No. _____

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
on behalf of itself and its members,

Plaintiffs-Respondents,

v.

WILLIAM LEE, ET AL.,

Defendants-Petitioners.

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

Defendants' Petition for Permission to Appeal Under Federal Rule of Civil Procedure 23(f)

Jonathan Skrmetti
Attorney General & Reporter

Andrée S. Blumstein
Solicitor General

Alexander S. Rieger
Senior Assistant Attorney General
Office of the Attorney General
Nashville, TN 37202
Alex.Rieger@ag.tn.gov
(615) 741-2408

Counsel for Defendants-Petitioners

April 27, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The plaintiffs in this case have alleged that Tennessee has failed to uniformly administer its felon re-enfranchisement laws. From start to finish, the complaint alleges that the process for felons to regain their right to vote differs from county to county and that it is constitutionally inadequate because there are no generally applicable and effective state-level safeguards of the purported right to re-enfranchisement. The relief Plaintiffs seek is an injunction requiring state officials to implement a new system for administering the re-enfranchisement law.

On April 13, 2023, the district court certified a class of felons who have previously sought or attempted to seek to regain their right to vote, concluding that Plaintiffs could bring their challenge to the voting-rights-restoration system on behalf of this class. But Plaintiffs' claim of an allegedly scattershot re-enfranchisement framework is precisely what makes this case inappropriate for class adjudication. The claims for which the class was certified—namely, two procedural-due-process claims and one equal-protection claim—require the court to consider what the Plaintiffs allege to be varying county-level policies and the disparate circumstances of the felons seeking re-enfranchisement. The

patent need for individualized consideration and balancing in adjudicating those claims defeats Rule 23's class-certification requirements.

This Court should grant Defendants' Petition for Permission to Appeal Under Federal Rule of Civil Procedure 23(f). An interlocutory appeal is appropriate because Defendants are likely to succeed in reversing the district court's class certification order, an appeal will also help the parties avoid substantial and unnecessary costs, and the posture of the case in the district court favors immediate review.

STATEMENT OF RELEVANT FACTS

Under Tennessee law, eligible felons may regain their voting rights by obtaining a "certificate of voting rights restoration" ("COR"). *See* Tenn. Code § 40-29-203(a). (c). CORs are issued by "[t]he pardoning authority," "[t]he warden or an agent or officer of the incarcerating authority," or "[a] parole officer or another agent or officer of the supervising authority." *Id.* § 40-29-203(a).

Plaintiffs, the Tennessee Conference of the National Association for the Advancement of Colored People, along with Lamar Perry, Curtis Gray Jr., John Weare, Benjamin Tournier, Leola Scott, and Reginald Hendrix, filed suit to challenge this voting-rights-restoration scheme,

alleging that the statutes are administered in a manner that deprives disenfranchised felons of their statutory and constitutional rights. The individual plaintiffs are all convicted felons residing in Tennessee (R. 83, Memorandum, PageID# 454), who are seeking CORs to restore their voting rights. Defendants, William Lee, Mark Goins, Tre Hargett, and Lisa Helton, are all Tennessee public officials.

The First Amended Complaint

As pertinent to class certification, Plaintiffs make three claims under 42 U.S.C. § 1983.[1] Count One of the First Amended Complaint—the operative complaint—alleges a violation of procedural due process. (R. 102, First Am. Compl., PageID# 648–51.) According to the Plaintiffs, "[t]he Tennessee legislature has created a liberty interest, protected by procedural due process, in a COR for individuals who meet certain eligibility criteria." (*Id.* at 649.) They assert that "the current COR process lacks uniform access to an impartial decisionmaker, clear decisions based on the rules, a statement of reasons for the decision, uniform procedures

[1] Plaintiffs sought, and the district court granted, class certification "pursuant to Counts One, Two, and Three of [the] First Amended Complaint." (R. 122, Memorandum, Page ID# 822.).

for assessing eligibility, protections against denials for immaterial reasons, and an opportunity to be heard (on appeal)." (*Id.* at 649–50.)

