

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

**REPLY IN SUPPORT OF THE SECRETARY OF STATE'S
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Article 5, Section 1 of the Arkansas Constitution ensures that voters from more than 15 counties participate in the petitioning process. Act 236 does not contravene that intent or infringe on the People's right to gather petitions; rather, it furthers the constitutional guarantee by requiring voter participation in 50 counties, more than the 15-county floor. Plaintiffs could not dispute that in their response, and their attempts to reframe their complaint now are in vain. Just because Plaintiffs bolded some parts of their complaint does not change the fact that Senator King does not have standing simply because he is a voter, and LWVAR does not allege any specific involvement it currently has in the petition process. This Court should grant Secretary Thurston's Motion to Dismiss.

Analysis

1. **Because Act 236 does not infringe on any of the People's rights, it does not violate Article 5, Section 1.**

Article 5, Section 1 of the Arkansas Constitution sets a "floor" of 15 counties from which a petition must collect signatures. Act 236 requires signatures from 50 counties, which does not

run afoul of the plain text of the constitution's 15-county minimum. Recognizing this, Plaintiffs have pivoted to different parts of the text in Article 5, Section 1 than those they focused 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 three passages from the constitution, but the whole text is important here. First, the opening paragraph of Article 5, Section 1 reads:

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.

The first paragraph of Article 5, Section 1 makes clear that the General Assembly is vested with all legislative powers, except what is explicitly reserved to the People. *See* Ark. Const. art. 5, § 1 (providing that “[t]he legislative power of the people . . . shall be vested in a General Assembly,” except certain specified powers that “the people reserve to themselves”). In Article 5, Section 1, the People reserved the rights to propose new legislation and constitutional amendments and to reject the General Assembly's proposed legislation and constitutional amendments. That is still the case; Act 236 didn't change it. In fact, the People can approve or reject Act 236, or any other Act from the 2023 legislative session, by referendum if the appropriate number of counties produce the appropriate amount of signatures.

Later, 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.

2. Plaintiffs Do Not Have Standing.

As Secretary Thurston stated in his opening brief, Plaintiffs do not have standing because their complaint does not set forth how they are currently being harmed by Act 236, and any harm they do mention is far too generalized.

Plaintiffs are asking this Court to essentially grant standing to every registered voter in Arkansas if an Act could potentially affect them. Senator Bryan King has no more standing in this

case than any other registered voter in Arkansas, and Plaintiffs don't argue otherwise. Instead, they say that because this allegedly affects his rights as a voter, he has standing. There are no allegations of specific petitions he is engaged in, or even a history of being involved in the petition process. He is simply a voter who believes Act 236 harms him just like it allegedly harms every registered voter. Such a generalized harm is not specific enough to confer Senator King standing.

Plaintiffs also argue that LWVAR has standing because they have allegedly had some nebulous involvement in the petition process in the past. Plaintiffs are right when they say the facts in the complaint should be taken as true for purposes of a Motion to Dismiss. But Plaintiffs do not allege any facts in their complaint that constitute an actual harm caused by Act 236. They say LWVAR actively participates in the initiative and referendum process. They make no allegations about what LWVAR specifically does that Act 236 would harm. They do not allege any particular petitions they are currently circulating, which could be sufficient to grant standing. *See Arkansas Hotels & Ent., Inc. v. Martin*, 2012 Ark. 335, 6, 423 S.W.3d 49, 53 (2012) (finding standing where Plaintiffs were a Ballot Question Committee and were seeking a writ regarding their own initiative's deficiencies). Plaintiffs allege that Act 236 will restrict their ability to participate in the process in the future, but that is not a "fact" that this Court should accept as true; it's the very definition of speculation insufficient to confer standing. Once again, a mere "wish" to participate in the petition process is not sufficient for standing.

Finally, Plaintiffs attempt to cite a circuit court decision that is not precedential and has no bearing on the matter at hand. The circuit court's order in *League of Women Voters of Arkansas v. Thurston*, 60cv-21-3138 should be disregarded for multiple reasons. First, one circuit court's decision has no control over another. Second, that order is currently stayed pending review by the Arkansas Supreme Court. Plaintiffs' reference to this circuit court case has no merit.

3. Secretary Thurston is entitled to Sovereign Immunity.

Plaintiffs briefly touch on Sovereign Immunity. Plaintiffs cite to the Supreme Court's holding in *Thurston v. League of Women Voters of Ark.*, 2022 Ark. 32, 639 S.W.3d 319. However, that holding was that sufficient facts had been pleaded to allege a constitutional violation, and therefore Thurston was not entitled to sovereign immunity. *Id.* at 6–7, 639 S.W.3d at 322. Here, Plaintiffs have not pleaded sufficient facts to allege a constitutional violation. Act 236 does not violate Article 5, Section 1, and Plaintiffs do not allege how alleged unconstitutional action would harm them. Therefore, *Thurston* does not control, and Secretary Thurston is entitled to sovereign immunity.

Conclusion

Plaintiffs' claims should still be dismissed for three reasons. Plaintiffs still do not have standing to bring this claim because they do not allege any specific harm that is going to befall them due to Act 236, and do not allege any past actions that would have been blocked by Act 236. Secretary Thurston is also protected by sovereign immunity since Act 236 does not require him to take any unconstitutional action towards Plaintiffs. Finally, despite Plaintiffs' attempt to reframe their argument in the response, Act 236 is constitutional, as it is not an unwarranted restriction on the People's right to petition. For those reasons, Plaintiffs' claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 1, 2023, I electronically filed the foregoing document to the eFlex filing system, which notifies the eFlex participants.

/s/ Justin Brascher
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