IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

TATI ABU KING, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:23-cv-408-JAG
	)	
JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Not even Plaintiffs can discern the contours of the class they propose. They seek to certify a class of individuals who are (or will be) disenfranchised for convictions of any crimes that "were not a felony at common law" in 1870. But there is no reliable way to determine which modern-day offenses would have qualified as felonies at common law; indeed, Plaintiffs' own proffered expert was unable to classify *hundreds* of current Virginia felonies under Plaintiffs' proposed common-law test. And that is only the Virginia felonies; Plaintiffs' class would also include those convicted of felonies under federal law and the law of 49 other States. But Plaintiffs' proffered expert did not even attempt to classify those crimes. Plaintiffs thus fail to provide this Court with the boundaries of their proposed class.

Because the contours of the class are unknowable, Plaintiffs' class-certification motion should be denied. At the threshold, the class is not ascertainable, and thus cannot satisfy a critical requirement for *all* class certification actions. Nor can Plaintiffs satisfy Rule 23(a)'s requirements of typicality, commonality, and adequacy. Classifying the handful of criminal offenses that the two named Plaintiffs committed would not answer the many thousands of other thorny questions this Court would face in attempting to categorize a multitude of very different felonies under the common law of 1870. For similar reasons, Plaintiffs cannot satisfy the requirements of Rule 23(b)(2) because the purported class has a lack of cohesiveness. In nearly every way that matters, this case is not fit for resolution as a class action. The Court should deny Plaintiffs' motion for class certification.

BACKGROUND

In the Virginia Readmission Act of 1870, Congress approved Virginia's 1869 Constitution as "republican." 16 Stat. 62. The 1869 Constitution disenfranchised anyone convicted of any "felony"—including statutory felonies that were not felonies at common law. See Va. Const. art.

III, § 1 (1869). The Virginia Readmission Act prohibited Virginia from amending its Constitution to disenfranchise any class of persons who were not already disenfranchised under the 1869 Constitution, unless for crimes that were felonies at common law. 16 Stat. 63. Virginia continues to disenfranchise all felons in its current Constitution. See Va. Const. art. II, § 1 (1971).

Plaintiffs contend that Virginia is violating the Readmission Act. See Memo. in Support of Pls.' Mot. to Certify Class (Class Cert. Mot.) at 1 (ECF No. 150). According to them, the Readmission Act permits the Commonwealth to disenfranchise *only* those persons convicted of crimes that would have qualified as felonies at common law in 1870. *Ibid.* If a present-day State or federal felony would not have been understood as a felony at common law in 1870, Plaintiffs say, Virginia may not disenfranchise an individual convicted of that felony. *Ibid.*

Plaintiffs now ask the Court to certify the following class: "All citizens of the Commonwealth of Virginia who are currently, or in the future will be, disqualified from voting under Article II, Section 1 of the Virginia Constitution because they were convicted of a crime that was not a felony at common law in 1870." Class Cert Mot. 1. This Court should deny Plaintiffs' motion for class certification because it fails to satisfy any of the requirements of Rule 23, save numerosity.

LEGAL STANDARD

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). To come within the exception, a "party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. "Rather, the party must present evidence that

the putative class complies with Rule 23." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014).

First, the Fourth Circuit, like many circuits, has "repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *EQT Prod. Co.*, 764 F.3d at 358 (citation omitted). Courts often refer to "this rule as an 'ascertainability' requirement." *Ibid.* (collecting cases). Next, Federal Rule of Civil Procedure 23(a) provides that one or more members of a class may sue as representative parties on behalf of all members only if: (1) "the 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). A party must "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast Corp.*, 569 U.S. at 33 (quotation marks omitted).

Finally, "[t]he party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp.*, 569 U.S. at 33. Here, Plaintiffs argue that they satisfy Rule 23(b)(2) or, in the alternative, Rule 23(b)(1)(A). See Class Cert. Mot. 8–12. Rule 23(b)(2) requires that "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). Rule 23(b)(1)(A) requires that "prosecuting separate actions by or against individual class members would create a risk of

inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A).

ARGUMENT

Plaintiffs are unable to determine the contours of their own proposed class. The amorphous class definition they have offered does not satisfy the requirements of ascertainability, typicality, commonality, and adequacy due to the countless and varied questions that will arise when trying to apply Plaintiffs' proposed common-law test to the over 1,000 felonies in Virginia's code and innumerable other felonies under federal law and the law of other States. Each of these flaws is an independent basis for denying Plaintiffs' motion for class certification. For similar reasons, Plaintiffs cannot satisfy Rule 23(b)(2) due to a lack of cohesiveness in the proposed class. Plaintiffs fail at every turn of the analysis.

