

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

Barbara Rexroat and Katherine Carda,)	
individually and as representatives of the class)	
of registered voters who petitioned to place an)	
open-access ordinance on the municipal ballot;)	
)	
Plaintiffs,)	
)	No. 1:11-cv-224
v.)	
)	VERIFIED CLASS-ACTION
City of Poplar Bluff, Missouri, a municipality)	COMPLAINT FOR DECLARATORY
and political subdivision of the State of)	AND INJUNCTIVE RELIEF
Missouri;)	
)	
Pamela S. Kearbey, in her official capacity as)	
City Clerk for the City of Poplar Bluff,)	
Missouri,)	
)	
Defendants.)	

INTRODUCTION

1. Plaintiffs are individuals who signed a petition to place an initiative on the municipal ballot for the City of Poplar Bluff. If approved by voters, the initiative would adopt a proposed ordinance that limits Poplar Bluff's discretion in enacting policies related to the provision of Internet services within the City. The proposed measure is popularly known as "Open Access."

2. Plaintiffs bring this suit on their own behalf and as representatives of the thousands of registered voters who reside in Poplar Bluff and signed the petition.

3. Plaintiffs seek declaratory and injunctive relief requiring the City Clerk to certify the petition presented on November 7, 2011, and the amended petition presented on November 28, 2011, and present them to the City Council without delay so that the proposed ordinance either may be adopted within twenty days or placed on the ballot for the February 2012

municipal election, or the ballot for such other municipal election thereafter deemed appropriate by this Court.

4. Plaintiffs have been deprived by the City Clerk without due process of their protected interest in placing an initiative on the ballot for consideration by voters. Missouri state law creates a liberty interest in citizens who submit sufficient signatures that entitles them to placement of a proposed ordinance on the ballot for a municipal election if it is not adopted by the City Council. The statute places substantive limitations on the official discretion of the City Clerk to terminate Plaintiffs' entitlement to placement of the measure on the municipal ballot. In this case, the City Clerk has acted arbitrarily to terminate Plaintiffs' liberty interest. In doing so, she is also in violation of state law.

Jurisdiction and Venue

5. This Court has jurisdiction over Plaintiffs' federal claims under 28 USC §§ 1331, 1343, 2201 and 42 USC § 1983.

6. This Court has supplement jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367(a).

7. Venue lies in the United States District Court for the Eastern District of Missouri because the relevant events or omissions giving rise to Plaintiffs' claims occurred in the Poplar Bluff, which is located in Butler County, Missouri.

8. Divisional venue is in the Southeastern Division because the events leading to the claim for relief arose in Butler County. E.D.Mo. L.R. 2.07(A)(3), (B)(2).

Parties

9. Plaintiff Barbara Rexroat is a registered voter who resides in the City of Poplar Bluff and who signed the petition submitted on November 7, 2011, and amended petition submitted on November 28, 2011.

10. Plaintiff Katherine Carda is a registered voter who resides in the City of Poplar Bluff and who signed the petition submitted on November 7, 2011, and amended petition submitted on November 28, 2011.

11. Defendant City of Poplar Bluff is third-class city and political subdivision of the State of Missouri.

12. Defendant Pamela S. Kearbey is the City Clerk for the City of Poplar Bluff. As City Clerk, she serves at the pleasure of the City Council. In determining whether sufficient signatures have been attached to an initiative petition, she is the chief policy-making authority for the City of Poplar Bluff.

Class Allegations

13. The Named Plaintiffs are members of a Class of registered voters residing within Poplar Bluff who signed the petition submitted on November 7, 2011, the amended petition submitted on November 28, 2011, or both.

14. Defendant Kearbey determined that the petition submitted on November 7, 2011, contained 3,472 signatures, of which she determined 1,877 were valid signatures of registered voters residing in Poplar Bluff.

15. Defendant Kearbey determined that the amended petition submitted on November 28, 2011, contained 4,680 signatures, of which she determined 2,900 were valid signatures of registered voters residing in Poplar Bluff.

16. The number of individuals in the Class of registered voters residing within Poplar Bluff who signed the petition submitted on November 7, 2011, the amended petition submitted on November 28, 2011, or both is so numerous that joinder of all members of the Class would be impracticable.

