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

BLACK VOTERS MATTER FUND, MEGAN GORDON, PENELOPE REID, and ANDY KIM, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; DEKALB COUNTY BOARD OF REGISTRATION & ELECTIONS; ANTHONY LEWIS, SUSAN MOTTER, DELE LOWMAN SMITH, SAMUEL E. TILLMAN, and BAOKY N. VU, in their official capacities as Members of the DeKalb County Board of Registration & Elections; and ERICA HAMILTON, in her official capacity as Director of Voter Registration and Elections, and all others similarly situated,

Defendants.

CIVIL ACTION FILE

NO. 1:20-cv-01489-AT

DEFENDANT SECRETARY OF STATE RAFFENSPERGER'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Defendant Secretary of State Brad Raffensperger (the "Secretary"), sued in his official capacity, files this Brief in Opposition to Plaintiffs' Motion for Class Certification ("Plaintiffs' Motion"). With this Brief, the Secretary

shows the Court that (1) this Court should decide the merits of the Secretary's Motion to Dismiss [Doc. 90] before considering Plaintiffs' Motion; (2) there is no need for class action relief for Plaintiffs' per se poll tax claim (Count I); and (3) Plaintiffs have failed to satisfy the "rigorous analysis" required under Rule 23 for Count II, the Anderson/Burdick balancing test. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). The Motion should be denied.

INTRODUCTION

Plaintiffs' Amended Complaint seeks to compel Georgia—state or county—taxpayers to pay postage for voters who choose to request an absentee ballot and return the absentee ballot to county election officials. [E.g., Doc. 88 at ¶ 9]. Count I raises a per se claim under the Twenty-Fourth Amendment of the United States Constitution. [Id. at ¶¶ 62-67.][1] Plaintiffs allege that the Defendants' decisions not to pre-pay for voters' postage is somehow the same as the imposition of a tax to vote. [Id.]. There is no legal

[1] Plaintiffs have previously sought to articulate an as-applied poll tax under the Twenty-Fourth Amendment. [Doc. 84 at 6.] There is no support in law for such an as-applied challenge. If a government policy is a poll tax under the Twenty-Fourth Amendment, then it is always unconstitutional. U.S. Const. amend. XXIV. If a practice imposes a burden on voting but could be otherwise be constitutionally applied, the Anderson/Burdick analysis of Count II applies. See Jacobson v. Fla. Sec'y of State, 957 F.3d 1193, 1216-17 (11th Cir. 2020).

support for this new theory, and no court has endorsed Plaintiffs' policy position. Class relief is unnecessary for this claim.

Count II argues that requiring voters to pay postage creates an unconstitutional burden on all voters, even those who choose to vote in person. [Doc. 88 at 24-25]. Plaintiffs also claim that the COVID-19 virus renders the alleged postage requirement unconstitutional under the First and Fourteenth Amendments. [Id.]. Plaintiffs' class action representatives fail, however, because they have no burden: each possesses stamps and the means to acquire more. [Docs. 2-5 and 38]. In addition, even if the individual representatives were unconstitutionally burdened, class relief would be inappropriate, because putative class members' individual burdens (if any) would vary greatly. For instance, some putative class members will have stamps; others can easily afford them; some can order stamps online; and more still can have them delivered by services. Plaintiffs proposed subclass—persons identified as being at higher risk for severe illness from COVID-19—fares no better. They are incredibly diverse and lack a common injury or remedy. [See Doc. 110-6]. Under no scenario, therefore, should Plaintiffs' Motion be granted.

FACTS

Plaintiffs' first putative class identifies all registered Georgia voters. [Doc. 110-1 at 4]. They are to be represented by individual plaintiffs Gordon and Reid (the "Individual Plaintiffs"). [Id.]. This first putative class necessarily includes persons who choose to vote by mail or in person. [Id.].

The Individual Plaintiff declarations relate to Plaintiffs' claims, albeit unsuccessfully. [See generally Docs. 2-5 and 38.]. Both Individual Plaintiffs have stamps. [Id.]. Both have means to obtain more stamps. [Id.]. Indeed, Ms. Reid acknowledges that she can afford stamps and uses them frequently. [Doc. 38 at 1-2]. Ms. Gordon has sufficient stamps for the upcoming election(s), but she simply believes she should not have to use them. [Doc. 2-5 at 1]. Both Individual Plaintiffs did not want to vote in-person when they signed their declarations (in April) for fears of COVID-19 transmission. [Id.].

Plaintiffs also seek to certify a subclass of voters "who are particularly susceptible to COVID-19." [Doc. 110-4 at 5]. This class is to be represented by Plaintiff Reid only. [Id.]. Plaintiffs propose to identify this subclass based on a document from the Centers for Disease Control ("CDC"), which identifies individuals who are 65 years of age or older, or live in a nursing home or long term care facility. [Doc. 110-6]. The subclass also includes persons with the following medical conditions, including but not limited to: chronic lung

disease; asthma; immune-system deficiency; complications caused by smoking; obesity; diabetes; kidney disease; and liver disease. [Id.]. Plaintiffs do not explain how the Court, or the Secretary can identify or enforce a remedy for this subclass, whether a competent diagnosis would be needed, or what other types of proof could be used. Ms. Reid's only criteria would be her age. [Doc. 110].

ANALYSIS AND CITATION TO AUTHORITY

Plaintiffs' attempt to manufacture a poll tax case is matched by their attempt to create a class where there is either no need or no readily-identifiable class. Each attempt fails, and this Court should grant the Secretary's Motion to Dismiss. At the very least, Plaintiffs' Motion should be denied.

1. Standard of Review.

As with their claims generally, Plaintiffs must satisfy a high burden to establish a class. Class actions are the "exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." Wal-Mart Stores, Inc., 564 U.S. at 348 (citation omitted). Consequently, courts must apply a "rigorous analysis that the prerequisites" of class relief have been satisfied. Id. at 351. Plaintiffs have the burden of proof to show the "'propriety of class certification.'" Taylor v. Screening Reports, Inc., 294

F.R.D. 680, 688 (N.D.Ga. 2013) (quoting Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000)).

Only if a named plaintiff has standing (unlike those here), will courts proceed to the Rule 23 analysis which requires looking beyond the pleadings, Wal-Mart Stores, Inc., 564 U.S. at 350, and Plaintiffs must provide evidence to satisfy Rule 23's requirements. Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013). The evidence must be demonstrated by a preponderance of the evidence. Teggerdine v. Speedway, LLC, No. 8:16.cv-03280-T-27TGW, 2018 WL 2451248 at *2 (M.D. Fla. May 31, 2018) (citing Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 811 (7th Cir. 2012); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2009); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)). Finally, courts consider the underlying merits of the putative class's claims when performing this analysis. Taylor v. Screening Reports, Inc., 294 F.R.D. 680, 688 (N.D. Ga. 2013) (citation omitted).

2. This Court Should Grant Defendants' Motions to Dismiss Before Considering Plaintiffs' Motion.

Before conducting the Rule 23 analysis, courts should first determine whether the "'named class representative[s have] Article III standing to raise each class subclaim.'" Amin v. Mercedes-Benz USA, LLC, 301 F.Supp.3d 1277, 1283 (N.D.Ga. 2018) (citing Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)). In other words, "[o]nly after determining whether the named plaintiff[s have] standing can it be determined whether the named plaintiff[s have] representative capacity to assert the rights of others." Prado-Steiman, 221 F.3d at 1279. Plaintiffs do not meet this threshold requirement.

As this Court recognized in its Order [Doc. 101] on Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction and for Expedited Briefing [Doc. 93], the Secretary has raised important questions about the justiciability of Plaintiffs' claims. [Doc. 101 at 3]. Indeed, he has done so at every turn in this case thus far, including by filing a Motion to Dismiss [Doc. 67-1] the original Complaint and a Motion to Dismiss Plaintiffs' Amended Complaint [Doc. 90]. With the Eleventh Circuit's recent decision in Jacobson v. Florida Secretary of State, No. 19-14552 (11th Cir. April 29, 2020), the Secretary has raised further questions about the

justiciability of Plaintiffs' claims, which continue to support dismissal of this action. [See e.g., Doc. 87].

The United States Supreme Court has explained that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (quoting Ex parte McCardle, 7 Wall. 506, 514 (1868)). In Davis v. Collins, this Court considered a defendant's motion to dismiss, which sought dismissal on a variety of grounds, including lack of subject-matter jurisdiction. No. 1:18-CV-03345-AT, 2018 WL 6163155 at *1 (N.D. Ga. Oct. 11, 2018). In granting the motion to dismiss in Davis, this Court elaborated at length on federal trial courts' need to decide jurisdictional questions before substantive ones. Id. at *2 (quoting Steel Co., 523 U.S. at 94).

In considering the justiciability of Plaintiffs' claims in light of Jacobson, the Court stated that it "will not barrel into ruling on such serious legal issues confronting it under these circumstances." [Doc. 101 at 3]. Now is the time to consider justiciability – before certification of any class. Hoak v. Ledford, No. 1:15-CV-03983-AT, 2016 WL 8948417, at *13 n.15 (N.D. Ga. Sept. 27, 2016) (citing Steel Co., 523 U.S. at 94). "'Only after the court

determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others.'" Id. (citations omitted) (quoting Prado—Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)).

Judicial economy also points to ruling on the threshold jurisdictional issues prior to considering Plaintiffs' request for class certification. The Supreme Court has repeatedly held that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982). If the class representative does not have individual standing to raise a claim, the class representative cannot bring such claim on behalf of a class either. See Bush, 221 F.3d at 1279 ("It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class.").

Because the Individual Plaintiffs do not have standing to bring the claims in Plaintiffs' Amended Complaint, they cannot serve as class representatives of the voter class. Further, Penelope Reid cannot serve as representative of the voter subclass if she does not have standing to bring the

claims in her individual capacity. Binding precedent and efficiency in the management of this case will be best served by ruling on the Secretary's Motion to Dismiss Plaintiffs' Amended Complaint [Doc. 90] before proceeding to any consideration of Plaintiffs' proposed class action.

3. Plaintiffs' 24th Amendment Claim, Count I Does Not Warrant Class Relief.

If the Court does proceed to ruling on Plaintiffs' proposed class certification—and for the reasons above, it should not—any class certification that the Court does grant for Count I should only be for the per se poll tax claim because, as explained above, there is no support in the law for an as-applied poll tax claim. As-applied challenges require an Anderson/Burdick analysis, which Plaintiffs allege in Count II.

Even if the Court determines that the Plaintiffs have satisfied the requirements of Rule 23(a) for Count I, however, the Court should still deny class certification because it is unnecessary. Indeed, courts decline class certification as unnecessary in instances where the proposed class members would benefit from a ruling in plaintiffs' favor even without class certification. For example, in Bailey v. Patterson, 323 F.2d 201, 204 (5th Cir.

1963),[2] the former Fifth Circuit held it was "unnecessary to determine [] whether th[e] action was properly brought under Rule 23(a)" because "[t]he very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated." Id. at 206.[3] In other words, class certification is unnecessary in

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[2] Former Fifth Circuit cases are binding precedent in the Eleventh Circuit. *See* Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981)

[3] *See also*, *e.g.*, Galvan v. Levine, 490 F.2d 1255, 1261 (2nd Cir. 1973) (affirming denial of motion for class action designation because "insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs"); Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1548 (10th Cir. 1994) (class certification unnecessary where all proposed class members would benefit from an injunction with state-wide application issued on behalf of the named plaintiffs); Sandford v. R. L. Coleman Realty Co., 573 F.2d 173, 178 (4th Cir. 1978) (Class certification unnecessary where "the requested (injunctive) relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack"); Lincoln CERCPAC v. Health & Hosps. Corp., 920 F. Supp. 488, 493 (S.D.N.Y. 1996) (denying as "superfluous" motion to certify class in action against government agency where plaintiffs' requested relief, if granted, would impact all proposed class members regardless of whether they are included in a class action); Bradley v. Kissinger, 418 F. Supp. 64, 67 (D.D.C. 1976) ("[I]t is unnecessary and inadvisable to encumber this suit with the burdens of a class action" where relief protects those that plaintiffs seek to represent); Perez-Funez v. Dist. Dir., I.N.S., 611 F. Supp. 990, 995 (C.D. Cal. 1984) ("There must be some necessity for class certification: where the relief, if granted to the plaintiff in his individual capacity only, would inure to the benefit of the entire proposed class, the class need not be certified" (citing Bailey, 323 F.2d at 206)).

cases where all of the proposed class members would be equally affected if the court were to grant plaintiffs' requested relief – class or no class.

Here, Plaintiffs seek declaratory relief "that the requirement that voters affix their own postage to mail-in absentee ballots and mail-in absentee ballot applications is unconstitutional." [Doc. 88 at 25]. If the Court were to grant such declaratory relief, it would apply equally to all proposed class members, regardless of whether they are included in a class action.[4] For this reason, class certification is unnecessary and should be denied for Count I's per se poll tax claim.

4. Plaintiffs' Anderson/Burdick Claims Fail To Demonstrate Need For Class Relief.

Plaintiffs' Count II claims—both for the voter class and the subclass—fail to satisfy the demanding Rule 23 analysis imposed by the Supreme Court and the Eleventh Circuit. As shown, this Court need not even embark on this analysis, as the Plaintiffs lack standing to bring a First and Fourteenth Amendments claim. Even if this Court considered the pleadings, they remain facially deficient for class certification purposes.

[4] It would also apply to all proposed class members irrespective of individual distinctions, another reason that shows Count I is properly construed as a per se, rather than an as-applied, claim.

A. Plaintiffs' Proposed Classes for Count II Are Not Adequately Defined or Clearly Ascertainable.

Beyond standing, Plaintiffs must demonstrate that their proposed class is "adequately defined and clearly ascertainable" before proceeding with the traditional Rule 23 analysis. Carriuolo v. Gen. Motors Co., 823 F.3d 977, 984 (11th Cir. 2016). This requires the application of an "objective criteria." Teggerdine, 2018 WL 2451248 at *3. Further, the process should be "'administratively feasible,' meaning that 'identifying class members is a manageable process that does not require much, if any, individual inquiry.'" Id. (quoting Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 787 (11th Cir. 2014)).

Plaintiffs' first proposed class of "all Georgia voters" fails to articulate this required "objective criteria" for an as-applied analysis. Because the alleged burden is economic (and ignores the Postal Services' ("USPS") uncontested policy of delivering official election mail without sufficient postage), it varies from voter to voter. Plaintiffs have offered no basis to evaluate this impact, nor have they explained how the Court would decide who is arguably burdened and who is not. For example, would punitive class members be required to disclose annual income, monthly cash flow, or other economic indicia to determine whether purchasing a stamp constitutes an

unconstitutional burden? It is equally uncertain why Plaintiffs proposed class could not rely on the USPS. As there is no clear order for this Court to issue that evaluates which voters can afford a stamp and which cannot, Plaintiffs' proposed class is neither justiciable nor wise. See Levy v. Miami-Dade Cty., 358 F.3d 1303, 1305 (11th Cir. 2004) (rejecting remedy in election case).

The subclass is similarly ill-defined and unascertainable because investigating Georgia voters' medical history would be far too intrusive. For example, determining who would be entitled to State aid in paying for postage would require invasive and questionable (and, in some cases illegal) practices of delving into citizens' medical history. This is not an ascertainable classification much less a "clearly ascertainable" one. Carriuolo v. Gen. Motors Co., 823 F.3d 977, 984 (11th Cir. 2016). For these reasons alone, this Court should deny Plaintiffs' Motion as it relates to Count II.

B. Plaintiffs Fail To Satisfy Rule 23(a).

Neither of Plaintiffs classes satisfy Rule 23's requirements for Count II, which alleges a First and Fourteenth Amendment violation. To obtain class action status, Plaintiffs must demonstrate that (1) joinder of all members is impracticable; (2) there are questions of law of fact common to the class; (3) the individual plaintiffs' claims are "typical" of the claims of the class; and (4)

the representative parties will fairly and adequately represent the interests of the class. Taylor, 294 F.R.D. at 688 (citing Fed. R. Civ. P. 23(a)).

The commonality prong requires an examination of the legal claims being alleged, Erica P. John Fund v. Halliburton Co., 563 U.S. 804, 809 (2011), and it requires "predicting how the parties will prove [the elements of the claim] at trial." Brown v. Electrolux Home Products, Inc., 817 F.3d 1225, 1234 (11th Cir. 2016). Plaintiffs' burden is not satisfied by "merely [claiming] that they have all suffered a violation of the same provision of law." Wal-Mart Stores, Inc., 564 U.S. at 350. There must be a "common contention" between the claims. Id. A "class including both injured and non-injured [voters] cannot satisfy the commonality requirement of Rule 23(a)." Taylor, 294 F.R.D. at 689. Here, that means that the entire class must be burdened, on an individualized basis, by purchasing stamps (or relying on the USPS) when requesting and returning absentee ballots.

As to typicality, the "focus … is on whether the Plaintiff[s are] a typical representative of the class." Taylor 294 F.R.D. at 689. In other words, Plaintiffs must show that Ms. Gordon and Ms. Reid each experienced (or will experience) the same injury as the putative class members. Id. The commonality and typicality factors are frequently "highly related" and the analysis between them "merges." Cox v. Stone Ridge at Vinings, No. 1:12-

CV-2633-AT, 2014 WL 12663763 at *3 (N.D. Ga. Sept. 30, 2014) (citations omitted).

i. *The Proposed Class of All Georgia Voters.*

Neither of the Individual Plaintiffs have alleged anything more than phantom injuries. [Doc. 110-1 at 4]. As shown in the Secretary's Motion to Dismiss the Amended Complaint [Doc 90], Ms. Gordon lacks standing to assert any injury, and any class claims based on her experience fail for the same reasons. For example, Plaintiff Gordon has stamps and can use them; her professed injury is purely ideological: "I do not want to use the postage that I have." [Doc. 2-5 at 1]. She has no apparent underlying health condition, is not prohibited from washing her hands or using sanitizer after voting in person, and she does not claim she lacks a mask or is unable to buy one if she wanted to vote in-person. [Id.]. Thus, because she has no claim under an Anderson/Burdick analysis, she cannot represent a class of purportedly injured voters.

Ms. Reid's alleged injury fares no better. Like Ms. Gordon, she has stamps now. [Doc. 38]. She frequently votes absentee, and she acknowledges that she can afford more stamps. [Doc. 38]. Consequently, she has no cognizable burden under the Anderson/Burdick analysis either. This prevents her from representing a group of purported injured voters.

Plaintiffs also offer Ms. Reid to represent the subclass of voters who are at a higher risk for having complications caused by COVID-19 exposure. [Doc. 110-1 at 5; Doc. 110-5]. The only factor that Ms. Reid apparently satisfies is age. [Id.]. She cannot, therefore, adequately represent persons with additional risk factors, as each of those purported high-risk populations would require "individualized proof" of an injury. Taylor, 294 F.R.D. at 689. [See Doc. 38 at ¶ 2.]

Further, there is no competent medical evidence that shows that there is a high risk associated with voting in person. For example, is a "social smoker" at the same level of risk as a person undergoing chemotherapy? What about individuals who have moderate asthma, but they wear a mask and wash hands? Is every person with a BMI over 40 in real danger, especially if they take precautions? Ms. Reid represents none of these types of people and she cannot speak of their potential harm. Times have changed since April and are changing more still. The CDC has issued "Recommendations for Election Polling Locations, and these guidelines, which Georgia counties have been encouraged to follow, mitigate strongly against the spread of COVID-19 in polling locations."[5] The CDC has also

[5] A true and accurate copy of the CDC's guidelines are attached as "Exhibit 1."

recently said that COVID-19 does not generally spread on surfaces, which further undermines Plaintiffs' concerns about voting in person.[6] And, the circumstances of the pandemic could be very different in November. Each of these factors cut dramatically against Plaintiffs' claims that some voters must vote absentee. Ultimately, a general at-risk status does not equate to a constitutional injury. That leap requires actual evidence and Plaintiffs have not satisfied that burden.

In sum, neither Plaintiff Gordon nor Plaintiff Reid has an injury. They are not representative of the illusory claimant that Plaintiffs have not discovered: a Georgian who cannot afford a stamp, acquire a stamp from a third party, rely on the USPS's policy to deliver official election mail without a stamp, or vote in person. Consequently, Plaintiffs Motion should be denied.

C. Plaintiffs Fail To Satisfy Rule 23(b).

Plaintiffs must satisfy at least one of the 23(b) criteria, and they claim their putative classes satisfy Rule 23(b)(1)(A) or 23(b)(1)(B). The former is satisfied if separate trials "create[s] a risk of" inconsistent rulings or if rulings for the individual class representatives would be dispositive as to the

[6] See *CDC updates COVID-19 transmission webpage to clarify information about types of spread*, CDC, https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html.

remaining members of the putative classes. Fed. R. Civ. P. 23(b)(1)(A). Plaintiffs seeking injunctive and declaratory relief can satisfy Rule 23(b)(1)(B) if the Secretary "has acted or refused to act on grounds that apply generally to the class."). Fed. R. Civ. P. 23(b)(2).

Plaintiffs' challenge with satisfying Rule 23(a) preclude it from establishing a class based on Rule 23(b)(1)(A). To the extent that Plaintiffs' arguments are based on per se arguments—either as a poll tax or a per se unconstitutional burden—Rule 23(b)(1)(A) is satisfied. But, Count II's Anderson/Burdick claim is not per se in nature, and any risk of inconsistent rulings is based on the type of injury, which is necessarily individualized. In other words, those alleging an injury under Count II "are likely to have been affected [by COVID-19] in a different manner or extent—or not at all." Cox, 2014 WL 12663763 at *4. The "actual scope and nature of [the alleged] problems will be different depending on" the individual voters' economic and health circumstances. Id. Both of these facts weigh strongly against class certification. Cf. Taylor, 294 F.R.D. at 689 (addressing Rule 23(b)(3)).

For the same reasons, Plaintiffs' as-applied theory cannot satisfy Rule 23(b)(2), because a broad injunction for all Georgia voters is not appropriate to the as-applied claims. Where some voters would lack an injury, there would not be a basis for sweeping injunctive or declaratory relief.

CONCLUSION

Plaintiff chose to bring per se and as-applied claims. Neither Individual Plaintiff satisfies standing requirements to do so. In addition, class relief is unnecessary for Count I, the per se claim. Plaintiffs have failed to prove their burden for class action status with the as-applied claim in Count II. For these reasons, this Court should grant the Secretary's Motion to Dismiss and deny Plaintiffs' Motion.

This 15th day of June, 2020.

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L.R. 7.1(D) CERTIFICATION

I certify that this Brief has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this Brief has been prepared using 13-pt Century Schoolbook font.

/s/ Josh Belinfante
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