UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

RICHARD WEST and JOSEPH BRUYETTE, individually and on behalf of a class of similarly situated persons,

Plaintiffs,

v.

AL GOBEILLE, Vermont Secretary of Human Services, MARTHA MAKSYM, Vermont Deputy Secretary of Human Services, MICHAEL TOUCHETTE, Vermont Department of Corrections Commissioner, BENJAMIN WATTS, Vermont Department of Corrections Health Services Director, in their official capacities, and CENTURION OF VERMONT, LLC,

Defendants.

Case No. 2:19-cv-81

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION UNDER RULE 23(B)(2)

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I. INTRODUCTION

The Vermont Agency for Human Services (AHS), Vermont Department of Corrections (DOC), and contracted health care provider Centurion of Vermont, LLC (Centurion) are systematically denying or withholding medical treatment to hundreds of people with chronic Hepatitis C (chronic HCV) in the legal custody of DOC. Although the medical standard of care for chronic HCV requires treatment with direct-acting antiviral (DAA) medications—which can essentially cure chronic HCV—the Defendants' policy or practice denies or withholds this lifesaving treatment for the putative class. Instead, the named Plaintiffs and the putative class face a byzantine bureaucracy that refuses them necessary lifesaving treatment, without medical justification, for the Defendants' purpose of saving money. The systematic denial and withholding of lifesaving treatment for the imprisoned to limit agency budget expenditures lies at the heart of Plaintiffs' claims.

Plaintiffs now seek to certify a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of hundreds of inmates subject to the Defendants' improper medical policies or practices. This class certification is sought to facilitate classwide, prospective injunctive relief. Specifically, the Plaintiffs' Complaint asks the Court to order the Defendants to promulgate a written policy that affords treatment to the putative class in conformance with the standard of care, and to act in accordance with that policy. With the elimination of the Defendants' treatment restrictions, putative class members would be relieved of unnecessary pain, serious medical complications, and an ever-increasing risk of death. With the present motion, Plaintiffs seek a Court order certifying the proposed class, appointing the named Plaintiffs as class representatives, and appointing Plaintiffs' attorneys as class counsel.

Courts across the United States have certified essentially identical classes of incarcerated individuals challenging similarly restrictive chronic HCV treatment policies or practices of state correctional institutions. *See, e.g.*, *Hoffer v. Jones*, 323 F.R.D. 694 (N.D. Fla. 2017); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-cv-04219-NKL, 2017 WL 3185155 (W.D. Mo. July 26, 2017); *Graham v. Parker*, No. 3-16-cv-01954, 2017 WL 1737871 (M.D. Tenn. May 4, 2017); *Chimenti v. Wetzel*, CIVIL ACTION NO. 15-3333, 2018 WL 2388665 (E.D. Pa. May 24, 2018). Further, courts within the Second Circuit have consistently recognized that prisoners' civil rights actions challenging such generalized courses of conduct by prison officials are especially appropriate for Rule 23(b)(2) treatment because of the potential for common resolution. *See McGee v. Pallito*, No. 1:04-cv-00335-jgm, 2015 WL 5177770, at *4 (D. Vt. Sept. 4, 2015) ("Rule 23(b)(2) classes originated as a tool to manage civil rights cases, where a class of people subjected to discriminatory policies sought to challenge those policies. In that context, as in this one, the benefit of the injunction inures to the entire class." (citation omitted)). Just as these courts have ruled that similar proposed classes were suitable for certification, so too should the Court here grant the Plaintiffs' Motion for Class Certification.

II. FACTUAL BACKGROUND

A. The Hepatitis C Epidemic

Chronic HCV is the deadliest infectious disease in the United States. Declaration of Dr. Stacey Trooskin (Trooskin Decl.) at ¶ 12 (filed concurrently with this motion). Across the country, an estimated 3.5 million individuals are chronically infected with the Hepatitis C virus. *Id.* More than 20,000 individuals die each year because of chronic HCV. *Id.* According to the Centers for Disease Control and Prevention (CDC), more Americans now die of chronic HCV than all the next 60 infectious diseases reported to the CDC *combined*. *Id.* The chronic HCV epidemic is even more rampant in prisons. Of the 2.2 million people in American jails and

prisons, the CDC estimates that approximately one-third of them are infected with chronic HCV. *Id.* at ¶ 17.

This deadly disease is highly contagious. Vermont HCV surveillance data show a significant increase in newly reported cases of chronic HCV infection in the state, with 723 new cases reported by the CDC. *Id.* at ¶ 15. Chronic HCV was the second most common newly reported disease in Vermont and "one of the greatest disease burdens across the state." *See* Ex. 1 to Declaration of James Diaz (Diaz Decl.) (filed concurrently with the Complaint) at PRR-002106. From 2010 to 2016, Vermont HCV surveillance data show a near doubling in new cases over those six years, from 541 infected individuals to 928 infected individuals. *Id.* at PRR-002112.

