IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

BRYAN KING and
THE LEAGUE OF WOMEN VOTERS OF ARKANSAS **Plaintiffs**

Case No. 60CV-23-1816

JOHN THURSTON, in his official capacity
as the Arkansas Secretary of State **Defendant**

DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs have filed a Motion for Judgment on the Pleadings (MJOP) prematurely. There is already a pending Motion to Dismiss in this case, which has been fully briefed. Because of that, the pleadings have not closed in this case, and the MJOP should be struck. If this Court does not strike Plaintiffs' MJOP, then in the alternative Defendant asks this Court to deny Plaintiffs' MJOP. Act 236 does not currently harm Plaintiffs in any way, yet they still wish to challenge its constitutionality. The Arkansas Constitution requires a designated percentage of signatures be gathered for an initiative or referendum to be placed on the ballot. In addition, a certain amount of signatures must come from at least 15 counties in the state. Act 236 increased the requirement that individuals or groups gathering signatures for an initiative or referendum get at least half of a designated percentage of signatures from at least 15 counties to 50 counties. Plaintiffs are not gathering signatures for any initiatives or referendums, and Plaintiffs do not even identify any initiatives or referendums that they are working on that would potentially be harmed by this Act. Therefore, they have no standing to bring this cause of action. Even if they do have standing, Secretary Thurston is

protected by sovereign immunity since he has not acted unconstitutionally, illegally, or ultra vires in relation to Act 236. Finally, the case has no merit based on the facts alleged by the Plaintiffs: The constitution requires signatures from at least 15 counties, and Act 236 requires signatures from 50 counties, which is at least 15.

Alleged Facts

Article 5, Section 1 of the Arkansas Constitution sets the minimum requirements to put an initiative or referendum on the ballot. An initiative, which can be a act or a constitutional amendment, is proposed directly by the people through the gathering of signatures. *Id*. A referendum is a mechanism for citizens to take an act of the legislature and place it before the electorate to decide whether they want to keep it or repeal it. *Id*.; Ark. Att'y Gen. Op. 2023-023. To propose an initiated act, at least "Eight (8) percent of legal voters" must sign the initiative. *Id*. To propose an initiated constitutional amendment, ten (10) percent must sign the initiative petition. *Id*. To propose a referendum, "not less than six (6) percent of legal voters" must sign the petition to place any act passed by the General Assembly on the ballot. *Id*.

The Arkansas Constitution also provides, for initiative and referendum petitions, that "it shall be necessary to file from at least fifteen (15) of the counties of the State, petitions bearing the signature of not less than one-half of the designated percentage of the electors of such county." Ark. Const. art. 5, § 1.

The Arkansas Constitution also provides a "cure provision" in part (2)(b) of Section 1 for fixing petitions that, on their face, have at least the total required signatures but that, upon review, turn out to have more than 75% but less than 100% of the required number of valid signatures. Ark. Const. art. 5, § 1 (2)(b).

On March 7, 2023, HB1419 of the 94th General Assembly was signed into law by Governor Sarah Huckabee Sanders and immediately became effective as Act 236 of 2023. Act 236 required that initiatives and referendums now be filed from "at least fifty (50) counties" and that petitions "bear the signature of at least one-half (1/2) of the designated percentage of the electors of each county" that filed a petition. Act 236 is codified at Arkansas Code Annotated § 7-9-126. Act 236 does not purport to alter the constitution's "cure provision."

Plaintiff League of Women Voters of Arkansas (LWVAR) wishes to continue to "participate in the initiative and referendum process." Compl. ¶ 7. LWVAR claims they "work[ed] for and supported measures" in 2022, and in both 2020 and 2022 they were "one of the leaders" in campaigns to defeat proposed constitutional amendments. *Id.* Plaintiff Senator Brian King is a registered voter and elected Senator in Arkansas. Compl. ¶ 9. On March 10, 2023, Plaintiffs filed this lawsuit. Defendant filed a Motion to Dismiss on May 10, which was fully briefed on June 1. The Motion to Dismiss is still pending before this Court. On November 30, Plaintiffs filed a "supplemental response" consisting of a two page brief and an exhibit. On December 11, Plaintiffs filed an MJOP. Defendants now move to strike, or in the alternative, respond.

