UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Richard W. DeOtte, et al., Plaintiffs, v. **Alex M. Azar II**, et al., Defendants.	Case No. 4:18-cv-825-O

REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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The defendants oppose certification for three reasons. First, they contend that a certified class should never be defined by reference to an individual's subjective religious beliefs. *See* ECF No. 30 at 2–3, 5–6, 8–9, 12–15. Second, the defendants object to the inclusion of "current and future" objecting employers and individuals. *See* ECF No. 30 at 7. Finally, the defendants complain that it will not be "administratively feasible" to determine class membership under the proposed class definitions. *See* ECF No. 30 at 7–8. All of this leads the defendants to conclude that the proposed classes fail to satisfy the requirement of "ascertainability," as well as "commonality" and "typicality."

None of these are reasons to deny certification. Courts certify Rule 23(b)(2) classes all the time under RFRA and RLUIPA, and it is common for these classes to be defined by an individual's subjective religious beliefs. *See, e.g.*, *Freeman v. Texas Department of Criminal Justice*, 369 F.3d 854, 858 (5th Cir. 2004) (certifying a Rule 23(b)(2) class comprising "TDCJ inmates who subscribe to the Church of Christ faith"); *see also* App. Tabs 1–10 (compiling examples). And in all events, the proposed classes can be easily redefined to turn on an individual's outward conduct rather than his inward thought processes. The Fifth Circuit has also repeatedly approved the certification of classes that include unknown future members. *See, e.g.*, *Pederson v. Louisiana State University*, 213 F.3d 858, 868 n.11 (5th Cir. 2000). And "administrative feasibility" is not a requirement for class certification in the Fifth Circuit.

I. The Proposed Classes Easily Satisfy The Fifth Circuit's Test For Ascertainability

Nothing in the text of Rule 23 requires a class to be "ascertainable" or "identifiable."[1] But numerous courts—including the Fifth Circuit—have imposed an "ascertainability" requirement on top of the criteria for class certification spelled out in Rule 23. *See De-Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) ("[T]o maintain a class

1. *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 913 (2017) ("[C]lass ascertainability . . . [is] neither mandated by the text of Rule 23 nor supported by a reasonable interpretation of the Rule's language and purpose.").

action, the class sought to be represented must be adequately defined and clearly ascertainable."). This "ascertainability" doctrine allows courts to deny certification to vague or poorly defined classes. *See John v. National Security Fire & Casualty Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" (citation omitted)). *DeBremaecker*, for example, rejected a proposed class of "residents of this State active in the 'peace movement,'" because of the "patent uncertainty of the meaning of 'peace movement' in view of the broad spectrum of positions and activities which could conceivably be lumped under that term." *Id.*

There is nothing vague or imprecise about the proposed class definitions. Each of them describes a clear and specific objection: Opposition to the compelled coverage of some or all contraceptive services, based on religious belief. And the class members will be easy to identify because their objections to the Contraceptive Mandate lead to specific *actions* that are easily ascertained. Each of the objecting employers, for example, will refuse to arrange for contraceptive coverage in the health insurance that they offer to their employees. The objecting individuals will seek out or obtain health insurance that excludes contraceptive coverage. Both the *beliefs*—and the *actions* that inevitably follow from those beliefs—are clearly set forth in the proposed class definitions. A class of individuals "active in the 'peace movement,'" by contrast, leaves everyone guessing as to what the required actions *and* beliefs might be. Just how much does one have to do to qualify as "active" in the peace movement? And what does "the peace movement" mean? Is it full-fledged pacifism, or does it include anyone who opposes any particular war?

