prisoners from attending ***862** Friday afternoon services. 482 U.S. at 346-48, 107 S.Ct. at 2403-05. Given the availability of a number of other Muslim practices in the prison, the Court upheld the policy. *Id.*

Likewise, many of the inmates in the instant case reside in units that schedule supplemental worship services conducted by Church of Christ volunteers and structured like free-world Church of Christ assemblies to frequently include communion and a cappella singing. TDCJ permits Church of Christ members to arrange for immersion baptism services, permits the possession of religious literature, and allows inmates to meet with an approved spiritual advisor. Such supplemental programs, offered in addition to the weekly Christian/non-Roman Catholic worship services, furnish the inmates with "alternative means" of exercising their religion. *See* *Id.* at 351-53, 107 S.Ct. 2400.

TDCJ persuasively contends that yielding to the class's expansive demands would spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates, and prison resources. *Turner,* 482 U.S. at 90, 107 S.Ct. at 2262 ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of correctional officials."). Moreover, no obvious, easy alternatives would accommodate both the class's requests and TDCJ's administrative needs. *Turner,* 482 U.S. at 90, 107 S.Ct. at 2262. Despite the class's arguments to the contrary, prison officials do not "have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional

complaint." *Id.* at 90-91, 107 S.Ct. 2254. The class has not offered an alternate solution that would expose TDCJ's policy as an "exaggerated response to prison concerns." *Id.* at 90, 107 S.Ct. 2254. In particular, the fact that TDCJ already allows distinctive Church of Christ worship services in some units does not demonstrate the feasibility, much less constitutional imperative, of offering them in all 100+ units. Demands imposed by security, architecture, number of religious adherents, and schedule conflicts all potentially limit the grant of further specific accommodations in every unit. There is no factual basis for our disregarding TCDJ's policy choice in these units.

In the end, TDCJ has not abused the substantial discretion *Turner* and its progeny afford prison administrators. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89, 107 S.Ct. 2254. TDCJ's policy offers reasonable accommodations to permit Church of Christ members to exercise their religion. Therefore, we affirm the district court's dismissal of the class's First Amendment free exercise claim.

B. Equal Protection Claim

[8] [9] [10] [11] Next, the class alleges that TDCJ violated the Fourteenth Amendment's equal protection guarantee by favoring other religions over the Church of Christ. "To succeed on their equal protection claim [the class] must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Muhammad v. Lynaugh,* 966 F.2d 901, 903 (5th Cir.1992) (citing *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)). However, the Fourteenth Amendment does not demand "that every religious sect or group within a prison-however few in numbers-must have identical facilities or personnel." ***863** *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 1082 n. 2, 31 L.Ed.2d 263 (1972). Instead, prison administrators must provide inmates with "reasonable opportunities ... to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments." *Id. Turner* applies with corresponding force to equal protection claims. *Williams v. Morton,* 343 F.3d 212, 221 (3d Cir.2003). For the reasons discussed above, TDCJ's policy satisfies *Turner*' s neutrality requirement. The class offered little or no evidence that similarly situated faiths are afforded superior treatment, or that TDCJ's policy was the product of purposeful discrimination. Accordingly, the class's equal protection claim also fails.

C. Freeman's Retaliation Claim

[12] Freeman challenges the dismissal of his retaliatory transfer claim on qualified immunity grounds. Federal courts employ a two-step inquiry to determine whether the individual defendants are entitled to qualified immunity: First, whether the facts alleged, taken in the light most favorable to the plaintiff, establish that the officers' conduct violated a constitutional right; second, if a violation of a constitutional right occurred, whether the right was "clearly established" at that time. *See* *Price v. Roark,* 256 F.3d 364, 369 (5th Cir.2001). The district court found, under the first stage of this inquiry, that Freeman's constitutional right to free speech was not violated. We agree.[11]

11 The district court held, in the alternative, that even if the prison officials had violated Freeman's right to free speech, the officers' actions were objectively reasonable in light of the law as it existed at the time. Because we conclude that the prison officials did not violate the First Amendment, we need not reach the district court's alternative holding. *See* *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991).

[13] To sustain a § 1983 retaliation claim, Freeman must establish: (1) the existence of a specific constitutional right; (2) the defendant's intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. *See* *Woods v. Smith,* 60 F.3d 1161, 1166 (5th Cir.1995). The key question, in the instant appeal, is whether Freeman's public criticism of Chaplain Horton was protected by the First Amendment. "If the inmate is unable to point to a specific constitutional right that has been violated, the claim will fail." *Jones v. Greninger,* 188 F.3d 322, 325 (5th Cir.1999) (citing *Tighe v. Wall,* 100 F.3d 41, 43 (5th Cir.1996)).

[14] [15] The Supreme Court has admonished that inmates do not forfeit all constitutional rights when they pass through the prison's gates. *Jones v. N.C. Prisoners' Labor Union,* 433 U.S. 119, 137, 97 S.Ct. 2532, 2544, 53 L.Ed.2d 629 (1977) (Burger, C.J., concurring); *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979). However, the Court is equally cognizant of the inherent demands of institutional correction, the deference owed to prison administrators, and the subjugation of individual liberty that lawful incarceration necessarily entails. *See* *Jones,* 433 U.S. at 132, 97 S.Ct. at 2541 (recognizing that prison administrators may curtail an inmate's ability to exercise constitutional rights to prevent "disruption of prison order," ensure stability, or to advance other "legitimate penological objectives of the prison environment"). As a result, "a prison inmate retains those First Amendment rights that are not inconsistent with his status

as a prisoner or with the legitimate penological objectives of the corrections system." *Pell,* 417 U.S. at 822, 94 S.Ct. at 2804; *see also* *Jackson v. Cain,* 864 F.2d 1235, 1248 (5th Cir.1989) ("A prison inmate is entitled to his First Amendment right to freedom of expression so long as it is not inconsistent with his status as a prisoner and does not adversely ***864** affect a legitimate state interest.") (citations omitted).

[16] [17] [18] Freeman contends that the defendants violated his First Amendment right to criticize Chaplain Horton publicly. Freeman does retain, in a general sense, a right to criticize prison officials. *Woods v. Smith,* 60 F.3d 1161, 1164 (5th Cir.1995); *Gibbs v. King,* 779 F.2d 1040, 1046 (5th Cir.1986) (quoting *Ruiz v. Estelle,* 679 F.2d 1115, 1153 (5th Cir.), *opinion amended in part and vacated in part,* 688 F.2d 266 (5th Cir.1982)) ("[P]rison officials [are] prohibited from 'retaliation against inmates who complain of prison conditions or official misconduct.' "). But, to succeed, Freeman must do more than point to the existence of a generic First Amendment right. He must also establish that he exercised that right in a *manner* consistent with his status as a prisoner.

In *Adams v. Gunnell,* 729 F.2d 362, 367-68 (5th Cir.1984), a prison disciplined inmates for collaborating in a prison-wide petition. While recognizing that prisoners may exercise a variety of First Amendment rights, the court reasoned, nevertheless, that where internal grievance procedures are available, a prison may proscribe the use of internally circulated petitions if it believes they contain the potential for inciting violence. *Id.* at 368 (citing *Jones,* 433 U.S. at 128, 97 S.Ct. at 2539). *Adams* thus confirmed the prison's authority to circumscribe the manner in which a grievance or criticism right is exercised.

[19] The present case is no different. Prison officials may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment. *See* *Goff v. Dailey,* 991 F.2d 1437, 1439 (8th Cir.1993) (recognizing that a "prison has a legitimate penological interest in punishing inmates for mocking and challenging correctional officers by making crude personal statements about them in a recreation room full of other inmates"). As in *Adams,* internal grievance procedures remained open to Freeman, and in fact, Freeman availed himself of this process to express his theological disagreements with Chaplain Horton. Freeman chose, however, to go further and publicly remonstrate concerning Horton's "departure from the faith," theological errors, and leading of the prisoners into views contrary to Church of Christ doctrine. His conduct amounted to a public rebuke of Chaplain Horton, a member of the prison administration's staff, and was intended to, and did, incite about 50 other prisoners in a walkout from the church service. Therefore, the manner of Freeman's statement was inconsistent with his status as a prisoner and is not afforded First Amendment protection.[12]

12 We note, however, that the situation presented here is fundamentally different from that in *Clarke v. Stalder,* 121 F.3d 222 (5th Cir.1997), *vacated en banc by,* 154 F.3d 186 (5th Cir.1998). In *Clarke,* the panel rejected a Louisiana prison rule that prohibited inmates from verbally challenging "the legality of an official's actions." 121 F.3d at 229. First, the panel opinion was vacated by the grant of en banc rehearing and is not precedential. Second, this case concerns the much narrower issue of a penalty imposed on a prisoner for a public verbal challenge to a prison administrator that incited other prisoners' conduct.

Because Freeman has not demonstrated a violation of his constitutional rights, summary judgment was properly awarded to the defendants.

IV. CONCLUSION

For these reasons, the district court's grant of summary judgment is AFFIRMED.

All Citations

369 F.3d 854

Tab 7

191 F. Supp. 2d 23
United States District Court,
District of Columbia.

Isadore GARTRELL, et al., Plaintiffs,
v.
John D. ASHCROFT, et al., Defendants.

No. Civ.A.01–01895(HHK).
|
Feb. 19, 2002.

Synopsis

Rastafarian and Muslim inmates, on behalf of class of inmates whose avowed religious beliefs forbid them from cutting their hair or shaving their beards, sued District of Columbia, U.S. Attorney General, and Federal Bureau of Prisons (BOP), alleging that BOP's housing of inmates from D.C. in Virginia Department of Corrections (VDOC) facilities with policy prohibiting long hair and beards burdened their religious beliefs in violation of Religious Freedom Restoration Act (RFRA). Following bench trial, the District Court, Kennedy, J., held that: (1) each individual decision by BOP to place or keep inmate in VDOC facility was subject to scrutiny under RFRA; (2) inmates' sincerely held religious beliefs were substantially burdened by VDOC policy; and (3) BOP failed to demonstrate that housing inmates in VDOC facilities was least restrictive means of achieving compelling government interest.

Ordered accordingly.

West Headnotes (7)

[1] **Civil Rights**—Liability of Federal Government and Its Agencies and Officers

RFRA applies to federal officers and agencies. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

1 Cases that cite this headnote

[2] **Prisons**Hair, Grooming, and Clothing

Each individual decision by Federal Bureau of Prisons to place or keep inmate in Virginia Department of Corrections (VDOC) facility was subject to scrutiny under RFRA in class action by Rastafarian and Muslim inmates alleging that VDOC grooming policy prohibiting long hair and beards violated their religious beliefs. Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C.A. § 2000bb et seq.

5 Cases that cite this headnote

[3] **Civil Rights**Presumptions, Inferences, and Burdens of Proof

Under RFRA, it is plaintiffs' burden to prove that government action substantially burdens their sincerely held religious beliefs. Religious Freedom Restoration Act of 1993, § 3(b)(1, 2), 42 U.S.C.A. § 2000bb–1(b)(1, 2).

1 Cases that cite this headnote

[4] **Civil Rights**Presumptions, Inferences, and Burdens of Proof

Under RFRA, burden of establishing that government activity which substantially burdens plaintiffs' sincerely held religious beliefs furthers compelling interest, and is least restrictive means of furthering that interest, rests with government. Religious Freedom Restoration Act of 1993, § 3(b)(1, 2), 42 U.S.C.A. § 2000bb–1(b)(1, 2).

2 Cases that cite this headnote

[5] **Civil Rights**Particular Cases and Contexts

Under RFRA, substantial burden on sincerely held religious belief exists where government imposes punishment or denies benefit because of conduct mandated by religious belief, thereby putting substantial pressure on adherent to modify his behavior and to violate his beliefs. Religious Freedom Restoration Act of 1993, § 3(b)(1, 2), 42 U.S.C.A. § 2000bb–1(b)(1, 2).

1 Cases that cite this headnote

[6] **Prisons**Hair, Grooming, and Clothing

Rastafarian and Muslim inmates' sincerely held religious beliefs forbidding them from cutting their hair or shaving their beards were substantially burdened by prison grooming policy prohibiting long hair and beards, as required to support their claim that policy violated RFRA. Religious Freedom Restoration Act of 1993, § 3(b)(1, 2), 42 U.S.C.A. § 2000bb–1(b)(1, 2).

8 Cases that cite this headnote

[7] **Prisons**Hair, Grooming, and Clothing

Federal Bureau of Prisons (BOP) failed to demonstrate that housing Rastafarian and Muslim inmates in Virginia Department of Corrections (VDOC) facilities, where grooming policy prohibiting long hair and beards substantially burdened inmates' sincerely held religious beliefs, was least restrictive means of achieving compelling government interest, as required to rebut inmates' claim that policy violated RFRA; housing such inmates in facilities operated by BOP or non-VDOC contractors would not have affected BOP's interest in managing overcrowding, and BOP never considered alternative of assigning inmates with religious objections to VDOC grooming policy to other facilities. Religious Freedom Restoration Act of 1993, § 3(b)(2), 42 U.S.C.A. § 2000bb–1(b)(2).

7 Cases that cite this headnote

Attorneys and Law Firms

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Daria Jean Zane, Michael A. Humphreys, U.S. Attorney's Office, Washington, DC, for John D. Ashcroft, Kathleen Hawk–Sawyer.

Michael A. Humphreys, U.S. Attorney's Office, Washington, DC, for Bureau of Prisons.

MEMORANDUM

KENNEDY, District Judge.

Plaintiffs represent a class of prisoners from the District of Columbia whose avowed religious beliefs forbid them from cutting their hair or shaving their beards. They are in the custody of the Federal Bureau of Prisons ("BOP") and are housed in prison facilities run by the Virginia Department of Corrections ("VDOC"). Plaintiffs allege that BOP's decision to house them in VDOC prisons rather than in BOP prisons violates the Religious Freedom Restoration Act ("RFRA")[1] and the Free Exercise Clause of the First Amendment[2] because VDOC imposes a grooming policy that requires prisoners to shave their beards and keep their hair short. Plaintiffs seek declaratory and injunctive relief to prevent BOP from subjecting them to the grooming policy.

1 42 U.S.C §§ 2000bb to 2000bb–4.

2 U.S. Const. amend. I.

This case is a continuation of litigation brought against the District of Columbia in December, 1999, during which BOP intervened as a party defendant. At that time, plaintiffs made two basic claims. "First, they contended that VDOC lacked a compelling interest in the grooming policy and that the policy was not the least restrictive means of achieving whatever interests VDOC had. Alternatively, they argued that BOP and the District had a less restrictive means of housing prisoners who believed that the grooming policy required them to violate fundamental religious tenets: transferring them to non-Virginia prison facilities without such grooming policies."[3] This court resolved the case by entering a judgment in favor of the defendants, holding that plaintiffs had failed to exhaust their administrative remedies as required by the Prison Litigation Reform Act. (PLRA).[4] This court also addressed and rejected plaintiffs' claim that VDOC's grooming policy violated RFRA and the First Amendment's Free Exercise clause.[5] On appeal, the D.C. Circuit affirmed this ***25** court's judgment, agreeing that plaintiffs had failed to exhaust their administrative remedies, but vacated the portion of this court's decision regarding the merits of plaintiffs' claims. The D.C. Circuit observed, however, that this court had expressly " 'decline[d] to evaluate' the issue raised by the prisoners' alternative claim: 'whether defendants have compelling interests in keeping plaintiffs incarcerated in Virginia Corrections facilities.' "[6] With respect to this claim, the court said, "should the prisoners refile after exhausting their administrative remedies, the district court will need to consider whether BOP and the District can demonstrate that alternative placement in non-Virginia prisons without grooming policies is infeasible."[7]

3 *Jackson v. District of Columbia,* 254 F.3d 262, 264 (D.C. Cir. 2001)

4 42 U.S.C. § 1997e(a).

5 *Jackson v. District of Columbia,* 89 F. Supp. 2d 48 (D.D.C.2000).

6 *Jackson v. District of Columbia,* 254 F.3d at 266.

7 *Id.* at 271.

After exhausting their administrative remedies, plaintiffs refiled the instant action. Based on the evidence presented at the three-day trial of this case, the court makes the

following:

FINDINGS OF FACT

I. BOP'S DECISION TO HOUSE CLASS MEMBERS IN VDOC FACILITIES SUBSTANTIALLY BURDENS THEIR RELIGIOUS BELIEFS AND PRACTICES

A. Plaintiffs Have Sincere Religious Beliefs That Conflict With the VDOC Grooming Policy

1. The parties have stipulated that "each of the named plaintiffs has sincerely held religious beliefs that prohibit them from shaving or cutting their hair, and that conflict with VDOC's grooming policy." Stipulations of Fact ¶ 13 (filed Oct. 27, 2001). *See also* *Jackson,* 89 F. Supp. 2d at 65 (finding that "plaintiffs have met their burden of showing that [VDOC's] grooming policy substantially burdens their exercise of religion.").

2. Carl Wolfe, one of the named plaintiffs in this action, is an adherent of the Rastafarian faith. As a part of the practice of his faith, Wolfe has taken the Vow of the Nazarite, based on Numbers 6 of the Bible, that prohibits him from shaving his beard or cutting his hair. It would be a violation of a fundamental tenet of the Rastafarian faith for Wolfe to have his hair cut or his face shaved after he has taken this vow. *See* *Jackson,* 89 F. Supp. 2d at 65 (finding Wolfe's testimony regarding his faith to be "heartfelt and sincere," and finding that he grows his beard and dreadlocks "because of [his] religious beliefs").

3. Isadore Gartrell and Darnell Stanley, both named plaintiffs in this action, are adherents of the Sunni Muslim sect of the Islamic religion. Gartrell and Stanley hold sincere beliefs that shaving off their beards violates a fundamental tenet of Islam. *See id.* (finding that previous named plaintiff who was Sunni Muslim grew his beard "because of [his] religious beliefs").

B. VDOC's Grooming Policy Imposes a Substantial Burden Upon Plaintiffs'

Religious Beliefs

4. A fundamental tenet of the Sunni and other Muslim sects prohibits male followers from shaving their faces. *See* *Jackson,* 89 F. Supp. 2d at 65. Likewise, a fundamental tenet of Rastafarianism prohibits a person from shaving his beard or cutting his hair after he has taken the Vow of the Nazarite. *See* *Jackson,* 89 F. Supp. 2d at 65.

