UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:22-cv-191-MTS
WENTZVILLE R-IV SCHOOL DISTRICT,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. Background

The Named individual Plaintiffs are current students in Defendant Wentzville R-IV School District (the "District"). Plaintiff C.K.-W. attends a District school, where she has access to and uses the school library, and her parents plan for her to continue to attend District schools through high school graduation. (Doc. 19-31.) C.K.-W.'s parents wish for her to be able to access from a school library and read *The Bluest Eye*, by Toni Morrison; *Fun Home: A Family Tragicomic Paperback*, by Alison Bechdel; *All Boys Aren't Blue*, by George M. Johnson; *Heavy: An American Memoir*, by Kiese Laymon; *Lawn Boy*, by Jonathan Evison; *Gabi, A Girl in Pieces*, by Isabel Quintero; *Modern Romance*, by Aziz Ansari; and *Invisible Girl*, by Lisa Jewell (the "Banned Books") and books with similar viewpoints. *Id.* Plaintiff D.L. is a senior at a high school in the District, where he has access to and uses the school library. (Docs. 19-29; 19-30.) D.L. was a student when the Banned Books were removed from library access and will continue to attend the District high school until graduation. *Id.* D.L. and his parents wish for him to be

able to access from a school library and read the Banned Books and books with similar viewpoints. *Id.* D.L. checked out *Gabi* from the school library after access was restored. (Doc. 19-29).

The Named Plaintiffs are not alone. Thus, they seek prospective relief on behalf of a class of similarly situated persons: current and future students in District schools who use, or will use, a District school library to access information (the "Class" or "Proposed Class"). For the following reasons, movants satisfy the requirements of Federal Rule of Civil Procedure Rules 23(a) and (b)(2) and the motion for class certification should be granted.

II. Argument

At the class certification stage, this Court's "primary task is not to determine the final disposition of a plaintiff's claims, but instead to examine whether those claims are appropriate for class resolution." *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1037 (8th Cir. 2018) (citation omitted). The governing standards for class certification are well-established. A motion for class certification involves a two-part analysis. First, the movants must demonstrate that the proposed class satisfies the requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Second, the movants must demonstrate that the proposed class fits into one of the three categories identified in Rule 23(b). Thus, the action must: (1) create a risk of establishing incompatible standards of conduct through inconsistent adjudications or

substantially impair the interests of individuals not party to the litigation, Rule 23(b)(1); or (2) involve a party opposing the class who acted on grounds that apply generally to the class, Rule 23(b)(2); or (3) involve a court finding both that questions of law or fact common to class members predominate over individual questions and that a class action is "superior to other methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3).

A. The Proposed Class Satisfies All Rule 23(a) Requirements

Rule 23(a) of the Federal Rules of Civil Procedure establishes four criteria that must be satisfied in order for any case to be appropriately deemed a class action:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997). All four requirements are met here.

1. Numerosity

Rule 23(a)(1) requires the proposed class to be "so numerous that joinder of all members is impracticable." Rule 23(a)(1) sets a "low threshold for numerosity," *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("[i]mpracticable does not mean impossible"). In addition, "[i]n order to meet [the numerosity] requirement it is not necessary to specify an exact number or to prove the identity of each class member, rather 'the plaintiffs must only show a reasonable estimate of the number of class members.'" *Halbach v. Great-West Life & Annuity Ins. Co.*, 2007 WL 1018658, at *3 (E.D. Mo. Apr. 2, 2007) (quoting *Morgan v. United Parcel Serv. of Am.,* 169 F.R.D. 349, 355 (E.D. Mo. 1996)). Moreover, courts are "permitted to make common sense assumptions in order to

find support for numerosity." *Phipps v. Sheriff of Cook Cty.*, 249 F.R.D. 298, 300 (N.D. Ill. 2008) (citing *Block v. Abbott Labs.*, 2002 WL 485364, at *3 (N.D. Ill. Mar. 29, 2002)).

The requirement of numerosity is satisfied here because the proposed class of students who currently attend and will in the future attend District schools is numerous. Approximately 17,400 students were enrolled in District schools during the 2020-21 school year, and thousands of students will continue to attend District schools in the future. (Doc. 18 at ¶ 117). Moreover, the number of individuals in the Class of current and future students who use, or will use, a District school library to access information is so numerous that joinder of all members of the Class would be impracticable, satisfying the numerosity requirement.

