IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

CALVIN DAVIS; TODD FASON; NEDRAYA MCGOWAN; and ROBBY RIEDEL, on behalf of themselves and all similarly situated individuals, **PLAINTIFFS**

v. **CASE NO. 4:26-CV-89-KGB**

BOYCE HAMLET, in his official capacity as Chair of the Arkansas Post-Prison Transfer Board; LINDSAY WALLACE, in her official capacity as Secretary of the Arkansas Department of Corrections; JIM CHEEK, in his official capacity as Director of the Arkansas Division of Community Correction; and JAMIE BARKER, in his official capacity as Chair of the Arkansas Board of Corrections **DEFENDANTS**

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Class certification is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Plaintiffs bear the burden of affirmatively demonstrating that their proposed class and subclass satisfy the "rigorous analysis" required by Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). They have not done so. Rather than presenting a cohesive class bound together by a common mode of injury and susceptible to resolution "in one stroke," Plaintiffs seek to aggregate hundreds if not thousands of individualized parole revocation proceedings—each of which are governed by fact-specific constitutional and statutory standards—into a single, statewide injunction.

The proposed class sweeps in all current and future parolees who may face revocation proceedings, regardless of the nature of their alleged violations, their requests (or non-requests) for counsel, the voluntariness of any waivers, the nature of the evidence, or the presence or absence of disability. The proposed disability subclass adds further layers of individualized inquiry, requiring case-by-case determinations of qualifying disability, functional limitation, reasonable accommodation, and causation. Because Plaintiffs cannot satisfy Rule 23(a)'s commonality requirement, and because their claims lack the cohesiveness necessary under Rule 23(b)(2) or the incompatibility required under Rule 23(b)(1)(A), their motion for class certification should be denied.

Background

The named Plaintiffs in this case seek to certify one class and one subclass. Specifically, Plaintiffs Todd Fason, NeDraya McGowan, and Robby Riedel[1] ask the Court to certify the following class:

> All adult parolees who are in the custody, or under the supervision, of the Arkansas Department of Corrections ("ADC"), and who currently face, or will in the future face, parole revocation proceedings administered by Defendants.

ECF No. 4 at 1.

Plaintiffs Todd Fason and Robby Riedel ask the Court to certify the following subclass:

> All adult parolees who are in the custody, or under the supervision, of the ADC; who have a disability, as defined by 42 U.S.C. § 12102 and 29 U.S.C. § 705(9)(B); who need accommodations in order to meaningfully access and participate equally in the parole revocation process; and who currently face, or in the future will face, parole revocation proceedings administered by Defendants.

ECF No. 4 at 2.

Argument

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano*, 442 U.S. at 700–701. To come within the exception, Plaintiffs "must affirmatively demonstrate" their compliance with Federal Rule of Civil Procedure 23. *Dukes*, 564 U.S. at 350. They do not, so their motion for class certification should be denied. This is a "rigorous analysis," and courts may not "conditional[ly]" certify a class, a procedure Congress specifically removed. *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 832 n.7 (8th Cir. 2016) (quoting *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006)). And even if (indeed, especially when) a district court certifies a class at an early stage, the district court

[1] Plaintiff Calvin Davis also requested certification of this class but has since dismissed all his claims against Defendants. *See* ECF No. 28.

retains an "independent duty" to guarantee the certified class "continues to be certifiable under [Rule] 23(a)" throughout litigation. *Id.* at 831, 832 (quoting *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999)).

I. Plaintiffs do not satisfy Rule 23(a)'s prerequisites for the proposed class or subclass.

Rule 23(a) provides four prerequisites that must be satisfied before class certification can be granted:

> (a) 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. P. 23(a).

Plaintiffs fail to establish these elements.

A. The named members of the class and subclass will not qualify as representative parties once their parole-revocation hearings have occurred.

