UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: RACE DISCRIMINATION IN CINCINNATI POLICING	:	**Case No. C-1-99-317**
	:	**Judge Dlott**
	:	**PLAINTIFFS' MOTION TO PROVISIONALLY CERTIFY CLASS**

MOTION

Pursuant to Fed. R. Civ. Proc. 23(a) and (b)(2), the plaintiffs move this court to provisionally certify the following plaintiff class:

> All African-American or Black persons and people perceived as such who reside, work in and/or travel on public thoroughfares in the City of Cincinnati, Ohio either now or in the future and who are stopped, detained, and arrested by Cincinnati Police Officers or their agents.

Plaintiffs further move that this court appoint the Friends of Cincinnati Black United Front ("The Front") and the American Civil Liberties Union of Ohio Foundation, Inc. ("ACLU") as class representatives and the undersigned counsel be appointed as class counsel.

MEMORANDUM

I. Introduction

This is a civil rights class action challenging disparate treatment of African-American persons by the Cincinnati Police Division. This treatment includes stops, detentions and searches based on race. This treatment also includes discriminatory enforcement of the traffic and other laws resulting in a disproportionate number of African American people being charged with minor traffic violations and discretionary offenses such as jaywalking. This treatment also includes discriminatory uses of force against African-American persons and other practices that have the purpose and/or effect of discriminating against African-American persons because of their race. Plaintiffs seek declaratory and injunctive relief for the class under the First, Fourth, and Fourteenth Amendments to the United States Constitution, federal law, the Ohio Constitution, and state law.

This motion to certify a class is being filed at the same time as a motion for preliminary injunction and a motion to amend the complaint. Expedited scheduling on these motions is requested.

II. Argument

A. Standard for Certification of Class Action

The determination that an action will be maintained as a class action involves a two step process. First, the Court must find that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – have been

satisfied. The court must then decide whether the proposed class qualifies under one or more of the three alternative bases of certification set forth in Rule 23(b).

As set out in detail below, the class in this case is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the plaintiffs' claims are typical of the class; and plaintiffs will fairly and adequately protect the interest of the class. In addition, plaintiffs satisfy the requirements of Fed. R. Civ. Pro. 23(b)(2) because the primary relief sought by plaintiffs is injunctive and declaratory.

A "rigorous analysis" of compliance with Rule 23 is expected in class action determinations. *In re American Medical Systems, Inc.*, 75 F. 3d 1069, 1078-1079 (6th Cir. 1996) (citing *Tel. Co. v. Falcon*, 457 U.S. 147, 161. (1982)). As the proponents of certification, plaintiffs have the burden to prove that certification is appropriate. *Id.* at 1079 (citing *Falcon*, 457 U.S. at 161; *Senter v. General Motors Corp.,* 532 F.2d 511, 522 (6th Cir. 1976), *cert denied*, 429 U.S. 870 (1976)). The merits of the case are not to be tried on a class certification motion:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.... "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-178 (1974) (quoting *Miller v. Mackey International*, 452 F.2d 424, 427 (CA5 1971).

The present task in this case, therefore, is not to determine the merits of plaintiffs' claims of discrimination. Indeed, merits discovery has not commenced. Rather, this court must determine whether plaintiffs have satisfied the requirements of the

Rule 23.

Plaintiffs have proposed a class in this race discrimination case defined as follows:

> The plaintiffs propose that the Court adopt the following class definition:
>
> All African-American or Black persons and people perceived as such who reside, work in and/or travel on public thoroughfares in the City of Cincinnati, Ohio either now or in the future and who are stopped, detained, and arrested by Cincinnati Police Officers or their agents.

Plaintiffs seek only injunctive relief on their class claims. Certification is requested under Rule 23(b)(2) which requires that plaintiffs show that 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." As the Supreme Court recently noted, "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) classes]." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). That is precisely what plaintiffs are alleging in this case. Indeed, rooting out the racial disparity in the criminal justice system evident at all levels of the justice system is a major issue locally, state-wide and nationally. Class treatment is uniquely appropriate in such cases.

B. The Requirements Of Rule 23(a) Are Satisfied.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

Rule 23(a)(1) requires that, for certification purposes, the class be so numerous that the joinder of all members is impracticable. Impracticability means only difficulty or inconvenience of joining all members of the class. *Senter*, 532 F.2d at 523; *Bowling v.*

Pfizer, Inc., 143 F.R.D. 141, 158 (S.D. Ohio 1992). The proposed class in this case consists of thousands of African American and Black persons and people perceived as such. Much smaller classes have met the numerosity requirement. *Nash v. City of Oakwood*, 94 F.R.D. 83, 89 (S.D. Ohio 1982) (33 members); *Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (35 members).

A racial profiling class was certified in *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 184 F.R.D. 583 (N.D. Ohio 1998). The class was defined as "all current and future Hispanic motorists and/or passengers traveling in Ohio, who are involved in traffic stops by officers, agents or employees of the Ohio State Highway Patrol, and are questioned about immigration matters, or suffer the seizure of their lawfully issued immigration documents." *Id.* at 586. The court held that the numerosity requirement was satisfied because the number of persons included was large and likely to continue to grow; members are geographically dispersed and many of the class members are low income and lack the financial resources and knowledge to bring individual actions. *Id* at 586-587. In the case at bar, the class members are in the thousands and they also will continue to grow, are geographically dispersed, and many lack resources and knowledge to file separate actions. The class is too numerous to permit joinder of all of the members of the class.

