

1 EXPEDITE
2 Hearing set for:
3 Date: Friday, April 16, 2021
4 Time: 9:00 a.m.
5 Judge/Calendar: Judge James Dixon

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9 SUPERIOR COURT OF WASHINGTON
10 FOR THURSTON COUNTY

CLASS ACTION

11 CANDIS RUSH, JUSTIN AUTREY,
12 GREGORY STEEN, on behalf of themselves
13 and all others similarly situated,

No. 21-2-00491-34

MOTION FOR CLASS CERTIFICATION

14 Plaintiffs/Petitioners,

15 vs.

16 WASHINGTON STATE DEPARTMENT OF
17 CORRECTIONS, a state agency; STEPHEN
18 SINCLAIR, Secretary of the Washington State
19 Department of Corrections; WASHINGTON
20 STATE DEPARTMENT OF HEALTH, a state
21 agency; and DR. UMAIR SHAH, Secretary for
22 the Washington State Department of Health,

23 Defendants/Respondents.

I. INTRODUCTION

At its heart, this is a case about cruel punishment. It alleges that the Department of Health (DOH) and the Department of Corrections (DOC)'s failure to offer COVID-19

1 vaccinations to all the people incarcerated in DOC facilities violates Article I, § 14--the cruel
2 punishment clause of the Washington Constitution and the Defendants' common law duties to
3 protect people in our prisons. Furthermore, this case alleges that DOC's failure to require its staff
4 who have contact with people in prison to be vaccinated likewise violates Article I, § 14 and the
5 Defendants' common law duties. Plaintiffs ask the Court to enter an order certifying this matter
6 as a class action under CR 23(a) and CR 23(b)(2) in order to obtain relief for all those affected
7 by DOC's constitutional violations. They ask the Court to define the class to include all persons
8 currently incarcerated, or who become incarcerated, in DOC's prisons.

9 Plaintiffs filed this complaint for a declaratory judgment pursuant to RCW 34.05.570 as
10 to DOH and pursuant to RCW 7.24 as to DOC. They allege that Defendants have failed to carry
11 out their duties required by law. Plaintiffs are also seeking a preliminary injunction requiring the
12 Defendants to immediately offer COVID-19 vaccinations to all people in its custody who want
13 one, to ensure that all people in prison have access to accurate, comprehensive, trusted
14 information about the vaccine in order to make an informed choice about whether to be
15 vaccinated, and to require any DOC staff who come into contact with people in prison to be
16 vaccinated.

17 **II. STATEMENT OF FACTS**

18 Facts relevant to this motion are laid out in the Plaintiffs' complaint. In addition,
19 Plaintiffs will be filing a motion for preliminary injunction to be heard in conjunction with this
20 motion for class certification. That motion will set forth additional facts related to this case and
21 will be accompanied by additional declarations in support of that motion. For the most part, facts
22 included in the complaint and the motion for preliminary injunction and supporting documents
23 will not be repeated here, except as those facts relate to this motion.

1 Approximately 14,300 people are currently in DOC custody in correctional facilities.¹
2 According to DOC, fourteen people in DOC custody have died since the beginning of the
3 pandemic.² 6,189 people in prison have been infected. *Id.* It is not known how many of those
4 infected became seriously ill. Twenty-nine (29) people in DOC custody became infected within
5 the last thirty days. *Id.* The last reported death in DOC custody occurred on February 9, 2021.³
6 DOC reports that 2,839 people have been fully vaccinated, but that figure includes DOC staff,
7 and does not distinguish between staff and people in prison.⁴ DOC has publicly acknowledged
8 vaccinating only a few dozen people in prison.⁵ DOC employs over 8,000 staff members across
9 approximately 120 locations throughout the state.⁶ While Plaintiffs do not currently know the
10 exact number of staff who have direct contact with people in prison, there are likely thousands of
11 staff members who closely interact with people in custody on a daily basis, including
12 correctional officers, prison administrators, medical staff, mental health care providers, among
13 others.

14 DOC does not require vaccinations of its staff who have close, sometimes hands-on,
15 contact with people in our prisons. The COVID-19 vaccine is now available to DOC staff, but
16

17 ¹ Fact Card, Washington Department of Corrections (December 31, 2020)
<https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

18 ² Confirmed Cases, Washington Department of Corrections, <https://doc.wa.gov/corrections/covid-19/data.htm#confirmed>.

19 ³ <https://www.doc.wa.gov/news/2021/02092021p.htm>

20 ⁴ <https://doc.wa.gov/corrections/covid-19/data-vaccines.htm#vaccine-by-facility>. DOC webpage indicates data on
number of incarcerated individuals who have been vaccinated is “Coming Soon”.

21 ⁵ <https://www.doc.wa.gov/corrections/covid-19/faq.htm#vaccine-faq>. Incarcerated people who are geriatric with
22 chronic medical needs residing and/or requiring assistance with activities of daily living in CRCC Sage East, a long-
term care living unit in the facility that houses fewer than 40 individuals, or other long term care patients
(approximately 20) with similar needs who cannot reside in Sage East.

