

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
FIFTH DIVISION**

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

**PLAINTIFFS**

**v. CASE 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**

**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY AND  
ALTERNATIVE MOTION FOR EXTENSION OF TIME AND NEW TRIAL DATE**

Plaintiffs, by and through their undersigned counsel, and for their Opposition to Defendants' Motion to Stay Pending Appeal and Alternative Motion for Extension of Time and New Trial Date, state:

1. The trial date was originally set for February 15 through 18 per a scheduling order entered over five months ago on **September 1, 2021**. The parties diligently prepared for trial on that date throughout the fall of 2021 and early winter of 2022. The trial date was postponed at the February 11 scheduling conference because of the surge in COVID-19 cases in Arkansas and reset – with the concurrence of all parties – for March 15 through 18. At that conference, Defendants' counsel specifically agreed on the record to produce their exhibit lists, which had not been produced by the January 20, 2022 deadline, no later than ten days after the Court entered its order.

2. The only change since February 11 is the Supreme Court's denial of Defendants' first appeal on sovereign immunity grounds. Defendants have noticed a second appeal raising precisely the same already-rejected sovereign immunity issues.

3. On their second appeal, unlike their first one, Defendants seek a stay under Ark. R. Civ. P. 62. Rule 62 applies only to stay proceedings to enforce a judgment or decree. There is no judgment or decree, interlocutory or final, injunctive or otherwise, that can give rise to a stay in this case under Rule 62. Not one of the situations in which Rule 62 provides for a stay of executing or enforcing a judgment, decree or order are present in this case at this time. The Court has not ruled on the merits of the claims.

4. Further, Defendants' second interlocutory appeal is foreclosed by the Supreme Court's decision on their first interlocutory appeal, whether on grounds of *stare decisis* or law of the case.

5. In addition, Rule of Appellate Procedure—Civil 2(a)(10) does not contemplate serial interlocutory appeals of the issue of sovereign immunity in the same case: the Rule provides for appeal of an “order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity.” By providing for an interlocutory appeal from one or the other of these rulings, the Rule does not provide for two appeals. The Defendants have taken their interlocutory appeal in this case and have lost.

6. The Motion to Stay should be denied.

7. It is not only Plaintiffs but also the voters of Arkansas who would be prejudiced by further delay of this litigation. The start of absentee and early voting for the May 2022 primary elections is imminent, and Arkansas's election officials—not to mention voters—need to know what Arkansas law permits or prohibits in preparing for the May 2022 election. The statutes at

issue pose restrictions on Plaintiffs’ (and all Arkansas voters’) fundamental constitutional rights. Delay is hardly prejudice free—at least not for Plaintiffs, voters, or election administrators.

8. Weighed against that all-but-certain prejudice, Defendants’ effort to conjure reasons for delay fall flat.

9. Defendants argue that they need additional time to review Plaintiffs’ exhibits. But Plaintiffs produced their exhibit and witness lists, along with copies of all their exhibits, more than a month ago, on January 20, as required by this Court’s scheduling order. By contrast, Defendants failed to produce an exhibit list by the deadline – or indeed, at any time since that deadline has passed. This Court afforded an extension until March 4 to produce Defendants’ witness and exhibit lists, and Defendants’ exhibits—a deadline that Defendants specifically agreed to on the record at the February 11 conference. Nothing has changed since that time – except Defendants’ position.

10. Defendants’ characterization of the case aside, the three lawyers of record for the Defendants are hardly a “David” up against a “Goliath” here—they are attorneys with the Arkansas Attorney General’s Office. According to the State of Arkansas, that office has 177 employees “and is one of the largest law firms in the State.”<sup>1</sup>

**I. The Court should deny Defendants’ motion to stay pending appeal.**

11. Aside from the fact that Rule 62 does not provide for a stay in a case where the court has not entered a final or interlocutory decree or order granting an injunction, receivership, or other relief that could be stayed pending appeal, and aside from the fact that Rule 2(a)(10) does not provide for two serial interlocutory appeals of sovereign immunity in the same case, the Arkansas Supreme Court has already rejected Defendants’ interlocutory appeal of this Court’s

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<sup>1</sup> Attorney General’s Office, Arkansas.Gov, <https://directory.arkansas.gov/agency/attorney-generals-office/#:~:text=The%20Office%20of%20the%20Attorney,officer%20and%20chief%20consumer%20advocate> (last visited Mar. 1, 2022).

ruling on sovereign immunity on the motion to dismiss. Given the Supreme Court’s holding, Defendants’ current appeal is plainly meritless and provides no basis for granting a stay.