Hepatitis C is a blood-borne infectious disease, which is transmitted through exposure to infected blood. Trooskin Decl. at ¶ 9. Even a microscopic amount of blood can transmit HCV. *Id.* Of every 100 people infected with the Hepatitis C virus, 75 to 85 will develop a chronic infection, curable through DAAs. *Id.* at ¶ 13. Individuals infected with chronic HCV suffer from a range of hepatic (affecting the liver) and extrahepatic (affecting other organ systems) symptoms. *Id.* at ¶ 19. A common hepatic manifestation of chronic HCV infection symptom is fibrosis, the formation of scar tissue in the liver. *Id.* at ¶ 20. This scarring of the liver ranges from mild to severe, with the most severe form of fibrosis being cirrhosis. *Id.* As cirrhosis progresses, more scar tissue forms, making it difficult for the liver to function. *Id.* Indeed, Hepatitis C is the most common cause of liver transplants in the United States. *Id.* at ¶ 26. Advanced scarring of the liver is associated with an increased risk of cancer. *Id.* at ¶ 21. Cirrhosis is associated with increased rates of liver transplants and increased risk of death. *Id.* Metavir Fibrosis Score ("fibrosis score") measures the degree of scarring on a spectrum of

Fibrosis State F0 to F4. *Id.* at ¶ 32. A score of F0 represents no fibrosis with an ascending score to F4, which reflects cirrhosis of the liver. *Id.* A parallel scale of measurement is known as "Ishak Stage," named after one of the pathologists who developed it, and it quantifies fibrosis on an ascending scale of 0-6. *Id.*

Key to the Plaintiffs' Complaint is the nature of chronic HCV's manifestation in the stages before cirrhosis. First, DAA treatment at the earlier stages of fibrosis represents the standard of care because a significant number of persons with chronic HCV who have no or mild fibrosis will progress to cirrhosis in the absence of treatment. *Id.* at ¶ 23. Currently, there is no way to predict which newly infected patients will develop advanced liver disease. *Id.* at ¶ 24. And second, individuals in any stage of fibrosis can suffer ongoing extrahepatic effects unrelated to the damage occurring to their liver. Chronic HCV infection can be associated with myocardial infarction, diabetes, decreased cognitive function, fatigue, joint pain, depression, sore muscles, arthritis, various cancers, decreased kidney function, certain types of rashes, and autoimmune disease. *Id.* at ¶ 29. These effects disappear when a patient is successfully treated with DAAs. Thus, delaying treatment by excluding individuals based on fibrosis score or its proxy has a variety of adverse effects, including increased risk of liver damage, cancer, and death, in addition to allowing individuals to continue suffering from ongoing extrahepatic effects. *Id.* at ¶ 45.

B. Standard of Care for Chronic Hepatitis C

Defendants' policy or practice contravenes the current standard of care. *Id.* at ¶¶ 69-70. The American Association for the Study of Liver Diseases (AASLD) and the Infectious Diseases Society of America (IDSA) jointly publish treatment guidelines that establish the standard of care for HCV treatment. *Id.* at ¶¶ 49-51. The AASLD and IDSA recommend DAA treatment for *all* patients with chronic HCV infection except for those with a short life expectancy that cannot be remedied by HCV treatment, liver transplantation, or another directed therapy. *Id.* at

¶ 56. Specifically, the treatment guidelines establish DAA treatment as the standard of care regardless of fibrosis-related measurements and without exclusions on individuals who have recent alcohol or substance use, mental health diagnoses, or recent tattoos, and certainly not on the basis of a jail or prison disciplinary record. *Id.* at ¶¶ 68-69. The Centers for Medicare and Medicaid Services, the U.S. Department of Veterans Affairs, and Vermont Medicaid program endorse or follow these guidelines. *Id.* at ¶ 53. On October 24, 2017, Vermont Medicaid's Drug Utilization Review Board of the Department of Vermont Health Access (DVHA)—which is also under the direction of Defendant Gobeille—removed the fibrosis score and sobriety restrictions that previously prevented Vermont Medicaid patients from accessing DAAs. Shortly afterward, DVHA sent an advisory update to Medicaid providers confirming that curative DAA treatment must be accessible without regard to fibrosis score or sobriety requirements. *See* Ex. 15 to Diaz Decl.

The current standard of care for chronic HCV is highly effective. Starting in 2011, the United States Food and Drug Administration approved a series of DAA oral medications for the treatment of HCV capable of curing the infection. *See* Trooskin Decl. at ¶ 38. Prior to DAAs, the previous standard of care involved treatment that provided, at best, a 70 percent cure rate and could be accompanied by severe side effects. *Id.* at ¶ 37. By contrast, DAAs are easily tolerable, with mild and treatable side effects. *Id.* at ¶ 42. For more than 90 percent of patients who take DAAs, the Hepatitis C virus becomes virtually undetectable and they are no longer able to transmit the virus to others, a status known in medical terms as "sustained virologic response" or SVR. *Id.* at ¶¶ 38, 40-44. The benefits of SVR inure to the patient irrespective of fibrosis score, although if treatment has been delayed until cirrhosis, the risk of liver cancer persists, and that

individual must continue to be screened for liver cancer every six months, indefinitely. *Id.* at ¶¶ 45, 48.

