UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Linquista White, *et al*., Plaintiffs, v. Kevin Shwedo, *et al*., Defendants.	Civil Action No. 2:19-cv-03083-RMG (CLASS ACTION) **Expedited Ruling Requested**

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs Emily Bellamy, Janice Carter and Linquista White are South Carolinians whose driver's licenses are indefinitely suspended by the South Carolina Department of Motor Vehicles ("DMV") because Plaintiffs failed to pay traffic tickets ("FTPTT") and related reinstatement fees. Before suspending Plaintiffs' licenses, the DMV did not determine whether Plaintiffs could afford to pay or inform Plaintiffs of any process for contesting the suspensions. Because they are unable to pay the traffic fines or reinstatement fees, Plaintiffs Bellamy and Carter are absolutely barred from legally driving under the DMV's policy and practice. Nor are Plaintiffs able to secure a hearing before the Office of Motor Vehicle Hearings ("OMVH")—the only agency empowered to review license suspensions—to contest their suspensions on the basis of inability to pay due to the OMVH's administrative denial of hearings to those who do not pay a filing fee. As a result of the DMV and OMVH's policies and practices, Plaintiffs are unable to drive to work, secure better paying jobs, and take care of family responsibilities, among other hardships. And at the time this lawsuit was filed, Plaintiff White faced an imminent threat of suspension (and resulting harm) because of pending tickets likely to carry unaffordable fines and fees.

Plaintiffs filed this lawsuit to challenge the constitutionality of the DMV's policy and practice of automatically and indefinitely suspending driver's licenses for nonpayment of traffic tickets and reinstatement fees without providing a hearing or other inquiry into whether nonpayment was willful and without providing adequate notice of how to contest suspension based on inability to pay. Plaintiffs also challenge the OMVH's denial of hearings to contest license suspensions to people who do not pay filing fees. Plaintiffs established in their opening brief that their proposed Classes meet the requirements of Federal Rule of Civil Procedure Rule 23(a) and (b)(2). Defendants do not challenge Plaintiffs' satisfaction of any certification requirement other than the Rule 23(a) numerosity requirement, but Defendants simultaneously

acknowledge that the proposed Classes consist of tens of thousands of people, which is more than sufficient for numerosity.

Defendants focus the remainder of their arguments on Article III standing and the notion that the classes should be redefined in a way that Defendants contend precludes certification. Neither argument has merit, and both depend on Defendants' recharacterization of the injuries and claims of Plaintiffs and the proposed members of the Classes. Defendants assert that the proposed Classes are "overbroad" because they are not limited to people who can demonstrate that they are unable to pay their traffic tickets. But Plaintiffs appropriately defined the proposed Classes to include all individuals who have been impacted by Defendants' allegedly unconstitutional policies and practices. While those policies and practices disproportionately impact indigent people, they are unconstitutional as to all members of the proposed Classes and not just those who are unable to afford to pay traffic fines and reinstatement fees. Defendants' standing argument is similarly flawed as it focuses on S.C. Code § 17-25-350, an irrelevant statute governing the sentencing decisions of South Carolina courts—not the DMV's suspension decisions. The DMV is the sole entity that imposed the suspensions that cause Plaintiffs' injuries and the sole entity with the power under S.C. Code § 56-25-20 to remove the suspensions. Similarly, Section 17-25-350 has no bearing on the OMVH's administrative authority to provide an administrative appeals process to people seeking to contest the DMV's suspension of a license.

Because the Classes satisfy the requirements of Rule 23(a) and (b)(2), Plaintiffs request that the Court grant their motion for class certification.

II. ARGUMENT

A. The proposed Classes are not overbroad.

It is unsurprising that Defendants prefer to redefine the proposed Classes and then attack certification of the strawmen Defendants themselves created, particularly since Defendants articulate no basis for denying certification of the Classes as Plaintiffs have defined them. But this is not Defendants' role. Plaintiffs intentionally defined the proposed Classes to include all individuals whose driver's licenses are indefinitely suspended due to their failure to pay traffic tickets (Suspension Class) and failure to pay reinstatement fees (Reinstatement Fee Class) regardless of the reason for the nonpayment. This is because Plaintiffs contend Defendants' policies and practices are unconstitutional independent of whether the individual whose license is suspended for failure to pay is indigent.

