

**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 LEAVE TO
FILE MOTION FOR CLASS
CERTIFICATION AND
MEMORANDUM IN SUPPORT**

CLASS ACTION

Plaintiffs, through their undersigned counsel, respectfully move this Court to grant Plaintiffs leave to file the attached Motion for Class Certification prior to the Rule 26(f) conference, as generally required pursuant to Local Rule 23.3, for the reasons stated in this Motion and the accompanying Memorandum of Law. Plaintiffs are seeking to file their Motion for Class Certification simultaneously with their Complaint out of an abundance of caution. As explained more fully in the Memorandum of Law, this case is a challenge to election law that will not be mooted on Election Day because the harm is capable of repetition yet evading review, but other factors related to the individual Plaintiffs could still moot the case. Moreover, the claims described in Plaintiffs' Complaint are certain to arise again in future election cycles, while remaining live for only the four day period between the deadline to request absentee ballots and the close of polls on Election Day. It is therefore important that Plaintiffs file an early motion for class certification to ensure the availability of class-wide relief.

WHEREFORE, Plaintiffs request the Court grant them leave to file their class certification motion now, prior to a Rule 26(f) conference.

Dated: November 6, 2018

Respectfully submitted,

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**motions for admission pro hac vice forthcoming*
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MEMORANDUM OF LAW

INTRODUCTION

Plaintiffs, through their undersigned counsel, respectfully move this Court to grant Plaintiffs leave to file the attached Motion for Class Certification prior to the Rule 26(f) conference required pursuant to Local Rule 23.3. Out of an abundance of caution, Plaintiffs seek to file at this time in order to preserve the availability of class-wide relief in circumstances that are capable of repetition yet evading review.

ARGUMENT

Plaintiffs are seeking to file their class certification motion simultaneously with their Complaint out of an abundance of caution. Because Plaintiffs' claims are only live for a short time (at most, the mere days spanning from the close of business on the Friday before the Election until polls close on the Tuesday of the Election), the capable-of-repetition-yet-evading-review exception to the mootness doctrine permits this case to proceed beyond Election Day. *See Libertarian Party of Michigan v. Johnson*, 714 F.3d 929, 931-32 (6th Cir. 2013) (holding that an election law challenge "is too short in duration to be fully litigated prior to the conclusion of the election cycle and, [] there is a reasonable expectation that the controversy will recur"). That exception applies in election law cases even where the recurrence may not necessarily be between the same parties. *See id.* ("There is also a reasonable expectation that this controversy will recur, at least with respect to some other candidate and political party. We have previously allowed election law challenges to move forward even if the challenging parties do not have cognizable legal interests" because "the standard for the second prong of the mootness exception is 'somewhat relaxed in election cases.'" (quoting *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005))).

Although the election calendar will therefore not moot this case, other factors related to the individual Plaintiffs could, and thus it is important that Plaintiffs file an early motion for class certification to ensure the availability of class-wide relief. This is particularly true where, as here, the claims described in Plaintiffs' Complaint are certain to arise again in future election cycles, while remaining live for only the four-day period between the deadline to request absentee ballots and the close of polls on Election Day. Once a motion for class certification is filed, the class may proceed even if the named Plaintiffs' claims become moot. *See Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2016); *Barry v. Corrigan*, 79 F. Supp. 3d 712, 727 (E.D. Mich. 2015) ("It is well-established in this Circuit that mooting the named plaintiffs' claims while a motion for class certification is pending does not moot the case."). Plaintiffs therefore request the Court grant them leave to file their class certification motion now, to ensure class-wide relief remains available.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant them leave to file their class certification motion pursuant to Local Rule 23.3, and direct the Clerk to docket the attached motion for class certification as filed on today's date.

Dated: November 6, 2018

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49(c)(3)*

CERTIFICATION OF SERVICE

I hereby certify that on November 6, 2018, I served the foregoing on counsel for Defendant via e-mail as indicated below:

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