C. DOC Policy or Practice for Chronic HCV

Motivated by short-term (and short-sighted) fiscal interests, Defendants have subjected Plaintiffs to a policy or practice that categorically withholds chronic HCV treatment based on non-medical considerations. The Defendants exclude putative class members from DAA treatment based on: (i) an arbitrary or indefinite amount of time remaining before release, (ii) an individual's disciplinary record, (iii) a history of substance abuse or mental health issues, (iv) the acquisition of tattoos while incarcerated, and (v) disease severity measures. *Id.* at ¶¶ 67-70. In each of these instances, the denial of care is at odds with the standard of care. *Id.*

Among the many obstacles that putative class members face with respect to accessing DAA treatment is the lack of a single, coherent written policy applicable to all individuals in DOC's legal custody. Defendants' current *de facto* policy must thus be cobbled together from DOC's past practices, the experiences of the named Plaintiffs, recent public statements of the Defendants, data reflecting the history of DOC's practice, private correspondence, draft documents, internal meeting notes, and contractual records, as described in the Complaint. *See* Compl. at ¶¶ 83 -125 & Exs. 4-15 to Diaz Decl. Taken together, all of these elements reveal a policy or practice that contradicts the standard of medical treatment for chronic HCV. The following considerations are emblematic of such contradictions.

1. Time Incarcerated Before Release

Upon admission, DOC is required to perform an "Initial Healthcare Receiving Screening" that includes opt-out Hepatitis C testing.[1] *See* Ex. 3 to Diaz Decl. at PRR-000153; *see also* 28

[1] "Opt-out" screening is a process by which an individual is given the choice by DOC as to whether they are tested to determine the presence of an HCV infection.

V.S.A. § 801(b)(1) ("Upon admission to a correctional facility for a minimum of 14 conseuctive days, each inmate shall be given a physical assessment . . . ."). Defendants have denied or withheld DAA treatment from individuals who have less than one year remaining on their sentence, who will reach their maximum sentence within one year, and who have an indefinite release date because they are pre-trial detainees or past their minimum sentence. *See* Compl. at ¶¶ 93, 121; Ex. 22 to Diaz Decl. The overwhelming evidence illustrates that limitations on treatment stem from fiscal concerns. *See* Compl. at ¶¶ 126-140; Exs. 16-22 to Diaz Decl. Nevertheless, Defendants have publicly justified their decisions on the basis that DOC is "unable" to provide or facilitate medication oversight after release. *See* Ex. 14 to Diaz Decl. at 12 ("Unable at present to manage a successful community transition on treatment: Too Many Variables.")

2. Disciplinary Records

The Defendants' last known written formal policy to treat chronic HCV relied on a policy published by Centurion (Centurion Guidelines). *See* Compl. ¶¶ 82–91; Ex. 4 to Diaz Decl. The Centurion Guidelines include non-medical factors that violate the standard of care with a punitive tenor, such as the exclusion of individuals with "chronic behavioral management issues." Ex. 4 to Diaz Decl. at PRR-000202.

3. Substance Use and Reponsibility

Without explanation or support, the Centurion Guidelines also state that patients with high propensity for relapse may need more extended time periods of sobriety prior to treatment. *See* Compl. ¶ 91; Ex. 4 to Diaz Decl at PRR-000199. The Centurion Guidelines further impose a vague requirement associated with a "responsibility to learn from past behaviors and interact with society positively." *See* Compl. ¶ 88; Ex. 4 to Diaz Decl at PRR-000198.

4. Tattoos

The Defendants' policies have historically banned treatment for people who have new tattoos. *See* Compl. ¶ 91; Ex. 26 to Diaz Decl. at PRR-000304.

5. Disease Severity and Unnecessary Treatment Criteria

The documentary record shows that Defendants have used a policy or practice that significantly deviates from the standard of care by categorically excluding or rationing care for some individuals on the basis of disease severity. FIB-4 scores estimate liver scarring through a calculation including patient age, platelet count, and liver enzymes. Trooskin Decl. at ¶ 35. Documents from DOC reveal a policy or practice of only referring individuals infected with chronic HCV for DAA treatment when their FIB-4 scores are greater than 1.45. *See* Compl. ¶¶ 107, 125; Ex. 24 to Diaz Decl. at PRR-003488 ("FIB-4 of < 1.45 indicates a negative predictive value for advanced fibrosis, and the plan is generally to recheck the FIB-4 in 4-6 months."); Ex. 25 to Diaz Decl. at PRR-002548-49 (workflow indicating "Continue Monitoring" where FIB-4 score is less than 1.45). Under such a policy or practice, if an inmate has a FIB-4 score of less than 1.45, the inmate is categorically excluded from DAA treatment, with ongoing HCV treatment relegated to monitoring. This categorical threshold is at odds with the standard of care, which does not countenance a disease severity threshold for treatment of any type. Trooskin Decl. at ¶ 67. Moreover, the FIB-4 score threshold of 1.45 or higher correlates to fibrosis score of F3 or F4, meaning that the threshold is targeted to identify those with advanced fibrosis, to the exclusion of individuals at fibrosis score F0 through F2. *Id.*

