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

Vita Nuova Inc., on behalf of itself and others similarly situated, Plaintiff, v. **Alex M. Azar II**, in his official capacity as Secretary of Health and Human Services; **United States of America**, Defendants.	Case No. 4:19-cv-00532-O

REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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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 DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) ("[T]o maintain a class 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 definition. The proposed definition includes "every present and future health-care provider in the United States that opposes abortion for sincere religious reasons." The defendants complain that the phrase "health-care provider" is vague and could be construed to include insurers. We doubt that "health-care provider" can be reasonably construed that way, but if this is a problem it can be easily remedied by including the following definition of "health-care provider" in the class-certification order:

> The term "health-care provider" shall include but is not limited to any person, corporation, facility, entity, or institution that provides health care, including a physician, dentist, pharmacist, registered or licensed

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.").

> practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or physical therapy assistant, clinical psychologist, hospital, health clinic, dental office, or pharmacy. The term "health-care provider" shall not extend to entities that merely provide health insurance or payment for health care.

The defendants also claim that the proposed class definition flunks the ascertainability test because it turns on the "subjective" religious beliefs of an individual health-care provider. *See* ECF No. 38 at 9–11. But the class members will be easy to identify because their subjective beliefs will produce *actions* that are taken in plain sight for all to see. The proposed class members will publicly identify as a religious health-care provider, and everyone knows which religious institutions oppose abortion or which religious institutions do not. And the defendants can simply *ask* applicants for federal funding whether they oppose abortion for sincere religious reasons, and exempt anyone who checks the box from the disputed requirements of 42 U.S.C. § 300a-7(c). This is not a situation in which the defendants will be left in the dark about who might fall within the proposed class definition, and it is easy for the defendants to find out when the statute is enforceable only against entities that apply for or receive federal money. 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 also complain that "it will not be possible for the Court to determine class membership." Defs. Br. (ECF No. 38) at 11.[2] But the Fifth Circuit has

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. 38 at 11 ("It is not currently possible for the Court to identify whether any particular individual or entity is a member of this broad category"). 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 v. Louisiana State University*, 213 F.3d 858, 868 n.11 (5th

certified classes that require *far* more difficult and complex individualized assessments to determine membership. *In re Rodriguez*, 695 F.3d 360 (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 assessments" 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

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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").

courts disallow them.[3] But they are lawful in the Fifth Circuit, despite the extensive "individualized assessments" 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 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 assessments.

Rodriguez and *Mullen* make clear that there is no problem in the Fifth Circuit with class definitions that require difficult and complex "individualized assessments" 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 assessments" 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*.

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.'").

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.

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*

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).").

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.").

approved (b)(3) classes despite the extensive individualized assessments 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. The Proposed Class Definition Is Not Overbroad

The defendants complain that the proposed class sweeps too broadly by including health-care providers that oppose abortion, but that may not want to exclude health-care workers who perform or assist abortions from employment. *See* ECF No. 38 at 5–8.[6] The defendants argue that this precludes Vita Nuova from establishing commonality and typicality, because these members of the proposed class "may not object *at all* to the requirements of Section 300a-7(c), or may object to only *part* of the requirements." *Id.* at 16. And the defendants suggest these members of the proposed class will lack Article III standing and should be excluded from the class definition for that reason as well. *See id.* at 6 & n.1. None of this warrants denial of class certification.

The scope of the proposed class is no different from the class that was certified in *J.D. v Azar*, 925 F.3d 1291 (D.C. Cir. 2019), where the representative plaintiffs challenged a federal policy that denied abortion access to unaccompanied minors in the government's custody, and sought to certify a class of *all* pregnant unaccompanied minors in the legal custody of the federal government. *Id.* at 1305. The district court certified the proposed class, and the court of appeals affirmed—even though the class definition included pregnant unaccompanied minors who had no desire for an abortion, as well as pregnant unaccompanied minors who stridently opposed abortion for ideological, religious, or moral reasons. The Court explained that the class members

6. The defendants include these overbreadth objections within their discussion of whether the proposed class is "ascertainable" or "identifiable," but these issues have nothing to do with the ascertainability of the class or the clarity of the proposed class definition.

had suffered a common injury by being denied a *choice* in whether to have an abortion, even though many of the absent class members would never have exercised that choice had it been available to them:

> The constitutional right asserted by the class is a woman's "right to choose to terminate her pregnancy" before viability. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (quoting *Casey*, 505 U.S. at 870, 112 S. Ct. 2791 (plurality)). The class members all assert a common entitlement to make that choice on their own, free from any veto power retained (unconstitutionally, the class says) by ORR. And on the plaintiffs' theory, they are all denied the right to terminate their pregnancies by a veto power that effectively supersedes it. The class representatives are suited to press that interest on the class's behalf, even if various class members might make varying ultimate decisions about how to exercise their choice.

