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

Plaintiffs have failed to remedy their standing issues, and their response does nothing to change that. In addition to incorporating the arguments of their previous response to Defendant's Motion to Dismiss their original complaint, Plaintiffs attempt to renew their Motion for Judgment on the Pleadings. Plaintiffs do this even though their MJOP was based on their original complaint, not their amended complaint, and the pleadings in this case have yet to close. Therefore, the MJOP is once again requested prematurely. For those reasons, this Court should grant Secretary Thurston's Motion to Dismiss.

Analysis

1. Plaintiffs still do not have standing.

Plaintiffs' response to Secretary Thurston's standing arguments have nothing to do with the actual issue. While Plaintiffs talk about the Arkansas Period Poverty Project being a "person" and that it does not have to be a corporation or entity, those assertions have nothing to do with the standing of the League of Women Voters (LWVAR). As Secretary Thurston stated in his Motion to Dismiss, LWVAR does not have standing because its amended complaint still does not set forth

how it is currently being harmed by Act 236, and any harm it does mention is far too generalized. LWVAR's involvement in the Arkansas Period Poverty Project Ballot Question Committee (BQC) is not sufficient to grant standing when it is not the BQC or one of its officers that is bringing suit. Plaintiffs' response does not address this issue at all, and therefore this Court should find that LWVAR lacks standing.

Plaintiffs also emphasize that Senator King is seeking standing as a voter. However, as this Court has previously noted, simply being a registered voter does not grant Senator King standing in this case. 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 Act 236 allegedly affects Senator King's 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, and therefore his claims should be dismissed.

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

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 response to the Motion to Dismiss pivoted to different parts of the text in Article 5, Section 1 than those they focused in their amended complaint. Act 236 does not violate these 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 could have approved or rejected Act 236, or any other Act from the 2023 legislative session, by referendum if the appropriate number of counties had produced the appropriate amount of signatures within 90 days of the end of the legislative session.

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 a canvasser 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.

3. <u>Secretary Thurston is entitled to sovereign immunity.</u>

Plaintiffs briefly touch on sovereign immunity. Plaintiffs' response to the original Motion to Dismiss cites 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. Secretary Thurston recognizes that the Court has spoken on this issue in its recent order, denying that Secretary Thurston is entitled to sovereign immunity. However, *Thurston* does not control in the present case, and Secretary Thurston is entitled to sovereign immunity.

4. <u>Plaintiffs cannot assert their motion for judgment on the pleadings at this time.</u>

Finally, Plaintiffs attempt to refile their MJOP by "incorporating" it into their response to Secretary Thurston's Motion to Dismiss their Amended Complaint. This is improper for multiple reasons. First, Plaintiffs can not just skirt the rules of civil procedure by incorporating a dispositive motion into their response to a completely different motion. The reasons for this are obvious. Secretary Thurston has five business days to reply to Plaintiffs' response. If one could incorporate one's own dispositive motion into a response, that would cut the 14 days a party should have to respond to such a motion down to five. Such an "incorporation" is doubly ridiculous because Plaintiffs' MJOP was based on their *original* complaint, not their amended one. Plaintiffs are wrongly attempting to incorporate an MJOP into a response to an MTD based on a complaint that is no longer valid.

On top of all of that, an MJOP is premature at this time, as Secretary Thurston argued in response to the original MJOP. The pleadings have not yet closed. If Secretary Thurston's MTD is dismissed, he would then have ten days to file an answer. After the answer is filed, then the pleadings would be closed, and then a renewed MJOP, based on the amended complaint, would be proper. An MJOP before that would not be proper. This Court agreed with this reasoning during the February 26 motion hearing and agreed Secretary Thurston should have an opportunity to file an answer should his MTD be denied. That is still the case. Therefore, even if this Court does take Plaintiffs' "incorporation" of their previous MJOP as legitimate, it is still premature, and should be denied until the pleadings have closed.

<u>Conclusion</u>

Plaintiffs' claims should still be dismissed for three reasons. Plaintiffs still do not have standing do bring this claim because they do not sufficiently tie LWVAR's membership in a BQC

to a specific harm. Also, Senator King does not have standing simply by being a voter. 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. In addition, Plaintiffs' attempt to "incorporate" their MJOP in order to bypass the rules of civil procedure fails. For those reasons, Plaintiffs' claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 15, 2024, I electronically filed the foregoing document to the eFlex filing system, which notifies the eFlex participants.

/s/ Justin Brascher
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