

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

TOMMY RAY MAYS II and QUINTON
NELSON SR., individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

JON HUSTED, in his official capacity as
Secretary of State,

Defendant.

Case No. 2:18-cv-1376

JUDGE MICHAEL H. WATSON
Magistrate Judge Chelsey M. Vascura

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION AND
MEMORANDUM IN SUPPORT**

CLASS ACTION

Plaintiffs respectfully move this Court to enter an order certifying this case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), and appointing the undersigned counsel as class counsel, for the reasons set forth in this Motion and the accompanying Memorandum of Law. In Ohio, qualified voters who are arrested after the deadline to request an absentee ballot and held in detention through Election Day are not permitted to vote, in violation of the First and Fourteenth Amendments of the United States Constitution. Named plaintiffs Mays and Nelson seek to serve as Class Representatives and represent a class pursuant to Counts One and Two of Plaintiffs' Complaint, to be defined as:

All individuals arrested and held in detention in Ohio on or after close of business for the county election board on the Friday prior to the Election who (1) are eligible to vote in Ohio and are registered to do so, (2) did not vote absentee in person or by mail prior to their detention, (3) were provided neither an absentee ballot nor transportation to a voting center nor access to any other method of voting while held in detention, and (4) will remain in detention through close of polls on Election Day.

As explained in the accompanying Memorandum of Law, class certification is appropriate under Federal Rules of Civil Procedure 23(a) and 23(b)(2) because (1) joinder of all class members

is impracticable, (2) the class presents common questions of law and fact, (3) the claims of Class Representatives are typical of the claims of the members of the putative class, (4) Class Representatives and their attorneys are adequate representatives for the putative class, and (5) Defendant has acted or refused to act on grounds that apply generally to the class, such that declaratory and injunctive relief is appropriate for the class as a whole.

This Motion is based on (1) the accompanying Memorandum of Law, (2) the concurrently filed expert submission of Mark Salling, PhD, (3) the concurrently filed declarations of Mark Gaber, Chiraag Bains, and Laura Bishop, undersigned counsel, (4) all pleadings and papers on file with the Court in this action, and (5) all other materials as may be presented to the Court at or before the hearing on this Motion.

WHEREFORE Plaintiffs respectfully request that the Court certify their proposed class pursuant to Rule 23(b)(2) and appoint the undersigned as class counsel.

Dated: November 6, 2018

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MEMORANDUM OF LAW

INTRODUCTION

Plaintiffs respectfully move this Court to enter an order certifying this case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). In Ohio, qualified voters who are arrested after the deadline to request an absentee ballot and held in detention through Election Day are not permitted to vote, in violation of the First and Fourteenth Amendments of the United States Constitution. Although Ohio law provides an emergency absentee ballot procedure for individuals who are hospitalized after these deadlines due to unforeseen accidents or medical emergencies (or whose minor children experience the same), there is no similar mechanism for late-jailed electors to access the ballot. Because these electors are unable to vote in-person on Election Day due to their detention, their lack of access to absentee ballots or other emergency voting procedures results in total disenfranchisement.

Named Plaintiffs Tommy Ray Mays II and Quinton Nelson Sr. seek to represent a class pursuant to Counts One and Two of Plaintiffs' Complaint, which alleges that Ohio's current election law and policies and administration thereof place a significant burden on Plaintiffs and plaintiff class members' fundamental right to vote, such that their ability to exercise the franchise is denied in violation of the First and Fourteenth Amendments to the United States Constitution.

For the reasons described herein, Plaintiffs' class claims are well suited for class treatment and satisfy the requirements of Federal Rule of Civil Procedure 23. Plaintiffs thus respectfully request that the Court certify these claims as a class action.

