

SUPREME COURT OF ARKANSAS

No. CV-21-581

JOHN THURSTON, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF
STATE OF THE STATE OF
ARKANSAS; SHARON BROOKS;
BILENDA HARRIS-RITTER;
WILLIAM LUTHER; CHARLES
ROBERTS; JAMES SHARP; AND J.
HARMON SMITH, IN THEIR
OFFICIAL CAPACITIES AS
MEMBERS OF THE ARKANSAS
STATE BOARD OF ELECTION
COMMISSIONERS

APPELLANTS

V.

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS; ARKANSAS
UNITED; DORTHA DUNLAP; LEON
KAPLAN; NELL MATTHEWS MOCK;
JEFFERY RUST; AND PATSY
WATKINS

APPELLEES

Opinion Delivered: February 17, 2022

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. 60CV-21-3138]

HONORABLE WENDELL L.
GRIFFEN, JUDGE

AFFIRMED.

KAREN R. BAKER, Associate Justice

Appellee, the League of Women Voters of Arkansas and Arkansas United, Dortha Dunlap, Leon Kaplan, Nell Matthews Mock, Jeffery Rust, and Patsy Watkins (“the League”) filed suit against appellants John Thurston, in his official capacity as the Secretary of State of the State of Arkansas; and Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, James Sharp, and J. Harmon Smith, in their official capacities as members

of the Arkansas State Board of Election Commissioners (“Thurston”) alleging that four acts passed by the 93rd Session of the Arkansas General Assembly were unconstitutional—Act 736, Act 973, Act 249, and Act 728. The League refers to the acts as the “Absentee Application Signature Match Requirement,” the “In-Person Ballot Receipt Deadline,” the “Voter ID Affidavit Prohibition,” and the “Voter Support Ban,” respectively. Thurston moved to dismiss based on sovereign immunity. The circuit court denied the motion. Pursuant to Arkansas Rule of Appellate Procedure—Civil 2(a)(10) (2021), Thurston filed this appeal, which permits an interlocutory appeal from “an order denying a motion to dismiss . . . based on the defense of sovereign immunity or the immunity of a government official.” See Ark. R. App. P.—Civ. 2(a)(10); *City of Little Rock v. Dayong Yang*, 2017 Ark. 18, at 4, 509 S.W.3d 632, 634 (internal citations omitted) (“[W]e do not hear on appeal any issue other than whether the circuit court erred in denying summary judgment on the issue of immunity.”). We affirm.

On May 19 and July 1, 2021, the League filed its complaint and its amended complaint for injunctive and declaratory relief alleging that the four acts violate various provisions of the Arkansas Constitution. Specifically, the League alleged that Act 736 makes it substantially harder for voters to obtain an absentee ballot by making the signature-matching process more unreliable and error-prone, thereby disenfranchising voters properly entitled to absentee ballots. With regard to Act 973, the League alleged that the Act unjustifiably shortened the deadline for voters to return absentee ballots in person, thereby disenfranchising voters without reasonable justification. The League further alleged that Act 249, enacted a strict voter-identification requirement and eliminated the “Affidavit-Fail

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Safe” written affirmation for voters who lacked an accepted form of voter identification, thereby disenfranchising voters who do not have acceptable voter identification. Last, the League alleged that Act 728, restricts the expressive activities of nonprofit nonpartisan groups and criminalizes entering an area within 100 feet of a polling place unless the person is entering or leaving the building where voting is taking place for lawful purposes. The League alleged that Act 728 is unnecessarily vague and impedes nonpartisan voter-support activities by excluding nonvoting caretakers, friends, and family from providing support to voters waiting in line. The League alleged that these four Acts violate the following provisions of the Arkansas Constitution: article 2, sections 3, 4, and 6; article 3 sections 1 and 2; amend. 51 section 19; the Free and Fair Election Clause; the Equal Protection Clause; the Voter Qualification Clause, and the Free Speech and Assembly Clauses of the Arkansas Constitution; and that the Affidavit Prohibition violates section 19 of amendment 51. The League sought declaratory relief to declare the legislative Acts at issue unconstitutional and to enjoin enforcement of the Acts.

On June 18 and July 20, 2021, pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure, Thurston filed a motion to dismiss and amended motion to dismiss alleging, among other things, that Thurston was entitled to sovereign immunity. On October 1, 2021, the circuit court conducted a hearing. On November 1, the circuit court entered an order finding that

sovereign immunity does not bar [the League’s] claims. The Supreme Court has long recognized an exception to the defense of sovereign immunity when the State is acting illegally, unconstitutionally, or if a state agency officer refuses to do a purely ministerial action required by statute. . . . [The League] allege[s] that the Challenged Provisions are unconstitutional, satisfying the exception to sovereign immunity. . . .

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Whether the validity of the challenged legislative enactments is governed by rational basis or strict scrutiny review is a question of law that requires consideration of the facts pertinent to the challenged enactments.

....