To sue under Rule 23, Plaintiffs Todd Fason, NeDraya McGowan, and Robby Riedel must be "members of a class." Fed. R. Civ. P. 23(a).[2] They "cannot represent a class of whom they are not a part." *Bailey v. Patterson*, 369 U.S. 31, 32–33 (1962); *see Elizabeth M. v. Montenez*, 458 F.3d 779, 785 (8th Cir. 2006) ("When the class was certified, Caroline C. and Susan Z. were the only named plaintiffs residing in one of the three mental health facilities and therefore eligible to

[2] Plaintiff Calvin Davis dismissed his claims, presumably on the basis that he does not currently face, nor will in the future face, parole revocation proceedings administered by Defendants.

represent a class of present and future residents seeking equitable relief to improve conditions within the facilities."); *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("A class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). According to Plaintiffs' Status Report, ECF No. 25, NeDraya McGowan's final revocation hearing was scheduled for February 17, 2026. That hearing was continued to a later date. But once it does occur, McGowan will be unable to show that he "currently face[s], or will in the future face, parole revocation proceedings administered by Defendants." ECF No. 4 at 1. Mr. Fason and Mr. Riedel do not know when their revocation hearings will take place. *See* ECF No. 25 at 2–3. But once their hearings do occur, they also will no longer be members of the proposed class and hence they may not "sue . . . as representative parties on behalf of all members" of the proposed class. *See* Fed. R. Civ. P. 23(a). The same is true for Todd Fason and Robby Riedel for the proposed subclass. Once their hearings occur, they will no longer be qualified to serve as class representatives, and their claims will be moot. *See Elizabeth M.*, 458 F.3d at 784 ("a claim for equitable relief altering the custodial conditions at a state institution normally becomes moot when the plaintiff is no longer subject to the challenged conditions").

B. Commonality is lacking because Plaintiffs lack a common contention that can be resolved in one stroke.

Commonality under Rule 23(a)(2) requires that the plaintiffs have suffered the same injury, which means that their "claims must depend upon a common contention" and "[t]hat common contention, moreover, must be of 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." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court made clear that commonality is not satisfied merely because class

members allege violations of the same law; rather, what matters is whether the class proceeding can produce a common *answer* to a common contention that drives the resolution of the litigation. *Id*. at 349–50.

Here, Plaintiffs attempt to frame this case as a systemic challenge to Arkansas's parole revocation practices. *See* ECF No. 1 at 1–4; ECF No. 5 at 1–3. But as pleaded, the claims turn on highly individualized circumstances that defeat commonality under *Dukes*. The core constitutional question under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), is whether a particular parolee is entitled to appointed counsel. That determination isn't categorical. Indeed, *Gagnon* directs that the analysis is individualized to each parolee and thus "*must* be made on a case-by-case basis." *Id.* at 790 (emphasis added). For one, some parolees will not be indigent and may retain private counsel and will thus fall completely outside Plaintiffs' claims, yet the defined class would inappropriately include non-indigent parolees anyway. And looking only to indigent parolees, the analysis depends on whether the parolee has a timely and colorable claim of innocence, whether there are substantial mitigating reasons that make revocation inappropriate, and whether the parolee is capable of speaking effectively for himself or herself. *Id.* Each of those factors is fact-specific and individualized. To be sure, "[t]he facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision." *Id*. There is no single, class-wide answer to the question whether "parolees are entitled to counsel." The answer varies parolee by parolee, violation by violation, and circumstance by circumstance.

Dukes is particularly instructive because it rejected class certification where the alleged discrimination resulted from discretionary decisions made by local supervisors across many stores.

564 U.S. at 355–56. The Court emphasized that a policy of allowing discretion, standing alone, is not "a common mode of exercising discretion" that can establish commonality. *Id.* at 356. The same principle applies here. The revocation framework involves individualized assessments by community supervision officers and revocation hearing officers. *See*, *e.g.*, 16 C.A.R. § 22-302(h). Decisions about issuing violation reports, pursuing revocation, recommending sanctions, permitting confrontation, or determining whether counsel is constitutionally required depend on the specific facts of each parolee's case. Plaintiffs do not plausibly identify a single uniform policy that automatically denies counsel in circumstances where *Gagnon* mandates it, *see* ECF No. 25 (acknowledging that named Plaintiff Robby Riedel was appointed counsel and consulted with counsel at revocation hearing), ECF No. 31 at 25–26 (explaining that plaintiffs misinterpret parole-board rule as a flat ban on state-appointed counsel when it is not), ECF No. 31-1 (form for parolees to request appointment of counsel).[3] Instead, they challenge the absence of a categorical appointment system and the alleged manner in which discretion is exercised. Under *Dukes*, that is insufficient.

