UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

JOHN P. MIALL, JR., ROBYN HITE, DAVID SHAW, DANIE JOHNSON, and WILLA GRANT, Plaintiffs, v. CITY OF ASHEVILLE, DEBRA CAMPBELL, in her official capacity as City Manager of the City of Asheville, and ESTHER MANHEIMER, in her official capacity as Mayor of the City of Asheville, Defendants.	Civil Action No. 1:23-cv-00259-MR-WCM **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

Plaintiffs move for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The proposed class will be represented by Plaintiffs John Miall; Robyn Hite; David Shaw; Danie Johnson; and Willa Grant (Plaintiffs). The proposed class consists of past, present, future, and deterred nonminority Asheville or Buncombe County applicants to the Human Relations Commission of Asheville (HRCA) that—but for their race—are qualified to apply and compete for an appointment to the HRCA on equal footing.

LEGAL STANDARD

Plaintiffs seeking class certification must "affirmatively demonstrate" by a preponderance of the evidence that the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. *See Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rule 23(a) requires that (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. *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 233–34 (4th Cir. 2021). The Fourth Circuit also requires that putative class members be "ascertainable" with reference to objective criteria. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Finally, class actions brought under Rule 23(b)(2) require the putative class representatives to show 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 … is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

ARGUMENT

I. The Proposed Class Satisfies the Numerosity Requirement

Rule 23(a)(1) contains a numerosity requirement that calls on a party seeking class certification to show that the proposed class is so numerous that joinder is impracticable. "Though no specified number is needed to maintain a class action … a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone." *In re Zetia,* 7 F.4th at 234 (citation omitted). Here, the putative class includes all past, present, and future nonminority Asheville or Buncombe County applicants to the HRCA that have applied, are qualified to apply, or would have applied for an appointment to the HRCA but for the City's race-based preferences.

Although it is difficult to determine the exact number of class members, any reasonable estimate would put the number of class members at well above 40. For one, Asheville has received at least 46 applications to the HRCA from nonminority applicants who were subjected to the City's race-based preferences, and about 30 of those nonminority applicants were not appointed to the HRCA. (*See* Exhibit 1 to Declaration of Andrew Quinio (Quinio Decl.)). But these numbers do not account for all the would-be nonminority applicants to the HRCA—in the past and future—if not for the City's advertisements of its race-based preferences for appointing individuals to the HRCA. *See, e.g.*, *Christman v. Am. Cyanamid Co.*, 92 F.R.D. 441, 451 (N.D.W. Va. 1981) (putative

class in sex discrimination case determined to be sufficiently numerous when it included women deterred from applying to defendant employer by discriminatory hiring policies); and *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981) ("Moreover, the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met …"). Recent Census Bureau data estimates that 77.5% of Asheville's 93,776 residents are white and non-Hispanic.[1] Thus, it would be an impracticable, time-intensive endeavor to contact all eligible nonminority citizens of Asheville and Buncombe County to inquire if they would have applied for appointment to the HRCA but for the City's policies of race-based preferences for appointments and would be willing to join this lawsuit.

Courts have held "speculation is permitted in the case of prospective classes for injunctive relief on behalf of those who will be harmed by future allegedly wrongful conduct, at least when joined with a fixed class of individuals suffering current harm." *Casale v. Kelly*, 257 F.R.D. 396, 405 (S.D.N.Y. 2009) (*citing Boucher v. Syracuse Univ.*, 164 F.3d 113, 119 n.11 (2d Cir.1999)); *see also Doe v. Charleston Area Med. Ctr., Inc*., 529 F.2d 638, 645 (4th Cir. 1975). Class certification is further appropriate because of the financial circumstances of proposed class members. *Torrezani v. VIP Auto Detailing, Inc.*, 318 F.R.D. 548, 554 (D. Mass. 2017) (certifying class of fewer than 40 members because "the class members have limited financial resources and would find it difficult to pursue the claims themselves"); *Gries v. Standard Ready Mix Concrete, L.L.C.*, 252 F.R.D. 479, 486–87 (N.D. Iowa 2008) (collecting cases). Here, the proposed class members are nonminority applicants and residents of Asheville and Buncombe County seeking equal treatment in the consideration of their applications to the HRCA. Given that service on the HRCA is an