Joinder of all these future students is impracticable. "Even a small class of fewer than 10 actual members may be upheld if an indeterminate number of individuals are likely to become class members in the future or if the identity or location of many class members is unknown for good cause." 1 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 3:5 (4th ed. 2002). This is because numbers alone are not determinative of the numerosity requirement. "In addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982).

Thus, for instance, "numerosity is met where, as here, the class includes individuals who will become members in the future. As members *in futuro,* they are necessarily unidentifiable, and therefore joinder is clearly impracticable." *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding numerosity satisfied). The Fifth Circuit has addressed this issue squarely, explaining that, "number comparisons"—that is, whether the number of class members is

"enough or too few to satisfy Rule 23(a)(1)"—often "miss the point of the Rule. The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir. 1981). Where, as here, "***the alleged class includes future and deterred applicants, necessarily unidentifiable*** . . .. In such a case the requirement of Rule 23(a)(1) is clearly met, for joinder of unknown individuals is certainly impracticable." *Id.* (emphasis added). *See also Shariff v. Goord*, 235 F.R.D. 563, 570 (W.D.N.Y. 2006) (relying in part on future inmate class members); *Twarog v. Allen*, 2007 WL 2228635, at *5 (M.D. Ala. July 31, 2007) (same); *Lawson v. Wainwright*, 108 F.R.D. 450, 454 (S.D. Fla. 1986) (same). Here, the Proposed Class includes those individuals who will be attending District schools in the future.

Relatedly, because the putative Class includes individuals who will attend District schools in the future, it is impossible to know the identity of the future Class members now, making class certification appropriate. *See Lane v. Lombardi*, 2:12-CV-4219-NKL, 2012 WL 5462932, *2 (W.D. Mo. Nov. 8, 2012) ("Joinder of all members may be impracticable where the class includes individuals who may become members in the future, but are currently unidentifiable."); *Barrett v. Claycomb*, 11-CV-04242-NKL, 2011 WL 5822382, *2 (W.D. Mo. Nov. 15, 2011) ("because of the fluid nature of this class …, it would be impracticable to require individual lawsuits"); *Phillips*, 637 F.2d at 1022.

Plaintiffs also satisfy the condition of numerosity because requiring each member of the putative Class to file his or her own suit would be a waste of judicial resources. This is particularly true where, as here, "[i]t is clear that joining each of the putative plaintiffs individually and trying separate suits for each would be wasteful, duplicative, and time consuming. And, if each of the Plaintiff's claims was tried individually, much of the evidence

and many of the witnesses would be the same in each case, constituting a waste of judicial resources." *Van Orden v. Meyers*, 4:09CV00971 AGF, 2011 WL 4600688, *6 (E.D. Mo. Sept. 30, 2011).

Finally, in the context of Rule 23(b)(2) civil rights cases, "courts have suggested that the numerosity requirement should not be employed in a mechanical manner to preclude the use of the class action device in precisely the kind of situation for which it is most appropriate." *Gurmankin v. Costanzo*, 626 F.2d 1132, 1135 (3d Cir. 1980); *see also Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975) (giving liberal construction to numerosity requirement in civil rights suits seeking injunctive relief on behalf of future class members); *accord Postawko*, 910 F.3d at 1037 (finding numerosity requirement was satisfied where at least 2,000 Missouri inmates were class members).

2. Commonality

The requirement of commonality is satisfied because Plaintiffs' claims for prospective relief present common questions of law and fact regarding Defendant's unconstitutional policy of removing books from District library access.

Rule 23(a)(2) requires "questions of law or fact common to the class." Like the requirement of numerosity, commonality is a "low[-]threshold" requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001). *See also Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) ("The threshold requirements of commonality and typicality are not high."). "This requirement imposes a light burden on the plaintiff seeking class certification and does not require commonality on every single question raised in a class action." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 207 (W.D. Mo. 2006) (citing *DeBoer v. Mellon Mortg. Co.,* 64 F.3d 1171, 1174 (8th Cir.1995)). *See also Paxton*, 688 F.2d at 561 ("The

rule does not require that every question of law or fact be common to every member of the class.").

