

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

ORGANIZATION FOR BLACK  
STRUGGLE, ST. LOUIS A. PHILIP  
RANDOLPH INSTITUTE, GREATER  
KANSAS CITY A. PHILIP RANDOLPH  
INSTITUTE, NATIONAL COUNCIL OF  
JEWISH WOMEN ST. LOUIS SECTION,  
and MISSOURI FAITH VOICES,

*Plaintiffs,*

v.

JOHN R. ASHCROFT,  
in his official capacity as the Missouri  
Secretary of State, and

GREENE COUNTY CLERK'S OFFICE,  
JACKSON COUNTY ELECTION BOARD,  
ST. CHARLES COUNTY ELECTION  
AUTHORITY, and ST. LOUIS COUNTY  
BOARD OF ELECTIONS, and all others  
similarly situated,

*Defendants.*

No. 2:20-cv-4184-BCW

**PLAINTIFFS' REPLY SUGGESTIONS IN SUPPORT OF  
MOTION TO CERTIFY A DEFENDANT CLASS OR FOR JOINDER  
OF 116 LOCAL ELECTION AUTHORITIES**

Plaintiffs have demonstrated that certification of a Defendant class of local election authorities in Missouri, represented by counsel for class representatives, is warranted and will not offend due process (Motion to Certify D. Class, Doc. #28). Not one of the proposed class representatives has opposed class certification, although all were served with the complaint and summons and attended the Court's telephonic status conference on September 24, 2020, in which the briefing schedule for the class certification motion was set. The Greene County Clerk's Office,

the only proposed class representative to respond to Plaintiffs' motion, expressly stated that "it takes no position with respect to" class certification (*See* Greene Cty. Response Suggestions to Ps.' Motion to Certify D. Class, Doc. #45 at 1).<sup>1</sup> Indeed, the only opposition to class certification came from Defendant Ashcroft, and as he is neither a proposed class representative nor a member of the putative class, his opposition should be disregarded as he has no standing to object to class certification.<sup>2</sup> Even if Defendant Ashcroft were an appropriate party to oppose class certification, he has failed to overcome plaintiffs' showing that class certification is appropriate and is the fairest and most efficient way to resolve this litigation.

Finally, Defendant Ashcroft cites no support for the proposition that *Plaintiffs* bear any burden to offer up class counsel or proffer evidence of counsel for class representatives under Rule 23(g) and Rule 23(c)(1)(B)—a proposition that is incongruent with the text of Rule 23(g). Fed. R. Civ. P. 23(g) ("Unless a statute provides otherwise, a court that certifies a class must appoint class counsel."). This Court can appoint as class counsel those counsel who have entered appearances on behalf of class representatives. For the reasons described in Plaintiffs' Motion to Certify a Defendant Class of Local Election Authorities or, in the Alternative, Joinder of All Local Election Authorities (Doc. #5), Plaintiffs' Suggestions in Support (Doc. #28), and the law set out in Plaintiffs' Proposed Order Certifying a Defendant Class (on file with Court), Plaintiffs'

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<sup>1</sup> Somewhat inconsistently, Greene County Clerk's Office also purported to adopt Defendant Ashcroft's later-filed response to class certification. (*See* Doc. 45 at 1.) The Office's concerns relating to financial liability for fulfilling its ministerial functions are not an issue properly raised here, as they do not speak to the propriety of class certification.