5. In November 1999, VDOC adopted Inmate Grooming Standards Procedure No. DOP 864 (the "grooming policy") requiring all inmates in VDOC facilities to ***26** wear their hair short, in military-style fashion, and prohibiting all inmates from wearing beards.

6. The grooming policy requires all BOP inmates housed in VDOC to submit to grooming at regular intervals. The grooming policy also requires all newly admitted BOP inmates from the District to submit to grooming during the VDOC intake process.

7. An inmate who refuses to comply with the grooming policy is subject to disciplinary reports, administrative segregation (confinement in a cell for 23 hours a day), increases in security and custody level, loss of prison employment, exclusion from programming, and loss of privileges such as visitation, commissary, and telephone. Named plaintiff Wolfe, for example, was held in administrative segregation at Sussex II because he refused to comply with the grooming policy.

8. VDOC officials do not consider religious objections to be a valid basis for noncompliance with the grooming policy. The VDOC lieutenant overseeing Wolfe's intake at Sussex II told Wolfe that his Rastafarian beliefs regarding shaving his beard and cutting his hair did not matter, and that if he had an objection to the grooming policy, he would have to "take that up in court."

9. The grooming policy allows VDOC correctional officers to use force and restraints to shave newly admitted inmates during the intake process if the inmates refuse to comply with the grooming policy. VDOC recently began forcibly shaving inmates who do not voluntarily comply. Inmates who refuse to comply on religious grounds are restrained, with one guard on each side and three guards positioned near their legs, and shaved by a VDOC official. After the VDOC officials complete the forced shaving, they issue a disciplinary report against the objecting inmate and send him to administrative segregation.

10. VDOC has repeatedly told Wolfe that if he returns to Sussex II, he will be shaved by force. On one occasion, as he was being transported from administrative segregation to meet with his counsel, a VDOC official told Wolfe, " 'Rasta boy I'm really going to cut that shit off your hair." Wolfe testified as follows how such a forced shaving would affect him: "If somebody should hold me down and cut my dre[a]ds and shave my face, that's going to hurt me. That's like taking a part of my soul. This is my faith. This is my . . . whole life . . . this is my religion. This is something where I live by . . . And it will just kill

me."

11. The court finds that subjecting class members to the VDOC grooming policy imposes a substantial burden on the exercise of their religion. *See* *Jackson,* 89 F. Supp. 2d at 65.

C. BOP Houses its District of Columbia Inmates in Both VDOC and BOP Prison Facilities

12. In 1997, Congress passed the Revitalization Act, which required the District of Columbia Department of Corrections ("D.C.Corrections") to close its Lorton facility by December 31, 2001. The Revitalization Act also required that BOP assume custody of all sentenced felons coming out of District of Columbia courts no later than December 31, 2001.

13. Pursuant to the Revitalization Act, in October 1999 BOP began to take custody of some District inmates and began transferring them out of D.C. Corrections facilities and into BOP facilities, VDOC facilities, and other contract facilities around the country.

14. As a result of these custody transfers under the Revitalization Act, some 6,800 District inmates, including the named plaintiffs, are now in the custody of BOP. A majority of these inmates—approximately ***27** 3,600—are housed in BOP facilities located across the United States. One thousand low security BOP inmates from the District are housed at Rivers Correctional Center, a private contract facility in North Carolina, and some 2,200 District inmates are housed in VDOC facilities.

15. BOP has intergovernmental agreements with the Commonwealth of Virginia to house District inmates at two facilities in Virginia: Greensville, located in Greensville, Virginia; and Sussex II, located in Waverly, Virginia. Greensville houses medium security District inmates and Sussex II houses high security District inmates.

16. BOP executed the agreement with VDOC to house inmates at Greensville on October 1, 1999, and renewed that agreement effective September 6, 2001.

17. BOP executed the agreement with VDOC to house inmates at Sussex II on July 13, 2001. BOP's Sussex II contract replaced a similar contract between the District of Columbia and VDOC that expired on that day.

D. BOP Does Not Consider Alternatives to Housing Plaintiffs in VDOC Facilities

18. Since the filing of the *Jackson* lawsuit in December 1999, BOP has been aware that a number of District inmates at Greensville and Sussex II have religious objections to the VDOC grooming policy.

19. BOP is also aware of the substantial burdens imposed on its inmates who have religious objections to the grooming policy. For example, BOP is aware that a number of District inmates at Sussex II are in administrative segregation because they failed to comply with the grooming policy due to religious objections.

20. BOP admits that denying an inmate access to religious practices because he is in administrative segregation may undermine the inmate's prospects of reintegration and rehabilitation. Nonetheless, BOP places inmates with religious objections to the grooming policy in administrative segregation in VDOC rather than transferring them to other facilities where they would be able to fully practice their religion.

21. Sound correctional practice recognizes that inmates who are allowed to practice the fundamental tenets of their religion present less of a management problem than inmates who do not participate in religious activities. Penological research also indicates that inmates who practice the fundamental tenets of their religion have lower recidivism rates than inmates who do not participate in religious activities.

22. Despite its knowledge that the VDOC grooming policy imposes a substantial burden upon Muslim and Rastafarian inmates, BOP has refused to consider any alternative to housing the class members in VDOC facilities.

II. BOP HAS LESS RESTRICTIVE ALTERNATIVES AVAILABLE FOR HOUSING CLASS MEMBERS

A. BOP's Non–VDOC Facilities Provide a Less Restrictive Alternative

23. BOP has approximately 100 institutions of its own in which it houses inmates. BOP's District prisoners are already housed in almost all of these facilities. In addition, BOP contracts with a number of private facilities to house inmates.

24. BOP does not impose a grooming policy restricting hair or beard length in its own institutions. *See* 28 C.F.R. §§ 551.2, 551.4. Rather, an inmate may select "the hair style of

personal choice, and [BOP] expects personal cleanliness and dress in keeping with standards of good grooming and the security, good order, and discipline of the institution." *Id.* ***28** In addition, "an inmate may wear a mustache or beard or both." *Id.*

25. Across the BOP system, inmate population is in constant flux. Bed space opens every day as thousands of inmates per week are released from custody, or transferred from one institution to another within the same security level or between security levels. In fact, there are more than 50,000 inmate movements in the BOP system each year.

26. BOP's own institutions, and those of its contractors that do not impose a grooming policy that would burden plaintiffs' religious practices, provide less restrictive alternative placements in which class members could be housed.

B. BOP'S Contention That Its Non–VDOC Facilities Are Not Available to House Class Members Is Contrary to the Evidence

At trial, BOP admitted that it has not considered whether there is a less restrictive alternative to housing class members in VDOC institutions. Nonetheless, BOP argued at trial that no less restrictive alternative is available for two reasons: 1) because BOP's non-VDOC facilities are overcrowded; and 2) because it would either be unlawful or impracticable for BOP to determine whether an inmate has a bona fide religious objection to the VDOC grooming policy. Each of these purported justifications fails to establish that BOP has no less restrictive alternative available to subjecting class members to a grooming policy that substantially burdens their religion.

1. BOP'S contention that its non-VDOC facilities are unavailable because they are overcrowded is unfounded

27. BOP currently has custody of approximately 156,000 prisoners. Approximately 50,000 of these inmates are medium or high security. There is a constant flow of prisoners into, out of, and within the system, amounting to more than 50,000 inmate movements in the BOP system each year.

28. Every BOP-owned facility tracks its "pipeline in" and "pipeline out," showing numbers of inmates scheduled to go to and leave from a particular institution over a 30– or 45–day period. The number of inmates at any given institution is changing constantly because some inmates are departing while others are arriving. For example, there is a

high turn-over of BOP inmates in VDOC's Greensville facility.

29. Throughout the process of taking custody of District inmates pursuant to the Revitalization Act, BOP has placed the majority of District inmates in non-VDOC facilities. Out of the more than 7,000 District offenders BOP has designated over the past several years, approximately 6,800 are still in BOP custody. About 1,000 of these offenders are currently housed at VDOC's Greensville facility, and about 1,240 are housed at VDOC's Sussex II facility. Therefore, only about 2,240 out of BOP's 6,800 District inmates are housed in VDOC facilities. Put another way, BOP has placed about two-thirds of its District inmates in non-VDOC facilities.

30. BOP's District inmates can be housed in any BOP facility. BOP currently houses District inmates in virtually every BOP facility, including facilities as far away as California.

31. For overall capacity purposes, it is irrelevant which District inmates are housed in VDOC facilities and which are housed in BOP facilities. Because BOP already places the majority of District inmates in non-VDOC facilities regardless of its alleged capacity problems, the crowding at BOP facilities is not relevant to whether BOP has less restrictive placements in non-VDOC facilities available for plaintiffs. ***29** Indeed, BOP has admitted that it could transfer plaintiffs into its own facilities on any given day. If it did so, it would promptly fill the beds vacated by plaintiffs with other inmates, eliminating any impact of the transfers on overall capacity.

32. Under the Sussex II contract, BOP contracts for 1,276 beds at VDOC's Sussex II facility. Because 1,240 BOP inmates are currently housed there, Sussex II is virtually full for BOP's purposes. Under the Greensville contract, BOP contracts for 1,000 beds at VDOC's Greensville facility. Greensville, like Sussex II, is virtually full for BOP's purposes.

33. BOP currently is taking and will continue to take into custody somewhere between 70 and 120 District inmates each month. Because both Sussex II and Greensville are virtually full for BOP's purposes, the percentage of the overall D.C. inmate population that is housed in non-VDOC facilities will continue to grow as new inmates come into the system.

34. If BOP inmates are transferred out of Sussex II or Greensville as a result of the court's Order in this case, BOP could and would easily replace those inmates from the population of newly sentenced D.C. inmates. Therefore, there is no support for defendants' claim that transfer of class members from VDOC facilities to BOP facilities is infeasible from a capacity standpoint. To the contrary, transfer of plaintiffs from VDOC facilities to BOP facilities based on their sincere religious objections to VDOC's grooming policy will have no effect on overall capacity.

35. BOP plans to phase out its use of both Greensville and Sussex II by the end of 2002. From a capacity standpoint, it makes no difference to BOP which inmates are moved out of these facilities first.

36. Even if every bed vacated by a class member ordered out of VDOC would not be filled by a new District prisoner, BOP has failed to establish that there are too many class members to be accommodated in its own facilities. In response to the preliminary injunction this court issued in *Jackson,* BOP implemented a process to determine the number of District inmates at VDOC's Greensville facility who had religious objections to the grooming policy. BOP found that there were only a handful of inmates with religious objections.

37. That only a small number of BOP inmates at Greensville have religious objections to the grooming policy is confirmed by VDOC's grievance reports from that facility, demonstrating that between November 1999 and October 2001, fifteen grievances were filed against the grooming policy for religious reasons. Even assuming that entries which do not specify a reason for the grievance were based on the inmate's religious beliefs, no more than twenty-one of the grievances at Greensville involved religious beliefs. In addition, BOP has admitted that this number includes grievances filed by non-BOP inmates.

38. Likewise, when VDOC screened inmates at Sussex II in response to the *Jackson* injunction, it identified only nineteen out of 1200 District inmates who had sincerely held religious beliefs that conflicted with the grooming policy. These inmates have already been transferred out of Sussex II. Between March 2000 and October 2001 at Sussex II, eight grievances were filed against the grooming policy which cited religious or spiritual beliefs or practices. Even including grievance report entries that do not specify the reason for the complaint, the total number of grievances at Sussex II that involved religious beliefs during this eighteen month period could not have exceeded twenty-eight.

30 2. *BOP's contention that its non-VDOC facilities are unavailable because it cannot determine whether inmates have bona fide religious objections to the grooming policy is unfounded

a. BOP's Security Classification and Designation Manual requires BOP to identify religious beliefs and practices of inmates

39. BOP designates inmates to institutions pursuant to the policies and procedures set out in its Security Classification and Designation Manual ("Designation Manual"), which has been in effect since 1979. The Designation Manual applies to BOP's decisions to send District inmates to its contract facilities, including VDOC, and to BOP's decisions to transfer inmates out of VDOC. According to the Manual, BOP's placement and transfer procedures provide for two levels of review. The first involves determining the inmate's proper custody or security level. The second involves designation to an appropriate facility and includes consideration of the inmate's programmatic and other individualized needs. Expert witnesses testified at trial that this two-tiered procedure is consistent with sound custody classification and designation practice. Security and safety concerns are properly addressed at the first stage, and religious beliefs are properly considered under the second-stage, individualized consideration.

40. The plain language of the Designation Manual requires BOP officials to assess each inmate's religious beliefs and practices and take those beliefs into account when deciding whether that inmate should be placed (i.e., designated) in a non-BOP facility. Specifically, the Designation Manual requires: "When designating a non-federal facility for an inmate, Designators *shall consider the inmate's religious beliefs* as one of the factors in making a designation decision." Pls.' Ex. 1 at BOP 000064 (emphasis added). Such a policy clearly contemplates that BOP should assess whether an inmate's sincerely held religious beliefs would be burdened by a particular placement. *Id.* at BOP 00064 ("If necessary, Designators may consult with Central Office chaplaincy staff in making this designation decision.").

41. The plain language of the Designation Manual also requires BOP officials to assess each inmate's religious beliefs and practices and take those beliefs into account when making transfer (i.e., redesignation) decisions. Specifically, the Designation Manual states: "*Religious beliefs will be considered* when designating a non-federal facility for a federal inmate. Ordinarily, a facility that systematically restricts the free exercise of religion will not be designated for that inmate." *Id.* at BOP 000179 (emphasis added).

42. By its clear and unambiguous language, therefore, BOP's Designation Manual contemplates that BOP is able to, and indeed "shall" and "will," determine the religious beliefs and practices of its inmates before its designation and redesignation decisions are made. *Id.* BOP's witnesses admitted that this policy is mandatory.

43. Nonetheless, BOP witnesses admitted at trial that BOP has not ascertained inmates' religious beliefs and practices and has not taken those beliefs into account when designating BOP inmates to, and redesignating BOP inmates out of, VDOC facilities.

44. BOP admitted that if information on the religious affiliation of inmates was available, BOP would be required to take that information into account when making designation decisions.[8] For example, BOP ***31** acknowledged that if a judge informed BOP that a

newly-sentenced inmate was a Muslim Imam, BOP would take that information into consideration when making the inmate's designation decision. BOP also admitted that it would be feasible to use religious belief and practice information when it makes designation decisions.

8 Despite admitting that BOP is required under its policies to take inmates' religious beliefs and practices into account when making designation decisions if that information is available, BOP's witnesses also testified that doing so would be contrary to sound correctional practice. Because these witnesses did not adequately explain how BOP's own written Designation Manual is contrary to sound correctional practice, the Court does not credit the testimony of the BOP witnesses on this subject.

45. Although there are numerous indicators of inmates' religious affiliation available to BOP, BOP has not tried to ascertain the religious affiliation of the District inmates it designates and redesignates.

b. BOP's religious accommodation policy requires BOP to evaluate whether an inmate has a bona fide religious belief

46. BOP's policies require BOP to determine whether inmates have bona fide religious beliefs that require specific practices. For example, BOP requires inmates who seek to participate in religion-based dietary practices to make the request in writing and be subjected to an interview by the prison chaplain. Based on the interview with the prison chaplain, inmates may be denied certification and thus barred from participation in religion-based food service, and must wait six months before applying again.

47. Under BOP's policy, an inmate may be removed from his religion-based food service by an institution's Warden or Chaplain if he shows indicia of not following the dietary practices of his religion. After being removed from the religion-based food service program, an inmate must participate in a screening interview with BOP personnel before he may participate again in the program again.

c. Other prison systems identify inmates with bona fide religious beliefs and practices and accommodate the inmates' religious beliefs

48. Evidence presented at trial established that it is routine practice for prison systems to determine whether an inmate is a bona fide member of a religious group. Expert witnesses testified that the purpose of making these determinations is to ascertain

whether an individual inmate is entitled to accommodation based on his religious beliefs or practices.

49. The testimony of adult corrections expert Dr. James Austin[9] established that the state correctional systems in Pennsylvania, Washington, Oregon, and New Mexico have institutionalized processes to determine whether an inmate has a bona fide religious belief or practice. These states have created committees, comprised of representatives from various divisions within the Department of Corrections, to make determinations on an individual basis as to whether an inmate has a bona fide religious belief or practice. These committees have successfully handled inmates who seek to manipulate the system and ***32** gain advantage by being identified as members of a religious group.

9 Dr. Austin's testimony was credible and persuasive. Dr. Austin has worked in the field of adult corrections for more than thirty years. He has particular expertise in the area of inmate classification and designation, having studied and implemented classification and designation systems for numerous jurisdictions around the country. Moreover, he has particular expertise with regard to D.C. offenders and their integration into the BOP system, having been retained by Congress on several occasions to work on this issue. Dr. Austin continues to play an active role in this process, currently working with the D.C. Department of Corrections' Trustees Office, in conjunction with the BOP, to create and implement a security classification system for District inmates.

50. In addition, VDOC indicated during this litigation that it is able to identify which inmates have bona fide religious objections to its grooming policy. During the pendency of the injunction in *Jackson,* VDOC informed BOP that it could implement a "methodology" at Greensville to "identify [BOP inmates] with sincerely held religious beliefs." VDOC also successfully implemented a system to determine which District inmates at Sussex had religious objections to its grooming policy. BOP has admitted that VDOC is fully capable of identifying which inmates have sincerely held religious objections to the grooming policy.

51. As a result of the procedure it implemented to comply with the *Jackson* injunction, VDOC identified 19 inmates out of 1,200 at Sussex with bona fide religious objections to its grooming policy. Those inmates at Sussex who were found to have bona fide religious objections to the grooming policy were "moved to other facilities." No evidence was presented at trial that these prisoner transfers out of Sussex caused other prisoners to try to manipulate the system in order to receive a transfer out of VDOC, or that these transfers caused other prison administration problems.

d. BOP has successfully implemented screening procedures to identify inmates with bona fide religious objections to the VDOC grooming policy.

