IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0442

WILLIAM SCOTT ROGERS, individually and on behalf of all others similarly situated,

Plaintiffs – Appellees,

v.

LEWIS & CLARK COUNTY,

Defendant – Appellant.

OPENING BRIEF OF APPELLANT LEWIS & CLARK COUNTY

On Appeal from the First Judicial District Court,
Lewis and Clark County, Montana
Cause No. DDV-2018-1332

Appearances:

Jared S. Dahle
Nicholas J. Lofing
Garlington, Lohn & Robinson, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT 59807-7909
Phone (406) 523-2500
Fax (406) 523-2595
jsdahle@garlington.com
njlofing@garlington.com
Attorneys for Defendant – Appellant

Keif A. Storrar
Jonathan L. King
Doubek, Pyfer & Storrar, PLLP
P.O. Box 236
Helena, MT 59624
Phone (406) 442-7830
Fax (406) 442-7839
keif@lawyerinmontana.com
jonathan@lawyerinmontana.com
Attorneys for Plaintiffs – Appellees

Appearances (cont'd):

Mitchell A. Young
MACo Defense Services
2717 Skyway Drive, Suite F
Helena, MT 59602-1213
Phone (406) 441-5471
Fax (406) 441-5497
myoung@mtcounties.org
Attorneys for Defendant – Appellant

Lawrence A. Anderson
Attorney at Law, P.C.
P.O. Box 2608
Great Falls, MT 59403
Phone (406) 727-8466
Fax (406) 771-8812
laalaw@me.com
Attorneys for Plaintiffs – Appellees

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I. STATEMENT OF ISSUES

1. *Did the District Court clearly err in finding and concluding that the Detention Center's booking records—rather than actual search records—could be substituted and used to analyze commonality, numerosity, and typicality criteria for class certification*?

2. *Did the District Court abuse its discretion in its class certification order by determining that common questions predominate over the individualized determinations required by the statute, namely the particularized inquiry whether a misdemeanant is searched without a reasonable suspicion of concealing a weapon, contraband, or evidence of a commission of a crime?*

II. STATEMENT OF THE CASE

Appellant Lewis & Clark County (the "County") appeals the First Judicial District Court's order certifying a class described as follows:

> Each person arrested or detained for a non-felony offense from October 31, 2015, to the present who has been subjected to a strip search or visual body cavity search by a law enforcement officer or employee of the Lewis and Clark County Detention Center *pursuant to a Detention Center policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general custody.*

Order Pl.'s Mot. Cert. Class Action 20-21, Aug. 5, 2021, CR134 ("Order") (emphasis added).

Detainees are ninety-six former detainees of the Lewis & Clark County Detention Center ("Detainees") and petition for relief on behalf of an unenumerated number of putative class members. Am. Compl. Damages, Injunctive Relief, & Class Relief & Demand Jury Trial ¶1, Sept. 16, 2019, CR35 ("Am. Compl."). Detainees' Amended Complaint alleged constitutional and statutory violations and various torts, based on alleged strip searches conducted at the Lewis & Clark County Detention Center ("Detention Center"). Am. Compl. ¶¶1-68. Detainees allege that the Detention Center conducted approximately 3,572 strip searches of similarly situated persons in the three years preceding the lawsuit, with an estimated additional 977 similar searches since filing. Order 2.

On previous interlocutory appeal, the Supreme Court affirmed that no constitutional claim existed for the unclothed searches of misdemeanants entering the general population of the Detention Center. The Court reversed, however, concluding that Montana Code Annotated § 46-5-104 prohibits a suspicionless strip search of a misdemeanant. *Rogers v. Lewis & Clark Cty.*, 2020 MT 230 ("*Rogers I*").

Following the Montana Supreme Court's *Rogers I* opinion, the parties stipulated to dismissal of the claims for constitutional violation, invasion of

privacy and punitive damages. Mot & Stip., May 10, 2021, CR130. Detainees then renewed their motion to certify a class, proposing the following class:

> Each person arrested or detained for a traffic offence or an offense that is not a felony who, with the three years preceding the filing of this action and up until the date this case is concluded, has been or will be subjected to a strip search as defined under Montana law, by a peace officer or law enforcement employee at the Lewis & Clark County Detention Center *without suspicion to believe that the person was concealing a weapon, contraband, or evidence of commission of a crime*.

Am. Compl. ¶17; *see* Pls.' Reply Br. Support Supp. Mot. Cert. Class Action, Feb. 23, 2021, CR113 ("Reply Br.") (emphasis added).

After briefing and hearing, the District Court entered its class certification order. The District Court's certification order unilaterally modified the class description and replaced the statutory language on reasonable suspicion with parameters relating to the Detention Center's policy.

The County now appeals the class certification under Montana Rule of Appellate Procedure 6(3)(d).

III. STATEMENT OF FACTS

A. The strip search policy by the Detention Center protects safety and well-being of inmates.

The Detention Center has a policy and practice of strip searching every inmate eligible for housing in the general population of the Detention Center. Order 2. The "general population" includes any location within the Detention

Center where two or more persons are detained in the same physical space. *Rogers I*, ¶5. For the purposes of the statute, "strip search" includes both "a visual inspection of a naked individual" and a "visual inspection of the anal and genital areas" of an individual. Order 2, n.1 (citing *Rogers I*, ¶1, n.1). The strip search policy was established and designed to protect all inmates from the unlawful entry of weapons, drugs, and contraband. CR44, Ex. 4.[1]

The search involves an unclothed inspection of the detainee by an officer of the same gender. *Rogers I*, ¶5. The detainee enters a room with the officer and removes all clothing. *Rogers I*, ¶5. The officer inspects the detainee's open mouth, under bare feet, under raised arms, and as applicable, under breasts, scrotum, or other body folds. *Rogers I*, ¶5. The detainee is required to squat and cough for an inspection of the anus. *Rogers I*, ¶5. Once cleared, the detainee is given jail-issued clothing and can enter the general population.

Detainees deposed Sheriff Leo Dutton, Undersheriff Jason Grimmis, Captain Alan Hughes, Sergeant Troy Christensen, Sergeant Bryan Merritt,

[1] Detainees filed a 428-page document on October 7, 2019 styled as a "Statement of Undisputed Facts." The County never agreed the contents represented undisputed facts. In fact, the document is rife with unsupported editorializing, contested facts, and improper legal conclusions. The County rejects to its characterization as "undisputed facts," consequently using reference citation to Civil Record or "CR" 44.