2. Questions Of Law Or Fact Are Common To The Class.

The alleged nature of the defendants' conduct in this case together with the similar legal status of the class members requires the Court to find that questions of law or fact are indeed common to the class. All of the class members are present now or in

the future within the geographical boundary of the City of Cincinnati and are subject to interaction with the Cincinnati Police. The need for a consistent and uniform rule prohibiting the improper use of race in policing is obvious.

Common questions exist whenever the action arises from a nucleus of operative facts. *Thompson v. Midwest Foundation Independent Physicians Association*, 117 F.R.D. 108, 112 (S.D. Ohio 1987). *See also, Sterling v. Velsicol Chemical Corporation*, 855 F.2d 1188 (6th Cir. 1988). The focus of the Court's consideration of class certification should be directed at, and fixed upon, the factual and legal nature of defendants' liability and course of conduct as it uniformly affects all plaintiffs. *Thompson*, 117 F.R.D. at 109. This prerequisite is satisfied "as long as the members of the class have allegedly been affected by a **general** policy of the defendant, and the general policy is the focus of the litigation." *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976) (emphasis in original). In *Farm labor Organizing Committee*, the court held that this requirement was satisfied in a racial profiling case: "Plaintiff's complaint has questions of both law and fact that are common to the class. The legal question involved –whether defendants' practices are illegal and unconstitutional –is common to all class members. Likewise, the factual question—the exact nature and extent of defendants' practices—is common to all members." 184 F.R.D. at 587.

That requirement of common questions of fact and law has certainly been met in this case. Plaintiffs have alleged discriminatory practices including but not limited to:

> Stops of African-American persons without reasonable suspicion that a crime has been committed;
>
> Disproportionate application of the following practices to African American persons: Undue detention, unnecessary searches, improper use of handcuffs,

improperly locking of innocent citizens in cruisers, improperly forcing innocent persons to obey direction at gunpoint;

Disproportionate retaliation against African Americans who seek badge numbers and names from police officers;

Disproportionate charging of discretionary offenses against African Americans as a pretext for race-based stops;

Failure to monitor, supervise and discipline white officers who are targets of repeated complaints of misconduct;

Rewarding officers for aggressive police practices and arrests rather rewarding those who implement the Community Oriented Policing Philosophy;

Establishing arrest expectations by neighborhood.

Plaintiffs seek to remedy these policies and practices through an order requiring data collection that will permit the tracking of charges and stops by race and permit the tracking of misconduct by officer, increased diversity and conflict resolution training and improved field training; and reforms in the manner in which misconduct is investigated and discipline imposed. As in *Farm Labor Organizing Committee*, this requirement is satisfied.

3. The Claims Of The Plaintiffs Are Typical Of The Claims Of The Class.

One of the purposes of the typicality requirement is to ensure that the named representatives' claims are similar enough to those of the class to ensure that the named representatives will adequately represent the class. *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157, n.13 (1982). To be typical, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Senter v. General Motors Corporation, supra*, at 525, n.31.

In this action, the proposed representative plaintiffs are civil rights organizations whose mission includes advocacy in opposition to racial discrimination in policing.

Many of the class members are members of these organizations. The organizations clearly have standing in their own right and on behalf of their members to pursue this case which tracks so closely to their mission of opposing discrimination and advocating for equal justice.

The standing question is controlled by Supreme Court precedent, including the recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In that case, the plaintiff environmental organization sued on behalf of members who alleged that they were refraining from the use of a river which was being polluted by discharges from the defendant company. The alleged injury from the pollution was sufficient to find standing to sue. The Court explained that standing has roots directly in Article III §2 of the Constitution which requires that in order for a federal court to have jurisdiction there must be a "case or controversy."

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 180-181 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The issue in *Friends of the Earth* was whether the plaintiff association members had alleged sufficient injury in fact to bring the suit. The court held that there was injury in fact:

> [W]e see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this

case, and that is enough for injury in fact.

Id. at 184-185.

The declarations from members of these groups demonstrate that the discrimination they experience makes them less likely to call on police and more fearful when they do interact with police. Similar allegations from members of environmental organizations who use an area allegedly being polluted by defendant "for whom the aesthetic and recreational value of the area will be lessened" by the challenged activity supported standing in *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). The Supreme Court relied on such allegations in *Friends of the Earth.* The declarations from members of the civil rights organizations submitted with the motion for preliminary injunction meet this test.

The holding in *Friends of the Earth* is consistent with prior rulings extending standing in cases challenging race discrimination and racial steering in housing in suits brought under Title VIII of the Civil Rights Act of 1968. *Gladstone, Realtors, et al. v. Village of Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982). In *Gladstone*, a Village, its residents and non-resident prospective homebuyers had standing to challenge an alleged practice of racial steering in which African-Americans were steered toward a 12 by 13 block area of the community and white customers were steered away from that area. The alleged injury deemed sufficient for standing was the deprivation of the "social and professional benefits of living in an integrated society." 441 U.S. at 91.

