UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TAMARA G. NELSON and TIMOTHEA RICHARDSON, individually and on behalf of all other persons similarly situated, Plaintiffs, v. BELINDA C. CONSTANT, et al., Defendants.	Case No. 17-cv-14581-JVM Division 1: Magistrate van Meerveld (Class Action)

MEMORANDUM IN SUPPORT OF PLAINTIFF TIMOTHEA RICHARDSON'S MOTION TO CERTIFY A SETTLEMENT CLASS

After extended negotiations, parties in this case have reached settlement terms designed to remedy the due process violations of the Deferred Prosecution Program outlined in the second count of Plaintiffs' Amended Complaint. Plaintiff Timothea Richardson's ("Plaintiff") claims are typical of and raise questions of fact and law common to those appearing before the Gretna Mayor's Court. Plaintiff will act fairly and adequately to protect the interests of all those who appear before the Mayor's Court. Therefore, Plaintiff respectfully submits this memorandum in support of her motion to certify a class for settlement under Federal Rules of Civil Procedure 23(a) and 23(b)(2).

PROPOSED CLASS

Plaintiff Timothea Richardson seeks to certify the following class and sub-classes:

All persons who in the past year were denied participation in, terminated from, or threatened with termination from the deferred prosecution program due to their inability to pay program fees.

> Subclass A: all persons with unpaid Deferred Prosecution Program fees on a case filed in the Gretna Mayor's Court on or before December 31, 2017.
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> Subclass B: all persons terminated from the Deferred Prosecution Program from June 1, 2015, to present, who forfeited payments to the program, were later convicted, paid fines and fees upon conviction, but received no credit for the funds forfeited to the Deferred Prosecution Program.
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> Subclass C: all persons terminated from the Deferred Prosecution Program on or after January 1, 2018, for failure to pay and are either (i) awaiting trial or (ii) have failed to make their final payment as scheduled or have been attached for failure to appear.

ARGUMENT

As alleged in the Amended Complaint, the City of Gretna prosecutes violations of municipal ordinances in the Gretna Mayor's Court. The City Prosecutor offers many defendants in the Mayor's Court an opportunity to participate in the deferred prosecution program, in which the City Prosecutor will dismiss the charges against the defendants in exchange for a fee. There is no nonfinancial alternative to participate in the deferred prosecution program. Conditioning participation in the deferred prosecution program upon a person's ability to pay a sum of money violates the Equal Protection Clause.

The rules of civil procedure contemplate certification of classes for the purposes of settlement exclusively, after an analysis to determine if the class meets the requirements for class certification under Rule 23(a) and (b). Fed. R. Civ. P. 23(e); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Plaintiffs seeking to certify a class must satisfy each of the requirements of Fed. R. Civ. P. 23(a) and at least one of the three criteria for certification under Rule 23(b). *Amchem*, 521 U.S. at 614–15. Rules 23(a) and 23(b)(2) are easily satisfied in this case. Plaintiff alleges that Defendants apply materially identical unconstitutional practices to each of the proposed Class members. Plaintiff Timothea Richardson's claims are representative

of the other Class members' claims in all material respects. Plaintiff has a sufficiently live stake in the controversy to represent the Class. And "the relief sought [will] perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011). If the practices alleged in this case are unconstitutional for Plaintiff, they are necessarily unconstitutional for everyone else. Because Plaintiff satisfies the requirements of Rule 23(a) and Rule 23(b)(2), this Court should certify the Class proposed above.

I. The Requirements of Rule 23(a) Are Met.

Plaintiffs seeking class certification must meet four requirements under Rule 23(a):

> (1) [T]he class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements, known respectively as numerosity, commonality, typicality, and adequacy, are each met in this case.

a. Numerosity

Although there is no set number of people needed to meet the numerosity requirement, a class of more than 40 is presumptively adequate. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing 1 *Newberg on Class Actions* § 3.05, at 3–25 (3d ed. 1992) for the proposition that a class of more than forty members "should raise a presumption that joinder is impracticable"). There is no dispute that the proposed Class is sufficiently numerous to render joinder impracticable. Over three thousand cases are filed in the Mayor's Court annually. The annual number of participants in the Deferred Prosecution Program ranged from 1,633–1,851 between 2015 and 2018. (ECF No. 112-2 at 4 ¶ 19) There are dozens, if not

hundreds, of class members who have been impacted by the conditioning of deferred prosecution program on money payments.