D. DOC's Policy or Practice Is Based on Fiscal Concerns Rather than Medical Necessity

Defendants' policy or practice represents systematic denial of lifesaving treatment for individuals in their custody who are living with chronic HCV and who would otherwise be

candidates for curative treatment. The reasons underlying these decisions are not a mystery. DOC is knowingly sacrificing medically necessary care for the sake of saving money. As far back as 2014, individuals working on DOC's behalf were engaged in hyperbole resting on untested assumptions of the fiscal impact of proper care, indicating that "[a]ll costs come directly out of the State of Vermont tax revenues... treating everyone would bankrupt the state." *See* Ex. 16 to Diaz Decl. at PRR-000578. Dr. Scott Strenio, the Medical Director of the DVHA, relayed the financial motivation to deny treatment, and his indifference to the standard of care, in an email to Defendant Centurion after he learned that Massachusetts had begun to administer DAA treatment to its patients:

> Left wing propaganda no doubt, LOL / But really sobriety not a requirement?/ Rationing medical care never done before? Really? / Highly unethical? To break the bank for this one disease state? Really? / Ramping up moral outrage? Nice touch..../ Maybe Mass has lots more money but we clearly do not have the capacity to go down this road ..../ am not sure what the benefit of this would be; outside of what we would do if we had the funding we needed..../ Thoughts? (other than sending our members to Mass.).

See Ex. 18 to Diaz Decl. at PRR-000613-14. Further, internal emails among Vermont officials discussing DOC's budget request in early 2017 illustrate concern about the scope of a proposed $2 million increase. In the context of this discussion, and disregarding the standard of care, these emails reflect the belief that patients "may wait out progression of disease to determine if treatment is necessary." *See* Ex. 19 to Diaz Decl. at PRR-001357; Ex. 20 to Diaz Decl. at PRR-003382 (discussing calibration of numbers of patients to be treated by DOC in the context of fiscal impact).

The parade of evidence illustrating the denial of medically necessary care for the sake of budget savings crescendoed in 2018. In April 2018, Defendant Watts and Centurion's Regional Director of Health Stephen Fisher made a presentation to the Vermont Hep C Task Force, a group of third parties invested in Vermont's treatment decisionmaking. In the presentation,

Watts and Fisher characterized the notion that "[e]verybody has to be treated" as "HCV Mis-Information." *See* Ex. 14 to Diaz Decl. at 11. In support of this point, Watts and Fisher cited, *inter alia*, the "[o]ngoing significant financial toxicities" of DAA treatment. *Id.* On June 21, 2018, to support providing a response to a request for information from Vermont Legal Aid's Health Care Advocate, Defendant Watts informed Defendant Touchette and then-DOC Commissioner Lisa Menard, about the costs of treating chronic HCV, noting that inmate eligibility for DAAs was limited to those inmates who would be in custody for a minimum of 9-13 months. *See* Ex. 21 to Diaz Decl. at PRR-001710-11. In a 2018 Centurion-authored document entitled "Management of Hepatitis C," Defendant Centurion stated that "*[r]esource challenged systems* may use the combination of proprietary indices and abdominal ultrasound to assess for the presence of F2-F4 hepatic fibrosis." *See* Ex. 4 to Diaz Decl. at PRR-000201 (emphasis added). In DOC's FY2019 Budget Presentation to the Governor of Vermont, in a section marked "key budget issues," it claimed that chronic HCV treatment should be expanded to "[a]ll diagnosed cases of Hepatitis C." *See* DOC, FY2019 Governor's Budget Presentation at 49, *available at* http://doc.vermont.gov/about/reports/department-of-corrections-budget-documents/doc-fy19-budget-presentation (last visited May 15, 2019). However, DOC noted that "the process to fully implement these changes may be delayed. Currently, the cost for treatments has averaged above $150,000.00 per patient....The current treatment drug costs are decreasing, and could be as low as $25,000.00 per treatment course, but the expanded treatments could represent a significant increase in costs which are also not budgeted at this time." *Id.* DOC articulated no other explanation for why implementation would be delayed apart from the lack of budgeted resources. Internal emails among Vermont officials discussing adjustments to DOC's chronic HCV treatment protocol from June 2018 to November 2018 focus on the cost of DAA

medications, the budgetary calculations, and limiting the budget for chronic HCV treatment to what is needed for those inmates who will certainly be in DOC custody for about one year. *See* Ex. 22 to Diaz Decl.

The overwhelming weight of the public record makes clear that there is a single, central reason explaining DOC's failure to adhere to the standard of care and the resulting denial or withholding of medically necessary care. There is no mystery – the reason begins and ends with the Defendants' interest in saving money at the expense of the health and welfare of the Plaintiffs and the putative class.

