IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

LEAGUE OF WOMEN VOTERS OF ARKANSAS, *et al.* **PLAINTIFFS,**

v. **No. 5:20CV05174 PKH**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, *et al.* **DEFENDANTS.**

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs have no competent evidence of ballot rejections, and their desperate hail Mary effort to create a dispute of material fact with last-minute declarations fails. Summary judgment is appropriate.

I. Plaintiffs have no competent evidence of ballot rejections.

Plaintiffs assert that their absentee ballots were rejected. But, remarkably, ***Plaintiffs have no competent evidence that any of these Plaintiffs submitted an absentee ballot or had any ballot rejected.*** Def.'s Resp. to Pl.'s SOF ¶¶ 29-41. The record contains no declarations or other testimony from Plaintiffs Fields, McNamer, or Pennington. Plaintiffs submitted no declarations or other testimony from any witness capable of authenticating any voting record, spreadsheet, or report. Instead, Plaintiffs rely on unauthenticated hearsay presumably obtained through FOIA requests from third-party sources. *See id.* And Defendants have no ability to independently vouch for the authenticity of Plaintiffs' submissions.

Any document submitted at summary judgment "must be authenticated by and attached to [an] affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or [a] deposition." *Watkins v. Perkins*, 618 F. App'x 299, 300 (8th Cir. 2015) (citing *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005)). "[D]ocuments not meeting such

requirements *cannot be considered*." *Id.* (emphasis added). Defendants object to Plaintiffs' inadmissible submissions, and the Court should strike or not consider them.

II. The Court should not consider self-serving declarations Plaintiffs submitted with their response.

In a desperate effort to create a dispute of material fact, Plaintiffs submit three self-serving declarations that were not served on Defendants except through an ECF notice when Plaintiffs filed them on the Court's docket with their summary-judgment response. These include a declaration from Plaintiff McNee, one from LWVAR 30(b)(6) representative Ms. Nell Matthews Mock, and one from Plaintiffs' counsel Mr. Harold Williford. Docs. 112-1, 112-31, 112-32.

Defendants served an interrogatory specifically requesting production of any declaration from any witness regarding the subject matter of this lawsuit. *See* Doc. 93-1 at 28 (Interrogatory No. 18). Plaintiffs objected and produced nothing in response. *See id.* (Pl.'s response). The Eighth Circuit has declared "highly suspicious" a party's filing of an affidavit "on the same day" its summary-judgment response is due—precisely what Plaintiffs have done here. *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 476 (8th Cir. 2006). Defendants object to Plaintiffs' improper last-minute declarations; the Court should strike or not consider them. *See* Doc. 67 at 1 (Am. Final Sch. Order) ("Witnesses and exhibits not identified in response to appropriate discovery may not be used at trial except in extraordinary circumstances.").

A. The Court should not consider Plaintiff McNee's last-minute declaration.

Further, as described in Defendants' briefs supporting their motion to compel (Doc. 86) and the pending sanctions motion seeking dismissal of Plaintiff McNee (Doc. 102), Plaintiffs led Defendants on a five-month-long discovery goose chase for information concerning Plaintiff McNee's alleged medical condition—ultimately forcing Defendants to file a motion to compel

on the eve of the discovery deadline. The Court ordered Plaintiffs "to immediately provide complete responses to Defendants' requests for McNee's medical records" (Doc. 97 at 3), but Plaintiffs successfully ran out the discovery clock before producing those records. Plaintiffs now follow their months of stonewalling on Plaintiff McNee's alleged medical condition with an attempt to create a dispute of material fact concerning that same condition via an eleventh-hour, self-serving declaration. Plaintiff McNee's declaration contains no information that could not have been provided months ago when Defendants requested it. Therefore, the Court should strike or not consider Plaintiff McNee's declaration (Doc. 112-31), and grant summary judgment to Defendants.[1]

B. The Court should not consider Ms. Mock's last-minute declaration.

Ms. Mock's declaration is likewise a transparent, last-ditch attempt to create a dispute of material fact via a self-serving declaration containing information that could have been provided months beforehand in response to Defendants' discovery requests or in response to the questioning concerning LWVAR's activities during her deposition. *See, e.g.*, Doc. 108-16 (Def.'s Ex. 5, Mock Dep.) at 24 (dep. p. 92) (testifying that activities were carried out by the *local* leagues, and LWVAR only did some social media, specifically Facebook posts); *id.* at 6 (dep. pp. 20-21) (LWVAR "was primarily engaged in a social media campaign").