Count Two also alleges a violation of procedural due process, this time invoking the fundamental right to vote. (R. 102, First Am. Compl., PageID# 651–52.) Plaintiffs allege that because a COR is necessary for a disenfranchised felon to regain the right to vote, the "failure to administer procedures to protect against erroneous deprivation of CORs, and the attendant right to vote, also violates the Due Process Clause." (*Id.* at 652.)

Count Three alleges a violation of the Equal Protection Clause of the Fourteenth Amendment. (R. 102, First Am. Compl., PageID# 652–54.) Plaintiffs allege that a disenfranchised felon's ability "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 processes for keeping and maintaining records." (*Id.* at 652–53.) Plaintiffs claim that, "[a]bsent a uniform process and standards for requesting and issuing CORs," "there is no way to ensure equal application of the COR

process and the attached right to vote to similarly situated individuals." (*Id.* at 654.)

Plaintiffs seek declaratory and injunctive relief. They want an injunction requiring Defendants to implement new policies "to ensure that the COR system meets the minimum requirements of the Due Process Clause and Equal Protection Clause," including "a uniform appeals process," "uniform procedures for interpreting the COR requirements," "a uniform, formal mechanism to request a COR," and "a requirement to issue formal decisions on COR requests," among other things. (R. 102, First Am. Compl., PageID# 658.) They also seek an injunction forbidding Defendants from "rejecting valid voter registration applications from eligible voters" and requiring Defendants to "create registration forms and policies that comply" with federal voting rights laws. (*Id.*)

District Court's Class-Certification Decision

Plaintiffs moved the district court to certify a class comprising "Tennessee residents who have been disenfranchised because of a felony conviction and have requested or attempted to request a Certification of Restoration ('COR') from the pardoning, incarcerating, or supervising authority, but to date have not received a COR sufficient to restore their

voting rights." (R. 104, Motion, PageID# 666.) Defendants opposed class certification, arguing that Plaintiffs had not established the numerosity, commonality, or typicality requirements of Rule 23(a), and that they did not satisfy any of the requirements under Rule 23(b). (R. 108, Response, PageID# 772.) The district court granted Plaintiffs' motion and certified the proposed class in an order entered on April 13, 2023. (R. 122, Memorandum, PageID# 822 (attached as Exhibit A); R. 123, Order, PageID# 831 (attached as Exhibit B).)

Defendants now seek this Court's review of that class-certification order under Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5.

QUESTION PRESENTED

Whether the district court abused its discretion in certifying the putative class, when Plaintiffs failed to satisfy the commonality and typicality factors under Fed. R. Civ. P. 23(a) and failed to show that Defendants have acted or refused to act on generally applicable grounds as required for class certification by Fed. R. Civ. P. 23(b)(2).

RELIEF SOUGHT

Defendants seek permission to appeal the district court's class-certification order and, ultimately, reversal of that order.

STANDARD FOR APPEAL UNDER RULE 23(f)

Federal Rule of Civil Procedure 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification." This Court has "unfettered discretion" to permit an appeal under Rule 23(f). *In re Delta Air Lines*, 310 F.3d 953, 957 (6th Cir. 2002) (per curiam) (citation omitted).

Four factors guide this Court's consideration of a Rule 23(f) petition. First, the Court considers "the likelihood of the petitioner's success on the merits." *In re Tivity Health, Inc.*, 2022 WL 17243323, at *1 (6th Cir. Nov. 21, 2022) (citation omitted). When evaluating likelihood of success, "the standard of review is whether the district court committed an abuse of discretion." *Delta Airlines*, 310 F.3d at 960. "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) (citation omitted). Second, the Court considers "[t]he 'death-knell' factor"—that is, whether "the costs of continuing litigation for either a plaintiff or defendant may present such a barrier that later review is hampered." *Tivity Health*, 2022 WL

17243323, at *1 (citation omitted). Third, "[t]he case that raises a novel or unsettled question may . . . be a candidate for interlocutory review." *Id.* (citation omitted). And fourth, "the posture of the case as it is pending before the district court is of relevance." *Id.* (citation omitted).