I. Plaintiffs cannot satisfy Rule 23's requirement of ascertainability

Plaintiffs cannot satisfy Rule 23's threshold requirement of ascertainability because, by their own admission, the scope of their class is unknowable. "A class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *EQT Prod. Co.*, 764 F.3d at 358. If "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Ibid.* (quotation marks omitted). "The requirement that there be a class will not be deemed satisfied unless it is administratively feasible for the court to determine whether a particular individual is a member." *Ibid.* (cleaned up). Otherwise, individual plaintiffs must bring their own suits. Here, Plaintiffs' own expert has conceded that it is impossible to identify the class. Plaintiffs' proposed class would require at least two inquiries: (1) what crimes were understood as felonies at common law in 1870, and (2) whether each of the thousands of modern-day felonies can be classified as falling within one of those

common-law felonies. On both points, Professor Hessick has stated that she cannot fully determine the answer.

With respect to determining which crimes were felonies at common law in 1870, Professor Hessick stated that "there was less consensus regarding which crimes were appropriately deemed common law felonies." Report of Carissa Hessick (Hessick Report) at ¶ 24 (ECF No. 148-2). Although Professor Hessick identified some crimes that she thought were common-law felonies, she is "uncertain about whether" other crimes "would have been considered felonies at common law in 1870." *Id.* ¶ 35; see also *id.* ¶ 34 (stating there are "other crimes about which I have less confidence" as to whether they would have been felonies at common law); *id.* ¶ 33 (stating there are other crimes that "*possibly* could have been understood to fall within the phrase 'felonies at common law' as used in the Virginia Readmission Act" (emphasis added)). Professor Hessick's inability to determine the crimes that would qualify as felonies at common law is fatal in and of itself: if there is no consensus on what was a "felony at common law" in 1870, a class of felons "convicted of a crime that was not a felony at common law in 1870" is impossible to ascertain. Class Cert. Mot. 1.

That failure is compounded by the impossibility of answering the second question—whether each modern-day crime falls within the scope of one of those (partially identified) common-law felonies. Even using their own proposed list of "felonies at common law" in 1870, Plaintiffs are unable to ascertain whether large swaths of modern felonies would have been common-law felonies in 1870. Indeed, Professor Hessick admits she was "unable to definitively classify 238 current Virginia statutory felonies as either falling within the phrase 'felonies at common law' as the term was used in the Virginia Readmission Act or falling outside of the

phrase." Hessick Report ¶ 41. Her inability to classify *hundreds* of felonies under her own test forecloses class certification.

Even within the context of *a single* Virginia felony, it is often extremely difficult to discern the scope of the class. Arson is a prime example. Professor Hessick asserted that arson would have been understood as a common-law felony in 1870. Hessick Report ¶ 44. But she was uncertain as to whether Virginia's felony arson statute qualified as a common-law felony. See Transcript of Deposition of Carissa Hessick (Hessick Dep. Tr.) at 113:14–22 (ECF No. 144-2). One of the reasons for her uncertainty was that the modern Virginia arson statute applies to "maliciously burning structures that would not have fallen within the understanding of common law arson," because common law arson was differentiated from "other burnings that were not a felony based on what was burned." *Id.* at 114:2–9, 14–15. The modern-day arson statute criminalizes the malicious burning of (among other structures) a "dwelling house," "occupied hotel," "hospital," "mental health facility," "occupied railroad car, boat, vessel, or river craft in which persons usually dwell or lodge," "occupied jail or prison," or "occupied church." Va. Code § 18.2-77. At her deposition, Professor Hessick was asked about each of these structures. Although she was confident that burning down a "dwelling house" would have qualified as a felony at common law, she could not answer whether burning down an "occupied hotel" would satisfy the test. Hessick Dep. Tr. 114:16–115:16. And while an occupied railroad car was "out" of the common law scope, it would "get[] more complicated once we start talking about barges, and boats, and those sorts of things." *Id.* at 116:6–15. Her responses with respect to the other structures demonstrates how many questions will arise even in the context of a *single* felony statute—let alone over a thousand—when attempting to apply Plaintiffs' test to Virginia's criminal code. See *id.* at 116:1–5, 116:16–117:1.