E. Plaintiffs and the Proposed Class

Richard West and Joseph Bruyette move the Court for an order appointing them as class representatives for a class of individuals in the legal custody of DOC and for whom DOC has responsibility with respect to medical care. The Proposed Class includes all persons:

i. Who are, or will be, in the legal custody of the Vermont Department of Corrections regardless of facility location; and
ii. Who have been incarcerated for at least 14 days or who have completed their Initial Healthcare Receiving Screening, whichever occurs first; and
iii. Who have been diagnosed with a chronic HCV, and are candidates for DAA treatment as per the standard of care; and
iv. For whom DAA treatment has been or will be denied or withheld based on considerations that deviate from the medical standard of care, including, but not limited to: time left before release from DOC custody or indefinite release date, a disciplinary record, a history of substance abuse or mental health issues, the acquisition of tattoos while incarcerated, disease severity considerations, or other unnecessary treatment criteria.

Both Richard West and Joseph Bruyette are typical members of the class, and they seek to be named class representatives. Mr. West is a 48-year-old man who has been in the legal custody of DOC since 2005. *See* Declaration of Richard West (filed concurrently with this motion) (West Decl.) at ¶¶ 2-4. His maximum release date is June 23, 2019. *Id.* at ¶ 4. Mr. West suffers from chronic HCV, with his initial diagnosis coming in 2006. *Id.* at ¶ 5. His life

expectancy is longer than one year, and he has been informed by his doctor that he is a good candidate to receive DAA treatment. *Id.* at ¶¶ 4, 8. In addition to suffering from a host of physical extrahepatic effects associated with his chronic HCV, Mr. West experiences ongoing stress and worry in connection with his illness. *Id.* at ¶¶ 6-7. Mr. West has formally requested DAA treatment from DOC and received a denial. *Id.* at ¶ 9. Subsequently, Mr. West endured a series of appeals, and he has now exhausted his administrative remedies. *Id.* at ¶¶ 10-20.

The circumstances of Joseph Bruyette are similar. Mr. Bruyette is a 59-year-old man who has been in the legal custody of DOC since 1987. *See* Declaration of Joseph Bruyette (filed concurrently with this motion) (Bruyette Decl.) at ¶¶ 2, 6. His maximum release date is in January 2043. *Id.* at ¶ 6. Mr. Bruyette has served much of his sentence in out-of-state correctional facilities that have contracts with DOC to retain physical custody of Vermont inmates. *Id.* at ¶ 5. Most recently, Mr. Bruyette was housed at the Tallahatchie County Correctional Facility in Mississippi. *Id.* Mr. Bruyette suffers from chronic HCV, with his initial diagnosis in 1994 or 1995. *Id.* at ¶ 7. His life expectancy is longer than one year, and he has been informed by his doctor that he is a good candidate to receive DAA treatment. *Id.* at ¶¶ 7, 10. In addition to suffering from a host of physical extrahepatic effects associated with his chronic HCV, Mr. Bruyette experiences ongoing stress and worry in connection with his illness. *Id.* at ¶¶ 8-9. Mr. Bruyette has formally requested DAA treatment from DOC and received a denial. *Id.* at ¶ 11. Subsequently, Mr. Bruyette endured a series of appeals, and he has now exhausted his administrative remedies. *Id.* at ¶¶ 12-18.

Plaintiffs further propose that James Diaz, Lia Ernst, James Valente, and Kevin Costello be appointed class counsel. As among the three coordinating legal organizations seeking to represent the class, proposed counsel have significant, relevant litigation experience, including

matters brought on behalf of vulnerable populations of low-income health care consumers, matters involving complex medical facts, class actions for both state and national classes, and matters involving corrections. Each proposed counsel's qualifications and experience are described at length in declarations filed concurrently with this motion. *See generally* Declaration of James Diaz in Support of Plaintiffs' Motion for Class Certification (Diaz Class Cert. Decl.); Declaration of Lia Ernst in Support of Plaintiffs' Motion for Class Certification (Ernst Class Cert. Decl.); Declaration of James Valente in Support of Plaintiffs' Motion for Class Certification (Valente Class Cert. Decl.); Declaration of Kevin Costello in Support of Plaintiffs' Motion for Class Certification (Costello Class Cert. Decl.).

III. ARGUMENT

A. The Rule 23 Standard for Class Certification

Under Rule 23 of the Federal Rules of Civil Procedure, a proposed class must meet two discrete sets of requirements in order to be certified. First, the proposed class must meet each of the four requirements of Rule 23(a). Second, the proposed class must meet at least one of the three prongs of Rule 23(b), which describes different species of class claims. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

The four requirements of Rule 23(a) are numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). In the Second Circuit, there is an additional "implied requirement of ascertainability." *Brecher v. Republic of Arg.*, 806 F.3d 22, 24 (2d Cir. 2015) (quoting *In re Pub. Offerings Secs. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006)). Factual findings at this stage must meet the preponderance of the evidence standard. *McGee*, 2015 WL 5177770, at *3 (summarizing *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,* 546 F.3d 196, 202 (2d Cir. 2008)). In the Second Circuit, district courts are afforded broad

discretion to fashion classes with "liberal rather than restrictive construction," *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

In this case, the Plaintiffs seek to certify a class pursuant to Rule 23(b)(2) for the purposes of obtaining prospective injunctive relief. Under this Rule, proposed class representatives must show 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). Class certification under Rule 23(b)(2) is proper where allegations "stem from central and systemic failures." *Marisol A.*, 126 F.3d at 378. Specifically, "[c]ivil rights cases seeking broad declaratory or injunctive relief for a large and amorphous class . . . fall squarely into the category of [Rule] 23(b)(2) actions." *Id.* (citation and internal quotation marks omitted).