Sergeant Clair Swain, Sergeant Shawn Wittmer, and Sergeant Scott Ferguson. CR44, Exs. 5-12. Each testified that the search policy was necessary for the safety of the detainee and the safety of all jail inmates. Sergeant Ferguson testified:

> Q. The reason that you're strip-searching them is simply because they're going into general [population].
>
> A. Correct, because we have a duty to ensure that the people that we're putting in general population, they're safe, we're safe, and the other inmates are safe.

CR44, Ex. 012: Dep. S. Ferguson 22:14-18, June 6, 2019. Similarly, Captain Hughes testified that:

> A. Well, we perform strip searches on the folks that come in for a number of reasons. The main reason is to make sure that there's no contraband that's brought into the common areas where there's multiple inmates, and also to make sure there's no health hazard brought with inmates or arrestees that are brought in.

CR44, Ex. 006: Dep. Capt. A. Hughes 8:6-11, May 9, 2019. He explained further:

> Right now, there is no way to provide a safe jail without doing what we're doing. And if somebody gets hurt because we allowed weapons or drugs, contraband, into the jail, it's going to be a very - not only a costly lawsuit, but that's going to weigh on myself and all the other detention officers that work there that we allowed that to happen.

CR44, Ex. 006: Dep. Hughes 53:15-21. *See also* testimony of Undersheriff Grimmis: "…for the safety of all people in custody, we do a strip search" and "…we've got an obligation to maintain a safe and secure facility for all that are in custody," CR44, Ex. 007: Dep. J. Grimmis 14:24-25, 16:18-21; Sergeant Christensen: "It's protecting the people inside the facility. The Eighth Amendment tells us we've got to do that, make sure everybody is safe. It's not violating anybody's privacy." CR44, Ex. 008: Dep. T. Christensen 44:14-17, June 4, 2019. *See also* CR44, Ex. 009: Dep. Sergeant B. Merritt 10:5-11, June 6, 2019; CR44, Ex. 011: Dep. Sergeant S. Wittmer 7:19-21, June 24, 2019; CR44, Ex. 005: Dep. Sheriff L. Dutton 7:22-23, May 9, 2019.

Those conducting the searches testified to the contraband they have uncovered as a result of conducting strip searches. For example, Sergeant Merritt testified:

> Q. Okay. You do search in their mouth, though?
>
> A. Yes. I've found razor blades, I've had a gentleman pull out tobacco that was rolled up in his rectum, I've found drugs on people taped up under their scrotum.
>
> Q. Okay.
>
> A. I've found handcuff keys.
>
> Q. Do you know if those were folks --well, recently, in the last three years?
>
> A. Drugs, yes.

Q. Taped up, you mean, or what do you mean?

A. No, just falling out of their clothes when you get them undressed.

Dep. Dutton 54:8-20.

Similarly, Captain Hughes testified about baggies of drugs, pocketknives, and other contraband revealed during the search. Dep. Hughes 42:11-18. Undersheriff Grimmis testified that he has found dope on misdemeanants, including pills, baggies of drugs, and weapons. Dep. Grimmis 37:6-38:10. Sergeant Christensen clarified that contraband includes any unauthorized item coming into the jail, including, for example, tobacco:

Q. Tobacco doesn't give you reasonable suspicion, though, does it, the scent of tobacco?

A. Well, yeah. You can't have any form of contraband in the jail.

Dep. Christensen 34:15-20. Even personal clothing is considered contraband. Dep. Ferguson 34:11-23; Dep. Grimmis 18:22-23.

Sergeant Swain testified about having a detainee say to her "you missed a gun in my back pocket" during a search, as well as a separate time when a pocketknife was missed during the search, resulting in self-cutting by the inmate. CR44, Ex. 010: Dep. C. Swain 32:24-33:8, June 4, 2019. Further she

testified about the frequency and danger of allowing hidden piercings into the jail:

Q. And you catalog all that?

A. And we catalog it all. And sometimes they do have piercings that they don't want to tell us about. Piercings can be really bad if they get into population. Nipple rings, belly rings, things like that, they can be sharpened pretty easily and made into weapons. And with - I don't know if any of you have any piercings, but you don't want to let them go because it will close up. And they try to sneak them - everybody that has one usually tries not to get them out, especially if they're new. Tongue piercings, belly button rings, those close up pretty fast.

Q. But you have to take them anyways.

A. We have to take them anyway.

Q. And to the best of your knowledge, I mean, if you had to guess or estimate, I guess, how many folks have come in for non-felony traffic offenses or other non-felony offenses and you found, through the strip-search process, weapons and contraband?

A. Felony versus non-felony, I couldn't guess. I would say that - god, I don't do a lot of them right now, so when I was doing searches, when I was on the line and I was the only female on shift, every fourth female would try to conceal a piercing and not hand it over.

. . .

Q. Is jewelry considered a weapon or contraband?

A. It can be, yes.

Q. Okay. Under a policy or just under what you know?

A. Well, a lot of things can happen with jewelry. It can be sharpened and used as a weapon.

Q. Okay.

A. Okay? It can be used as something to -- betting. You know, they have betting. It can be used, "Hey, if you take my ring, get out of here, pawn it, the next time you come back, you bring me something inside the jail."

Dep. Swain 77:21-78:19; 79:4-15.

Given the concerns over smuggled contraband entering the jail—from weapons to personal clothing—the deponents all supported the strip search policy as the best way to minimize contraband from entering the Detention Center and keeping inmates and officers safe. As Undersheriff Grimmis testified, without a uniform dress out policy, "there would be a lot worse circumstances up there with contraband coming in." Dep. Grimmis 36:21-24.

B. Misdemeanor detainees entering the general population are searched under varying circumstances and for varying reasons.

Detainees appear to propose class representation by all 96 named Detainees. The District Court noted "that ninety-six Detainees are likely more than are necessary to adequately represent the class, and the Detainees may wish to consider reducing the number of class representatives." Order 10, n.2. The Detainees did not provide arrest records or booking records for any of the

named class representatives or putative class members, other than for William Scott Rogers ("Rogers").

Class representative Rogers was arrested by the Montana Highway Patrol on September 22, 2017 around 4:40 p.m. for Driving under the Influence, 1st Offense and Speeding. CR44 ¶158, Ex. 21-005. He was transported to the Detention Center around 5:20 p.m. *Id.* He was booked around 5:55 p.m., including confiscation of his clothing and possessions. CR44, Ex. 21-003. Rogers underwent an unclothed search because he was being placed into the general population. CR44, Ex. 21-002. He was placed in a holding cell at 6:21 p.m. and was observed sleeping and lying down throughout the evening, until almost midnight. CR44, Ex. 21-004. The records do not indicate, but it is understood that he posted bond and left the Detention Center.

