No. 23-0502

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE WILLIAM LEE, ET AL.

On Petition for Permission to Appeal from the
United States District Court for the Middle District of Tennessee
No. 3:20-cv-01039

Defendants' Motion to Stay Pending Appeal

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Pending before this Court is a Petition for Permission to Appeal Under Federal Rule of Civil Procedure 23(f) filed by Defendants, William Lee, Lisa Helton, Mark Goins, and Tre Hargett. That petition seeks this Court's review of the district court's April 13, 2023, class-certification order. Defendants now move this Court to stay proceedings in the district court pending final resolution of that interlocutory appeal, under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 8(a). Specifically, Defendants ask this Court to stay the district-court proceedings until the Court decides whether to grant the petition and, if it is granted, to continue the stay until final resolution of that appeal.

BACKGROUND

On April 13, 2023, the district court certified Plaintiffs' proposed class of "Tennessee residents who have been disenfranchised because of a felony conviction and have requested or attempted to request a Certificate of Restoration ('COR') from the pardoning, incarcerating, or supervising authority, but to date have not received a COR sufficient to restore their voting rights." (Order, R. 123, PageID# 831.) But the certification decision lacked the requisite "rigorous analysis" and improperly concluded that the class satisfied Rule 23's demanding requirements. Thus,

on April 27, 2023, Defendants filed with this Court a Rule 23(f) petition for permission to appeal the district court's certification order (the "Petition"). Defendants moved for a stay in the district court on May 3, 2023; that motion was denied on June 29, 2023. (Order, R. 142) (attached as Exhibit A); (Memorandum, R. 141) (attached as Exhibit B). The district court found it unlikely that Defendants would succeed in securing an interlocutory appeal or prevailing on the merits of any such appeal. (Memorandum, R. 141, PageID# 993–94.) The court also found that the balance of the harms weighed against granting a stay. (*Id.* at 994–95.)

This Court should stay the district court proceedings until it finally resolves the Petition. A stay is warranted because Defendants are likely to succeed in securing interlocutory relief—the certification decision did not rigorously analyze commonality or typicality on a claim-by-claim-basis, nor did it reach the correct conclusion with respect to the requirements of Rule 23. What's more, the balance of the harms favors pausing trial proceedings until the certification issue is decided. The dispositive-motion deadline is weeks away, and both the parties and the district court would expend considerable effort and resources litigating

this case with an improperly certified class. Plaintiffs, by contrast, face little prejudice from staying proceedings until this issue is resolved.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 23(f), "[a] court of appeals may permit an appeal from an order granting or denying class-action certification." Rule 23(f) also empowers "the district judge or the court of appeals" to stay the district-court proceedings during the pendency of a class-certification appeal. Fed. R. Civ. P. 23(f). On a motion to stay pending appeal, this Court considers (1) the likelihood that Defendants will prevail on the merits of the appeal, (2) the likelihood that Defendants will be irreparably harmed absent a stay, (3) the prospect that others will be harmed by a stay, and (4) the public interest in granting the stay. *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020). These factors are not prerequisites that must be met but are interrelated considerations that must be balanced together. *Id.* Additionally, when the State is the moving party, "its own potential harm and the public's interest merge into a single factor." *Id.*

REASONS FOR GRANTING RELIEF

Defendants are entitled to a stay pending this Court's decision on the Rule 23(f) Petition. Defendants are likely to succeed on the merits of the class-certification issue because the district court did not apply Rule 23's requirements properly to this case. Staying the district court proceedings until this Court decides the Petition would harm no one. By contrast, denying a stay would needlessly waste resources and frustrate the interests of judicial economy.

I. Defendants Will Likely Succeed on the Merits by Obtaining Interlocutory Relief from the Certification Order.

This Court will not grant a stay unless the movant can establish some likelihood of success on appeal. *SawariMedia, LLC*, 963 F.3d at 596 ("we may not grant a stay where the movant presents no likelihood of merits success'"). And to establish that likelihood, "the movant must show, 'at a minimum, serious questions going to the merits.'" *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (per curiam) (quotation omitted).

Defendants meet that standard here. Not only are there "serious questions" about the merits of the district court's certification order, but there is also a strong likelihood that the Defendants will ultimately *succeed* in securing interlocutory relief. The barebones analysis offered

by the district court does not satisfy Rule 23's "demanding standards." *See In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 671 (6th Cir. 2020). This factor thus strongly favors granting a stay. *See Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 344 (6th Cir. 2018) (explaining that "[t]he likelihood of success is perhaps the most important factor" for deciding whether to grant a stay pending appeal).

When evaluating the likelihood of success on the merits of a class-certification ruling, "the standard of review is whether the district court committed an abuse of discretion." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (per curiam). "A district court abuses its discretion 'when [it] relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.'" *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007). "Any class certification must satisfy Rule 23(a)'s requirement of numerosity, commonality, typicality, and adequate representation." *Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 278 (6th Cir. 2018). Next, the class must "fit under at least one of the categories identified in Rule 23(b)." *Id.* "[B]oth the Supreme Court and this Circuit require that a district court conduct a

'rigorous analysis' of [those] requirements before certifying a class." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 629 (6th Cir. 2011); *accord Fox v. Saginaw County*, 67 F.4th 284, 300 (6th Cir. 2023).

As more fully discussed in the Petition, the district court abused its discretion by finding that the proposed class meets the requirements of Rule 23(a)(2) and (3) and Rule 23(b)(2). *See* Pet. 8–24.

A. Plaintiffs do not satisfy the commonality requirement.

Plaintiffs failed to make a sufficient showing of commonality. To establish commonality, Plaintiffs must demonstrate that class members have suffered the same injury. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). In other words, their claims must "depend upon a common contention" whose resolution "will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 350.

Like all of Rule 23(a)'s requirements, commonality must be considered "on a claim-by-claim basis." *In re Rodriguez*, 695 F.3d 360, 369 n.13 (5th Cir. 2012) (quotation omitted); *see Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 928 (6th Cir. 2002) (quoting *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001), for the proposition that both

standing and class certification must be addressed on a claim-by-claim basis). Each claim must be treated individually, and a district court should certify a class with respect to "only those claims for which certification is appropriate." *Rodriguez*, 695 F.3d at 369 n.13; *see*, *e.g.*, *Santiago v. City of Chicago*, 19 F.4th 1010, 1017–18 (7th Cir. 2021) (vacating a class-certification order when the district court did not conduct claim-by-claim analysis). Such analysis is necessary "to preserve the efficiencies of the class action device without sacrificing the procedural protections it affords to unnamed class members." *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000).

1. There is no commonality for the equal-protection claim.

A rigorous analysis of the equal-protection claim reveals that Plaintiffs cannot establish commonality because their alleged injuries do not stem from a uniform policy or practice. Plaintiffs themselves complain of *disparate, county-level policies*, practices, and decisions. In their words, "[w]hether or not an eligible individual is able to request and be issued a COR and thereby regain their right to vote depends entirely on the willingness of local and county-level officials to entertain COR requests, their varying interpretations of state law . . . , and their pro-

cesses for keeping and maintaining records." (First Am. Compl., R. 102, PageID# 652–53.) Thus, a court cannot reach a yes-or-no answer to all of Plaintiffs' claim in one stroke, but must determine on a county-by-county basis whether convicted felons were unfairly treated differently due to their particular county's policies, procedures, and interpretation of state law. Each felon's story is different depending on that felon's county of residence. Consequently, the class fails the commonality requirement of Rule 23(a).

Notably, when faced with similar circumstances, the District of Columbia Circuit decided against class certification. In *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013), the plaintiffs alleged that the District of Columbia's educational policies and practices "resulted in systemic failures" to offer disabled preschool-age children the services required by the Individuals with Disabilities Education Act ("IDEA"). *Id.* at 122. On appeal, the circuit court determined that the "harms alleged to have been suffered" "involve different policies and practices at different stages" of the IDEA process. *Id.* at 127. Critically, "the district court identified no single or uniform policy or practice that bridges all their claims." *Id.* Instead, the claims were "based on multiple, disparate fail-

ures to comply with the [District's] statutory child obligations rather than a truly systemic policy or practice which affects them all." *Id.* at 128. For that reason, the plaintiffs did not satisfy the commonality requirement. *See id.* at 128–29.

So too here. Plaintiffs complain about "disparate failures" with respect to felon re-enfranchisement on a county-by-county basis, and Plaintiffs admit that there is no "truly systemic policy or practice" imposed by the state Defendants. *See DL*, 713 F.3d at 128. They repeatedly allege the *absence* of "a uniform process and standards," (First Am. Compl., R. 102, PageID# 654), and they describe the re-enfranchisement framework as a "scattershot system across Tennessee's ninety-five counties" that creates "disparate results," (*id.* at PageID# 613); *see also* (*id.* at PageID# 612) ("there are no uniform procedures for determining if [a] person meets the eligibility criteria" for a COR); (*id.* at PageID# 613) ("This lack of guardrails and uniform policies creates a high risk of erroneous deprivation of the statutory right to a COR."); (*id.*) (decrying the "decentralized process"). And a claim of an equal-protection injury, by itself, is insufficient to show commonality. *See DL*, 713 F.3d at 126 (citing *Wal-Mart*, 564 U.S. at 350). Like the alleged harms in *DL*, the harms

that the Plaintiffs allege here result from "different policies and practices" and decisions carried out by different actors in different jurisdictions. Thus, there is no common contention throughout the class.

