

Last-Minute Absentee Voting by Last-Minute Prisoners

Fair Elections Ohio v. Husted (Susan J. Dlott and
S. Arthur Spiegel, 1:12-cv-797) and *Mays v. Husted*
(Michael H. Watson, 2:18-cv-1376) (S.D. Ohio)

Prisoner-rights organizations filed a federal complaint seeking provisions ensuring the ability to vote by voters detained during the days immediately preceding the 2012 general election. The district judge denied the plaintiffs immediate relief because they had not presented compelling evidence of disfranchisement. The state’s accommodations for persons with medical emergencies on election day did not create an equal protection violation because of the different burdens placed on election officials. After the case was transferred to another judge in 2014, and after additional discovery, the second judge granted the plaintiffs summary judgment on a showing that the burden on disfranchised voters outweighed the burden on accommodating late-jailed voters. The court of appeals determined, over a dissent, however, that the plaintiff organizations did not have standing. A lawsuit filed in 2018 by two persons arrested over the weekend before election day and detained through election day was successful for them. A potential class action remains pending.

Subject: Absentee and early voting. *Topics:* Prisoner voters; equal protection; absentee ballots; class action.

Litigation begun in 2012 to provide absentee voting rights to voters arrested and detained just before election day was ultimately unsuccessful for reasons of standing. But litigation begun in 2018 by two plaintiffs detained beginning the weekend before election day was successful for those two plaintiffs. A potential class action remains pending.

2012 Case

Five prisoner-rights organizations filed a federal complaint in the Southern District of Ohio’s Cincinnati courthouse on October 15, 2012, “to ensure that eligible electors who are jailed the weekend before Election Day and who remain confined through Election Day are afforded the right to vote.”¹ The plaintiffs named as defendants Ohio’s secretary of state, Ohio’s attorney general, and the chair of Hamilton County’s board of elections, who was named as a representative for “all members of County Boards of Elections.”² With their complaint, the plaintiffs filed a motion for a temporary restraining order.³

1. Complaint, *Fair Elections Ohio v. Husted*, No. 1:12-cv-797 (S.D. Ohio Oct. 15, 2012), D.E. 1.

2. *Id.* at 6–8.

3. Temporary Restraining Order Motion, *id.* (Oct. 15, 2012), D.E. 2.

Judge Susan J. Dlott held a telephonic status conference on October 16, set another telephonic conference for two days later, and issued a list of questions for the parties to address at the second conference.⁴ The questions pertained to numbers of voters likely to be affected and the parties' standing.⁵ An amended complaint on October 18 named five additional board of elections chairs for Southern District counties.⁶ Judge Dlott set a hearing on the motion for a temporary restraining order for October 23.⁷

Judge Dlott denied the plaintiffs immediate relief.⁸ She found that the plaintiffs had standing because the injury complained of had an impact on one or more plaintiff organization's allocation of resources.⁹ The plaintiffs did not, however, present sufficiently compelling evidence of disfranchisement:

[The plaintiffs presented evidence that] approximately forty-four percent of the people arrested during the weekend prior to the election will be registered to vote. Plaintiffs have submitted no evidence to demonstrate what percentage of those individuals will actually be prevented from voting, given that they will have already had an opportunity during the month prior to the election to request an absentee ballot or to take advantage of Ohio's in-person early voting system. Nor have Plaintiffs submitted any evidence to demonstrate the percentage of those individuals who are likely not only to be arrested during the weekend prior to the election but also detained through the actual election.¹⁰

Ohio's statutory accommodation for medical emergencies on election day did not violate equal protection, because medical emergencies and sudden detentions following arrests are not similar situations with respect to the burdens placed on election officials.¹¹

A second amended complaint filed on February 8, 2013, by three of the original plaintiffs named only Ohio's secretary of state and its attorney general as defendants.¹² The court transferred the case to Judge S. Arthur Spiegel

4. Order, *id.* (Oct. 16, 2012), D.E. 10 [hereinafter Oct. 16, 2012, Order]; Docket Sheet, *id.* (Oct. 15, 2012).

5. Oct. 16, 2012, Order, *supra* note 4.

6. Amended Complaint, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Oct. 18, 2012), D.E. 12.

7. Notice, *id.* (Oct. 18, 2012), D.E. 11; see Transcript, *id.* (Oct. 23, 2012, filed Oct. 24, 2012), D.E. 24 (afternoon session); Transcript, *id.* (Oct. 23, 2012, filed Oct. 24, 2012), D.E. 23 (morning session); Minutes, *id.* (Oct. 24, 2012), D.E. 22; see also *Ohio Denies Recently Jailed Voters, Suit Says*, Cincinnati Enquirer, Oct. 24, 2012, at B5.