The defendants complain that the proposed classes require "individualized inquiries" into the sincerity of an objector's religious beliefs, and they argue that this precludes ascertainability.[2] But the Fifth Circuit has certified classes that require *far* more difficult and complex "individualized inquiries" to determine membership. *In re Rodriguez*, 695 F.3d 360

2. The defendants appear to be arguing that the Court must be able to identify every potential class member before certifying the class. *See* ECF No. 30 at 6 ("Although it is possible to implement the rules without identifying all potential entities and individuals

(5th Cir. 2012), for example, approved the certification of "fail-safe" classes; these are classes that are "defined in terms of the ultimate question of liability" and "whose membership can only be ascertained by a determination of the merits of the case." *Id.* at 369–70; *see also id.* at 370 ("Stated otherwise, the class definition is framed as a legal conclusion."). The certified class in *Rodriguez* included all individuals:

> (a) who owed funds on a Countrywide serviced note as of February 26, 2008; (b) who have not fully paid the relevant mortgage note, fees, or costs owed to Countrywide, its successors and assigns; (c) who filed a chapter 13 proceeding in the United States Bankruptcy Court for the Southern District of Texas on or before October 15, 2005 and have confirmed chapter 13 plans that treated mortgages serviced by Countrywide; and (d) as to whom Countrywide has assessed a fee or cost governed by Rule 2016(a), attributable to a time after the filing of a bankruptcy petition and before the date on which the individual received a chapter 13 discharge, unless such fee or cost was approved in a Bankruptcy Court order.

Id. at 364. All sorts of "individualized inquiries" were required to determine class membership, yet the Fifth Circuit held that this class satisfied its ascertainability doctrine. *See id.* at 369–70. "Fail-safe classes" of this sort are controversial and other courts disallow them.[3] But they are lawful in the Fifth Circuit, despite the extensive "individualized inquiries" needed to determine membership.

And in *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999), the Fifth Circuit certified a class of "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the

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encompassed by the exemptions, it is not possible to do so under Rule 23."). If that is the defendants' position, it is mistaken. Courts certify classes all the time that include unknown and unnamed future members who cannot possibly be identified at the time of certification. *See, e.g.*, *Pederson*, 213 F.3d at 868 n.11; *see also infra* at 8–9.

3. *See, e.g.*, *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) ("A fail-safe class is impermissible because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." (internal quotation marks omitted)); William B. Rubenstein, *Newberg on Class Actions* § 3:6 (5th ed. 2011) ("Courts hold that such liability-begging definitions are administratively infeasible, as the inquiry into class membership would require holding countless hearings resembling 'mini-trials.'").

defective ventilation system in place aboard the vessel." *Id.* at 623. This class definition requires expert medical testimony to determine whether someone's ailments were "caused or exacerbated" by the defendant's faulty ventilation system. But the Fifth Circuit did not hesitate to certify this class, notwithstanding the need for extensive individualized inquiries.

Rodriguez and *Mullen* make clear that there is no problem in the Fifth Circuit with class definitions that require difficult and complex "individualized inquiries" to determine whether someone is a member—so long as the class *definition* is precise and avoids the vague and indeterminate criteria that were proposed in *DeBremaecker*. The defendants do not cite *any* authority from the Fifth Circuit that would allow this Court to deny certification on account of the "individualized inquiries" that might be required to determine class membership. And they do not make any effort to explain how a decision denying certification on this ground could be reconciled with *Rodriguez* and *Mullen*.

II. The Requirement Of Ascertainability Is Greatly Relaxed For Rule 23(b)(2) Classes

The requirement of "ascertainability" (also called "identifiability" or "definiteness") is also applied with far less rigor when certification is sought under Rule 23(b)(2). At least three circuits hold that "ascertainability" is categorically inapplicable to (b)(2) classes.[4] And the Fifth Circuit (along with many other courts) has recognized that the ascertainability requirement is greatly relaxed in the (b)(2) context:

> [T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance.

4. *See Shelton v. Bledsoe*, 775 F.3d 554, 563 (3rd Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief"); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) ("[W]hile the lack of identifiability [of class members] is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).").

In re Monumental Life Ins. Co., 365 F.3d 408, 413 n.6 (5th Cir. 2004) (quoting *Rice v. City of Philadelphia,* 66 F.R.D. 17, 19 (E.D. Pa. 1974)).[5] *Rodriguez* and *Mullen* approved (b)(3) classes despite the extensive individualized inquiries that were required; that creates an even steeper hill for the defendants, who must explain why this Court should reject ascertainability in the more forgiving (b)(2) context.