52. During the pendency of the injunction in *Jackson,* BOP implemented a successful

screening process that identified District inmates with religious objections to the VDOC grooming policy and prevented them from being assigned to VDOC institutions. This process involved BOP personnel interviewing District inmates at BOP holdover facilities about the inmates' religious beliefs. Inmates identified by this process were placed in non-VDOC facilities so that their religious beliefs and practices would not be burdened by the VDOC grooming policy.

53. It took BOP only a few weeks to put this new screening process into place. Although BOP argued at trial that a screening process would cause major problems, including pretextual conversions of inmates subject to potential transfer to VDOC, BOP's witnesses did not identify any substantive problems that arose when such a process was actually implemented during the *Jackson* injunction.[10] Under questioning from BOP's own attorneys and the court, the only difficulties with the screening procedure that BOP witnesses could identify were that it involved "a little training" for staff and that it was not "fair." These witnesses also testified, however, that the procedure took only a few weeks to develop and implement, and that once the procedure was in place, BOP had accomplished "what [it] had set out to do."

10 Other prison systems have also implemented religion screening processes without problems. For example, states have removed groups of inmates from sister-state prisons when the sister-state infringes on a group's religious practice. Dr. Austin testified that Washington State pulled back Native Americans inmates from Hawaii because Hawaii was not accommodating their religious practice.

54. BOP continues to use holdover facilities, but it no longer uses its holdover facilities to screen District inmates with religious objections to VDOC's grooming policy. BOP admits that it stopped its screening for religious beliefs only because the *Jackson* injunction was lifted. While BOP was screening District prisoners and keeping those identified as having religious ***33** objections to VDOC's grooming policy at holdover facilities, BOP was continuing to place other District inmates in its own facilities. Nonetheless, BOP made no effort to find a place at its own facilities for the inmates it identified as having religious objections.

55. After a new inmate is sentenced by the District of Columbia courts, it takes six to eight weeks for the inmate to be transferred from the custody of D.C. Corrections to BOP custody. The vast majority of these inmates are housed in the District of Columbia while this six-to eight-week custody transfer process takes place. Expert witnesses testified at trial that BOP could perform screening interviews like the ones previously performed at BOP holdover facilities while these inmates are in the District awaiting their custody transfer from D.C. Corrections to BOP.

56. BOP also successfully screened inmates already at VDOC during the injunction in *Jackson*. As a result of this process, a handful of Rastafarian and Muslim inmates were identified as having religious objections to the grooming policy and were transferred out

of Greensville by BOP.

57. Despite BOP's claim that such a screening and transfer process would lead to inmates making pretextual conversions in order to qualify for transfer out of VDOC, BOP admitted that to its knowledge no such conversions occurred when it did implement such a process.

e. Objective measures are available to BOP to identify inmates with religious objections to the grooming policy

58. There are objective indicators readily available to BOP that would assist it in identifying those of its inmates who have religious beliefs and practices that conflict with the grooming policy. The contractual agreement between VDOC and BOP grants BOP access to information related to its inmates housed in VDOC, including the list of grievances filed by inmates in Sussex II and Greensville. These lists, which were produced by BOP as part of this litigation, summarize the basis of each inmate's objection to the grooming policy, and therefore can be used to determine which inmates may have religion-based objections. BOP also has available to it the actual grievance forms, which contain more detailed information regarding the basis of an inmate's objection to the grooming policy.

59. BOP is in the process of reviewing the files of its inmates in Sussex II to determine whether they are serving their sentences in the appropriate facility. As part of this process, BOP has discovered that VDOC documents every inmate's participation in religious services and requests for special meals based on religious beliefs. This information would assist BOP in identifying which inmates are members of religious faiths that have prohibitions on cutting hair short or shaving beards.

60. The religious affiliation of each BOP inmate is also available to BOP through the information gathered by VDOC personnel at the time of intake. All BOP inmates being housed in the VDOC system go through an intake process. During that intake process, VDOC asks each inmate's religious affiliation and records that information.

61. If an inmate refuses to comply with the grooming policy during the intake process, he is given a disciplinary report and sent to administrative segregation.[11] ***34** Thus, in addition to the documents easily available to it, BOP can simply identify inmates in administrative segregation for refusal to comply with the grooming policy and assess whether that refusal is based on a religious objection to the grooming policy.

11 For example, when named plaintiff Wolfe refused to comply with the grooming policy because of his religious objections, he was placed in administrative segregation at Sussex II from April 9, 2001, until he returned to the District of Columbia for the trial in this action.

62. Finally, for any inmate who has previously served time in any BOP prison, BOP has that inmate's religious affiliation recorded in its SENTRY[12] computer system. Likewise, any inmate who has served time in any other corrections system, such as D.C. Corrections or the Corrections Corporation of America, has had his religious affiliation information recorded and put in his inmate file. There is nothing preventing BOP from seeking this information from these other prison systems that have incarcerated the inmates who are now in BOP's care.

12 Throughout the trial, various witnesses talked about BOP's SENTRY system. The trial transcript records each of these references to SENTRY as references to "century."

f. BOP routinely determines whether an inmate qualifies for placement in an alternative prison setting in other contexts

63. BOP regularly identifies which inmates qualify for alternative prison placements in other contexts. For example, BOP runs a residential drug treatment program (the "program") for its inmates. Because not every BOP facility offers the program, if an inmate qualifies and his institution does not provide the program, he will be transferred to an institution that does offer the program. Under the terms of the program, an inmate who is serving time for a nonviolent crime can obtain a one-year sentence reduction if he successfully completes the program. In order to determine whether an inmate has a substance abuse problem and qualifies for the program, BOP uses a screening process in which it reviews documents about the inmate; interviews family members, former doctors, and members of the community about the inmate; and has a psychologist interview the inmate. As part of this process, BOP successfully separates those inmates who have a bona fide substance abuse problem and who can benefit by transfer to a facility that provides treatment for their problem from those inmates who do not have a bona fide problem but seek to transfer so that they can reduce their sentences.

64. Likewise, BOP allows inmates to apply for transfer to a particular BOP institution that offers a food service program so that they can learn to become chefs. In order to determine whether an inmate has a bona fide desire to become a chef, the food service program administrators review an inmate's file and, if necessary, request that the community corrections office for the area where the inmate is housed collect more information on the inmate. If an inmate is approved for participation, he is then

transferred to the BOP institution that offers the program.

65. Trial testimony showed that BOP is willing to transfer inmates in order for them to learn how to cook, but will not transfer inmates whose fundamental religious beliefs and practices are burdened by VDOC's grooming policy:

> Q: Now, if an inmate wants to be transferred because of religious convictions that conflict with VDOC's grooming policy, what's BOP's procedure for processing that request?
>
> A: I'm not aware of any procedure.
>
> Q: So let me make sure I understand this. If Carl Wolfe, sitting over here, wants to learn to cook, there's a procedure in place for him to request a transfer to a BOP facility. ***35** But there's no procedure for him to request a transfer based on the fact that he has been in administrative segregation since he arrived at Sussex II for the sole reason that his religious beliefs prevent him from cutting his hair or shaving his face?
>
> A: Correct.

Tr. at 43:6–18.

g. Prison systems around the country evaluate whether an inmate has a sincere religious belief or practice

66. Numerous prison systems around the country are required to assess the bona fides of inmates' religious beliefs as a routine component of inmate requests for special property, special meals, or grooming policy exemptions. *See e.g.,* *Morrison v. Garraghty,* 239 F.3d 648, 652 (4th Cir. 2001) (holding that plaintiff was entitled to sincerity determination in review of his religious property request); *DeHart v. Horn,* 227 F.3d 47, 52 (3d Cir. 2000) (finding that prisons are protected from random requests for special diets by the requirement that the request be "the result of sincerely held religious beliefs"); *Jackson v. Mann,* 196 F.3d 316, 317 (2d Cir. 1999) (stating that kosher meal eligibility in the New York Department of Corrections is based on "a process of interview and review of documentation to substantiate the inmate's Judaic background and intent to strictly observe Jewish dietary law"); *Mosier v. Maynard,* 937 F.2d 1521, 1526–27 (10th Cir. 1991) (reviewing Oklahoma prison's denial of grooming policy exemption where plaintiff challenged adverse sincerity determination); *McElyea v. Babbitt,* 833 F.2d 196, 198–99 (9th Cir. 1987) (remanding for assessment of sincerity of inmate's request for kosher

meals at Arizona state prison); *Caldwell v. Caesar,* 150 F .Supp.2d 50, 53 (D.D.C.2001) (reviewing alleged denial of access to special meals by D.C. Corrections); *Beerheide v. Suthers,* 82 F. Supp. 2d 1190, 1198–99 (D.Colo.2000) (reviewing denial by Colorado Department of Corrections of kosher meal request). VDOC itself assesses the bona fides of inmates' religious beliefs in the context of requests for religion-based exemptions to property restrictions, *see* *Morrison,* 239 F.3d at 652, as do the New York, Colorado, and D.C. Departments of Corrections in the context of special meals requests, *see* *Jackson,* 196 F.3d at 317 (stating that eligibility for New York Department of Correction's kosher diet program requires substantiation of inmate's "intent to strictly observe Jewish dietary law"); *Caldwell,* 150 F. Supp. 2d at 53 (stating that D.C. Corrections makes special meals available only to those "authorized by the Chaplain to receive a special diet"); *Beerheide,* 82 F. Supp. 2d at 1198–99 (documenting the "effective method by which sincerity of [a Colorado Department of Correction's] inmate's religious beliefs may be tested").

h. BOP could implement a screening procedure to identify inmates with bona fide religious objection to the VDOC grooming policy

67. BOP could implement a procedure to identify inmates with bona fide religious objections to the VDOC grooming policy. While the injunction was in effect in *Jackson,* BOP effectively implemented a system that prevented inmates with religious objections from being sent to VDOC and identified and removed inmates from VDOC who had religious beliefs that would be violated by the grooming policy. Other state systems have also implemented systems that work well in identifying inmates' religious beliefs and practices.

68. Moreover, with regard to new inmates coming into the system, BOP can have D.C. Corrections identify for it those inmates who have religious objections to the grooming policy. Dr. Austin, who is ***36** working with the D.C. Corrections' Trustee to implement a new classification and designation system for D.C. Corrections by the end of the year, indicated at trial that "it would be no problem for the D.C. Department of Corrections to provide information to the BOP on the religious preference of each inmate who has been sentenced as a felon and is likely now to be designated by the BOP . . ." Tr. at 148:3–12.

69. It is consistent with sound correctional practice for BOP to implement a procedure to identify and accommodate inmates with religious objections to the VDOC grooming policy because such a procedure would assist in prison population management and reduce recidivism.

C. Plaintiffs Seek Relief That Would Be "Narrowly Drawn"

70. The relief that plaintiffs seek is an order requiring BOP to consider class members' religious beliefs and practices and to house class members in non-VDOC facilities, when such alternative placements are available consistent with an inmate's security level. For the following reasons, such relief would be narrowly drawn:

71. *First,* such an order would be consistent with BOP's own policies regarding consideration and accommodation of inmates' religious beliefs when making placement and transfer decisions involving non-BOP facilities.

72. *Second,* BOP takes individual factors into account on a regular basis when deciding the appropriate housing for an inmate. For example, BOP takes into account judicial recommendations, available programming (e.g., the food service program), and substance abuse problems when making designation and transfer decisions. BOP has failed to demonstrate that the same could not be done for religion.

73. *Third,* BOP and VDOC successfully implemented screening procedures during the pendency of the *Jackson* injunction that would provide the relief that plaintiffs now seek. BOP has not presented evidence that these screening procedures caused any management problems.

74. *Fourth,* BOP is already in the process of reviewing placement of inmates at VDOC's Sussex II facility to make sure that those placements are appropriate and that BOP inmates are not housed in the "wrong environment." Consistent with its Designation Manual, BOP could take religious beliefs into account as it makes these decisions.

75. *Fifth,* it is undisputed that state corrections departments routinely and effectively assess the sincerity of individual inmates' religious beliefs. In addition, prison systems that contract with other states have done what plaintiffs seek here—remove groups of inmates when the sister state holding them under contract infringes on the inmates' religious practice.

CONCLUSIONS OF LAW

I. DEFENDANTS HAVE VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT[13]

13 Because our finding that defendants violated RFRA entitles plaintiffs to the injunctive relief they requested, we need not reach plaintiffs' First Amendment claim.

[1] 1. The Religious Freedom Restoration Act ("RFRA") applies to federal officers and agencies like BOP. *Henderson v. Kennedy,* 265 F.3d 1072, 1073 (D.C. Cir. 2001).

2. BOP is bound by RFRA in discharging its obligations under the 1997 Revitalization Act. *See* 42 U.S.C. § 2000bb–3(b) ("Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless ***37** such law explicitly excludes such application by reference to [RFRA].").

[2] 3. Each BOP decision to place or keep a member of the plaintiff class in a VDOC facility is subject to RFRA scrutiny because RFRA applies "to all Federal . . . law, *and the implementation of that law,* whether statutory or otherwise." 42 U.S.C. § 2000bb–3(a) (emphasis added).

[3] 4. Under RFRA, it is plaintiffs burden to prove that a government action substantially burdens their sincerely held religious beliefs. 42 U.S.C. § 2000bb–1(a).

5. Once a substantial burden is established, the government must "demonstrate [ ]" that its action: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb–1(b)(1)–(2) (emphasis added).

6. RFRA makes clear that "the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion." *Id.* § 2000bb–2(3).

[4] 7. Consistent with the statute, relevant case law confirms that the burden of establishing compelling interest and least restrictive means rests with the government under RFRA. *Diaz v. Collins,* 114 F.3d 69, 72 (5th Cir. 1997) (holding that the burden of proving the "compelling interest test" is on the government); *Jolly v. Coughlin,* 76 F.3d 468, 477 (2d Cir. 1996) (same); *Cheema v. Thompson,* 67 F.3d 883, 885 (9th Cir. 1995) (holding that the government was wrong in asserting that it did not have the burden to prove no less restrictive alternative was available). Indeed, the D.C. Circuit has already noted that defendants bear the burden of persuasion on this issue. *Jackson v. District of Columbia,* 254 F.3d at 271 (D.C. Cir. 2001) ("[T]he district court will need to consider whether BOP . . . can demonstrate that alternative placement in non-Virginia prisons without grooming policies is infeasible.").

A. Plaintiffs Have Proven That They Have Sincerely Held Religious Beliefs That Are Substantially Burdened by VDOC's Grooming Policy.

[5] 8. A substantial burden on a sincerely held religious belief exists where the government imposes punishment or "denies . . . a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Woods v. Evatt,* 876 F. Supp. 756, 762 (D.S.C.1995) (quotations and citations omitted).

[6] 9. Defendants have stipulated that "[e]ach of the named plaintiffs has sincerely held religious beliefs that prohibit them from shaving or cutting their hair, and that conflict with VDOC's grooming policy." Stipulations of Fact, at ¶ 13 (Oct. 27, 2001).

10. This court has held that plaintiff Wolfe has sincerely held religious beliefs that prohibit him from cutting his hair and shaving his face. *Jackson,* 89 F. Supp. 2d at 65 (finding Wolfe's testimony to be "heartfelt and sincere").

11. This court has held that subjecting plaintiffs to the grooming policy substantially burdens their sincere religious beliefs. *Id.,* 89 F. Supp. 2d at 65 (finding that the grooming policy "imposes at least a substantial burden if not more").

12. The burden on plaintiffs' beliefs has increased since the court's ruling in the *Jackson* case. At the time of the *Jackson* decision, VDOC's policy gave the named plaintiffs a "choice" between cutting their hair and shaving their beards *or* being placed in administrative segregation and losing all privileges. Here, it is undisputed ***38** that if plaintiffs are returned to VDOC facilities, they will be forced to cut their hair and shave their beards *in addition* to being sent to administrative segregation for failure to voluntarily comply with the grooming policy.

B. Defendants Have Failed to Meet Their Burden of Proving That There Is No Less Restrictive Alternative.

[7] 13. Because plaintiffs have demonstrated that the VDOC grooming policy substantially burdens their sincerely held religious beliefs, the burden shifts to defendants to prove that subjecting plaintiffs to the grooming policy is the least restrictive means of achieving a compelling interest. *See* 42 U.S.C. § 2000bb–1(b)(2); *Diaz,* 114 F.3d at 72; *Jolly,* 76 F.3d at 477–78; *Cheema,* 67 F.3d at 885. BOP has failed to carry this

burden.

14. As a less restrictive alternative, BOP could house plaintiffs in any of the many institutions run by BOP or its non-VDOC contractors that do not impose a substantial burden on plaintiffs' religious beliefs and practices.

15. Defendants assert two arguments to justify their failure to house plaintiffs in facilities that would not burden their religious beliefs and practices: 1) BOP's prisons are overcrowded and thus it has nowhere to house plaintiffs; and 2) BOP cannot identify class members because BOP cannot assess the bona fides of an inmate's religious beliefs. Neither of these arguments is persuasive.

16. Defendants have failed to demonstrate that BOP's interest in managing overcrowding would be affected in any way by plaintiffs' request that BOP take their sincere religious objections to the grooming policy into account in making placement and transfer decisions. BOP's capacity concerns are not implicated by individualized designations and redesignations to non-VDOC facilities for class members, because BOP's inmate population is already in constant flow around the country, the number of individuals involved is relatively small, VDOC facilities are virtually full, BOP already places two of every three District inmates in a non-VDOC facility, BOP will easily refill spaces vacated at VDOC facilities, and the overall number of individuals in the BOP system will not be affected. Although BOP undoubtedly has an important interest in managing overcrowding, that interest will not be harmed by the relief plaintiffs seek and therefore cannot justify BOP's practice of burdening plaintiffs' sincere religious beliefs.

17. Congress specifically warned that the judicial deference owed to prison administrators under RFRA does not allow either the administrators or the courts to rely on conclusory arguments. S.Rep. No. 103–111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 ("[T]he state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety"); *see also* *Jolly,* 76 F.3d at 479 (2nd Cir. 1996) (finding that prison regulations are "not insulated from scrutiny merely because the defendants brandish the concepts of public health and safety"). To prove that no less restrictive alternative exists, defendants must show that the alternatives proposed by plaintiffs will not protect BOP's interest in prison security. They have failed to make this showing.

