IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC. and REGIS GOYKE,	)	
Plaintiffs,	)	CIVIL ACTION FILE NO.
v.	)	1:08-CV-2141-CC
PINKIE TOOMER, in her official capacity as Judge of the Probate Court of Fulton County, Georgia, and all others similarly situated	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO CERTIFY CLASS

Introduction

Plaintiffs seek to resolve the constitutionality of a Georgia statute that prohibits non-residents of Georgia from receiving a Georgia firearms license ("GFL"). GFLs are issued by the 159 county probate judges. When Putative Class Representative/Defendant Toomer informed Plaintiff Goyke that it was impossible for him to apply for and receive a GFL, solely because of his non-residency, he commenced this action.

Plaintiffs filed a Motion to Certify Class. Rather than attempting to show that class certification is inappropriate in this case, Defendant opposes certification based primarily on arguments that Plaintiffs have not sufficiently shown the need for certification. Plaintiffs show this Court that legal precedent indicates certification is appropriate and the Motion is well founded and should be granted.

Factual Background

Plaintiff Regis Goyke is a resident of the State of Wisconsin and a citizen of the United States. Declaration of Regis Goyke, ¶¶ 1-2. On June 19, 2008, Goyke's counsel contacted Defendant's office to inquire into Goyke applying for a GFL as a nonresident of Georgia. Defendant's office replied that he would not be permitted even to apply, because Georgia law specifies residency in the Georgia county where applying as a prerequisite. *See*, O.C.G.A. § 16-11-129(a). Declaration of John Monroe, ¶ 3. Plaintiff GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. Its primary mission is to foster the rights of its members to keep and bear arms. Declaration of Edward Stone, ¶ 2. Goyke is a member of GCO. GCO has several other members who are not Georgia residents. *Id.*, ¶¶ 3-4.

Argument

Defendants lose sight of the primary purposes of the class action rules: to achieve economies of time and effort, *Buford v. American Finance Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); and, to accomplish judicial economy by avoiding multiple suits, *Haley v. Medtronic, Inc.*, 169 F.R.D. 643 (C.D. Cal. 1996). "The very purpose to be served by a class action is the opportunity it affords to prevent multiplicity of suits based on a common wrong…. If we were to deny a class action simply because all of the allegations of the class do not fit together like pieces in a jigsaw puzzle, we would destroy much of the utility of Rule 23." *Green v. Wolf Corp.*, 406 F.2d 291 (2nd Cir 1968). "[I]f there is to be an error made, let it be in favor and not against the maintenance of a class action, for it is always subject to modification should later developments during the course of the trial so require." *Id.*, 406 F.2d at 298, *citing Esplin v. Hirschi*, 402 F.2d 94 (10th Cir 1968).

Defendant makes no effort to show this Court that the purpose of the rules would not be accomplished by certification of the class in this case. Nor can she. It is clear from Plaintiffs' initial Brief and this Reply that the purpose of the rules is accomplished by certification in this case.

Numerosity

Defendant criticizes Plaintiffs' numerosity arguments because the 159 putative class members are all identifiable and all are within the State of Georgia. Defendant mistakenly attempts to show that because joinder of all 159 probate judges is theoretically ***possible,*** it necessarily is ***practical.*** Defendant would have this Court believe that any number of identifiable and state-concentrated class members will overcome the presence of numerosity. This is not the law.

"[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir 1986). In the instant case, common sense dictates the finding that 159 class members, four times the presumptively-numerous threshold, are too many to have in a single case. While it might be possible in some fantastic way to litigate a case with that many defendants, it simply is not practicable to do so.

Defendant relies on a district court case from Florida where the court found the number of putative class members to be "closer to zero" and all within Florida with known addresses. *Kuehn v. Cadle Co., Inc.* 245 F.R.D. 545 (M.D. Fla. 2007). Because the district court decertified the class in *Kuehn* and mentioned that all class members could be identified and all are defined to be within Florida, Defendant has

inferred the existence of a rule that identifiable class members within a single state are not numerous. There is no such rule.

The district court decertified the class in *Kuehn* primarily because there was no reliable evidence on how many class members there actually were. The plaintiff had merely speculated on how many class members there might be. In the instant case, however, it is known with certainty (and Defendant does not and can not dispute) that there are 159 probate judges in Georgia. In *Edmondson v. Simon,* 86 F.R.D. 375, 379 (N.D. Ill. 1980), the court said, "[W]hen the class is large, numbers alone are dispositive, but when the class is small, factors other than numbers are significant" (finding a class of 85 to be *per se* numerous). *See also Massengill v. Board of Education*, 88 F.R.D. 181, 184 (N.D. Ill. 1980) ("As a general rule, joinder of over one hundred people is impractical.").