III. There Is No Prohibition Against Certifying A (b)(2) Class Defined By An Individual's Subjective Religious Beliefs, And Even If There Were The Proposed Classes Can Be Easily Redefined To Obviate This Objection

The defendants appear to be arguing that RFRA, RLUIPA, and Free Exercise claims may *never* be litigated as class actions because they require individualized inquiries into a class member's beliefs. *See* ECF No. 30 at 10 ("[C]laims brought under RFRA must be assessed by the Court on a case-by-case basis and are not suitable for class determination."). This contention is meritless. Courts certify classes of RFRA and RLUIPA claimants all the time, especially in prison litigation, and our appendix includes some of the many rulings that certify such classes or award classwide relief under RFRA or RLUIPA. *See* App. at Tabs 1–10.

At other times, the defendants appear to advance the more limited claim that classes should not be defined according to members' subjective religious beliefs. *See* ECF No. 30 at 6 (citing cases). This contention is also mistaken. Certified classes defined by members' subjective beliefs are common in RFRA and RLUIPA litigation. *See, e.g.*, *Gartrell v. Ashcroft*,

5. *See also Finch v. New York State Office of Children and Family Services*, 252 F.R.D. 192, 198 (S.D.N.Y. 2008) ("A Rule 23(b)(2) class need not be defined as precisely as a Rule 23(b)(3) class"); *Multi-Ethnic Immigrant Workers Organizing Network v. City of Los Angeles*, 246 F.R.D. 621, 630 (C.D. Cal. 2007) ("[L]ess precision is required of class definitions under Rule 23(b)(2) than under Rule 23(b)(2), where mandatory notice is required by due process . . . . Manageability is not as important a concern for injunctive classes as for damages classes." (citations omitted)); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325, 390 (2017) ("Conditioning certification on the ascertainability of class members should not apply to Rule 23(b)(2) classes because it is immaterial whether individual class members can be identified."); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 638–39 (2017) ("The definiteness and ascertainability requirements either do not apply in Rule 23(b)(2) cases, or apply in a far less demanding and precise manner.").

191 F. Supp. 2d 23, 24, 40–41 (D.D.C. 2002) (awarding classwide injunctive relief under RFRA to a class of prisoners "whose avowed religious beliefs forbid them from cutting their hair or shaving their beards"); *see also* App. at Tabs 1–8 (providing similar examples). The defendants cite district-court rulings from Indiana and Wisconsin to support their argument. *See* ECF No. 30 at 6 (citing *Lindh v. Dir., Fed. Bureau of Prisons*, No. 2:14-CV-151-JMS-WGH, 2015 WL 179793 (S.D. Ind. Jan. 14, 2015), and *Tatum v. Misner*, No. 13-CV-44-WMC, 2017 WL 4271657 (W.D. Wis. Sept. 26, 2017)).[6] But those cases were litigated in the Seventh Circuit, which flatly prohibits class definitions that turn on an individual's subjective state of mind. *See, e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660 (7th Cir. 2015) ("[C]lasses that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement."). No such prohibition exists in the Fifth Circuit—and it does not exist in the other circuits where district courts have certified RFRA or RLUIPA classes that are defined by reference to their members' actual religious beliefs.

Finally, even if the defendants were correct to oppose certification on this ground, the proper response is not to deny certification but to redefine the classes so that membership turns on one's outward conduct rather than internal thoughts. *See Mullins*, 795 F.3d at 660 ("Plaintiffs can generally avoid the subjectivity problem by defining the class in terms of conduct (an objective fact) rather than a state of mind."); *National Org. for Women, Inc. v. Scheidler,* 172 F.R.D. 351, 358–59 (N.D. Ill. 1997) (accepting modified class definition so that "membership in the classes sought to be certified is based exclusively on the defendants' conduct with no particular state of mind required"); *Monumental Life Ins.*, 365 F.3d at 414 ("District courts are permitted to limit or modify class definitions to provide the necessary precision."). In *Maston v. Willis*, No. 1:09-cv-00815-JMS-DML (S.D. Ind.), for example, the district court defined its RLUIPA class by reference to whether someone *asserted* a particular religious belief rather than *actually held* that belief. *See* App. at Tab 10 (certifying a

6. The third case that the defendants cite did not involve class certification and has no bearing on these Rule 23 issues. *See Cejas v. Brown*, No. 3:18-cv-00543-WQH-JLB, 2018 WL 3532964, at *4 (S.D. Cal. Jul. 20, 2018).