Aside from the circumstances under which Rogers came to the Detention Center, testimony established that people come in under varying circumstances – including probation violations, prerelease proceedings, serving their time on a weekend-only arrangement, temporary holding as part of the Department of Corrections operations, etc. In other words, the Detention Center is not solely the place where recent arrestees are detained. Depending on the reasons for booking at the Detention Center, there are varying circumstances and practices relating to strip searches.

As varied, or more, is the number of circumstances that give rise to a reasonable suspicion that contraband may be smuggled into the jail. For example, Sheriff Dutton testified:

> Q. And 3.7 [of the policy] says that: "Strip searches upon admission are authorized only upon individualized determination of reasonable suspicion or probable cause as set forth below." What does an "individualized determination" mean in your mind?
>
> A. I would give that to officer discretion much like when you're in the field and the officer discretion is to write a ticket or not.
>
> Q. So it's based upon the facts and circumstances of each individual case, right?
>
> A. Yes.

Dep. Dutton 43:23-44:9. Sheriff Dutton continued consistently:

> Q. Okay. Do you agree with this statement: The determination of whether reasonable grounds exist to justify a strip search on a non-felony offender must be made on a case-by-case basis and, therefore, cannot be made on the basis of a standardized uniform course of conduct?
>
> A. I believe applied to a deputy, yes.
>
> Q. Deputy—
>
> A. Or sheriff, or yourself there.
>
> Q. You mean on the streets?
>
> A. Yes.
>
> Q. But not as applied to the detention –

A. I think the detention officer has to make a decision about the searches. A detention officer knows he has to keep the facility safe under -- I don't have any choice under the Eighth Amendment.

Q. So you understand that this is a lawsuit with a lot of Detainees, right? I think we've got about 15.

A. I heard your radio ad, yes, sir.

Q. Well, there could be more out there, so that's why we took that out. But my -- this is potentially going to be certified as a class action. And what I want to know is: Your policies within the detention center, you say they're equitable and they don't discriminate because everyone's searched, everyone that goes into general population is searched, correct?

A. Correct.

Dep. Dutton 75:10-76:11. Similarly, Captain Hughes testified:

Q. […] What does an individualized determination mean in your mind?

A. I think it's – in my mind, it just means per arrestee.

Q. Okay, so each - each arrestee with the facts surrounding that particular person?

A. Yes.

Dep. Hughes 39:3-9.

The Detention Center interfaces with a broad variety of persons, and the circumstances potentially giving rise to reasonable suspicion are similarly varied and individually distinct.

C. Detainees provide only booking records, not search records, which do not provide a clear picture of the putative class for analyzing the class criteria.

Detainees have alleged that 3,572 strip searches occurred comprising the class. CR44, ¶129. Detainees obtained the complete booking records (not search records) from the Detention Centers from October 31, 2015 to October 31, 2018. CR44, ¶127. The complete booking records were over 287 pages long and recorded 8,202 total bookings, which included felonies and other bookings. CR44, ¶127, Exs. 19-20. Detainees' attorney "combed through" the records to identify those "arrested with a misdemeanor, non-felony offense." CR44, ¶128, Ex. 20. Detainees did a "key word search" to tally their proposed class, supposedly comprised of those booked for "Arrest Misdemeanor: 2,328" and "Warrant Misdemeanor: 1,294." CR44, ¶¶128-129, Ex. 20.[2]

Detainees' putative class is extremely overbroad based on the testimony and records. First, Detainees have not accounted for those misdemeanants booked but not searched. Second, Detainees have not provided search records or evidentiary record to distinguish those misdemeanants searched with a reasonable suspicion basis.

[2] Mr. Keif Storrar's calculation for these two categories is 3,622 detainees, but Plaintiffs have alleged 3,572. There is no explanation for this discrepancy, which may or may not be simply a math error.

1. Some misdemeanants are booked but not searched.

Many misdemeanor detainees are booked, but never strip searched. This situation arises under a number of circumstances. For example, it arises if the detainee posted bail timely, was held in an individual cell, was transferred from the jail, had a low enough blood alcohol content for release to the custody of a sober individual, etc. Sheriff Dutton testified to several situations where a misdemeanant can be arrested, booked, and released without a strip search, including (1) a judicial arrangement that exists for highway patrol detainees released once their when breath sample comes under a certain level, (2) immediate or quick bonding, and (3) "book and release."[3] Dep. Dutton 65:22-66:25.

Captain Hughes testified, as did other deponents, of the situation when a misdemeanant gets booked and bonded without ever entering the general population, and therefore never strip searched:

> A. So if they say their bond is on the way, they're going to bond out, should be here in less than an hour, we'll try to hold onto them there on the booking floor. There's a bench

[3] "Book and release" persons are never searched. Dkt. 44, Ex. 008-011. Detainees have correctly excluded them from the putative class. Similarly excluded are those referred to as "Commit misdemeanor" or "weekenders," who are serving a sentence under an arrangement with the judge to serve at specified times, e.g., on weekends, and are always searched. Dkt. 44, Ex. 006-023; Dkt. 44, Ex. 008-009.

> there. And we can hold somebody there and not have to be concerned about them, and they can bond out, have a bail bondsman come in, get them bonded out. And we, if we don't have to put them into the general population, that's great, we can get them out of the detention center.

Dep. Hughes 32:16-24; *see same* Dep. Hughes 102:7-14; 114:5-17; *see same* Dep. Grimmis 17:11-16; 30:15-31:23; Dep. Christensen 38:12-18; Dep. Merritt 10:7 (clarifying "we don't perform them on everyone"); Dep. Swain 90:4-12; Dep. Wittmer 22:12-18.

Captain Hughes also explained an arrangement with the County Attorney's Office to release a detainee without bond so long as the blood alcohol content is below 0.03 and another sober adult picks up the detainee. Dep. Hughes 33:18-34:2. In this situation, the person is booked but not strip searched. *See, e.g.,* Dep. Hughes 114:5-17.

Undersheriff Grimmis also explained the situation where detainees are not – at least immediately – booked or dressed out for general population because they have mental health issues or medical issues that require them to be held in isolation. Dep. Grimmis 30:15-31:23. A similar situation occurs when a person is very intoxicated or extremely violent. Dep. Wittmer 41:19-42:18. There are even occurrences when an officer brings in a detainee, who is booked, but then released for whatever reason, without further processing or any strip search. Dep. Swain 44:2-10. *See also* Dep. Ferguson 37:2-38:13.

None of these situations have been accounted for by the Detainees or the District Court's order as a result of Plaintiff's substitution of booking records for determining the class, even though many persons booked are not strip searched.