Moreover, there is a future stream of putative class members who will suffer the same injury, because the Mayor's Court is in session four days of each week, holding two arraignment days and two trial days in order to process the thousands of cases heard by the court each year. Class relief targeting Defendants' unconstitutional conditioning of the deferred prosecution program solely on money payments is therefore even more appropriate because the indeterminate number of future class members makes traditional "joinder" impracticable. *See Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) ("[T]he fact that the class includes unknown, unnamed future members also weighs in favor of certification."); *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974) (finding the numerosity requirement satisfied where the class included "unknown, unnamed future" class members rendering joinder "certainly impracticable"); *see also* 5-23 *Moore's Federal Practice – Civil* § 23.22(f) (2017) ("Class-action plaintiffs seeking injunctive or declaratory relief frequently seek to define a class to include people who might be injured in the future. Courts in these cases often find that joinder of separate suits would be impracticable because those who have not yet been injured, or who do not know that they have been injured, are unlikely to join a lawsuit."); *Newberg on Class Actions* § 25:4 (4th ed. 2016) ("Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause.").

In such cases, the numerosity requirement is met because the composition of the class is fluid and unknown, but resolution will affect numerous future people. *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (granting liberal construction of numerosity prong in a case

seeking injunctive relief on behalf of future class members because "[t]he general rule encouraging liberal construction of civil rights class actions applies with equal force to the numerosity requirement of Rule 23(a)(1)"); *see also Jones v. Gusman*, 296 F.R.D. 416, 465 (E.D. La. 2013); *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009); *Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001).

In addition to the future stream of people suffering the same violations, other factors highlight the undesirability of individual lawsuits here. In assessing impracticability of non-class joinder, "courts should take a common-sense approach which takes into account the objectives of judicial economy and access to the legal system." *Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993). The judicial resources that would be expended in repeated litigation and discovery, the potential for multiple or conflicting judgments inherent in many more individual cases concerning the same systems, and the lack of access to the legal system for low-income arrestees all point strongly toward the advantages offered by the class-action vehicle in this case. *See, e.g.*, *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1039 (5th Cir. 1981) ("[A] number of facts . . . may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim.").

The resolution of the central facts and legal issues in a class action concerning the Defendants' alleged policy of conditioning participation in a diversion program entirely upon wealth is far preferable to proceedings being repeatedly filed in this Court on behalf of people newly cited to appear before the Mayor's Court each week. Judicial economy will be served by adjudicating the legality of the Defendants' practices in a single class proceeding rather than clogging this Court with numerous individual suits on an ongoing basis.

Moreover, the ability of individual putative class members to initiate separate lawsuits is compromised because they may not have the resources to investigate and develop their constitutional claims, let alone to find a lawyer to represent them. The vast majority of people appearing before the Gretna Mayor's Court are unrepresented. Unlike those who have been injured by a defective product, criminal defendants proceeding pro se may not even be aware that they have a valid constitutional claim because many people are not aware of the Equal Protection issues inherent in a wealth-based deferred prosecution program. *See Jackson v. Foley*, 156 F.R.D. 538, 541–42 (E.D.N.Y. 1994) (finding numerosity and impracticable joinder when the majority of class members came from low-income households, greatly decreasing their ability to bring individual lawsuits); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding, in action brought for injunctive relief challenging Medicaid policy, that joinder was impracticable because the proposed class consisted of poor and elderly or disabled people who could not bring individual lawsuits without hardship); *Gerardo v. Quong Hop & Co.*, No. C 08-3953 JF (PVT), 2009 WL 1974483, at *2 (N.D. Cal. July 7, 2009) (certifying class where "potential class members are not legally sophisticated" making it difficult for them to bring individual claims).