[3] To be sure, Plaintiffs allege that one of the rules of the Post-Prison Transfer Board, 16 C.A.R. 22 § 22-302(g)(2)(B), constitutes a "flat ban" on state-appointed counsel. ECF No. 3 at 20. Defendants disagree with that interpretation, *see* ECF No. 31 at 25–26, and disagree that they do not screen or appoint counsel when required under *Gagnon*. Because the Supreme Court has "[r]epeatedly . . . emphasized" that it "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013), this Court should first hear evidence and decide this disputed contention before certifying the proposed class. Thus, at the very least, the Court should hold a decision on class certification in abeyance to allow for "certification-related discovery." *Day*, 827 F.3d at 832 & n.7 (connecting certification-related discovery to the required "rigorous analysis" that "[c]ertification orders must undergo" (citation omitted)).

Moreover, Plaintiffs' due process claims beyond counsel appointment likewise lack a unifying common answer. Whether a parolee was coerced into waiving a hearing, *see* ECF No. 5 at 11, depends on the specific interaction between that parolee and a particular officer. Whether a parolee was denied the opportunity to present evidence, *see* ECF No. 5 at 2, depends on what evidence was offered and how the hearing officer responded. Whether cross-examination was improperly limited, *see* ECF No. 5 at 2, depends on the nature of the testimony and the stated reasons for limitation. These are not questions that can be resolved with common proof. They require individualized consideration of separate revocation proceedings. A class-wide proceeding would devolve into a series of mini-trials concerning hundreds or thousands of discrete hearings—precisely the type of fragmentation *Dukes* held incompatible with Rule 23(a)(2).

The same defect is present in the proposed disability subclass. Whether a parolee is a "qualified individual with a disability," *see* 42 U.S.C. § 12132 (Americans with Disabilities Act); *see also* 29 U.S.C. § 794 (Rehabilitation Act); *Durand v. Fairview Health Servs.*, 902 F.3d 836, 841 (8th Cir. 2018) (courts generally interpret ADA and RA "interchangeably"), whether that disability affected his or her ability to participate meaningfully in a hearing, and whether (and what) reasonable accommodations were required and denied are inherently individualized inquiries. *See Harris v. Union Pacific R.R. Co.*, 953 F.3d 1030, 1035 (8th Cir. 2020) (reversing class certification for an ADA claim because of the "individualized inquiries"). Indeed, the ADA imposes a "statutory obligation to determine the existence of disabilities on a case-by-case basis." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

Disabilities also differ in type, severity, and functional impact. The accommodations that may be required for a hearing-impaired parolee are not the same as those that may be required for

a parolee with ADHD, anxiety, or a vision impairment. *See Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 490 (3d Cir. 2018) ("The wide variety of potential ADA violations captured in the broad class definition certified by the District Court does not lend itself to" resolution in one stroke.). There is no single "common answer" to whether the revocation process violates the ADA. *See Dukes*, 564 U.S. at 352. The answer turns on individualized medical, functional, and procedural facts.

Dukes also emphasized that commonality requires "[s]ignificant proof" of a general policy affecting all class members in the same way. 564 U.S. at 353. Here, Plaintiffs rely on anecdotal accounts from particular parolees to suggest systemic deficiencies. But anecdotal evidence of disparate experiences does not establish a common mode of unconstitutional conduct. To the contrary, the varied nature of the allegations underscores that revocation proceedings differ in practice, timing, personnel, and outcome. Without a uniform policy that operates identically on all class members, there is no "glue" holding the claims together. *See id*. at 352.