<sup>2</sup> Defendant Ashcroft, as a non-class member, should not be empowered to oppose class certification. Analogous to the rule in federal courts that non-parties lack standing to object to class settlements or consent decrees, Defendant Ashcroft should be found to lack standing to oppose class certification because certification of the class does not affect Defendant Ashcroft's posture in this litigation, prejudice the Secretary's rights, or affect the defenses available to the Secretary in this case. *See* 4 Newberg on Class Actions § 13:22 (5th ed.).

respectfully request this Court to certify a Defendant class composed of the 116 local election authorities in Missouri, represented by counsel who have entered appearances for class representatives the Greene County Clerk's Office and the St. Louis County Board of Elections.<sup>3</sup>

### **ARGUMENT**

Courts in the Eighth Circuit and other jurisdictions have certified defendant classes of public officials to fairly and efficiently resolve claims raising issues of public concern, so long as the requirements of Rule 23 are met. *Bell v. Brockett*, 922 F.3d 502 (4th Cir. 2019); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 19995); *Bellotti v. Baird*, 428 U.S. 132, 138 (1976); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 57 (1976); *Doe v. Miller*, 405 F.3d 700, 705–06 (8th Cir. 2005); *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1136 (W.D. Mo. 2019); *Kennard v. Kleindienst*, No. 2:14-CV-04017, 2015 WL 4076473, at \*3n.1 (W.D. Mo. June 5, 2015); *Doe v. Miller*, 216 F.R.D. 462, 473 (S.D. Iowa 2003). Plaintiffs have established that certification of a Defendant class is warranted here, and Defendant Ashcroft has failed to undermine that showing.

#### **A. THE PROPOSED DEFENDANT CLASS MEETS THE FEDERAL RULE 23(a) REQUIRMENTS OF NUMEROSITY, COMMONALITY, TYPICALITY AND ADEQUACY.**

The Defendant class of Missouri's 116 local election authorities meets the pre-requisites to class certification under Rule 23(a). Defendant Ashcroft misstates the applicable standards established by federal courts for a defendant class action under Rule 23.<sup>4</sup> Although a plaintiff

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<sup>3</sup> Counsel for the Jackson County Election Board and the St. Charles County Election Authority have not yet appeared on behalf of their clients, but as explained below, Counsel who have appeared are adequate and this Court can add counsel for the other class representatives when counsel appear in this case.

<sup>4</sup> This is true even though the standards are set out in the treatise Defendant Ashcroft relied upon in his Suggestions in Opposition. *See, e.g.*, (Doc. #49 at 13,14,16,22,23) (citing 2 Newberg on Class Actions §§ 5:9, 5:10 (5th ed.); 1 Newberg on Class Actions § 3:84 (5th ed.)).

generally appoints the defendant class representative, courts recognize that if plaintiffs were required to find a willing defendant representative, defendants could simply block defendant class actions by refusing to serve as representative. *See Marcera v. Chinlund*, 595 F.2d 1231, 1239 (2d Cir. 1979), *judgment vacated on other grounds*, 442 U.S. 915 (1979) (“[T]o permit [named defendants] to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread illegality.”). “Courts have solved this dilemma by essentially merging the commonality and typicality requirements with that of adequacy—if the claims are truly common and the proposed representative’s claim is indeed typical, then if the representative vigorously defends its own interests, it will also thereby vigorously defend those of the absent defendant class members.” 2 Newberg on Class Actions § 5:12 (5th ed.) (noting also that this “lessens the need for the representative to take on additional financial burdens to represent the class”).

**Numerosity.** Proposed Defendant class satisfies the numerosity requirement of Rule 23. To satisfy numerosity under Rule 23(a) the moving party must show that “the class is so numerous that joinder of all members is impracticable” in light of the particular circumstances of the case. Fed. R. Civ. P. 23(a)(1); *Arkansas Educ. Ass’n v. Board of Educ. of Portland, Arkansas School Dist.*, 446 F.2d 763, 765 (8th Cir. 1971). The Rule does not require that joinder is impossible, “but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required.” *Arkansas Educ. Ass’n*, 446 F.2d at 765. Indeed, the Eighth Circuit has declined to create “arbitrary rules regarding the necessary size of classes,” *Paxton v. Union Nat’l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982), and has affirmed the certification of classes with as few as twenty members. *See, e.g., Ark. Educ. Ass’n.*, 446 F.2d at 765–66 (upholding class of seventeen to twenty members). Here, the size and geographical dispersion of class members, the financial resources of the class

representatives (some of the most affluent local election authorities in the state), the difficulty and logistical complexity of joining 116 parties, and the judicial economy and efficiency arising from avoidance of multiple of actions involving nearly identical evidence and defenses render a class action the most effective and efficient manner of addressing the issues raised in this case, and easily satisfy Rule 23(a)'s numerosity requirement.

