IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ORGANIZATION FOR BLACK STRUGGLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 2:20-cv-4184
v.	)	
	)	
JOHN R. ASHCROFT, et al.,	)	
	)	
Defendants.	)	

MISSOURI SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY A DEFENDANT CLASS OR FOR JOINDER OF 116 LOCAL ELECTION AUTHORITIES

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INTRODUCTION

The defendant class Plaintiffs seeks is procedurally improper, factually flawed, and legally unsupportable. Plaintiffs cite no Supreme Court or Eighth Circuit case allowing a defendant class action, and they disregard bedrock principles of federal class action law, ignoring both the plain text and procedural protections of Rule 23. Nor is there any need to join all 116 local election authorities: there are no individual named plaintiffs—only advocacy organizations with unidentified "members"—and there is no evidence that voters in every county are affected. In fact, Plaintiffs' evidence focuses heavily on only two counties—St. Louis County and Greene County—with little or no evidence relating to any other local election authority.

This Court thus should deny Plaintiffs' motion under Federal Rule of Civil Procedure 23 to certify a defendant class of 116 Missouri local election authorities. It should also deny Plaintiffs' motion, in the alternative, for joinder of all 116 election authorities as parties.

LEGAL STANDARD

Class actions are an exceptional device, and defendant class actions are rarer still. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-701 (1979)). And it is even more exceptional to certify a class of defendants proposed by a plaintiff. *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 853 (7th Cir. 2002).

To certify a defendant class action, under Rule 23, the plaintiff carries "the burden of showing that the class should be certified and that the requirements of Rule 23 are met." *Coleman v. Watt*, 40 F.3d 255, 258-59 (8th Cir. 1994). And the district court must undertake a "rigorous

analysis" to ensure that the case meets the requirements for certification. *Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 925 (8th Cir. 2015).

For certification to be proper, the plaintiff "must meet all of the requirements of Rule 23(a) and must satisfy one of the three subsections of Rule 23(b)," as well as prove adequate class counsel. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005). First, a plaintiff must meet all four threshold requirements of Rule 23(a): "numerosity, commonality, typicality, and adequacy." *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1155 (8th Cir. 2017). Second, once all of those requirements are satisfied, "the proposed class must also fit within 'one of the three subsections of Rule 23(b).'" *Id.* (quoting *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477 (8th Cir. 2016)). Third, Plaintiffs must show that class counsel exists who will meet the requirements of Rule 23(g) and Rule 23(c)(1)(B).

Plaintiffs fail to identify the burden of proof, but Rule 23 places a heavy burden upon them. The burden of proof is on the "party who is invoking Rule 23" to show "by a preponderance of the evidence that all the prerequisites to utilizing the class-action procedure have been satisfied." 7A CHARLES A. WRIGHT, ARTHUR MILLER, AND MARY KANE, FED. PRAC. & PROC. CIV. § 1759 (3d ed.) (collecting cases).

Moreover, Defendant class actions "present special due process concerns and require the court to be more diligent in assuring that the class is adequately and fairly represented." *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 59-60 (Mo. App. W.D. 2000) (quoting 7A CHARLES A. WRIGHT, ARTHUR MILLER, AND MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 1770 (2d ed. 1986)).

It is also not enough for a plaintiff merely to plead the elements of Rule 23. *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Rather, "a party seeking class certification must *affirmatively*

demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis added). For this reason, it "may be necessary for the court to probe behind the pleadings." *Id.*

ARGUMENT

Class actions are an exceptional device in litigation, but *defendant* classes are truly "rare birds." *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 853 (7th Cir. 2002). One commentator "has with harmless exaggeration called them 'as rare as unicorns.'" *Id.* (citations omitted). Indeed, defendant classes are seldom certified. *Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y. 2006). This is especially true in Missouri, with only a few reported decisions showing certified defendant classes, and no Supreme Court or Eighth Circuit decisions ever approving the certification of a defendant class.