ARGUMENT

The Court should certify Counts One and Two of Plaintiffs' Complaint for class treatment pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2). To have a suit certified as a class action, Plaintiffs must satisfy the requirements of Rule 23(a) as well as the additional requirements

of one of three categories of class actions. Rule 23(a) has four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)–(4). A class action may be maintained pursuant to Rule 23(b)(2) when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). In assessing whether a suit satisfies Rule 23(a)’s requirements, courts should err on the side of favoring class treatment, particularly in civil rights suits. “Rule 23(b)(2) has long been recognized as an appropriate and important vehicle for civil rights actions.” *Ball v. Kasich*, 307 F. Supp. 3d 701, 713 (S.D. Ohio 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011)).

As discussed below, because Plaintiffs clearly satisfy the requirements of Rule 23(a) and class certification is appropriate under Rule 23(b)(2), Plaintiffs’ motion for class certification should be granted.

I. Proposed Plaintiff Class Definitions

An order certifying a class action must define the class. *See* Fed. R. Civ. P. 23(c)(1)(B). Plaintiffs propose one class. The plaintiff class applicable to the claims in Plaintiffs’ Complaint is defined as:

All individuals arrested and held in detention in Ohio on or after close of business for the county election board on the Friday prior to the Election who (1) are eligible to vote in Ohio and are registered to do so, (2) did not vote absentee in person or by mail prior to their detention, (3) were provided neither an absentee ballot nor transportation to a voting center nor access to any other method of voting while held in detention, and (4) will remain in detention through close of polls on Election Day.

Should the Court ultimately grant the declaratory and injunctive relief Plaintiffs seek with respect to the proposed plaintiff class, Defendants will be required to provide the plaintiff class

members with a method of accessing the ballot, such as by allowing plaintiff class members to avail themselves of the emergency absentee ballot request procedure afforded to individuals and their minor children who are hospitalized between the standard absentee ballot request deadline and Election Day. The plaintiff class members are easily identifiable using arrest and detention records and voter registration records. The proposed class definition relies upon objective criteria and can be easily administered, thus satisfying the requirement for a class certified under Rule 23(b)(2).¹

II. The Proposed Plaintiff Class Satisfies the Criteria of Rule 23(a)

A. Numerosity

¹ In any event, where injunctive and declaratory relief is sought under Rule 23(b)(2), rather than monetary damages under Rule 23(b)(3), the requirements of definiteness and ascertainability of class members do not apply. *See* Fed. Judicial Ctr., *Manual for Complex Litigation*, § 21.222 (4th ed. 2004). (“[B]ecause individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not.”). Moreover, notice is not required in Rule 23(b)(2) actions, and it is the case that:

relief obtained on behalf of the class is injunctive and therefore does not require distribution to the class. Because defendants are legally obligated to comply [with any relief the court orders] . . . it is usually unnecessary to define with precision the persons entitled to enforce compliance. Therefore, it is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all.

¹ William B. Rubenstein, *Newberg on Class Action* § 3:7 (5th ed. 2017) (internal quotation marks and footnote omitted). Thus, “while the lack of identifiability 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).” *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) (citing *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972)); *see also Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) (holding that “ascertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief”); Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (providing “illustrative” examples of (b)(2) classes as “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration”).

The proposed plaintiff class easily meets the numerosity requirement of Rule 23(a)(1). To be maintained as a class action, the class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “While no strict numerical test exists, ‘substantial’ numbers of affected [individuals] are sufficient to satisfy this requirement.” *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 416 (6th Cir. 2012). The Court may consider class size, geographic distribution of members and the ability of class members to pursue individual litigation; however, courts in Ohio have typically held that a group of forty or more members is generally sufficient to meet the numerosity requirement of Rule 23(a). *See Treviso v. Nat’t Football Museum, Inc.*, 2018 WL 4608197, at *4 (N.D. Ohio, Sept. 25, 2018).

