IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

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

Case No. 60CV-23-1816

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

BRIEF IN SUPPORT OF THE SECRETARY OF STATE'S
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

This Court recently allowed Plaintiffs an opportunity to correct the pleading defects in its Complaint by filing an Amended Complaint that would add additional allegations to show that each Plaintiff had standing to bring this action. The Amended Complaint does not even attempt to add additional allegations that would show Plaintiff King has standing. Therefore, he should be dismissed from this action. While the Amended Complaint does add additional allegations regarding the League of Women Voters of Arkansas ("the League"), those additional allegations still fail to chin the bar. Therefore, the Amended Complaint should be dismissed in its entirety.

Act 236 of 2023 modified the requirements for putting an initiative or referendum on the general election ballot. Act 236 still does not harm Plaintiffs in any way, yet they still wish to challenge its constitutionality. The Arkansas Constitution requires a certain 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 do not sufficiently allege involvement in the signature gathering process to make them members of a "harmed class," as the League is simply a *member* of a Ballot Question Committee (BQC). The League is not the BQC itself or even an officer in the BQC. Therefore, both the League and Senator King 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 is a law, whether a statute or constitutional amendment, proposed directly by the citizens of Arkansas through the collecting of signatures. Ark. Const. art. 5, § 1. A referendum is a process under which citizens can directly vote to approve or reject a statute passed by the legislature. *Id*. To propose an initiated act, at least "Eight (8) percent of legal voters" must sign the initiative. *Id*. To propose a 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 that, for initiative and referendum petitions, "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 provides a "cure provision" in part (2)(b) of Section 1 for fixing petitions that fall short of the required number of signatures. For such a correction to be accepted,

the petition must have at least seventy-five percent (75%) of the necessary signatures currently collected. 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 requires that initiated acts, initiated constitutional amendments, 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."

The League wishes to continue to "participate in the initiative and referendum process." Am. Compl. ¶ 7. The League claims it "work[ed] for and supported measures" in 2022 and in both 2020 and 2022 it was "one of the leaders" in campaigns to defeat proposed constitutional amendments. *Id*. The League is listed as a member of the Arkansas Period Poverty Project Ballot Question Committee (APC). *Id.* Plaintiff Senator Brian King is a registered voter and a duly elected state senator. Am. Compl. ¶ 9.

On March 10, 2023, Plaintiffs filed this lawsuit. On April 10, 2023, Defendant was served with this lawsuit. On May 10, 2023, Defendant moved to dismiss this lawsuit. The Motion to Dismiss was fully briefed on June 1, 2023. On December 11, 2023, Plaintiffs filed a Motion for Judgment on the Pleadings. Plaintiffs timely responded. A hearing was held on February 26, 2024. Following the hearing, this Court issued an order giving Plaintiffs five days to amend their complaint to remedy their standing issues, or the Court would grant the Defendant's Motion to Dismiss. Plaintiffs filed an amended complaint on March 5, 2024. Defendant now renews his Motion to Dismiss.

Analysis

1. The League does not have standing merely because it is a member of a ballot question committee.

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 Law 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,* 277 Ark. 300, 613 S.W.2d 372 (1981).

Traditionally, suits involving harm to a ballot question committee (BQC) involve the actual BQC as a party. *See Zook v. Martin*, 2018 Ark. 306, 558 S.W.3d 385 (where BQC was an intervenor); *Arkansans for Healthy Eyes v. Thurston* 606 S.W.3d 582, 585, 2020 Ark. 270; *Safe Surgery Arkansas v. Thurston*, 2019 Ark. 403; *Benca v. Martin*, 2016 Ark. 359; *Roberts v. Priest*, 334 Ark. 503. In each of those cases, the BQC itself sued, along with an *officer* of the committee acting on the committee's behalf. Here, neither the BQC itself nor or any of its officers are suing to remedy harm that Act 236 will allegedly cause them. Instead, the League, a separate

organization merely listed as a member of the BQC, alleges harm on behalf of the BQC. Mere membership in the BQC is not sufficient to make the League part of a harmed class for purposes of standing.

Plaintiffs still have not shown how they would be injured any differently than the average citizen as a result of the enforcement of Act 236. The League claims that, purely by virtue of its members in a BQC, it is directly impacted by the alleged harms of Act 236. However, while it has alleged how the BQC itself may be harmed by Act 236, the League has not alleged how that harms it as members any differently than an average citizen. The League is not part of any class that would be prejudiced by Act 236. Plaintiffs have not shown how they belong to the "class that is prejudiced" because they still have not identified what class they are a member of. Plaintiffs have claimed that they are part of the petition gathering process by being part of a BQC, but because the BQC itself is not suing, the alleged harm is still far too attenuated to actually grant standing. Therefore, the League still does not belong to a class of those who participate in the petition process. Any "harm" that comes to the BQC as a result of Act 236 is a harm to the BQC and, at most, its officers. Harm to the League, a mere member of the BQC, is not sufficient.

Plaintiffs also 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 or hamper their ability to circulate petitions. Instead, the Act protects the right of citizens around the State to participate in the initiative process. Neither the League nor its members are positioned differently than any other citizen of Arkansas.

Plaintiffs do not allege any actions that they plan to take in the petition process that would be stopped, or even curtailed, by Act 236. Plaintiffs mention the League'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. Am. Compl. ¶ 7. But they 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. They then reference being members of a BQC this election cycle. They allege that they will have to collect more signatures because of Act 236. However, the League is not the actual BQC, nor is it even an officer in the in the BQC. Therefore, Plaintiffs have not alleged any specific action that they would be prohibited from undertaking due to Act 236. They have therefore failed to allege how they are specifically harmed for purposes of standing. 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 the League "worked," "supported," and "led." Plaintiffs lack standing for this reason as well.

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. The complaint mentions that Senator King is a State Senator and a registered voter. Am. 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 want to challenge the constitutionality of Act 236 before they have even done anything that could be harmed by Act 236. All alleged harm is purely prospective and hypothetical and for those reasons, their claims should be dismissed due to a lack of standing.

2. Because Act 236 does not require Secretary Thurston to take any unconstitutional action, he is entitled to sovereign immunity.

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 dismiss.

3. Act 236 is constitutional, and therefore Plaintiffs claims should be dismissed.

Plaintiffs allege 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 who voted in the last gubernatorial election, 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 both the state-wide signature requirement and the at least 15-county requirement. 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 who voted in the last gubernatorial election, 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 modify the cure period percentage 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.

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 Am. Compl. ¶ 16. Those two words are the most critical words to the entire suit, yet Plaintiff failed to plead them in their complaint.

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

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 quote from two passages of the Arkansas Constitution in their Amended Complaint. Those passages 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' Amended Complaint should be dismissed.

CONCLUSION

Plaintiffs' claims should be dismissed for three reasons. Plaintiffs lack standing to bring their claims since they provide no evidence that they are currently working on any petitions that would be impacted by Act 236. Defendant is also protected by sovereign immunity since Act 236 does not require him to take any unconstitutional action towards Plaintiffs. Finally, Act 236 is constitutional based on a plain reading of Article 5, Section 1 of the Arkansas Constitution. For those reasons, Plaintiffs' claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 25, 2024, I electronically filed the foregoing document to the eFlex filing system, which notifies the eFlex participants.

/s/ *Justin Brascher*
Justin Brascher