Defendant class actions do not fit easily within the text of Rule 23, and the better reading of the rule is to hold that they do not fall within some of the subparts invoked by Plaintiffs at all, such as Rule 23(b)(2). Still, even if some subparts of Rule 23 were to authorize certification of a defendant class action, Plaintiffs have not met their burden of establishing by a preponderance of the evidence these requirements of Fed. R. Civ. P. 23(a) and 23(b) for the class and the requirements of Rule 23(c) and 23(g) for class counsel. Plaintiffs propose a defendant class of "all Missouri local election authorities," with no mention of class counsel. ECF 5 at 2. But this class cannot be certified because Plaintiffs have not adequately pleaded the necessary class or class counsel allegations under Rule 23, let alone proven these allegations by a preponderance of the evidence, and pursuing a defendant class action would violate due process for the absent local election authorities.

I. Plaintiffs have failed to satisfy Rule 23(a)'s numerousity, commonality, typicality, and adequacy requirements.

Plaintiffs have not met their burden of establishing the four threshold requirements of Fed. R. Civ. P. 23(a): numerousity, commonality, typicality, and adequacy. Plaintiffs do not state who bears the burden on a motion to certify, instead claiming courts should err in favor of certification. But they must show by a preponderance that Rule 23 is met on each of these factors.

A. Plaintiffs have not proven that the class is so numerous that joinder is impracticable.

Rule 23(1)(1) requires the class to be too numerous to join all class members. This prong seeks to prevent the court from unnecessarily depriving members of a relatively small class of their rights without a day in court. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Under this prong, Plaintiffs must show "that it is extremely difficult or inconvenient to join all the members of the class." Wright & Miller, 7A Fed. Prac. & Proc. Civ. § 1762 (3d ed.).

Rather than show that the class is too large to serve and sue, Plaintiffs claim that "the time-sensitive nature of this action involving the constitutionally protected fundamental right to vote" supports class certification. ECF 28 at 9. In short, Plaintiffs seek to avoid compliance with Rule 23 to achieve a highly expedited resolution of their claims. But the Rule contains no "expedited case" exception. Plaintiffs' last-minute haste leads them to overlook due process, and it leads them to overstate the obstacles to joinder. In truth, the real objections to joinder stem not from the number of local election authorities or the difficulty of joining them, but from Plaintiffs' delay in bringing suit and from the need to observe due process in the litigation of this case. The time required to litigate the case against so many local election authorities comes from the individualized nature of claims, discovery, and evidence against each geographically dispersed

defendant. Plaintiffs' last-minute rush to a courthouse to change voting procedures during an election comes too late for any relief. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

B. Plaintiffs have not identified a common question central to the case.

Rule 23(a) also requires the class to be capable of common resolution. Every class complaint raises common questions. But merely raising common questions—"even in droves"—is not enough: "rather the capacity of a classwide proceeding to generate common *answers* to drive the resolution of the litigation" is what counts. *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (citation omitted). Thus, to merit certification, class claims "must depend upon a common contention … of such a nature that it 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*. "Thus, the issue becomes whether dissimilarities between the claims may impede a common resolution." WRIGHT & MILLER, 7A FED. PRAC. & PROC. CIV. § 1763 (3d ed.). The requisite "common questions may not be found when the decision regarding the propriety of injunctive or declaratory relief turns on a consideration of the individual circumstances of each class member or when the [plaintiffs have] not engaged in a common course of conduct toward them." *Id.*

"Rule 23 does not set forth a mere pleading standard," so "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (2011) (quoting *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160 (1982)). A court's Rule 23 analysis often "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351.

Plaintiffs purport to identify three common questions:

> (1) whether the class' enforcement of Missouri voting laws relative to mail-in ballots under Mo. Stat. Ann. § 115.302, places a severe or undue burden on the right to vote;
>
> (2) whether defendant class's rejection of ballots for omissions that are not material in determining a voter's qualifications violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B); and
>
> (3) whether defendant class's failure to provide Plaintiffs with sufficient pre-rejection notice of ballot deficiencies and a meaningful an opportunity to cure ballot such errors violates the Due Process Clause.

ECF 28 at 10-11. But these three issues are not common questions resolving aspects of liability against each defendant; they are common types of claims, sought to be asserted against each defendant. So a class action would not "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350.