Analysis

1. Defendants move to strike Plaintiffs' MJOP because it is premature.

Plaintiffs filed a MJOP prior to the pleadings closing in this case. Therefore, the MJOP should be struck, and can be refiled once the Court has ruled on the Defendant's Motion to Dismiss, and Defendants have had an opportunity to file an answer, if appropriate. Rule 12(c) of the Arkansas Rules of Civil Procedure outlines the appropriate time in which to file a motion for judgment on the pleadings: "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Ark. R. Civ. P. 12(c). Until the

pleadings have closed, a MJOP is premature. The pleadings remain open while a motion to dismiss is pending because a defendant still has an opportunity to file an answer if its motion to dismiss is not granted. Upon the denial of a motion to dismiss, the defendant has 10 days to file its answer to the plaintiff's complaint. "[I]f the court denies the motion . . . , the responsive pleading shall be filed within 10 days after notice of the court's action." Ark. R. Civ. P. 12(a)(2)(A). The time for pleadings cannot be closed while a motion to dismiss is still pending, given that the denial of such a motion triggers a new deadline in which to file an answer.

Such is the case here—Defendant has filed a motion to dismiss that is still pending in this Court, making Plaintiff's filing of a MJOP premature.

2. **Plaintiffs' November 30 "supplemental response" should not be part of the Court's analysis.**

The Plaintiffs have not amended their complaint or made their supplemental response a part of their pleadings in any way in this case. Therefore, if this Court does decide that the Plaintiffs' MJOP is not premature, Plaintiffs' supplemental response should not be part of the Court's consideration. When considering a MJOP, Arkansas courts traditionally disfavor issuing judgments. *Matter of Poston*, 318 Ark. 659, 661, 887 S.W.2d 520, 522 (1994). To enter a judgment for the plaintiffs on an MJOP, "the pleadings, construed liberally in favor of the defendants, [must] show on their face that there is no defense to the suit." *Brunson v. Little Rock Rd. Mach. Co*., 251 Ark. 721, 721, 474 S.W.2d 672, 672 (1972). Plaintiffs' "supplemental response" is not a pleading, and therefore cannot be considered in a MJOP.

3. **Because Plaintiffs have not pled they are currently gathering signatures for any initiatives or referendums, they have suffered no harm, and thus have no standing.**

Standing "is a fundamental principle in American jurisprudence" and must be addressed at the "threshold" of the courthouse before "a party [can] properly . . . advance a cause of action."

Toland v. Robinson, 2019 Ark. 368, at 6, 590 S.W.3d 146, 150. To have standing, a Plaintiff "must have had an interest . . . adversely affected or rights . . . invaded." *Id.* "Stated differently, Plaintiffs must show that the questioned act has a prejudicial impact on them." *Springdale Sch. Dist. No. 50 v. Evans L. Firm, P.A.*, 360 Ark. 279, 283, 200 S.W.3d 917, 920 (2005). The alleged injury must be either "actual or impending," not "uncertain, hypothetical, and speculative." *Palade v. Bd. of Trs. of Univ. of Ark. Sys.*, 2022 Ark. 119, at 9, 11, 645 S.W.3d 1, 6–7. Courts, as a general rule, require "that litigation must be pending or threatened" to have standing to ask for a declaratory judgment. *Jessup v. Carmichael*, 224 Ark. 230, 232, 272 S.W.2d 438, 440 (1954). When challenging the constitutionality of a law, Plaintiffs must generally "have suffered injury or belong to that class that is prejudiced in order to have standing to challenge the constitutional validity of a law." *Stokes v. Stokes,* 271 Ark. 300, 613 S.W.2d 372 (1981).

The Plaintiffs assert that they do have standing to bring this suit. However, they have not pled any injury as a result of the enactment of Act 236. They also are not a part of any class that would be prejudiced by Act 236. In addition, Senator King himself does not have standing to bring this cause of action based solely on his status as a registered voter in the State of Arkansas.