In short, the proposed class fails the commonality requirement because the central liability questions cannot be answered on a class-wide basis. The entitlement to counsel, the voluntariness of waivers, the adequacy of notice, the opportunity to present evidence, and the need for disability accommodations all depend on individualized facts unique to each parolee and each proceeding. Under *Dukes*, Rule 23(a)(2) does not permit certification where the alleged wrong arises from discretionary, case-specific decisions lacking a common, class-wide mechanism of injury.

Contrary to Plaintiffs' suggestion, *see* ECF No. 5 at 10, the Eighth Circuit's decision in *Postawko v. Missouri Department of Corrections*, 910 F.3d 1030 (8th Cir. 2018), is materially

distinguishable from this case, both legally and factually, and does not compel a finding of commonality here.

First, *Postawko* involved a single, uniform, statewide medical protocol that applied identically to every class member. The plaintiffs challenged a specific HCV[4] treatment policy—namely, the Missouri Department of Corrections' alleged practice of withholding direct-acting antiviral (DAA) drugs from inmates unless their APRI scores exceeded a set threshold. 910 F.3d at 1035. The plaintiffs alleged "the existence of a single policy related to HCV treatment and APRI scores that involves no discretionary decision-making." *Id.* at 1039 n.5. In other words, liability turned on whether one standardized medical protocol—applied across the board—constituted deliberate indifference. *See id*. at 1038. That question could be answered "in one stroke" for the entire class because every member was subjected to the same screening and treatment criteria. *See id*. at 1038, 1040.

By contrast, this case does not challenge a single, mechanistic, non-discretionary policy applied uniformly to all parolees. The revocation framework involves multiple stages—violation reporting, preliminary review, waivers, final hearings, sanction determinations—and individualized constitutional determinations under *Gagnon v. Scarpelli*. Whether counsel is constitutionally required depends on case-specific factors: whether the parolee asserts a colorable claim of innocence, whether mitigating circumstances are complex, and whether the parolee can speak effectively for himself or herself. Those determinations are inherently discretionary and fact bound. There is no analogue here to the fixed APRI-score threshold in *Postawko*.

[4] "HCV is a viral infection that can cause liver damage and other extremely serious side effects." *Postawko*, 910 F.3d at 1034.

Second, the nature of the alleged injuries differs fundamentally. In *Postawko*, the alleged constitutional violation was exposure to a uniform, medically deficient treatment policy that created a common risk of serious harm for all HCV-positive inmates. 910 F.3d at 1038. The Court looked to the Ninth Circuit's reasoning that "every inmate suffers exactly the same constitutional injury when he is exposed to a single . . . policy or practice that creates a substantial risk of serious harm." *Postawko*, 910 F.3d at 1039 (quoting *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)). The injury was the systemic denial or delay of DAA treatment under a standardized protocol.

Here, however, the alleged injuries vary dramatically across proposed class members. Some parolees may have waived hearings; others may have admitted violations; some may have contested probable cause; some may have sought counsel; others may not. Some may claim denial of confrontation; others may allege coercion; still others may assert ADA-based accommodation failures. The alleged harms arise not from exposure to a single, uniform rule, but from individualized interactions in discrete proceedings. Determining whether any constitutional violation occurred would require examining the specific facts of each revocation process. That fragmentation defeats the kind of "common answer" that *Dukes* requires and that *Postawko* found present.

Third, *Postawko* involved a medical treatment protocol that was largely objective and document-driven. The plaintiffs produced records showing denials of DAA treatment expressly tied to the APRI threshold and referenced standardized "protocols." *Postawko*, 910 F.3d at 1036. The evidentiary showing supported the existence of a centralized, cohesive policy. *Id.* at 1035. In contrast, parole revocation proceedings are conducted by different officers, in different facilities, under varying factual circumstances. Even assuming statewide regulations govern the framework,

the operative constitutional questions turn on how discretion is exercised in individual cases. The Supreme Court in *Dukes* made clear that a policy of allowing discretion is not itself a common mode of exercising discretion sufficient to establish commonality. That principle applies here, not *Postawko*.