[1] United States Census Bureau, QuickFacts: Asheville city, North Carolina, https://www.census.gov/quickfacts/fact/table/ashevillecitynorthcarolina# (last accessed Sept. 28, 2023).

unpaid, volunteer position, proposed class members are unlikely to expend financial resources on costly and potentially protracted litigation to seek an injunction to vindicate their constitutional rights. Moreover, many proposed class members are presumably reticent to bring individual lawsuits out of concern it may prejudice their chance to be appointed to other Asheville commissions.

II. There Are Questions of Law or Fact Common to the Members of the Proposed Class

Commonality requires a plaintiff to demonstrate that the proposed class's claims "depend upon a common contention," the resolution of which is "central to the validity" of each member of the class's claims. *Wal-Mart*, 564 U.S. at 350. That is precisely the case here. The putative class representatives intend to litigate questions of law common to members of the proposed class. Namely, whether the City of Asheville's appointment preference for minority applicants to the HRCA runs afoul of the Equal Protection Clause of the Fourteenth Amendment. This question is relevant to the claims of each proposed class member because each proposed class member's application to the HRCA would be subject to the City's race-based preferences for appointments to the HRCA. A court decision enjoining Asheville and its officials from applying race-based preferences for appointments to the HRCA "will resolve an issue that is central to the validity of each one of the claims" of the class members "in one stroke." *Id.*; *see also id.* at 359 (even a single common question will satisfy commonality).

III. The Plaintiffs' Claims Are Typical of the Claims of the Proposed Class

The Plaintiffs' claims here are typical of the claims of the proposed class. This typicality requirement, which tends to merge with the commonality requirement, *see Wal-Mart*, 564 U.S. at 349 n.5, does not require "that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006). The central inquiry is whether "plaintiff's claim is typical if it arises from the same event or practice or

course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Olvera-Morales v. Int'l Lab. Mgmt. Corp.*, 246 F.R.D. 250, 257 (M.D.N.C. 2007) (quoting *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1082 (6th Cir. 1996)). Here, both the Plaintiffs and members of the proposed class are nonminority applicants or residents who would otherwise compete for an appointment to the HRCA on equal grounds but for their race. Plaintiffs' claims share the same legal theory as the claims of the class: that Asheville's race-based preferences for appointments violate the Equal Protection Clause of the Fourteenth Amendment by distinguishing individuals on the basis of their race.

Additionally, the class representatives are not subject to unique claims that could become the focus of the litigation. *Wiseman v. First Citizens Bank & Tr. Co.*, 212 F.R.D. 482, 488 (W.D.N.C. 2003). While it is possible that discovery may uncover differences in the chances that any particular nonminority applicant ultimately receives an appointment to the HRCA, it is well-settled that the injury in an equal protection case involving racial discrimination is not the ultimate denial of the benefit, but the erection of "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

IV. The Plaintiffs Will Fairly and Adequately Protect Members of the Class

The Plaintiffs here satisfy the adequacy requirement, which requires them to demonstrate that they fairly and adequately protect the interests of the class. The adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "The moving party must show that 1) plaintiff's interests are not antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457 (E.D.N.C. 2011) (citation omitted).