First, Plaintiffs have not alleged any actual or impending injury caused by Act 236. Plaintiffs' pleadings have not identified any initiatives or referendums they are currently gathering signatures for. Instead, Plaintiffs rely on LWVAR's alleged past activity in the referendum and initiative process to justify their ability to bring this lawsuit. Compl. ¶ 7. Such a reliance means that their injury is "uncertain, hypothetical, and speculative" because the only harm alleged is some potential harm in the future. Plaintiffs state that LWVAR "wishes to continue to participate in the initiative and referendum process." A "wish" alone is not sufficient to make an alleged injury "actual or impending." Also, Plaintiffs claim they will be unable to participate in the initiative and

referendum process due to Act 236. However, Act 236 does nothing to stop Plaintiffs from participating in the process, it simply modifies an existing requirement. Thus, Act 236 does not harm Plaintiffs. Similarly, Plaintiffs have not proven how they belong to the "class that is prejudiced" because they have not identified what supposed class they are a member of. Plaintiffs have not claimed how they are currently participating in the petition process, and therefore don't belong to a class of those who do participate in the petition process. They also have not stated how they are specifically prejudiced right now.

Second, Plaintiffs also do not mention any actions that they take in the petition process that would be stopped, or even curtailed, by Act 236. Plaintiffs mention LWVAR's vague involvement in initiatives in the 2020 and 2022 election cycles, stating they "worked for and supported measures" in 2022 and were "one of the leaders" in campaigns against various proposed constitutional amendments in 2020 and 2022. Compl. ¶ 7. The pleadings make no reference to any actual signature collecting for any past initiatives or referendums and do not refer to how they supported and led in fighting against different measures. Therefore, Plaintiffs have not alleged any actual action that they would be prohibited from undertaking due to Act 236. Because Plaintiffs have not alleged any specific action they are being prevented from taking, they also can't claim to be members of any specific class of individuals. Even if past involvement in the process was sufficient to confer standing at present, Plaintiffs do not mention what that past involvement actually looked like, other than LWVAR "worked," "supported," and "led." Plaintiffs lack standing for this reason as well.

Third, even if Plaintiff LWVAR has standing, Plaintiff Senator Bryan King does not. The complaint mentions that Senator King is a State Senator and a registered voter. Compl. ¶ 6. Other than that, the complaint makes no mention of how Senator King may have standing. Simply being

a registered voter does not give an individual citizen a cause of action without a specific harm alleged. Similarly, simply being a member of the legislature does not automatically confer standing without some sort of actual harm being present. Just because Senator King was unable to stop the passage of Act 236 as a senator does not grant him automatic standing to challenge the Act's constitutionality now. Since Senator King makes no accusations about how he is currently harmed by Act 236, his claims should be dismissed for a lack of standing.

In short, Plaintiffs wish to challenge the constitutionality of Act 236 before they have even been harmed by Act 236. All alleged harm is purely prospective and hypothetical and for those reasons, their MJOP fails due to a lack of standing.

4. <u>Because Act 236 does not require Secretary Thurston to take any unconstitutional action, he is entitled to sovereign immunity.</u>

This Court lacks jurisdiction because Secretary Thurston is entitled to sovereign immunity. The Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." Ark. Const. art. 5, § 20. This lawsuit is against the Secretary in his official capacity, which is essentially a suit against the State, so he may assert sovereign immunity. *See Chaney v. Union Producing, LLC*, 2020 Ark. 388, at 6, 611 S.W.3d 482, 486. He is entitled to sovereign immunity if "a judgment for the Plaintiff will operate to control the actions of the State or subject it to liability." *Id.*

Although there is an exception to sovereign immunity, it does not apply. A Plaintiff may surmount sovereign immunity only if the Plaintiff "allege[s] illegal and unconstitutional acts in compliance with our fact-pleading rules" and merely seeks declaratory and injunctive relief. *Ark. Dep't of Educ. v. McCoy*, 2021 Ark. 136, at 7, 10, 624 S.W.3d 687, 692, 693. It is not sufficient for Plaintiffs to claim the exception; they must "plead sufficient facts" to persuade the court that the government acted unlawfully if those facts were true. *Rutledge v. Remmel*, 2022 Ark. 86, at 6,

643 S.W.3d 5, 9. Put differently, "[b]are-bones allegations unsupported by law [could] not survive an immunity defense." Id. at 7, 643 S.W.3d at 9. In this case, the potential actions Secretary Thurston could take in the future are perfectly constitutional, and therefore sovereign immunity applies. *See infra* Section 3.