**Commonality.** Rule 23(a)(2) requires only that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). There is no requirement under Rule 23(a)(2) that *all* questions of law or fact be common to the class or even that common questions predominate. Because questions of law and fact exist which are common to the class as a whole—namely whether specific voting laws, which every member of the Defendant class is charged with implementing and enforcing violate federal law or the Constitution, and whether those violations harm Plaintiffs and their members—that can readily be answered on a class-wide basis, Rule 23(a)'s commonality requirement is satisfied.

The Supreme Court's decision in *Wal-Mart v. Dukes*, which Defendant Ashcroft relies on heavily in his opposition, is not to the contrary. 564 U.S. 338 (2011). *Dukes* involved allegations of company-wide sex discrimination, and the Supreme Court found that the plaintiffs had failed to demonstrate commonality under Rule 23 where the harm the proposed class complained of resulted from an exercise of discretion by individual managers. *Dukes*, 564 U.S. at 355 (“The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's “policy” of allowing discretion by local supervisors over employment matters.”). Here, in contrast, the proposed class members concede that they do not have discretion under the challenged state laws challenged. (St. Louis Cty. Bd. Suggestions to Ps. Mot. TRO & PI at 2-3, Doc. #42; Schoeller Decl. ¶¶ 5-7, 11, Doc. 48-14 (declaration from County Clerk of Greene County)).

Defendant Ashcroft also claims that Plaintiffs have failed to demonstrate commonality because “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.” (Doc. # 49, at 12). This is belied by evidence Plaintiffs have proffered, including:

- Plaintiffs’ members have traditionally voted in person, (Rogers Decl. ¶24, Doc. #27-1); (Robinson Decl. ¶¶17,24, Doc. #27-2); (Jones Decl. ¶25, Doc. #27-3); (Alper Decl. ¶13, Doc. #27-4); (Gould Decl. ¶26, Doc. #27-5), but because of COVID-19 are planning to use remote ballots for the first time this year, (Rogers Decl. ¶¶25-26, Doc. #27-1); (Robinson Decl. ¶¶25-26, Doc. #27-2); (Jones Decl. ¶¶26-27, Doc. #27-3); (Alper Decl. ¶¶15-16, Doc. #27-4); (Gould Decl. ¶26, Doc. #27-5).
- Plaintiffs’ members experienced problems voting remotely in Missouri’s August 2020 election, (Rogers Decl. ¶35, Doc. #27-1); (Robinson Decl. ¶28, Doc. #27-2); (Jones Decl. ¶28, Doc. #27-3); (Alper Decl. ¶25, Doc. #27-4); (Gould Decl. ¶30, Doc. #27-5).
- Plaintiffs’ members have concerns about being unable to navigate the remote voting process or having their ballots counted in November, *see, e.g.*, (Rogers Decl. ¶25, Doc. #27-1); (Jones Decl. ¶¶21,29-30, Doc. #27-3,); (Alper Decl. ¶18, Doc. #27-4); (Gould Decl. ¶24, Doc. #27-5); *see also* (Robinson Decl. ¶27, Doc. #27-2); (Newman Decl. ¶¶7-10,18, Doc.#27-17).

Because every class member has a non-discretionary duty to apply the challenged laws to voters casting remote ballots in their jurisdictions, including Plaintiffs’ members, there is no need to analyze this evidence on a county by county basis.