2. Detainees' booking records are not search records and do not memorialize the lack of reasonable suspicion.

Detainees did nothing to distinguish those misdemeanants searched with a reasonable suspicion versus those searched for safety under the Detention Center policy. The District Court recognized this failure of the proposed class and proposed that the deficiency could be solved by looking at the search checklist. Order 15-16. Despite this recognition, however, the class was certified on the booking records, which is broadly over-inclusive.

As Captain Hughes testified:

> Q. Okay. And this is something [referencing booking records] that an inmate gets for every booking or only when they get put into general population?
>
> A. No, I think one of these would be filled out for every time somebody's booked in.
>
> Q. Okay. And a booking could be someone that comes in, like we said, has a bond come, sits on a bench for an hour, and then gets bonded out, and then leaves without going into general population?
>
> A. Yeah. They would still start this form because you don't know if that bond is really ever going to show up.

Dep. Hughes 96:6-17.

The District Court dismissed the County's concern that the proposed class was over-inclusive as mere "quibbles." Order 6. However, the distinction between those searched with a reasonable suspicion as opposed to those searched for safety when admitted to the general population is critical, as only the latter could potentially have any claim under the statute. The District Court committed error, on this record, and in certifying the overbroad class based on booking records.

IV. STATEMENT OF STANDARD OF REVIEW

The Court reviews a District Court order granting class certification for an abuse of discretion. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶6 (citing *Sangwin v. State*, 2013 MT 373, ¶10). Though the Court affords the trial court broad discretion as to class certification, if a District Court's decision "is not supported by findings as to the applicability of [Montana Rule of Civil Procedure] 23 criteria, it is not entitled to the traditional deference given to determinations of class status." *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶12 (citing *Mattson v. Mont. Power Co.*, 2012 MT 318, ¶17).

Findings of fact as to a Rule 23 criteria are reviewed under the clearly erroneous standard. *Kramer*, ¶12.

Rulings of law as to a Rule 23 criteria are reviewed de novo. *Kramer*, ¶12 (citing *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶25); *see also Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶13 ("A District Court's interpretation of procedural rules, like Rule 23, is a matter of law that we review de novo for correctness."). A District Court abuses its discretion if its certification order is premised on legal error. *Mattson*, ¶17.

The burden of proving that the proposed class meets the requirements of Rule 23 is on the party seeking certification. *Houser v. City of Billings*, 2020 MT 51, ¶4.

V. SUMMARY OF ARGUMENT

Following this Court's decision in *Rogers I*, Detainees have only one remaining potential class claim, which alleges that the County committed a statutory violation by strip searching misdemeanants upon entry into the Detention Center's general population. The statute allegedly violated—Montana Code Annotated § 46-5-105—prohibits strip searches of misdemeanants "unless there is a reasonable suspicion to believe the person is concealing a weapon, contraband, or evidence of the commission of a crime." Whether there exists "reasonable suspicion" is a traditionally fact-intensive determination based on the totality of circumstances. These statutory claims are not susceptible to class resolution. Simply put, the varied and factually-specific

determinations required as an element of the statutory claims is far too independent and particularized.

The District Court acknowledged the inherent inconsistency, but attempted to resolve the case-by-case nature of the claims by "refocusing" the inquiry from the statute to the Detention Center's general policy. In doing so, the District Court committed multiple factual and legal errors that require reversal. Because the District Court's error goes to the legal interpretation of the statute as it relates to this class litigation, this Court's review is de novo; no deference is afforded for legal errors.

First, the District Court abused its discretion with the clearly erroneous factual finding that the Detention Center's booking records could be substituted for search or reasonable suspicion records. In fact, the undisputed evidence demonstrates that not all persons booked were searched. Not even the Detainees went so far as to advocate a class with such breadth. The District Court's clearly erroneous substitution resulted in a grossly overbroad class to be certified, which will certainly cause confusion, unnecessary complications, and additional expense to sort out the class, and also result in an unfairly large class for the County to defend.

Second, the District Court committed a related legal error by modifying the terms of the class. Namely, the District Court removed the limiting

provision of the statute from the class description and replaced it with overly broad language that incorporates the Detention Center's policy. Among other errors, the District Court's modified class errantly includes both persons searched with and without a reasonable suspicion – directly contradicting the plain language of the statute. In so modifying the class description – beyond that which the parties' contemplated and beyond the plain terms of the statute – the District Court committed a legal error of statutory interpretation as it relates to certifying a class. The errant overbreadth of the District Court's order goes further. The overbroad class would also errantly include persons booked but not searched, as well as persons searched under the varying circumstances giving rise to a reasonable suspicion that contraband or weapons may be being smuggled.

The District Court's errors with the evidentiary basis and the class description extend and compound in the analysis of the class certification prerequisites: numerosity, commonality, typicality, predominance, and superiority. A rigorous analysis of each of the class prerequisites demonstrates that none are satisfied.

No common question susceptible to class resolution overarches the various situations arising on the Detention Center booking floor. Even if a superficially stated commonality – such as privacy violations – bound a

potential class here, the varied and independent analysis required for each detainee's situation would definitively predominate over any commonality presented. Numerosity cannot be analyzed without actual records keyed to the alleged violation. The class representative(s) do not present a representative case typical of the putative class. Finally, superiority of class litigation cannot be satisfied, given the numerous and varied detainees and circumstances leading to the booking floor, as well as the factually intensive analysis that goes into determining reasonable suspicion.

For all these reasons, certification is improper under Rule 23(b)(2) or (3). The impropriety of class certification over these statutory claims – based on these circumstances – is not salvageable by subsequent or ongoing modification of the District Court's certification order. The inquiry that will be required for this litigation is too individual to each potential claimant for it to be appropriate or fair to permit class proceedings.

VI. ARGUMENT

A. The Court Certified an Erroneously Overbroad Class, which Class Exceeds the Plain Language of Montana Code Annotated § 46-5-105 and Exceeds Even What the Detainees Requested.

The District Court unilaterally altered the class definition from that proposed by the Detainees. The District Court's modifications, and the stated reasons for making the modifications, bring to light the compounding legal

errors and abuses of discretion in the District Court's class certification order. These compounding errors are principal and not correctable by merely re-defining the class or creating sub-classes, as discussed in Section 2, *infra*.

1. The District Court committed legal error when it merged all misdemeanants booked, regardless of reasonable suspicion, because the statute necessarily excludes those searched with reasonable suspicion.

"Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a 'class.'" *Shelton v. Bledsoe*, 775 F.3d 554, 559-60 (3d Cir. 2015) (quoting 7A C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc. Civ. § 1760 (3d ed. 2005)). The members of a class must be identifiable at the moment of certification based on established objective criteria. *Id.*; *see also Kramer*, ¶31 ("class definitions themselves are premised upon objectively identifiable claim characteristics that are uncontested.").

Here, the District Court's certification order rests on clearly erroneous factual determinations, resulting in a reversible abuse of discretion. *Kramer*, ¶12 (citing *Mattson*, ¶17). The District Court errored when it defined the class to include all misdemeanants booked over a three-year period, regardless of whether the person was searched and regardless of whether reasonable suspicion was indicated. The Detainees had not even proposed such an

overbroad class, which overbroad class includes persons who would be statutorily excluded from the class. By removing the statutory limiting language, the District Court's certification order results in a class that includes persons who could never have a prima facie claim.

By way of background, the Detainees obtained the booking records of the Detention Center and tabulated the total number of misdemeanants booked. CR44 ¶¶127-129. The Detainees then excluded some categories of misdemeanants based on the coding system used in those records. CR44 ¶129 n.9. The Detainees' final tally included 3,572 class members, who were booked under the coding system of "Misdemeanor Offense" or "Warrant Misdemeanor." The Detainees provided no evidence how many or whom of these 3,572 persons were (1) searched or (2) searched without suspicion.

The Detainees did not use search records to tabulate and define their class. The Detainees' approach requires the unsupported assumption that every misdemeanant booked on a "Misdemeanor Offense" and "Warrant Misdemeanor" was strip searched. The testimony shows that only persons entering the general population were strip searched, whereas those posting bond, held in isolation, or transferred without entering the general population were not searched. (*See* testimony collected under Section III(c) of this Brief.)

In other words, the critical nexus between a statutory violation and the certified class is entirely absent.

The District Court attempted to solve the factual deficiency by unilaterally modifying the class definition. In doing so, the District Court committed legal error. This Court reviews legal conclusions, such as statutory interpretations, de novo and should reverse here. *Kramer*, ¶12. The District Court defined the class as follows:

> Each person arrested or detained for a non-felony offense from October 31, 2015, to the present who has been subjected to a strip search or visual body cavity search by a law enforcement officer or employee of the Lewis and Clark County Detention Center *pursuant to a Detention Center policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general custody.*

Order 20-21 (emphasis added).

> The class Detainees proposed is as follows:
>
> Each person arrested or detained for a traffic offence or an offense that is not a felony who, with the three years preceding the filing of this action and up until the date this case is concluded, has been or will be subjected to a strip search as defined under Montana law, by a peace officer or law enforcement employee at the Lewis & Clark County Detention Center *without suspicion to believe that the person was concealing a weapon, contraband, or evidence of commission of a crime*.

Am. Compl. 17; *see* Reply Br. (emphasis added).

The District Court's new class is unmoored from the statute and defines a class of persons far broader and includes persons who could not possibly be eligible for legal remedy. In one light, the District Court's re-definition highlights the fundamental legal error, namely, the statute contains two categories: (1) those searched with reasonable suspicion, and (2) those searched without reasonable suspicion. Those two statutorily distinct categories can never be combined for class certification purposes in a lawsuit alleging that statute's violation. For class certification analysis, any class necessarily cannot include those persons expressly excluded by the plain language of the statute.

After the District Court's Order, the Detainees, filed their proposed Class Notice on August 25, 2021. The Class Notice further illustrates the inherent legal error with this class certification. Detainees' Class Notice contains "addressees" and a defined class section that recite the overbroad class. *See* Pls.' Prop. Class Not. ¶¶1, 8, Aug. 24, 2021, CR135. However, other provisions of the Notice use the narrower class – that is, limited to those potentially eligible for relief after a suspicionless search – as proposed by the class Detainees in their complaint and briefing. *Compare* CR135 ¶¶2, 5, 7. The competing class descriptions are confusing to potential class addressees, not identifiable by objective standards, and results in an unfairly large class for the County to defend.

Class certification is inappropriate if the class includes members who did not sustain an injury-in-fact. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("The Detainees must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy."); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211-12 (2021) (large majority of the proposed class lacked standing because they experienced no injury-in-fact). Such a "standing" analysis is directly at issue here, where the District Court has erroneously certified a class that includes persons statutorily excluded from having any claim at all.

The District Court acknowledged this overbreadth problem but believed those it encompassed "likely to be few." Order 16. The record, however, contains conflicting evidence on the number searched with reasonable suspicion, and Detainees have failed their burden to demonstrate objective criteria for the class. The District Court's amorphous class inherently includes members without standing, without any possible claim, and otherwise statutory excluded from litigation. The District Court's overbroad class certification is a legal error requiring reversal.

As discussed in Part B, *infra*, the District Court's erroneous factual finding (i.e., substituting booking records to define the parameters of searched

persons) and its legal error (i.e., combining all searched persons in the class regardless of suspicion analysis) compound to cause multiple legal errors throughout its certification order, including as to the numerosity, commonality, typicality, predominance, and superiority. Any one of these errors constitutes grounds for reversal. *Kramer*, ¶12 (citing *Mattson*, ¶17, stating that if a District Court's decision "is not supported by findings as to the applicability of Rule 23 criteria, it is not entitled to the traditional deference given to determinations of class status.").

2. The District Court's legal error is not salvageable by subsequent or ongoing modification of its certification order.

The Rules of Civil Procedure afford the trial court flexibility to modify its certification orders. *Kramer*, ¶13 (citing Mont. R. Civ. P. 23(c)(1)(C); *Diaz v. State*, 2013 MT 219, ¶20). This possibility, and the accompanying deference for trial court management, do not extend, however, when the District Court is proceeding in legal error or based on clearly erroneous factual findings. *Mattson*, ¶17. In other words, the District Court is not relieved of its duty to conduct a "rigorous review."

Modification cannot save this litigation for class action because of the individualized analysis necessary to evaluate each potential claim of suspicionless search, discussed at length in Section B, *infra*. Unlike the

modified class in *Kramer*, the individual determinations of statutory reasonable suspicion will always predominate over any common questions of the Detention Center's booking practices.

The following Part B demonstrates that, even if class parameters were corrected by the District Court or this Court, the putative class fails for numerosity, typicality, commonality, predominance, and superiority criteria, with the commonality and predominance criteria most clearly absent and unattainable.

B. The District Court Erred in Determining Class Criteria Without Distinction Among the Class for those Searched With vs. Without Reasonable Suspicion.