Courts around the country routinely assume more than 40 to be a numerous class. *Wolkenstein v. Reville,* 539 F.Supp. 87 (W.D. N.Y. 1982); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 595 F.Supp. 1404 (D.C. Md. 1984) (25-30 members raises presumption that joinder would be impractical); *Talbott v. GC Services, L.P.,* 191 F.R.D. 99 (W.D. Va. 2000) (Joinder is usually presumed to be impractical for 25 or more); *Krieger v. Gast*, 197 F.R.D. 310 (W.D. Mich. 2000) (Class of forty or more is

sufficient); *Carrier v. JPB Enterprises,* 206 F.R.D. 332 (D.C. Me. 2002) (class of more than forty raises presumption that joinder is impracticable); *In re Nigerian Charter Flights Contract Litigation,* 233 F.R.D. 297 (E.D. N.Y. 2006) (More than 40 class members constitutes presumption of numerosity); *Iglesia-Mendoza v. La Belle Farm, Inc.,* 239 F.R.D. 363 (S.D. N.Y. 2007) (125 "easily" satisfies numerosity requirement); *Barnes v. District of Columbia,* 242 F.R.D. 113 (D.C. Dist. Col. 2007).

Commonality

Defendant relies on *Love v. Turlington*, 733 F.2d 1562 (11th Cir 1984) for the proposition that commonality is not present in the instant case. Defendant completely mischaracterizes *Love,* perhaps confusing it with another case with the same appellee, *Debra P. v. Turlington,* 664 F.2d 397 (5th Cir 1981). Read together, *Love* and *Debra P.* serve only to bolster Plaintiffs' commonality claim.

In *Debra P.*, the State of Florida used a "functional literacy test" to determine whether the Florida high school students taking the test would receive diplomas, regardless of their academic records. That is, passing the test was a condition precedent to receiving a diploma. "Commonality and typicality were clearly present," and class certification was granted. *Love,* 733 F.2d at 1564.

In *Love*, however, a different test was used to identify students who needed remedial programs. There, the needs of each student were different, and the results of the test were not blindly used to alter a students' curriculum. Commonality was not present. *Id.*

The instant case parallels *Debra P.*, but not *Love.* The "test" in the instant case is the simple inquiry of whether Plaintiffs are Georgia residents. The results of the test are applied uniformly throughout the state, because state law forbids issuing GFLs to non residents. The test of residency is a threshold test to determine whether a GFL applicant can apply. Commonality and typicality are therefore present.

Defendant obfuscates the inquiry by claiming that multiple factors go into the decision to issue or deny a GFL. Defendant loses sight of the fact that Plaintiffs are not attacking any eligibility requirements, application practices, or any other aspects of the GFL application process besides the constitutionality of requiring that GFL applicants be Georgia residents. That single test is applied, as state law requires, in every county. It is a threshold test that, if failed, results in denial of the right to apply for a GFL. It is a common question for all putative class members.

Defendant employs a cramped reading of the commonality requirement that is not supported in the law. "Rule 23(a)(2) is relatively easy to satisfy. Therefore it is

not surprising that very, very few cases have been dismissed for failing to meet the common question requirement." *Buford v. H&R Block*, 168 F.R.D. 340, 349 (S.D. Ga. 1996). "Rule 23(a)(2) requires only that the class movant show that a common question of law or fact *exists;* the movant need not show, at this stage, that the common question *overwhelms* the individual questions of law or fact which may be present within the class. *Id.* (citations omitted, emphasis in original). Moreover, there is an assumption of commonality where plaintiffs seek certification of class in a case for an injunction to right alleged constitutional wrongs. *Nicholson v. Williams,* 202 F.R.D. 377 (E.D. N.Y. 2001).

Typicality

Defendant attacks the typicality of putative class members' defenses by attempting to reach the merits of Plaintiff Goyke's claim against Defendant. In deciding to certify a class, the Court is not to inquire into the merits of the case. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). The question of typicality is whether the defenses of the putative class representative share "the same essential characteristics as the [defenses] of the class at large." *Appleyard v. Wallace,* 754 F.2d 955, 958 (11th Cir 1985). "[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Id.* Finally,

"Typicality may be assumed where nature of relief sought is injunctive and declaratory." *Nicholson v. Williams,* 202 F.R.D. 377 (E.D. NY 2001).

In the instant case, the legal theories are exactly identical. Plaintiffs' theory is that the state statute prohibiting issuing GFLs to non-residents is unconstitutional. Neither are any significant factual differences anticipated. Of course, if there is some anomalous circumstance in the case of an individual class member, that member can opt of the class. Because the relief sought is declaratory and injunctive, typicality is assumed.

Adequacy of Representation

While not attacking her counsels' capabilities, Defendant questions whether she can adequately represent the class. Defendant conjures up potential conflicts among her fellow probate judges. Claiming she lacks a personal interest in the case, Defendant worries that her fellow judges may be "avid gun advocates or opponents," and that such feelings could "color their response" in this case.