REASONS FOR GRANTING THE PETITION

I. Defendants Are Likely to Succeed in Showing that the Class-Certification Order Should Be Reversed.

Rule 23 imposes "demanding standards" for class certification. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 671 (6th Cir. 2020). To begin, "[a]ny 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). "[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). Next, the class must "fit under at least one of the categories identified in Rule 23(b)." *Clemons*, 890 F.3d at 278. Here, Plaintiffs relied on Rule 23(b)(2), which permits a class action 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); *see* R. 104, Motion, PageID# 665; R. 122, Memorandum, PageID# 823, 829-30.

If an interlocutory appeal is granted, Defendants are likely to succeed in showing that the district court abused its discretion in determining that Plaintiffs satisfied the requirements of Fed. R. Civ. P. 23(a)(2) and (3) and Fed. R. Civ. P. 23(b)(2).

A. The district court abused its discretion in determining that Plaintiffs satisfied the commonality requirement in Rule 23(a)(2).

Rule 23(a) forbids class certification unless "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To establish commonality, Plaintiffs must show "that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2022) (citation omitted). It is not enough that "they have all suffered a violation of the same provision of law"—instead, 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.*

Commonality, like the rest of Rule 23(a)'s requirements, must be considered "on a claim-by-claim basis." *In re Rodriguez*, 695 F.3d 360,

369 n.13 (5th Cir. 2012); *see Rosen v. Tenn. Comm'r of Finance & 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). The court must "trea[t] each claim individually and certif[y] the 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 (7th Cir. 2021) (vacating a class certification order when the district court failed to conduct a claim-by-claim analysis). "Certification on a claim-by-claim, rather than holistic, basis 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).

Here, the district court did not conduct the "rigorous analysis" mandated by Rule 23 and abused its discretion in finding commonality on the pertinent claims. Plaintiffs' equal-protection claim does not involve a common question because the injuries about which Plaintiffs complain do not derive from a uniform policy or practice. To the contrary, Plaintiffs' very allegations show that their purported injuries stem from

policies, procedures, and decisions that *vary* from county to county. Nor do Plaintiffs' procedural-due-process claims involve a common question because the amount of process an applicant received, as well as the amount of any additional process to which that applicant might be entitled, may well vary from applicant to applicant.

1. The equal-protection claim does not present a common question.

With respect to Plaintiffs' equal-protection claim, the district court offered nothing more than a bare conclusion about commonality. The court recited Plaintiffs' position "that [the equal-protection claim] presents the common question of whether the class is subject to arbitrarily different rules and procedures for regaining the right to vote based only on the county of a person's felony conviction." (R. 122, Memorandum, PageID# 826.) After reciting that question, the district court merely concluded—with no further analysis—that "[t]he answer to this common question will not change for each class member." (*Id.*) The court's ruling on the commonality factor constituted an abuse of discretion for two reasons.

First, the district court did not rigorously analyze whether the Plaintiffs' equal-protection claim presents a common question. Rigorous

analysis "is critical because it ensures that each of the prerequisites for certification have actually been satisfied." *Pipefitters Local 636 Ins. Fund*, 654 F.3d at 629. Neither "barebones analysis" nor conclusory assertions are enough to meet that requirement. *See*, *e.g.*, *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 129 (3d Cir. 2018) (holding that the district court's "barebones analysis" did not "permit a reviewing court to conclude that" it "undertook the 'rigorous' review mandated by our precedents"); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017) (vacating class certification because the district court offered "conclusions, not reasons," which "on their own do not constitute a 'rigorous analysis' of whether certification is proper in this case").