Class action litigation serves a specialized purpose and countervails the general policy that litigation be maintained by the actual party in interest. *Kramer*, ¶2; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011). Accordingly, Rule 23(a) sets out four necessary criteria to assure that the class exception is appropriate. Montana Rule of Civil Procedure 23(a) "Prerequisites" provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable;
> > (2) there are questions of law or fact common to the class;

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

The party seeking certification must establish that each element of Rule 23 is met, and if any one element is not met, then class certification fails. *Jacobsen*, ¶28 (citing *Chipman v. NW Healthcare Corp.*, 2012 MT 242, ¶43); *see also Byorth*, 2016 MT 302, ¶16.

The Court undertakes a rigorous analysis to determine whether the prerequisites of Rule 23(a) have been satisfied. *Jacobsen*, ¶37; *Wal-Mart*, 564 U.S. at 350-51. A "rigorous" analysis requires specific findings by the Court that each Rule 23(a) requirement has actually been satisfied, and it may require the Court to "probe beyond the pleadings and touch aspects of the merits to make this determination." *Jacobsen*, ¶37 (citing *Wal-Mart*, 564 U.S. at 350). In determining whether class certification is proper, the Court may need to consider the merits of Detainees' underlying claim. *Byorth*, 2016 MT 302, ¶16. *See also Wal-Mart*, 564 U.S. at 351. The District Court may not simply rely on the allegations of the parties but must resolve factual disputes relevant to each Rule 23 requirement. *Byorth*, 2016 MT 302, ¶16.

1. The District Court's numerosity determination is legal error.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impractical." *McDonald v. Wash.*, 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993). "Mere speculation as to satisfaction of the numerosity requirement is not sufficient. Rather, Detainees must present some evidence of, or reasonably estimate, the number of class members." *Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, ¶31 (quoting *Polich v. Burlington N., Inc.*, 116 F.R.D. 258, 261 (1987)); *Sangwin*, ¶17.

A "reasonable estimate is sufficient," but conclusory allegation is not a reasonable estimate. *Byorth v. USAA Cas. Ins. Co.*, 333 F.R.D. 519, 528 (D. Mont. 2019) (citations omitted). A numerosity analysis can only follow after identifying the class without factual and legal errors. Further, it may be that those persons coming within the ambit of the statute are not "so numerous that joinder of all class members is impractical." Mont. R. Civ. P. 23(a)(1).

Here, the Detainees have failed to satisfy their burden of proof in demonstrating numerosity of a class allegedly entitled to relief because they have proffered insufficient evidence of how many people would be eligible for relief under the statute. Rather than hold the Detainees to the standard, the District Court erroneously expanded the class to all persons searched—

regardless of suspicion—and further erroneously relied on booking records, not search records.

Just as in *Byorth*, the Detainees have not provided evidence of the number of actual persons allegedly violated. *Byorth*, 2016 MT 302 (reversing on numerosity for Detainees' failure to submit discernable evidence of class size when Detainees submitted evidence of insurance claims submitted, but not evidence of the number of claims denied). Detainees here have offered only booking records, not search records, much like the deficient claims information in *Byorth*, found deficient for not having a nexus to the alleged class violation.

This record is devoid of sufficient evidence to conduct the required "rigorous analysis." *Byorth*, 2016 MT 302, ¶18 (stating that while "we are deferential to a trial court's determinations regarding satisfaction of the Rule 23 requirements, we cannot affirm certification of a class when the record lacks evidence supporting a determination on a Rule 23 requirement. To hold otherwise would reduce the concept of 'rigorous analysis' to a nullity. It would also mean the proposed class's 'burden' to satisfy the requirements of Rule 23 is no burden at all." (internal citations omitted)).

2. The District Court's commonality determination is legal error.

Rule 23(a)(1) requires that there be "questions of law or fact common to the class." *See also Diaz*, 2011 MT 322, ¶40; *Jacobsen*, ¶129; *Ferguson v.*

Safeco Ins. Co. of Am., 2008 MT 109, ¶16. Plaintiff cannot merely allege any common question; rather, plaintiff "must pose a question that 'will produce a common answer….'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Wal-Mart*, 564 U.S. at 352). "What matters to class certification . . . is not the raising of common 'questions' . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quoting R. A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)); *Houser*, ¶5 (stating that commonality requires that the class members' claims "depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke" (internal citations omitted)).

The Court in *Byorth*, 2016 MT 302, ¶26, noted it had not yet adopted *Wal-Mart* as the standard for commonality in Montana but specifically recognized that *Wal-Mart* "significantly tightened" the commonality requirement. *Id.* Furthermore, the Court approved of the District Court's application of the standard and relied on the standard in its holding:

> Here, the mere act of sending claims to an outside contractor like AIS—without more—is not the type of programmatic conduct that satisfies *Jacobsen* and *Wal-Mart*. The question of whether all

> class members had claims reviewed by AIS is precisely the type of superficial question that fails to demonstrate a common injury. To satisfy commonality, the question would have to address the common injury allegedly shared across the class. In other words, the question would have to identify the allegedly unlawful, systematic program in place at AIS that causes the denials, just as the Detainees in *Jacobsen* identified the specific claims handling process that led to diminished settlement values for each class member.

Byorth, 2016 MT 302, ¶29.

Here, the District Court superficially stated that the "proposed class meets the *Wal-Mart* commonality standard." Order 7, 9. However, the District Court failed to identify a "common issue" justifying class commonality. Rather, the District Court relied on a "superficial question that fails to demonstrate a common injury." *Byorth*, 2016 MT 302, ¶29. The kind of "common questions" relied on by the Detainees and the District Court are precisely the kind of superficial questions rejected in *Byorth* and *Wal-Mart*. *Byorth*, 2016 MT 302, ¶26 (citing *Wal-Mart* as follows, the "U.S. Supreme Court has observed that 'any competently crafted class complaint literally raises common questions." *Wal-Mart*, 564 U.S. at 349). However, rigorous analysis requires that the allegedly "common question" justifying class certification be one that the answer to which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Sangwin*, ¶18 (quoting *Wal-Mart*, 564

U.S. at 350). Detainees and the District Court fail to identify such a common question.

First, the Detainees identify only the following allegedly common questions of law and fact in their Amended Complaint:

> a. Whether Defendants subjected the named Detainees and the Class to strip searches without reasonable suspicion to believe that they were concealing a weapon, contraband, or evidence of the commission of a crime, in violation of § 46-5-105, MCA.
>
> b. Whether Defendant Lewis and Clark County Detention Center has a policy or custom, written or unwritten, authorizing or implementing strip searches in violation of § 46-5-105, MCA.
>
> c. Whether such strip searches violated a duty of care owed by Defendants to the named Detainees and the Class.
>
> d. Whether the actions of Defendants are so egregious that punitive damages are warranted to set an example and to punish Defendants.