Id. at 1313. So too here. Vita Nuova seeks to represent every health-care provider that opposes abortion for sincere religious reasons, and it is asserting their right to choose whether to employ individuals who perform or assist abortions. And each of the class members is suffering the "same injury" because they are each being denied the prerogative to make that choice without forfeiting eligibility for federal funding. The plaintiffs have carried their burden under Rule 23(a)(2) by identifying an injury common to each of the class members, and the defendants cannot refute this showing by attempting to redefine the injury that the plaintiffs describe. *See J.D.*, 925 F.3d at 1313 (deferring to the "plaintiffs' theory" and characterizing the relevant injury as a denial of choice).

The defendants deny that an absent class member will have "standing" if he has no desire to apply for federal funding or exclude health-care workers who perform or assist abortions from employment. *See* ECF No. 38 at 12. There is deep circuit split over whether a certified class may include members who lack Article III standing,[7]

7. *Compare Kohen v. Pacific Investment Management Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.) ("[A]s long as one member of a certified class has a

and the Fifth Circuit has yet to weigh in on either side. *See id.* at 6 n.1. But each member of the proposed class *has* suffered injury from the denial of choice in their employment decisions—and that is all that is needed to confer standing on the class. *See J.D.*, 925 F.3d at 1313. In addition, religious and anti-abortion health-providers that are not *currently* receiving or applying for federal funds might change their minds and decide to seek federal money in the future, and any classwide relief should extend to these entities no less than the health-care providers that have an existing desire to obtain federal money. It is also perfectly normal for a certified class to include individuals who are later determined not to have suffered any injury. *See Kohen*, 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability

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plausible claim to have suffered damages, the requirement of standing is satisfied. . . . [A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification"); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998) ("[T]he named plaintiffs satisfy Article III. The absentee class members are not required to make a similar showing"); *id.* ("[W]hether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties."); *In re Nexium Antitrust Litigation*, 777 F.3d 9, 25 (1st Cir. 2015) ("[A] certified class may include a de minimis number of potentially uninjured parties. We need not decide whether it is ever permissible to define a proper class including more than a de minimis number of uninjured parties since we conclude that it has not been shown that the class here includes more than a de minimis number of uninjured parties."), *with Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (same).

does not preclude class certification . . . ."). This is especially true in consumer class-actions or in lawsuits alleging securities fraud, and the entire point of the class-action device is to sort the individuals who have suffered compensable harm from those who have not in a single proceeding.

In all events, if the defendants believe that it is inappropriate to include health-care providers that do not object to the requirements of the Church Amendment, then the proper response is not to deny class certification, but to alter the class definition. The proposed class can be easily redefined to include only those health-care providers that both object to abortion for sincere religious reasons *and* that wish to avoid employing individuals who perform or assist abortions. It can also be redefined to include only those health-care providers that currently receive or wish to apply for federal funding. Vita Nuova continues to believe that it is appropriate for the class to encompass *all* religious and anti-abortion health-care providers, just as the certified class in *J.D.* encompassed *all* pregnant unaccompanied minors in the legal custody of the federal government. But if the Court disagrees then the class definition can be altered to accommodate these concerns.

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

The defendants also suggest that the determination of class membership must be "administratively feasible." *See* Defs. Br. (ECF No. 38) at 7 (quoting *Morrow v. Washington*, 277 F.R.D. 172, 187 (E.D. Tex. 2011)). 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*.

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

Commonality requires only a single common question of law and fact, and the proposed classes includes *multiple* legal questions common to the class: (1) Does 42 U.S.C. § 300a-7(c) substantially burden the religious freedom of health-care providers who object to abortion for sincere religious reasons? (2) Is there a "compelling governmental interest" in enforcing 42 U.S.C. § 300a-7(c) against health-care providers who object to abortion for sincere religious reasons? (3) Is 42 U.S.C. § 300a-7(c) 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. 38 at 13–16.

That has nothing to do with commonality or typicality. The classes *by definition* include only health-care providers who hold sincere religious objections to abortion. 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.

CONCLUSION

The plaintiff's motion for class certification should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2020, I served this document through CM/ECF upon:

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