The commonality requirement "does not mean that the claims of the representatives must raise identical questions of law and fact with those raised by the claims of the rest of the class. Rule 23(a)([2]) clearly indicates that one common question of law or fact can be sufficient if the other pre-requisites are satisfied." *U.S. Fidelity & Guar. Co. v. Lord*, 585 F.2d 860, 873 (8th Cir. 1978); *accord Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994) ("Because the requirement may be satisfied by a single common issue, it is easily met, as at least one treatise has noted.") (citing H. NEWBERG & A. CONTE, 1 *Newberg on Class Actions* § 3.10, at 3-50 (3d ed. 1992)). "A broad based allegation of civil rights violations typically presents common questions of law and fact." *Pabon v. McIntosh*, 546 F.Supp. 1328, 1333 (E.D. Pa. 1982).

In this case, there are questions of law and fact that are common to the Proposed Class, including, but not limited to: the factual questions about how Defendant's policies are utilized to remove from library circulation books expressing ideas and opinions that conflict with the ideological views of members of its school board or some community members and the legal question of whether viewpoint-based removal of books from libraries violates the First Amendment and the Fourteenth Amendment. A class-wide proceeding has the capacity to generate common answers to these questions, and those answers are apt to drive the resolution of this litigation. *Postawko*, 910 F.3d at 1038 (finding that "the common question of whether the Defendants' policy or custom of withholding treatment with DAA drugs from individuals who have been or will be diagnosed with chronic HCV constitutes deliberate indifference to a serious medical need" would provide a class-wide answer "apt to drive resolution of litigation"). For instance, the answer to the legal question of whether students have a First Amendment right to

access that can be implicated by the removal of access to school library books is the same for all class members and is apt to drive resolution of this dispute in that the existence of such a right is the premise for this cause of action. Moreover, class-wide resolution of this case can be achieved by a single order enjoining Defendant from removing access to library books under a policy that causes a violation of students' constitutional rights.

3. Typicality

The Named Plaintiffs' claims are also typical of other members of the Proposed Class. "Typicality under Rule 23(a)(3) means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) (quoting *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)). Thus, "[t]he burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). Like the numerosity and commonality requirements, Rule 23(a)(3)'s requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" is a "low threshold" requirement. *Newton*, 259 F.3d at 182-83; *Shipes*, 987 F.2d at 316 ("The threshold requirements of commonality and typicality are not high."); *Paxton,* 688 F.2d at 562 ("The burden of showing typicality is not an onerous one"). The typicality requirement is satisfied if the class representatives' claims "arise[ ] from the same event or course of conduct as the class claims, and give[ ] rise to the same legal or remedial theory." *Alpern*, 84 F.3d at 1540; *see also Paxton*, 688 F.2d at 561-62.

Plaintiffs' claims for prospective relief are based on the same policies of Defendant as the claims of Class members generally, and they seek a remedy that would resolve a similar claim advanced by other students. Student Plaintiffs' claim that Defendant's book-removal policy

violates their rights under the First and Fourteenth Amendments is identical to the claims that could be raised by any member of the Class. The named students object to the removal of access to books that express the viewpoints of racial and sexual minorities; however, both their claim and the relief they seek are typical regardless of the viewpoint that the challenged policy causes to be censored. For example, should an objection to the King James Bible in the District's libraries be lodged because of disagreement with its view of Jesus as the Messiah and, because of the policy, cause removal of access to that title, but other access to other books in the District's libraries expressing different viewpoints about the divinity of Christ remain, the First Amendment claim lodged here and the remedy sought would be the same as that advanced by Plaintiffs. In other words, "the potential for minor factual variations does not undermine . . . [a] conclusion that the violation allegedly suffered by the Named Plaintiffs is typical of that suffered by the class as a whole." *Postawko*, 910 F.3d at 1039 (citation and quotation omitted). Accordingly, the typicality requirement of Rule 23(a) is satisfied.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "This requirement encompasses two distinct factors: '(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *Chorosevic v. MetLife Choices*, No. 4:05-CV-2394 CAS, 2007 WL 2159475, at *7 (E.D. Mo. July 26, 2007) (quoting *U.S. Fidelity & Guar. Co. v. Lord*, 585 F.2d 860, 873 (8th Cir. 1978)); *Paxton*, 688 F.2d at 562–63 ("The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.").