Mock's last-minute declaration is expressly an attempt to revise the testimony she gave in her deposition. *See* Doc. 112-32 (Mock Decl.) ¶¶ 13-15. Without conceding that Plaintiffs' self-

[1] Plaintiffs previously asserted (without evidence) that Plaintiff McNee's absentee ballot was rejected due to a noncomparing signature. Doc. 93-1 at 18 (Pl.'s Resp. to Int. No. 9 (claiming McNee's ballot was not counted)); *see also* Doc. 112-9 (Pl.'s Ex. 8, Mohammed Rpt. (claiming that McNee's ballot was rejected due to a noncomparing signature)). But Plaintiffs now claim that "Mr. McNee believes his absentee ballot was accepted." Doc. 112 at 11 (Pl.'s summary-judgment response); *see also* Doc. 112-31 (McNee Decl.) at 2 (McNee's self-serving declaration, asserting that he "believe[s] [his] absentee ballot was accepted").

serving declarations create any dispute of material fact, the Eighth Circuit is clear that a district court is entitled to "grant summary judgment where [Plaintiffs'] sudden and unexplained revision of testimony create[s] an issue of fact where none existed before." *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 476 (8th Cir. 2006) (quoting *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 288 (8th Cir. 1988)). The Court should strike or decline to consider Ms. Mock's declaration (Doc. 112-32), and grant summary judgment to Defendants.

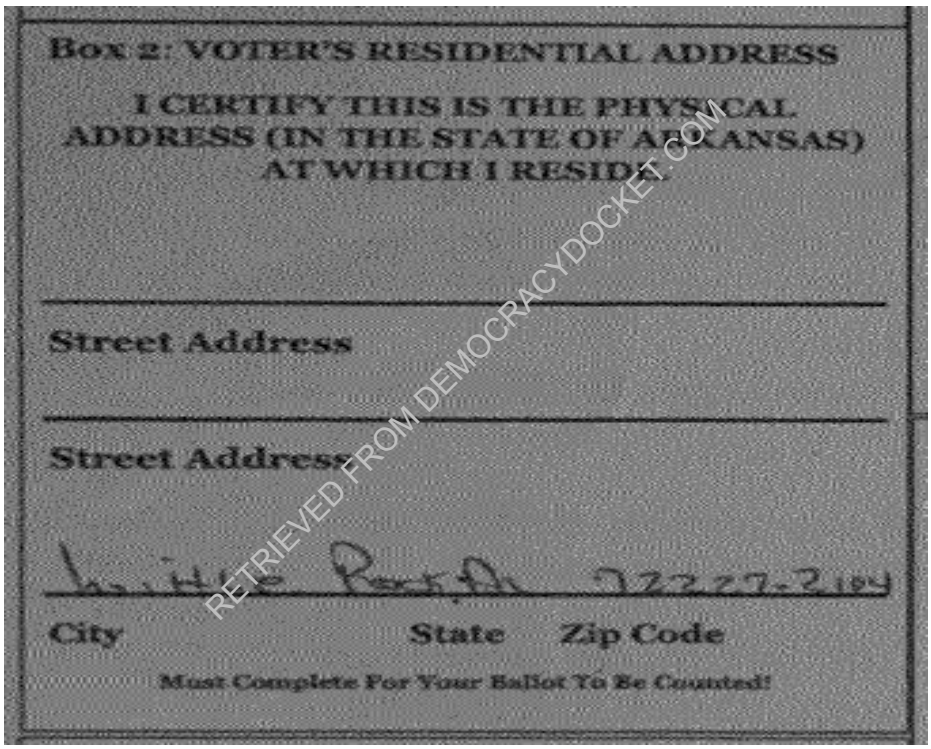
C. The Court should not consider Plaintiffs' counsel Mr. Williford's attempt to authenticate third-party documents.