Even if Plaintiffs could bring a constitutional or statutory challenge against every local election authority, there is simply not enough information to know—and Plaintiffs have not proved—that the hypothetical challenges against enforcement by each of the local election authorities would involve the *same* central disputed issues. Plaintiffs do not show any factual evidence of common factual questions, and Plaintiffs have not established that they are even at risk of a difficulty or confusion voting in every county in Missouri. Indeed, Plaintiffs may not have claims against each local election authority because Plaintiffs do not show that they have members in every county. And Plaintiffs' evidence focuses nearly exclusively on practices in Greene County and St. Louis County, with virtually no evidence relevant to practices in the other 114

LEAs. Certification of a defendant class is not appropriate when some putative class members may not even have viable claims against them.

Rather than show how these common questions resolve an issue that is central to the validity of each one of the claims in one stroke, Plaintiffs merely claim that all local election authorities enforce Missouri election law, and they recite that enforcement of these laws is part of the proof in each claim. ECF 28 at 11. But as explained in *Wal-Mart*, this misstates the commonality requirement. Simply posing common legal duties—even "droves" of them—is not enough. *Wal-Mart*, 564 U.S. at 350.

Moreover, this case is based in part on local election authorities' discretionary duties, and commonality is absent in such situations:

> The commonality prong [in defendant classes] can be a stumbling block where the central legal claim is highly fact-specific and requires detailed reference to individual class members. For example, if a plaintiff challenges the legality of a highly discretionary practice … the individual defendant class members can be expected to rely significantly on the facts of their individual situations. These claims cannot be resolved at all without reference to the individual defendants, so a common issue may be lacking.

NEWBERG ON CLASS ACTIONS § 5:9 (5th ed.). Across many plaintiffs and across 116 local election authorities, there is no commonality.

C. Plaintiffs have not met their burden of proving typicality for the defendant class.

Rule 23(a)(3) requires 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). In determining typicality, courts consider whether the named defendant's defense "arises from the same event or course of conduct as the class [defenses], and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). "A proposed representative is not adequate or

typical if it is subject to a unique defense that threatens to play a major role in the litigation." *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999).

Rather than grappling with complex and novel issues in class action law, Plaintiffs resort to mere legal conclusions for the defendant class. For the typicality prong, Plaintiffs just claim that this prong is "easily met," and they state "The named representatives of the proposed defendant class are typical of the defendant class as a whole, since they, like the members of their respective proposed defendant class, are charged with implementing and enforcing Missouri's voting laws and making rules and regulations not inconsistent with Missouri law necessary to the conduct of elections within their jurisdiction." ECF 28 at 12. These statements are pure legal conclusions, merely parroting the language of Rule 23 and the state statutes. Moreover, Plaintiffs evaluate the wrong criteria. They look solely at how similar the job duties of the class representatives are to their fellow class members, but they ignore the governing standard, which is how similar their *claims and defenses* are. The typicality "analysis focuses on whether the representative's claim is sufficiently similar to other class members' so as to justify certification." 2 NEWBERG ON CLASS ACTIONS § 5:10 (5th ed.). But here, Plaintiffs never offer facts showing that the claims and defenses of the defendant class members are similar.

Furthermore, Plaintiffs cannot succeed on the typicality prong because what local election authorities do is fact-specific. "Typicality is more difficult to satisfy when the class representative raises a defense that, by its nature, is fact-specific. Examples include … defendant class actions challenging a statute as applied, where the defense would necessarily focus on individual circumstances." *See* 2 NEWBERG ON CLASS ACTIONS § 5:10 (5th ed.). Plaintiffs seem to be saying that because all local election authorities are charged with enforcing Missouri's absentee voter laws, the defense of the statute would be typical to all defendants and adequately represented by

any local election authority. But the acts of local election authorities in the State of Missouri are discretionary, and thus, fact-specific. Mo. Rev. Stat. § 115.043 (giving local election authorities the discretion to make "all rules and regulations, not inconsistent with statutory provisions, necessary for the registration of voters and the conduct of elections."); *id.* § 115.023; *cf. State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc 2003) ("This Court reaffirms that a prosecutor has broad discretion to determine when, if, and how criminal laws are to be enforced."). Plaintiffs have failed to satisfy their burden to demonstrate, let alone even allege, typicality for a defendant class.