Plaintiffs are represented by qualified and experienced counsel in the present case. In the absence of proof to the contrary, courts presume that Class counsel is competent and sufficiently experienced to vigorously prosecute the class action. *See Morgan v. United Parcel Serv. of America, Inc.*, 169 F.R.D. 349, 357 (E.D. Mo. 1996). Moreover, one of Plaintiffs' attorneys, Anthony E. Rothert, has significant experience as class counsel in civil rights cases seeking prospective relief. *See, e.g.*, *Postawko*, 910 F.3d 1030; *Kennard v. Kleindienst*, No. 2:14-CV-04017 BCW, 2015 WL 4076473, at *1 (W.D. Mo. June 5, 2015); *Lane v. Lombardi*, 2:12-CV-4219 NKL, 2012 WL 5462932 (W.D. Mo. Nov. 8, 2012); *Barrett v. Claycomb*, 11-CV-04242 NKL, 2011 WL 5822382 (W.D. Mo. Nov. 15, 2011); *Bauer v. Jefferson Cty.*, 4:09-CV-2116 TIA (E.D. Mo. Oct. 5, 2011); *Van Orden v. Meyers*, 4:09-CV-00971 AGF, 2011 WL 4600688 (E.D. Mo. Sept. 30, 2011). Finally, Plaintiffs' interests as current District students subject to Defendant District's policy regarding book removal are not antagonistic to those of the Class and they will continue to prosecute vigorously the interests of the Class through qualified counsel.

B. The Proposed Class Satisfies All Rule 23(b) Requirements

The requirements of Rule 23(b)(2) are satisfied. "A class action may be maintained if Rule 23(a) is satisfied and if . . . (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) was promulgated . . . essentially as a tool for facilitating civil rights actions." 5 *Moore's Federal Practice* § 23.43(1)(a), at 23–191.

"Because one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule 'must be read liberally in the context of civil rights suits.'" *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (quoting *Ahrens v. Thomas*, 570 F.2d 286, 288

(8th Cir. 1978)). "This principle of construction limits the district court's discretion." *Id*. Thus, "[c]ourts should guard against the temptation to assume that the certification of a [Rule] 23(b)(2) class action is purely discretionary." *Id*. (quoting 3B J. MOORE & J. KENNEDY, *Moore's Federal Practice* ¶ 23.40(3) (1980)).

The District's book-removal policy has resulted in the removal of the Banned Books and the unavailability of the Banned Books to members of the Class; moreover, the District's policy causes the District's school board, officials, administrators, employees, and their agents to act on grounds generally applicable to the Class. Thus, regardless of any individual Class member's view of any particular book removal or current intention to use the library and access any particular book, the District's policy operates identically as to each member of the Class and will continue to do so, thereby making it appropriate for this Court to grant injunctive relief and any corresponding declaratory relief to the Class as a whole. The putative class seeks only prospective relief. Thus, if they are successful, "a single injunction or declaratory judgment would provide relief to each member of the class." *Ebert*, 823 F.3d at 480 (quoting *Dukes*, 131 S. Ct. at 2557); *see also Barrett v. Claycomb*, 11-CV-04242, ECF No. 94, at *8 (W.D. Mo. Nov. 15, 2011) (certifying (b)(2) class where state actor had instituted policy that affected rights of each proposed class member "in the exact same way" and commenting that even the exemptions and appeals from that policy affected putative class members generally), *aff'd by Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016) (en banc) (certification not challenged on appeal).

All current and future District students face the violation of their First and Fourteenth Amendment rights because of the District's book-removal policy. By the District's ongoing application of the policy, the District and its employees and agents continue to act on grounds generally applicable to the Class, thereby making it appropriate for this Court to grant injunctive

relief and any corresponding declaratory relief to the Proposed Class as a whole pursuant to Rule 23(b)(2).

III. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court certify a Plaintiff Class of all current and future students in District schools who use, or will use, a District school library to access information, or such other class of students the Court deems appropriate; appoint individual Plaintiffs D.L. and C.K.-W. as class representatives; and appoint Anthony E. Rothert, Jessie Steffan, Molly Carney, Emily Lazaroff, Gillian R. Wilcox, and Vera Eidelman as class counsel.

Respectfully submitted,

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