Plaintiffs move to certify the Proposed Class to secure classwide relief. The Proposed Class meets the threshold requirements for class certification under the Federal Rules of Civil Procedure Rule 23 because it meets the requirements for all four elements of Rule 23(a), as well as the requirements of Rule 23(b)(2).

B. The Proposed Class Meets All of the Requirements of 23(a)

1. The Proposed Class Meets the Implied Requirement of Ascertainability

Plaintiffs' proposed class is easily ascertainable. "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." *Brecher*, 806 F.3d at 24–25 (citation and internal quotation marks omitted). Whether someone is in the legal custody of the Vermont Department of Corrections is an empirically determinable question. *See* 28 V.S.A. § 701. Once in the legal custody of the DOC, the first physical medical screening when people can receive an HCV screening—the Initial Healthcare Receiving Screening—should happen within a fourteen-

day period. *See* Ex. 2 to Diaz Decl. at PRR-001719. Diagnosis of HCV can be done with a simple blood test, with a chronic infection characterized as one that has persisted for more than six months. Trooskin Decl. at ¶¶ 10, 13. With certain *de minimis* exceptions, all individuals in DOC custody who are diagnosed with chronic HCV should be candidates for treatment under the standard of care. Trooskin Decl. at ¶ 56. The Second Circuit's requirement of ascertainability is met here. Indeed, internal DOC documents indicate that the agency is capable of and has already performed much of the work necessary to identify the putative class. *See, e.g.*, Ex. 22 to Diaz Decl. at PRR-002721 (reflecting data analysis of DOC population by HCV status and length of custody).

2. The Proposed Class Is Sufficiently Numerous that Joinder Is Impracticable

Plaintiffs' proposed class is also sufficiently numerous. Rule 23(a)(1) does not "mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244–45 (2d Cir. 2007). While an exact number is not required for certification, *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), numerosity is presumed for classes larger than forty members, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Among other factors, the geographic dispersion, financial resources, and the ability of claimants to institute individual suits affect a numerosity ruling in the Second Circuit. *See Robidoux*, 987 F.2d at 936. In addition, "[t]he class action device is particularly well-suited in actions brought by prisoners due to the 'fluid composition' of the prison population . . . [and] generally tend[s] to be the norm in actions such as this." *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992)

(certifying class of deaf prisoners who were allegedly denied ASL interpreters and other accommodations) (citations omitted).

The precise number of putative class members is as yet unknown. DOC estimates that it has 250 people in its legal custody with chronic HCV in an average month. Ex. 10 to Diaz Decl. at PRR-001719-20. Of those individuals, DOC's length-of-custody requirement alone excludes approximately 75% – 188 patients – from entering DAA treatment. *Id.* Exact numbers aside, the transitive nature of the putative class members makes it particularly suitable for a class. *Clarkson,* 783 F. Supp. at 797. Further, individuals who are sentenced or detained and awaiting trial, whether they are incarcerated in a DOC correctional facility or an out-of-state contracted correctional facility, all are subject to the legal custody of DOC. *See* 28 V.S.A. §§ 701–02. These individuals' circumstances make joinder even more infeasible, thus supporting class certification. Based on the Defendants' own estimates the numerosity requirement is met.

3. Members of the Proposed Class Have Questions of Fact and Law in Common

Plaintiffs' proposed class meets the commonality requirement of Rule 23(a)(2) because all class members are uniformly subject to the same policy and systematic practice of the Defendants. Plaintiffs' claims must depend on a common contention. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). To meet the commonality requirement, plaintiffs and the putative class need only one common question of law or fact. *Id.* at 359; *McGee*, 2015 WL 5177770, at *3 (quoting *Bauer–Ramazani v. Teachers Ins. & Annuity Ass'n of Am. Coll. Ret. & Equities Fund*, 290 F.R.D. 452, 458 (D. Vt. 2013)). Such is the case here, where the resolution of a host of factual and legal questions is subject to classwide answers that would advance the matter to its conclusion. Plaintiffs' common questions of law and fact to be resolved here include at least the following:

1. Identifying the precise boundaries of the Defendants' policy or practice with respect to treating individuals with chronic HCV;
2. Whether living with chronic HCV constitutes a serious medical need;
3. What constitutes the standard of care for treatment of chronic HCV;
4. Whether the Defendants' policy or practice regarding chronic HCV treatment constitutes deliberate indifference to a serious medical need.