2. There is no commonality for the procedural-due-process claims.

A rigorous analysis of Plaintiffs' procedural-due-process claims likewise reveals that they do not involve a common question because the amount of process received—and the amount of any additional process potentially needed—may vary from applicant to applicant. "[T]he Due Process Clause is flexible and calls for such procedural protections as the particular situation demands." *Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.3d 736, 741 (6th Cir. 2015). And an analysis of whether a COR applicant has received due process must consider the policies that counties and localities have in place, as well as protections afforded under the statutory scheme. Analyzing this issue would therefore involve an individualized inquiry, which may produce different results for applicants from one county to another. That need for an individualized inquiry—and the attendant differing results—defeat commonality. *See, e.g., Secreti v. PTS of Am., LLC*, 2015 WL 3505146, at *3–4 (M.D. Tenn. June 3, 2015) (finding no commonality among class of inmates because their

claims would require individualized balancing based on each inmates' circumstances*); see also Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 553–54 (7th Cir. 2016) (finding no commonality because the class action against the jail for inadequate dental care would depend on the facts of each individual and could not be resolved for the class as a whole).

There is no commonality here because each COR applicant's individual situation and particular circumstances affect any risk of erroneous deprivation for that applicant. A determination of the merits of Plaintiffs' claims would require looking at each applicant, determining what process that applicant had been afforded based on that applicant's county of conviction, weighing the risk of erroneous deprivation for each distinct circumstance, and then considering whether the existing remedies satisfy constitutional requirements. *Cf. Garcia*, 782 F.3d at 741. The analysis for each applicant necessarily varies because, as Plaintiffs allege, there is no uniform policy affecting all COR applicants, and the process varies from locality to locality. (First Am. Compl., R. 102, PageID# 654.) Furthermore, some of the named individual Plaintiffs have out-of-state convictions, and their COR applications required action by out-of-state officials. (*Id.* at PageID# 622–23.) Any fault in connection

with those Plaintiffs might lie with out-of-state officials over whom Tennessee county officials have no authority, as opposed to other Plaintiffs' situations that allegedly involve error by a Tennessee county official. Because individualized consideration is required in this due-process inquiry, Plaintiffs cannot satisfy the commonality requirement for class certification on these claims either. *See, e.g., Secreti*, 2015 WL 3505146, at *3–4; *Phillips*, 828 F.3d at 553–58.

In sum, Defendants are likely to succeed in showing that Plaintiffs have not met the commonality requirement under Rule 23(a)(2) as to Plaintiffs' equal-protection and procedural-due-process claims.

B. Plaintiffs do not to satisfy the typicality requirement.

Nor have Plaintiffs shown that their claims are typical of the putative class. Class certification can be granted only when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Beattie*, 511 F.3d at 561 (quotation omitted). "The premise of the typicality requirement is simply stated: as goes the

claim of the named plaintiff, so go the claims of the class." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). Accordingly, typicality does not exist "when a plaintiff can prove his own claim but not 'necessarily have proved anybody else's claim.'" *Beattie*, 511 F.3d at 561 (quotation omitted).

Plaintiffs' three claims cannot be combined for purposes of assessing typicality. *See Rosen*, 288 F.3d at 928. This Court has explained that "where there are defenses unique to the individual claims of the class members, the typicality premise is lacking, for—under those circumstances—it cannot be said that a class member who proves his own claim would necessarily prove the claims of other class members." *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009). As discussed above, Plaintiffs' equal-protection and procedural-due-process claims require individualized consideration of county-level policies and each COR applicant's particular circumstances. The defenses available to Defendants could vary depending on the procedures used by certain local jurisdictions and the procedures available to each individual COR applicant. Consequently, it simply cannot be said that, as go the claims of the named Plaintiffs, "so go the claims of the class."

Sprague, 133 F.3d at 399. Plaintiffs cannot meet Rule 23's typicality requirement.

C. Defendants' actions or refusal to act do not apply generally to the class.

Plaintiffs also failed to meet the requirements of Federal Rule of Civil Procedure 23(b). Under Rule 23(b)(2), "[a] class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (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 to none of them.'" *Wal–Mart*, 564 U.S. at 360. The (b)(2) requirement is met if "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) (quotation omitted).