Am. Compl. ¶20.

The issue of punitive damages was dismissed by stipulation on May 10, 2021. No meaningful distinction exists between the three remaining alleged common questions, which are essentially alternative ways of asking the same question. Further, it must be recognized that the alleged "common question" is factual in nature, inquiring whether each search at the Detention Center is supported by a reasonable suspicion. This is a necessarily individual and

particularized determination that must be decided on a case-by-case basis, not a common question.

Rather than identify any specific common questions justifying a finding of commonality, the District Court took an even more superficial approach, defining commonality based on the conclusion that the "alleged injury suffered by each class member—invasion of their statutory privacy rights—is the same." Order 8. A broadly cast allegation of "invaded privacy rights" does not present a "common question" susceptible to class resolution. This broad "privacy invasion" theory is precisely the type of superficial pleading rejected by a rigorous analysis. This lack of commonality is particularly so here when the alleged "statutory privacy invasion" turns entirely on the individual determinations of reasonable suspicion.

Despite some gloss about the existence of "common issues of law or fact," *see, e.g.,* Order 9, there exists no common issue across the class that will "efficiently drive the resolution," *Jacobsen*, ¶40, or lead to "classwide resolution […] in one stroke," *Sangwin*, ¶18 (quoting *Wal-Mart*, 564 U.S. at 338). The question for continued litigation is the individual question of whether each litigant was searched, and if so, whether the search was supported by reasonable suspicion. These inquiries are factual in nature, individual in nature, and not susceptible to classwide resolution.

The District Court dismissed the factual nature of the remaining inquiry, stating: "Moreover, even if there may be individual variation in circumstance, there will likely be broad themes in the fact patterns behind individual searches and the damages suffered, obviating the need to hold individual hearings for each class member." Order 8. The District Court did not explain what "broad themes" may exist, and the Detainees did not argue as much. Such an assumption is not supported by the record, requires assumptions of unknown facts, and cannot constitute the kind of rigorous analysis required for the commonality prerequisite. *Jacobsen*, ¶37; *Wal-Mart*, 564 U.S. at 350-51.

This litigation contains no common question that can result in a common answer or resolution "in one stroke." *Jacobsen*, ¶40. Liability of the County, if any, necessarily turns on an individual determination whether a suspicionless search occurred as to each detainee. Reasonable or particularized suspicion is determined, "based on specific and *articulable facts known to the officer*, including rational inferences therefrom based on the officer's training and experience . . . ." *State v. Hoover*, 2017 MT 236, ¶¶9, 17 (emphasis in original). As a result, cases involving reasonable suspicion must be litigated on a case-by-case basis, as they are by definition fact specific. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001). Because liability necessarily turns on an individual inquiry, there cannot be a common question resulting in a common answer justifying class proceedings.

3. The District Court's typicality determination is legal error.

Montana Rule of Civil Procedure 23(a)(3) requires the claims or defenses of the representative parties to be "typical of the claims or defenses of the class." Typicality "focuses more closely on the named representatives' relationship to the rest of the class." *Byorth*, 2016 MT 302, ¶34. Class plaintiffs' "claims cannot be so different from the claims of absent class members that their claims will not be advanced by [class plaintiffs'] proof of [their] own individual claim." *See Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006).

Typicality requires that the named plaintiff's claim "stems from the same *event, practice,* or *course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory." *McDonald*, 862 P.2d at 1156 (quoting *Jordan v. Cty. of L.A.*, 669 F.2d 1311, 1321 (9th Cir. 1982)) (emphasis added); *Diaz*, 2011 MT 322, ¶35. The District Court's typicality conclusion is in error because the certified class includes persons booked under varied circumstances. For example, 1,294 of the 3,572 putative class members were allegedly arrested on warrants. CR44, ¶¶128-129, Ex. 20. These persons

would have to be detained in the Detention Center pending a court appearance and could not likely post a quick bond or sleep off intoxication in a single holding cell. The circumstances giving rise to these persons' warrants, arrests, detentions, and any searches, would be fact specific to their circumstances and anything but typical to Rogers' experience. Rogers, or any number of potential sub-class representatives, could not likely ever represent the numerous and varied circumstances of the misdemeanants. In other words, there is lacking the "same event, practice, or course of conduct" across the class or sub-classes, and therefore, there does not exist typicality. *Diaz*, 2011 MT 322, ¶35.

As noted in *Byorth*, "because typicality and commonality overlap to the extent both are measured by the reach of common questions of law or fact, we cannot overlook the fact that the record does not contain evidence of the alleged common question that unites not only the class as a whole, but also the named representatives with the absent class members." *Byorth*, 2016 MT 302, ¶37. In this case, the representative members claim they were strip-searched without reasonable suspicion. There is no indication in the record whether reasonable suspicion did or did not exist for the absent members of the class. In fact, the record demonstrates that many detainees were booked but not searched. The record also speaks to circumstances varying as much as the detainees, making

the class representative – to the extent it is Rogers – far from typical and certainly not representative of the overbroad class certified.

4. The District Court's predominance determination is legal error.

The certification analysis shifts to Rule 23(b) only after a court determines the Rule 23(a) prerequisites are satisfied. *Ferguson*, ¶16. The party seeking class certification must prove "in fact" the requirements of 23(a) and "satisfy through evidentiary proof" any individual provision of 23(b). *Kramer*, ¶15 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citing *Wal-Mart*, 564 U.S. at 350)). If a court is not fully satisfied that the requirements of Rules 23(a) and (b) have been met, it should deny certification. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

Montana Rule of Civil Procedure 23(b)(3) requires:

> (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

See Mont. R. Civ. P. 23(b)(3) (emphasis added).

"A central concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy." *Sangwin*, ¶31 (citations omitted). "Rule 23(b)(3)'s predominance and superiority requirements were added to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Kramer*, ¶¶18-19 (quoting *Mattson*, ¶39 (citing *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009))).

The predominance inquiry is more stringent than the commonality criteria under Rule 23(a)(2) and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.*; *see also Byorth*, 333 F.R.D. 519, 530-31 (citing *Amchem Prods.*, *Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)). "Cohesiveness rests on the dominance of common questions over individual interests in the case." *Byorth*, 333 F.R.D. 519, 530-31 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 452 (2016)). "Common issues must . . . be more prevalent than individual issues." *Sangwin*, ¶37. Common questions are those where "the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class wide proof[,]" while individual questions require class members "to present

evidence that varies from member to member." *Byorth*, 333 F.R.D. 519, 530-31 (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 (5th ed. 2012)).