Plaintiffs challenge the DMV's policy and practice of automatically and indefinitely suspending driver's licenses for failure to pay traffic tickets under Section 56-25-20 without first providing adequate notice of how to contest suspension based on inability to pay, a hearing on the individual's ability to pay, a determination that nonpayment was willful, and consideration of alternatives. ECF No. 1 ¶¶ 262–75, 301–32. Plaintiffs also challenge the OMVH's administrative enforcement of its rule requiring people to pay a non-waivable $200 filing fee to secure an administrative hearing to contest the DMV's suspension of a driver's license, including through failure to assign officers to provide hearings to those who cannot pay that fee. *Id*. ¶¶ 276–89, 301–21. All members of the Suspension Class were subject to these challenged courses of conduct. And all members of the Reinstatement Fee Class were subjected to the DMV's challenged policy and practice of automatically and indefinitely suspending driver's licenses for failure to pay reinstatement fees without first providing adequate notice of how to contest

suspension based on inability to pay, a hearing on the individual's inability to pay, a determination that nonpayment was willful, and consideration of alternatives. *Id*. ¶¶ 290–300.

It is true that Plaintiffs filed this lawsuit because they were unable to pay the fines and fees necessary to reinstate their suspended driver's licenses and to address the disproportionate impact of Defendants' policies and practices on others in the same situation. But Plaintiffs allege that *all* members of the proposed Classes have been deprived of adequate notice, an ability-to-pay hearing, a willfulness determination, and consideration of alternatives to driver's license suspension—regardless of whether they can ultimately prove they are unable to pay. The definitions of the proposed Classes are not overbroad just because a few members may have the resources to pay their fines and fees, and secure reinstatement of their licenses, but willfully refused to pay.[1] As one court has explained, "The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). In fact, "[t]he framers of the Rule stated that: 'Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to

[1] Defendants' suggestion that most people in the proposed Classes have the resources to pay but simply failed to do so, ECF No. 47 at 5–7, is belied by the record and logic. As explained in Plaintiffs' reply to the preliminary injunction motion, the DMV's own declaration shows that 52% of the 132,913 people subjected to FTPTT suspensions in the three years before the filing of this lawsuit have not paid to get their licenses back. ECF No. 46-1 ¶¶ 11–14 (indicating that of 165,472 people reported for failure to pay traffic tickets, only 32,559 paid to prevent the suspension from going into effect, and of the remaining people with FTPTT suspensions, 68,498 people have never paid); *see* Plaintiffs' PI Reply at 13–14 & n.20. By contrast, others were able to pay to get their driver's licenses back during this same period of time, whether before or after the FTPTT suspension went into effect. ECF No. 46-1 ¶¶ 12–13. The DMVs own data suggests that almost half of those with FTPTT suspensions simply do not have the resources to pay.

the class.'" 1 Newberg on Class Actions § 4:28 (5th ed. Dec. 2019 update) (quoting Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment).

In *Rodriguez*, for example, the plaintiffs sought injunctive relief requiring the government to provide individual bond hearings to all class members. 591 F.3d at 1111. The defendants argued that (b)(2) certification was inappropriate because some members were subject to mandatory detention and thus may not be entitled to a bond hearing. *Id.* at 1125. The court acknowledged that some in the class may not have viable individual claims for relief, but that did "not alter the fact that relief from a single practice is requested by all class members." *Id.* at 1126. It was sufficient that "all class members seek the same relief as a matter of . . . constitutional right." *Id.* As in *Rodriguez*, the possibility that certain members of the proposed Classes can afford to pay their fines or fees does not preclude (b)(2) certification.[2]

