UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANDY GOTTLIEB, et al.,	:	
	:	Case No. 3:20-cv-623-JCH
Plaintiffs,	:	
	:	
v.	:	
	:	
NED LAMONT, et al.,	:	
	:	
Defendants.	:	May 18, 2020

MOTION FOR CLASS CERTIFICATION
AS TO FIRST CLAIM (BALLOT ACCESS)

NOW COMES Plaintiffs, Andy Gottlieb, *et. al.*, by and through counsel, and pursuant to Rule 23 of the Federal Rules of Civil Procedure, move this Court for an order certifying a class as to Count One of the Complaint (First Claim) regarding ballot access in the upcoming August 11, 2020 state party primary, appointing them as class representatives, and appointing their counsel as class counsel.

In support of this Motion, the Plaintiffs incorporate by reference their Amended Complaint (ECF No. 8), and their Motion for Preliminary Injunction, Memorandum of Law, and Attached Exhibits (ECF No. 9). Plaintiffs ask this Court to certify a class consisting of all Connecticut registered voters. The grounds for this motion are set forth in the Memorandum in Support of Plaintiffs' Motion for Class Certification attached hereto.

Dated: May 18, 2020

Respectfully Submitted,

PLAINTIFFS, ANDY GOTTLIEB, LORNA CHAND, RICHARD LACOURCIERE, AND JASON BARTLETT, FOR THEMSELVES AND THE PROPOSED CLASS

By: /s/

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AS TO FIRST CLAIM (BALLOT ACCESS)

"The exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for likeminded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). *See also Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (denying stay of *Anderson* injunction prohibiting enforcement of ballot access laws because of COVID-19, but staying district court's specific remedy).

This action is filed on behalf of all Connecticut voters, all of whom are harmed when burdensome state law requirements unjustifiably exclude candidates from ballot access, as they threaten for the August 11, 2020 primary elections. Common questions of both law and fact pervade this matter, and Defendants have acted and refused to act on grounds generally applicable to the class as a whole. Simply put, this is the quintessential civil rights class action, and class certification should be granted.

The requirements of Federal Rules of Civil Procedure 23(a) and (b) are amply met. The class is indisputably numerous. The question at the heart of this case binds together all members of the class: do Connecticut's ballot access requirements, as modified by Defendant Lamont's

recent executive order, severely and unjustifiably burden voters' First Amendment rights? Plaintiffs' claims are typical of absent class members and their counsel will adequately and vigorously represent the class. Finally, Rule 23(b)(2) is satisfied because Defendant Lamont's executive order – and his refusal to take further action – is "on grounds that apply generally to the class" and applies to all voters, as would any injunction or declaration providing relief.

I. PROPOSED CLASS DEFINITION

All registered voters in Connecticut.

II. PROPOSED CLASS REPRESENTATIVES

The proposed class representatives are the Plaintiffs, active Connecticut registered voters. Their allegations and their affidavits are incorporated by reference. *See* ECF 8, 9.

III. ARGUMENT

Plaintiffs seek class certification under Rule 23, which requires determination of certification "[a]t an early practicable time." Rule 23(c)(1)(A). "By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). These criteria are met here, so class certification should be granted.

Civil rights actions like this case are particularly amenable to class action treatment. Rule 23 was enacted to "facilitate the bringing of class actions in the civil-rights area." 7A Wright & Miller, Federal Practice & Procedure §1775 (3d ed. 2018). The arguments are particularly strong for class action where individuals are unlikely to pursue claims individually. That is this case. Voters are unlikely to bring their own individual claims against to fight onerous state law ballot access requirements. *See Campbell v. Bysiewicz*, 213 F.Supp.2d 152, 157 (D.Conn. July 23, 2002)

(noting that the ballot access laws had "systematically denied Connecticut voters over the last 47 years a direct primary for district and state offices.").

For these reasons, courts routinely certify voting rights classes comprising all candidates, potential candidates, voters, and potential voters in cases such as this seeking injunctive and declaratory relief from onerous restrictions on the franchise. *E.g.*, *Paul v. Indiana Election Bd.*, 743 F. Supp. 616, 618 (S.D. Ind. 1990) (certifying class of all potential candidates, voters, and potential voters in the State of Indiana in voting case). The challenge of bringing individual cases is exacerbated by the COVID-19 pandemic, making class action all the more appropriate.

A. Plaintiffs' Claim Meets the Prerequisites of Rule 23(a)

1. The proposed class is so numerous that joinder would be impractical.

Although there is no "magic number" for numerosity, the Second Circuit has held that a proposed class with as few as 40 class members should raise a presumption that joinder is impracticable based on numbers alone. *See, e.g., Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (citing cases and treatise). *See also* NEWBERG ON CLASS ACTIONS (5th. ed. 2018) §3.12. Numerosity is easily met here, where the class will exceed 1 million Connecticut voters.

