UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES, et al., *Plaintiffs,* v. RON DESANTIS, in his official capacity as Governor of Florida, et al., *Defendants.*	Consolidated Case No. 4:19-cv-300-RH-MJF

***RAYSOR* PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

Pursuant to the Court's October 8, 2019 Scheduling Order, Doc. 203, the Raysor Plaintiffs respectfully submit this supplemental memorandum setting forth their proposed class definitions and addressing class-related issues arising from the Court's preliminary injunction order.

I. Proposed Class Definitions

The Raysor Plaintiffs propose two classes—a class related to their Twenty-Fourth Amendment poll tax claim (Count 2), and a subclass related to their Fourteenth Amendment wealth discrimination claim (Count 1).

The Raysor Plaintiffs propose that their Twenty-Fourth Amendment poll tax class be defined as: "All persons otherwise eligible to vote in Florida who are denied the right to vote because they have outstanding LFOs."

The Raysor Plaintiffs propose that their Fourteenth Amendment wealth discrimination subclass be defined as: "All persons otherwise eligible to vote in Florida who are denied the right to vote solely because they are genuinely unable to pay their outstanding LFOs."[1]

II. Ascertainability

At the preliminary injunction hearing, the Court raised the question of whether class certification was appropriate for the Raysor Plaintiffs' proposed Fourteenth Amendment wealth discrimination subclass—the claim upon which the Court recently granted a preliminary injunction—noting that there could be ascertainability issues in determining which Floridians are genuinely unable to pay their LFOs and thus are members of the subclass.[2] Certification for the wealth discrimination subclass is appropriate under Rule 23(b)(2). Courts have concluded that ascertainability is not an appropriate consideration for Rule 23(b)(2) class

[1] As the Raysor Plaintiffs previously noted, plaintiffs propose excluding from the class those plaintiffs separately represented by their own counsel in this consolidated action.

[2] Although the issue was not raised in the hearing, to the extent there are questions as to the ascertainability of the proposed Twenty-Fourth Amendment poll tax class, the same arguments in favor of certification apply.

certification—particularly in the area of civil rights—because class members can be ascertained through the remedial scheme employed to redress the violation.

"[T]he circuits that have squarely addressed the issue have generally concluded that the ascertainability requirement does not apply to Rule 23(b)(2) injunctive-relief classes." *Braggs v. Dunn*, 317 F.R.D. 634, 671 (M.D. Ala. 2016).[3] For example, the Third Circuit has held that plaintiffs seeking certification under Rule 23(b)(2) do not need to demonstrate their class members' identities are ascertainable. In *Shelton v. Bledsoe*, the court explained that "[b]ecause the focus in a (b)(2) class is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action." 775 F.3d 554, 561 (3d Cir. 2015). As the Third Circuit noted, the Advisory Committee notes to Rule 23 identify as "'illustrative' examples of a Rule 23(b)(2) class [those actions] 'in the civil-rights field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration*.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note)

[3] The Eleventh Circuit has held that classes certified under Rule 23(b)(3)—where monetary relief is sought—must be ascertainable. *See Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). But the Circuit has never adopted such a requirement for Rule 23(b)(2) classes. *See Braggs*, 317 F.R.D. at 671 (noting that the *Little* court's decision applied only to Rule 23(b)(3) classes, and that ascertainability was not a requirement for Rule 23(b)(2) classes in the Eleventh Circuit).

(emphasis in original). "In light of this guidance, a judicially-created implied requirement of ascertainability—that the members of the class be *capable* of specific enumeration—is inappropriate for (b)(2) classes." *Id.*

The three other circuits to squarely address the issue agree that ascertainability is not a requirement for Rule 23(b)(2) classes. *See Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("[A]scertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief."); *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) (holding that identifiability of class members is not a requirement for certification under Rule 23(b)(2)); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (holding that, because "notice to the members of a (b)(2) class is not required . . . the actual membership of the class need not . . . be precisely delimited.").[4]

Indeed, the old Fifth Circuit, whose decisions are binding on this Court, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), has likewise explained that ascertainability is not a requirement for Rule 23(b)(2) classes: "It is not necessary that the members of the class be so clearly identified that any member

[4] *See also, e.g.*, *Battle v. Pa.*, 629 F.2d 269, 271 n.1 (3d Cir. 1980); *Floyd v. City of New York*, 283 F.R.D. 153, 171-72 (S.D.N.Y. 2012); *Finch v. N.Y. State Office of Children & Family Servs.*, 252 F.R.D. 192, 203 (S.D.N.Y. 2008); *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008); *Multi-Ethnic Immigrant Workers Org. Network v. City of L.A.*, 246 F.R.D. 621, 630 (C.D. Cal. 2007); *Bzdawka v. Milwaukee Cty.*, 238 F.R.D. 469, 474 (E.D. Wis. 2006); *Rice v. City of Phila.*, 66 F.R.D. 17, 19 (E.D. Pa. 1974).

can be presently ascertained." *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970). In so holding, the *Carpenter* court cited Rule 23's Advisory Committee notes highlighting civil rights cases, with non-enumerable class members, as prime candidates for Rule 23(b)(2) certification. *Id.* As a matter of law, the ascertainability of the Raysor Plaintiffs' proposed wealth discrimination subclass is not a barrier to class certification.