(b)(2) class defined as "[a]ll prisoners confined within the Indiana Department of Correction . . . who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available."). The same maneuver can be used here. The objecting-employer class can be defined to include:

> Every current and future employer in the United States that *claims to hold a sincere religious objection to* establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments.

And the objecting-individual class be defined to include:

> All current and future individuals in the United States who: (1) *claim to hold a sincere religious objection* to coverage or payments for some or all contraceptive services; and (2) *claim that they are* willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services from a health insurance issuer, or from a plan sponsor of a group plan, who is willing to offer a separate benefit package option, or a separate policy, certificate, or contract of insurance that excludes coverage or payments for some or all contraceptive services.

Although these proposed definitions may sweep in a few individuals or employers who falsely assert religious objections to the Contraceptive Mandate, that is no reason to withhold certification. *See In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014) ("[T]he possibility that some [claimants] may fail to prevail on their individual claims will not defeat class membership on the basis of the ascertainability requirement." (citation and internal quotation marks omitted)); *id.* at 811 ("[*Wal-Mart*] demonstrates that district courts do not err by failing to ascertain at the Rule 23 stage whether the class members include persons and entities who have suffered 'no injury at all.'"). The Court can address this by either: (i) Defining the classes to exclude any employer or individual if the defendants deny the sincerity of his religious objections; or (ii) Crafting an injunction that permits the defendants to continue enforcing the Contraceptive Mandate whenever they "deny the sincerity of a class member's religious objections." Under this regime, all who *claim* to be religious objectors will be

protected by a classwide injunction *unless* the defendants decide to deny the sincerity of an objector's religious beliefs. The defendants will not lightly deny the sincerity of a religious objection because if they are wrong they can be sued and enjoined in an individual lawsuit—and they will be required to pay the individual objector's attorneys' fees if they lose.

IV. The Defendants' Objection To The Inclusion Of Future Class Members Is Without Merit

The defendants claim that the classes of religious objectors should be limited to a "sufficiently definite time period," ECF No. 30 at 7, but the only cases that they cite involve Rule 23(b)(3) classes that seek damages. In a Rule 23(b)(2) class that seeks injunctive relief, there is nothing wrong with a class that includes all present and future religious objectors. The Fifth Circuit has repeatedly approved classes of this sort without any expression of concern. *See Pederson v. Louisiana State University*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) ("[T]he fact that the class includes unknown, unnamed future members . . . weighs in favor of certification" because the "the inclusion of future members in the class definition [is] a factor to consider in determining if joinder is impracticable." (citing *Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974)); *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017) (affirming district court's certification of class and subclasses under Rule 23(b)(2) that included present and future prison inmates); *Herbert v. Monsanto Co.*, 682 F.2d 1111, 1132–33 (5th Cir. 1982) (redefining and certifying a subclass under Rule 23(b)(2) that includes "All blacks who apply for employment with Monsanto in the future"); *Gore v. Turner*, 563 F.2d 159, 166 (5th Cir. 1977) (redefining and certifying a class under Rule 23(b)(2) of "all blacks who, in the future, may be denied equal access to housing under the defendant's control").