18. BOP also argues that no less restrictive alternative is available because it is not permissible or proper for the government to inquire into the sincerity of inmates' religious beliefs, and therefore BOP cannot determine who would qualify for alternative placement. This argument fails both as a matter of fact and as a matter of law.

***39** 19. The Supreme Court has made clear that governmental agencies not only can assess bona fides when deciding whether to accommodate religious beliefs, but often

must do so in order to properly assess religious accommodation claims. *See* *United States v. Seeger,* 380 U.S. 163, 184–85, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965) ("Local [military draft] boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious. But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."); *accord U.S. v. Ward,* 989 F.2d 1015, 1018 (9th Cir. 1992); *Hager v. Secretary of Air Force,* 938 F.2d 1449, 1454 (1st Cir. 1991); *Philbrook v. Ansonia Bd. of Educ.,* 757 F.2d 476, 482 (2d Cir. 1985) ("[A] sincerity analysis is necessary in order to differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.") (internal quotation marks omitted); *Patrick v. LeFevre,* 745 F.2d 153, 157 (2d Cir. 1984); *U.S. v. Joyce,* 437 F.2d 740, 744 (7th Cir. 1971); *Lindenberg v. United States Dep't of Justice,* 657 F. Supp. 154, 161–62 (D.D.C.1987) (reviewing INS determination of inadequate "religious commitment" for purposes of special visa certification).

20. Prison officials in other systems can and do assess the sincerity of inmates' religious beliefs in order to administer prison programs and policies ranging from requests for exceptions to grooming policies or personal property rules to approval for special meals. *See e.g.,* *Morrison,* 239 F.3d at 658 (4th Cir. 2001) (finding that plaintiff was denied equal protection because defendants "never evaluated the sincerity of [plaintiff's] beliefs" as they would have for other inmates' requests for religious items); *DeHart,* 227 F.3d at 52 n. 3 (3d Cir. 2000) ("Prison officials are, of course, entitled both to make a judgment about the sincerity of an inmate's belief when he or she asks for different treatment and to act in accordance with that judgment."); *Mosier,* 937 F.2d at 1523, 1526 (10th Cir. 1991) (holding, in the context of a request for a grooming policy exemption, that "[w]ithout question, the prison may determine whether plaintiff's beliefs are sincere, meaning whether they are truly held and religious in nature"); *McElyea,* 833 F.2d at 199 (9th Cir. 1987) (holding that "[i]t is appropriate for prison authorities to deny a special diet if an inmate is not sincere in his religious beliefs"); *see also* *Makin v. Colo. Dep't of Corrections,* 183 F.3d 1205, 1213 (10th Cir. 1999) (relying on *Seeger,* 380 U.S. at 184–85, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), for validity of assessing sincerity of belief for special meals request); *Brock v. Carroll,* 107 F.3d 241, 244 (4th Cir. 1997) (Wilkins, J. concurring) (stating that request for exception to "contraband" rule should be analyzed under *Seeger* standard); *Jackson v. Mann,* 196 F.3d at 320 (2d Cir. 1999) (reviewing "through the prism of sincerity" defendants' motion to dismiss plaintiff's challenge to denial of kosher meal request).

21. Therefore, the court concludes that BOP officials not only are permitted to assess bona fides but are required to do so where defendants' actions impose a substantial

burden on plaintiffs' sincere religious beliefs regarding hair and beards.

22. Moreover, the government cannot meet its burden to prove least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. *See e.g., United States v. Playboy* ***40** *Entertainment Group, Inc.,* 529 U.S. 803, 824, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (finding, in the context of a First Amendment challenge to speech restrictions, that "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *City of Richmond v. J.A. Croson,* 488 U.S. 469, 507, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (finding city's minority set-aside program was not narrowly tailored in part because the city had not considered whether race-neutral measures would have achieved the government's interest); *Hunter ex rel. Brandt v. Regents of Univ. of Calif.,* 190 F.3d 1061, 1078 (9th Cir. 1999) (finding that government "neglected to undertake any consideration—let alone serious, good faith consideration" of race-neutral alternatives) (internal quotation marks and citation omitted). Thus, the government cannot meet its burden by relying on post-hoc excuses for continuing to burden individuals' religious beliefs. *Jolly,* 76 F.3d at 479 (finding that "post hoc rationalizations will not suffice to meet [RFRA's] requirements") (citations omitted). Here, BOP concedes that it never considered the less restrictive alternative of assigning inmates with religious objections to the VDOC grooming policy to BOP or other non-VDOC facilities, despite the fact that BOP successfully implemented this alternative in response to this Court's injunction in *Jackson,* an alternative which it discontinued only because the injunction was lifted.

23. The court concludes that BOP has available to it a less restrictive alternative to subjecting inmates with religious objections to the VDOC grooming policy. That alternative consists of taking inmates' religious beliefs into consideration as part of the designation or redesignation process, as BOP's own Designation Manual requires.

24. As instructed by the D.C. Circuit, the court has considered whether "alternative placement in non-Virginia prisons without grooming policies" is feasible, and finds that it is. *Jackson,* 254 F.3d at 271. The court therefore concludes that defendants have failed to meet their burden of proving that less restrictive means are not available. *See Cheema,* 67 F.3d at 885 (defendants' failure to offer evidence that a less restrictive alternative was not available required entry of an injunction in favor of plaintiffs asserting RFRA claim).

CONCLUSION

For the foregoing reasons, Judgment is entered in favor of plaintiffs and defendants are permanently enjoined from violating plaintiffs rights under RFRA. An appropriate order accompanies this memorandum.

ORDER

Pursuant to Fed.R.Civ.P. 58 and for the reasons stated by the court in its memorandum docketed this same day, it is this 19th day of February, 2002, hereby

ORDERED and ADJUDGED that judgment is entered in favor of plaintiffs; and it is further

ORDERED and ADJUDGED that the defendants (collectively "BOP"), before designating any inmate to a Virginia Department of Corrections ("VDOC") institution, shall consider each inmate's religious beliefs and practices and, to the extent those beliefs and practices would be burdened by the VDOC grooming policy, that factor shall militate against BOP designating that inmate to a VDOC institution; and it is further

ORDERED and ADJUDGED that BOP shall immediately evaluate whether the grooming policy of VDOC burdens the religious beliefs and practices of each of its inmates housed in a VDOC institution. If a BOP inmate's religious beliefs and practices ***41** are found to be burdened by the VDOC grooming policy, BOP shall promptly transfer that inmate out of VDOC; and it is further

ORDERED and ADJUDGED that all disciplinary action imposed on any class member as a result of the class member's refusal to comply with the VDOC grooming policy shall be expunged from any BOP record of such action immediately; and it is further

ORDERED and ADJUDGED that the court shall retain jurisdiction over this matter to ensure that the terms of its injunction are obeyed and for appropriate ancillary proceedings.

All Citations

191 F. Supp. 2d 23

Tab 8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Rodney J. Ireland, Lester McGillis, Gerald DeCoteau, William Carter, Ryan Corman, Matthew Graham, Terry Greak, Glenn Halton, Robert Hoff, Monte Hojian, Jeremy Johnson, Michael Kruk, Garrett Loy, Kevette Moore, Cruz Muscha, Darin Napier, Paul Oie, Timothy Olpin, Larry Rubey, Christopher Simon, Kelly Tanner, John Westlie, Robert Lilley, Darl Hehn, Oliver Wardlow, Joshua Keeping, Matthew Dyer, Travis Wedmore, Kyle Aune, Marcus Bartole, Jason Gores, Estel Naser, Andrew Olafson, Stanton Quilt, Raymond Voisine, Eugene Wegley, David Anderson, Eugene Fluge, Robert Beauchamp, Sandy Mangelsen, and Eugene Hinson, Plaintiffs, vs. Maggie D. Anderson, Executive Director, North Dakota Department of Human Services, in her official capacity, Leann Bertsch, Director, North Dakota Department of Corrections and Rehabilitation, in her official capacity, State of North Dakota, North Dakota Department of Human Services, North Dakota Department of Corrections and Rehabilitation, North Dakota State Hospital, and Dr. Rosalie Etherington, Superintendent of the North Dakota State Hospital, in her official capacity, Defendants.	)	Case No. 3:13-cv-3 **REPORT AND RECOMMENDATION**

Forty-one named plaintiffs challenge various aspects of North Dakota's system for civil commitment of persons who have been found to be sexually dangerous individuals (SDIs). The plaintiffs now move for certification of four separate classes and of three subclasses within one of those classes. (Doc. #343).

Summary

District courts are vested with discretion to apply the criteria of the applicable rule when determining whether class certification is appropriate. Considering each of those criteria, each of the proposed classes can be found to meet each of the rule's criteria.

However, the proposed class representatives for one of the requested classes—the Department of Corrections and Rehabilitation (DOCR) Class—lack standing to pursue claims of that class. This court therefore recommends that the motion for class certification be denied as to that proposed class and granted as to the other proposed classes and subclasses.

Background

North Dakota, like at least twenty other states, has adopted a statutory process for civil commitment of SDIs. See N.D. Cent. Code ch. 25-03.3. Under that statutory framework, a state's attorney can initiate a civil commitment proceeding by filing a petition with a district court. Id. § 25-03.3-03(1). If a petition is filed, the person alleged to be an SDI has a statutory right to notice, a right to counsel, a right to a hearing, and a right to services of an expert witness at state expense. Id. §§ 25-03.3-09 to -13.

The SDI civil commitment process usually begins while a person is serving a prison term in custody of the DOCR. If a person who has been convicted of "an offense that includes sexually predatory conduct" is in DOCR's custody, DOCR is required to assess the person and to decide whether to recommend civil commitment as an SDI. Id. § 25-03.3-03.1(1). DOCR's assessment is to occur approximately six months prior to the person's projected date of release from custody. If DOCR determines that a person may

meet the statutory definition of an SDI, DOCR is required to refer that person to one or more state's attorneys for possible civil commitment proceedings. Id. § 25-03.3-03(2). If a state's attorney files a petition after getting DOCR's recommendation, the person is transferred from DOCR custody to custody of the county where the petition was filed, pending a preliminary hearing. Id. § 25-03.3-03.11.

At a preliminary hearing, the state court determines whether there is probable cause to believe the individual is an SDI. If the court does not find probable cause, the petition is dismissed. Id. If the state court finds probable cause, the person is transferred to the North Dakota State Hospital (NDSH) for evaluation. Following evaluation, the state district court conducts a commitment hearing. The governing statute provides that a commitment hearing is to be held within 60 days of a finding of probable cause, unless the court finds good cause to extend that time. Id. § 25-03.3-13. But, declarations in the record describe plaintiffs being in the evaluation process at NDSH for as long as 197 days, 234 days, and 1 year. (Doc. #345-2, p. 2; Doc. #345-4, p. 2; Doc. #345-5, p. 2).

At a commitment hearing, the state has the burden to prove, by clear and convincing evidence, that the person meets the statutory definition of an SDI. To meet that burden, the state must prove (1) that the person has engaged in sexually predatory conduct, (2) that the person has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or another mental disorder or dysfunction, and (3) that the disorder makes that person likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others. N.D. Cent. Code § 25-03.3-01(8).

Under North Dakota's system, individuals who are found to be SDIs are committed to the custody of the Department of Human Services (DHS) for placement in

"an appropriate facility or program at which treatment is available." Id. § 25-03.3-13. The placement is to be in the "least restrictive available treatment facility or program necessary to achieve the purposes of [the SDI statutes]," though DHS is not required to "create a less restrictive treatment facility or treatment program specifically for [a] respondent or committed individual." Id.

Upon their commitment, DHS places SDIs in a facility on the NDSH campus—the Gronewald/Middleton Building. (Doc. #246, p. 27). DHS may initiate a petition seeking a court's approval for a community placement—rather than placement at NDSH—but an SDI may not petition for community placement, and the state courts have determined that a court cannot order community placement in the absence of a DHS request. N.D. Cent. Code § 25-03.3-24(1); In re Whitetail, 868 N.W.2d 833, 840 (N.D. 2015). SDI treatment stages are described in a resident handbook, and it appears that handbook contemplates a minimum of two to three years to complete the treatment program. (Doc. #344-3, pp. 15-23).

The governing statutes require that an individual who is committed as an SDI have an annual examination, with an exam report to be provided to the court that ordered the commitment. If an SDI is indigent, the statutes also give the SDI a right to an annual examination by a court-appointed expert at state expense. N.D. Cent. Code § 25-03.3-17(2). After receiving an annual report, the court may order further examination and may hold a hearing to determine whether the commitment should continue. Id. § 25-03.3-17(4).

Once committed, an SDI remains committed indefinitely, unless a court orders discharge. Discharge petitions can be initiated by an SDI or by DHS. Id. § 25-03.3-17(5).

There is a statutory requirement that an SDI receive annual notice of the right to petition for discharge, id. § 25-03.3-18(1), and an SDI is entitled to a discharge hearing every twelve months, id. § 25-03.3-18(2). At a hearing on a discharge petition, the SDI again has a right to a court-appointed expert at state expense. Id. § 25-03.3-18(3). In a discharge hearing, as in an initial commitment hearing, the state must prove, by clear and convincing evidence, that the person meets the statutory definition of an SDI. Id. § 25-03.3-18(4). Both initial orders for commitment as an SDI and orders denying petitions for discharge are appealable to the state supreme court. Id. § 25-03.3-19.

North Dakota began implementation of chapter 25-03.3 in 1997 through its Sex Offender Treatment and Evaluation Program (SOTEP). According to the defendants,[1] approximately 170 individuals have been evaluated by SOTEP to date, and approximately 100 of those individuals have been committed as SDIs. (Doc. #361, pp. 6-7). Of those who have been committed, approximately 46 were subsequently discharged from NDSH. Id. According to the plaintiffs, 23 SDIs were discharged pursuant to court orders over DHS' objection, 5 SDIs were discharged after annual reviews or on their own petitions but without DHS' objection, and 2 SDIs were discharged based on DHS-initiated petitions. (Doc. #344, pp. 2-3). Five SDIs have been approved for community placement—three based on DHS-initiated petitions, and two after annual review without DHS' objection. Id.[2]

[1] The statistical information which the plaintiffs provided is not completely consistent with that provided by the defendants. The discrepancies appears to result, at least in part, from continuing commitments and discharges. Unless otherwise noted, the discrepancies are not considered material to the instant motion.

[2] The plaintiffs state that they do not yet have information showing the path to release of all of those who have been released.

The plaintiffs' compilation of discovery data, which defendants have not questioned, shows that, of those currently confined at NDSH as SDIs, over half have been there for 8 or more years, and at least 25% have been there more than 10 years. Id. at 1. The first person who was evaluated as an SDI, plaintiff Matthew Dyer, was committed in 1998, and remained at NDSH until he was moved to a community placement in July 2016, eighteen years later. Id.; (Doc. #382-2, p. 2).

Plaintiffs' Claims

The plaintiffs claim that, since 2004, the defendants have implemented the SDI system under a policy of preventive detention, resulting in unconstitutional confinement of persons who are neither dangerous nor in need of further treatment. Plaintiffs have submitted data which shows a significant increase in the number of persons committed as SDIs beginning in 2004. (Doc. #343-1, p. 10). According to the plaintiffs, North Dakota transformed its SDI system as a consequence of a 2003 kidnapping and murder of a young Grand Forks woman, which was committed by a convicted sex offender who had been released from a Minnesota prison. The case garnered very extensive publicity, and resulted in the sex offender being sentenced to death in a federal case. See United States v. Rodriguez, D.N.D. Case No. 2:04-cr-55.

The plaintiffs further allege that, after 2004, NDSH added "prison-like features" to the Gronewald/Middleton Building and implemented "prison-type policies" for the SOTEP program. (Doc. #344-45, p. 3) (2007 Report of the Legislative Council describing "numerous risk-reduction strategies" implemented after escape of an SDI).

As claims common to the proposed classes, the plaintiffs allege that the defendants have:

(1) adopted and enforced an unconstitutional policy of preventive detention;

(2) created a civil commitment system that is punitive;

(3) not provided a less restrictive confinement option;

(4) not completed annual assessments of SDIs;

(5) used unconstitutional criteria for continued confinement;

(6) not implemented statutory provisions for community placement;

(7) not initiated discharge petitions or engaged in discharge planning;

(8) not provided adequate treatment to SDIs;

(9) continued confinement because SDIs decline to make self-incriminating statements;

(10) created "unnecessarily punitive" conditions of confinement;

(11) not provided adequate medical care to SDIs;

(12) committed persons as SDIs who have no underlying sexual disorder;

(13) committed persons as SDIs based on "sexually predatory conduct" committed while the person was a juvenile;

(14) not treated SDIs with disabilities in the least restrictive environment;

(15) burdened SDIs' exercise of religion;

(16) treated SDIs differently than "persons requiring treatment" under North Dakota Century Code chapter 25-03.1;

(17) violated SDIs' Fourth Amendment rights by conducting unreasonable searches and seizures;

(18) interfered with SDIs' First Amendment right to petition the government,

(19) violated SDIs' procedural and substantive due process rights by using a referral process that "lacks a rational basis";

(20) subjected SDIs to punitive conditions in violation of their due process and equal protection rights; and

(21) sought reimbursement from SDIs for the costs of their involuntary commitment.

(Doc. #343-1, pp. 17-34).

Proposed Classes and Subclasses

The plaintiffs seek certification of four separate classes, and of three subclasses within one of those four classes.

First, the plaintiffs propose a SOTEP Class, consisting of "all persons civilly committed to the [DHS] pursuant to N.D.C.C. Chapter 25-03.3 and confined in the Sex Offender Treatment and Evaluation Program at NDSH," with subclasses consisting of:

(1) all SOTEP Class members with disabilities as defined under the Americans with Disabilities Act (ADA Subclass);

(2) all SOTEP Class members whose civil commitment was based on "sexually predatory conduct" (as defined by North Dakota Century Code section 25-03.3-01(9)) committed while they were minors (Juvenile Subclass); and

(3) all SOTEP Class members whose religious exercise has been substantially burdened while civilly committed (Religious Land Use and Institutionalized Persons Act, or "RLUIPA" Class).