Commonality exists despite any variation in Plaintiffs' individualized courses of treatment identified by the Defendants. *See, e.g.*, *Postawko*, 2017 WL 3185155, at *7-10 ("[T]he reality that DAA drug treatment may not be appropriate for *every* inmate diagnosed with chronic HCV does nothing to undermine the existence of the common questions alleged by Plaintiffs . . . . [such as] whether Defendants' classwide policy of not even considering DAA drug treatment in the first place unless an inmate has an 'adequate' APRI score is lawful or unlawful."); *Graham*, 2017 WL 1737871, at *4 (finding commonality is met because "[p]laintiffs here are not challenging individual courses of treatment; they are challenging Defendants' official protocols and system-wide practices for Hepatitis C diagnosis and treatment"); *Hoffer*, 323 F.R.D. at 698 (finding commonality is met for those incarcerated with chronic HCV, notwithstanding differences in symptoms and disease progression, because plaintiffs' "claims are focused on Defendant's policy of non-treatment for HCV, which exposes every HCV patient to the same risk, regardless of their symptoms" (citation and internal quotation marks omitted)). Each member of the putative class shares the common experience of living with chronic HCV under the same system-wide policy or practice that denies or withholds treatment. No more is required to satisfy the commonality strictures of Rule 23.

In this case, the putative class shares these common issues regardless of any distinctions manufactured by the Defendants. All proposed class members are incarcerated and in the legal custody of DOC. All are subject to the Defendants' opaque, ever-evolving "wait out" policy or practice of non-treatment based on non-medical factors, causing unnecessary, serious,

unconstitutional harm, pain, and suffering for years. Regardless of any individualized distinctions manufactured by the Defendants, all putative class members are subject to the systematic disregard of the standard of care, prioritizing cost-savings over their health and welfare, as described above. Without DAA treatment, hundreds of putative class members are subject to the same potential range of extrahepatic effects and increasing risk of serious long-term health consequences, including liver failure, cancer, and even death. Living under the same DOC medical regime results in a class of plaintiffs with the same underlying questions and answers to form a class. Should the Court direct the DOC to establish a policy and implementation plan to treat people with chronic HCV according to the standard of care, the Court would resolve the central issue underlying all Plaintiffs' claims. Thus, the capacity of this matter, as a classwide proceeding, "to generate common answers apt to drive the resolution of the litigation," *Dukes*, 564 U.S. at 350 (emphasis omitted), is clear. Accordingly, Rule 23(a)'s commonality requirement for class certification is met.

4. The Claims of the Named Plaintiffs Are Typical of the Proposed Class

Plaintiffs' proposed class satisfies the typicality requirement in Rule 23(a)(2). Typicality "requires that the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (internal quotation marks omitted), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). In this case, the claims of the named Plaintiffs are identical to the claims of each member of the putative class. When challenging a regulatory scheme, proposed class members do not need to suffer the exact same deprivation or physical injury to satisfy the typicality requirement. *See, e.g.*, *Marriott v. Cty. of Montgomery*, 227 F.R.D. 159, 172 (N.D.N.Y. 2005), *aff'd*, No. 05-1590-

CV, 2005 WL 3117194 (2d Cir. Nov. 22, 2005); *Jones v. Goord*, 190 F.R.D. 103, 112 (S.D.N.Y. 1999).

The Proposed Class should be certified because the named Plaintiffs are subject to the same policy or practice that has denied or withheld DAA treatment in accordance with the standard of care. *See, e.g.*, *Hoffer*, 323 F.R.D. at 699 ("Here, Plaintiffs' claims are based on the same legal theories as the class's claims, and Plaintiffs are not in a markedly different factual position than other class members (at least not in a sense that would be relevant for their claims)."); *Postawko*, 2017 WL 3185155, at *11 ("Plaintiffs allege these policies are discriminatory based on HCV status and are violative of their Eighth Amendment rights. These claims are identical to the claims that could be raised by any member of the class."); *Graham*, 2017 WL 1737871, at *5 ("Plaintiffs' claims are typical of the claims of the class because they are seeking declaratory, injunctive, class-wide relief only that may benefit the entire class."). The named Plaintiffs and proposed class members are each subject to Defendants' policy or practice because they are in the legal custody of DOC. They have been diagnosed with chronic HCV, but denied appropriate treatment under the standard of care, because the Defendants have insisted on denying or withholding treatment for non-medical reasons, as described at length above. Given their shared diagnosis of chronic HCV, they may experience any of the hepatic or extrahepatic conditions that manifest as a result of this viral infection, including exposure to greatly increased risk of severe long-term health problems. Although the disease may manifest itself in varied ways, the named Plaintiffs share with each putative class member a core set of complaints arising from the failure of Defendants to treat them. By employing a host of arbitrary categories of exclusion, and without any basis in medical justification, DOC's policy or practice

has created a shared set of legal and factual issues as between the named Plaintiffs and the putative class members. The typicality requirement of Rule 23(a) is met.

5. The Plaintiffs Will Fairly and Adequately Represent the Interests of the Proposed Class

Plaintiffs' proposed class meets the adequacy of representation requirement in Rule 23(a)(4). The two-part adequacy inquiry asks whether: "(1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000) (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)).

Neither Richard West nor Joseph Bruyette has any interests that are antagonistic to the class. As described at length above, each are in the legal custody of DOC, are living with chronic HCV, and are good candidates for DAA treatment under the standard of care. Both the named Plaintiffs seek to end the Defendants' unlawful policy or practice of denying or withholding treatment from them and those similarly situated. Their interests are perfectly aligned with the absent members of the putative class.