Redefining the proposed Classes in the way Defendants urge—so that membership turns on an individual's inability to pay the fines and fees, rather than on suspension for failure to pay—would stray into the realm of "fail safe" classes, which courts find to be problematic precisely because "the class definition beg[s] the ultimate question underlying the defendant's liability in the case." 1 Newberg § 3:6. In other words, a "fail safe" class definition "require[s] a court to decide the merits of prospective individual class members' claims to determine class membership." *Id.* Moreover, fail safe class definitions like Defendants' redefinition of the proposed Classes threaten to prejudice defendants in class action litigation. As the Sixth Circuit has explained, these class definitions "allow putative class members to seek a remedy but not be bound by an adverse judgment—either those 'class members win or, by virtue of losing, they are not in the class' and are not bound." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th

[2] As a matter of common sense, those who have the resources necessary to reinstate their driver's licenses will promptly do so and, at that point, will no longer be members of the Classes.

Cir. 2012) (citation omitted); *see also Garcia v. ExecuSearch Grp., LLC*, No. 17-cv-9401, 2019 WL 689084, at *2 (S.D.N.Y. Feb. 19, 2019) ("[W]hat makes a fail-safe class asymmetrically unfair to defendants is that a finding of liability binds a defendant to an adverse judgment, while a finding of non-liability binds no class member because no class would exist by definition.").

Defendants also maintain the requested relief is inappropriate, ECF No. 47 at 5, 7, but that is an issue to be resolved after a determination of the merits of Plaintiffs' claims, not on class certification. All the Court need consider at this stage is whether the proposed declaratory or injunctive relief "would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). That standard is satisfied because if Plaintiffs prove Defendants' practices are unconstitutional, all proposed Class members will benefit from an injunction lifting suspensions for FTPTT and failure to pay reinstatement fees and eliminating reinstatement fees that are imposed and collected in an unconstitutional manner. It will also be appropriate for the injunction to reinstate the driver's licenses of all members of the proposed Classes whose licenses were not suspended on any other basis. As the court noted in *Johnson v. Jessup*, the DMV can "investigate whether a given license should remain revoked on some other basis or whether the license should be reinstated pending provision of sufficient due process." 381 F. Supp. 3d 619, 635 (M.D.N.C. 2019).

B. Plaintiffs have Article III standing.

To have Article III standing, a plaintiff must establish "(1) an injury in fact (i.e., a concrete and particularized invasion of a 'legally protected interest'); (2) causation (i.e., a 'fairly … trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is 'likely' and not 'merely speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273–74 (2008) (quoting *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). It is sufficient for one class representative to have standing. *See Horne v. Flores*, 557 U.S. 433, 445 (2009). As argued more thoroughly on pages 1 through 6 of their reply in support of the motion for preliminary injunction, all three Plaintiffs have Article III standing to pursue their claims.

Defendants' responses to Plaintiffs' motion for preliminary injunction and motion for class certification challenge Plaintiffs' showing that their injury[3]—being absolutely barred from legally driving and facing wealth-based barriers to license reinstatement—is traceable to the DMV and OMVH's policies and practices because Plaintiffs did not appear in initial court hearings on their traffic tickets.[4] But there is no merit to this argument. The DMV has the exclusive power to suspend driver's licenses—not the courts. *See* S.C. Code § 56-25-20 (upon notification of a "fail[ure] to comply with the terms of a traffic citation . . . the [DMV] *may* suspend or refuse to renew the person's driver's license"). Defendants acknowledge that the DMV chooses to exercise that authority by automatically and indefinitely suspending licenses based on a report of nonpayment without considering ability to pay or determining that