But conclusory assertions are all the district court offered here. Indeed, the court did not even *acknowledge* its obligation to rigorously analyze any of the Rule 23(a) criteria. *See In re BancorpSouth, Inc.*, 2016 WL 5714755, at *1 (6th Cir. Sept. 6, 2016) (order) (granting the Rule 23(f) petition because the district court "did not set forth the standard requiring it to rigorously analyze [the p]laintiffs' claims" and because it failed to conduct that analysis).

The district court's conclusory treatment of the equal-protection claim is itself reason enough to grant this Petition. *See*, *e.g.*, *Tivity Health, Inc.*, 2022 WL 17243323, at *1 (order) (granting the Rule 23(f) petition because the district court did not conduct a rigorous analysis of Rule 23's requirements); *In re Sandusky Wellness Ctr., LLC*, 570 F. App'x 437, 437 (6th Cir. 2014) (amended order) (same); *Reeb v. Ohio Dep't of Rehabilitation & Correction*, 81 F. App'x 550, 556–57, 559 (6th Cir. 2003) (vacating class certification because the district court did not rigorously analyze commonality).

Second, the district court committed a clear error in judgment when it concluded that the equal-protection claim presents a common question. The common question identified by the district court is whether class members are "subject to arbitrarily different rules and procedures for re-gaining the right to vote based only on the county of a person's felony conviction." (R. 122, Memorandum, PageID# 826.)

But geography, i.e., the county of conviction, is not what matters for purposes of restoring the right to vote under Tennessee law—*Defendants* do not impose rules on a county-by-county basis that favor some jurisdictions over others. And Plaintiffs themselves allege to the contrary,

claiming that it is a *county's* "varying interpretations of state law" and a *county's* "processes for keeping and maintaining records" that dictate an applicant's ability to regain the right to vote. (*See* R. 102, First Am. Compl., PageID# 652–53 (alleging that whether an individual can obtain a COR "depends entirely on the willingness of local and county-level officials").) Because those county-level policies, practices, and decisions allegedly vary among jurisdictions, there is no uniform policy affecting the entire class. The absence of such a policy a fortiori destroys commonality.

The decision in *DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013), is instructive. There, 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 Act ("IDEA"). *Id.* at 122. The district court certified a class comprising special needs children living in the District of Columbia. *Id.* at 123. On appeal, the circuit court determined that the "harms alleged to have been suffered" "involve[d] different policies and practices at different stages" of the IDEA process. *Id.* at 127. And 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 failures 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 court held that the plaintiffs did not satisfy the commonality requirement. *See id.* at 128–29.

Here, too, Plaintiffs complain about "disparate failures" with respect to felon re-enfranchisement on a county-by-county basis. By Plaintiffs' own admission, then, there is no "truly systemic policy or practice" imposed by the Defendants, *DL*, 713 F.3d at 128—indeed, Plaintiffs repeatedly allege the *absence* of a "single or uniform policy or practice," *id.* at 127, and describe the re-enfranchisement framework as a "scattershot system across Tennessee's ninety-five counties" that creates "disparate results," (R. 102, First Am. Compl., PageID# 613; *see also id.* at 612 ("there are no uniform procedures for determining if [a] person meets the eligibility criteria" for a COR); *id.* at 613 ("This lack of guardrails and uniform policies creates a high risk of erroneous deprivation of the statutory right to a COR."); *id.* (alleging a "decentralized process").) Although all Plaintiffs claim an equal-protection injury, that 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 Plaintiffs allege here result

from "different policies and practices" and decisions carried out by different actors in different jurisdictions. There is no common contention that binds the class together.

2. The procedural-due-process claims do not present a common question.

"[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). But the district court did not factor this key principle into its analysis when it summarily concluded that the commonality requirement was satisfied with respect to Plaintiffs' procedural-due-process claims. It did not expressly identify any common question. It merely recited Plaintiffs' proposed question—namely, "whether there are protected interests in CORs and restoration of the right to vote," (R. 122, Memorandum, PageID# 825), and mentioned, in a footnote, two other proposed common questions submitted by Plaintiffs, *id.* at n.2, noting its agreement with Plaintiffs' argument that "the *risk* of erroneous deprivation created by the lack of safeguards is a systematic inquiry with a common answer for all COR applicants," *id.* at 826. But in the end, the district court did not state what question it found common to the class or explain why it agreed with Plaintiffs' position.