Proposed class counsel are likewise adequate. Each of the attorneys bringing this action are experienced and competent counsel who will fairly and adequately protect the interests of the proposed class. The ACLU of Vermont, Costello, Valente & Gentry, P.C., and the Center for Health Law and Policy Innovation each have extensive experience with civil rights litigation. Specifically, proposed class counsel have been responsible for various complex civil lawsuits in federal court, including matters brought on behalf of vulnerable populations of low-income health care consumers, matters involving complex medical facts, and class actions for both state and national classes. Among these lawsuits is the successful certification of a statewide class of

Medicaid beneficiaries seeking access to chronic HCV treatment under the same standard of care at issue here. *See B.E. v. Teeter*, CASE NO. C16-0227-JCC, 2016 WL 3939674 (W.D. Wash. July 21, 2016). Each proposed class counsel has filed a declaration outlining their specific experience and qualifications. *See* Diaz Class Cert. Decl.; Ernst Class Cert. Decl.; Valente Class Cert. Decl.; Costello Class Cert. Decl. Because Plaintiffs and Plaintiffs' attorneys will adequately represent the interests of the Proposed Class, the final requirement in Rule 23(a) is satisfied.

C. The Plaintiffs Meet the Requirement of Rule 23(b)(2)

Under Rule 23(b)(2), class certification is appropriate 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. P. 23(b)(2). The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction . . . would provide relief to each member of the class." *Dukes*, 564 U.S. at 360.

Class actions are an appropriate vehicle for the type of claims raised here. *See McGee*, 2015 WL 5177770, at *4 (denying motion to decertify a Rule(b)(2) class based on an Eighth Amendment injury stemming from a specific policy as opposed to numerous similar actions taken by the Defendants that caused damages); *see also Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (affirming certification of statewide prisoner-class alleging deficient medical care because, among other considerations, "[c]ourts have repeatedly invoked [Rule 23(b)(2)] to certify classes of inmates seeking declaratory and injunctive relief for alleged widespread violations of the Eighth Amendment in prison systems"); *see generally* 2 H. Newberg & William B. Rubenstein, Newberg on Class Actions § 4.34 (5th ed. 2018 update) ("For example, if a

prisoner in a prison conditions lawsuit secures a ruling that a prison policy violates the Constitution, the court-ordered injunctive relief will necessarily apply to all other prisoners.").

Specifically, district courts across the country have certified classes of incarcerated individuals with chronic HCV who seek declaratory and injunctive relief to enforce the standard of care in their state prison system. *See, e.g.*, *Hoffer*, 323 F.R.D. 694 (granting plaintiffs' motion for class certification); *Postawko*, 2017 WL 3185155, at *15 (certifying a class because the proposed class would benefit from a policy that required policy revisions to "individually consider class members for DAA treatment rather than, as a matter of policy, denying this treatment exclusively based on APRI score or for nonmedical reasons such as cost"); *Chimenti*, 2018 WL 2388665, at *3 (granting plaintiffs' motions for class certification and ordering the Pennsylvania Department of Corrections to "(a) formulate and implement a Hepatitis C treatment policy that meets the community standards . . .(b) that members of the Class be treated with the medically necessary and appropriate direct acting antiviral drugs based on individual medical testing . . .(c) that members of the Class receive . . . appropriate access to and evaluation by a hepatologist and assessment regarding their need for a partial or full liver transplant"); *Graham*, 2017 WL 1737871, at *6 ("Plaintiffs have shown that TDOC has acted or refused to act on grounds that apply generally to the class of inmates with Hepatitis C . . . .").

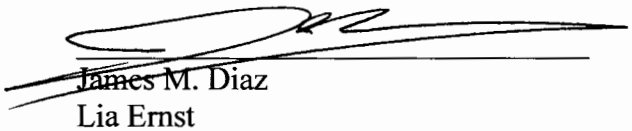
Like these similar classes of incarcerated people in other states, the Vermont Plaintiffs here make a straightforward request for prospective systemwide injunctive relief, ordering the Defendants to provide health care to individuals in DOC legal custody and diagnosed with chronic HCV in accordance with the standard of care. Motivated by cost-saving concerns, Defendants have created a central policy or practice that is deliberately indifferent to incarcerated individuals diagnosed with chronic HCV. Plaintiffs seek to correct their

unconstitutional and discriminatory policy or practice with a single injunction and declaratory judgment. The requested declaratory and injunctive relief would provide relief to all class members.

This Proposed Class satisfies Rule 23(b)(2) because relief from the Defendants' policy and practices would apply to all members of the class.

IV. CONCLUSION

For all the foregoing reasons, the proposed class satisfies the prerequisites of Fed. R. Civ. P. 23(a) and (b). Plaintiffs respectfully request that this Court grant Plaintiffs' Motion, certify the class proposed by the Plaintiffs, appoint the named Plaintiffs as class representatives, and appoint the undersigned as class counsel.



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