17. There are questions of law and fact that are common to the Class, including, but

not limited to, the legal question of whether the arbitrary imposition of a requirement for the number of signatures that must be submitted before a petition is submitted to the City Council that is a number different than the requirement provided by state law terminates Plaintiffs' entitlement to placement of a proposed ordinance on the municipal ballot (if the ordinance is not adopted by the City Council), in violation of Plaintiffs' right to due process under the Fourteenth Amendment.

18. The claim of the Named Plaintiffs that the arbitrary imposition of a requirement other than that provided by state law impermissibly infringes on their right to due process under the Fourteenth Amendment is typical of the claim of the Class.

19. As signatories to both the petition submitted on November 7, 2011, and the amended petition submitted on November 28, 2011, the Named Plaintiffs will fairly and adequately protect the interests of the Class.

20. In imposing an arbitrary requirement as to the number of signatures required before a petition will be submitted to the City Council for adoption or placement on the municipal ballot and, thereby, terminating Plaintiffs' entitlement to placement of the measure on the municipal ballot, Defendants have acted 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 Class as a whole.

Additional Factual Allegations

21. Plaintiffs wish Poplar Bluff to enact an ordinance that would require the City to:

- A. Allow customers of City-provided cable services to supply their own cable modems;
- B. Seek to provide the fastest cable modem speeds available in Missouri;
- C. Provide open access to services to cable modem and fiber-optic

networks at cost;

D. Upgrade to the latest Data Over Cable Service Interface

Specification (DOCSIS) and other related standards within eighteen months of release;

E. Provide Quality of Service queuing for streaming of voice, video, and other services over cable at cost;

F. Enhance its fiber-optic network;

G. Issue a press release three times a year discussing short-term and long-term goals, projected timelines, and completion status for cable-related Internet projects;

H. Make its Internet service an open-access participant;

I. Maintain separate financial records for income and expenses related to the provision of Internet service;

J. Employ an independent, telecommunications-industry expert every two years to calculate the costs and establish the rates for open access; and

K. Repeal any ordinances or portions of ordinances that conflict with the proposed ordinance.

22. The State of Missouri secures to residents of third-class cities an interest in placing proposed ordinances on the municipal ballot as an initiative.

23. The State of Missouri establishes by law the requirements for registered voters to place a proposed ordinance on a municipal ballot.

24. If a petition is presented to the City Council, then the City Clerk must determine whether sufficient signatures have been submitted and, if so, submit her certification with the

petition to the City Council.

25. The City Clerk has no discretion in determining the number of valid signatures that are sufficient.

26. After submission of the certified petition to the City Council, the City Council must either enact the proposed ordinance within twenty days or place the initiative on the ballot at the next election.

27. The statutory requirement is that any petition seeking an ordinance by initiative and referendum for a third-class city must be “signed by voters equal to twenty-five percent of the votes cast for all candidates for mayor at the last preceding election.” MO.REV.STAT. § 78.200.

28. Poplar Bluff operates under the council-manager form of government.

29. Poplar Bluff has seven elected City Council members, one from each of five wards and two at-large members, each serving staggered three-year terms.

30. Each year, the members of the City Council elect a mayor from their membership.

31. Under the circumstances of Poplar Bluff’s form of government, the number of signatures required before the City Clerk must present a certified petition to the City Council is the number of voters voting for city council candidates at the most recent election since they were each candidates for mayor. *Hickman v. City Council of Kirksville*, 690 S.W.2d 799 (Mo.App.W.D. 1985).

32. Ronnie D. Hendrix is the Ward One Councilman.

33. Ed DeGaris is the Ward Two Councilman.

34. Betty Absheer is the Ward Three Councilman.

35. Tracy Edington is the Ward Four Councilman.

36. Robert Louis Smith is the Ward Five Councilman.

37. Susan Williams and Loyd Matthews are the At-Large Councilmen.

38. Hendrix was elected to a three-year term on April 6, 2010. He received 81 votes. His opponent, Harold Tinsley, received 60 votes. The total number of votes cast in the election for the Ward One Councilman position was 141.

39. DeGaris was elected to a three-year term on April 7, 2009. He received 255 votes. One write-in vote was cast. The total number of votes cast in the election for the Ward Two Councilman position was 256.