[The League] allege[s] that the Challenged Provisions burden their fundamental rights to vote, speak, and assemble, and that strict scrutiny applies. . . . The Amended Complaint alleges how [the League is] . . . burdened or impaired in their exercise of their fundamental rights under the Challenged Provisions, that in certain circumstances their fundamental rights and those of others who are similarly situated will be outright denied, and the threat of harm is imminent. The Amendment Complaint also alleges that [Thurston] lack[s] any compelling state interest in the Challenged Provisions, and that they are not the least restrictive method available to carry out any such interests. Because these are questions of fact, the issue of which legal standard applies is not ripe for determination and will be addressed when the case is considered with the merits. However, the court holds that the amended complaint contains sufficient factual allegations to withstand dismissal at this stage as to those assertions.

From that order, Thurston filed the instant timely interlocutory appeal. On December 15, 2021, we granted Thurston's motion to expedite his appeal. For reversal, Thurston presents three points: (1) Thurston is entitled to sovereign immunity; (2) the applicable standard to assess the Acts is rational basis; and (3) the Acts are constitutional.

This appeal stems from the circuit court's denial of Thurston's motion to dismiss. "When reviewing a circuit court's order granting [or denying] a motion to dismiss, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Wade v. Ferguson*, 2009 Ark. 618, at 2, 2009 WL 4723356. 'In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.* When a complaint is dismissed on a question of law, this court conducts a de novo review. *State v. West*, 2014 Ark. 174, 2014 WL 1515898; *Fatpipe, Inc. v. State*, 2012 Ark. 248, 410 S.W.3d 574.' *Steele*

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[*v. Thurston*], 2020 Ark. 320, at 4, 609 S.W.3d 357, 361. The standard of review for the granting [or denying] of a motion to dismiss is whether the circuit court abused its discretion. *Henson v. Craddock*, 2020 Ark. 24, 593 S.W.3d 10.” *Kimbrell v. Thurston*, 2020 Ark. 392, at 5–6, 611 S.W.3d 186, 190. Further, “we look only to the allegations in the complaint and not to matters outside the complaint. However, we treat only the facts alleged in the complaint as true but not a plaintiff’s theories, speculation, or statutory interpretation.” *Arkansas State Plant Bd. v. McCarty*, 2019 Ark. 214, at 5, 576 S.W.3d 473, 476 (internal citations omitted).

With these standards in mind, we turn to the issue before us. We note that although Thurston has presented three points in this interlocutory appeal, the only issue we have jurisdiction to review is whether Thurston is entitled to sovereign immunity. See Ark. R. App. P.–Civ. 2(a)(10); *Williams v. McCoy*, 2018 Ark. 17, at 5, 535 S.W.3d 266, 269. Further, the circuit court did not rule on the merits of this matter. Instead, it denied Thurston’s motion to dismiss the League’s complaint and amended complaint, including denying his motion to dismiss based on sovereign immunity, which is the sole basis of our jurisdiction in this matter. Accordingly, the only issue before us is whether the circuit court erred when it denied Thurston’s motion to dismiss based on sovereign immunity.

On appeal, Thurston contends that he is entitled to sovereign immunity and that the League has not pled sufficient facts to allege the unconstitutionality of the Acts at issue. Thurston further asserts that the League has failed to plead sufficient facts upon which relief could be granted against the challenged Acts and that Thurston is entitled to sovereign immunity. Relying on *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, the League

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responds that the only analysis necessary to determine whether Thurston is entitled to the defense of sovereign immunity is to determine whether the League sufficiently alleged a violation of constitutional rights and only seeks equitable relief; if the League did sufficiently plead such, then Thurston is not entitled to sovereign immunity.

In *Haas*, 2018 Ark. 283, 556 S.W.3d 509, Haas, a voter, filed a declaratory action seeking a declaration that an act related to voter registration be declared unconstitutional and enjoin enforcement of the act. On appeal, Martin, as Secretary of State, contended that he was entitled to sovereign immunity. We held that sovereign immunity was not applicable. We explained that although Martin raised sovereign immunity, “[b]ecause [Haas] has asserted that Act 633 violates qualified voters’ constitutional right to vote and seeks declaratory and injunctive relief, not money damages, this action is not subject to the asserted sovereign-immunity defense.” *Id.* at 8, 556 S.W.3d at 515. Although we granted Haas no declaratory or injunctive relief on his claims, we concluded that sovereign immunity did not provide a basis for dismissal.

Here, as in *Haas*, the League has alleged that specific acts violate the Free and Fair Election Clause; the Equal Protection Clause; the Voter Qualification Clause, and the Free Speech and Assembly Clauses of the Arkansas Constitution; and that Act 249 additionally violates section 19 of amendment 51 of the Arkansas Constitution. The relief sought by the League, declaratory and injunctive relief regarding the alleged conflict between the Acts and the Arkansas Constitution, is the same relief that was sought by Haas. Accordingly, here, as in *Haas*, Thurston is not entitled to sovereign immunity. Therefore, we affirm the circuit court’s order denying Thurston’s motion to dismiss based on sovereign immunity.

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Affirmed.

WOOD, J., concurs.

WOMACK, J., dissents.

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