Likewise, Plaintiffs have identified common questions of law that apply to the entire Defendant class: (1) whether Defendant class’s enforcement of Missouri voting laws relative to the request and return requirements for mail-in ballots under Mo. Stat. Ann. § 115.302, places an undue burden on the right to vote; (2) whether Defendant class’s rejection of mail-in and absentee ballot (“remote ballot”) applications and remote ballots for errors or omissions that are not material in determining a voter’s qualifications violates 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 opportunity to cure ballot errors violates the Due Process Clause of the Fourteenth Amendment.

Thus, contrary to Defendant Ashcroft's arguments, Plaintiffs are not merely pleading the language of the Rule, but rather have demonstrated that these questions can be answered one time and the answers are necessarily the same for every member of the Defendant class, because all are charged with enforcing and implementing an identifiable set of state voting laws. These common questions of law and fact satisfy Rule 23(a)(2).

**Typicality.** The defenses of named class representatives are typical of those of the class as a whole because no local election authority has a unique defense to the claims asserted by Plaintiffs; thus the class meets the requirements of Rule 23(a)(3). While Defendant Ashcroft contends Plaintiffs have not *proven* there are no atypical defenses that some absent class member may have, Rule 23 imposes no such requirement.<sup>5</sup> Moreover, although he faults Plaintiffs for failing to prove a negative, Defendant Ashcroft has not identified any defense as to any of the claims raised by Plaintiffs that would be particular to one local election authority but not the others.

Missouri law does grant local election authorities the authority to: decide not to reject a ballot for a faulty statement, Mo. Rev. Stat. § 115.295.2; accept remote ballots after the Election Day Receipt Deadline, §§ 115.293, 115.302.14; allow mail-in ballots to be lawfully returned in person, § 115.302.12; or allow voters to correct errors on ballot envelopes received at the Election Day Receipt Deadline, §§ 115.293(1), 115.302(14); 115.295, 115.477. Indeed, Defendant local election officials submissions in this case explain why local election authorities in Missouri must assert similar defenses to the claims brought by Plaintiffs: they (a) must conduct elections in conformity with state law; and (b) do not have the ability to refuse to follow the statutes Plaintiffs

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<sup>5</sup> While Defendant Greene County Clerk's Office opposed Plaintiffs' Motion for a Temporary Restraining Order (Doc. #55) by incorporating the arguments of Defendant Ashcroft, neither the Office nor any of the other proposed class representatives asserted that they have defenses atypical of the class.

challenge as unconstitutional or contrary to federal law. (Doc. # 42 at 2); (Doc. #48-14, ¶¶ 5-7, 10-11). Thus, any defenses asserting the constitutionality of these state laws, their conformity with federal law, or the binding nature of state law on Defendant class that are available to the class representatives would be not only typical of, but identical to, those available to the absent class members.

***Adequacy of Representation.*** The proposed class representatives share a common interest with other local election authorities in Missouri to carry out their obligations under state election laws, and the named class representatives will therefore adequately represent the interests of the class. Defendant Ashcroft made no showing that the proposed class representative is “subject to a unique defense that threatens to play a major role in the litigation.” *In re Milk Products Antitrust Litigation*, 195 F.3d 430, 437 (8th Cir. 1999). As the leading class-action treatise has observed, the adequacy of representation prong in a defendant class action is tied to “commonality and typicality requirements . . . [because] if the claims are truly common and the proposed representative’s claim is indeed typical, then if the representative vigorously defends its own interests, it will also thereby vigorously defend those of the absent defendant class members.” 2 Newberg on Class Actions § 5:12 (5th ed.). Here, the class representatives who have appeared in the action are already defending the class’s interests. Greene County Clerk’s office opposed Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction and defended the legality of the challenged state election laws. (Doc. #55).

**B. CERTIFICATION OF A DEFENDANT CLASS IS APPROPRIATE UNDER RULE 23(b) BECAUSE THE CLASS FALLS UNDER 23(b)(1)(A), 23(b)(1)(B) AND 23(b)(2).**

This Court should find that certification of a Defendant class of Missouri’s 116 local election authorities is appropriate under Rule 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2). Because the goal of this lawsuit is to obtain a declaratory judgment and injunctive relief that would otherwise



establish different standards of conduct for each Defendant class member, creating uncertainty about the enforceability of state election laws and leading to non-uniform application of those laws throughout the state, Rule 23(b)(1)(A) certification is both appropriate and necessary. *See Doe*, 216 F.R.D. at 467.