Finally, as noted above, a class action does not present any insurmountable difficulties in management. The present members of the Class are ascertainable from records in the Defendants' possession, and the Class is limited in geographic scope as opposed to a nationwide, multi-district class. Requiring separate individual lawsuits would likely result in far greater manageability problems, such as duplicative discovery (including numerous depositions of the same people and repetitive production of documents), repeated adjudication of similar

controversies in this Court (with the resultant risk of inconsistent judgments), and excessive costs for all involved.

b. Commonality

"To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member's claims." *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014). The Rule asks whether the disputed questions are capable of class-wide proof or resolution; claims need not be identical. *Simms v. Jones*, 296 F.R.D. 485, 497 (N.D. Tex. 2013) ("Even a single common question of law or fact can suffice." (citation omitted)).

Although there need not be both common issues of law and fact under Rule 23(a), in this case there are. Among the common questions of fact:

- Are alternatives to monetary payments accepted by the City Prosecutor for participation in the deferred prosecution program?
- Does termination from the Deferred Prosecution program result in forfeiture of all funds previously paid into the program?

The most important common question of law is:

- Does the availability of the deferred prosecution program only to those who can afford it violate of the Equal Protection clause of the constitution?

A policy or practice need not uniformly violate the rights of each proposed class member to provide a foundation for class wide relief. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012). If the defendant "engages in a pattern or practice of agency action or inaction… 'with respect to the class,' so long as the declaratory or injunctive relief 'settling the legality of the defendants' behavior with respect to the class as a whole is appropriate." *Id.* at 847–48. The

1966 advisory committee note provides more insight: "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 the class." *Id.* at 848 (citing 1966 Amendment advisory committee note to Rule 23).

Under the proposed settlement, the City must engage in a proper analysis of a defendant's ability to pay, offer alternatives to monetary payments, and cannot terminate participants in the deferred prosecution program solely for their inability to pay fees. Whether the acts and omissions by the City in the operation of its Deferred Prosecution Program violated the potential class members due process rights is a question amenable to a common answer. The proposed settlement offers direct remedy to all of these alleged violations of due process rights in the operation of the Deferred Prosecution Program.

c. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 531 U.S. 395, 401 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

> Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.

Stirman v. Exxon Corp., 280 F.3d 554, 562 (5th Cir. 2002) (quoting *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001)). Typicality has also been cast in terms of whether a "sufficient nexus" exists between the representative plaintiffs and the putative class members. *See Prado-*

Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000); *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 194 (W.D. Tex. 1998) (finding a sufficient nexus where "plaintiffs assert injuries in the same general manner as all other class members"). Since the claims asserted by representative plaintiffs and the putative class members do not need to be identical but instead share essential characteristics, the typicality requirement is viewed by courts as "not highly demanding." 5-23 *Moore's Federal Practice, Civil* § 23.24 (2015).

Here, the named Plaintiff's claims are typical of the claims of the Class members. The named Plaintiff was subjected to the practices alleged in the Complaint and suffered the exact same constitutional violations that all other respective Class members suffered.

d. Adequacy

The adequacy analysis encompasses two separate inquiries: (1) whether the named Plaintiffs have common interests with the other class members, and (2) whether the representative will adequately prosecute the action through qualified counsel. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562–63 (8th Cir. 1982).

i. Named Plaintiff

Plaintiff Richardson was a participant in the Deferred Prosecution program at the time of filing and was threatened with termination from the program if she failed to make payments.[1]

[1] While Ms. Richardson no longer has an open case in the Mayor's Court, under well-settled Fifth Circuit law she continues to maintain a sufficiently live stake in this case to serve as a representative of this Class. "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). There are two principal circumstances in which this can be true: (1) in cases that are by their nature transitory, and are, therefore, capable of repetition yet evading review, *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); and (2) in cases where the defendant tries to "pick off" plaintiffs by satisfying small claims to frustrate class certification, *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981). In either circumstance, "the certification can be said to 'relate back' to the filing of the complaint." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (quoting *Sosna*, 419 U.S. at 402). If a named plaintiff in these circumstances had standing at the time of the filing of her complaint, she can serve as a class representative throughout the litigation.