Secretary Thurston has not acted unconstitutionally or illegally, and Act 236 does not require him to act unconstitutionally in the future. The Court should deny the MJOP.

5. <u>Act 236 is constitutional, and therefore Plaintiffs claims should be dismissed.</u>

Plaintiffs allege in their complaint that Act 236 is unconstitutional for two reasons: (1) it lowers the designated percentage of signatures required to cure incorrect petitions from 75% to 50%, and (2) it increases the number of counties from which a petition must have signatures from 15 counties to 50 counties. Neither argument is persuasive.

First, Act 236 does not change the constitutional requirements for percentages of signatures required from each county. Article 5, Section 1 of the Arkansas Constitution sets out the method for placing citizen-based initiatives and referendums on the ballot. Among other things, Section 1 establishes a "designated percentage" of signatures from counties for both initiatives and referendums. The designated percentage is the number of legal voters that must sign the petition for the initiative or referendum to make it onto the ballot. For initiated acts, that percentage is 8%, for initiated constitutional amendments it is 10%, and for referendums it is 6%.

Section 1 sets out two additional requirements. One is that the petitions must come from at least 15 different counties. The second is that each of those petitions must bear the signatures of at least one-half of the designated percentage of the electors of the county. For example, while an initiative may need signatures equaling at least 8% of registered voters in the entire state, the petition from Pulaski County would only need signatures from 4% (one-half of 8%) of the registered

voters in Pulaski County for Pulaski to count towards the 15 county requirement. *Arkansas Hotels & Ent., Inc. v. Martin*, 2012 Ark. 335, 9, 423 S.W.3d 49, 54.

The constitution also prescribes a procedure for amending or correcting an insufficient petition. Such a petition may be amended or corrected only if it has valid signatures amounting to at least 75% of the state-wide signatures required, and at least 75% of the required number from each of the 15 counties of the state. For example, an insufficient initiative petition could be amended as long as it had signatures from at least 6% of the state's registered voters, and at least 3% of the registered voters in each of the individual counties.

This is important because Plaintiffs are wrong when they state what the law currently is. First, Plaintiffs conflate the cure-period requirements with the standard requirements for putting an initiative or referendum on the ballot. Act 236 does not have anything to do with the cure period requirements listed in the constitution, and Plaintiffs' citations to that part of the constitution are misleading. Prior to Act 236, the constitution prescribed a requirement of one-half of the designated percentage of signatures from each of at least 15 counties for an initiative or referendum to be on the ballot. Following the passage of Act 236, the requirement is still one-half of the designated percentage of signatures from each county. Act 236 does absolutely nothing to modify the constitution's 75% requirement to cure insufficiencies in the number of valid signatures on a petition. Act 236 mirrors Article 5, Section 1 when comes to initiative and referendum requirements, with the sole exception of increasing the 15-county requirement to 50. It appears from Plaintiffs' premature MJOP that they have realized their error and abandoned this argument, it is still present in their complaint.

Second, the constitution sets 15 counties as a floor, not a ceiling, for counties that signatures are required from, and Act 236 fully complies with that requirement. Changing the county

requirement from 15 counties to 50 does not violate Article 5, Section 1 of the Arkansas Constitution because the constitution sets the 15-county requirement as a minimum, not a maximum, requirement. This is clear from reading the plain text of the constitution. Courts are to construe a statute "just as it reads, giving the words their ordinary and usually accepted meaning in common language," and there is no need to resort to rules of statutory interpretation if "the language of the statute is plain and unambiguous, and conveys a clear and definite meaning." *See Thompson v. State*, 2014 Ark. 413, 5, 464 S.W.3d 111, 114. Therefore, courts "must first look to the plain language of the statute." *Id.* Only if the language is ambiguous, do courts resort to the rules of statutory interpretation. *Id*. All statutes are "presumed constitutional" and courts in this state resolve all doubts in favor of constitutionality. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, at 12, 358 S.W.3d 890, 898. The party challenging a statute's constitutionality has the burden of proving that the act is unconstitutional. *Abraham v. Beck*, 2015 Ark. 80, 14, 456 S.W.3d 744, 753.