D. Plaintiffs have not met their burden of proving adequacy for the defendant class.

To meet Rule 23(a)(4)'s adequacy requirement, each class representative's interests must be "sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Labrier v. State Farm Fire & Cas. Co.*, 315 F.R.D. 503, 515 (W.D. Mo. 2016) (quoting *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004)) (internal quotes omitted). A "lack of adequate representation denies absentee class members due process of law and prevents the court from assuming personal jurisdiction over the absentee members." *Nat'l Ass'n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1457–58 (D.C. Cir. 1983) (internal quotations omitted). In determining whether a named defendant would adequately represent the interests of a defendant class, courts have considered two principal requirements: "1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representatives must appear able to vigorously prosecute the interests of class." *Id.*

The adequacy prong is an especially significant concern in a purported defendant class action because of the risk that the named representative will fail to serve the entire class. "Where parties seek to certify a defendant class, the Court is confronted with the strange situation where one side picks generals for the other side's army." *Medical Protective Company v. Center for*

Advanced Spine Technologies, 2015 WL 4653220, at *5 (S.D. Ohio Aug. 5, 2015) (quotations omitted). All that Plaintiffs allege is "The named representatives of the defendant class, the Greene County Clerk's Office, Jackson County Election Board, St. Charles County Election Authority, and St. Louis County Board of Elections, will fairly and adequately represent the interests of the class of local election authorities in the state as a whole." ECF 28 at 12-13. The class representatives "represent equally both major political parties and serve both urban and rural election authorities." ECF 28 at 13. "The interests of ensuring the common application of Missouri voting law is shared by all local election authorities and the proposed defendant class representatives' interests are not antagonistic to those of the rest of the proposed class." *Id.*

These allegations are classic examples of legal conclusions insufficient to state a claim. Plaintiffs just parrot the language of Rule 23 and state statutes, rather than prove facts. This is a particularly significant concern here given that Plaintiffs have inexplicably named, as class representatives for the local election authorities, appointed bipartisan boards and commissions from Missouri's most populated counties, whereas most local election authorities in the state are elected county clerks.

And Plaintiffs offer no evidence that the class representative will "pursue its interests sufficiently well so as to produce a judgment that can fairly bind all members of a group who cannot appear before the court individually." 2 NEWBERG ON CLASS ACTIONS § 5:10 (5th ed.). Plaintiffs fail to offer facts showing (1) why and how each class representative was selected, (2) whether they have a valid stake in the outcome, (3) whether they have the financial resources to adequately defend the case, (4) what their position is on the matters in conflict, and (5) whether there is any foreseeable divergence between the interests of the class representative and the party they represent. As such, they have not met their burden of proving adequacy.

II. Plaintiffs' proposed class does not satisfy any of the 23(b) requirements.

A. The proposed class fails to satisfy Rule 23(b)(1) because other Missouri local election authorities' interests will be preserved, not impaired, by separate actions.

Plaintiffs claim that the proposed defendant class satisfies the requirements of Rule 23(b). But whether Plaintiffs seek certification under 23(b)(1)(A) or 23(b)(1)(B), it is not clear that prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudications or impair the interests of others.

The proposed class cannot be certified under Rule 23(b)(1)(A), because a class action would not resolve the risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Individual actions and as-applied challenges would lead to correct results tailored to each local election authority over each set of facts, rather than preventing any other non-parties from raising or defending claims. This purported necessity of a class does not exist.

Plaintiffs claim that, because they seek statewide declaratory judgment and injunctive relief, they automatically satisfy Rule 23(b)(1)(A). ECF 28 at 14. They claim that a defendant class would avoid retaining rules for some voters in some jurisdictions that other voters in other jurisdictions need not follow, with resulting inequality, difficulty, or confusion. *Id*. But, whether a class is certified or not, this result would already be unavoidable, because Plaintiffs' delay has resulted in absentee and mail-in voting already being underway, and so under *Purcell* this factor counsels against any judicial intervention into the election.

