

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

STATE SENATOR BRYAN KING and  
THE LEAGUE OF WOMEN VOTERS OF ARKANSAS

PLAINTIFFS

V.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS  
THE ARKANSAS SECRETARY OF STATE

DEFENDANT

**RESPONSE TO MOTION TO DISMISS**

The Defendant has filed a Motion to Dismiss pursuant to Rule 12(b)(6) of Arkansas Rules of Civil Procedure. In considering a motion to dismiss the Court treats the facts alleged in the complaint as true and view them in the most favorable light to the plaintiff. The Court should look only at the allegations alleged in the complaint to decide a motion to dismiss. *Gordon v. Planters Merchants Bancshares Inc.*, 310 Ark 11 (1992), *Robbins v. Lemay*, 2021 Ark. App. 436 (Ark. C. App. 2021)

The complaint alleges the following relevant facts. Senator Bryan King is a citizen and resident of Carroll County, Arkansas and is a registered voter. See paragraph 6 of the complaint. The League of Women Voters of Arkansas (“LWVAR”) is a nonpartisan, nonprofit, membership organization first incorporated in Arkansas in 1920. The LWVAR has approximately 280 members located in Arkansas. The LWVAR and its members actively participate in the initiative and referendum process in Arkansas. The complaint alleges that in 2020 LWVAR worked for and supported measures for an Independent

Redistricting Commission and Top 4 Primary – Ranked Choice Voting in 2020. The complaint alleges that the LWVAR has participated in the past and wishes to continue to participate in the initiative and referendum process but that Act 236 substantially restricts the ability of the LWVAR and its members to participate in the initiative and referendum process. See paragraph 7 of the complaint. All these facts as alleged in the complaint must be considered as true by the Court. The LWVAR’s activities in the initiative and referendum process are directly impacted by Act 236.

The Defendant contends that the Plaintiffs lack standing to challenge Act 236. The complaint alleges that Act 236 attempts to amend by statute a constitutional provision. The complaint alleges that the General Assembly does not have the authority to amend the constitution or make laws contrary to the Constitution. Furthermore Article 5, Section 1 of the Constitution specifically prohibits laws being enacted that would interfere with the freedom of the people to procure petitions. Act 236 interferes with the freedom of the people to procure petitions. The ability of Senator King and the LWVAR, and all registered voters in Arkansas, to participate in the initiative and referendum process and to be able to exercise their right to vote on any measure when it qualifies for the ballot is directly affected by Act 236. Article 5, Section 1 of the Arkansas Constitution states in part in the first paragraph, “the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly...” Article 5, Section 1 further provides, “Unwarranted Restrictions Prohibited. No

law shall be passed to... in any manner interfering with the freedom of the people in procuring petitions...” The Constitution reserves to the people the right to circulate petitions. Article 5, Section 1 further provides, “Self-Executing. ... No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people.” The Constitution reserves to the people (voters) and prohibits the General Assembly from interfering with the freedom of the people (voters) in procuring petitions and specifically provides that no legislation can be enacted to restrict the rights reserved to the people (voters). Every voter in the state constitutional right has been directly impacted and threatened by Act 236. The Attorney General should be protecting the rights of the people (voters) to participate in the process instead of arguing that they have no right to appear before this court to have their claims heard.

A litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to them. The general rule is that one must have suffered injury or belong to a class that is prejudiced to have standing to challenge the validity of a law. A plaintiff must show that the questioned act has a prejudicial impact on them. *McCaffery v. Oxford Am. Literary Project, Inc.* 2016 Ark. 75, (1999). Article 5, Section 1 provides, “The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but **the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls** independent of the General Assembly; and also reserve the power, at their own option to approve or

reject at the polls any entire act or any item of an appropriation bill. Only registered voters may sign a petition and voters have the right to enact or reject any measure at the polls.” Emphasis added. Article 5, Section 1 gives power to the voters of the state to circulate petitions and voters have the right to enact or reject same at the polls. Act 236 of 2023 directly impacts the rights of voters to circulate petitions and ultimately enact or reject any measure at the poll. Senator King as a registered voter has standing to challenge the act.

The LWVAR alleges in the complaint the following relevant facts which must be accepted as true in response to a motion to dismiss.

The LWVAR encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy on issues. The LWVAR is dedicated to promoting civic engagement and protecting democracy. The LWVAR has approximately 280 members located in counties across the State of Arkansas. **The LWVAR and its members actively participate in the initiative and referendum process.** Specifically in 2022 by working for and supporting measures for an Independent Redistricting Commission and Top 4 Primary – Ranked Choice Voting. In 2020 and 2022 the LWVAR was one of the leaders in the campaigns to defeat referred constitutional amendments to impair the ability of citizens to propose measures pursuant to Article 5 Section 1 of the Arkansas Constitution. **As part of its mission, LWVAR has participated and wishes to continue to participate in the initiative and referendum process. Act 236 will substantially restrict the ability of the LWVAR and its members to participate in the initiative and referendum process.**

While Senator King has standing as a voter, the LWVAR and its members have standing, as an organization representing voters and also as an organization whose members have actively participated in the past and do intend to actively participate in the future in the initiative and referendum process. The LWVAR and its members have suffered an injury and belong to a class that is

prejudiced. Therefore, the LWVAR has standing to challenge the validity of the act. *Ghegan & Ghegan Inc. v. Weiss*, 338 Ark. 9 (1999); *Martin v. Haas*, 2018 Ark. 283. In a case pending in the Circuit Court of Pulaski County before the Honorable Wendell Griffin, Judge Griffin held that the LWVAR has standing to sue over four acts affecting the rights of voters passed by the General Assembly in 2021. *League of Women Voters of Arkansas v. Thurston*, 60CV-21-3138, order entered March 24, 2022. The LWVAR has standing to challenge Act 236.

Secretary Thurston contends that he is entitled to sovereign immunity. Secretary Thurston also made that same contention in the case pending before Judge Griffin. Judge Griffin denied that motion. Since the denial of a motion to dismiss based on sovereign immunity is immediately appealable Secretary Thurston appealed that order. In *Thurston v. The League of Women Voters of Ark.*, 2022 Ark. 32, the Arkansas Supreme Court upheld Judge Griffin's decision. The Court ruled, consistent with established precedent that since the complaint involved a challenge to a constitutional right and sought declaratory and injunctive relief, and not money damages then the action is not subject to the sovereign immunity defense. The same holds true for this matter. The plaintiffs have alleged a specific constitutional violation and have sought only declaratory and injunctive relief. The motion to dismiss based on sovereign immunity should be denied.

The plaintiffs have standing. Senator King is a registered voter whose rights to participate in the initiative process and ultimately vote for or against a measure has been impaired by Act 236. The LWVAR has organizational standing

as an organization whose members who have participated in the initiative process in the past and that intend to participate in the future. Their participation is directly impacted by Act 236. Secretary Thurston is not entitled to the defense of sovereign immunity as the plaintiffs are seeking only injunctive and declaratory relief. The motion to dismiss should be denied.

Respectfully submitted,

          /s/ David A. Couch          

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**CERTIFICATE OF SERVICE**

I certify that I filed the foregoing document to the eFlex filing system, which notifies all counsel of record of its filing.

          /s/ David A. Couch          

David A. Couch