[3] Neither brief explicitly challenges Plaintiffs showing of an injury in fact. *See* ECF No. 45 at 13–15; ECF No. 47 at 2–4. Defendants' contention that Plaintiffs' suspensions are not the result of inability to pay, ECF No. 47 at 3, is irrelevant to the question of whether Plaintiffs have suffered any personal injury from driver's license suspension and is debunked in Plaintiffs' reply in support of the preliminary injunction motion. *See* Plaintiffs' PI Reply at 7. There can be no serious dispute that injury-in-fact is met here because the record confirms that Ms. Carter's and Ms. Bellamy's suspensions for FTPTT and failure to pay reinstatement fees absolutely bar them from legally driving to earn income and care for their families and erect barriers to license reinstatement by conditioning it on full payment of fines and fees. *See* ECF No. 11 (Carter Decl.) ¶¶ 55–70; ECF No. 10 (Bellamy Decl.) ¶¶ 48–66; *see also Robinson v. Purkey*, 326 F.R.D. 105, 129–30 (M.D. Tenn. 2018) ("[T]he plaintiffs' concrete and particularized injuries-in-fact include not only the simple fact of not having a driver's license, but also the particular barriers placed between the plaintiffs and reinstatement.").

[4] As noted in Plaintiffs' brief in support of the motion for a preliminary injunction and discussed in their reply, Ms. White has standing under the mootness doctrine for inherently transitory claims. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1973); ECF No. 35 at 2 n.3; Plaintiffs' PI Reply at 5–6.

nonpayment was willful. *See* ECF No. 46 at 5, 7. Defendants also do not dispute that the DMV automatically suspended Plaintiffs' driver's licenses following reports of nonpayment without determining willfulness and continues to indefinitely suspend Ms. Carter's and Ms. Bellamy's licenses until they pay all traffic fines and reinstatement fees in full. *See id*. at 10–11. Nor do Defendants dispute that Plaintiffs will not be provided an administrative hearing before the OMVH to contest suspensions on the basis of inability to pay unless they pay filing fees. *See* ECF No. 45-1 at 23.

As Plaintiffs explain in their reply in support of their motion for a preliminary injunction, the statute requiring South Carolina courts to provide payment plans at sentencing upon a finding that a defendant is indigent, S.C. Code. § 17-25-350, is irrelevant to Plaintiffs' standing. Section 17-25-350 governs the sentencing decisions of South Carolina courts, which did not impose the suspensions that caused Plaintiffs' injuries and are not authorized to remove the suspensions.[5] Moreover, Plaintiffs were reported to the DMV for "failure to pay traffic tickets" and not failure to appear in court, as DMV documents confirm. *See, e.g.*, ECF Nos. 46-1, 46-2, 46-3 (Ten Year Driver Records); ECF Nos. 46-5, 46-8, 46-9, 46-10, 46-11, 46-12 (Official Notices). Plaintiffs thus have standing because their failure to appear in South Carolina traffic court did not cause the DMV to suspend their driver's licenses for failure to pay, as Defendants contend.

C. The Rule 23(a) requirements are satisfied.

The only Rule 23(a) requirement that Defendants contest is numerosity—but their own data demonstrates that the proposed Classes are sufficiently numerous to satisfy this

[5] Defendants' Section 17-25-350 argument is also illogical because, as Plaintiffs point out in their reply in support of the preliminary injunction motion, more than a quarter of FTPTT suspensions are based on reports of failure to pay out-of-state tickets for which Section 17-25-350 payment plan are unavailable. *See* Plaintiffs' PI Reply at 3–4.

requirement.[6] *See*, *e.g.*, *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) ("a class as large as 74 persons is well within the range appropriate for class certification"). Defendants acknowledge that "there are approximately 68,498 persons whose licenses are still under suspension starting in October 30, 2017, for failure to pay traffic tickets." ECF No. 47 at 4. While it does not impact numerosity, Plaintiffs dispute that a three-year statute of limitations—which would start October 30, 2016 (not 2017 as Defendants' contend), three years before Plaintiffs filed their complaint on October 30, 2019—applies because "the unconstitutional or illegal act [is] . . . a fixed and continuing practice." *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (second alteration in original) (citation omitted). Defendants do not claim to have ceased the policies and practices that Plaintiffs challenge. To the contrary, Defendants defend their policies and practices, such as the DMV's automatic suspension of driver's licenses under Section 56-25-20 following reports of failure to pay traffic tickets, ECF No. 46 at 5, 7; Plaintiffs' PI Reply at 1–2, and the OMVH's administrative enforcement of its rule requiring payment of a non-waivable $200 filing fee to secure a hearing to contest a license suspension, *see* ECF No. 45–1 at 23. As the Fourth Circuit explained, a continuing violation exists where, as here, the defendant is engaged in "an allegedly unconstitutional program" that continues to be applied to people within the statutory limitations period. *Id.* at 1167 (citation omitted).