In *Havens* the Court extended the scope of standing to include "testers." These plaintiffs posed as applicants for housing and were not bona fide applicants. The Court

held that African-American testers who were falsely told that no apartments were available to rent were denied truthful information. That was sufficient injury to support standing by the testers. 455 U.S. at 373-374.

Similar interests have supported standing in *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012 (6th Cir. 1989). In that case the Sixth Circuit reversed the dismissal of a class action headed by a neighborhood organization. One of the claims in the suit was under equal protection, claiming that the neighborhood received less police protection because of the race of the residents. The Court held that the plaintiff association had alleged valid claims under both Title VI, 42 U.S.C. §2000d-1 and under the Civil Rights Act, 42 U.S.C. §1983. Similar theories are pursued here. *See also Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (violation of equal protection to deny police protection based upon person's sexual orientation).

An examination of the complaint reveals that plaintiffs' claims are typical of the class members. Numerous examples of allegations from members of the plaintiffs' organizations are provided. Plaintiffs' claims focus upon the Defendant City's alleged wrongful conduct. Thus, their claims "are typical of the claims . . . of the class." *Sweet v. General Tire & Rubber Co., Supra* 74 F.R.D. at 335. In such circumstances, a class action may be the best suited vehicle to resolve such a controversy. *Sterling v. Velsicol Chemical Corporation*, 855 F.2d at 1197 (6th Cir. 1980). As long as the theories of liability transcend factual differences among the plaintiffs, this Court should find that plaintiffs have satisfied the typicality requirement. *See id.* at 1197. "While the focus is on the relatedness of the named plaintiffs' claims and those of the class members, the harm suffered by the named plaintiffs may differ in degree from that suffered by the other

members of the class so long as the harm suffered is of the same type." *In re Asbestos School Litigation* 1991 WL 137128 (E.D. PA).

4. The Representative Plaintiffs Will Fairly And Adequately Protect The Interest Of The Class Members.

Rule 23(a)(4) requires that the named plaintiffs "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves "to uncover conflicts of interest between named parties and the class they represent." *Amchem Products, Inc., supra, at 31.* The adequacy of representation requirement "tends to merge" with the commonality and typicality criteria of Rule 23(a) which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Products, Inc.* at 32 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982)).

In determining the adequacy of class representation, the Sixth Circuit has directed that the Court must examine two factors: 1) whether the named representatives have common interests with the unnamed class members; and 2) whether the named representatives will vigorously advance the interests of the class through qualified counsel. *See Senter v. General Motors Corporation, supra*, at 525; *See also, Bowling v. Pfizer, Inc.*, 143 F.R.D. at 159 (S.D. Ohio 1992); *In re American Medical Systems, Inc.*, 75 F. 3d at 1083.

Here, the named representatives' claims as class members are so interrelated to the other class members members' claims that the plaintiffs will be fair and adequate representatives. In the case at bar, there are no conflicts of interest between the proposed

class representatives and the members of the class since the claims of all parties arise from a consistent practice, are based upon identical theories of law, and the relief sought for the class is the same for all the class members.

The proposed class representatives are knowledgeable about the facts which are key to the issues presented in this case. The representatives understand the duty owed all plaintiffs in protecting their legal rights. Each representative has the ability and intention to fulfill the duty.

The second prong of the Sixth Circuit's adequacy of representation test, the qualifications of class counsel, is also satisfied. The named Plaintiffs are represented by counsel who are very experienced and thoroughly familiar with class action litigation and civil rights litigation, including race discrimination litigation. Counsel have also previously been deemed qualified to act as lead counsel and class counsel in other complex litigation.

.C. The Present Action Is Appropriate For Class Certification Under Rule 23(b)(2).

The injunctive relief sought by the class in this case is the primary relief requested, and is directed towards conduct that affects each and every member of the class. Indeed, this relief sought by the class cannot be awarded on a class member by class member basis. Certainly declaratory and injunctive relief addressing policing cannot be awarded on anything less than a class-wide basis. Thus, plaintiffs satisfy the requirements contained in Rule 23 (b)(2).

> Plaintiffs challenge an action which was directed towards the class as a whole and final class-wide declaratory injunctive relief would be appropriate. This is all that is required under sub-section 23(b)(2).

Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986).

Certification of a 23(b)(2) class is the only legally sound method available to properly manage and adjudicate all issues and claims. A similar class was certified in *Farm Labor Organizing Committee, supra.* The court reviewed all of the requirements of Rule 23 and certified the class under 23(b)(2).

The plaintiffs respectfully request that this Court order this action be maintained as a class action, that the named plaintiffs be appointed class representatives, and that the undersigned counsel be appointed counsel for the class.

III. Conclusion

Plaintiffs respectfully request that the class as described be provisionally certified.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing Motion to Provisionally Certify Class was served on the following counsel of record this day of March, 2001 by United States Mail:

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