Even where courts have found ascertainability of the class a relevant consideration in the Rule 23(b)(2) context, they have still certified the class because the identity of class members becomes known as part of the remedial scheme. In *O'Donnell v. Harris County*, the plaintiffs sued over wealth discrimination in the context of pretrial release determinations. The court concluded that "those who cannot pay" would be "objectively and readily identifiable from the affidavits of financial ability to post bond, which the court's relief requires the County to collect and maintain." No. H-16-1414, 2017 WL 1542457, at *4 (S.D. Tex. Apr. 28, 2017). Similarly, in *Dixon v. City of St. Louis*, plaintiffs sought class certification for all who would be detained "because they are unable to afford to pay a monetary release condition." No. 4:19-cv-0112-AGF, 2019 WL 2437026, at *4 (E.D. Mich. June 11, 2019). The defendant contended that class certification was inappropriate because "[p]laintiffs seek individualized bail determinations for each member." *Id.* at *6. The court rejected this argument, reasoning that plaintiffs were not seeking "case-by-

case injunctions," but rather "systemic procedural reforms, applicable to all class members, in the form of a prompt and proper hearing." *Id.* This, the court noted, was "precisely the purpose" of Rule 23(b)(2) classes. *Id.* Likewise, in *Thomas v. Haslam*, the court certified a class of all persons whose driver's licenses "have been or will be revoked . . . who . . . cannot or could not pay Court Debt due to their financial circumstances." 329 F. Supp. 3d 475, 537 (M.D. Tenn. 2018), *vacated on other grounds sub nom. Thomas v. Lee*, 776 Fed. App'x 910 (6th Cir. 2019). The court rejected defendant's argument that individual determinations would make class certification improper because plaintiff's challenge implicated a statewide administrative process that "makes no allowance for indigence of the debtor" and the injury alleged occurs as part of "the administration of a generally applicable government policy." *Id.* at 541. The procedure adopted to resolve that injury would necessarily ascertain those class members entitled to relief.

The same reasoning applies here—any remedy that is implemented with respect to the wealth discrimination claim will necessarily result in the identification of the subclass members entitled to that relief. In its preliminary injunction order, this Court explained that the Eleventh Circuit's *en banc* decision in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), required that "the State put in place an appropriate procedure through which an individual plaintiff may register and vote if otherwise qualified and genuinely unable to pay outstanding

financial obligations." Doc. 207 at 35. The Court noted that there could be multiple "constitutionally acceptable . . . method[s]," *id.* at 38, of implementing such a procedure—such as "provid[ing] a method by which a felon can claim inability to pay on the application form," *id.* at 48. Whatever method is adopted, the "State cannot . . . deny the right to vote to a felon who would be allowed to vote but for the failure to pay amounts the felon has been genuinely unable to pay." *Id.* at 38. This principle of law applies to *all* such Floridians—not just the named plaintiffs in this case. And regardless of the specific procedure adopted by the State, any constitutionally permissible process will resolve any ascertainability issues. In a Rule 23(b)(2) class—where notice to the class members and opt-out rights are not involved—there is no harm in the class membership being determined through the implementation of the remedy. Present ascertainability is therefore not a barrier to class certification of the Raysor Plaintiffs' Fourteenth Amendment wealth discrimination claim.

* * *

Class certification is necessary to ensure Floridians' constitutional rights are not infringed. First, it would extend the court's preliminary injunction to all similarly situated Floridians who are genuinely unable to pay outstanding LFOs, guaranteeing them a procedure to register and vote, as this Court recognized is required by the Fourteenth Amendment. Indeed, the Court should, consistent with

Rule 23(c)(1)(A)'s requirement of certification at "an early practicable time," act swiftly to certify the class and modify its preliminary injunction order to extend the relief granted to all members of the wealth discrimination subclass. This is particularly important given that trial in this case is scheduled for April 2020, *after* the March presidential primary. The deadline for registration in advance of the primary is in February 2020. Second, class certification would provide the unnamed class members an efficient mechanism to enforce their constitutional rights, via class counsel, in the event the State fails to take prompt action to implement uniform and constitutionally sufficient procedures statewide to address the Court's wealth discrimination ruling.

This is precisely the type of claim for which class certification under Rule 23(b)(2) is appropriate. The State "has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). The State offers no procedure to register and vote for any Floridian with a genuine inability to pay her outstanding LFOs. Injunctive relief requiring such a procedure would resolve the class's claim "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Moreover, this is a quintessential civil rights claim, and as the Supreme Court has emphasized, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of cases that should be certified under Rule 23(b)(2). *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Indeed, as the

old Fifth Circuit has held, Rule 23's requirements "must be read liberally in the context of civil rights suits," a rule that "is especially true when the class action falls under Rule 23(b)(2)." *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975). As the *Jones* court explained, "unless class actions are hospitably received into our judicial system, many valid constitutional claims may be stymied." *Id.* at 1100.

There is no reason to stymie certification of a Rule 23(b)(2) class because its precise membership cannot be ascertained at the time of certification. The class's members only need to be identified as part of the remedial procedure employed to comply with the injunction—which they necessarily will be here. Certification of the class is of paramount importance here, where the Court has already ruled that plaintiffs have shown a likelihood of success on their wealth discrimination claim. There is no justification for withholding the relief ordered in the Court's preliminary injunction from all similarly situated Floridians who are genuinely unable to pay their outstanding LFOs.

CONCLUSION

For the reasons stated in the Raysor Plaintiffs' motion for class certification, Doc. 172, and the foregoing supplemental brief, the Raysor Plaintiffs' motion for class certification should be granted, and the Court's preliminary injunction order modified to extend the relief granted to the entire wealth discrimination subclass.

October 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word count requirement of the Court's October 8, 2019 Order, Doc. 203, because it contains fewer than 3,200 words; it contains 2,083 words.

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CERTIFICATE OF SERVICE

I certify that on October 25, 2019, a copy of the foregoing was served on counsel of record via the Court's CM/ECF system.

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