Plaintiffs' underdeveloped theory would raise a torrent of follow-on questions regarding precisely how to apply Professor Hessick's test. For example, if an individual convicted of violating § 18.2-77 did, in fact, burn down a dwelling house, may he be disenfranchised since that specific act was a felony at common law? Or does he benefit from the fact that the statute also makes it a felony to burn down other structures that would not have qualified as felonies at common law? Would the answer change if the statute divided up the structures into subsections—*e.g.*, "(a) dwelling house, (b) occupied church, and (c) mental health facility"? That this number of difficult questions can arise in the context of a single felony statute defies any contention that this case is suitable for resolution as a class action. And this Court would have to apply the test to thousands of statutes of conviction, not just one. A host of inquiries that would at best resemble the Byzantine task of applying the categorical approach under the Armed Career Criminal Act cannot be resolved in a single class-action suit. See, *e.g.*, *Mathis v. United States*, 579 U.S. 500, 538 (2016) (Alito, J., dissenting) (noting that the categorical approach requires judges to delve into "pointless abstract questions"); *United States v. Scott*, 990 F.3d 94, 125–26 (2d Cir. 2021) (Park, J., concurring) ("As a growing number of judges across the country have explained, the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice.").

Moreover, Plaintiffs provide an analysis of only *Virginia* felonies. But they seek certification for disenfranchisement with respect to *any* felony conviction. See Hessick Report ¶ 11 ("The same methodology would apply to felonies contained in the United States code, or felonies from other modern state criminal codes[.]"). Plaintiffs have offered no analysis whatsoever to help the Court determine the contours of the class with respect to felony convictions under federal law or the law of the 49 other States. Cf. *EQT Prod. Co.*, 764 F.3d at 357 (placing the burden on

Plaintiffs to demonstrate compliance with Rule 23). All they say is that the same "methodology" should apply to those crimes, Hessick Report ¶ 11, but Professor Hessick herself stated that a Court could not independently replicate her analysis "without serious errors," Hessick Dep. Tr. 43:9–14.

In a footnote, Plaintiffs contend that the ascertainability requirement does not apply to classes certified under Rule 23(b)(2). Class Cert. Mot. 9 n.4 (citing *Kadel v. Folwell*, 100 F.4th 122, 160 (4th Cir. 2024)). As an initial matter, their only cited authority for this proposition has been vacated. See *Folwell v. Kadel*, No. 24-99, 2025 WL 1787687 (June 30, 2025). Moreover, courts have recognized that, although the ascertainability requirement may be "less stringent" with respect to a Rule 23(b)(2) class, it nevertheless requires "a class definition that accurately articulates the general demarcations of the class of individuals." *Thorpe v. District of Colum.*, 303 F.R.D. 120, 139 (D.D.C. 2014) (quotation marks omitted). Here, Plaintiffs *admit* they cannot accurately articulate the "general demarcations" of the class of individuals. They are unable to classify as common-law felonies *hundreds* of modern-day Virginia felonies under their own test, and they conspicuously say nothing at all about felonies under federal law or the laws of other States. Thus, Plaintiffs cannot satisfy even the relaxed version of ascertainability for classes certified under Rule 23(b)(2). Finally, because Plaintiffs cannot satisfy Rule 23(b)(2) due to a lack cohesiveness in any event, see *infra* pp. 13–14, they must satisfy the ascertainability requirement given their alternative request for certification under Rule 23(b)(1)(A).

II. Plaintiffs fail to satisfy several Rule 23(a) factors

Plaintiffs fail to satisfy Rule 23(a) given the distinct legal inquiry required to classify every felony under their amorphous common-law test. Under Rule 23(a), plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (typicality), that "there are questions of law or fact common to the class" (commonality), and that

"the representative parties will fairly and adequately protect the interests of the class" (adequacy). Fed. R. Civ. P. 23(a). Plaintiffs cannot meet any of these three factors.