23 ⁶ Current Employees, Washington Department of Corrections, <https://doc.wa.gov/about/employees/current.htm>.

1 DOC staff may choose not to be vaccinated. It is not known how many DOC staff who come into
2 contact with people in prison have been vaccinated, nor is it known how many are or will choose
3 not to be vaccinated. Initial reporting on vaccination acceptance suggests that at least 50% of
4 correctional staff nationwide are refusing to be vaccinated.⁷ *See also Declaration of Dr. Lauren*
5 *Brinkley-Rubinstein* at ¶ 51.

6 III. ARGUMENT

7 This is an appropriate matter to be maintained as a class action. Class actions are
8 authorized in Washington by CR 23.⁸ Class actions provide an effective procedure for redressing
9 the injuries of those whose economic position would not allow individual lawsuits. 7A Fed. Prac.
10 & Proc. Civ. § 1754 (3d ed.). They are intended to improve access to the courts. *Darling v.*
11 *Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982).

12 Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity
13 of litigation, saves members of the class the cost and trouble of filing individual suits, and also
14 frees the defendant from the harassment of identical future litigation. *Chavez v. Our Lady of*
15 *Lourdes Hospital at Pasco*, 190 Wn.2d 507, 515, 415 P.3d 224 (2018) (other citations omitted).

16 To maintain this action on behalf of a class, Plaintiffs must show that it meets the
17 requirements of CR 23(a) and at least one of the subdivisions of 23(b). *Schwendeman v. USAA*
18 *Casualty Insurance Co.*, 116 Wn. App. 9, 18, 65 P.3d 1 (2003). Washington appellate courts
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21 ⁷ <https://apnews.com/article/us-prison-guards-refuse-vaccine-despite-covid-19-outbreaks-522775575fc815ee2354e97c3428dce0>

22 ⁸ As there are relatively few Washington cases interpreting CR 23, and because the federal rule is identical, our
23 courts often look to federal cases when considering whether to certify a class under CR 23. *Brown v. Brown*, 6 Wn. App. 249, 252, 492 P.2d 581 (1971). However, Washington courts are by no means bound by those federal decisions. *Darling*, 96 Wn.2d 701 at 706.

1 have required that the trial court articulate on the record each of the CR 23 factors underlying its
2 decision on the certification issue. *Id.* at 19. *See also Chavez*, 190 Wn.2d at 515 (citing *WEA v.*
3 *Shelton School District*, 93 Wn.2d 783, 793, 613 P.2d 769 (1980)).

4 Class certification here is appropriate under CR 23(a) and CR 23(b)(2). These rules
5 provide:

6 (a) Prerequisites to a Class Action. One or more members of a class may sue
7 or be sued as representative parties on behalf of all only if (1) the class is so
8 numerous that joinder of all members is impracticable, (2) there are questions of
9 law or fact common to the class, (3) the claims or defenses of the representative
10 parties are typical of the claims or defenses of the class, and (4) the representative
11 parties will fairly and adequately protect the interest of the class.

12 (b) Class Actions Maintainable. An action may be maintained as a class action if
13 the prerequisites of subdivision (a) are satisfied, and in addition:

14
15 (2) The party opposing the class has acted or refused to act on grounds generally
16 applicable to the class, thereby making appropriate final injunctive relief or
17 corresponding declaratory relief with respect to the class as a whole.

18 Plaintiffs moving for class certification bear the burden of demonstrating that they meet
19 CR 23's requirements. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003).

20 Where, as here, class certification is sought at the early stages of litigation, courts generally
21 assume that the allegations in the pleadings are true and will not attempt to resolve material
22 factual disputes or make any inquiry into the merits of the claim. *Id. See also WEA v. Shelton*
23 *School Dist.*, 93 Wn.2d at 790. As shown below, this class meets each of the requirements of CR.
24 23(a) and (b)(2).

25 a. **Plaintiffs satisfy CR 23(a)'s requirements.**

26 i. **The class is so numerous that joinder is impracticable - Rule 23(a)(1).**

27 Although the absolute number of class members is not the sole determining factor, where
28 a class is large in number joinder will usually be impracticable. *Jordan v. County of Los Angeles*,

1 669 F.2d 1311, 1319 (9th Cir. 1982) *vacated on other grounds*, 459 U.S. 810, 103 S. Ct. 35, 74
2 L. Ed. 2d 48 (1982). There is no strict rule on the impossibility of joinder, but “joinder is
3 generally deemed practicable in classes with fewer than 20 members and impracticable in classes
4 with more 40 members.” 1 Newberg on Class Actions § 3:11 (5th ed.); *accord Chavez*, 190
5 Wn.2d at 520. Here, DOC’s data concludes this issue. With over 14,300 potential members there
6 can be no dispute that the putative class meets the numerosity requirement.

