IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, ARKANSAS UNITED, DORTHA DUNLAP, LEON KAPLAN, NELL MATTHEWS MOCK, JEFFERY RUST, and PATSY WATKINS, **PLAINTIFFS**

V. **No. 60CV-21-3138**

JOHN THURSTON, in his official capacity as the Secretary of 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, **DEFENDANTS**

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING OTHER MISCELLANOUS RELIEF

On the 11th day of February, 2022 the Court considered the motion for summary judgment filed by defendants John Thurston, in his official capacity as the Secretary of the State of Arkansas, and the six members of the Arkansas State Board of Election Commissioners, in their official capacities. Plaintiffs appeared through counsel, Matthew Gordon and Jess Askew III, and defendants appeared through counsel, Ka Tina Hodge of the Office of the Arkansas Attorney General.

PRIOR PROCEEDINGS

The League of Women Voters of Arkansas, Arkansas United, Dortha Dunlap, Leon Kaplan, Nell Matthews Mock, Jeffery Rust, and Patsy Watkins seek injunctive relief and declaratory judgment against defendants on grounds that Acts 736, 973, 249, and 728 of the 93rd General Assembly (the "Challenged Provisions") violate various provisions of the Arkansas Constitution. Defendants moved to dismiss plaintiffs' amended complaint on July 20, 2021, under Ark. R. Civ. P. 12(b)(6), and after considering the briefing and oral argument, this Court denied that motion on November 1, 2021. Defendants' interlocutory appeal of that order on sovereign immunity grounds remains pending before the Arkansas Supreme Court.

In the meantime, the parties have completed discovery, which included fourteen (14) depositions, written discovery, and the exchange of approximately 5,500 documents and other responsive material.

Defendants seek summary judgment on their contention that "[t]here are no genuine issues of material fact and the Defendants are entitled to judgment as a matter of law pursuant to Ark. R. Civ. P. 56." Defs.' Mot. Summ. J. at ¶ 1; *see also id.* at ¶ 5; Defs.' Br. Summ. J. (attaching eight exhibits). Plaintiffs filed their opposition brief along with 31 supporting exhibits on January 20, and defendants filed their reply on January 25.

Trial was originally scheduled for February 15-18, 2022. However, on January 25, 2022, this Court entered a General Order suspending all trials in this

Court due to the surge in COVID 19 cases in the state in order to protect court personnel, attorneys, parties, witness, and other persons from the risk of infection.

At scheduling conference on February 11, 2022, the parties agreed to waive oral argument on the motion for summary judgment. Based on the voluminous papers and all matters appearing of record, for the reasons that follow the Court holds that the motion for summary judgment should be and is hereby DENIED.

DISCUSSION

Plaintiffs seek declaratory judgment that (1) the Challenged Provisions violate the Free and Equal Elections Clause, Ark. Const. art. 2 § 3, and Equal Protection Clause, Ark. Const. art. 2 § 3; (2) Act 736 and Act 973 violate the Voter Qualifications Clause, Ark. Const. art. 2 § 1; and (3) Act 728 violates the rights to freedom of speech and assembly guaranteed by Ark. Const. art. 2 §§ 4, 6. *See* Am. Compl. ¶¶ 135-181. Plaintiffs seek equitable relief in the form of a permanent injunction against enforcement of the Challenged Provisions.

Summary judgment is appropriate only when "the state of the evidence . . . is such that the nonmoving party is not entitled to a day in court" because there is no "genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law." *Flentje v. First Nations Bank of Wynne*, 340 Ark. 562, at 570, 11 S.W.3d 531, 536 (2000). The moving party must demonstrate it is entitled to summary judgment, and "[a]ll proof submitted must be viewed in a light most

favorable to the party resisting that motion, [with] any doubts and inferences . . . resolved against the moving party." *Cash v. Lim*, 322 Ark. 359, at 362, 908 S.W.2d 655, 656 (1995) (quoting *Oglesby v. Baptist Med. Sys.*, 319 Ark. 280, at 284, 891 S.W.2d 48, 50 (1995)). "[S]ummary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothes[e]s might reasonably be drawn and reasonable minds might differ." *Thomas v. Sessions*, 307 Ark. 203, at 208, 818 S.W.2d 940, 943 (1991). Ultimately, the purpose of summary judgment proceedings is "to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied." *Wallace v. Broyles*, 332 Ark. 189, 192, 961 S.W.2d 712, 723 (1998).

The parties' collective hundreds of pages of filings and exhibits establish that there are genuine disputes of material fact on each claim and that summary judgment is not appropriate.

The legal standard governing review of the Challenged Provisions turns on questions of fact that are matters of genuine and material dispute. Specifically, whether the validity of the Challenged Provisions is governed by rational basis or strict scrutiny review, or by some other legal standard, is a question of law that turns on the facts, including whether the provisions infringe on fundamental rights. The Arkansas Supreme Court has long held that "[w]hen a statute infringes upon a fundamental right," it is subject to strict scrutiny and "cannot survive unless 'a

compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) (quoting *Thompson v. Arkansas Social Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)).

Plaintiffs point to evidence before the Court that each of the Challenged Provisions burdens or impairs the exercise of their fundamental rights, that in certain circumstances their fundamental rights and those of others similarly situated will be outright denied, and that the threat of harm is imminent. Plaintiffs also point to evidence that defendants lack any compelling state interest to justify the Challenged Provisions and the Challenged Provisions are not the least restrictive method available to carry out any state interest. Defendants dispute these points and have identified competing evidence. Because these genuine issues of material fact go to the fundamental question of what legal standard applies, this case cannot properly be resolved on summary judgment.

Separately, the Court again holds—as it did in November—that sovereign immunity does not bar plaintiffs' alleged 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." *Williams v. McCoy*, 2018 Ark. 17, 3, 535 S.W.3d 266, 268 (2018) (citing *Ark. State Claims Comm'n v. Duit Constr. Co., Inc.*,

2014 Ark. 432, 7, 445 S.W.3d 496, 502 (2014)); *see also Cammack v. Chalmers*, 284 Ark. 161, 163, 680 S.W.2d 689, 689 (1984) ("We view our [sovereign immunity] cases as allowing actions that are illegal, are unconstitutional or are *ultra vires* to be enjoined."). Sovereign immunity does not bar claims based on sufficiently alleged violation of constitutional rights that seek equitable relief. *Martin v. Haas*, 2018 Ark. 283, at 7–8, 556 S.W.3d 509, 514–15. Here, plaintiffs allege and have brought forth evidence to support their allegations that the Challenged Provisions are unconstitutional, and plaintiffs seek equitable injunctive relief. This satisfies the exception to sovereign immunity at this stage of this proceeding.

ADDITIONAL MATTERS

Plaintiffs' motions for Matthew Gordon and Jessica R. Frenkel to appear and practice *pro hac vice*, which were filed on December 3, 2021, are hereby GRANTED.

Defendants shall file supplemental witness and exhibit lists with the Court, and provide Plaintiffs with copies of all Defendants' intended trial exhibits, by no later than ten days from the date this order is filed.

The four-day bench trial is hereby RESCHEDULED for March 15 through 18, 2022.

IT IS SO ORDRED this 18th day of February 2022.

Hon. Wendell Griffen
Circuit Judge

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