

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

WENDY WHITAKER, et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO.
	:	
vs.	:	4:06-CV-0140-CC
	:	
SONNY PERDUE, et al.,	:	
	:	
Defendants.	:	

ORDER

On June 20, 2006, Plaintiffs filed this action challenging discrete portions of Georgia’s new sex offender residency law, Act No. 571, Ga. Laws 2006 (HB 1059), codified at Ga. Code Ann. § 42-1-15 (“the Act”), including the portion of the Act that prohibits anyone on the registry from living within 1,000 feet of any school bus stop in Georgia. See § 42-1-15(a) (“No individual required to register pursuant to Code Section 42-1-12 shall reside . . . within 1,000 feet of any . . . area[s] where minors congregate.”); § 42-1-12(a)(3) (defining “area where minors congregate as including “all . . . school bus stops”); § 42-1-12(a)(19) (defining school bus stop as “a school bus stop as designated by local school boards of education or by a private school”). Plaintiffs filed a Motion for Temporary Restraining Order, which the Court granted in part on June 26, 2006. The Court entered a written order reflecting this oral ruling on June 27, 2006. Plaintiffs now ask the Court to provisionally certify a class in this action, such class to consist of all persons who have registered as sex offenders pursuant to § 42-1-12, or who must so register in the future, and who are harmed by the residency, working, and loitering provisions of the Act. While the Court disagrees with Plaintiffs’ broad definition of the class in this action, the Court finds that provisional class certification is appropriate here.

The Court hereby PROVISIONALLY CERTIFIES a class consisting of all persons who registered as sex offenders pursuant to § 42-1-12 on or before July 1, 2006 and who reside within 1,000 feet of a currently-designated school bus stop or a school bus stop designated in the future.¹

I. CLASS CERTIFICATION ANALYSIS

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). An action may be maintained as a class action if all four subsections of Rule 23(a) and at least one subsection of Rule 23(b) are satisfied. See Fed. R. Civ. P. 23. The decision whether to grant class certification is vested within the trial court's discretion. See Murray v. Auslander, 244 F.3d 807, 810 (11th Cir. 2001).

As the parties seeking class certification, Plaintiffs bear the burden of proving that the prerequisites of Rule 23 have been met. Hudson v. Delta AirLines, Inc., 90 F.3d 451, 456 (11th Cir. 1996). In determining whether Plaintiffs have met their burden, the Court's inquiry is limited to ascertaining whether the prerequisites of Rule 23 are satisfied. Collins v. International Dairy Queen, Inc., 168 F.R.D. 668 (M.D. Ga. 1996). As the Supreme Court held in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974), there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

The Court must nonetheless perform a "rigorous analysis" in order to

¹ The Court recognizes that there may be registered sex offenders who do not currently reside within 1,000 feet of a school bus stop but who may in the future reside within 1,000 feet of a school bus stop. The Court does not consider such persons members of the provisionally certified class at this time; however, the Court may revisit this issue at a later time, as appropriate.

determine that the prerequisites of Rule 23 are satisfied and may look beyond the pleadings to determine whether those prerequisites have been met. General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982). Having conducted the required rigorous analysis of the issues relevant to provisional class certification here, for the reasons stated herein, the Court finds that Plaintiffs have met their burden.

A. This Action Satisfies Rule 23(a).

Rule 23 permits the maintenance of a class action when: (1) the class is so numerous that joinder of all its members is impracticable; (2) questions of law or fact common to the class are present; (3) the claims or defenses of the representative party are typical of the claims or defenses of the class; and (4) the representative parties will sufficiently protect the interests of the class. See Fed. R. Civ. P. 23(a).

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members would be "impracticable." "'Impracticable' does not mean 'impossible;' plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class." In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 698 (N.D. Ga. 1991). The Court may make common sense assumptions in order to support the finding of numerosity, and Plaintiffs "need not show the precise number of members in the class." Evans v. United States Pipe and Foundry, 696 F.2d 925, 930 (11th Cir. 1983).

The Court finds that the numerosity requirement is met here. Plaintiffs have submitted evidence demonstrating that hundreds, if not thousands, of current registered sex offenders live within 1,000 feet of a school bus stop and accordingly will be negatively impacted by the school bus stop provision. See

Notice of Filing Additional Exhibits, Exhibit 8 [Doc. No. 12]; Reply in Support of Plaintiffs' Motion to Provisionally Certify a Class for the Duration of the TRO Already Granted, Exhibits 1-3 [Doc. No. 19]. It would be impracticable to join all members of the class. The class representatives possess the same interest and suffer the same injury as class members – all will be required to vacate residences that are located within 1,000 feet of a school bus stop pursuant to a statute that may be constitutionally infirm. Applying common sense assumptions, the class will be greater than forty persons, which both sides recognize as adequate under Eleventh Circuit precedent. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986).