7 **ii. There are questions of law or fact common to the class - CR 23(a)(2).**

8 Commonality exists when, as here, the legal question “linking the class members is
9 substantially related to the resolution of the litigation even though the individuals are not
10 identically situated.” *Miller*, 115 Wn. App. at 824 (citing *Brown v. Brown*, 6 Wn. App. 249,
11 255, 492 P.2d 581 (1971)). CR 23(a)(2) does not require that every question of law or fact be
12 common to every member of the class. *Id.* The requirement is met if the “course of conduct”
13 that gives rise to the cause of action affects all the class members and at least one of the
14 elements of the cause of action is shown by all class members. *Pellino v. Brink's Inc.*, 164 Wn.
15 App. 668, 682, 267 P.3d 383 (2011) (commonality satisfied when alleged facts indicate
16 defendant was engaged in common course of conduct in relation to all potential class
17 members).

18 Here, Plaintiffs' class action complaint sets forth several questions of law which are
19 common to all proposed class members. These include whether:

20 1) Defendants have violated legal duties owed Plaintiffs by refusing to provide them
21 with access to COVID-19 vaccinations;

1 2) Defendants have violated legal duties owed the Plaintiffs by failing to put in place
2 a comprehensive, evidence-based, culturally competent, individualized and trustworthy
3 education and vaccine distribution process; and

4 3) Defendants have violated legal duties owed Plaintiffs by allowing correctional
5 staff, contractors, and agents who refuse to be vaccinated access to class members.

6 Any differences in the circumstances of individual class members are of no importance.

7 **iii. The claims of the representative parties are typical of the class - CR 23(a)(3).**

8 The typicality requirement is designed to assure that the named representative's interests
9 are aligned with those of the class. Typicality is satisfied if the class members' claims all arise
10 from the same course of conduct and are based on the same legal theory. *Doe L v. Pierce County*,
11 7 Wn. App. 2d 157, 203, 433 P.3d 838 (2018) (*citing Pellino*, 164 Wn. App. at 684). Like every
12 member of the putative class, each of the plaintiffs is at serious risk of contracting COVID and
13 suffering in other ways due to the Defendants' illegal acts. *See generally Declaration of Candis*
14 *Rush, Declaration of Justin Autry; Declaration of Gregory Steen.*

15 In this case the requirements of CR 23(a)(3) have been met. Putative class members are
16 all similarly affected by not being offered the vaccine, by the lack of helpful information about
17 the vaccine, and by continued contact with unvaccinated DOC staff, contractors, or agents.

18 **iv. The representative parties will fairly and adequately represent the interests**
19 **of the class – CR 23(a)(4).**

20 In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other*
21 *grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374
22 (2011), the Ninth Circuit set forth a two-pronged test for adequacy of representation: (1) do the
23 named Plaintiffs and their counsel have any conflicts of interest with other class members and

1 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
2 class? Washington courts have adopted this test. *See, e.g., Kihuria v. Consumer Legal Services*
3 *America, Inc.*, 5 Wn. App. 2d 1001, 2018 WL 4087600 at *6 (Div. 1 Aug. 27,
4 2018)(unpublished).

5 Plaintiffs satisfy both parts of the test. There are no conflicts between Plaintiffs' counsel
6 and other class members, nor are there any conflicts between Plaintiffs and other class members.
7 Class certification is sought under CR 23(b)(2) and seeks only injunctive and declaratory relief
8 as to the Defendants. Plaintiffs do not seek to require any class member to take any action.

9 The proposed class representatives and their counsel will vigorously represent the class.
10 Columbia Legal Services has decades of experience representing people in prison, including
11 advocacy aimed at improving access to health care and protection from harm. Proposed class
12 counsel includes four attorneys, two of whom with substantial experience, including class action
13 advocacy. *See Decl. of Nicholas B. Straley in Support of Motion for Class Certification.*

14 **b. Defendants have acted on grounds generally applicable to the class, thereby**
15 **making appropriate final injunctive and declaratory relief with respect to the**
16 **class as a whole.**

17 This case should be certified as a CR 23(b)(2) class action.

18 *Subdivision (b)(2)* This subdivision is intended to reach situations where a party
19 has taken action or refused to take action with respect to a class, and final relief of
20 an injunctive nature or of a corresponding declaratory nature, settling the legality
21 of the behavior with respect to the class as a whole, is appropriate.

22 Advisory Committee's Notes, 39 F.R.D. 69, 102. Washington's CR 23(b)(2) is identical to the
23 federal rule. Settling whether DOC's actions and inactions violate the state Constitution with
respect to all those incarcerated in DOC facilities, and if so, what non-monetary relief is
appropriate falls squarely under CR 23(b)(2). Moreover, Washington Courts have recognized

1 that class certification is particularly appropriate, where the plaintiffs seek declaratory and
2 injunctive relief. *Johnson v. Moore*, 80 Wn.2d 531, 535-36, 496 P.2d 334 (1972).

3 **IV. CONCLUSION**

4 Based on the foregoing, Plaintiffs ask the Court to certify a CR 23(b)(2) class, appoint
5 Plaintiffs as class representatives, and appoint Plaintiffs' counsel as class counsel.

6 DATED this 30th day of March, 2021.

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