Plaintiffs also assert that Rule 23(b)(1)(B) is met because of "[c]ommon questions of law applicable to each authority" and an individual action "could be used to bind" other local election authorities. ECF 28 at 15. But under that reasoning, any election-related suit would merit a

defendant class action. Plaintiffs cannot bootstrap statewide relief into the case through the backdoor a motion to certify a defendant class, under threat of seeking a statewide injunction on the merits, when a statewide injunction would be inappropriate in the first place. All of these assertions are, in any event, a far cry from proving that individual actions, "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23 (b)(1)(B).

In the end, all Plaintiffs can assert is that a defendant class would "facilitate a speedy, just, and importantly, consistent resolution of this time sensitive statewide issue," which they claim is the purpose of Rule 23(b)(1), but this alleged purpose of the rule cannot substitute for Plaintiffs' failure to offer proof satisfying each of the rule's textual requirements.

B. The proposed class fails to satisfy Rule 23(b)(2) because that rule cannot be used to certify a defendant class.

Plaintiffs have the burden to show they satisfy one of the three subsections of Rule 23(b). *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005). But Rule 23(b)(2) cannot apply to a defendant class.

Rule 23(b)(2) provides for class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). "'The party opposing the class' means the opposing party in the litigation." *Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 39 (1st Cir. 2003). Thus, Rule 23(b)(2) envisions a situation in which a class of plaintiffs seek certification against a defendant who has allegedly acted or refused to act on grounds generally applicable to the class. *Id*. But with a defendant class, it is the

members of the proposed class—the defendants—who have allegedly acted to justify injunctive relief. *Id*.

Rule 23(b)(2) thus does not provide grounds to certify a defendant class. "Always it is the alleged wrongdoer, the defendant—never the plaintiff (except perhaps in the reverse declaratory suit)—who will have 'acted or refused to act on grounds generally applicable to the class.'" *Henson v. E. Lincoln Twp.*, 814 F.2d 410, 414 (7th Cir. 1987) (quoting Fed. R. Civ. P. 23(b)(2)). "The wording of Rule 23(b)(2) is awkward in application to any defendant class" because it "seems to contemplate injunctive relief as running against the party opposing class. This conclusion would render it inapplicable to any defendant class." *Mudd v. Busse*, 68 F.R.D. 522, 530 (N.D. Ind. 1975). This "language of Rule 23(b)(2) leaves no room for such a circumstance to ground certification of a defendant class." *Tilley*, 345 F.3d at 39–40. "[T]here is a strong textual argument that Rule 23(b)(2) does not countenance defendant classes". *Brown v. Kelly*, 609 F.3d 467 (2d Cir. 2010); *see, e.g.*, *Thompson v. Bd. of Educ.*, 709 F.2d 1200, 1204 (6th Cir.1983); *Paxman v. Campbell*, 612 F.2d 848, 854 (4th Cir.1980) (per curiam); *Greenhouse v. Greco*, 617 F.2d 408, 413 n. 6 (5th Cir. 1980) (suggesting in dictum that Rule 23(b)(2) is "not an appropriate basis for the certification of a defendant class.").

This reading is confirmed by the committee comments. In the comments, "the Advisory Committee Notes make no reference to defendant class actions under Rule 23(b)(2)." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:46 (16th ed.). To the contrary, the comment to subdivision (b)(2) states that it "is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." Fed. R. Civ. P. 23(b)(2) cmt.

For this reason, the putative defendant class cannot be certified under Rule 23(b)(2). For Rule 23(b)(2) to apply, the party opposing the class must act on some ground toward the class that justify injunctive relief *for the class*. But here Plaintiffs have taken no action with respect to a defendant that would support injunctive or declaratory relief. And the class of local election authorities do not seek an injunction. Instead, Plaintiffs seek an injunction *against the class*.

Without an act from the opposing party, the elements of the rule are not satisfied and the case has no injury to tie between the party opposing the class and the party enforcing the class. *Hopson v. Schilling*, 418 F.Supp. 1223, 1238 (N.D. Ind. 1976). Some courts have claimed that by filing the lawsuit, plaintiffs have created an injury against the class. *Kidd v. Schmidt*, 399 F.Supp. 301, 304-05 (E.D. Wis. 1975). But this reading of Rule 23(b)(2) would render the rule meaningless by allowing it to be satisfied immediately upon filing of suit, without proof of any injury attributable to the defendant-class. *Hopson*, 418 F.Supp. at 1238; Defendant Class Actions, 91 Harv. L. Rev. 630, n. 23 (1978); *but see Marcera v. Chinlund*, 595 F.2d 1231, 1235 (2d Cir. 1979).