Finally, Plaintiffs' counsel Mr. Harold Williford submitted with Plaintiffs' summary-judgment response his own declaration in which he purports "under penalty of perjury" to authenticate third-party documents that Plaintiffs failed to authenticate. Doc. 112-1 (Williford Decl.) at 5. These include forms purportedly relating to absentee ballots for individual Plaintiffs (and other documents) presumably obtained through FOIA requests to third-parties. *Id.* ¶¶ 12-14. Among the documents Mr. Williford purports to authenticate is a spreadsheet that he tried, and failed, to authenticate during the deposition of Pulaski County Election Commissioner David Scott. *See* Doc. 112-7 (Pl. Ex. 6, Scott Decl.) at 13 (dep. pp. 42-44).

Notably, Mr. Williford does *not* claim that his testimony is based on personal knowledge or otherwise show that he is competent to authenticate the documents. Fed. R. Civ. P. 56(c)(4) (a "declaration used to support or oppose a motion must be made on personal knowledge . . . and show that the affiant or declarant is competent to testify on the matters stated."). *Williams v. Evangelical Ret. Homes of Greater St. Louis*, 594 F.2d 701, 703 (8th Cir. 1979) ("[A]ffidavits supporting or opposing summary judgment shall be made on personal knowledge."). The Court should strike or decline to consider Mr. Williford's declaration (Doc. 112-1), and grant summary judgment to Defendants.

III. Even Plaintiffs' incompetent evidence is insufficient to create a dispute of fact.

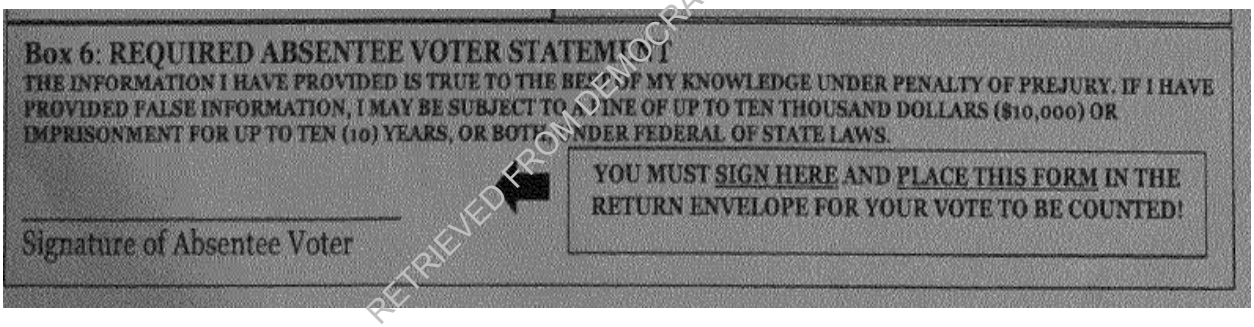
Even if Plaintiffs' incompetent evidence were to be considered (and it should not), Plaintiffs still fail to create a dispute of material fact. For example, Plaintiff Pennington asserts that she had no notice that her failure to certify the place of her physical residence in Box 2 of her voter statement would result in her ballot not being counted. Yet Box 2 of Plaintiff Pennington's purported voter statement has the express notice "**Must Complete For Your Ballot to Be Counted!**" (See below.)



Doc. 112-12 at 4. Thus, even Plaintiffs' incompetent hearsay submission indicates that Plaintiff Pennington was given express, pre-rejection notice of this requirement. *Id.* There is no constitutional right to vote absentee without certifying the place of one's residence. Nor does the Constitution require Arkansas to give Plaintiff Pennington *further* pre-rejection notice or another opportunity to cast a ballot in the same election.