V. The Fifth Circuit Does Not Require That The Analysis Of Class Membership Be "Administratively Feasible"

The defendants also insist that the determination of class membership be "administratively feasible." *See* ECF No. 30 at 7. But no such requirement exists in the Fifth Circuit. *See* William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed. 2011) ("Some Circuits also

require that the class certification proponent demonstrate that the analysis of class membership be 'administratively feasible,' while other Circuits have explicitly rejected the administrative feasibility inquiry or have a more relaxed approach to it." (footnotes omitted)); *id*. at § 3:3 at n. 10.30 (listing the circuits that have adopted the "administrative feasibility" requirement; the Fifth Circuit is not among them). That is evident from *Rodriguez*'s approval of "fail-safe classes," as well as *Mullen*'s approval of a class whose membership turned on findings of medical causation. *See Rodriguez*, 695 F.3d at 364, 369–70; *Mullen*, 186 F.3d at 623. The administrative burdens associated with evaluating the sincerity of a religious objector's beliefs pale in comparison to the task of determining class membership in *Rodriguez* and *Mullen*. And in all events, those administrative burdens can be absolved by redefining the proposed classes along the lines described in Section III. The defendants' fear that they might be held in contempt for unwittingly enforcing the Contraceptive Mandate against a class member can be addressed by crafting an injunction that triggers contempt penalties only if the defendants knowingly or willfully enforce the Mandate against a religious objector; it has no bearing on whether the proposed classes satisfy the requirements of Rule 23.

VI. The Proposed Classes Easily Satisfy Rule 23's Commonality And Typicality Requirements

Commonality requires only a single common question of law and fact, and each of the proposed classes includes *multiple* legal questions common to the class: (1) Is there a "compelling governmental interest" in enforcing the Contraceptive Mandate against religious objectors? (2) Is the Contraceptive Mandate the "least restrictive means" of advancing those "compelling governmental interests"? The defendants do not deny any of this, but they insist that the need to determine the sincerity of an individual's religious beliefs defeats any possible showing of commonality or typicality. *See* ECF No. 30 at 9–15.

That has nothing to do with commonality or typicality. The classes *by definition* include only those who hold sincere religious objections to the Contraceptive Mandate. So the *class* will not be litigating sincerity, because that goes to whether someone *belongs* to the class and

does not affect whether the class is entitled to relief. Whatever goes into determining whether someone falls inside or outside the class logically precedes the common questions and typical claims that the representatives will litigate on behalf of the class members.[7]

* * *

"Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (citation and internal quotation marks omitted). The defendants have readily agreed to group-wide relief when litigants have challenged the Contraceptive Mandate under the doctrine of associational standing—and they have done so without raising any concerns about the need to evaluate the sincerity of each present or future member of the plaintiff organization. *See Catholic Benefits Ass'n v. Azar*, No. 5:14-cv-00240 (W.D. Okla.) (App. at Tab 11); *Reaching Souls Int'l v. Azar*, No. 5:13-cv-01092 (W.D. Okla.) (App. at Tab 12); *Little Sisters of the Poor Home for the Aged v. Azar*, No. 1:13-cv-02611 (D. Colo.), ECF No. 82 (App. at Tab 13). There is no basis for resisting classwide relief here, especially when the defendants have admitted that the Mandate violates RFRA and the alternative will require endless litigation from individual religious objectors, at considerable cost to the public fisc.

CONCLUSION

The motion for class certification should be granted.

7. The defendants note that some class members have previously challenged the Mandate and may be subject to judicial decrees. *See* ECF No. 30 at 12–13. This concern is easily addressed by re-defining the classes to exclude any objector subject to a judicial decree that contradicts the relief sought by the class representatives in this lawsuit. *See, e.g.*, *Catholic Benefits Ass'n v. Azar*, No. 5:14-cv-00240-R (W.D. Okla.), ECF No. 184 (App. at Tab 11) (excluding any employer who has "had an adverse ruling on the merits issued against it in another case involving the Mandate").

Respectfully submitted.

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Dated: March 15, 2019

CERTIFICATE OF CONFERENCE

I certify that on January 28, 2018, I conferred with Daniel Riess, counsel for the defendants, and he informed me that the defendants reserve the right to object to this motion pending their review of the papers that we file.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF SERVICE

I certify that on March 15, 2019, I served this document through CM/ECF upon:

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