[6] Plaintiffs accept Defendants' data for purposes of this motion since it confirms that numerosity is satisfied. *See Johnson*, 381 F. Supp. 3d at 633 (finding numerosity satisfied even using the defendant's data and rejecting argument that the plaintiffs had not shown all class members were low income as "an attack on a straw man" since the proposed classes consisted of all individuals whose licenses were or will be suspended for failure to pay traffic fines). Defendants do not dispute Plaintiffs' evidence that the Reinstatement Fee Class consists of tens of thousands of people. *See* ECF No. 13 ¶ 8, Ex. B.

The other Rule 23(a) requirements are satisfied for the reasons discussed in Plaintiffs' opening brief, which Defendants do not dispute. Although only a single common question is required, *EQT Prod. Co. v. Adair,* 764 F.3d 347, 360 (4th Cir. 2014), Plaintiffs identified several legal and factual questions common to the proposed Classes. ECF No. 8-1 at 28–29; *see also Johnson*, 381 F. Supp. 3d at 634 (finding "the DMV's enforcement of [North Carolina's driver's license suspension law] against named Plaintiffs and proposed class members provides sufficient common questions of fact and law on which to sustain a constitutional class action"). Plaintiffs' claims are also typical of the claims of members of the proposed Classes because all claims arise from the same course of conduct by Defendants and all challenge the legality of this common course of conduct. *See Moodie v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 378 (D.S.C. 2015); *see also Johnson*, 381 F. Supp. 3d at 635 ("[T]he constitutional violations Plaintiffs assert are not dependent on whether a given traffic defendant would be able to successfully show inability to pay at an ability-to-pay hearing. It is the alleged lack of notice and a hearing prior to revocation that forms the basis of Plaintiffs' procedural due process claims.").

Plaintiffs have shown that they are adequate representatives because they are committed to vigorously pursuing these claims on behalf of the proposed Classes, have no conflicts of interest with proposed Class members, and have retained capable and dedicated counsel. *See Moodie*, 309 F.R.D. at 378; *see also* ECF No. 9 ¶ 73; ECF No. 10 ¶ 66; ECF No. 11 ¶ 71; ECF No. 12 ¶¶ 1-33. Plaintiffs have also shown that the members of the Classes are "readily identifiable" from the DMV's records. ECF No. 8-1 at 33; *EQT*, 764 F.3d at 358 (recognizing that "Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable'" (citation omitted)).

D. Rule 23(b)(2) is satisfied.

Plaintiffs' claims satisfy Rule 23(b)(2) because Defendants have "acted or refused to act on grounds generally applicable to the class" and Plaintiffs seek "final injunctive relief and corresponding declaratory relief" that is appropriate "with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). As discussed above and in their opening brief, Plaintiffs allege that Defendants acted on grounds generally applicable to all members of the proposed Classes. *See* ECF No. 8-1 at 34. And Plaintiffs seek injunctive and declaratory relief that is appropriate for all proposed Class members. This is exactly the type of civil rights case the drafters of Rule 23 contemplated when including (b)(2) certification. Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment.

III. CONCLUSION

Plaintiffs request that the Court grant their motion for class certification, certifying the proposed Classes under Rule 23(b)(2), appointing Plaintiffs to serve as class representatives, and appointing Plaintiffs' counsel to serve as class counsel.

RESPECTFULLY SUBMITTED AND DATED this 24th day of January, 2020.

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