Fourth, the relief sought in *Postawko* targeted a discrete medical protocol—essentially, reformulation of HCV screening and treatment criteria. A single injunction addressing that protocol could provide relief to each class member. *See Postawko*, 910 F.3d at 1040 ("The injunctions sought in this case . . . relate only to a single policy regarding one particular illness."). By contrast, the relief sought in this case would require restructuring parole revocation procedures across a range of contexts, potentially altering counsel screening practices, waiver processes, evidentiary procedures, and disability accommodations. Because the alleged violations depend on individualized circumstances, no single injunction could resolve all claims without embedding the federal court in ongoing, case-by-case supervision. *Cf. id.* at 1040 (noting "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law" and stating that the Court "may wait to consider any further concerns about the balance between state and federal authority until (and if) the district court imposes an equitable remedy").

In sum, *Postawko* turned on the existence of a single, centralized, non-discretionary medical policy that allegedly exposed all class members to the same unconstitutional risk and thus pointed to the same constitutional answer. This case involves individualized parole proceedings governed by discretionary, fact-specific determinations under established constitutional standards. The absence of a uniform, mechanistic policy—combined with the individualized nature of the alleged

injuries—renders *Postawko* distinguishable and prevents it from supplying the "common answer" required under Rule 23(a)(2).

Similarly, Plaintiffs incorrectly claim that "*Gasca v. Precythe*, [2019 WL 112789] is even more on point" than *Postawko* because the court certified a class of Missouri parolees challenging parole-revocation practices. ECF No. 5 at 10. *Gasca* is not on point. The opinion spans approximately three pages and the court's Rule 23(a) analysis is a single sentence long: "The Court has conducted a rigorous analysis and finds that the proposed class satisfies the Rule 23(a) requirements of nume[ro]sity, commonality, typicality, and adequacy." *Gasca v. Precythe*, No. 17-CV-04149-SRB, 2019 WL 112789, at *1 (W.D. Mo. Jan. 4, 2019). The brevity of the court's analysis is not surprising given that the "Defendants consent[ed] to class certification" and "filed no opposition" to the class-certification motion. *Id*. To be sure, the definition of the class in *Gasca* is materially the same as the proposed class here. But the absence of any actual analysis by the court in *Gasca*—or any opposition from the defendants—renders the opinion of no persuasive value.

Likewise, *Hickman v. Arkansas Board of Pardons and Paroles*, 361 F. Supp. 864 (E.D. Ark. 1973), is readily distinguishable from this case and does not support class certification here. *Hickman* says nothing about Rule 23(a) or commonality. Moreover, *Hickman* arose in a unique post-*Morrissey* transitional context. The case was filed shortly after the Supreme Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), which for the first time articulated minimum due process requirements for parole revocation. The district court found that Arkansas had not yet adopted procedures conforming to *Morrissey*, and that many parolees had been denied the newly announced constitutional safeguards. *Hickman*, 361 F. Supp. at 866. The constitutional violations in *Hickman* were seemingly undisputed: the State had not implemented the procedural framework

that *Morrisey* required. *Id*. The injunctive relief ordered by the court thus required adoption of procedures that mirrored *Morrissey*'s requirements.

That circumstance is fundamentally different from the present case. Here, there is no plausible allegation that Defendants are operating without a constitutional framework. *See* 16 C.A.R. § 22-302 (rules applicable to revocation hearings), § 22-303 (revocation hearing decisions), § 22-304 (revocation hearing continuances), § 22-305 (revocation hearing waivers), § 22-401 (revocation appeal requests), § 22-402 (revocation appeal review). Arkansas has long since implemented formal revocation procedures designed to comply with *Morrissey* and *Gagnon*. Plaintiffs' claims instead concern how those procedures are applied in particular cases—whether counsel was required under *Gagnon*, whether waivers were voluntary, whether accommodations were sufficient, or whether confrontation was properly limited. Those questions do not present the kind of uniform, facial procedural deficiency that existed in *Hickman*. So *Hickman* is inapposite.

