

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. The judge later granted summary judgment to a certified plaintiff class. The court of appeals, however, determined that the franchise burden on arrested voters was modest and justified by election officials' burdens in providing new prisoners with ballots.

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. The court of appeals ultimately determined that it was constitutional to provide ballots to voters who were unexpectedly hospitalized but not to voters who were unexpectedly arrested during the few days before an election.

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

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

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

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 gen-

2. *Id.* at 6–8.

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

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

5. Oct. 16, 2012, *Fair Elections Ohio 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, *Fair Elections Ohio Opinion*], 2012 WL 5414454; *see Judge Won’t Alter Election Law for Inmates*, Cincinnati Enquirer, Nov. 2, 2012, at C3.

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

10. *Id.* at 30–31.

11. *Id.* at 32–34.

eral as defendants.¹² The court transferred the case to Judge S. Arthur Spiegel 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, "[t]hose 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 comparable to hospitalized voters' for voters detained over the weekend.²²

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

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

Judge Spiegel died on December 31, 2014. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

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 (punctuation slightly altered for clarity).

16. *Id.* at 615.

17. *Id.* at 617.

18. *Id.* at 615.

19. *Fair Elections Ohio*, 770 F.3d 456 (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. *Fair Elections Ohio*, 770 F.3d 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; *Mays v. LaRose*, 951 F.3d 775, 780–81 (6th Cir. 2020).

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 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 [temporary-restraining-order] relief this late on Election Day"²⁷

One year later, Judge Watson certified a plaintiff class and granted it summary judgment: persons suddenly confined to jail on election day had to be given the same opportunities for absentee voting as persons suddenly confined to hospital on election day.²⁸

The court of appeals determined to the contrary on March 3, 2020, that Ohio's secretary of state had

identified several counties that do not have adequate resources to process late absentee ballot requests from unexpectedly jail-confined electors without foregoing other duties necessary to ensure the orderly administration of Ohio's elections. Thus, he has shown that the State's interests are important and weighty enough to overcome the moderate burden that Ohio's disparate treatment of confined electors imposes on Plaintiffs.²⁹

23. Transcript, *Mays*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018, filed Dec. 10, 2018), D.E. 20.

24. *Id.* at 15–16.

25. *Id.* at 20; *see Mays*, 951 F.3d at 781.

26. Injunction, *Mays*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), D.E. 12 [hereinafter *Mays* Injunction]; *see Eric Heisig, Judge Orders That 2 Jailed Voters Be Given Ballots*, *Cleveland Plain Dealer*, Nov. 7, 2018, at A22.

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

28. Opinion, *Mays v. LaRose*, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2019), D.E. 70; *see Mays*, 951 F.3d at 781; *see also Randy Ludlow, Federal Judge Sides with Prisoners in Voting Case*, *Cincinnati Enquirer*, Nov. 12, 2019, at A9.

29. *Mays*, 951 F.3d at 791.