8. Opinion, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Nov. 1, 2012), D.E. 30 [hereinafter Nov. 1, 2012, Opinion], 2012 WL 5414454; see *Judge Won't Alter Election Law for Inmates*, Cincinnati Enquirer, Nov. 2, 2012, at C3.

9. Nov. 1, 2012, Opinion, *supra* note 8, at 21–25.

10. *Id.* at 30–31.

11. *Id.* at 32–34.

12. Second Amended Complaint, *Fair Elections Ohio*, No. 1:12-cv-797 (S.D. Ohio Feb. 8, 2013), D.E. 53.

on August 20, 2014.¹³ Following the parties' period of discovery, Judge Spiegel granted the plaintiffs summary judgment on September 16.¹⁴

The plaintiffs proffered "expert evidence that at least, if not more, than 400 late-jailed voters state-wide were impeded from voting in the 2012 election."¹⁵ "The Court further finds late-jailed electors are similarly-situated to late-hospitalized electors whom the boards of election already accommodate. The boards of election teams should have no trouble locating late-jailed electors, as they literally have a captive audience."¹⁶ "[T]here is no genuine dispute that African-Americans are disproportionately affected by this policy."¹⁷ Moreover, "Those detainees who can post bond can also vote, whereas those who cannot, cannot. As such, Ohio's denial of the ability to vote to late-jailed electors acts as an unconstitutional wealth-based voting restriction."¹⁸

On October 24, a panel of the court of appeals, over a dissent, vacated Judge Spiegel's summary judgment and ordered the case dismissed, finding that the plaintiffs lacked standing.¹⁹ On the one hand, the court held, allocation of resources to advise persons how to comport with the law or to seek a change in the law cannot be sufficient to afford standing to challenge the law.²⁰ On the other hand, the relationship between the organizations and election-weekend-detainees is insufficient to afford third-party standing.²¹

2018 Case

On the day of the 2018 general election, two plaintiffs who had been arrested for misdemeanors on Friday or Saturday night filed a class action federal complaint against Ohio's secretary of state in the Southern District seeking absentee voting accommodations for voters detained over the weekend comparable to hospitalized voters' accommodations.²²

Judge Michael H. Watson heard the case at 1:00 p.m.²³ When asked why the complaint was not filed until Tuesday, the plaintiffs' attorney said that it could not be known that they would be detained on Tuesday until their arraignment the day before.²⁴ At 1:57, Judge Watson announced that he was

13. Order, *id.* (Aug. 20, 2014), D.E. 121.

14. *Fair Elections Ohio v. Husted*, 47 F. Supp. 3d 607 (S.D. Ohio), *rev'd*, 770 F.3d 456 (6th Cir. 2014); see Dan Horn, *Arrest in Days Before Election Won't Stop Vote*, Cincinnati Enquirer, Sept. 18, 2014, at A7; Alan Johnson, *Jailed and Can't Post Bail? Ballot Will Come to You*, Columbus Dispatch, Sept. 18, 2014, at 4B.

15. *Fair Elections Ohio*, 47 F. Supp. 3d at 611.

16. *Id.* at 615.

17. *Id.* at 617.

18. *Id.* at 615.

19. *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014) (opinion by Circuit Judge John M. Rogers, joined by Circuit Judge Deborah L. Cook); see *id.* at 461–64 (dissenting opinion by Circuit Judge R. Guy Cole, Jr.); see also Order, *Fair Elections Ohio v. Husted*, No. 1:12-cv-797 (S.D. Ohio Nov. 20, 2014), D.E. 128 (dismissing the case).

20. *Id.* at 460.

21. *Id.* at 461.

22. Complaint, *Mays v. Husted*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), D.E. 1.

23. Transcript, *id.* (Nov. 6, 2018, filed Dec. 10, 2018), D.E. 20.

24. *Id.* at 15–16.

going to grant relief to the individual plaintiffs.²⁵ He ordered personal delivery of absentee ballots to the plaintiffs by 5:30, a wait for their casting, collection of the ballots for counting, and notice to detention authorities of the court's order.²⁶ "The Court concludes that it would be impractical, if not logistically impossible, to grant any class-wide TRO relief this late on Election Day"²⁷

Magistrate Judge Chelsey M. Vascura is presiding over pretrial proceedings.²⁸

25. *Id.* at 20.

26. 2018 Injunction, *id.* (Nov. 6, 2018), D.E. 12; see Eric Heisig, *Judge Orders That 2 Jailed Voters Be Given Ballots*, Cleveland Plain Dealer, Nov. 7, 2018, at A22.

27. 2018 Injunction, *supra* note 26, at 2.

28. Preliminary Pretrial Order, *Mays*, No. 2:18-cv-1376 (S.D. Ohio Mar. 11, 2019), D.E. 28.