2. The proposed class will be adequately represented.

To show adequacy, Plaintiffs and their counsel must show they will "fairly and adequately protect the interests of the class." Rule 23(a)(4). For Plaintiffs, that means showing that their interests are not in conflict with the class. "In order to defeat a motion for certification . . . the conflict must be fundamental." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). *See also Charron v. Wiener*, 731 F.3d 241, 251 (2d Cir. 2013). Alleged conflicts must also not be speculative or hypothetical. *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 296 (E.D.N.Y. 1998), *opinion adhered to on reconsideration sub nom. In re Olsten Corp.*, 181 F.R.D.

218 (E.D.N.Y. 1998). ("The court finds that this alleged conflict is speculative and hypothetical, and should not prevent [appointment of class representatives]."). No conflicts exist here. Plaintiffs' claims are typical.

In addition, counsel must show that they are qualified, experienced, and able to vigorously conduct this proposed litigation. That is the case here. The plaintiffs have retained Alexander T. Taubes, Esq., a graduate of Yale Law School, who has significant experience in Election Law, Class Actions, and Civil Rights. For those reasons and others counsel satisfy the requirements of Rule 23(g) and should be appointed class counsel.

3. The plaintiffs' claims are typical of the class.

To satisfy typicality, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Typicality is not a demanding standard: "When it is alleged that the same unlawful conduct . . . affected both the named plaintiff and the class . . . the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993). While numerosity and commonality "identify the characteristics that make representative litigation appropriate," typicality, like adequacy of representation, "focus[es] on the desired attributes of the class's representative." NEWBERG ON CLASS ACTIONS § 3:28 (5th ed.). The requirement is intended "to ensure that the interests of the class representative[s] are closely aligned with those of the class, so that by pursuing [their] own interests the class representative will also promote those of the class." *Id.* at § 3:32 (5th ed.).

Here typicality is easily met. The class representatives are Connecticut voters suffering the same injury as class members—diminished choices at the ballot box, because potentially

viable candidates are being excluded from the state party primary. Their First Amendment claim is typical – indeed, identical – to all Connecticut voters.

4. Common issues pervade this litigation

Rule 23(a)(2) requires that "questions of law or fact" be "common to the class." Fed. R. Civ. P. 23(a)(2). Commonality requires the identification of an issue that by its nature "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." *Dukes v. Wal-Mart Stores, Inc*., 564 U.S. 338, 350 (2011). A single common issue is sufficient to establish commonality. *Id*. at 359 ("We quite agree that for purposes of Rule 23(a)(2) even a single common question will do. . . .") (internal quotation marks, brackets, and citations omitted).

The named plaintiffs' claims satisfy the commonality requirement because "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir. 2007). The common claim is that the ballot access laws, as modified by Defendant Lamont's executive order, violate the First Amendment to the United States Constitution. Many common issues of law and fact predominate over the common claim: the extent to which the ballot access laws, as modified by the order, burden First Amendment rights; the state interests justifying the restrictions; whether to apply strict scrutiny or a lesser scrutiny to the regulations; whether and to what extent the COVID-19 pandemic affects the First Amendment analysis; and many other legal and fact questions are common among Plaintiffs and all Connecticut voters.

Of course there are differences among Connecticut voters. Some people eligible to vote may prefer not to vote, while others are enthusiastic about voting, for example. But as courts have

repeatedly recognized, even under the more stringent standards applicable to class actions that seek damages under Rule 23(b)(3), class action treatment is appropriate despite the existence of individual differences among class members. *Tyson Foods, Inc. v. Bouaphakeo*, --- U.S. ---, 136 S.Ct. 1036, 1045 (2016) ("When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.") (internal quotation marks and citations omitted). Where as here, the commonalities are readily apparent, Rule 23 is amply satisfied.

B. Plaintiffs' Claim Meets the Requirements of Rule 23(b)(2)

Plaintiffs' claim fits within Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." The "prime examples" of Rule 23(b)(2) cases, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997), are civil rights cases like this one, where the defendants have engaged in unlawful behavior toward a defined group. The rule applies, moreover, where "a single injunction or declaratory judgment would provide relief to each member of the class" (as opposed, for example, to cases in which each class member would need an individual injunction or declaration, or in which each class member would be entitled to an individualized award of money damages). *Dukes*, 564 U.S. at 360-61.

Plaintiffs' First Claim, on which they seek class certification today, satisfies these requirements. Defendants have engaged in unconstitutional behavior toward the entire class. Every member of the class is at risk of being denied "an effective platform for the expression of views

on the issues of the day," *Anderson*, *supra* p. 1, because Defendants' activities will prevent legitimate candidates from accessing the ballot for the August 11, 2020 primary elections. And, because every member of the class is entitled to relief from this unconstitutional conduct, an appropriate injunction or declaration will provide relief on a class-wide basis. "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." *Dukes*, 564 U.S. at 360. That is this case.

IV. CONCLUSION

Class certification should be granted, Plaintiffs should be appointed as class representatives, and the undersigned should be appointed as class counsel.

Dated: May 18, 2020

Respectfully Submitted,

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