40. Absheer was elected to a three-year term on April 6, 2010. She received 61 votes. No other votes were cast, so the total number of votes cast in the election for the Ward Three Councilman position was 61.

41. Edington was elected to a three-year term on April 7, 2009. He received 417 votes. Eight write-in votes were cast. The total number of votes cast in the election for the Ward Four Councilman position was 425.

42. Smith was elected to a three-year term on April 7, 2011. He received 107 votes while his opponent, Carolyn Rivers, received 77 votes. The total number of votes cast in the election for the Ward Five Councilman position was 184.

43. Williams and Matthews were elected to three-year terms on April 5, 2011. At the April 5, 2011, election, each voter was permitted to cast two votes for the at-large positions. Williams received 589 votes. Matthews received 590 votes. In addition, Max Clodfelter received 564 votes, and 506 votes were cast for Alan Shackleford. A total of eight votes were cast for write-in candidates. In all, 2,257 votes were cast for the election for the at-large Councilmen positions.

44. The cumulative number of voters who voted for City Council candidates at the most recent election for each position on the City Council was 3,324.

45. Within the 3,324 votes cast in those elections, each registered voter in Poplar Bluff had the opportunity to cast three votes for a City Councilman position: one for the voter's ward and two for at-large positions.

46. Twenty-five percent of 3,324 is 831.

47. On November 7, 2011, a petition was submitted to the City Council containing 3,472 signatures.

48. Defendant Kearbey determined that 1,877 of the signatures were valid.

49. Rather than the requirement set by statute for citizens to advance an initiative petition, Defendant Kearbey arbitrarily exercised discretion she is not afforded by state law to decide that 3,136 signatures (twenty-five percent of the 12,544 registered voters in Poplar Bluff as of the date the petition was submitted) would be required, rather than the 831 signatures (at most) required by statute. As a result, she did not certify the petition or present it to the City Council and, thereby, terminated Plaintiffs' interest in placing the initiative on the ballot.

50. On November 28, 2011, an amended petition was submitted to the City Council containing 4,680 signatures.

51. Defendant Kearbey determined that 2,900 of the signatures were valid.

52. Rather than the requirement set by statute for citizens to advance an initiative petition, Defendant Kearbey arbitrarily exercised discretion she is not afforded by state law to decide that 3,136 signatures would be required, rather than the 831 signatures (at most) required by statute. As a result, she did not certify the amended petition or present it to the City Council and, thereby, terminated Plaintiffs' interest in placing the initiative on the ballot.

53. Defendant Kearbey's arbitrary selection of a signature requirement other than that established by state law was not Poplar Bluff's first arbitrary departure from the law on this point. On June 28, 2011, City Manager Doug Bagby wrote to a proponent of the initiative that,

“A local initiative in [Poplar Bluff’s] form of government requires 25 percent of the registered voters in the City of Poplar Bluff as of the last gubernatorial election, whether they voted or not, in order for an item to be place on the ballot. This is roughly 2,900 signatures[.]”

54. On November 21, 2011, counsel for Plaintiffs wrote the City Attorney to advise Poplar Bluff that the standard for certification the City Clerk used for the petition was incorrect and to demand that the petition be certified. There was no response to the letter or phone calls from Plaintiffs’ counsel to discuss the issue.

55. In the actions described herein, Defendant Kearbey was acting under color of law and carrying out the customs, practices, and policies of Poplar Bluff.

COUNT I
Violation of Due Process
Failure to Certify and Send to City Council
November 7, 2011 Petition

56. Plaintiffs repeat, re-allege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

57. Missouri state law has created in Plaintiffs an interest in seeking enactment of an ordinance by initiative if they submit to the City Council a petition signed by registered voters in a number that exceeds twenty-five percent of the number of voters who voted for City Council Candidates at the most recent election for each City Council position.

58. Missouri state law places substantive limitations of Defendant Kearbey’s official discretion to determine whether to certify a petition and present the certified petition to the City Council.

59. Defendant Kearbey arbitrarily refused to certify the petition submitted on November 7, 2011, and, further, arbitrarily refused to present the certified petition to the City Council.