Once again, the district court abused its discretion; it did not rigorously analyze the commonality requirement because it failed to identify a common question or explain its reasoning. And contrary to the district court's conclusion, it is *not* correct that "the risk of erroneous deprivation" is the same for all COR applicants. (R. 122, Memorandum, PageID# 826.) That risk will necessarily vary depending on each county's individualized policies and each applicant's circumstances.

With regard to the varying governmental policies, Plaintiffs assert that the class has not been given the procedural protections that the Due Process Clause requires. But Plaintiffs also allege that the re-enfranchisement policies vary from county to county and that there is no uniform policy that affects the entire class. (R. 102, First Am. Compl., PageID# 613 (describing the re-enfranchisement framework as a "scattershot system across Tennessee's ninety-five counties" that creates "disparate results."); *see also id.* at 612 ("there are no uniform procedures for determining if [a] person meets the eligibility criteria" for a COR); *id.* at 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").) Any inquiry into whether a COR applicant has

received constitutionally adequate process must include consideration of any policies that counties and localities have in place, as well as protections afforded under the statutory scheme. Such an inquiry would necessarily involve an individualized inquiry, which may produce different results for applicants from one county to another, and that need for an individualized inquiry and the attendant differing results per se 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).

Each COR applicant's individual situation and particular circumstances would affect any risk of erroneous deprivation for that applicant. To determine whether to grant relief, the court would need to look at each plaintiff, determine what process that applicant had been afforded based on that applicant's county of conviction, weigh the risk of erroneous

deprivation for each distinct circumstance, and then consider whether the existing remedies satisfy constitutional requirements. *Cf. Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.3d at 741. That determination would vary from applicant to applicant because, as Plaintiffs themselves allege, there is no uniform policy affecting all COR applicants, and the process instead varies from locality to locality. Moreover, because some of the named individual Plaintiffs have out-of-state convictions, they have submitted their COR applications to out-of-state officials, which will present another basis for individualized consideration in any due-process inquiry—yet another reason why Plaintiffs cannot satisfy the commonality requirement for class certification. *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 the district court abused its discretion in finding that Plaintiffs satisfied the commonality requirement under Rule 23(a)(2) as to Plaintiffs' equal-protection claims and as to Plaintiffs' procedural-due-process claims.

B. The district court abused its discretion in determining that Plaintiffs satisfied the typicality requirement in Rule 23(a)(3).

Rule 23(a) also forbids class certification unless "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 (citation 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. Gen. 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 (citation omitted).

Here, the district court abused its discretion in finding typicality. The court offered *no* analysis in support of its determination—let alone the requisite *rigorous* analysis. The district court merely identified the legal standard and recited the parties' arguments and then, simply nodding agreement with Plaintiffs, "[found] that [they] have met the

typicality prerequisite of Rule 23(a)(3)." (R. 122, Memorandum, PageID# 827.) The district court's failure to provide any supporting reasoning for its typicality finding would alone warrant a grant of this Petition. *See, e.g.*, *Tivity Health, Inc.*, 2022 WL 17243323, at *1 (granting the Rule 23(f) petition).

Moreover, the district court improperly combined Plaintiffs' three claims for purposes of assessing typicality, *see Rosen*, 288 F.3d at 928, thereby committing a clear error of judgment in finding typicality for all three claims. 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 with respect to the commonality factor in Subsection A above, Plaintiffs' equal-protection and procedural-due-process claims demand individualized consideration of countywide policies and each COR applicant's particular circumstances. And the defenses available to the 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.

C. The district court abused its discretion in determining that Plaintiffs satisfied Rule 23(b)(2).

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." "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 as to none of them.'" *Wal–Mart*, 564 U.S. at 360 (citation omitted). In other words, 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) (citation omitted).