"The typicality requirement goes to the heart of a representative parties' ability to represent a class[.]" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). As part of this requirement, "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Id.* at 466–67. "[W]hen the variation in claims strikes at the heart of the respective causes of actions," the Fourth Circuit "ha[s] readily denied class certification." *Id.* at 467. "Thus, it follows that the appropriate analysis of typicality must involve a comparison of the plaintiffs' claims or defenses with those of the absent class members." *Ibid.*

That analysis confirms Plaintiffs' claims are not typical of the proposed class members. The proposed class representatives, Johnson and King, were collectively convicted of three crimes that would qualify for relief under Plaintiffs' theory—possession of a controlled substance with intent to distribute, distribution of a controlled substance, and neglect of a child. See ECF No. 152-1 ¶¶ 6, 15-17. But Plaintiffs seek to certify a class covering *every single* felony conviction in the Virginia code (which Plaintiffs quantify as over 1,000 crimes, see Hessick Report ¶¶ 39–41), the United States code, and the criminal codes of every single State in the Union. And these crimes all require *their own* determination as to whether they qualify as common-law felonies. Given that some untold number of modern-day felonies, such as felony arson in Virginia, include multiple variations—some of which may satisfy Plaintiffs' common-law definition and others that may not—each of these crimes may actually require *multiple* determinations as to whether they are in, out, or in-between. Plaintiffs do not hide the ball on this point: they are asking the Court to march through every possible felony conviction in the Virginia code, the federal criminal code, and the

code of every other State and analyze whether each different way of committing each crime would have been deemed a felony at common law in 1870. Because "the claims of" an unknowable number of absent class members—possibly in the tens of thousands—"will not be advanced by plaintiff[s'] proof of [their] own individual claim[s]" regarding the three crimes of which they were convicted, Plaintiffs cannot demonstrate typicality. *Deiter*, 436 F.3d at 466–67.

Plaintiffs' failure to show typicality also demonstrates why they cannot show commonality or adequacy either. "As the Supreme Court has said, the final three requirements of Rule 23(a)"—commonality, typicality, and adequacy—"tend to merge" or at least significantly overlap. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). All three "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5. For the same reason that Plaintiffs fail to show typicality, they also fail to show commonality. As the Fourth Circuit has explained, if a claim requires individualized review for various members, "[s]uch individualized review precludes a finding of commonality." *EQT Prod. Co.*, 764 F.3d at 363. Here, classifying thousands of different felony convictions, enacted by various sovereigns, underscores both the lack of commonality and that litigating this case as a class action is far from "economical." *Dukes*, 564 U.S. at 349 n.5.

For similar reasons, Plaintiffs cannot show adequacy. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "The adequacy of representation requirement overlaps with the typicality requirement because in the absence of

typical claims, the class representative has no incentives to pursue the claims of the other class members." *Olvera-Morales v. Int'l Lab Mgmt. Corp.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007) (quotation marks omitted).

Here, there is a substantial risk that the Plaintiffs—who are subject only to three relevant crimes of conviction on their theory—will not adequately represent all those convicted of *other* crimes. Professor Hessick provided an excellent example of this conflict. On Plaintiffs' theory, larceny is a felony at common law. Hessick Report ¶ 44. One would think this means that the Commonwealth could disenfranchise an individual convicted of any form of larceny. But at her deposition, Professor Hessick made clear that this was *not* her view. Even for those felonies that are "appropriately classified as a felony at common law" under her test, an *individual* could argue that his act of larceny would not have been a felony at common law. See Hessick Dep. Tr. 100:4–11. For example, "somebody who's convicted for larceny for stealing a trade secret," Professor Hessick offered, "might want to say, 'Look, as a general matter, larceny is a common law felony and was considered a common law felony in 1870, [but t]hat same thing can't be said about my conviction for theft of a trade secret'" because trade secrets were not recognized as a form of property in 1870. *Id.* at 100:12–17. But no individual convicted of larceny for stealing a trade secret is before the Court, and Plaintiffs are contending that "larceny" was one of "the core crimes that were considered felonies at common law" such that those convicted of larceny offenses can be disenfranchised. Memo. in Supp. of Pls.' Mot. for Summ. J. at 15 (ECF No. 152). Therefore, far from protecting the interests of absent class members, Plaintiffs are throwing overboard the person convicted of larceny for stealing a trade secret in the (vain) search for a more administrable test. And the same conflict exists for all present and future felons convicted of different offenses

than Plaintiffs' who might wish to make an argument along the lines that Professor Hessick is articulating.

Plaintiffs' litigation choices also demonstrate concerns about adequacy. Despite seeking to certify a class that includes individuals who committed federal felonies and felonies under the laws of the other 49 States, Plaintiffs have made no effort to categorize those crimes. They have exclusively concentrated on felonies under Virginia law, despite the fact that an undetermined, but certainly substantial, portion of the proposed class has been convicted of felonies under federal or non-Virginia state law.