Plaintiffs' purported absentee-ballot applications provide, in bold, italicized font, "***If you provide false information on this form, you may be guilty of perjury and fine of up to $10,000 or Imprisonment for up to 10 years***." *See* Doc. 112-10 at 5; Doc. 112-11 at 5; Doc. 112-12 at 5. One is required to sign one's name, acknowledging, "**If I have provided false information, I may be guilty of perjury** . . . ." Doc. 112-11 at 5. The voter statement similarly requires signing a statement "**UNDER PENALTY OF PERJURY**" to the same effect. *See* Doc. 112-11 at 4.

Plaintiff Fields claims that she had no notice that her vote would not be counted due to her failure to sign her voter statement. Yet her purported voter statement had a bold, capitalized, underlined notice expressly stating "**YOU MUST SIGN HERE . . . FOR YOUR VOTE TO BE COUNTED!**" (See below.)


Box 6: REQUIRED ABSENTEE VOTER STATEMENT
THE INFORMATION I HAVE PROVIDED IS TRUE TO THE BEST OF MY KNOWLEDGE UNDER PENALTY OF PREJURY. IF I HAVE PROVIDED FALSE INFORMATION, I MAY BE SUBJECT TO A FINE OF UP TO TEN THOUSAND DOLLARS ($10,000) OR IMPRISONMENT FOR UP TO TEN (10) YEARS, OR BOTH UNDER FEDERAL OF STATE LAWS.
YOU MUST SIGN HERE AND PLACE THIS FORM IN THE RETURN ENVELOPE FOR YOUR VOTE TO BE COUNTED!
Signature of Absentee Voter

Doc. 112-10 at 4. Thus, even Plaintiffs' incompetent hearsay submission indicates that Plaintiff Fields was given express, pre-rejection notice of this requirement. *Id.* By purportedly not signing Box 6, Plaintiff Fields would have failed to swear under penalty of perjury that the information she provided was true. There is no constitutional right to vote absentee without swearing to the truth of basic identity-verifying information (i.e., name, birth date, and address). Nor does the Constitution require Arkansas to give Plaintiff Fields further pre-rejection notice or another opportunity to cast a ballot in the same election.

Unlike Plaintiff Fields, the third and final Plaintiff whose purported ballot was not counted—Plaintiff McNamer—*did* purportedly swear that the information she provided was true. But Plaintiffs' incompetent hearsay submissions indicate that election officials discovered that information was *not* true after all. Plaintiff McNamer purportedly provided different zip codes on her absentee-ballot application and voter statement—both of which she swore were true under penalty of perjury. *Compare* Doc. 112-11 at 4 *and* Doc. 112-11 at 5. The Constitution does not require Arkansas to count a ballot where information provided under penalty of perjury on the absentee-ballot application contradicts information provided under penalty of perjury on the voter statement. Given the express threat of criminal penalties for providing false information, Plaintiff McNamer cannot seriously suggest that she lacked pre-rejection notice that providing contradictory and false information in her sworn statements would jeopardize the validity of her purported absentee ballot. The Constitution does not require Arkansas to give Plaintiff McNamer further pre-rejection notice or another opportunity to cast a ballot in the same election.

IV. Plaintiffs cannot challenge Arkansas's signature-comparison process.

Finally, even assuming for the sake of argument that Plaintiffs had competent evidence of ballot rejections (which they don't), still the thrust of Plaintiffs' purported factual claims (including the entirety of Dr. Mohammed's report) is immaterial because Plaintiffs concede it is "[u]ndisputed" that "[n]o Plaintiff remaining in this case has had an absentee ballot rejected for a noncomparing signature." Doc. 114 (Pl.'s Resp. to Def.'s SOF), resp. to ¶ 17.

CONCLUSION

For the reasons set forth in Defendants' brief, exhibits, statement of facts, response to Plaintiffs' statement of facts, and herein, the Court should grant summary judgment to Defendants.

Submitted: January 31, 2023

Respectfully,

TIM GRIFFIN
Attorney General
MICHAEL A. CANTRELL (2012287)
Assistant Solicitor General
MATTHEW M. FORD (2013180)
Assistant Attorney General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
Ph: (501) 682-2007
Michael.Cantrell@ArkansasAG.gov

Counsel for Defendants