60. Defendant Kearbey's refusal to certify the petition terminated Plaintiffs' entitlement to have their proposed ordinance placed on the February 2012 municipal ballot, if the City Council did not adopt the ordinance within twenty days.

COUNT II
Violation of Due Process
Failure to Certify and Send to City Council
November 28, 2011 Amended Petition

61. Plaintiffs repeat, re-allege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

62. Defendant Kearbey arbitrarily refused to certify the amended petition submitted on November 28, 2011, and, further, arbitrarily refused to present the certified petition to the City Council.

63. Defendant Kearbey's refusal to certify the amended petition terminated Plaintiffs' entitlement to have their proposed ordinance placed on the April 2012 municipal ballot, if the City Council did not adopt the ordinance within twenty days.

COUNT III
Violation of MO.REV.STAT. § 78.200
Failure to Certify and Send to City Council
November 7, 2011 Petition

64. Plaintiffs repeat, re-allege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

65. MO.REV.STAT. § 78.200 does not afford Defendant Kearbey discretion to refuse to certify and submit to the City Council a petition that contains a number of valid signatures in excess of twenty-five percent of the total number of voters who voted for City Council candidates at the most recent election for each position on the City Council.

COUNT IV
Violation of MO.REV.STAT. § 78.200
Failure to Certify and Send to City Council
November 28, 2011 Amended Petition

66. Plaintiffs repeat, re-allege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

67. MO.REV.STAT. § 78.200 does not afford Defendant Kearbey discretion to refuse to certify and submit to the City Council an amended petition that contains a number of valid signatures in excess of twenty-five percent of the total number of voters who voted for City Council candidates at the most recent election for each position on the City Council.

WHEREFORE Plaintiffs pray this Court:

- A. Certify a Class of registered voters residing within Poplar Bluff who signed the petition submitted on November 7, 2011, the amended petition submitted on November 28, 2011, or both.
- B. Enter declaratory judgment that Defendants violated the Fourteenth Amendment, MO.REV.STAT. § 78.200, or both when Defendant Kearbey failed to certify the petition submitted on November 7, 2011, and failed to present the certified petition to the City Council;
- C. Enter declaratory judgment that Defendants violated the Fourteenth Amendment, MO.REV.STAT. § 78.200, or both when Defendant Kearbey failed to certify the petition submitted on November 28, 2011, and failed to present the certified petition to the City Council;
- D. Issue appropriate preliminary and permanent injunctions to require Defendants to afford to Plaintiffs the guarantees of the Due Process Clause and to comply with MO.REV.STAT. § 78.200, by certifying the petition

submitted on November 7, 2011 and promptly submitting the certified petition to the City Council; to certify and present to the City Council any future initiative petitions signed by the number of voters voting for city council candidates at the most recent election since they were each candidates for mayor, or more; and to order such other relief as is necessary to secure Plaintiffs' constitutional and statutory rights;

- E. Issue appropriate preliminary and permanent injunctions to require Defendants to afford to Plaintiffs the guarantees of the Due Process Clause and to comply with MO.REV.STAT. § 78.200, by certifying the petition submitted on November 28, 2011 and promptly submitting the certified petition to the City Council; to certify and present to the City Council any future initiative petitions signed by the number of voters voting for city council candidates at the most recent election since they were each candidates for mayor, or more; and to order such other relief as is necessary to secure Plaintiffs' constitutional and statutory rights;
- F. Award Plaintiffs' costs, including reasonable attorneys' fees pursuant to 42 U.S.C. §1988; and
- G. Allow such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,

/s/ Anthony E. Rothert

ANTHONY E. ROTHERT, #44827MO

GRANT R. DOTY, #60788MO

AMERICAN CIVIL LIBERTIES UNION

OF EASTERN MISSOURI

454 Whittier Street

St. Louis, Missouri 63108

(314) 652-3114

FAX: (314) 652-3112

tony@aclu-em.org

grant@aclu-em.org

ATTORNEYS FOR PLAINTIFFS

Verification of Barbara Rexroat

I have studied the allegations of the Verified Complaint and, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based upon my personal knowledge.

/s/ Barbara Rexroat
BARBARA REXROAT

Verification of Katherine Carda

I have studied the allegations of the Verified Complaint and, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based upon my personal knowledge.

/s/ Katherine Carda
KATHERINE CARDA