The numerosity requirement is plainly met here. In 2015, approximately 383,326 individuals were admitted into jail in in Ohio—an average rate of 1,050 individuals admitted per day.² Thus, from Friday, November 2 to Monday, November 5, approximately 4,200 individuals will be booked into Ohio jails. An estimated 7,990,902 Ohioans are registered to vote.³ Ohio’s estimated population in 2017 was 11,658,609 individuals, 22.3% (2,559,869) of whom are under 18 years old.⁴ Thus, an estimated 87.8%⁵ of Ohioans over the age of 18 are registered to vote. Based on the rates of voter registration and jail admissions in Ohio, an estimated 3,689 eligible electors will be admitted into Ohio jails in the period from Friday, November 2 to Monday, November 5. With respect to the proposed plaintiff class, the potential for up to 3,689 affected plaintiffs clearly surpasses the numerosity requirement.

² <http://trends.vera.org/rates/ohio?incarcerationData=all&admissions=count>.

³ <https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-general-elections/#gref>.

⁴ <https://www.census.gov/quickfacts/fact/table/oh/AGE295217#viewtop>.

⁵ 7,990,902 Ohioans are registered to vote. The Census Bureau estimates that 9,098,740 individuals in Ohio are over the age of 18.

Further, a 2014 study conducted by Dr. Mark Salling, the Director of the Northern Ohio Data and Information Service, concluded that in the 2012 general election, between 438 and 479 voters registered in Ohio were unable to cast ballots because they were in jail the weekend and Monday before the election. *See* Expert Submission of Mark Salling, PhD, Exhibit A, at ¶ 6a. Although we cannot yet know the number of people affected in this election cycle, there is no reason to think that number has gone down significantly over the past few years.

B. Commonality

Plaintiffs also satisfy the requirement that “there [be] questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). “[F]or purposes of Rule 23(a)(2), [e]ven a single [common] question will do.” *Id.* at 359 (internal quotation marks omitted; first bracket added). The commonality requirement is satisfied if the question “is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350. The Sixth Circuit has described the following analysis as necessary to determine commonality:

The commonality requirement deals with shared questions of law or fact. Although Rule 23(a)(2) speaks of “questions” in the plural, we have said that here need only be one question common to the class. It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.

Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998) (en banc) (internal citations omitted); *see also Wal-Mart*, 564 U.S. at 359.

The commonality requirement is met here. This case presents common question applicable to the proposed plaintiff class, including, but not limited to:

- Whether Defendant has precluded eligible voters held in detention in Ohio county jails from exercising the fundamental right to vote;
- Whether Ohio law governing absentee voting by pretrial detainees and detainees with misdemeanor convictions, Ohio Rev. Code § 3509.08, is consistent with the U.S. Constitution;
- Whether declaratory relief holding unconstitutional Ohio’s practice of disenfranchising qualified electors who are jailed the weekend before election day and who remain confined through election day is appropriate; and
- Whether injunctive relief is appropriate to require the Secretary of State to direct all members of all County Boards of Elections to provide a reasonable and practicable means of voting for all eligible, confined voters, at least equivalent to that provided for late-hospitalized persons pursuant to Ohio Rev. Code § 3509.08.

These issues are common both to the claims of the Named Plaintiffs and to the claims of the unnamed class members. Ohio’s current law and practice regarding absentee voting systematically disenfranchises all qualified electors who are arrested and held in detention between the deadline for requesting an absentee ballot has elapsed and Election Day, and who remain in detention through Election Day.

For all of these questions, class treatment has the capacity “to generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350 (emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Unlike in *Wal-Mart*, where the Court found that commonality did not exist

because plaintiffs had not “identified a common mode of [each supervisor] exercising discretion that pervade[d] the entire company,” *id.* at 356, here, Ohio’s election laws affect all class members in the exact same manner—by preventing them from exercising their fundamental right to vote for the sole reason that they have been detained. Injunctive and declaratory relief will resolve all class and subclass members’ claims “in one stroke.” *Id.* at 350. Plaintiffs easily satisfy the commonality requirement.