(Doc. #343, pp. 1-2).

The plaintiffs assert that the proposed SOTEP class has over 50 members. (Doc. #343-1, p. 14). According to the defendants, the proposed SOTEP class would include, at most, 55 members, 28 of whom are named plaintiffs. (Doc. #361, p. 13). As to the three subclasses, the plaintiffs assert that eleven persons—four of whom are named plaintiffs—would qualify for the proposed ADA Subclass, that at least six would qualify for the proposed Juvenile Subclass, and that at least ten would qualify for the proposed RLUIPA Subclass. (Doc. #343-1, pp. 15-16). The defendants assert that evidence shows only one member of the proposed ADA Subclass. (Doc. #361, pp.13-14). As to the

proposed Juvenile Subclass, the defendants contend that evidence shows no members, Id. The defendants do not dispute that the proposed RLUIPA Subclass could include at least ten members, but note that five of those persons are named plaintiffs. Id. at 14.

Second, the plaintiffs propose a DOCR Class, consisting of all sex offenders, as defined in Department of Corrections and Rehabilitation Policy No. 1A-16 (2012), (see Doc. #344-20), committed to the custody of DOCR "who have been or will be referred to a state's attorney for civil commitment" as provided by North Dakota Century Code section 25-03.3-03.1. (Doc. #343, p. 2). The plaintiffs state that their review of the North Dakota Attorney General's Sex Offender Website has identified over 75 persons currently in custody at the North Dakota State Penitentiary (NDSP) who would meet the criteria for the proposed DOCR Class. (Doc. #343-1, pp. 14-15). The defendants counter that no person in the proposed DOCR Class has yet suffered an "injury in fact," and that therefore no person in that proposed class has standing. (Doc. #361, pp. 14-15).

Third, the plaintiffs propose an Evaluation Class, consisting of "all persons in custody at [NDSH] for evaluation as to whether they are [SDIs] pursuant to N.D.C.C. § 25-03.3-11." (Doc. #343, p. 2). The plaintiffs recognize that only a small number—five—would qualify for the proposed Evaluation Class at this time, but argue that class certification is nonetheless appropriate because of the "fluid nature of the population" and the short time any individual is on evaluation status. (Doc. #343-1, p. 15). The defendants have not questioned the plaintiffs' assertion that five persons would qualify for an Evaluation Class at this time.

Finally, the plaintiffs propose a Debt Class, consisting of "all persons from whom DHS or NDSH has demanded payment since January 1, 2004, for their civil

commitment as [SDIs] pursuant to Chapter 25-03.3." (Doc. #343, pp. 2-3). According to the plaintiffs, more than 90 persons—all those who are or have ever been committed as SDIs—would qualify for the proposed Debt Class. (Doc. #343-1, p. 14). The defendants contend that, since they demand payment only from those who have been discharged from SOTEP, and since only 46 persons have been discharged to date, the proposed Debt Class could not exceed 46 members. (Doc. #361, p. 14). Additionally, the defendants contend that the plaintiffs have not identified any plaintiff from whom DHS or NDSH has actually demanded payment, and therefore have not identified anyone who would have standing as a member of the proposed Debt Class. Id.

Law and Discussion

Class certification is governed by Federal Rule of Civil Procedure 23, which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (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. Pro. 23(a). In addition to the four elements of Rule 23(a), class certification requires that one of three criteria of Rule 23(b) be satisfied. In this case, the plaintiffs assert they meet the criteria of Rule 23(b)(2)—"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."

The plaintiffs have the burden to establish each of Rule 23's requirements. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). In considering a motion for class certification, the court must conduct a "rigorous analysis" to ensure that all Rule 23 requirements are satisfied. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982). Though the merits of the claims and defenses are not directly addressed in the context of class certification, the required rigorous analysis is to involve "consideration of what the parties must prove." Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006). Of course, the court must "ensure that it has Article III jurisdiction to entertain each claim asserted by the named plaintiffs." Id. But, when there are questions as to whether class certification is appropriate, the court is to give the benefit of the doubt to certifying the class. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013).

In civil rights matters, Rule 23(b)(2) is to be "read liberally." Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980). Where a class action is to be certified for injunctive relief under Rule 23(b)(2), courts have taken a more flexible approach in defining the class, since notice to class members is not required under Rule 23(b)(2), and since no questions as to distribution of any monetary relief are involved. When considering motions for class certification in actions seeking injunctive relief against state agencies, however, a court must be "constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." Elizabeth M., 458 F.3d at 784.

Most of the courts of appeals recognize additional, implicit, requirements of Rule 23—that the class be ascertainable with reference to objective criteria and that there be a reliable mechanism to determine whether putative members come within the objectively

defined class. The Eighth Circuit, however, has not adopted ascertainability as a separate element. In a recent opinion, the Eighth Circuit stated that, rather than addressing ascertainability as a separate preliminary requirement, "this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'" Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc., 821 F.3d 992, 995-96 (8th Cir. 2016).[3] This opinion therefore does not separately address the implicit requirements as defined by other circuits. The parties' arguments concerning those implicit requirements are instead incorporated into the discussion of standing and of the explicit requirements of Rule 23.

1. Standing

The defendants argue that standing is lacking as to some of the plaintiffs' claims. In class actions, as in any other federal case, plaintiffs must establish standing to sue. The purpose of the standing requirement is to ensure that a plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." Baker v. Carr, 369 U.S. 186, 204 (1962). Federal courts use a familiar three-part test to determine whether a plaintiff has standing to sue. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered "injury in fact." Second, the injury must be traceable to the defendant's action which is being

[3] Prior to the recent Sandusky decision, some district courts in this circuit had also considered the implicit requirements adopted in other circuits as separate elements. Liles v. Am. Corrective Counseling Servs., Inc., 231 F.R.D. 565, 571 (S.D. Iowa 2005); Dirks v. Clayton Brokerage Co. of St. Louis, Inc., 105 F.R.D. 125, 130 (D. Minn. 1985).

challenged. Id. Finally, the injury must be one that would be redressed by a decision favorable to the plaintiff. Id. at 561. The first element—injury in fact—requires a showing that an injury is concrete and particularized and "actual or imminent," not conjectural or hypothetical. Id. at 560.

As described by the Supreme Court:

> [T]he fact that a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."

Gratz v. Bollinger, 539 U.S. 244, 289 (2003) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976)). A class cannot be certified if it includes members who lack standing; rather, a class must be "defined in such a way that anyone within it would have standing." Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 779 (8th Cir. 2013).

The relationship between the doctrine of standing and Rule 23's class certification requirements, however, makes standing analysis more complex in class actions:

> The doctrine of standing insists on a relationship between a plaintiff's individual harm and the scope of the claims that she seeks to litigate. This relationship is complicated in a class action because a named plaintiff seeks to litigate the claims of others, as well as her own claims, and because the requirements of Rule 23(a)—commonality, typicality, and adequacy—exist to test the relationship between the named plaintiff's claims and those of the class. The concepts of standing and Rule 23(a) therefore appear related as they both aim to measure whether the proper party is before the court to tender the issues for litigation. But, they are in fact independent criteria. They spring from different sources and serve different functions. Because individual standing requirements constitute a threshold inquiry, the proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint, not to deny class certification. The class issues are not reached in

> this instance. On the other hand, when a class plaintiff shows individual standing, the court should proceed to Rule 23 criteria to determine whether, and to what extent, the plaintiff may serve in a representative capacity on behalf of the class.

1 William B. Rubenstein, Newberg on Class Actions § 2:6, pp. 76-77 (5th ed. 2011).

In the context of class actions, the standing analysis may be complicated by a "disjuncture" between the harm that a plaintiff suffered and the requested class relief. Courts have approached this disjuncture problem in differing ways:

> Put simply, the scope of the harm defines the contours of a plaintiff's standing and hence of her claims.
>
> While the principle is simple to state in individual cases, its application to class action practice is more complex. The confusion is generated because the disjuncture . . . is refracted through the representative relationship: the class representative may seek to litigate harms not precisely analogous to the ones she suffered but harms that were nonetheless suffered by other class members. This situation generates confusion because it can be, and has been, addressed in two distinct manners: some courts, applying the standing principle identified [in the paragraph quoted] above, simply find that the class representative lacks standing to pursue the class members' claims because she did not suffer their injuries in this disjuncture situation. Other courts, having determined that the class representative has standing to pursue her own claims, move on from the standing inquiry and approach the disjuncture as an issue of class certification, not standing; these courts may hold that the class representative cannot pursue the harms that she did not suffer because her claims are not typical of those class members' claims and/or because she cannot, therefore, adequately represent those claimants. In short, there is a "standing" and a "class certification" approach to the disjuncture problem.

Id. at 78. The Gratz court noted a "tension" in prior cases as to whether similarity of injuries suffered by a named plaintiff and unnamed class members is "appropriately addressed under the rubric of standing or adequacy." 539 U.S. at 263 n.15. In Gratz itself, the Court found the requisite standing despite some disjuncture between the harm suffered and the relief sought. Newberg on Class Actions suggests that Gratz holds that a

disjuncture problem can be overcome by demonstrating a sufficient relationship between the named plaintiff's injury and the class' injury, such that the named plaintiff can litigate the claims of the class. Rubenstein, supra, § 2.6, p. 84.

As Newberg on Class Actions discusses, disjuncture may be especially problematic in cases seeking equitable relief:

> Any plaintiff seeking injunctive relief typically must demonstrate that she will be subjected to the defendant's policy again in the future. This basic rule does not change for the class action plaintiff. When a named plaintiff in a class suit attempts to obtain an injunction due to the likelihood of future injury, that injury must be suffered personally by the named plaintiff—potential future injuries to class members do not provide standing for the named plaintiff to seek injunctive relief. Thus, a plaintiff who has suffered an actual injury but is unlikely to suffer further injury in the future may have standing to bring an individual or class claim for damages but be unable to seek equitable relief even if other class members are likely to suffer future injury.

Id. at 87.

The defendants argue three groups of proposed class members lack standing: (1) those not currently confined under North Dakota Century Code chapter 25-03.3; (2) those whose claims are based on past conduct for which no prospective relief can be granted; and (3) unknown future class members. (Doc. #361, p. 6). The court next analyzes standing as to each of those three groups.

A. Persons Not Currently Confined

The proposed classes include two groups of persons not currently confined as SDIs—those in the proposed Debt Class who have been discharged from SOTEP and those in the proposed DOCR Class who are currently in DOCR custody rather than in DHS custody.

I. Debt Class

In denying a motion to dismiss, the court previously found standing as to those who have been discharged from SOTEP, but from whom the defendants have demanded payment for their stays at NDSH. That ruling was based on DHS's statutory authority to seek recovery of the costs of SOTEP treatment for up to six years and on a demand for payment[4] "in the form of a dunning letter constitut[ing] a continuing injury for which the proposed class members have standing to seek injunctive relief." (Doc. #244, pp. 3-4).

Concerning the Debt Class, the defendants now argue that only those who have been discharged and are subject to a current demand for payment could have standing, and further argue that the plaintiffs have not identified any named plaintiffs or proposed class members who are currently subject to payment demands. (Doc. #361, p. 9). But, in fact, the plaintiffs' motion is supported by declarations of three SDIs discharged from SOTEP, each of whom describes a current demand for payment. Two describe notices that their bills had been referred to a collection agency. (Doc. #345-7, pp. 7-8; Doc. #345-11, p. 3). A declaration of another plaintiff describes NDSH having garnished over $70,000 from his Supplemental Security Income (SSI) benefits while he was confined at NDSH. (Doc. #345-2). The record shows another SDI having filed bankruptcy to discharge his debt to NDSH. (Doc. #344-34). At minimum, each of the three plaintiffs whose declarations describe a current demand for payment meets Lujan's three-part standing test. Thus, as to the proposed Debt Class, defendants' contention that standing is lacking should be rejected.

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[4] Although NDSH bills SOTEP residents for their stays, no demand for payment is made until after an SDI is discharged from SOTEP. (Doc. #361, p. 9 n.2).

II. DOCR Class

Turning to the proposed DOCR Class, the court must determine whether any named plaintiff has individual standing as to claims against DOCR. An earlier order of the court discussed the plaintiffs' claims against DOCR:

> The procedural due process claim alleged by the plaintiffs concerns DOCR's pre-petition process. North Dakota law requires that approximately six months before the projected release date of an inmate, the department is to complete an assessment of the inmate to determine whether a recommendation is to be made to a state's attorney for civil commitment. If, after completion of the assessment, the department determines the inmate may meet the definition of a[n] SDI, the department is to refer the inmate to the state's attorney of a county. Following receipt of the referral, but at least 60 days before the inmate's release date, the state's attorney is to notify the DOCR and the attorney general whether the state's attorney intends to file a civil commitment petition. If the DOCR authorizes a petition, the district court determines whether the individual must be detained pending a commitment hearing.
>
> The plaintiffs maintain that this process unconstitutionally deprives them of liberty without notice because the DOCR does not inform an inmate of possible detention for commitment proceedings until immediately before the scheduled release date from DOCR custody. The lack of notice, according to plaintiffs, results in few contested probable cause hearings. Tied into this claim is plaintiffs' claim that the defendants have violated substantive due process rights because DOCR's referral process lacks a rational basis for utilizing "discredited actuarial instruments" in the selection of inmates to be referred for SDI proceedings. Although defendants contend the plaintiffs lack standing to bring such a claim because they are no longer in DOCR custody, it appears from the record that several SDI plaintiffs are, in fact, in DOCR custody. Moreover, the duration of time in which the inmate is in DOCR custody and aware of the potential SDI commitment proceedings is short. By the time the inmate in DOCR custody is aware of the referral, they are moved out of DOCR custody and in the midst of the process of being committed as an SDI. By statute, release of a potential SDI from DOCR custody for a SDI evaluation and committal as an SDI is approximately 60 days.
>
> The court finds the allegations in the complaint are sufficient to survive a motion to dismiss and that the plaintiffs alleging due process claims have standing to pursue them.

(Doc. #244, pp. 5-6).

That earlier order, in the context of a motion to dismiss, was based on information then in the record, with all reasonable inferences construed in the plaintiffs' favor. Now, however, the burden is on the plaintiffs to establish that they meet each of Rule 23's requirements, and that they meet standing requirements. The court must therefore consider the circumstances of the two plaintiffs proposed as DOCR Class representatives—Lester McGillis and Travis Wedmore—to determine whether either has standing to raise claims of the proposed DOCR Class. The record now includes declarations describing the DOCR custody status of both McGillis and Wedmore. (See Doc. #348; Doc. #350).

As the plaintiffs propose the DOCR Class, it would include those in DOCR custody "who have been or will be referred to a state's attorney for civil commitment." (Doc. #343, p. 2). As discussed above, DOCR is statutorily required to assess sex offenders prior to their release, to determine whether to refer an individual to a state's attorney for civil commitment. DOCR, is not, however, statutorily required to refer any individual for civil commitment.[5] Under the plaintiffs' proposed definition, only those who have been or will be referred for civil commitment—not those who will be assessed for referral—would be included in the DOCR Class.

Both McGillis and Wedmore are in DOCR custody because of criminal conduct—though not sexually predatory conduct—which occurred during their

[5] Although not required by statute, DOCR policy requires that persons who meet certain criteria be referred to a state's attorney, regardless of whether DOCR believes a person may be an SDI. If a person meets criteria of that DOCR policy, but DOCR does not believe that person is an SDI, DOCR contacts the state's attorney to advise of the offender's upcoming release. (Doc. #344, p. 4).

confinement at NDSH. McGillis' declaration states that he began serving a sentence in DOCR custody in October 2014, after a conviction for assault of an NDSH staff member. Also in October 2014, a state court judge determined that McGillis no longer meets the definition of an SDI and ordered him discharged from civil commitment. (Doc. #348, p. 5). Therefore, when his DOCR sentence is completed, McGillis is not scheduled to be returned to NDSH. Wedmore's declaration states that he is in DOCR custody because of a conviction for punching an NDSH staff person and that he will be returned to NDSH after completion of his DOCR sentence. (Doc. #350, pp. 1-2).

The plaintiffs argue that the risk of future injury—that is, the risk of DOCR referring them for civil commitment—confers standing on both Wedmore and McGillis. To meet Lujan's standing test, a future injury must be "imminent" and "not conjectural or hypothetical." Thus, Wedmore and McGillis must show that the risk of DOCR again referring them for civil commitment is imminent, and not conjectural or hypothetical.

Wedmore is subject to an existing commitment order. The court conceives no reason why DOCR might refer someone subject to an existing commitment order for another commitment proceeding, and the plaintiffs' brief suggests no reason for doing so. Nor do the plaintiffs identify any circumstances in which a person situated similarly to Wedmore has been referred for another commitment proceeding. Consequently, this court cannot conclude that Wedmore is at imminent risk of being referred for another commitment proceeding, and must therefore conclude that he does not have standing to raise claims of the proposed DOCR Class.

Even though a state court has determined McGillis no longer meets the SDI criteria, the plaintiffs assert that he could again be subject to referral for another

commitment proceeding. According to a declaration of the plaintiffs' counsel, "several individuals have been committed as SDIs on two separate occasions and/or referred for possible commitment on more than one occasion." (Doc. #344, p. 11).

McGillis meets DOCR's definition of a sex offender,[6] so it is possible that he would be referred for another commitment proceeding, even though he is not currently serving a sentence for a sex-related offense. But, the plaintiffs have cited no instances in which DOCR has actually referred a person in custody for a non-sex related offense for a commitment proceeding. Nor have plaintiffs identified instances in which DOCR has referred someone whom a court has recently found to no longer meet the definition of an SDI for another commitment proceeding. The plaintiffs' theory that DOCR might refer McGillis for a commitment proceeding as the end of his current DOCR sentence nears is, in this court's opinion, conjectural and hypothetical.

In this court's opinion, none of the named plaintiffs currently in DOCR custody has standing to raise issues concerning DOCR's process for referral to a state's attorney for commitment proceedings.[7] They are in the situation Newberg on Class Actions

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[6] DOCR's Policy 1A-16 includes within its definition of "sex offender" those who have a prior record of sex offenses and remain subject to sex offender registration laws, and those who have "any history of sexually predatory conduct." Information in the record does not suggest that McGillis would meet the policy's criteria for mandatory referral to a state's attorney discussed in footnote 5.