Rule 23(b)(1)(B) also counsels in favor of class certification because common questions of law applicable to each local election authority in Missouri form the crux of this case and the relief sought—declaratory and injunctive relief applicable in the November 2020 election. And a favorable decision on the merits holding the challenged state election laws unconstitutional or in violation of the Materiality Provision of the Civil Rights Act would effectively bind other local election authorities in the state.

Finally, as in *Turtle Island Foods, SPC*, 425 F. Supp. 3d at 1136, certification of a Defendant class of local election authorities in this case is appropriate in here under Rule 23(b)(2), as cases “involv[ing] actions to enjoin a group of local public officials from enforcing a locally administered state statute or similar administrative policies” fall within the ambit of Rule 23(b)(2). *Greenhouse v. Greco*, 617 F.2d 408, 413 n.6 (5th Cir. 1980).

**C. THIS COURT SHOULD APPOINT COUNSEL FOR GREENE AND ST. LOUIS COUNTY ELECTION AUTHORITIES AS CLASS COUNSEL UNDER RULE 23(g).**

Rule 23(c)(1)(B) requires an order certifying a class to appoint class counsel under Rule 23(g). Fed. R. Civ. P. 23(c)(1)(B); *see also* Fed. R. Civ. P. 23(g) (“a court that certifies a class must appoint class counsel”). This occurs at the time of class certification. 1 William B. Rubenstein, *Newberg on Class Actions* § 3:84 (5th ed. 2011). Adequate class counsel for the Greene County Clerk’s Office and St. Louis County Board of Elections have already appeared in this action and have not objected (nor have the class representatives objected) to serving as class counsel.

This Court should have no difficulty finding that counsel for named class representatives Defendant Green County Clerk's Office and Defendant St. Louis County Board of Elections will fairly and adequately represent the interests of Missouri's other local election authorities because they: (1) have adequately identified and demonstrated a commitment to investigating the potential claims in this action and entered appearances in this case; (2) possess experience in handling class actions involving the types of claims asserted in this action; (3) have knowledge of the applicable law; and (4) will devote the resources necessary to represent the proposed class. Indeed, neither of these defendants nor their counsel have objected to being designated class counsel. Moreover, this Court may "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23 (g)(3). Thus, should the Court deem it necessary, it can appoint counsel for the Jackson County Election Board and the St. Charles County Election Authority as additional class counsel when they appear in the action.

Defendant Ashcroft cites no support for the proposition that Plaintiffs bear a burden to show that class counsel meets the requirements of Rule 23(g) and Rule 23(c)(1)(B) nor could Defendant Ashcroft because that simply is not the law. Fed. R. Civ. P. 23(g). In any event, as explained above, counsel for Defendant Green County Clerk's Office and Defendant St. Louis Board of Election meet Rule 23(g)'s requirements.

### **CONCLUSION**

For the forgoing reasons as well as those described in Plaintiffs' Suggestions in Support of Motion to Certify a Defendant Class (Doc. #28), Plaintiffs' motion to certify a Defendant class of all 116 local election authorities, represented by counsel for the Greene County Clerk's Office and the St. Louis County Board of Elections (Doc. #5) should be granted.

Dated: October 6, 2020

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Respectfully submitted,

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\* Admitted *Pro Hac Vice*

\*\* Motion for Admission *Pro Hac Vice*  
pending

**CERTIFICATE OF SERVICE**

I certify that on October 6, 2020, I filed the foregoing with the Clerk of the Court using the CM/ECF system, and a copy was made available to all electronic filing participants.

/s/ Anthony E. Rothert