C. Typicality

The third requirement of Rule 23(a) is that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). For the same reasons that plaintiffs’ claims meet the commonality requirement, they also meet the typicality requirement. Indeed, the Supreme Court has noted that the typicality, adequacy of representation, and commonality requirements “tend[] to merge.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997). The Sixth Circuit has stated the following with respect to the typicality requirement:

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.... A necessary consequence of the typicality requirement is that the representative’s interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Sprague, 133 F.3d at 399. “[T]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.” *Id.*

Here, there is no question that the Named Plaintiffs’ claims are in fact identically aligned with those of the unnamed class members. The Named Plaintiffs are all individuals who were effectively disenfranchised by virtue of their detention. *See* Exhibits A and B to Plaintiffs’ Memorandum of Law in Support of their Emergency Motion for a Temporary Restraining Order.

The Named Plaintiffs seek injunctive and declaratory relief permitting them to vote, and the relief they seek is identical to that sought by all of the unnamed class members who are similarly disenfranchised by Ohio’s early and absentee voting system. That relief would resolve the claims of all class members.

The claims of the Named Plaintiffs are therefore entirely aligned with the unnamed class members—all of them seek access to the ballot in order to exercise their fundamental right to vote, notwithstanding their arrests and detention—and injunctive and declaratory relief will address all of their claims. The typicality requirement is plainly satisfied.

D. Adequacy of Representation

The final requirement of Rule 23(a) is that “the representative parties will fairly and adequately protect the interests of the class,” Fed. R. Civ. P. 23(a)(4), and this inquiry overlaps with the inquiries into commonality and typicality, *see Amchem*, 521 U.S. at 626 n.20. “The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Id.* at 625. “A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* “Accordingly, to satisfy the adequate representation requirements under Rule 23 . . . there must be an absence of a conflict of interest, and the presence of common interests and injury.” *Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998). To determine whether a class of plaintiffs meet Rule 23(a)(4)’s adequacy of representation requirement, courts must consider two criteria: “(1) the representative must have common interests with unnamed members of the class; and (2) it must appear that the representative[] will vigorously prosecute the interests of the class through qualified counsel.” *Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 648 (S.D. Ohio 2017).

Here, the representatives are plainly adequate. In this case, the Named Plaintiffs do not have *any* conflict, much less a fundamental one, with the other members of the class and subclasses. The injunctive and declaratory relief they seek will benefit the entire class in the same manner—granting all class members access to the ballot notwithstanding their detention. They are plainly adequate class representatives.

Plaintiffs’ counsel similarly meet this requirement. “The adequacy [requirement] also factors in competency and conflicts of class counsel.” *Amchem*, 521 U.S. at 626 n.20. Class counsel in this case easily meet the adequacy requirement of Rule 23(a)(4). “The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are qualified, experienced and generally able to conduct the litigation and whether counsel will vigorously prosecute the interests of the class.” 1 William B. Rubenstein, *Newberg on Class Actions* § 3:72 (5th ed. 2017) (internal quotation marks and footnotes omitted); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 71 (6th Cir. 2000).

Plaintiffs are represented by counsel with substantial experience in election law and voting rights litigation, civil rights litigation generally, and class actions. *See* Declaration of Mark Garber, Exhibit B; Declaration of Chiraag Bains, Exhibit C; Declaration of Laura Bishop, Exhibit D.

For these reasons, as demonstrated in counsel’s declarations, class counsel also satisfy the requirements of Rule 23(g), which requires that the Court appoint class counsel at the time of certification, and that in doing so the Court consider (1) “the work counsel has done in identifying or investigating potential claims in the action,” (2) “counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action,” (3) “counsel’s knowledge of the applicable law,” and (4) “the resources that counsel will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Plaintiffs' counsel Campaign Legal Center is a preeminent national nonpartisan, nonprofit election law organization with decades of experience litigating voting rights matters. Recent example litigation includes cases addressing Georgia's "exact match" voter registration system, North Dakota's "residential address" requirement as applied to Native Americans living on reservations, Alabama's system of felony disenfranchisement, Texas's photo ID requirement, and Arizona's dual registration system. *See* M. Gaber Dec. ¶¶ 4-5. Plaintiffs' counsel Mark Gaber has significant experience on these and other voting rights and civil rights matters, as well as litigating complex commercial cases, and has experience litigating putative and certified class actions, including having been found to be adequate class counsel in the past in a case challenging Virginia's marriage ban. *See id.* ¶ 4. Plaintiffs' counsel Danielle Lang likewise has years of experience litigating voting rights and civil rights matters, *see id.* ¶ 5, and Plaintiffs' counsel Jonathan Diaz has experience litigating complex matters and other civil rights actions, *id.* ¶ 6. Plaintiffs' counsel has invested significant work investigating and preparing for this matter, *id.* ¶ 2, and are committed to investing the resources necessary to pursue this matter, *id.* ¶ 7.