[7] The plaintiffs' brief refers to a third named plaintiff as also being in DOCR custody, but does not identify him as a proposed class representative. (Doc. #343-1, p. 32). That third plaintiff is referenced as Timothy Olafson, though that appears to be a typographical error. Andrew Olafson, but not Timothy Olafson, is a named plaintiff. The court is familiar with the circumstances of Andrew Olafson, who is a plaintiff in another case in this court. See Olafson v. Schultz, D.N.D. Case No. 3:14-cv-90. The record of that other case shows that Andrew Olafson is currently in DOCR custody because of convictions for assault and disorderly conduct relating to incidents that occurred while he was committed at NDSH. Id. at Doc. #16, p. 7. There is no information in the record

describes: "[A] plaintiff who has suffered an actual injury but is unlikely to suffer further injury in the future may have standing to bring an individual or class claim for damages but be unable to seek equitable relief even if other class members are likely to suffer future injury." Rubenstein, supra, § 2.7, p. 87.

Nor does any named plaintiff who is not currently in DOCR custody have standing; all have completed the commitment process, and there is no showing that any of them is at imminent risk of again being subject to referral for that process. Since there is no named plaintiff who has the requisite standing, this court recommends against certification of the proposed DOCR Class.

B. Claims Based on Past Conduct and Non-Parties' Conduct

One of the requirements for standing is redressability—the alleged injury must be one that would be addressed by a decision favorable to the plaintiff. In that context, the court considers the defendants' assertion that plaintiffs lack standing as to various claims based on past conduct. The defendants contend that standing cannot be found as to the claims based on: DOCR's referrals to state's attorneys, detention pending probable cause hearings, transfer to and confinement at NDSH for SDI evaluations, and confinement pending a commitment hearing. (Doc. #361, p. 9). The plaintiffs reply that, though they will offer evidence of past conduct, they seek only prospective relief. (Doc. #368, p. 6). By itself, the fact that claims are based on past conduct does not preclude prospective relief, and does not result in lack of standing.

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suggesting that Olafson will not be subject to continuing commitment as an SDI after his DOCR custody ends. As it relates to the standing inquiry, Olafson's situation is no different from Wedmore's.

The defendants also contend that the proposed classes include persons whose claims are against non-parties. (Doc. #361, p. 10). In that regard, the defendants identify claims concerning conduct of those who ordered detention pending probable cause hearings, those who detained persons pending probable cause hearings, and those who ordered persons transferred to NDSH for SDI evaluations. The defendants argue that, in essence, the plaintiffs are improperly challenging past decisions of state judges and law enforcement personnel.[8] Id. The plaintiffs reiterate that they are alleging only current and imminent violations of their constitutional rights, (Doc. #368, p. 13 n.6), and the court has stated that it will not review state court decisions, (see Doc. #244, p. 3) ("The judicial commitment orders are not subject to review in this action."). The fact that the plaintiffs may offer evidence of conduct by, and decisions of, non-parties does not preclude prospective relief against the defendants and does not defeat standing.

C. Future Class Members

The defendants argue that the proposed classes include unknown future class members who lack standing. (Doc. #361, p. 6). Though the class definitions which the plaintiffs have proposed do not explicitly include future members, the plaintiffs argue that the injunctive relief which they seek would benefit persons who do not come within a class definition at this time, but will in the future. The plaintiffs urge the court to consider those potential future beneficiaries in analyzing the impracticability of joinder of all class members. (Doc. #368, p. 6). It is within this context that the defendants assert that the proposed classes would include unknown future members.

[8] In this regard, the defendants reassert application of the Rooker-Feldman doctrine. In the context of an argument that a motion to amend the complaint was futile, the court previously found the Rooker-Feldman doctrine did not deprive it of jurisdiction. (Doc. #99; Doc. #102).

A pending case involving Missouri's sex offender treatment program addressed concerns about inclusion of future class members:

> Plaintiffs seek prospective injunctive relief which, if granted, would presumably apply to future [Sexual Offender Rehabilitation and Treatment Services] residents. Therefore, the inclusion of "future" SORTS residents in the proposed classes is redundant and unnecessary, and could unduly complicate the proceedings. The Court will modify the proposed class definitions to restrict the classes to those who are, or will be *during the pendency of this action*, residents of SORTS.

Van Orden v. Meyers, No. 4:09CV00971, 2011 WL 4600688, at *4 (E.D. Mo. Sept. 30, 2011).

The plaintiffs suggest that the defendants' concerns about inclusion of future class members can be addressed in a manner similar to that employed in Van Orden. (Doc. #368, p. 7). This court agrees. Specifically, as to the Debt Class, the definition can be narrowed to include only those persons from whom DHS or NDSH has demanded payment from January 1, 2004, through the pendency of this action.[9] The definitions of the SOTEP Class, of each of the subclasses within the SOTEP Class, and of the Evaluation Class can be similarly narrowed, to include only persons subject to SOTEP commitments or evaluations during the pendency of this action.[10]

[9] Additionally, the plaintiffs offer to narrow the starting date for inclusion in the Debt Class to August 2008, six years prior to filing of the second amended complaint, if the defendants stipulate that they will make no attempt to collect from any SDIs discharged prior to August 2008. (Doc. #368, p. 4 n.3).

[10] Though this court recommends against certification of the proposed DOCR Class, if that class were certified, its definition could similarly be narrowed to limit it to those whom DOCR refers for civil commitment proceedings during the pendency of this litigation.

D. Named Class Representatives

The defendants contend that there are not named representatives for some of the proposed classes. The defendants argue that no named plaintiff meets the criteria for a proposed Juvenile Subclass, as that subclass is described in the Sixth Amended Complaint. Further, they contend that the definition now proposed for the Juvenile Subclass is improper because it is different from that included in the complaint.[11] (Doc. #361, p. 11). Defendants cite no authority for the proposition that a class definition must mirror the definition pled in the complaint, and the court has identified no authority for that position.

District courts have certified classes defined differently than originally pled, and Rule 23(c)(1)(C) allows for amendment of a certification order at any time prior to final judgment. See, e.g., Hopkins v. Kan. Teachers Comm. Credit Union, 265 F.R.D. 483, 485 n.2 (W.D. Mo. 2010); In re Select Comfort Corp. Sec. Litig., 202 F.R.D. 598, 606 (D. Minn. 2001). The court therefore considers the Juvenile Subclass definition as proposed in the plaintiffs' motion, rather than as described in the complaint. As proposed in the motion, three named plaintiffs meet the definition for a Juvenile Subclass. (See Doc. #345-3; Doc. #345-9; Doc. #345-13). Each of the three—Jason Gores, Robert Lilley, and John Westlie—declare that they were committed as SDIs based on conduct which occurred while they were juveniles. Id.

[11] The Sixth Amended Complaint describes an "SDI Minors" subclass, to include persons who were minors at the time of SDI referral, detention, and/or commitment. (Doc. #246, p. 13). The subclass definition now proposed would include those whose commitment was based on sexually predatory conduct which was committed while they were minors, rather than on commitment proceedings occurring while they were minors.

As to the proposed ADA Subclass, the defendants argue that the plaintiffs have not proved that any proposed class member is under a disability, apart from a sexual behavioral disorder which is excluded from ADA coverage. (Doc. #361, p. 12). In support of this position, the defendants cite only Belles v. Schweiker, where the circuit court affirmed the district court's denial of class certification, stating:

> [The plaintiff] cannot identify any other person who has been subjected to the same or similar treatment as she has. She only speculates that such is the case. Proof of typicality requires more than general conclusory allegations.

720 F.2d 509, 515 (8th Cir. 1983).

In a declaration, plaintiffs' counsel states that review of SDIs' records has identified eleven who have disabilities. (Doc. #344, p. 16). Further, counsel assert they cannot identify additional potential ADA Subclass members because records of nonparty SDIs who have not signed releases are not available to them. (Doc. #368, p. 9). According to counsel's declaration, one of the proposed representatives of the ADA Subclass has been diagnosed as having psychotic disorders, and another has been diagnosed as having "borderline intellectual functioning and a pattern of cognitive deficits thought to be consistent with prenatal alcohol exposure." (Doc. #344, pp. 6, 9). Another plaintiff, who is not identified as a representative of the proposed ADA Subclass, is described as having been diagnosed with pervasive developmental disorder and mild mental retardation. Id. at 7. The declaration of counsel, an officer of the court, cannot be considered speculative or conclusory. The proposed ADA Subclass is not speculative under Belles, and the proposed representatives of that class meet requirements for standing.

The defendants have not raised standing issues as to representatives of the SOTEP Class, the RLUIPA Subclass, or the Evaluation Class. In this court's opinion, the plaintiffs have met standing requirements as to the following proposed classes and subclasses: SOTEP Class, Juvenile Subclass, RLUIPA Subclass, ADA Subclass, Evaluation Class, and Debt Class. There are named plaintiffs who have standing to assert the claims of each of those classes and subclasses.[12]

The court next considers whether the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—have been established as to each proposed class and subclass.

2. Rule 23(a)(1)—Numerosity

The defendants argue that none of the proposed classes or subclasses meet Rule 23(a)(1)'s requirement that a class be "so numerous that joinder of all members is impracticable." A finding of numerosity does not depend solely on the number of members of a potential class. Indeed, the plaintiffs are not required to demonstrate that joinder of all members as named plaintiffs would be impossible; impracticability requires a showing that it would be extremely difficult or inconvenient to join all members of the class. Van Orden, 2011 WL 4600688, at *6; Hanson v. Acceleration Life Ins. Co., No. A3-97-152, 1999 WL 33283345, at *9 (D.N.D. Mar. 16, 1999).

[12] Class representatives for the SOTEP Class are David Anderson, Matthew Dyer, Jason Gores, Terry Greak, Robert Hoff, Robert Lilley, Oliver Wardlow, Travis Wedmore, and John Westlie. (Although Wedmore is currently in DOCR custody, he anticipates being returned to DHS custody at NDSH.) Class representatives for the respective subclasses are: ADA Subclass—Anderson, Gores, and Wardlow; Juvenile Subclass—Gores, Lilley, and Westlie; RLUIPA Subclass—Lilley. Class representative for the Evaluation Class is Eugene Hinson. Class representatives for the Debt Class are Rodney Ireland, Larry Rubey, and Jeremy Johnson. (Doc. #343).

Newberg on Class Actions suggests that "the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." Evans v. Am. Credit Sys., Inc., 222 F.R.D. 388, 393 (D. Neb. 2004) (citing 1 Herbert B. Newberg, Newberg on Class Actions, § 3.05).

In considering the numerosity factor, the Eighth Circuit has directed courts to analyze not only the number of persons in the class, but also the nature of the action, the size of the individual claims, the inconvenience of trying individual cases, and "any other relevant factor." Emanuel v. Marsh, 828 F.2d 438, 444 (8th Cir. 1987). If the case involves a request for broad-based declaratory and injunctive relief which would not be available to individual plaintiffs, that can weigh in favor of certification. Paxton v. Union Nat. Bank, 688 F.2d 552, 561 (8th Cir. 1982). Courts have found that, in certifying a class seeking only injunctive relief, the numerosity requirement can be met with a smaller class size, since "the benefits to be gained not only inure to the benefit of the known class but will benefit a future class of indeterminate size." San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio, 188 F.R.D. 433, 442 (W.D. Tex. 1999).

Some courts have considered fear of retaliation for litigation as a factor making joinder impracticable. Rubenstein, supra, § 3:12, p. 208. The plaintiffs urge the court to consider that factor, contending that they have "endured harassment by NDSH staff persons because of their participation in this suit." (Doc. #343-1, p. 14).

The defendants point to the large percentage of the proposed SOTEP Class and subclasses who are named plaintiffs, contending that shows that joinder of all class members is not impracticable. And, the defendants argue that those who have "made

the voluntary choice not to become embroiled in this litigation . . . should not be conscripted" to do so through class certification. (Doc. #361, p. 13). They argue those SDIs not named as plaintiffs should not be forced into the action; however, the defendants contend that class certification is not necessary because any injunctive relief will benefit SDIs not named as plaintiffs, along with the named plaintiffs. Thus, defendants argue that those not plaintiffs should not be required to be involved, even though they acknowledge they may be impacted by this litigation.

As to the SOTEP Class, the court has not identified any cases discussing the situation presented here—where up to one-half of the members of the proposed class are named plaintiffs. Although that factor could be interpreted to show that joinder of all class members is not impracticable, the court also considers the plaintiffs' evidence that fear of retaliation has kept some SDIs from joining as named plaintiffs. (Doc. #172, pp. 1-2; Doc. #172-3, p. 3; Doc. #295-1, p. 2; Doc. #307-2, p. 5).

In considering impracticability of joinder of all class members, the Van Orden court noted:

> It 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 Plaintiffs' 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. Therefore, in this case joinder is "impracticable" and the numerosity requirement of Rule 23(a)(1) is satisfied.

Van Orden, 2011 WL 4600688, at *6. Considering the nature of the action, the inconvenience of trying individual cases, some potential class members' stated fear of retaliation, and that at least 50 persons would meet the class definition, the court recommends finding that the numerosity requirement for certification of a SOTEP Class has been satisfied.

At least 46 persons would meet the Debt Class definition, and the percentage of those persons who are named plaintiffs is lower than in the proposed SOTEP Class. Again, considering that the action is one seeking only injunctive relief, the size of the proposed class, and the inconvenience of trying individual cases, this court recommends finding the numerosity requirement satisfied as to the Debt Class.

If considered by itself, the proposed Evaluation Class—for which only five persons are currently eligible—would certainly not meet numerosity standards. However, considering it in the context of the litigation as a whole, this court nonetheless recommends that the numerosity factor be found satisfied for this class. The proposed Evaluation Class would be represented by Eugene Hinson, who was recently added as a named plaintiff. (Doc. #372). If an Evaluation Class were not certified, when Hinson's evaluation is completed, his request for relief concerning the evaluation process would be moot.[13] That might well result in a motion to add yet another plaintiff, so that another person then on evaluation status would have standing to raise the same claims. If the class is certified, however, an exception to the mootness doctrine would apply, and adding yet another plaintiff would not be necessary. Erwin Chemerinsky, Federal

[13] Although there is an exception to the mootness doctrine for claims capable of "repetition yet evading review," that exception applies only if "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007) (emphasis added) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)); see also Iowa Prot. & Advocacy Servs. v. Tanager, Inc., 427 F.3d 541, 544 (8th Cir. 2005). As discussed in the order allowing Hinson to be added as a named plaintiff, absent certification, the "repetition yet evading review" exception would not apply in these circumstances, because the "same complaining party" requirement would not be satisfied.

Jurisdiction § 2.5, p. 133 (6th ed. 2012) ("Cases are not dismissed as moot if there are secondary or 'collateral' injuries, if . . . it is a properly certified class action suit.") Considerations of impracticability and judicial efficiency therefore weigh in favor of finding the numerosity factor satisfied despite the small size of the Evaluation Class.

In summary, the court recommends finding sufficient numerosity as to the following proposed classes: SOTEP Class, Debt Class, and Evaluation Class.[14]

Although it is generally required that each subclass independently satisfy each of the Rule 23 criteria, if the subclass members are members of a larger certified class, courts have applied the numerosity requirement less stringently. Rubenstein, supra, § 3:16, p. 223; Christina A. ex rel. Jennifer A. v. Bloomberg, 197 F.R.D. 664, 667-71 (D.S.D. 2000). All members of the three proposed subclasses would be members of the SOTEP Class. Although the subclasses would each be quite small in number, convenience and judicial economy support certifying them if a SOTEP Class is certified. Thus, if the SOTEP Class is certified, the three proposed subclasses—Juvenile, RLUIPA, and ADA, should also be considered to meet the numerosity requirement.

3. Rule 23(a)(2)—Commonality

The commonality prong of Rule 23(a)(2) requires a showing of common questions of law or fact, the "determination of [which] will resolve an issue that is

[14] As to the proposed DOCR Class, the plaintiffs estimate class membership of 75 individuals. That estimate is based on the plaintiffs' review of the state sex offender website, which identified persons who are classified as "high risk" or "lifetime" sex offenders who are currently incarcerated at the NDSP. (Doc. #344, p. 16). As discussed above, however, it is this court's opinion that no named plaintiff has standing as a member of the proposed DOCR Class. But, in the event standing were found, a DOCR Class as proposed should be found to meet Rule 23(a)'s numerosity requirement.

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). Claims of a class must "depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor" or "a uniform employment practice." Id. at 350, 355. But, not every question of law or fact need be common to every member of the class. Paxton, 688 F.2d at 561. Other courts have found sufficient commonality when the claims turn on whether a defendant's policies and procedures result in deprivations of the plaintiffs' constitutional rights. Christina A., 197 F.R.D. at 667; Lambertz-Brinkman v. Reisch, No. CIV 07-3040, 2008 WL 4774895, at *2 (D.S.D. Oct. 31, 2008).

In arguing their positions on commonality, not surprisingly, the parties articulate the issues very differently. As the Eighth Circuit recently observed:

> How one articulates the claims in any given case could artfully carry the day on the issue of commonality, since any competently crafted class complaint literally raises common questions. But merely advancing a question stated broadly enough to cover all class members is not sufficient under Rule 23(a)(2). Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.

Ebert v. General Mills, Inc., 823 F.3d 472, 478 (8th Cir. 2016) (citations and internal quotation marks omitted).

As outlined above, see supra Plaintiffs' Claims, pp. 7-8, the plaintiffs' brief identifies 21 claims they assert are common to members of the various proposed classes. The defendants strenuously disagree, contending:

> the rigorous analysis as outlined by the United States Supreme Court to ensure that the requirements of Rule 23(a) are satisfied necessitates an examination of the individual background, diagnosis, medical history, behavior, treatment needs, treatment plans, treatment participation, applicable policy, and other individualized factors of each SOTEP resident to determine whether the claims, if proven, are capable of class wide resolution.

> Therefore, the Rooker-Feldman doctrine and the doctrine of *res judicata*, at the very least, impact the required prerequisite analysis of commonality by this Court because the analysis is very fact specific as it relates to each individual Plaintiff.