Plaintiffs claim that "Courts in the Eighth Circuit have found that certification of a defendant class is appropriate pursuant to Fed. R. Civ. P. 23(b)(2)." ECF 28 at 15. But they cite only a single Wisconsin district court case for that proposition, *Parenthood of Wisconsin v. Van Hollen*, No. 13–cv–465–wmc, 2013 WL 3989238 (W.D. Wis. Aug. 2, 2013), not a case from a district court in the Eighth Circuit. (Wisconsin is in the Seventh Circuit.) And this Wisconsin case is inconsistent with the Seventh Circuit's contrary decision in *Henson v. E. Lincoln Township*, 814 F.2d 410, 413–16 (7th Cir. 1987). *Henson* suggested that Rule 23(b)(2) does not allow a defendant-class member to opt out of the suit or receive notice. *Id*. at 415. Judge Posner noted that under 23(b)(2) the class members are "told" rather than "asked" to join the class, and therefore

found that Rule 23(b)(2) can not apply to defendant-classes since "it would be odd if the rule permitted a defendant class with requiring notice." *Id.*

Lacking any judicial authority for a defendant class under Rule 23(b)(2), Plaintiffs cite a treatise for the claim that their "sorts of claims for declaratory and injunctive relief are particularly well addressed through (b)(2) class actions." ECF 28 at 15 (citing 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1775 (3d ed.)). But this treatise states the opposite. That treatise explains, correctly, that "the wording of the rule suggests that the injunctive relief must be sought in favor of the class." 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1775 (3d ed.). "As a result, an action to enjoin a class from pursuing or failing to pursue some course of conduct would not fall under Rule 23(b)(2) and would have to qualify under Rule 23(b)(1) or Rule 23(b)(3) in order to be given class-action treatment." *Id.* The treatise then collects cases from courts holding "that defendant class suits are outside the scope of Rule 23(b)(2)." *Id.* And it explains that, "Although arguments have been made that certification of defendant class suits under Rule 23(b)(2) would be desirable, as well as consistent with the policies underlying the rule, the fact remains that the language is clear, and the better view is to restrict its applicability to plaintiff classes seeking injunctive relief." *Id.*

C. The proposed class fails to satisfy Rule 23(b)(3) predominance and superiority because a class action brought against an atypical and inadequate representative of a defendant class is inferior.

Plaintiffs' proposed class fails to meet the requirements of Rule 23(b)(3). As shown above, it fails to meet even the commonality requirement of Rule 23(a)(2). *See supra*. And the "predominance criterion [of 23(b)(3)] is far more demanding" than Rule 23(a)'s commonality requirement. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). And, similar to how

Plaintiffs have not met the commonality requirement, they also have not met the predominance requirement, which "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "The predominance requirement explicitly requires a comparison between common issues and individual issues in order to ascertain whether the common issues predominate, and thus requires the Court to identify the common issues and the individual issues presented by the case." *In re Bisphenol–A (BPA) Polycarbonate Plastic Products Liability Litigation*, 276 F.R.D. 336, 340 (W.D. Mo. 2011). For the same reasons that there is no commonality, as above under all the other factors, which need not be repeated again here, the proposed class also cannot satisfy the more demanding predominance criterion of 23(b)(3).

Rule 23(b)(3) certification is to be used in "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision for persons similarly situated, *without sacrificing procedural fairness or bringing about other undesirable results*." Fed. R. Civ. P. 23(b)(3) Advisory Committee Notes (1966 Amendment) (emphasis added). Here, although "there is no general impediment to certification of a defendant class under Rule 23(b)(3), that provision is of limited utility because any member of a defendant class in a (b)(3) suit can opt out and thus not be bound by any judgment entered." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:46 (16th ed.). Nothing shows that a class action would be superior to individual cases.