Defendant's fears are unfounded. She offers no evidence that any putative class member, all of them judges, would allow their personal feelings to cloud their positions. Moreover, Defendant does not illustrate how an individual class member's personal feelings about guns would alter the defense or constitute a conflict.

Defendant has not given any indication that she does not intend to defend this case vigorously, and there is no reason to believe that she will not. Finally, an individual class member who preferred to defend herself, as opposed to letting Defendant represent her interests, would be free to opt out of the class. Fed. R. Civ. P. 23(c)(2)(B)(v).

Common Questions Predominate Over Individual Questions

Once again, Defendant confuses the question in this case (Is the state prohibition against issuing GFLs to non-residents constitutional?) with the subject of GFL eligibility generally. It will not be necessary in this case to consider the eligibility criteria for GFLs other than the residency requirement. Plaintiffs are not asserting that the Court should order Defendant or other class members to issue GFLs. Plaintiffs only seek the invalidation of the residency test.

Defendant claims that individual questions among the class members will predominate over the class-wide questions. This simply cannot be the case. The only question before the class is the one noted above. It does not matter how an individual class member determines any other factors of eligibility than residency. It does not even matter how an individual class member ***determines*** residency, because the

premise of Plaintiffs' case is that the Plaintiffs are stipulated not to be residents. There is nothing to determine in this regard.

This is a not a case with a plaintiffs' class where each class member has unique circumstances, because it is not a plaintiffs' class at all. The defendant class is composed of 159 members that are identically situated. They all are probate judges that have no statutory discretion to issue GFLs to non-residents.

Superiority of Class Action

Plaintiffs opening Brief noted that prosecuting this case as a class action will conserve considerable judicial resources. Plaintiffs also note that the pooled resources of the class defendants are better suited to defending this action than having each class member defend himself or herself in a separate case.[1]

In addition, Plaintiffs discussed each of the factors of Rule 23(b)(3) in their Complaint (and Amended Complaint). Plaintiffs will re-visit them briefly below.

[1] Plaintiffs note that they purposefully selected Defendant as the class representative because of the resources available to her in the Fulton County Attorney's Office. Plaintiffs could have brought this case against a probate judge in a small county with little hope of defending herself adequately, but Plaintiffs seek to have this matter resolved correctly and appropriately.

1. Individual Interests of Class Members

Plaintiffs are aware of no individual interests of class members in controlling individual defenses. Given that each putative class member is a government official merely carrying out ministerial duties assigned to her, there is no reason to believe otherwise. If, however, it turns out that there are individual class members that want to control their own defenses (as illogical as that would appear), such class members can opt out of the class. Given that Defendant has not indicated that she actually believes there are such members, her argument on this subject appears to be *pro forma* and not based on such a belief.

Defendant again introduces the topic of class members having different "method[s] for determining if a GFL applicant is eligible." Plaintiffs reiterate that the ***method*** of determining eligibility is not an issue in this case. It is irrelevant to Plaintiffs ***how*** Defendant and the class members determine that a GFL applicant is not a resident. What is important is ***that*** they make (really that they make use of) the determination at all. The question is whether that determination, made by whatever method, may constitutionally prohibit an applicant from applying for and receiving a GFL.

2. Existence of Other Related Litigation

Plaintiffs have brought no related litigation, and they are aware of no other by other plaintiffs. Defendant does not assert that there is such other litigation. In fact, she says there is none.

3. Desirability of the Forum

Plaintiff GCO is in this District. GCO has members throughout Georgia and some members (who have interest in this case) in other states. Plaintiffs' counsel is in this District. Defendant is in this District. Defense counsel is in this District.

This appears to be a convenient forum for all parties and counsel except for Plaintiff Goyke. GCO's other non-resident members are not expected to be needed to participate. Given the convenience of this forum to most parties and counsel, this appears to be a reasonable forum in which to have this case. There is no reason to believe a different forum would be more preferable, and Plaintiffs note that Defendant has conceded that this forum is acceptable.

4. Manageability

Plaintiffs have noted (and Defendant cites to Plaintiffs' assertion) that this case would be easily managed as a class action. The class members are known and readily identifiable. Defendant, as class representative, has ready access to an email listserve

with which to communicate to all class members. This case should be easier to manage than most class actions for those reasons alone. The only argument Defendant makes against the manageability of the case is that the case is not "necessary," but she cites no authority for the proposition that an assertion of lack of necessity equates to unmanageability.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Plaintiffs' Reply in Support of Motion for Class Certification was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Plaintiffs' Reply in Support of Motion to Certify Class on August 1, 2008 using the CM/ECF system which automatically will send email notification of such filing on the following:

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