Here, the constitutional provision is clear by a reading of the plain text. Namely, the provision uses the phrase "at least." Article 1, Section 5 states "it shall be necessary to file from at least fifteen counties of the state" when describing the initiative and referendum process. In fact, while describing the cure provision, signatures are needed "from at least fifteen counties of the state." Ark. Const. art. 5, § 1 (2)(b). Plaintiffs failed to include the words "at least" in their citation of Section (2)(b) in their complaint. See Compl. ¶ 16. Those two words are the most critical words to the entire suit, yet Plaintiff failed to plead them in their complaint.

6. <u>Because Act 236 does not infringe on any of the People's rights, it does not violate Article 5, Section 1.</u>

In their MJOP, Plaintiffs have pivoted to different parts of the text in Article 5, Section 1 than those focused on in their complaint. Act 236 does not violate these new provisions either.

Plaintiffs argue that Act 236 unconstitutionally infringes on the People's right to petition and referendum under Article 5, Section 1 of the Arkansas Constitution. They partially quote two passages of the constitution in their MJOP. However, the entire passages are important, and are restated below:

> Under the heading "unwarranted restrictions prohibited," the Constitution states:
>
> > No law shall be passed to prohibit any person or persons from giving or receiving compensation for circulating petitions, nor to prohibit the circulation of petitions, nor in any manner interfering with the freedom of the people in procuring petitions; but laws shall be enacted prohibiting and penalizing perjury, forgery, and all other felonies or other fraudulent practices, in the securing of signatures or filing of petitions.

This section says laws shall not be made to "prohibit the *circulation* of petitions" or "interfere[] with the freedom of the people in *procuring* petitions." Ark. Const. art. 5, § 1 (emphases added). Act 236 has nothing to do with the process of gathering signatures or circulating petitions. And the other two sentences confirm that the section is only referencing the literal signature gathering process, both by allowing for paid canvassers and allowing for criminal charges if something is fraudulently obtaining signatures. Again, Act 236 has nothing to do with this.

> Finally, under the heading "self executing," the Constitution provides:
>
> > This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.

The final quoted section says no law can restrict the "rights herein reserved to the people." Ark. Const. art. 5, § 1. The constitutional text defines scope of that reserved right. *Id.* The right reserved to the people includes that the signatures come from "*at least* fifteen counties." Ark. Const. art. 5, § 1 (emphasis added). Act 236 honors that right by setting the county requirement above 15

counties. In other words, setting the minimum at 50 counties does not infringe on any reserved right or violate the 15-county minimum requirement.

There is no need to make this any more complicated. The Arkansas Constitution sets a floor, not a ceiling, of 15 counties by using the phrase "at least." Act 236 stays well above the floor by raising the present bar to 50 counties. Therefore, it is perfectly constitutional, and Plaintiffs' MJOP should be denied.

Conclusion

Plaintiffs' MJOP should be struck or in the alternative denied for several reasons. The MJOP should be struck because it was filed prematurely, since Defendant's Motion to Dismiss is still pending before this Court. Plaintiffs' MJOP also fails on the merits in several ways. Plaintiffs do not have standing to being their claim, and Defendant is entitled to sovereign immunity. Also, Act 236 is constitutional, and therefore Plaintiffs' MJOP fails. For these reasons, Plaintiffs' MJOP should be struck, or in the alternative, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2023, I electronically filed the foregoing document to the eFlex filing system, which notifies the eFlex participants.

/s/ Justin Brascher
Justin Brascher