III. Plaintiffs do not even attempt to meet the mandatory requirements of Rule 23(g) and Rule 23(c)(1)(B) for identifying class counsel.

Furthermore, Plaintiffs have not attempted to meet the requirements of Rule 23(g) and Rule 23(c)(1)(B) to identify class counsel that meets the Rules' detailed requirements. *See, e.g.*, *Bell v. Brockett*, 922 F.3d 502, 510 (4th Cir.), cert. denied sub nom. *Brockett v. Orso for REX Venture*

Grp., LLC, 140 S. Ct. 469 (2019). These requirements include identifying and considering: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g). The court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Id*. Nor can this matter be delayed: it must be done "in the certification order." Fed. R. Civ. P. 23(c)(1).

Plaintiffs have made no attempt to meet these requirements. They lack any showing that any class representative's counsel would suffice or any other evidence on which to conclude this factor is met. Because Plaintiffs have the burden to prove that the requirements of adequate class counsel are met at the time of certification, this failure is an independent ground on which to deny certification. *See* 1 NEWBERG ON CLASS ACTIONS § 3:84 (5th ed.).

IV. A defendant class raises serious due process problems.

The principal reason why defendant classes are rare is why one is inappropriate here: "certification of a defendant class raises nettlesome due process issues that are not implicated by plaintiff classes." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:46 (16th ed.). "The very features of class actions that provide efficiency and consistency at the same time present serious risks, including the risk of due process violations…. For a defendant class, concerns are arguably even greater with the very real possibility that judgments can be entered against absent defendants without those defendants receiving notice of the underlying action itself." *Sharp Farms v. Speaks*, 917 F.3d 276, 298–99 (4th Cir. 2019) (Quattlebaum, J., concurring). "In defendant class actions, an unnamed class member can be brought into a case, required to engage in discovery and even be subjected to a judgment compelling the payment of money or other relief without ever being individually

served with a lawsuit." *Bell v. Brockett*, 922 F.3d 502, 511 (4th Cir. 2019). This distinction matters because "unnamed plaintiff stands to gain while the unnamed defendant stands to lose." *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 97 F.R.D. 668, 674 (N.D. Ill. 1983). Thus, "[a]ny rule that permits a court to exercise jurisdiction over absent defendant class members who have neither consented to jurisdiction nor have sufficient minimum contacts with the forum is of doubtful constitutional validity." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:46 (16th ed.).

Here, the very nature of the action raises concerns about due process, given that the protective requirements of Rule 23 are not met and given the lack of service and notice on the class. In particular, Plaintiffs have not shown that this Court has jurisdiction over all Missouri local election authorities, especially local election authorities that fall outside the geographical limits of this District who have not been found and served in this District. To cure this problem, service and notice must be made on each member of the defendant class, which would remove much of the efficiency and speed purported to be gained by binding the class in its absence.

Instead of addressing the deficiencies of their proposed action under Rule 23 and the Constitution, Plaintiffs claim that Plaintiffs' counsel is experienced in class action, like the Court, and that both would find one action more convenient than individual cases. ECF 28 at 18. But "[f]undamental fairness to absentee members must be balanced against judicial savings." *Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 97 F.R.D. 668, 674 (N.D. Ill. 1983).

V. Plaintiffs lack any basis for standing or statewide relief.

It is also telling that standing is not mentioned in Plaintiffs' certification motion. But regardless of Plaintiffs' failure to address the issue, it is clear that not every plaintiff has a claim against every defendant in this case.

As shown in the motion to dismiss and the opposition to a preliminary injunction, Plaintiffs lack standing and they lack any justification for statewide relief. Plaintiffs have not carried the heavy burden of proving that any injunction should extend beyond the parties due to the scope of the violation established under the traditional equitable factors against the plaintiffs, not by hypothetical future harm to unknown other people. *Rodgers v. Bryant*, 942 F.3d 451, 457–60 (8th Cir. 2019). The plaintiffs must prove the "impracticability of more narrow relief." *Id*. at 460. Even within their associations, there is no evidence that member voters in every local election authority are affected or that any group member has been injured. This raises standing concerns. "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., dissenting).