The predominance requirement under Rule 23(b)(3) is not met when "factual questions must be answered on an individual basis before the Detainees will be in a position to establish liability." *Sangwin*, ¶37 (citation omitted) (holding that a common question of contractual breach could not be answered unless individual assessments were first made to determine whether an individual's claims were properly denied and, thus, the common question was not predominant).

The District Court identified the predominance issue as the "most substantial dispute between the parties," Order 12, and then proposed to solve "this problem" by changing the definition of the class "to those who were searched pursuant to the blanket search policy." Order 15. The District Court's "solution" does not properly "limit" the class, but rather erroneously expands the class as discussed in Part A, *supra*. Just as importantly, the District Court's "solution" strays far afield of this Court's predominance analysis.

In fact, there is no common question presented that predominates over all class members. Liability, if any, turn on an individualized determination as to the presence or absence of reasonable or particularized suspicion to support the

search. The District Court's predominance analysis, here, loses its way by starting "first" with declaring that "the proper focus of the class action is on the policy" of the Detention Center. Order 14. The District Court's focus rests on a fallacy that the policy violates the statute; rather only a certain fact pattern of the policy's application arguably gives rise to a violation. That determination turns on a case-by-case basis, not common analysis. *See, e.g., Roadhouse v. Las Vegas Metro. Police Dep't*, 290 F.R.D. 535, 546 (D. Nev. 2013) (denying class certification in strip search litigation because there existed no "common nucleus of facts" and "[t]oo many individual questions and answers predominate over the common questions and answers," and further listing the numerous, varied circumstances for inquiry surrounding searches in detention centers).

An analogous situation arose in *Byorth*, in which class Detainees sought class certification of breach of contract and bad faith adjustment of insurance claims. Magistrate Judge Timothy Cavan concluded that "common questions do not predominate over the class members' individual questions," as the evidence required to adjudicate the claims would differ substantially for each class member and would require an inquiry in the adjustment process for each claim. *Byorth*, 333 F.R.D. 519, 531. Because statute and case law required a totality of circumstances review for the bad faith claims, the court concluded

that "each member's claim file would be subject to an individualized review, and 'mini trials' would be required." *Byorth*, 333 F.R.D 519, 532. Similarly, the particularized suspicion determination that would be required to prove liability of the County also requires a totality-of-the-circumstances review, which would require "mini trials" and individualized review. *See City of Helena v. Brown*, 2017 MT 248, ¶¶9-10 ("Particularized suspicion […] depends on a totality of the circumstances…."). In other words, these "individualized issues would predominate over the common issues," making class action improper. *Byorth*, 333 F.R.D. 519, 531.

5. The District Court's superiority determination is legal error.

The District Court erroneously concluded that "all class members' claims involve identical legal issues and nearly identical facts" thus making class proceedings superior. Order 19. As true for each of the prerequisites discussed—numerosity, typicality, commonality, and predominance—the District Court's conclusion rests on the fallacy that some unifying question susceptible to class wide resolution arches over the putative class, rather than acknowledging the individualized analysis required for a particularized suspicion determination, as embedded in the statute. The concern is succinctly stated by the Ninth Circuit Court of Appeal:

> If the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate … [and if] each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not "superior."

Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189-92 (9th Cir. 2001) (citation omitted).

The District Court reasoned that class certification was the best method because individual claims are small and litigation impractical. Order 18. No evidence supports that conclusion. This Court upheld the refusal to certify in *Ascencio* when the record was "devoid of any evidence to support [the] superiority argument." *Ascencio v. Orion Int'l Corp.*, 2018 MT 121, ¶¶20-21 (citing *Byorth*, 2016 MT 302, ¶17; *see also Sangwin*, ¶¶15-16). Certification requires *at least some* evidence to satisfy each of Montana Rule of Civil Procedure 23's requirements. *Id.*; *see also Ascencio*, ¶21, faulting plaintiff for failure "to articulate why it would be difficult for individual claimants to pursue their claims separately and why this class action is the superior method."

C. The District Court erred in certifying a class under Rule 23(b)(2).

For all the stated reasons above, the District Court's certification under Rule 23(b)(2) is also in error and requires reversal. *See Houser*, 2020 MT 51.

Certification under Rule 23(b)(2) is proper 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). Rule 23(b)(2) may be satisfied if "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). "The key to the Rule 23(b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted — the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (internal quotations omitted). Here, as explained *supra*, there is no "pattern or practice generally applicable to the class as a whole." Mont. R. Civ. P. 23(b)(2).

Though monetary damages may be permissible under Rule 23(b)(2), money damages only result if they are incidental to the litigation, and do not require an individualized determination. *Byorth*, 333 F.R.D. 519, 526 (citing *Wal-Mart*, 564 U.S. at 360-62). Generally, Rule 23(b)(2) does not authorize class certification if "an individualized award of money damages" is requested. *Ellis*, 657 F.3d at 986.

Consequently, even if Rule 23(b)(2) certification could overcome the obstacle of individualized determinations across the class, it would be improper here and potentially prejudice individual litigant's right to monetary recovery for the alleged statutory violation.

VII. CONCLUSION

The County respectfully requests this Court reverse the District Court's order and conclude that class certification criteria are not, and cannot be, satisfied, as the individualized determination requisite to the statutory reasonable suspicion analysis is not susceptible to class resolution.

DATED this 20th day of December, 2021.

/s/ Jared S. Dahle
Attorney for Lewis & Clark County

/s/ Nicholas J. Lofing
Attorney for Lewis & Clark County

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365 MSO is 9,905 words, excluding Certificate of Service and Certificate of Compliance.

/s/ Nicholas J. Lofing
Attorney for Lewis & Clark County

CERTIFICATE OF SERVICE

I, Nicholas J. Lofing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-21-2021:

Mitchell A. Young (Attorney)
2717 Skyway Dr., Ste. F
Helena MT 59602
Representing: Lewis and Clark County
Service Method: eService

Keif Alexander Storrar (Attorney)
PO Box 236
Helena MT 59624
Representing: William Scott Rogers
Service Method: eService

Lawrence A. Anderson (Attorney)
Attorney at Law, P.C.
P.O. Box 2608
Great Falls MT 59403-2608
Representing: William Scott Rogers
Service Method: eService

Jared S. Dahle (Attorney)
Garlington, Lohn & Robinson, PLLP
PO Box 7909
Missoula MT 59807-7909
Representing: Lewis and Clark County
Service Method: eService

Electronically signed by Jackie D Lawrenson on behalf of Nicholas J. Lofing
Dated: 12-21-2021