(Doc. #361, p. 19) (citation omitted). The plaintiffs reply that the individual circumstances of the SOTEP Class members "have no bearing on whether the North Dakota statute under which they are confined is unconstitutional." (Doc. #368, p. 12). Rather, the plaintiffs describe their intent to use evidence about individual SDIs as examples of alleged systematic deficiencies. Id.

As presented by the plaintiffs, the issues are similar to those found to satisfy commonality requirements in cases challenging sex offender treatment programs in two other districts in this circuit. Van Orden, 2011 WL 4600688, at *3; Karsjens v. Jesson, 283 F.R.D. 514, 518 (D. Minn. 2012) ("[T]he class members allege the same injuries—generally, the lack of treatment, inadequate conditions of confinement, and lack of meaningful opportunity for release."). Considering the standards established by the Supreme Court and the Eighth Circuit, the court recommends finding sufficient commonality as to the SOTEP Class and its subclasses, the Evaluation Class, and the Debt Class.[15]

4. Rule 23(a)(3)—Typicality

Under Rule 23(a)(3), claims of class representatives must be typical of those of other members of the class. This typicality requirement is generally considered satisfied if the claims of the named representatives and the other class members "stem from a

[15] If standing were found as to the DOCR Class, commonality should similarly be found to be sufficient as to that class.

single event or are based on the same legal or remedial theory." Paxton, 688 F.2d at 561-62. "Commonality and typicality tend to merge because 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.'" Karsjens, 283 F.R.D. at 519 (quoting Duke, 564 U.S. at 349 n.5). The Eighth Circuit has analyzed typicality in terms of whether there are other class members who have the same or similar grievances as the named plaintiffs. Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir. 1977).

Recognizing the principle that commonality and typicality tend to merge, the defendants' contentions as to lack of typicality mirror their contentions as to lack of commonality. In essence, they argue that the fact finder will need to make a "case-by-case determination as to whether each individual Plaintiff's constitutional rights were violated and whether that Plaintiff is entitled to specific relief." (Doc. #361, p. 23).

The named plaintiffs and the putative class members allege constitutional violations arising from the same policies and conditions. The alleged constitutional violations are based on the same legal theories and involve the same requested legal remedies. See Karsjens, 283 F.R.D. at 519; Van Orden, 2011 WL 4600688, at *8. This court recommends finding sufficient typicality as to the SOTEP Class and each of its subclasses, as to the Evaluation Class, and as to the Debt Class.[16]

[16] Again, if standing were found as to the proposed DOCR Class, the typicality requirement should be considered to have been satisfied.

5. Rule 23(a)(4)—Adequacy of Representation

There are two components to Rule 23(a)(4)'s requirement for adequate representation. First, the interests of the class representatives and the interests of the unnamed plaintiffs must be coextensive and not antagonistic to each other. Van Orden, 2011 WL 4600688, at *9 (citing Rentschler v. Carnahan, 160 F.R.D. 114, 116 (E.D. Mo. 1995)); Halvorson, 718 F.3d at 777. Second, the plaintiffs' counsel must be fully competent to prosecute the matter as a class action.

The defendants do not question the adequacy of the representation factor as to plaintiffs' counsel. But, the defendants argue that the named plaintiffs have not demonstrated that they will adequately represent the interests of the class, "because individual incentives to press issues important to that specific Plaintiff will impair the ability to raise the issues important to other members of the class." (Doc. #361, pp. 24-25). In making that assertion, the defendants cite no facts specific to this case. And, each of the proposed class representatives has signed a declaration which confirms an understanding of obligations of a class representative and a promise to fulfill those obligations. (Doc. #345-1, p. 4; Doc. #345-2, p. 6; Doc. #345-3, p. 3; Doc. #345-4, p. 6; Doc. #345-5, p. 6; Doc. #345-6, p. 3; Doc. #345-7, p. 8; Doc. #345-8, p. 4; Doc. #345-9, p. 5; Doc. #345-10, p. 5; Doc. #345-11, p. 3; Doc. #345-12, p. 5; Doc. #345-13, p. 11; Doc. #348, p. 8; Doc. #350, pp. 2-3).

Plaintiffs' counsel have significant experience with class actions, including class actions challenging policies of governmental agencies and other class actions in this district. (Doc. #344, pp. 17-18). They agreed to undertake this representation more than three years ago, and have demonstrated their willingness to vigorously protect their

clients' interest throughout the course of the litigation to date. Considering the factors of Rule 23(g)(1)(A), their appointment as class counsel is in order.

There is no issue as to plaintiffs having met Rule 23(a)(4)'s requirement for adequacy of representation as to any of the proposed classes or subclasses.

6. Rule 23(b)(2)—Appropriateness of Injunctive Relief

Since they assert application of Rule 23(b)(2), the plaintiffs must show that the defendants "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." The defendants contend that the plaintiffs' claims lack the cohesiveness required by Rule 23(b)(2), again relying on their assertion that the plaintiffs' claims "depend[] heavily on case-by-case analysis and [are] extremely fact intensive." (Doc. #361, p. 26). Additionally, the defendants point to a paragraph in the Sixth Amended Complaint's prayer for relief which asks for "any other relief deemed just and appropriate, including prospective monetary relief but only to the extent that any defendant is not entitled to absolute or qualified immunity." (Doc. #246, p. 87) (emphasis added). Though the complaint includes that single reference to monetary relief, the plaintiffs have consistently stated that they seek only injunctive relief. Their brief in support of the motion for class certification confirms they request no monetary relief. (Doc. #368, p. 10).

The plaintiffs challenge policies and practices alleged to have been generally applied to the putative classes. In this court's opinion, the injunctive and declaratory relief which the plaintiffs are seeking makes certification pursuant to Rule 23(b)(2) appropriate.

Conclusion

In recommending certification of some of the proposed classes, the court is mindful of the fact that class certification decisions are "necessarily prospective and subject to change." Van Orden, 2011 WL 4600688, at *19; In re Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011). The court is also mindful that the Supreme Court has directed that district courts are to "give the benefit of the doubt" to certifying a class. Amgen Inc., 133 S. Ct. at 1194-95. With those factors in view, and considering the various factors discussed throughout this opinion, the court **RECOMMENDS** certification of the following classes and subclasses:

(1) SOTEP Class, consisting of all persons civilly committed to the DHS pursuant to North Dakota Century Code chapter 25-03.3 and confined in the Sex Offender Treatment and Evaluation Program at NDSH during the pendency of this litigation, with subclasses consisting of:

   (a) all SOTEP Class members with disabilities as defined under the Americans with Disabilities Act (ADA Subclass);

   (b) all SOTEP Class members whose civil commitment was based on "sexually predatory conduct" (as defined by North Dakota Century Code section 25-03.3-01(9)) committed while they were minors (Juvenile Subclass); and

   (c) all SOTEP Class members whose religious exercise has been substantially burdened while civilly committed (Religious Land Use and Institutionalized Persons Act, or "RLUIPA" Class);

(2) Evaluation Class, consisting of all persons in custody at NDSH for evaluation as to whether they are SDIs pursuant to North Dakota Century Code section 25-03.3-11, during the pendency of this litigation; and

(3) Debt Class, consisting of all persons from whom DHS or NDSH has demanded payment January 1, 2004, through the pendency of this litigation, for their civil commitment as SDIs pursuant to North Dakota Century Code chapter 25-03.3.[17]

[17] In the event the defendants stipulate that they will engage in no efforts to collect payments from those discharged more than six years before the Second Amended

The court further **RECOMMENDS** that Brancart & Brancart and the Fremstad Law Firm be appointed as class counsel for the classes and subclasses described above, and that the individuals whom the plaintiffs have proposed be appointed as representatives of those classes and subclasses. Under Rule 23(c)(1)(B), the court **RECOMMENDS** that the claims of the classes and subclasses be preliminarily defined to include those set forth above, see supra Plaintiffs' Claims, pp. 7-8, with the exception of the claim that DOCR violated SDI's procedural and substantive due process rights by using a referral process that lacks a rational basis.

Finally, the court **RECOMMENDS** that plaintiff's motion be denied as to the proposed DOCR Class.

Dated this 29th day of August, 2016.

/s/ *Alice R. Senechal*
Alice R. Senechal
United States Magistrate Judge

NOTICE OF RIGHT TO OBJECT

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, and District of North Dakota Local Court Civil Rule 72.1(D)(3), any party may object to this Report and Recommendation by filing with the Clerk of Court no later than **September 10, 2016**, a pleading specifically identifying those portions of the Report and Recommendation to which objection is made and the basis of any objection. Failure to object or to comply with this procedure may forfeit the right to seek review in the Court of Appeals.

Complaint was filed, the starting date for inclusion in this class should be August 27, 2008, rather than January 1, 2004.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Rodney J. Ireland, et al.,

Plaintiffs,

-vs-

Maggie D. Anderson, Executive Director, North Dakota Department of Human Services, in her official capacity, et al.,

Defendants.

Case No. 3:13-cv-03

ORDER ADOPTING REPORT AND RECOMMENDATION (DOC. #394)

On August 29, 2016, the court received a Report and Recommendation from the Honorable Alice R. Senechal, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, recommending denial of class certification as to one proposed class and granting class certification as to the other proposed classes and subclasses.[1] In addition, the court received a supplement to the Report and Recommendation.[2] The defendants filed objections to the Report and Recommendation, asserting that the plaintiffs cannot satisfy the requirements of Fed.R.Civ. P. 23.[3] The defendants further contend that certification of the small classes is unnecessary because the relief requested, if successful, will be identical regardless of whether or not a class action is maintained. The plaintiffs filed a response to the objections.[4]

A *de novo* review of the record and applicable case law demonstrates that class

[1] Doc. #394.

[2] Doc. #399.

[3] Doc. #401.

[4] Doc. #406.

certification is appropriate. The court hereby adopts the magistrate judge's Report and Recommendation in its entirety. The court finds that the requirements of Fed.R.Civ.P. 23 have been met as to the SOTEP Class and subclasses, the Evaluation Class, and the Debt Class. The law firms of Brancart & Brancart and the Fremstad Law Firm are appointed as class counsel for the classes and subclasses. The plaintiffs' proposed individuals are appointed as representatives of the classes and subclasses, with the addition of Garrett Loy as an additional representative of the Evaluation Class. The claims of the classes and subclasses are preliminarily defined to those set forth in the magistrate judge's Report and Recommendation. The plaintiffs' motion to certify the proposed DOCR class is denied.

The plaintiffs' motion for class certification is granted in part and denied in part.

IT IS SO ORDERED.

Dated this 21st day of March, 2017.

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court

Tab 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS JACKSON, ISADORE GARTRELL, CARL WOLFE & RODDY MCDOWELL,

Plaintiffs,

v.

Civil Action 99-03276 (HHK)

DISTRICT OF COLUMBIA & ODIE WASHINGTON,

Defendants.

ORDER

Plaintiffs' Motion for Class Certification, filed January 18, 2000, is before the court. As none of the defendants has filed an opposition to this motion, the court treats it as conceded. Moreover, the court concludes–substantially for the rationale set forth in plaintiffs' supporting memorandum–that the motion should be granted. It is, this 8th day of February 2000, hereby

ORDERED that plaintiffs' Motion for Class Certification is **GRANTED**; and it is further

ORDERED that a class consisting of prisoners who were committed to the custody of the DC Department of Corrections or Federal Bureau of Prisons after sentencing in DC Superior Court or the United States District Court for the District of Columbia, who are presently housed in correctional facilities administered by the Virginia Department of Corrections ("Virginia Corrections"), and who claim that their sincerely held religious beliefs render Virginia

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Corrections' grooming policy a substantial burden on the free exercise of their religion is **CERTIFIED**; and it is further

ORDERED that this case shall proceed as a class action per Federal Rules of Civil Procedure 23(a) and 23(b)(2).

Henry H. Kennedy, Jr.
United States District Judge

Tab 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MASTON WILLIS, *Plaintiff*,	)	
vs.	)	1:09-cv-00815-JMS-LJM
COMMISSIONER INDIANA DEPARTMENT OF CORRECTION, *et al.*, *Defendants*.	)	

ORDER

Presently before the Court is Plaintiff Maston Willis' Motion for Class Certification. [Dkt. 19.][1] Through it, he seeks class certification on Count I of his Second Amended Complaint.

BACKGROUND

Mr. Willis is an Orthodox Jewish prisoner in the custody of the Indiana Department of Correction ("IDOC") whose faith requires him to "keep kosher." [Dkt. 17 ¶¶1, 7.] As is relevant here, he alleges that the IDOC recently stopped offering prisoners kosher meals. [*Id.* ¶1.] Mr. Willis contends that IDOC did so in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, which (among other things) generally requires states to avoid imposing a "substantial burden" on the religious liberties of prisoners, absent a "compelling governmental interest" and, even then, so long as the state uses "the least restrictive means [available] of furthering that compelling interest." 42 U.S.C. § 2000-cc-1(a).

Mr. Willis seeks to certify a class of similarly situated individuals for his RLUIPA claims. He has proposed the following class definition:

[1] By written consent of the parties, this case has been referred to the magistrate judge for all proceedings, including for the entry of judgment, as permitted under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. [Dkt. 22.]

> [A]ll prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

[Dkt. 19 ¶2.] Based on the discovery that he has conducted thus far, Mr. Willis estimates that the putative class, if certified, would contain at least 139 members. [Dkt. 39 at 2.] And because the class also seeks to include future prisoners who may also require kosher diets as a tenet of their religion, Mr. Willis notes that the number may expand (it's also possible that it could contract) given inevitable changes in the IDOC prison population and their religious beliefs. [*See id.*]

DISCUSSION

In deciding whether to certify a class, the Court may not blithely accept as true even the well-pleaded allegations of the complaint but must instead "make whatever factual and legal inquiries are necessary under Rule 23" to resolve contested issues. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Specifically, the Court must find that the putative class satisfies the four "prerequisites" set forth in Federal Rule of Civil Procedure 23(a). If the putative class does, the Court must additionally find that it satisfies the requirements set forth in Federal Rule of Civil Procedure 23(b), which vary depending upon which of three different types of classes is proposed. The Court will address the two sets of requirements in turn.

A. Federal Rule of Civil Procedure 23(a)

The four class-action prerequisites in Federal Rule of Civil Procedure 23(a) are commonly termed "numerosity, commonality, typicality, and adequacy." *In re Ready-Mixed Concrete Antitrust Litig.*, 2009 U.S. Dist. LEXIS 82043, *46 (S.D. Ind. 2009).

1. Numerosity

The Court can only certify a class that "is so numerous that joinder of all members is impracticable." Fed. R. Civ. Pro. 23(a). Implicit in this requirement is that the members of the class be ascertainable; otherwise the Court could not count them. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977).

Insofar as Defendants object that the future putative class members are, as of yet, currently unknown, Mr. Willis correctly notes that the very open-endedness supports certification where, as here, injunctive relief is sought. *See Rosario v. Cook County*, 101 F.R.D. 659, 661 (N.D. Ill. 1983) ("Plaintiffs request a declaration that defendants' promotion procedures violate Title VII, and an injunction against continued use of the performance evaluations and written examination. A decision will necessarily affect the interests of future Hispanic applicants for sergeant. Regardless of their number, the joinder of future alleged discriminatees is inherently impracticable."). Because their identity as class members will be ascertainable by objective criteria—*i.e.* whether or not they identify themselves to IDOC as requiring a kosher meal for religious reasons—the Court likewise rejects Defendants' claim that the class cannot be shown to exist as to future class members. *See Rochford*, 565 F.2d at 976.[2]

As for the number of identifiable individuals currently in the putative class, Defendants claim there are only 122 members [dkt. 40 at 2], not the 139 members that Mr. Willis claims [dkt. 39 at 2]. But no matter which party's math is correct, the class satisfies the numerosity

[2] There, the Seventh Circuit affirmed a class defined in part as "all residents of the City of Chicago, and all other persons who are physically present within the City of Chicago for regular or irregular periods of time, who engage or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities…hereafter may be[] subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination by defendants or their agents." *Id.*

requirement. "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient to satisfy Rule 23(a)(1)." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 644 (N.D. Ill. 2002) (collecting cases). Even under Defendants' calculations, the proposed class exceeds forty. Furthermore, given that the putative class members are incarcerated in facilities across the State of Indiana, logistical and security concerns associated with transporting multiple prisoners to and from this Court—as would be required if they had to participate personally—also weigh in favor of finding joinder impracticable. *Cf. Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992) (finding numerosity and noting geographic dispersion and "already overtaxed judicial resources").

Accordingly, the Court finds that Mr. Willis has satisfied the numerosity requirement.

2. Commonality

A class action also requires "questions of law or fact common to the class." Fed. R. Civ. Pro. 23(a)(2). That commonality requirement is a "low hurdle." *S. States Police Benev. Ass'n, Inc. v. First Choice Armor & Equipment, Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007). "A certifiable class claim must arise out of the same legal or remedial theory," *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980), which in this Circuit is usually satisfied if the class members' claims share "[a] common nucleus of operative fact," that is, some "common question…at the heart of the case," *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted).

The common question at the heart of this case, for all members of the proposed class, is the same: Does the IDOC provide prisoners kosher meals when those prisoners request them for religious reasons? Based on his affidavit (recounting an admission of a party-opponent) and on an affidavit from a prisoner in another facility, Mr. Willis believes that IDOC has adopted an

across-the-board policy against providing any more kosher meals, despite the religious views of prisoners. [*See* dkt. 34-1 ¶ 49, -2 ¶6.] In contrast, while IDOC denies that any such policy exists and claims that each facility prepares its food in a different manner, Defendants have offered absolutely no evidence on either count [*see* dkt. 39 at 3], even though the facts necessary to substantiate those contentions are readily within their control. In the Court's "preliminary inquiry into the merits" for class certification purposes, *Szabo*, 249 F.3d at 676, the Court charges that failure of evidence to Defendants, *cf. Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983) ("According to the 'missing witness' rule, when a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, but chooses not to call them, an inference arises that the testimony, if produced, would be unfavorable." (citation and quotation omitted)).

Mr. Willis has satisfied the commonality requirement.