In sum, Plaintiffs' proposed class fails every requirement of Rule 23(a) at issue.[1] Plaintiffs' attempt to certify a class that incorporates not only the 1,000-plus felonies in the Virginia code, but also all felonies under federal law or the law of any other State, raises innumerable thorny questions that will vary for each crime. The untold number of questions that Plaintiffs' proposed class presents forecloses any suggestion that "maintenance of a class action is economical" and that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5.

[1] Although Defendants have stipulated that the numerosity requirement of Rule 23(a) is satisfied, their stipulation does not, as Plaintiffs assert, "reflect[] that there are hundreds of thousands of Virginians ineligible to register to vote under the Felony Disenfranchisement Provision." Class Cert Mot. 2. Classes of one hundred or less have been held to satisfy the numerosity requirement. See, *e.g.*, *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984).

III. Plaintiffs fail to satisfy Rule 23(b)(2) due to the lack of cohesiveness among the proposed class members

Plaintiffs also cannot satisfy Rule 23(b)(2).[2] "Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification." *Williams v. Jones*, No. 9:14-cv-787-RMG-BM, 2014 WL 2155251, at *9 (D.S.C. May 22, 2014). "What cohesiveness means in this context is that the class's claims are common and that adjudication of the case will not devolve into consideration of myriad individual issues." 2 Newberg & Rubenstein on Class Actions § 4:34 (6th ed. June 2025 update). Therefore, "the Rule 23(b)(2) 'cohesiveness' requirement is not met" when "Plaintiffs' claims—including the requests for declaratory and injunctive relief—require individualized . . . determinations." *Parsons v. Columbia Gas Transmission, LLC*, Nos. 2:19-cv-649, 2:20-cv-279, 2022 WL 4809492, at *13 (S.D. W. Va. Sept. 30, 2022); see also *ibid.* ("'[C]ohesiveness is lacking where individual issues predominate' and 'a class under Rule 23(b)(2) must not be overrun with individual issues.'" (quoting *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 635–36 (W.D. Wash. 2011))).

One requirement of "'cohesiveness'" is that "any classwide injunctive relief can satisfy the limitations of Federal Rule Civil Procedure 65(d)—namely, the requirement that it 'state its terms specifically; and describe in reasonable detail the act or acts restrained or required.'" *Williams*, 2014 WL 2155251, at *9 (quoting *Shook v. Board of Cnty. Commr's of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (Gorsuch, J., for the panel)). Therefore, "individual issues" in a proposed Rule 23(b)(2) class "cannot be avoided simply by formulating an injunction at a stratospheric level of abstraction," because "'injunctions simply requiring the defendant to obey the law are too

[2] Plaintiffs alternatively ask the Court to certify their class under Rule 23(b)(1)(A). See Class Cert. Mot. 9–12. But the ascertainability requirement indisputably applies in full force to a Rule 23(b)(1)(A) class, and Plaintiffs cannot satisfy that requirement for the reasons explained *supra*, at pp. 4–8.

vague' to satisfy Rule 65." *Shook*, 543 F.3d at 604 (quoting *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 895 F.2d 659, 668 & n. 5 (10th Cir.1990)). For example, the court in *Williams v. Jones* declined to certify a class that would require it "to determine what constitutes 'adequate' medical training or deliberate indifference," because "it would be extraordinarily difficult to craft an injunction satisfying the specificity requirements of Fed. R. Civ. P. 65(d)." 2014 WL 2155251 at *9.

Plaintiffs cannot demonstrate cohesiveness under Rule 23(b)(2) given their admitted uncertainty about what crimes qualify as "felonies at common law." Were this Court to enter Plaintiffs' requested injunction, Defendants would be required—under threat of contempt—to answer thousands of variations of questions that not even Plaintiffs' proposed expert can answer. Thus, Plaintiffs' attempt to avoid raising individual issues has led to a class definition at a high level of abstraction, which would lead to an injunction that is "too vague to satisfy Rule 65." *Shook*, 543 F.3d at 604 (quoting *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004)). This lack of cohesiveness precludes certification under Rule 23(b)(2). In short, no matter the part of Rule 23 that Plaintiffs invoke, the result is the same: this case cannot be certified as a class action.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for class certification.

Dated: August 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on August 8, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

*Erika L. Maley*_____
Erika L. Maley (VSB #97533)
Solicitor General