She was not given a nonfinancial option to continue in the program. She therefore has common interests with all others who were denied participation, terminated from, or threatened with termination from the Deferred Prosecution program.

The named Plaintiff has standing. She is an adequate representative of the Class and sub-classes.

ii. Counsel

Plaintiff is represented by attorneys from the Roderick and Solange MacArthur Justice Center in New Orleans ("MacArthur Justice Center")[2] who have experience in litigating complex civil rights matters in federal court. Counsel have knowledge of both the details of Defendants' practices and the relevant constitutional and statutory law.

II. The Requirements of Rule 23(b) Are Met.

A putative class action must also meet the requirements of either Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3). The Class meets the requirements of Rule 23(b)(2), which provides for class certification 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. Rule 23(b)(2).

That is the case here. Those who have been denied participation in or terminated from the deferred prosecution program due to their inability to make money payments are subjected to criminal liability solely because they are poor. They are set for trial while their wealthier peers

[2] The MacArthur Justice Center is a non-profit public interest law firm. Undersigned counsel Eric Foley, staff attorney at the MacArthur Justice Center, worked for two years as a federal judicial clerk in the District Court of Puerto Rico before beginning his practice of law in Louisiana in 2011. He has litigated civil rights cases at the trial and appellate stages in state court and federal court. Ex. A, Declaration of Eric Foley. Jim Craig is Director of the MacArthur Justice Center's Louisiana office and has practiced in federal and state courts in Mississippi and Louisiana for over thirty years. He has litigated multiple complex civil matters, including class actions. Ex. B, Declaration of James Craig.

avoid prosecution altogether. Defendant has "acted . . . on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

The Class seeks declaratory and injunctive relief as to Defendants' unconstitutional wealth-based deferred prosecution program. Because the putative Class challenges the Defendants' practices as unconstitutional through declaratory and injunctive relief, and the same relief would apply to every Class member, Rule 23(b)(2) class certification is appropriate and necessary. *See, e.g.*, *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002) ("Rule 23(b)(2) certification is appropriate where plaintiffs seek declaratory or injunctive relief for class-wide injury.)."[3] As the Supreme Court explained:

> When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.

Dukes, 564 U.S. at 362–63. In the absence of the proposed settlement, a declaration stating that the Defendants' operation of the deferred prosecution program is unconstitutional would provide relief to every member of the Class. *See Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 198 (5th Cir. 2010) ("Instead of requiring common issues, 23(b)(2) requires common behavior by the defendant towards the class.").

As the relief requested makes clear, the requirements of Rule 23(b)(2) are satisfied because the "relief sought [by the Rule 23(b)(2) class] is injunctive or declaratory." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998); *Baby Neal v. Casey*, 43 F.3d 48, 58

[3] Rule 23(b)(2) arose out of experience "in the civil rights field," *Amchem*, 521 U.S. at 614 (citation omitted), in which the government typically treats a whole class in an unconstitutional manner based on law or government policy. "Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions." 5-23 *Moore's Federal Practice* § 23.43 (2017); *see also Newberg on Class Actions* § 1:3 (5th ed.) ("Rule 23(b)(2) authorizes a class action when a party has taken or refused to take action with respect to a class, and final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole. This category is typically employed in civil rights cases and other actions not primarily seeking money damages. The (b)(2) class action is often referred to as a 'civil rights' or 'injunctive' class suit.").

(3d Cir. 1994) (noting that requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief" for common legal claims); *see also Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 465 (S.D. Fla. 2002) (finding class certification appropriate when "the Class Plaintiffs sought exclusively injunctive relief based on their allegations"). Here, Plaintiff seeks only declaratory and equitable relief.

CONCLUSION

Plaintiff alleges that Defendants are engaged in the ongoing violation of the constitutional rights of the putative class members. The numbers of people currently affected, the indeterminate number of future class members, the common questions of fact and law among representative Plaintiff and proposed class members, and the adequacy of both the Plaintiff and undersigned counsel all weigh in favor of certifying the proposed Class for settlement.

Respectfully submitted,

/s/ Eric A. Foley

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