Plaintiffs' counsel Demos is a nonprofit, racial justice organization dedicated to an America in which we all have an equal voice and an equal chance. *See* C. Bains Dec. ¶ 3. Demos has significant experience litigating voting rights issues, including voter purges, language access, and voter registration requirements of the National Voter Registration Act ("NVRA"). *See id.* ¶¶ 4, 6. Plaintiffs' counsel Chiraag Bains has litigated many voting rights and redistricting cases, including *Veasey v. Abbott* and *United States v. Texas*. *Id.* ¶ 4. Plaintiffs' counsel Naila Awan likewise has significant experience in voting rights matters, including particular experience litigating such matters in Ohio. Her cases include *A. Philip Randolph Institute v. Husted* and *League of Women Voters v. Ashcroft*. *Id.* ¶ 6.

Plaintiffs’ counsel the Roderick and Solange MacArthur Justice Center at the Northwestern Pritzker School of Law (“MacArthur Justice Center”) is a public interest law firm that advocates for human rights and social justice through litigation. *See* L. Bishop Dec. ¶ 3. MacArthur Justice Center’s attorneys have led significant litigation in areas that include the treatment of incarcerated men and women, the rights for the indigent in the criminal justice system, compensation for the wrongfully convicted, and police misconduct. *Id.* Plaintiffs’ counsel Laura Bishop has experience litigating matters across a wide range of subjects, including serving as counsel on multiple putative class actions in federal courts. *Id.* ¶ 4. Plaintiff’s counsel Locke E. Bowman is the Executive Director of MacArthur Justice Center and has a long track record litigating cases about individual and systemic injustice, *id.* ¶ 5, and Plaintiffs’ counsel Alexa Van Brunt has experience with a variety of civil rights cases, including two recent class action cases in Illinois, *see id.* ¶ 6.

Plaintiffs have satisfied their initial burden to demonstrate adequacy of representation, 3 *Newberg on Class Actions*, *supra* § 3:72, and absent any evidence to the contrary, the Court should thus presume the adequacy has been satisfied, *id.*

III. Class Certification is Appropriate Under Rule 23(b)(2)

The Court should certify the classes pursuant to Rule 23(b)(2). A class action may be maintained pursuant to Rule 23(b)(2) when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Supreme Court has noted that certification under Rule 23(b)(2) is particularly appropriate in “[c]ivil rights cases against parties charged with unlawful, class-based discrimination.” *Amchem*, 521 U.S. at 614. “The key to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or

declared unlawful only as to all of the class members or as to none of them.” *Wal-Mart*, 564 U.S. at 360.

That is precisely the case here. First, this is exactly the type of civil rights action that Rule 23(b)(2) was created to foster. Ohio categorically denies access to the ballot to its citizens who are arrested and detained in the days immediately preceding an election, despite the facts that they have not been convicted of any crime and are, in many instances, only detained because of their financial inability to meet their bail obligations. There is no substantive difference among the class members, and therefore injunctive and declaratory relief is “appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The unifying features of the class—the timing of their arrests and detention, their eligibility and desire to vote, and the structural obstacles impeding their ability to vote—are precisely the characteristics of individuals disenfranchised by Ohio’s law. The Court should certify this action under Rule 23(b)(2).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify their proposed class pursuant to Rule 23(b)(2) and appoint the undersigned as class counsel.

Dated: November 6, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2018, I served the foregoing on counsel for

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