12. On February 17, the Supreme Court made clear that—regarding the question of sovereign immunity—this case is controlled by *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509. See *Thurston et al. v. League of Women Voters of Arkansas et al.*, 2022 Ark. 32, pp. 6-7. The Supreme Court explained that although the State raised sovereign immunity in *Haas*, “[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.* (quoting *Haas*, 2018 Ark. 283 at 8, 556 S.W.3d at 515). Accordingly, as the Supreme Court explained:

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.

*Id.*

13. Importantly, *Haas* was not before the Supreme Court on a motion to dismiss, but instead on appeal of a grant of a preliminary injunction *after an evidentiary hearing*. *Haas*, 2018 Ark. 283 at 11, 556 S.W.3d at 516. Still, the outcome was the same regardless of the procedural posture, and it would be the same on Defendants’ second interlocutory appeal, if a second interlocutory appeal were permitted. The Supreme Court held in no uncertain terms that because *Haas* *pled* a constitutional harm, sought only equitable relief, and did not seek money damages,

sovereign immunity does not apply. *Id.* at 8, 556 S.W.3d at 515. That ruling applies fully in this case, as the Supreme Court has determined already.

14. This Court was equally unequivocal in its February 17 Order denying Defendants' motion for summary judgment, explaining that the Defendants' sovereign immunity defense fails for the same reasons it did when they raised it in November 2021.

15. Defendants hope to shoehorn the merits of their losing motion for summary judgment into the limited scope of an interlocutory appeal of sovereign immunity under Rule of Appellate Procedure 2(a)(10). But given the Supreme Court's definitive rejection of that same tactic in denying the State's appeal on the motion to dismiss, their already-rejected argument that sovereign immunity encapsulates the merits of any constitutional claims against the state can provide no just cause to stay the trial on the merits. *Thurston et al. v. League of Women Voters of Arkansas et al.*, 2022 Ark. 32 at 4, 5 (noting State presented three points on appeal: that the Secretary was entitled to sovereign immunity, that the applicable standard for reviewing the laws at issue is rational basis, and that the laws are constitutional but that "the only issue before [the court was] whether the circuit court erred when it denied [Defendants'] motion to dismiss based on sovereign immunity").

**II. The Court should deny Defendants' motion in the alternative for extension of time and a new trial date.**

16. The Court should also deny Defendants' motion in the alternative for extension of time and a new trial date. This trial has already been delayed once and further delay would almost certainly prevent Plaintiffs from obtaining relief prior to Arkansas's primary elections in May 2022.

17. This lawsuit addresses crucially important issues regarding the voting rights of Arkansas's citizens and has now been pending since May 19, 2021, when Plaintiffs filed their

initial complaint challenging four new election laws passed by the 93<sup>rd</sup> General Assembly, Acts 736, 973, 249, and 728, as violating their constitutional rights to vote, speak, and assemble, and the equal protection of laws.

18. This case is currently set for a bench trial on March 15–18, 2021. Defendants’ counsel agreed to those trial dates following this Court’s February 11 hearing, and both Plaintiffs’ and Defendants’ counsel confirmed those dates with this Court.

19. Plaintiffs *and* Defendants have both reaffirmed the importance of holding this trial on the scheduled dates. Because this case involves laws related to elections, both parties have long agreed that the issues in this case must be resolved as early as possible. *See* Ex. A, Defs.’ Mot. to Expedite Appeal ¶¶ 5–6 (“Trial on the merits is set for February 15, 2022. This trial date *is necessary* to permit a decision on the merits before Arkansas’s primary elections in May of 2022.”). As Defendants themselves put it, keeping the trial dates is necessary to give “[e]lection officials, including the [Defendants], . . . sufficient time to know what election laws will be in effect before the [May 2022] primaries.” *Id.* ¶ 6.

20. Because of the importance of resolving this case as quickly as possible, the parties have worked cooperatively to keep this matter on track for the trial dates. As of this filing, all discovery has been completed, motions in limine have been filed, and Plaintiffs have provided Defendants with their exhibit and witness lists, as well as copies of their exhibits—all in reliance on the existing schedule and Defendants’ representations about holding trial on the scheduled dates.<sup>2</sup>

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<sup>2</sup> Defendants provided a witness list and a deficient exhibit list (identifying only as a single catch-all “[a]ny document produced through the course of discovery in this matter”) to Plaintiffs the day after the parties’ agreed-upon January 20, 2022 deadline to exchange those lists and copies of exhibits. The Court has already generously allowed Defendants until March 4 to provide Plaintiffs with an adequate witness and exhibit list—approximately six weeks more than Plaintiffs had.