The district court abused its discretion here in finding that Plaintiffs satisfied the requirements of Rule 23(b)(2), because Plaintiffs failed to and cannot show that there is a generally applicable pattern or

practice. In fact, Plaintiffs allege exactly the opposite—i.e., that the relevant policies, procedures, and decisions governing re-enfranchisement are scattered among and applied variously by sundry and separate jurisdictions. (R. 102, First Am. Compl., PageID# 613 (describing the re-enfranchisement framework as a "scattershot system across Tennessee's ninety-five counties" that creates "disparate results."); *see also id.* at 612 ("there are no uniform procedures for determining if [a] person meets the eligibility criteria" for a COR); *id.* at 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"). Plaintiffs thereby essentially concede 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 particular procedures available to them.

In short, 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. Interlocutory Review Will Help the Parties Avoid Substantial and Unnecessary Costs.

In addition to Defendants' likelihood of success, granting permission to appeal at this stage in the case is also warranted because continued litigation with an improperly certified class would materially change the nature of this litigation and consume substantial judicial, party, and executive resources. *Cf. Delta Airlines*, 310 F.3d at 960 (acknowledging that the costs of continued litigation factors into whether to grant a Rule 23(f) petition).

By Plaintiffs' own estimation, the class "consists of somewhere between 1,774 and roughly *290,000* people." (R. 109, Reply, PageID# 773 (emphasis added).) Because this case raises many questions about the individualized circumstances of COR applicants, Defendants would be forced to expend substantial taxpayer resources on discovery into potentially hundreds of thousands of improperly certified class members. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("We see no reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned."). That would not only seriously burden the Defendants, but it would also considerably lengthen the district-court proceedings for all parties involved.

See In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002) ("Where a district court class certification decision is manifestly erroneous, for example, Rule 23(f) review would be warranted even in the absence of a death-knell situation if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed.").

III. The Posture of the Case Favors Interlocutory Review.

This Court considers "the posture of the case as it is pending before the district court" when deciding whether to grant a Rule 23(f) petition. *In re Delta Airlines*, 310 F.3d at 960. "A district court's indication that it may reconsider the certification decision, for instance, counsels against interlocutory review." *In re E.I. DuPont de Nemours & Co. C-8 Personal Injury Litig.*, 2022 WL 4149090, at *3 (6th Cir. Sept. 9, 2022). Review is also disfavored before the district court enters the formal certification order. *Id.* at *10.

Here, though, no postural obstacles preclude interlocutory review. The district court has not indicated any intent to reconsider its decision; the court has entered the formal certification order (R. 123, Order, PageID# 831), and has already scheduled a status conference to discuss

the discovery schedule "[i]n light of the court's ruling on the motion for class certification," (R. 124, Order, PageID# 832). Consideration of this factor therefore weighs in favor of granting review under Rule 23(f).

CONCLUSION

For the reasons stated, Defendants' Petition for Permission to Appeal Under Federal Rule of Civil Procedure 23(f) should be granted.

Dated: April 27, 2023

Respectfully Submitted,

JONATHAN SKRMETTI
Attorney General & Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ Alexander S. Rieger
ALEXANDER S. RIEGER
Senior Assistant Attorney General
Office of the Attorney General
Nashville, TN 37202
Alex.Rieger@ag.tn.gov
(615) 741-2408

Counsel for Defendants-Petitioners

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed R. App. P. 5(c)(1) because it does "not exceed 5,200 words"—specifically, it contains 4,992 words (excluding the parts of the petition 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 petition 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: April 27, 2023

/s/ Alexander S. Rieger
Alexander S. Rieger

CERTIFICATE OF SERVICE

On April 27, 2023, I filed an electronic copy of this petition 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 6 Cir. R. 25(f)(1)(A), "[t]his constitutes service on them and no other service is necessary."

Dated: April 27, 2023

/s/ Alexander S. Rieger
Alexander S. Rieger