The vast majority of Plaintiffs' evidence relates solely to St. Louis County, with a minor complaint about Greene County. Exhibits A-E are affidavits of the class representatives which include hearsay anecdotes about voters. Exs. F-M all relate to a single issue in St. Louis County (many ballots were rejected because of a missing check box by the address) which St. Louis County has now corrected by using a different ballot envelope in November. Exs. N-Q are declarations of individual voters (three in St. Louis County, one in Greene County) who allegedly experienced mail delays, all of whom were able to vote by alternative means. There are no first-hand allegations of any issues or problems for any LEAs other than St. Louis County and Greene County. The narrow, focused nature of the evidence contrasts starkly with the sweeping rhetoric of their claims, and it undercuts any need for certifying a defendant class.

Here, not every member of the plaintiff groups, or even every named plaintiff, has a claim against every member of the defendant class. A voter only has possible standing against the local

election authority in his or her own jurisdiction, and he or she has no plausible claim against those outside his or her jurisdiction.

VI. Certifying the classes is inappropriate at this early point in the litigation.

Beyond problems with standing and their proposed remedy, numerous other problems preclude granting class certification at this time. A motion to dismiss is pending, class discovery has not yet occurred, and Plaintiffs have not met their burden under Rule 23 for the proposed defendant class, particularly on the commonality, adequacy, typicality, and class counsel prongs.

Inadequate class allegations are properly addressed at the motion to dismiss stage. As the Supreme Court of the United States has observed, "sometimes [class certification] issues are plain enough from the pleadings." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). The Eighth Circuit has been even more explicit, holding that "class claims that fail to meet the requirements of Rule 23 may be properly dismissed by granting a Rule 12(b)(6) motion." *McCrary v. Stifel, Nicolaus & Co., Inc.*, 687 F.3d 1052, 1058-59 (8th Cir. 2012) ("[W]e cannot find any authority that requires a court to analyze the appropriateness of class treatment only after the merits of the individual claims have been examined.").

Even if this court does find that Plaintiffs' conclusory pleadings can survive a motion to dismiss, class certification is inappropriate at this juncture. Defendants have not been afforded the opportunity to conduct class discovery, including discovery on the named Plaintiffs, nor have Defendants been given the opportunity to file a motion for summary judgment. Plaintiffs' request for class certification is both premature and prejudicial.

The Supreme Court of the United States held in *General Telephone Co. of Southwest v. Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. 147, 160 (1982). Certification is only proper

if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161. These principles were reaffirmed by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, which restated that "actual, not presumed, conformance with Rule 23(a) remains indispensable." 564 U.S. 338, 351-52 (2011) (citations omitted). These principles indicate that, in many cases, discovery is necessary to gather more than what the pleadings offer. *See Burton v. District of Columbia*, 277 F.R.D. 224, 230 (D.D.C. 2011) ("*Wal-Mart* confirms that pre-certification discovery should ordinarily be available."). As such, assuming the class allegations are not dismissed, discovery is necessary to test the sufficiency of these claims.

VII. Joinder of 116 local election authorities is unwarranted.

Finally, in their request for relief, Plaintiffs ask this Court, in the alternative, to join all 116 local election authorities to the suit as defendants. They provide nothing in support of this request and do not even cite the governing rule. Under Rule 20 of the Federal Rules of Civil Procedure, defendants may be properly joined if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). But for all the reasons why a class is unwarranted, so too is joinder. In particular, even if Plaintiffs had standing, not every proposed defendant has a claim against it.

CONCLUSION

Plaintiffs' motion to certify a defendant class of all 116 local election authorities should be denied and the Court should deny joinder of all these election authorities as parties.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer
D. John Sauer, #58721
Solicitor General
Julie Marie Blake, #69643
Deputy Solicitor General
Missouri Attorney General's Office
207 W. High St.
Jefferson City, MO 65102
Tel: (573) 751-8870
John.Sauer@ago.mo.gov
Julie.Blake@ago.mo.gov

Counsel for Defendant Missouri Secretary of State John R. Ashcroft

Dated: October 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020, the foregoing was filed and served through the Court's CM/ECF system upon all counsel of record.

/s/ D. John Sauer