21. Indeed, Plaintiffs agreed (and kept to) a demanding summary judgment briefing schedule to accommodate Defendants' request for additional time without sacrificing the existing trial date. For example, Plaintiffs agreed that Defendants should have additional time to file their Motion for Summary Judgment and did not oppose Defendants' request to extend the deadline for that motion from December 31, 2021 to January 10, 2022. *See* Ex. B, Mot. for Extension of Time to File Dispositive Mot. ¶ 4. To give Defendants more time to file their motion, Plaintiffs agreed to a response deadline a *mere 10 days* later, instead of the 21 days provided for by Rule 56. *Id.* For their part, Defendants agreed to shorten their reply deadline to January 25, 2022. *Id.* At the time the parties agreed to this schedule, both sides understood that briefing on the Motion for Summary Judgment would conclude three weeks before the then-scheduled trial dates and, in fact, agreed to this demanding schedule in order to keep the trial dates.

22. In reliance on that schedule, Plaintiffs have worked diligently to meet every deadline set in the case—including the deadline to file their response to Defendants' Motion for Summary Judgment, to exchange exhibit and witness lists, and to file motions in limine.

23. The Court, too, acknowledged the importance of resolving this matter as expeditiously as possible in a February 11, 2022 pretrial conference. To do so, the Court instructed the parties to select a trial date in March, and the parties conferred and agreed to the March 15 trial date.

24. Against that background, Defendants' new-found arguments for extension and delay of trial are groundless.

25. Defendants' counsel first complain that they have not had time to review documents associated with this case, citing Plaintiffs' recent productions. Mot. ¶¶ 12, 17. This is more than a little ironic: these are documents that *Defendants* repeatedly represented that *they would produce*

to *Plaintiffs* (relating primarily to the number of free voter identification cards that the counties have issued). When Defendants suddenly reversed course near the close of discovery and explained that they did not have access to these materials, Plaintiffs were forced to serve public records requests to the various counties and have been promptly producing the responses to Defendants as they have been received. This is hardly a reason to delay the trial: the records are neither voluminous nor difficult to understand and the timing of their production is a consequence of Defendants' own actions and positions in this litigation.

26. Defendants next contend that they need additional time to produce an exhibit list. But the deadline for serving exhibit and witness lists has long passed: January 20, 2022. Plaintiffs fully complied with that deadline and Defendants have had Plaintiffs' disclosures—and copies of their exhibits—for a full *six weeks*. Further, Plaintiffs timely produced their witness and exhibit lists for trial on January 20, 2022, approximately six weeks ago. Defendants failed to provide their witness and exhibit lists. Defendants can hardly be heard to argue that trial must be delayed because they have not reviewed Plaintiffs' exhibits when they have had them at their disposal since the January 20, 2022 deadline.<sup>3</sup>

27. Defendants next argue that they “have a single, newly assigned attorney.” Mot. ¶ 14. Actually, Defendants' counsel entered her appearance a month ago, on February 1, 2022, and Attorney Brittany Edwards will also be working on this matter. *See* Ex. C, Email Exchange. In addition, Attorney Caleb Conrad entered his appearance in December 2021. The Attorney General can hardly be heard to argue that the State lacks the resources to defend against a constitutional lawsuit on fundamental voting rights that has been pending since last spring and was long set for

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<sup>3</sup> Plaintiffs, on the other hand, will have far less time to review Defendants' exhibits—which Plaintiffs *still* have not received—but even Plaintiffs will be able to adequately review the Defendants' exhibits in the eleven days between Defendants' new deadline to provide them and the scheduled start of trial.



trial in February before only recently being delayed to March. No fewer than three lawyers are apparently assigned to work on this matter.

28. Defendants' motion does not acknowledge, much less address, the significant prejudice that delay of trial would cause. Trial is scheduled to begin two weeks from today. Defendants have been aware of this Court's ruling on the motion for summary judgment since February 8 but chose to wait more than three weeks to notice an appeal and to file their groundless motion to stay.

29. Most importantly, as Defendants have previously admitted, expeditious resolution of this case is *necessary* to provide clarity to Arkansan election officials and to allow for the orderly conduct of the rapidly approaching election.<sup>4</sup> See Ex. A, Defs.' Mot. to Expedite Appeal ¶¶ 5–6. Early voting for the primary election begins on May 9. Ark. Code § 7-5-418(a)(1)(A). Ballots must be delivered to overseas and military voters even sooner, by April 8, 2022. See Ark. Code § 7-5-407(a).

WHEREFORE, Plaintiffs respectfully request the Court deny Defendants' Motion to Stay Pending Appeal and Alternative for Extension of Time and New Trial Date.

Respectfully submitted,

**/s/ Jess Askew III**

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<sup>4</sup> Additionally, trial at any later date will be difficult for Plaintiffs due to counsel's other commitments.

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**CERTIFICATE OF SERVICE**

I, Jess Askew III, hereby certify that I served the Clerk of Court with the foregoing, and all exhibits hereto, on this 1st day of March 2022, via the e-flex electronic filing system, which shall send notice to all counsel of record.

**/s/ Jess Askew III**  
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