3. Typicality

The third prerequisite for a class action is that the "claims…of the representative parties [be] typical of the claims…of the class." Fed. R. Civ. Pro. 23(a)(3). A proposed class representative can satisfy this prerequisite if his or her "claim…arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (quotation and citation omitted).

In opposing typicality, Defendants stress the individualized nature of "least restrictive" balancing test and question whether Judaism even requires adherents to keep kosher at all. As to

the first point, however, Mr. Willis rightly notes that courts can, and do, certify RLUIPA classes, *see, e.g.*, *Miller v. Wilkinson*, 2009 WL 862169 (S.D. Ohio 2009), and Defendants have presented no argument why this case is somehow more difficult than the others where classes have been certified.[3] As to the second, whether or not keep kosher is a central requirement of Judaism is not the issue presented in this case. Indeed, as Defendants themselves note in their brief, RLUIPA expressly covers religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Thus, the issue presented is whether prisoners who believe their religious obligations require them to eat kosher meals can do so while in the custody of the IDOC. Mr. Willis' claim—that he can't get kosher meals even though he believes that he needs them for religious reasons—is a prime example of the claims that other class members would assert.

The Court finds that the typicality requirement is satisfied here.

4. Adequacy

To satisfy the fourth, and final, class-action prerequisite, the Court must find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a)(4). This is a two-pronged inquiry, "one relates to the adequacy of the named plaintiffs' representation of the class and requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation." *In re Ready-Mixed Concrete Antitrust Litig.*, 2009 U.S. Dist. LEXIS 82043, *53 (S.D. Ind. 2009) (citation omitted).

[3] If it later turns out that weighing the burdens imposed on an IDOC-wide class becomes unwieldy (which the Court doubts at present), the current class can be split into sub-classes, defined, for example, on an institution-by-institution basis. *See* Fed. R. Civ. Pro. 23(c)(1)(C) ("An order that grants…class certification may be altered or amended before final judgment"), 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").

Defendants argue that Mr. Willis has a conflict with the other class members because, by maintaining this action as a class action, he seeks to "force[]" his religious beliefs on others. [Dkt. 40 at 5.] Defendants present no evidence to support such claim, and the Court finds otherwise. The proposed class definition itself requires self-identification, so there is no merit to a claim of imposed religious beliefs. Mr. Willis seeks to expand the religious freedoms available to IDOC prisoners, so that those who believe their religion requires them to eat kosher meals—no matter their religious denomination—may do so. Thus, there is no conflict; Mr. Willis is an adequate class representative.

Because Defendants do not contest the adequacy of Mr. Willis' counsel and because the Court's own experiences with his counsel (in this case and in others) confirm counsel's legal abilities, the Court finds that the representation here is also adequate.

B. Federal Rule of Civil Procedure 26(b)

Where, as here, a proposed class satisfies all the prerequisites listed in Federal Rule of Civil Procedure 23(a), the Court can only certify the class if it fits within one of the categories described in 23(b). The category that Mr. Willis claims applies is 23(b)(2), which authorizes a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. Pro. 23(b)(2).

In this case, Mr. Willis claims that the IDOC has violated his, and his fellow prisoners', civil rights, and he seeks injunctive relief against any future such violations. That is the "prime example" of a proper class under Rule 23(b)(2). *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted); *see also Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill.

1992) ("[T]he primary limitation on the use of Rule 23(b)(2) is the requirement that injunctive or declaratory relief be the predominant remedy requested for the class members.").

Mr. Willis has alleged a common injury to the class: He claims that the IDOC replaced a policy that enabled religious prisoners to obtain kosher meals with one that precludes kosher meals for prisoners. If proven, injunctive relief against that new policy would be appropriate. Given that Mr. Willis seeks exactly that type of relief, the Court finds that Rule 23(b)(2) is satisfied here.

CONCLUSION

Based on the evidentiary material submitted, the Court finds that Mr. Willis has satisfied all of the prerequisites under Federal Rule of Civil Procedure 23(a) and has additionally satisfied Federal Rule of Civil Procedure 23(b)(2). Accordingly, the Court now **CERTIFIES** the following class with respect to Count I of Mr. Willis' Second Amended Complaint:

> All prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

The Court hereby **DESIGNATES** Mr. Willis as the representative plaintiff for that certified class and, pursuant to Federal Rule of Civil Procedure 23(g), **DESIGNATES** Mr. Falk as lead class counsel.

The Court now **ORDERS** the parties to meet and confer with one another and, within **fourteen days**, to submit a joint report in this matter setting forth a proposed plan (or, if necessary, competing plans) for providing appropriate notice to the class pursuant to Federal Rule of Civil Procedure 23(c)(2). A status conference for this matter will be set by separate entry.

12/07/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

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Tab 11

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CATHOLIC BENEFITS ASSOCIATION LCA, *et al*.,	)	
Plaintiffs,	)	
v.	)	**Case Nos. CIV-14-240-R**
	)	**CIV-14-685-R**
HARGAN, *et al*.,	)	
Defendants.	)	

ORDER

Before the Court is Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment, *CBA I* (CIV-14-240-R) Doc. 161 and *CBA II* (CIV-14-685-R) Doc. 57. This case began with the Affordable Care Act's contraceptive mandate ("the Mandate," defined below) and has continued for several years through changes in implementing regulations, the Government's position on the Mandate's legality and accommodation process, and nationwide litigation over the application of the Religious Freedom and Restoration Act ("RFRA") to religious employers' provision of healthcare consistent with their faith. Defendants no longer defend the Mandate or its accommodation process to Plaintiffs' RFRA claim, and they concede that the issue is not moot. Having considered the parties' briefs and all relevant legal authority, the Motion is GRANTED AS SET FORTH HEREIN.

The Court ORDERS that this Court's previous preliminary injunctions in *CBA I* (CIV-14-240-R, Doc. 68, at 21, as modified by Docs. 84, 107, 116, 128, 138, and 146) and in *CBA II* (CIV-14-685-R, Doc. 40, at 15) are hereby replaced in their entirety by the following:

The Court restricts relief to Plaintiffs and future Group II Members (non-exempt nonprofits) and Group III Members (for-profit employers) of the Catholic Benefit Association ("CBA") that meet the following criteria:[1]

1) The employer is not yet protected from the Mandate;

2) The CBA's Membership Director or CEO has determined that the employer meets the CBA's strict membership criteria;

3) The CBA's Membership criteria have not changed since the CBA filed its complaint on March 12, 2014; and

4) The employer has not had an adverse ruling on the merits issued against it in another case involving the Mandate.

The Court hereby DECLARES that Defendants—the United States Departments of Health and Human Services, Treasury, and Labor, along with their respective Secretaries—violated RFRA, 42 U.S.C. § 2000bb-1 *et seq*., by promulgating and enforcing regulations pursuant to 42 U.S.C. § 300gg-13 that require Plaintiffs to take actions that facilitate the provision, through or in connection with their health plans, of Food and Drug Administration-approved contraceptive methods, abortifacients, sterilization procedures, and related patient education and counseling ("the Mandate").

The Court also finds that Plaintiffs have met the standards necessary for injunctive relief: (1) Plaintiffs have demonstrated, and Defendants now concede, that enforcement of the Mandate against Plaintiffs would violate their rights under RFRA; (2) Plaintiffs will suffer irreparable harm to their ability to practice their Catholic beliefs—harm that is the direct result of Defendants' conduct—unless Defendants are enjoined from further interfering with Plaintiffs' religious practice; (3) The threatened injury to Plaintiffs outweighs any injury to Defendants

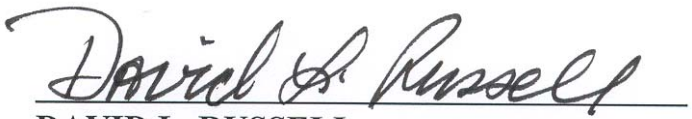
[1] The Court adopts its prior Group II and III definitions. *See* Preliminary Injunction, Doc. 68, at 19. This order does not modify the Court's prior denial of relief for CIC and CBA Group I Members. *See id*. at 10–11, 14–15.

resulting from this injunction; and (4) The public interest in the vindication of religious freedom favors the entry of an injunction.

The Court therefore PERMANENTLY ENJOINS AND RESTRAINS Defendants, their agents, officers, and employees, and all others in active concert or participation with them, including their successors in office, from enforcing 42 U.S.C. § 300gg-13(a)(4) and regulations passed in relation to this statute—or from enforcing any penalties, files, assessments, or other adverse consequences, including any penalties under 26 U.S.C. §§ 4980D and 4980H, as a result of noncompliance with any law or regulation requiring the provision of religiously-objectionable contraceptive methods, abortifacients, sterilization procedures, and related patient education and counseling ("medical care") since August 1, 2011—against CBA members, their health plans, their health insurance issuers, or third-party administrators in connection with their health plans, to the extent that these laws and related regulations require CBA members to contract, arrange, pay, or refer for religiously-objectionable medical care.

For the reasons set forth herein, Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment, *CBA I* (CIV-14-240-R) Doc. 161 and *CBA II* (CIV-14-685-R) Doc. 57, is GRANTED. The Court further orders that any petition by Plaintiffs for attorney's fees or costs shall be submitted within 45 days from the date of this order. The Court shall retain jurisdiction as necessary to enforce this order.

IT IS SO ORDERED this 7th day of March, 2018.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

Tab 12

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-13-1092-D
ALEX M. AZAR, II, Secretary of the United States Department of Health and Human Services, *et al*.,	)	
Defendants.	)	

ORDER GRANTING PERMANENT INJUNCTION AND DECLARATORY RELIEF

Upon consideration of Plaintiffs' Motion for Permanent Injunction and Declaratory Relief [Doc. No. 91], and Defendants' response thereto, the Court finds that the Motion should be granted, as set forth herein.

Plaintiffs Reaching Souls International, Inc. and Truett-McConnell College, Inc. are nonprofit religious organizations that provide employee health benefits through a group plan sponsored by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). The GuideStone Plan is a "church plan" as defined by 29 U.S.C. § 1002(33), and is available to organizations controlled by or associated with the Southern Baptist Convention, which share sincere religious views regarding abortion and contraception and rely on GuideStone to provide insurance coverage consistent with those views. By the Complaint, a prior motion for a preliminary injunction, and the instant Motion, Plaintiffs seek relief pursuant to Fed. R. Civ. P. 65 from federal regulations

implementing the Affordable Care Act ("ACA")[1] that require compliance with ACA's mandate to include contraceptive services in group health plan coverage as a preventive care service for women, and provide a means of compliance for nonexempt organizations that have religious objections to some contraceptive methods. *See* 42 U.S.C. § 300gg-13. This mechanism, known as the accommodation, was codified in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131.[2] Defendants are federal agencies and officials responsible for implementing these regulations and other recently proposed amendments.[3]

On December 20, 2013, the Court granted preliminary injunctive relief and enjoined the enforcement of the accommodation and the contraceptive mandate as a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), under *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2103), *aff'd sub nom*., *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014). *See* Mem. Decision & Order [Doc.

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] These regulations have been recently reserved and amended by interim final rules. *See* 82 Fed. Reg. 47792, 47838 (Oct. 13, 2017). But federal courts have enjoined enforcement of the interim rules so their effectiveness remains in doubt.

[3] By operation of Fed. R. Civ. P. 25(d), the current defendants are: Alex Azar, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; R. Alexander Acosta, Secretary of the United States Department of Labor; United States Department of Labor; Steven T. Mnuchin, Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

No. 67] (available at 2013 WL 6804259).[4] At Plaintiffs' request, and without objection by Defendants, the injunction was made broad enough to protect a putative class of similarly situated employers, as defined in the Complaint. *See id*. at 16; Compl. [Doc. No. 1], ¶ 18. Defendants appealed, and this case was stayed by agreement of the parties. *See* 3/26/14 Order [Doc. No. 79]. After an appellate ruling in consolidated appeals, *Little Sisters of the Poor v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), a grant of certiorari by the Supreme Court that resulted in an order vacating the decision and remanding the case for further proceedings, *Zubick v. Burwell*, 136 S. Ct. 1557 (2016), and a change of administrations, the Tenth Circuit on October 23, 2017, granted Defendants' motion for voluntarily dismissal of the appeal. The case is once again pending in this Court.[5]

Upon consideration of Plaintiff's current Motion in light of the existing case record, the Court finds that a permanent injunction under Rule 65(d) and declaratory relief under 28 U.S.C. § 2201 are warranted, and states the following findings and conclusions:

1) Plaintiffs have demonstrated, and Defendants concede, that the promulgation and enforcement of the contraceptive mandate against Plaintiffs, either through the accommodation or other regulatory means that require Plaintiffs to facilitate the provision

[4] Plaintiffs also sought injunctive relief based on constitutional claims that the Court declined to reach. *See id*. at 16 n.9; *see also* 3/10/14 Order [Doc. No. 77]. In addition, the Complaint asserts a claim under the Administrative Procedures Act, 5 U.S.C. § 706. *See* Compl., ¶ 333. These claims have not been resolved, and currently remain pending.

[5] Given the marked change in circumstances, one might question what remains to be accomplished in this action. Plaintiffs' counsel assures the Court that an actual controversy still exists even though Defendants offer little resistance, and the Court accepts the representations of counsel, which Defendants do not dispute.

of coverage for contraceptive services to which they hold sincere religious objections, violated and would violate RFRA.

2) Plaintiffs will suffer irreparable harm as a direct result of Defendants' conduct unless Defendants are enjoined from further interfering with Plaintiffs' practice of their religious beliefs.

3) The threatened injury to Plaintiffs outweighs any injury to Defendants resulting from this injunction.

4) The public interest in the vindication of religious freedom favors the entry of an injunction.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Permanent Injunction and Declaratory Relief [Doc. No. 91] is GRANTED.

IT IS FURTHER ORDERED that the Court issues the following PERMANENT INJUNCTION:

Defendants, their agents, officers, employees, and all successors in office are enjoined and restrained from any effort to apply or enforce the substantive requirements of 42 U.S.C. § 300gg-13(a)(4) and any implementing regulations as those requirements relate to the provision of contraceptive drugs, devices, or procedures and related education and counseling to which Plaintiffs have sincerely-held religious objections, and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or other enforcement actions for noncompliance related thereto, including those in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. §§ 1132 and 1185d, and including, but not limited to,

penalties for failure to offer or facilitate access to religiously-objectionable contraceptive drugs, devices, or procedures, and related education and counseling, against Reaching Souls International, Inc., Truett-McConnell College, Inc., GuideStone Financial Resources of the Southern Baptist Convention, all current and future participating employers in the GuideStone Plan, and any-third party administrators acting on behalf of these entities with respect to the GuideStone Plan. Defendants remain free to enforce 26 U.S.C. § 4980H for any purpose other than to require Plaintiffs, other employers participating in the GuideStone Plan, and third-party administrators acting on their behalf, to provide or facilitate the provision of contraceptive coverage, or to punish them for failing to do so.

IT IS SO ORDERED this 15th day of March, 2018.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

Tab 13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 13-cv-2611-WJM

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation,
LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated, along with CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation, and CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs,

v.

ALEX AZAR, Secretary of the United States Department of Health and Human Services,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
R. ALEXANDER ACOSTA, Secretary of the United States of Department of Labor,
UNITED STATES DEPARTMENT OF LABOR,
STEVEN MNUCHIN, Secretary of the United States Department of the Treasury, and
UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

ORDER REOPENING CASE AND GRANTING PERMANENT INJUNCTION

Upon consideration of Plaintiffs' Unopposed Motion to Reopen Proceedings and for Entry of Permanent Injunction and Declaration (ECF No. 80), Defendants' response thereto (ECF No. 81), and the existing case record, the Court finds that reopening this case and granting a permanent injunction under Rule 65(d) and declaratory relief under 28 U.S.C. § 2201 is warranted, and states the following findings and conclusions:

A. Plaintiffs have demonstrated, and Defendants concede, that the promulgation and enforcement of the mandate against Plaintiffs, either through the accommodation or other regulatory means that require Plaintiffs to facilitate the

provision of coverage for contraceptive and sterilization services and related education and counseling, to which they hold sincere religious objections, violated and would violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

B. Plaintiffs will suffer irreparable harm as a direct result of Defendants' conduct unless Defendants are enjoined from further interfering with Plaintiffs' practice of their religious beliefs.

C. The threatened injury to Plaintiffs outweighs any injury to Defendants resulting from this injunction.

D. The public interest in the vindication of religious freedom favors the entry of an injunction.

The Court therefore ORDERS as follows:

1. Plaintiffs' Unopposed Motion to Reopen Proceedings and for Entry of Permanent Injunction and Declaration (ECF No. 80) is GRANTED.

2. This case is REOPENED pursuant to D.C.COLO.LCivR 41.2.

3. The Court issues the following PERMANENT INJUNCTION:

> Defendants, their agents, officers, employees, and all successors in office are enjoined and restrained from any effort to apply or enforce the substantive requirements of 42 U.S.C. § 300gg-13(a)(4) and any implementing regulations as those requirements relate to the provision of sterilization or contraceptive drugs, devices, or procedures and related education and counseling to which Plaintiffs have sincerely-held religious objections, and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or other enforcement actions for noncompliance related thereto, including those in 26 U.S.C. §§ 4980D and 4980H, and 29 U.S.C. §§ 1132 and 1185d, and including, but not limited to, penalties for failure to offer or facilitate access to religiously-objectionable sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, against Plaintiffs, all current and

future participating employers in the Christian Brothers Employee Benefit Trust Plan, and any-third party administrators acting on behalf of these entities with respect to the Christian Brothers Employee Benefit Trust Plan, including Christian Brothers Services. Defendants remain free to enforce 26 U.S.C. § 4980H for any purpose other than to require Plaintiffs, other employers participating in the Christian Brother Employee Benefit Trust Plan, and third-party administrators acting on their behalf, to provide or facilitate the provision of sterilization or contraceptive drugs, devices, or procedures, and related education and counseling, or to punish them for failing to do so.

4. The Clerk shall enter judgment in favor of Plaintiffs and against Defendants, and shall terminate this case. Plaintiffs shall have their costs upon compliance with D.C.COLO.LCivR 54.1.

Dated this 29th day of May, 2018.

BY THE COURT:

William J. Martínez
United States District Judge