Plaintiffs have not satisfied the requirements of Rule 23(b)(2) because they cannot show that Defendants engaged in a generally applicable pattern or practice. Indeed, Plaintiffs allege exactly the opposite—

i.e., that the relevant policies, procedures, and decisions governing re-enfranchisement are scattered among and applied variously by different jurisdictions. (First Am. Compl., R. 102, PageID# 612–13.) Inherent in Plaintiffs' contention is that there is *no* generally applicable policy. Moreover, and as discussed above, each COR applicant faces different risks of erroneous deprivation based on their individual circumstances and the procedures available to them.

Plaintiffs failed to show that Defendants "[have] acted or refused to act on grounds that apply generally to the class" under Rule 23(b)(2). Because individual inquiries and analyses are necessary to determine any eligibility for relief—and the proper scope of any injunctive relief—class certification is improper.

II. The Balance of Harms Favors Granting a Stay.

The balance of harms favors staying the district court proceedings until this Court finally resolves the Petition. Since May 3, 2023, when Defendants moved for a stay in the district court, discovery has now closed, and the July 26, 2023, deadline for dispositive motions is quickly approaching. (Order Granting Motion to Amend Scheduling Order, R. 140, PageID# 990.) Unless this Court stays the proceedings below, the

Defendants will be seriously prejudiced. Plaintiffs, to the contrary, will not be harmed by pausing the district court proceedings until the certification issue is finally decided. And the fact that Defendants are likely to succeed on the merits of the certification issue lowers the degree of harm needed to obtain a stay. *See Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) ("The strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue.").

The erroneous class-certification order prejudices the Defendants in two ways. First, class certification materially changes the nature of this litigation, and as a result, this litigation will consume substantial judicial and party resources if the proceedings are not stayed until the appeal is resolved. Indeed, the scope of the trial in this case will depend significantly on resolution of the question whether class certification is appropriate. Plaintiffs estimate that the class "consists of somewhere between 1,774 and roughly *290,000* people." (Reply, ECF No. 109, PageID# 773) (emphasis added). Since this case raises many questions about the individualized circumstances of COR applicants, the parties

and the district court would expend considerable time, effort, and resources considering issues that are not properly presented. *See Willcox v. Lloyds TSB Bank, PLC*, 2016 WL 917893, at *6 (D. Haw. Mar. 7, 2016) ("In the Rule 23(f) context, courts have found irreparable injury where failure to issue a stay pending interlocutory appeal would result in 'substantial time and resources being spent on litigation.'"); *Nieberding v. Barrette Outdoor Living, Inc.*, 2014 WL 5817323, at *4 (D. Kan. Nov. 10, 2014) (holding that litigation costs are irreparable because a decertification or alteration to the class might result in duplicative or wasteful litigation).

Second, continuing this litigation absent a definitive class-certification decision, coupled with the potential for broad and sweeping injunctive relief in favor of a potentially non-existent putative class, puts undue pressure on Defendants to consider settlement with far-reaching implications beyond Tennessee's voting-rights restoration, including the operation of state courts and court clerks. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (granting interlocutory relief because the defendants faced "intense pressure to settle" based on the erroneous certification order).

Plaintiffs would not be harmed if a stay is granted pending interlocutory appeal. A delay in the proceedings due to a stay is not inherently prejudicial. Any argument by Plaintiffs that a stay might delay Plaintiffs regaining their voting rights presumes that Plaintiffs will succeed on the merits of this case. Such a presumption is purely speculative. *See Beacon Navigation GMBH v. FCA US LLC,* 2018 WL 11350623, at *1 (E.D. Mich. Dec. 3, 2018) ("speculative prejudice . . . does not outweigh the judicial efficiency considerations associated with . . . [a] stay"). Moreover, that argument also presumes that it is impossible for Plaintiffs to regain their rights under the process currently in place. But that is nothing more than an assumption.

In other words, a stay is warranted because "the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (Easterbrook, J.).

CONCLUSION

For the reasons stated, Defendants' Motion to Stay Pending Appeal should be granted.

Dated: July 11, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed R. App. P. 27(d)(2) because it does "not exceed 5,200 words"—specifically, it contains 3,594 words (excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b)(1)), as counted using the word-count function on Microsoft Word.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Microsoft Word using a proportionally spaced typeface in fourteen-point Century Schoolbook font.

Dated: July 11, 2023

/s/ Philip Hammersley
Philip Hammersley

CERTIFICATE OF SERVICE

On July 11, 2023, I filed an electronic copy of this motion with the Clerk of the Sixth Circuit using the CM/ECF system. That system sends a Notice of Docket Activity to all registered attorneys in this case. Under 6th Cir. R. 25(f)(1)(A), "[t]his constitutes service on them and no other service is necessary."

Dated: July 11, 2023

/s/ Philip Hammersley
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