Here, the Plaintiffs can make both showings. First, the interests of the representative parties will not conflict with the interests of the class members. The Plaintiffs seek relief that would benefit each of the absent class members: an injunction preventing Asheville from flouting the Equal Protection Clause and crafting race-based preferences for appointments in a way that burdens individuals of the disfavored race. The Plaintiffs have a strong incentive to pursue a favorable ruling from this Court—as such, a ruling would not just vindicate their fundamental right to equality before the law, but also give their applications to the HRCA fair and equal consideration. Second, the class will be represented by experienced and competent counsel. Plaintiffs are represented by Pacific Legal Foundation, a public interest nonprofit with 17 wins before the Supreme Court of the United States—including three in the last term—and a long track record of advancing the important principle of equality before the law.[2] The proposed class members can therefore rest assured that counsel will vigorously prosecute this action on behalf of the class.[3]

V. The 23(b)(2) Requirements Are Met

Rule 23(b)(2) provides that class certification is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Gaston v. LexisNexis Risk Sols., Inc*., 483 F. Supp. 3d 318, 341 (W.D.N.C. 2020). Certification under Rule 23(b)(2) is warranted in cases where "a single injunction or declaratory judgment would provide relief to each member of the class." *EQT Prod. Co.*, 764 F.3d

[2] https://pacificlegal.org/equality-before-the-law/; *see also* Quinio Decl. at Par. 3.

[3] Rule 23 contains an implicit requirement that a putative class be ascertainable with reference to objective criteria. *See EQT Prod. Co.*, 764 F.3d at 358. Here, the nonminority applicants have met the ascertainability requirement a court can readily identify the class members in reference to objective criteria. *Id.* The class members can be determined by asking a simple question: Whether a current, prospective, or deterred nonminority applicant is otherwise eligible to serve on the HRCA, i.e., a resident of Asheville or Buncombe County demonstrating an interest and experience in human relations.

at 357. Civil rights class action with an uncertain number of class members are uniquely suited for certification under Rule 23(b)(2). *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("The twin requirements of Rule 23(b)(2)—that the defendant acted on grounds applicable to the class and that the plaintiff seeks predominantly injunctive or declaratory relief—make that Rule particularly suited for class actions alleging racial discrimination and seeking a court order putting an end to that discrimination."); *see also Chicago Teachers Union v. Board of Educ. of City of Chicago*, 797 F.3d 426, 441 (7th Cir. 2015) ("[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes).

The class representatives in this case do not seek individualized relief or individually calculated damages but instead seek "either … a declaration about or [to] enjoin the *defendant's actions* affecting the class as a whole." *Thorn*, 445 F.3d at 330. The Plaintiffs' lawsuit seeks to enjoin Asheville from: (1) Appointing members to the Human Relations Commission of Asheville (HRCA) under the race-based appointment preferences set forth in the Asheville Code of Ordinances, Chapter II, Article III, Division 14, Sec. 2-185.25, and any other policy, practice, or procedure in existence or being proposed that provides race-based appointment preferences to applicants to the HRCA; and (2) Otherwise discriminating on the basis of race in making appointments to the HRCA. The Plaintiffs seek a "single injunction" that would ultimately "provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. Certification is warranted under Rule 23(b)(2).

CONCLUSION

Plaintiffs' motion for class certification should be granted.

DATED: October 6, 2023.

Respectfully submitted,

/s/ Jessica L. Thompson

Jessica L. Thompson
N.C. Bar No. 48112
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Tel.: (202) 888-6881
Fax: (916) 419-7747
JLThompson@pacificlegal.org

Andrew Quinio*
Cal. Bar. No. 288101
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Tel.: (916) 419-7111
Fax: (916) 419-7747
AQuinio@pacificlegal.org

**Pro Hac Vice*

Ruth C. Smith
N.C. Bar No. 26754
The Elmore and Smith Law Firm, P.C.
79 Woodfin Place, Suite 103
Asheville, NC 28801
Tel.: (828) 367-7998
Fax: (828) 367-7991
ruth@mywncattorney.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2023, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

Eric P. Edgerton
City of Asheville
7 Carraway Street
Woodfin, NC 28804
eedgerton@ashevillenc.gov
Counsel for Defendants

/s/ Jessica L. Thompson
Jessica L. Thompson