II. Plaintiffs fail to satisfy Rule 23(b)'s requirements.

Rule 23 requires that plaintiffs meet all of Rule 23(a)'s requirements and "satisfy one of the three subsections of Rule 23(b)." *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1033 (8th Cir. 2020) (quoting *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477 (8th Cir. 2016)). Plaintiffs seek class certification "under Rule 23(b)(2) or (b)(1)(A)." ECF No. 5 at 3. Those provisions state that a class action may be certified if Rule 23(a) is satisfied and if "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), or "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class," Fed. R. Civ.

P. 23(B)(1)(A). Plaintiffs do not satisfy either (B)(2) or (B)(1)(A), so class certification should be denied.

A. Plaintiffs' class and disability subclass claims are not cohesive.

Rule 23(b)(2) states that a class action may be certified if Rule 23(a) is satisfied and if "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 touchstone of a 23(b)(2) class is that the class claims must be cohesive." *Harris*, 953 F.3d at 1033.

Under *Dukes*, Rule 23(b)(2) certification is proper only when "a single injunction or declaratory judgment would provide relief to each member of the class." 564 U.S. at 360. The Supreme Court emphasized that Rule 23(b)(2) applies when the relief is indivisible. That is, when the defendant's conduct is such that one uniform remedy resolves the claims of all class members at once. *Id*. That principle is dispositive here.

1. The class claims are not cohesive.

Wal-Mart makes clear that it is not enough to identify a broadly framed policy or a shared grievance. What matters instead is whether the class proceeding can generate a common answer to a common contention that drives the resolution of the litigation. The proposed class—"[a]ll adult parolees who are in the custody, or under the supervision, of the Arkansas Department of Corrections, and who currently face, or will in the future face, parole revocation proceedings"—does not satisfy that requirement because no single injunction could provide relief to each member of that class.

The Supreme Court explained in *Dukes* that Rule 23(b)(2) certification is inappropriate "when each individual class member would be entitled to a *different* injunction or declaratory

judgment against the defendant." 564 U.S. at 360 (emphasis in original). The Court contrasted proper (b)(2) classes—those seeking uniform injunctive relief from a standardized practice—with cases in which each class member would be entitled to different or case-specific remedies. *Id.* at 361. The central inquiry is whether the relief can be granted "respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Here, the alleged constitutional violations arise from parole revocation proceedings that are inherently individualized. Whether due process requires appointment of counsel under *Gagnon* depends on whether a particular parolee asserts a timely and colorable claim of innocence or substantial mitigating reasons, and whether he is capable of effectively presenting those arguments. That inquiry is fact-specific by design. An injunction declaring that "counsel must be appointed" would be contrary to *Gagnon*'s case-by-case framework. There is no single, class-wide directive that resolves the entitlement question for all parolees facing revocation.

The same problem arises with respect to confrontation rights, waiver validity, and evidentiary disclosure. Whether a waiver was voluntary depends on the specific interaction between the parolee and the supervising officer. Whether confrontation was improperly limited depends on the nature of the adverse evidence and any stated justification. Each of these determinations is individualized.

2. The disability subclass claims are not cohesive.

The Eighth Circuit's decision in *Harris v. Union Pacific R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020), is on point and supports denial of certification of Plaintiffs' proposed disability subclass. In *Harris*, the plaintiffs challenged a company-wide fitness-for-duty policy under the ADA, arguing that the policy itself was unlawfully discriminatory and could be adjudicated on a class-wide basis. The district court certified a Rule 23(b)(2) and (b)(3) class. The Eighth Circuit reversed, holding

that the ADA's statutory structure required individualized inquiries that defeated both predominance and cohesiveness. The Court emphasized that even where plaintiffs characterize their claim as a facial challenge to a "policy itself," the ADA requires examination of whether the challenged standard is "job-related for the position in question and is consistent with business necessity." 953 F.3d at 1035. Because that inquiry depended on the specific job, the specific employee, and the specific medical condition, common questions did not predominate and a single injunction could not resolve the claims for all class members.