2. Commonality

Rule 23(a)(2) requires that for an action to be properly maintained as a class action, there must be questions of law or fact common to the class. The commonality requirement “is not high, requiring only that resolution of the common questions affect all or a substantial number of the class members.” Collins, 168 F.R.D. at 674. A single common question of law or fact is sufficient. In order to satisfy this requirement, the class action “must involve issues that are susceptible to class-wide proof.” Murray, 244 F.3d at 811.

The commonality requirement is satisfied here. The class claims share common questions of law and fact related to the constitutionality of the school bus stop provision. The class action mechanism is an efficient method of resolving this challenge. Requiring each member of the class to file separate actions challenging the school bus stop provision does not serve the interests of efficiency, consistency, or judicial economy. Whether the school bus stop provision was intended by the legislature to be punitive is a common question as to all class members. A finding that the legislature acted with punitive legislative intent would effectively end the

constitutional inquiry. See Smith v. Doe, 538 U.S. 84, 92 (2003).

3. Typicality

Rule 23(a)(3) requires that “the claims of the representative parties [be] typical of the claims of the class.” The typicality requirement focuses on whether named representatives’ claims have the same essential characteristics as the claims of the class at large. Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985). The typicality requirement is met when the proposed class representatives’ claims arise out of the same course of conduct and are based on the same legal theory as the claims of the other class members. *Id.*

The Court has defined the class to include all persons who live within 1,000 feet of a school bus stop and will be required to move pursuant to the Act. The representatives’ claims are typical of the other class members – the claims are based on the same legal theory and arise from the same event. See Konberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984). The Court disagrees with Defendants’ argument that the class members are in different circumstances – each member of the provisional class defined by the Court is in fact in the same circumstance. Each member lives within 1,000 feet of a bus stop. Each member will be required to leave his or her home on July 1, 2006 under the Act’s provisions.

4. Adequacy

Rule 23(a)(4) has a two-fold standard: (1) the class representatives’ interest must not be antagonistic to those of the other members of the class; and (2) the class representatives’ attorneys must be qualified, experienced, and generally able to conduct the litigation. Defendants do not dispute that Plaintiffs have met this standard, and the Court agrees that this requirement is satisfied.

B. The Requirements of Rule 23(b)(2) Have Been Satisfied.

In addition to satisfying the requirements of Rule 23(a), an action must satisfy at least one of the conditions of subdivision (b) of Rule 23. This action satisfies Rule 23(b)(2), which states that class certification is appropriate where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” The school bus stop provision applies equally to all members of the class and is accordingly generally applicable. In addition, Plaintiffs seek relief that is appropriate under a Rule 23(b)(2) action – injunctive relief.

The Court notes that Defendants contend for the first time in response to the present motion that the Governor and the Attorney General do not have direct enforcement authority over the Act and do not have authority to require local law enforcement to comply with this Court’s rulings. This issue is irrelevant to the Court’s analysis of provisional class certification. To the extent that Defendants contend Plaintiffs have not sued the proper parties, Defendants should have raised this issue at the TRO hearing and will have the opportunity to address this issue at the preliminary injunction hearing.²

Until this matter is resolved, the Court expects local law enforcement officers, who are state agents, to comply with the Court’s rulings. See Grech v. Clayton County, 335 F.3d 1326, 1333 (11th Cir. 2003) (“In enforcing the laws and conserving the peace, the Georgia Governor does not act alone, but necessarily acts through state agents such as sheriffs.”); Fed. R. Civ. P. 65(d) (noting that

²The Court has scheduled a preliminary injunction hearing on July 11, 2006. The Court requests that Plaintiffs and Defendants each submit pre-hearing briefing on all issues on or before July 7, 2006 at 4:00p.m.

temporary restraining orders are binding on agents of the parties and those acting in concert with them).

II. CONCLUSION

For the reasons stated herein, the Court provisionally certifies a class consisting of all persons who registered as sex offenders pursuant to § 42-1-12 on or before July 1, 2006 and who reside within 1,000 feet of a currently-designated school bus stop or a school bus stop designated in the future. Unless otherwise ordered, this provisional certification is only for the duration of the TRO. The relief granted to the named Plaintiffs in the Court's June 27, 2006 Order on Plaintiffs' Motion for Temporary Restraining Order is hereby extended to all members of the provisionally certified class.

SO ORDERED this 29th day of June, 2006.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE