

United States Court of Appeals
for the Fifth Circuit

No. 23-10612

KENRIC LEDBETTER, *Individually and on behalf of all others similarly situated*; ISAAC CARDENAS, *Individually and on behalf of all others similarly situated*; SANTHY INTHALANGSY, *Individually and on behalf of all others similarly situated*; DAVID MARTIN, *Individually and on behalf of all others similarly situated, also known as ETSUZEN*; MIGUEL BYGOYTIA, *Individually and on behalf of all others similarly situated*; JAMES RENFRO, *Individually and on behalf of all others similarly situated*; JUSTIN PANUS, *Individually and on behalf of all others similarly situated*; RICHARD CROSS, *Individually and on behalf of all others similarly situated*; WILLIAM OLIVER, *Individually and on behalf of all others similarly situated*,

Plaintiffs—Appellants,

versus

RELIGIOUS PRACTICE COMMITTEE, *Individually and in his or her official capacity*; TIMOTHY JONES, *TDCJ Director of Chaplaincy, Individually and in his or her official capacity*; THOMAS BROUWER, *TDCJ Assistant Director of Chaplaincy, Individually and in his or her official capacity*; C. F. HAZELWOOD, *TDCJ Director of Religious Service, Individually and in his or her official capacity*; CHRISTOPHER CARTER, *TDCJ Director of Rehabilitation Program Division, Individually and in his or her official capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:22-CV-191

ON PETITION FOR REHEARING

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 16, 2023

Lyle W. Cayce
Clerk

No. 23-10612
Summary Calendar

KENRIC LEDBETTER, *Individually and on behalf of all others similarly situated*; ISAAC CARDENAS, *Individually and on behalf of all others similarly situated*; SANTHY INTHALANGSY, *Individually and on behalf of all others similarly situated*; DAVID MARTIN, *Individually and on behalf of all others similarly situated, also known as ETSUZEN*; MIGUEL BYGOYTIA, *Individually and on behalf of all others similarly situated*; JAMES RENFRO, *Individually and on behalf of all others similarly situated*; JUSTIN PANUS, *Individually and on behalf of all others similarly situated*; RICHARD CROSS, *Individually and on behalf of all others similarly situated*; WILLIAM OLIVER, *Individually and on behalf of all others similarly situated*,

Plaintiffs—Appellants,
versus

RELIGIOUS PRACTICE COMMITTEE, *Individually and in his or her official capacity*; TIMOTHY JONES, *TDCJ Director of Chaplaincy, Individually and in his or her official capacity*; THOMAS BROUWER, *TDCJ Assistant Director of Chaplaincy, Individually and in his or her official capacity*; C. F. HAZELWOOD, *TDCJ Director of Religious Service, Individually and in his or her official capacity*; CHRISTOPHER CARTER, *TDCJ Director of Rehabilitation Program Division, Individually and in his or her official capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:22-CV-191

Before WIENER, STEWART, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Ten inmates at the French Robertson Unit of the Texas Department of Criminal Justice filed an action in the United States District Court for the Southern District of Texas complaining of violations of 42 U.S.C. §§ 1983, 2000cc. Because only one plaintiff had paid the filing fee, the court ordered each remaining plaintiff to pay the fee or to submit an application for leave to proceed in forma pauperis (“IFP”). The plaintiffs objected and moved for reconsideration, which was denied. After the case was transferred to the appropriate venue—the Northern District of Texas—the plaintiffs were permitted to file an out-of-time notice of appeal from the filing fee order and from the order denying their motion for reconsideration.

“This Court must examine the basis of its jurisdiction, on its own motion, if necessary.” *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). We may hear appeals only from: (1) “final decisions under 28 U.S.C. § 1291”; (2) “interlocutory decisions under 28 U.S.C. § 1292”; (3) “nonfinal judgments certified as final”; or (4) “some other nonfinal order or judgment to which an exception applies.” *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 538 (5th Cir. 1999) (internal quotation marks and citations omitted).

Here, the appellants have not applied for IFP status in the district court or in this court, and there has been no final decision in this case. *See*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 23-10612

§ 1291. The appellants' failure to comply with the orders by paying the fee or by moving for leave to proceed IFP could result in dismissal of their claims for failure to prosecute, but this has not yet occurred. Moreover, the orders are not among the types of interlocutory orders that are permitted to be appealed by statute. *See* § 1292(a)(1). The district court has not certified in writing that the orders involve a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." § 1292(b). Neither has the district court certified the matter for immediate appeal under FED. R. CIV. P. 54(b). *See DeMelo v. Woolsey Marine Indus., Inc.*, 677 F.2d 1030, 1031-32 (5th Cir. 1982) (discussing and comparing § 1292(b) and Rule 54(b)). As we therefore lack jurisdiction, this appeal must be DISMISSED.

ENTERED

December 01, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT ZIRUS, <i>et al.</i> ,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	CIVIL ACTION NO. H-22-2858
	§	
RELIGIOUS PRACTICE	§	
COMMITTEE, <i>et al.</i> ,	§	
	§	
<i>Defendants.</i>	§	

ORDER

Plaintiffs, a group of ten state inmate prisoners proceeding *pro se*, filed a lawsuit under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA) for violations of their constitutional rights. The docket shows that only one of the plaintiffs – Scott Zirus – has paid the \$402.00 filing fee. Each of the prisoner plaintiffs must pay the \$402.00 filing fee in order to proceed as a plaintiff in this lawsuit.

Plaintiffs Kenric Ledbetter (#00628824), Isaac Cardenas (#02230470), Santhy Inthalangsy (#02186559), David Martin (#02125617), Miguel Bygoytia (#02161244), James Renfro (#01937567), Justin Panus (#02167693), Richard Cross (#02100125), and William Oliver (#02290434) are each **ORDERED** to pay the \$402.00 filing fee, or submit an application to proceed *in forma pauperis* with a certified copy of their current inmate trust account statement, within **THIRTY DAYS** from date of this order.

The failure of any plaintiff to comply timely with this order will result in dismissal of that plaintiff for non-payment of the filing fee.

Signed at Houston, Texas, on NOV 30 2022.



ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

ENTERED

December 19, 2022

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SCOTT ZIRUS, a/k/a §
SCOTT ASH JAMES ZIRUS, §
et al., §
§
Plaintiffs, §
§
v. § CIVIL ACTION NO. H-22-2858
§
§
RELIGIOUS PRACTICES §
COMMITTEE, *et al.*, §
§
§
Defendants. §

ORDER

Ten state prisoners at the Robertson Unit in Amarillo, Texas, filed this *pro se* lawsuit under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) for violation of, and substantial burdens on, their religious free exercise rights as Buddhists. The Court **ORDERS** as follows:

A. Filing Fees

The Court ordered each of the co-plaintiffs to pay the filing fee or submit a properly-supported application to proceed *in forma pauperis* by December 30, 2022. The co-plaintiffs filed a motion for reconsideration on December 13, 2022, arguing that the \$402.00 filing fee was paid by one of the co-plaintiffs and that the other nine co-plaintiffs should not be required to pay their own filing fee. (Docket Entry No. 7.)

The Prison Litigation Reform Act clearly provides that "if a prisoner brings a civil action . . . the prisoner shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Ten prisoners are named as co-plaintiffs, such that each co-plaintiff has brought this lawsuit and must pay a filing fee. Although they allege they do not intend to proceed *in forma pauperis*, only one of the ten prisoners has paid his filing fee.

Prisoners cannot evade the plain language of the Act and the clear intent of Congress by the simple expedient of filing multi-party actions, hoping thereby to gain the benefits of litigation without paying the full fee required by the Act. The motion for reconsideration (Docket Entry No. 7) is **DENIED**.

B. Class Action

The co-plaintiffs request certification of this lawsuit as a class action brought on behalf of all similarly-situated Buddhist prisoners confined within the Texas Department of Criminal Justice. (Docket Entry No. 1, ¶ 173.)

The purpose of a class action is to conserve resources of both the courts and the parties by economically litigating issues that potentially affect every class member. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986). To further this goal, Federal Rule of Civil Procedure 23(a) provides that a member of a class may bring suit as a representative on behalf of the other members only if: (1) the joinder of all members is impracticable because the class is so numerous; (2) there are common questions of law or fact; (3) the claims of the

representative are typical of the claims of the class; and (4) the representative party will fairly and adequately protect the interests of the class.

The co-plaintiffs plead no factual allegations meeting their burden of proof under Rule 23(a). In particular, because they are proceeding *pro se*, the co-plaintiffs cannot satisfy the adequacy requirement of Rule 23(a)(4). The United States Court of Appeals for the Fifth Circuit interprets the adequacy requirement to “require the class representatives to possess a sufficient level of knowledge and understanding to be capable of ‘controlling’ or ‘prosecuting’ the litigation.” *Ibe v. Jones*, 836 F.3d 516, 529 (5th Cir. 2016). Courts have declined to certify *pro se* prisoner class actions for fear that “the competence of a layman representing himself [is] clearly too limited to allow him to risk the rights of others.” *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975). As a consequence, it would be “plain error to permit [an] imprisoned litigant who is unassisted by counsel to represent his fellow inmates in a class action.” *Id.*; *see also Debrew v. Atwood*, 792 F.3d 118, 132 (D.C. Cir. 2015) (“[A] *pro se* litigant who is not trained as a lawyer is simply not an adequate class representative.”); *Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000) (“A litigant may bring his own claims to federal court without counsel, but not the claims of others.”).

Because the co-plaintiffs are proceeding *pro se*, they are unable to satisfy, and have not satisfied, the adequacy requirement of Rule 23(a)(4). They further fail to plead factual

allegations in support of the remaining requirements of Rule 23(a). The request for class certification is **DENIED**.

C. Transfer

Because certification of this lawsuit as a class action has been denied, each co-plaintiff must prosecute this lawsuit as to the violation of his own legal rights. *See Gregory v. McKennon*, 430 F. App'x 306, 310 (5th Cir. 2011) (finding that a prisoner cannot bring claims under 42 U.S.C. § 1983 on behalf of other prisoners); *Reeves v. Collins*, 37 F.3d 631 (5th Cir. 1994) (holding that civil rights litigants must show a constitutional violation of their own personal rights). Consequently, the alleged violations pleaded in the co-plaintiffs' complaint under section 1983 (denial of free exercise of religion) and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") (substantial burden upon religious exercise) must be viewed in context of the co-plaintiffs's rights as prisoners confined at the Robertson Unit.

As judicial relief to remedy the violations of their religious rights, the co-plaintiffs seek the following:

1. A declaratory judgment that their religious rights have been violated.
2. A permanent injunction allowing them to purchase meditation cushions for personal use and at religious services and retreats.
3. A permanent injunction ordering defendants to recognize a certain religious fast day and provide them a sack meal of no less than 1,400 calories to break the fast.

4. A permanent injunction allowing them to gather together and hold a peer-led retreat of no less than eight hours for religious holy days.
5. A permanent injunction allowing them to share a one-hour communal meal for religious holy days.
6. A permanent prohibition against being required to designate their official faith preference as "Eastern Religion" in order to receive lay-in passes to attend their Eastern Services.
7. A permanent injunction allowing them to conduct a weekly two-hour peer-led religious study meeting.
8. A permanent injunction allowing them two hours per week to conduct a peer-led Eastern Service.
9. A permanent injunction allowing the donation and use of a brass gong bowl during meditation sessions and Eastern Services.
10. A permanent injunction allowing them to purchase and wear religious wrist bracelets (prayer beads) at all times.
11. A permanent injunction allowing them to purchase certain food items for their religious new year celebrations.

The courts determine venue for section 1983 and RLUIPA lawsuits under the general venue provision of 28 U.S.C. § 1331(b). Under § 1331(b), venue lies in the judicial district where a defendant resides,¹ or in the judicial district where a substantial part of the events or omissions giving rise to the claims occurred. The complaint alleges that the co-plaintiffs are being denied their right to practice their religion at the Robertson Unit. Numerous prison grievances were submitted with the complaint, showing that Robertson Unit officers and

¹No factual allegations are pleaded in the complaint as to the residency of any named individual defendant.

officials denied the co-plaintiffs' grievances regarding the denial of their religious rights. Although some religious policy decisions may have been promulgated or made by prison officials outside the Robertson Unit, any denial of the co-plaintiffs' free exercise rights occurred in context of their religious activities as Buddhist prisoners at the Robertson Unit. The co-plaintiffs seek judicial relief allowing them to freely practice their religion at the Robertson Unit.

These considerations equally apply to the co-plaintiffs' RLUIPA claims. To proceed under RLUIPA, a plaintiff must demonstrate that the government practice complained of imposes a substantial burden upon his religious exercise. In order to demonstrate a substantial burden, a plaintiff must show that the challenged action truly pressured him to significantly modify his religious behavior and significantly violated his religious beliefs. In this case, any imposition of a substantial burden upon the co-plaintiffs' religious exercise occurred at the Robertson Unit.

Consequently, the Court finds that Houston is not a proper venue for this lawsuit, and that venue lies in the judicial district where a substantial part of the events or omissions giving rise to the claims occurred. In this instance, venue would be proper in the Northern District of Texas, Abilene Division, where the Robertson Unit is located.

When a civil complaint is filed in the wrong venue, the court has the discretion to (1) dismiss the complaint without prejudice to its filing in the correct venue; or (2) transfer the complaint to the correct venue, if transfer is in the interest of justice. *Lowery v. Estelle*, 533

F.2d 265, 267 (5th Cir. 1976); *McClintock v. Sch. Bd. E. Feliciana Par.*, 299 F. App'x 363, 366 (5th Cir. 2008). The Court finds that dismissal of this lawsuit would not be in the interest of justice, and that the case should be transferred to the Northern District of Texas, Abilene Division.

For these reasons, and in the interest of justice, this lawsuit is **ORDERED TRANSFERRED** to the United States District Court for the Northern District of Texas, Abilene Division. 28 U.S.C. § 1404(a).

In summary, the Court orders the following:

1. The motion for reconsideration (Docket Entry No. 7) is **DENIED**.
2. Certification of this lawsuit as a class action is **DENIED**.
3. This case is **ORDERED TRANSFERRED** to the United States District Court for the Northern District of Texas, Abilene Division.

Signed at Houston, Texas, on DEC 19 2022.



ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

SCOTT ZIRUS
a.k.a. KONCHOK TINGDZIN
WANGYAL,
Institutional ID No. 1640002;

KENRIC LEDBETTER;
Institutional ID No. 00628824;

ISAAC CARDENAS,
Institutional ID No. 02230470;

SANHY INTHALANGSY,
Institutional ID No. 02186559;

DAVID MARTIN,
Institutional ID No. 02125617;

MIGUEL BYGOYTIA,
Institutional ID No. 02161244;

JAMES RENFRO,
Institutional ID No. 1937567;

JUSTIN PANUS,
Institutional ID No. 02167693;

RICHARD CROSS,
Institutional ID No. 02100125;

WILLIAM OLIVER,
Institutional ID No. 02290434;

Plaintiffs,

No. 1:22-CV-00191-H

v.

RELIGIOUS PRACTICE
COMMITTEE, *et al.*,

Defendants.

DEFICIENCY SHOW CAUSE ORDER

Plaintiffs, ten state prisoners incarcerated in the TDCJ Robertson Unit, jointly signed and filed this civil-rights complaint in the United States District Court, Southern District of Texas,

Houston Division. (Dkt. No. 1.) Proceeding pro se, they complain that various TDCJ officials are impeding their ability to freely practice Buddhism in the Robertson Unit. But only Plaintiff Scott Zirus paid the filing fee.

On November 30, 2022, United States District Judge Alfred H. Bennett ordered the remaining nine plaintiffs to either pay the \$402 filing fee or file an application to proceed *in forma pauperis* (IFP) with a certified copy of his inmate trust account statement by December 30. (Dkt. No. 4.) He warned them that their individual failure to timely comply would result in dismissal of their claims. (*Id.*) Then, on December 19, Judge Bennett denied Plaintiffs' request to certify this lawsuit as a class action and transferred it here. (Dkt. No. 8.)

The deadline for the remaining nine plaintiffs to comply with Judge Bennett's November 30 order has lapsed. To date, none of the remaining nine plaintiffs have paid the filing fee or filed IFP documents.¹ Nor have they sought an extension of time to do so.

The Court orders that each of the remaining nine plaintiffs must take the following action within 14 days from the date of this order: (1) either pay the \$402 filing fee or file an IFP application with a certified copy of his inmate trust account;² or (2) show good cause why his claims should not be dismissed for want of prosecution under Federal Rule of Civil Procedure 41(b). *See Fed. R. Civ. P.* 41(b). If any plaintiff fails to comply with or respond to this order, the Court will dismiss his individual claims without further notice.

¹ Plaintiffs filed a motion asking Judge Bennett to reconsider his November 30 order that each plaintiff must pay a separate filing fee. (Dkt. No. 7.) Judge Bennett denied the motion. (Dkt. No. 8.) The Prison Litigation Reform Act (PLRA) requires each prisoner-plaintiff to pay the full filing fee, even if he or she is granted leave to proceed IFP. *See 28 U.S.C. § 1915.* Prisoners cannot avoid the PLRA's fee requirement by filing jointly. *See Bouribone v. Berge, 391 F.3d 852, 854-56 (7th Cir. 2004); see also Hubbard v. Haley, 262 F.3d 1194 (11th Cir. 2001).* The PLRA cannot be circumvented through the "creative joinder of actions." *Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 464 (5th Cir. 1998).*

² Where a prisoner plaintiff has been granted leave to proceed IFP, a \$350 filing fee will be deducted from the prisoner's account. *See District Court Miscellaneous Fee Schedule.* If the prisoner plaintiff has not been granted leave to proceed IFP, he must pay the \$350 fee plus a \$52 administrative fee, resulting in a total filing fee of \$402. *See id.* The Prison Litigation Reform Act (PLRA) requires each plaintiff to pay the full filing fee, even if he is granted leave to proceed IFP. *See 28 U.S.C. § 1915.*

The Court will defer ruling on Plaintiffs' Motion to Transfer Venue and Motion for Leave to File Amended Complaint until the deadline for each plaintiff to comply with the Court's order lapses. In addition, at that time, the Court will address whether each plaintiff who has cured his preliminary filing deficiencies should be allowed to proceed jointly in this action under Federal Rule of Civil Procedure 20.³

The forms required to comply with this order are available in the law library of Plaintiffs' current prison unit.

Dated January 17, 2023.



JAMES WESLEY HENDRIX
United States District Judge

³ Judge Bennett did not explicitly address whether Plaintiffs should be permitted to proceed jointly in one civil action under Rule 20. *See* Fed. R. Civ. P. 20. However, he did not sever the remaining nine plaintiffs from this action or order them to file an amended complaint setting forth their individual claims. Regardless, until each plaintiff has either cured his preliminary filing deficiencies or the deadline to do so lapses, the Court finds that addressing the propriety of party joinder is premature.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

SCOTT ZIRUS
a.k.a. KONCHOK TINGDZIN
WANGYAL,
Institutional ID No. 1640002;

KENRIC LEDBETTER;
Institutional ID No. 00628824;

ISAAC CARDENAS,
Institutional ID No. 02230470;

SANTHY INTHALANGSY,
Institutional ID No. 02186559;

DAVID MARTIN,
Institutional ID No. 02125617;

MIGUEL BYGOYTIA,
Institutional ID No. 02161244;

JAMES RENFRO,
Institutional ID No. 1937567;

JUSTIN PANUS,
Institutional ID No. 02167693;

RICHARD CROSS,
Institutional ID No. 02100125;

WILLIAM OLIVER,
Institutional ID No. 02290434;

No. 1:22-CV-00191-H

Plaintiffs,

v.

RELIGIOUS PRACTICE
COMMITTEE, *et al.*,

Defendants.

ORDER

Plaintiffs, ten state prisoners incarcerated in the TDCJ Robertson Unit, jointly signed and filed this civil-rights complaint in the United States District Court, Southern District of Texas,

Houston Division. (Dkt. No. 1.) Proceeding pro se, they complain that various TDCJ officials are impeding their ability to freely practice Buddhism in the Robertson Unit. But only Plaintiff Scott Zirus paid the filing fee.

On November 30, 2022, United States District Judge Alfred H. Bennett ordered each of the remaining nine plaintiffs to either pay the \$402 filing fee or file an application to proceed *in forma pauperis* (IFP) with a certified copy of his inmate trust account statement by December 30. (Dkt. No. 4.) He warned them that their failure to timely comply would result in dismissal of their individual claims. (*Id.*) In response, all plaintiffs except Scott Zirus filed objections to Judge Bennett's order and requested that he reconsider his order requiring each of them to pay a separate filing fee. On December 19, 2022, Judge Bennett overruled their objections, denied their request for reconsideration, and transferred the case here.¹ (Dkt. No. 8.)

On January 17, 2023, this Court entered an order instructing each of the remaining nine plaintiffs to fully comply with Judge Bennett's November 30, 2022 order by January 31. (Dkt. No. 13). Specifically, the Court ordered each of the remaining nine plaintiffs to (1) either pay the \$402 filing fee or file an IFP application with a certified copy of his inmate trust account; or (2) show good cause why his claims should not be dismissed for want of prosecution. (*Id.*)

The deadline for each of the remaining nine plaintiffs to comply with this Court's January 17 order has lapsed. To date, none of the remaining nine plaintiffs have complied or sought an extension of time to do so. Instead, they filed a motion seeking an extension of time to file a notice of appeal of Judge Bennett's December 19, 2022 order, which overruled their objections to his earlier order requiring each of them to pay a separate filing fee. (Dkt. No. 14). They contend that they did not receive notice of Judge Bennett's December 19, 2022 order until they received *this* Court's January 17, 2023 order referencing it. In support of their motion, the plaintiffs attach copies of

¹ In his December 19 order, Judge Bennett also denied Plaintiffs' request to certify this lawsuit as a class action.

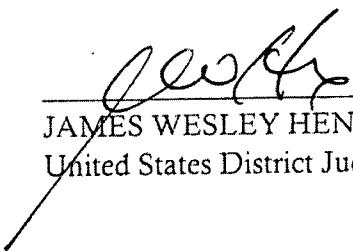
various I-60 "Inmate Request" forms asking the Robertson Unit mailroom to confirm whether they received any legal mail from "the United States District Court in Houston" between December 19, 2022 and January 20, 2023. (Dkt. No. 14-2.) In the space marked "disposition" on each form, an unidentified person wrote "Received Letter from Northern District on 12-22-22;" and "No Record from the Southern District." (*Id.*) However, none of the plaintiffs filed a sworn affidavit or unsworn declaration made under penalty of perjury in support of their motion. And the I-60 forms they attach are not authenticated and do not appear to have been signed by a Robertson Unit official.

Based on the record before it, the Court concludes that it does not have sufficient information to determine whether the remaining nine plaintiffs should be granted additional time to file a notice of appeal of Judge Bennet's December 19, 2022 order under Federal Rule of Appellate Procedure 4(a)(5)(A).

The Court will provide Plaintiffs 14 days to supplement their motion by filing either a sworn affidavit or unsworn declaration made under penalty of perjury pursuant to 28 U.S.C. § 1746. Should they choose to do so, each participating plaintiff must sign the supplemental document.

The Court cautions Plaintiffs that including false statements in an affidavit or unsworn declaration made under penalty of perjury may result in prosecution for perjury.

Dated February 3, 2023.



JAMES WESLEY HENDRIX
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

SCOTT ZIRUS
a.k.a. KONCHOK TINGDZIN
WANGYAL,
Institutional ID No. 1640002;

KENRIC LEDBETTER;
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Institutional ID No. 02100125;

WILLIAM OLIVER,
Institutional ID No. 02290434;

Plaintiffs,

No. 1:22-CV-00191-H

v.

RELIGIOUS PRACTICE
COMMITTEE, *et al.*,

Defendants.

ORDER

Plaintiffs, ten state prisoners incarcerated in the TDCJ Robertson Unit, filed this civil-rights complaint in the United States District Court, Southern District of Texas, Houston Division. In

December 2022, United States District Judge Alfred H. Bennett transferred the case here. (Dkt. Nos. 8, 9.) Pending before this Court is Plaintiffs' motion for an extension of time to file a notice of appeal of an order entered by Judge Bennett. (Dkt. No. 14.) As explained below, the Court finds Plaintiffs' motion should be granted.

1. Background

Plaintiffs signed and filed their original complaint jointly. They complain that various TDCJ officials are impeding their ability to freely practice Buddhism in the Robertson Unit. But only Plaintiff Scott Zirus paid the filing fee. On November 30, 2022, Judge Bennett ordered each of the remaining nine plaintiffs to either pay the \$402 filing fee or file an application to proceed *in forma pauperis* (IFP) with a certified copy of his inmate trust account statement by December 30. (Dkt. No. 4.) He warned them that their failure to timely comply would result in dismissal of their individual claims. (*Id.*) In response, all plaintiffs except Scott Zirus filed objections to Judge Bennett's order and requested that he reconsider his order requiring each of them to pay a separate filing fee. On December 19, 2022, Judge Bennett overruled their objections, denied their request for reconsideration, and transferred the case here. (Dkt. No. 8.)

On January 17, 2023, this Court entered an order instructing each of the remaining nine plaintiffs to fully comply with Judge Bennett's November 30, 2022 order by January 31. (Dkt. No. 13). Specifically, the Court ordered each of the remaining nine plaintiffs to (1) either pay the \$402 filing fee or file an IFP application with a certified copy of his inmate trust account; or (2) show good cause why his claims should not be dismissed for want of prosecution. (*Id.*)

The deadline for each of the remaining nine plaintiffs to comply with this Court's January 17 order has lapsed. To date, none of the remaining nine plaintiffs have complied or sought an extension of time to do so. Instead, they filed the instant motion seeking an extension of time to file a notice of appeal of Judge Bennett's December 19, 2022 order, which overruled their objections to his earlier order requiring each of them to pay a separate filing fee. (Dkt. No. 14).

2. Legal Standard

Federal Rule of Appellate Procedure 4(a)(5) allows the district court to extend the time for filing a notice of appeal if the moving party “shows excusable neglect or good cause.” *Rivers v. Lumpkin*, No. 18-11490, 2022 WL 1517027, at *3 (5th Cir. 2022) (citing Fed. R. App. P. 4(a)(5)). A motion for extension of time under Rule 4(a)(5) must be filed no later than 30 days after the expiration of the time for filing a notice of appeal. *Id.*

In determining whether a party has shown excusable neglect or good cause, the Court must consider all relevant circumstances surrounding the party’s omission, including (1) the danger of unfair prejudice; (2) the length of the delay and its potential impact on judicial proceedings; and (3) the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *See Rivers*, 2002 WL 1517027, at *4 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395 (1993)). The United States Court of Appeals for the Fifth Circuit reviews a ruling on a Rule 4(a)(5) motion for abuse of discretion and gives more leeway to a district court’s excusable-neglect or good-cause determination when the district court grants the motion for an extension of time. *See Rivers*, 2002 WL 1517027, at *3 (citing *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 820 (5th Cir. 2007)).

3. Analysis

The remaining nine plaintiffs seek to appeal Judge Bennett’s December 19, 2022 order. Under Rule 4(a)(1)(A), they had 30 days afterward—until January 18, 2023—to file a notice of appeal. *See Fed. R. App. P. 4(a)(1)(A)*. Pursuant to the prison mailbox rule,¹ they filed the instant motion on January 25, 2023. (Dkt. No. 14 at 3.) Because the remaining nine plaintiffs filed their motion within 30 days after the time to file a notice of appeal expired, the Court concludes that their motion was timely filed for purposes of Rule 4(a)(5)(A)(i).

¹ *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (providing that a prisoner’s habeas petition is deemed to be filed when he delivers the papers to prison authorities for mailing).

The remaining nine plaintiffs contend they did not receive notice of Judge Bennett's December 19, 2022 order until they received *this* Court's January 17, 2023 order referencing it. In support of their motion, they attach copies of various I-60 "Inmate Request" forms asking the Robertson Unit mailroom to confirm whether they received any legal mail from "the United States District Court in Houston" between December 19, 2022 and January 20, 2023. (Dkt. No. 14-2.) In the space marked "disposition" on each form, an unidentified person wrote "Received Letter from Northern District on 12-22-22;" and "No Record from the Southern District." (*Id.*) However, because none of the plaintiffs had filed a sworn affidavit or unsworn declaration made under penalty of perjury in support of their motion, on February 3, 2023, the Court determined that it did not have sufficient information to determine whether Plaintiffs should be granted additional time to file a notice of appeal under Rule 4(a)(5). (Dkt. No. 20.) The Court provided Plaintiffs 14 days to supplement their motion. (*Id.*)

Plaintiffs, including Scott Zirus, have since filed a joint signed declaration under 28 U.S.C. § 1746. (Dkt. No. 21 at 3–4.) Each plaintiff states under penalty of perjury that he (1) did not receive a copy of Judge Bennet's December 19, 2022 order; and (2) had no reason to believe that Judge Bennet had issued that ruling until "it was referenced by this Court" in its January 17, 2023 deficiency show cause order. (*Id.* at 3.)

Because Plaintiffs state under penalty of perjury that they did not receive notice of the order that they intend to appeal until *after* the time for filing a notice of appeal under Rule 4(a)(1)(A) expired, the Court accepts as true their contention that their delay in filing a notice of appeal was outside their control. Moreover, this case is still pending preliminary judicial screening under 28 U.S.C. § 1915A, and Defendants have not been served with process. Thus, the Court finds that Defendants will not suffer any prejudice by a delay.

Under these circumstances, the Court concludes that the remaining nine plaintiffs have shown that there is good cause to excuse their failure to timely file a notice of appeal. *See* Fed. R.

App. P. 4 (a)(5)(A)(ii); *see also Rivers*, 2002 WL 1517027, at *4 (finding that it would not have been an abuse of discretion for the district court to extend the time to file a notice of appeal because the plaintiff established through his affidavit that he did not receive timely notice of the judgment he sought to appeal).

4. Conclusion and Instructions

For the foregoing reasons, the Court grants the remaining nine plaintiffs' motion for an extension of time to file a notice of appeal of Judge Bennet's December 19, 2022 order. The Court therefore accepts for filing their Joint Notice of Appeal, which is attached to their motion. (Dkt. No. 14-1.) The Court directs the Clerk to enter the Joint Notice of Appeal as a new entry on the docket sheet.

Dated June 7, 2023.


JAMES WESLEY HENDRIX
United States District Judge