That reasoning maps neatly onto Plaintiffs' proposed disability subclass here.

First, as in *Harris*, Plaintiffs attempt to frame their ADA theory at a high level of abstraction—i.e., that the revocation system fails to accommodate parolees with disabilities. But the statutory question under Title II of the ADA is not whether a general "policy" exists. The question is whether a qualified individual with a disability was denied meaningful access to services, programs, or activities by reason of that disability. *See* 42 U.S.C. §§ 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"); 12182(b)(2)(A)(iii) (defining discrimination as "a failure to take such steps as may be necessary to ensure that no individual with a disability is . . . treated differently than other individuals because of the absence of auxiliary aids and services"). That inquiry necessarily requires individualized determinations, e.g.: whether a particular parolee has a qualifying disability, what functional limitations arise from that disability, what accommodation was needed in the context of a specific revocation proceeding, whether the accommodation was requested or apparent, and whether any denial was by reason of disability. *Durand v. Fairview*

Health Servs., 902 F.3d 836, 841 (8th Cir. 2018); *Folkerts v. City of Waverly*, 707 F.3d 975, 983 (8th Cir. 2013); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076 (8th Cir. 2006); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) ("To state a prima facie claim under the ADA, a plaintiff must show: 1) he is a person with a disability as defined by statute; 2) he is otherwise qualified for the benefit in question; and 3) he was excluded from the benefit due to discrimination based upon disability.").

Harris thus squarely rejects the notion that plaintiffs can bypass individualized statutory elements by invoking a generalized "policy" theory. The Eighth Circuit pointed to an opinion from the Third Circuit, which explained: "[T]hat the existence of the polic[y] alleged by plaintiffs can be adjudicated on a classwide basis . . . does not mean that th[is] polic[y], if proven to exist, would amount to a classwide showing of unlawful discrimination under the ADA." *Id.* at 1037 (quoting *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 184 (3d Cir. 2009)). In other words, even if a common policy can be identified, liability under the ADA still turns on individualized statutory criteria. The same is true here.

Second, *Harris* is particularly instructive regarding Rule 23(b)(2)'s cohesiveness requirement. The court reiterated that Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class," and that a class is improper when the defendant's conduct "cannot be evaluated without reference to the individual circumstances of each plaintiff." 953 F.3d at 1038 (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010)). That language is directly applicable to the proposed disability subclass.

The disability subclass here would necessarily encompass parolees with widely varying conditions, which could potentially include mental health disorders, cognitive impairments,

sensory impairments, mobility limitations, medication needs, and more. The accommodation required for a hearing-impaired parolee (e.g., an interpreter) is categorically different from the accommodation required for a parolee with ADHD (e.g., additional explanation or extended time), which is different still from a parolee with anxiety requiring medication continuity. Whether any ADA violation occurred thus depends on the interaction between the individual's specific limitations and the specific features of a particular revocation proceeding. Under *Harris*, that lack of cohesiveness precludes Rule 23(b)(2) certification.

Finally, *Harris* underscores that Rule 23 cannot be satisfied where statutory defenses or justifications require case-specific evaluation. There, the "job-related and consistent with business necessity" inquiry defeated predominance and cohesiveness because it varied by job and condition. 953 F.3d at 1036. Here, any asserted justification (such as safety concerns, security constraints, or the nature of the alleged parole violation) will vary across proceedings and facilities. Those defenses cannot be resolved in a single stroke.

In sum, *Harris* teaches that ADA claims are not suitable for class-wide resolution when liability turns on individualized assessments of disability, functional limitation, and context-specific justification. The proposed disability subclass suffers from precisely the same defect. Under controlling Eighth Circuit precedent, the subclass lacks the cohesiveness required by Rule 23(b)(2), and certification should be denied.

B. Plaintiffs' class and disability subclass do not satisfy Rule 23(b)(1)(A).

Rule 23(b)(1)(A) states that a class action may be certified if Rule 23(a) is satisfied and if "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). The Rule "'takes in cases where the party is obliged by law to treat the members of

the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners).'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted). In other words, "subdivision (b)(1)(A) is applicable when practical necessity forces the opposing party to act in the same manner toward the individual class members and thereby makes inconsistent adjudications in separate actions unworkable or intolerable." 7AA Fed. Prac. & Proc. Civ. § 1773 (3d ed. Sept. 2025 update).

The proposed class consists of "[a]ll adult parolees who are in the custody, or under the supervision, of the Arkansas Department of Corrections, and who currently face, or will in the future face, parole revocation proceedings." The proposed disability subclass encompasses parolees with disabilities who allegedly require accommodations in revocation proceedings. Neither group satisfies Rule 23(b)(1)(A).

First, separate adjudications of individual due process or ADA claims would not create "incompatible standards of conduct" for Defendants. If one parolee were to prevail on a claim that he was constitutionally entitled to appointed counsel under *Gagnon*, the resulting judgment would require Defendants to provide relief to that parolee. If another parolee were to lose a similar claim because his circumstances did not satisfy *Gagnon*'s criteria, that outcome would not compel Defendants to act inconsistently. The difference would reflect the individualized constitutional standard itself. The governing law already contemplates case-by-case determinations. Divergent results based on different factual circumstances do not amount to incompatible standards; they reflect the proper application of individualized constitutional analysis.

Moreover, Rule 23(b)(1)(A) is concerned with situations where, for example, one court orders a defendant to take a specific action while another court orders the defendant not to take that same action—placing the defendant in a position where compliance with one judgment necessarily violates the other. That is not the risk here. A judgment in favor of one parolee requiring additional procedural protections would not preclude Defendants from prevailing in another case where those protections were not constitutionally required. The standards governing revocation—*Morrissey*, *Gagnon*, and the ADA—are uniform. Courts applying those standards may reach different outcomes based on different facts, but that does not create incompatible legal obligations.

Second, the proposed class is extraordinarily broad and forward-looking. It includes parolees who "will in the future face" revocation proceedings. Any alleged risk of inconsistent adjudications would arise only if multiple courts interpreted the governing constitutional standards differently in a way that imposed mutually exclusive obligations. But federal and state courts are bound by the same Supreme Court precedents. The mere possibility that different courts might reach different conclusions in fact-specific applications of *Gagnon* or ADA requirements does not constitute the kind of incompatibility Rule 23(b)(1)(A) addresses.

Third, the disability subclass fares no better. ADA liability turns on whether a particular qualified individual with a disability was denied meaningful access by reason of that disability and whether a requested accommodation was reasonable in the circumstances. If one parolee were to obtain a judgment requiring an accommodation tailored to his disability—such as an interpreter, extended time, or medication access—that would not impose a general obligation inconsistent with a judgment in another case denying relief to a parolee with a different disability or different factual showing. The obligations would be individualized and reconcilable. There is no scenario in which

Defendants would be ordered both to provide and not provide the same accommodation to the same category of individuals under mutually exclusive legal standards.

Finally, certification under Rule 23(b)(1)(A) is particularly inappropriate where the governing law already mandates individualized determinations. The constitutional standards at issue—especially the case-specific inquiry required by *Gagnon*—presuppose that different parolees may be entitled to different procedural protections depending on their circumstances. That variability is not a defect to be cured through class certification. Using Rule 23(b)(1)(A) to aggregate such claims would invert the rule's purpose.

In sum, separate suits by individual parolees would not establish incompatible standards of conduct for Defendants. At most, they would yield different outcomes based on different facts under the same governing legal framework. Because Rule 23(b)(1)(A) targets mutually exclusive legal commands, the proposed class and subclass do not satisfy its requirements.

CONCLUSION

Plaintiffs' motion for class certification should be denied.

Respectfully submitted,

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