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

LEAGUE OF WOMEN VOTERS OF ARKANSAS, ROBERT WILLIAM ALLEN, JOHN MCNEE, and AELICA I. ORSI, **PLAINTIFFS,**

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

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities as members of the Arkansas State Board of Election Commissioners, **DEFENDANTS.**

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiffs' response serves only to highlight the deficiencies of their Amended Complaint. As explained below, Plaintiffs are unable to plausibly allege any claim because they lack post-election standing, their claims are barred by sovereign immunity, they lack any procedural-due-process liberty interest, and the Amended Complaint is devoid of any genuinely supportive factual allegations that votes are wrongfully rejected.

I. Plaintiffs lack standing post-Election Day.

Election Day has come and gone, and there remains no allegation that Plaintiffs' absentee ballots were rejected for a signature mismatch—or that they even *cast* timely and otherwise valid absentee ballots to begin with. Whether that deficiency is framed in terms of ripeness, standing, or mootness, Plaintiffs' lawsuit fails as a matter of law.

The Supreme Court has explained that "[t]he various doctrines of 'standing,' 'ripeness,' and 'mootness,' . . . are but several manifestations . . . of the primary conception that federal ju-

dicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961) (footnotes omitted); *see id.* at 504 (federal courts "have no right to pronounce an abstract opinion upon the constitutionality of a State law").

A. Plaintiffs did not adequately allege injury before the election.

Arkansas's signature-verification process posed no concrete and imminent threat of harm to Plaintiffs *before* the election. *See* Opinion and Order, DE 34 at 5-9. For the same reason, in a decision that Plaintiffs' response fails to distinguish, the Sixth Circuit affirmed the denial of a preliminary injunction on essentially the same grounds. *Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6046, 2020 WL 6074331, at *5 (6th Cir. Oct. 15, 2020). The court rejected claims that Tennessee's signature-verification process would disenfranchise voters because, as the plaintiffs claimed, "an unknown number of the ballots that are rejected will be erroneously rejected." *Id.* Because, like here, "[t]he plaintiffs' allegations involve[d] two layers of speculation," the court found that "the plaintiffs ha[d] clearly not demonstrated that they face an actual, concrete, particularized, and imminent threat of harm." *Id.* Thus, they failed to adequately allege standing. *Id.*

As in *Hargett*, Plaintiffs here assert that Arkansas's signature-verification process "disenfranchises" voters on the basis that an unknown number of ballots will be erroneously rejected. *See, e.g.*, DE 35 at 3, 24, 27, 28. But this is implausible and fails to adequately allege an injury-in-fact. First, in Plaintiffs' minds, "disenfranchisement" occurs *any time* a vote is not counted, even rightfully. But "reasonable election [procedures] do not 'disenfranchise' anyone under any legitimate understanding of that term." *Democratic Nat'l Comm. v. Wisc. State Legislature*, No.

20A66, 2020 WL 6275871, at *7 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

Second, Plaintiffs' Amended Complaint is bereft of any genuinely supportive factual allegations. Plaintiffs provide absolutely no evidence that Arkansas's process disenfranchises voters. Plaintiffs have not, for example, come forward with even a single example of an absentee ballot that has been *wrongly* rejected. Nor do they make any allegation concerning what the wrongful-rejection rate (if any) actually is. This massive omission dooms the plausibility of their claims. Third, as explained in Defendant's principal brief in support, historically, only 0.1 to 0.3% of absentee ballots are affected by the signature-verification process. *See* Def.'s Br., DE 28 at 44, 52. So, even assuming *all* of those determinations were wrongful rejections—a dubious assumption—the wrongful-rejection rate is miniscule. Therefore, Plaintiffs' claims are implausible and should be dismissed.

B. Plaintiffs do not allege any post-election injury.

Plaintiffs likewise face no immediate threat of harm *after* the election. First, their claims are moot because the allegations of their Amended Complaint relate *exclusively* to the November 2020 election. *See* Amd. Compl., DE 11. "A court properly dismisses a claim as moot if it has lost its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract questions of law." *Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012) (quotation and citation omitted). And in any case, Plaintiffs can invoke the jurisdiction of this Court under *Ex parte Young*'s "narrow exception," only for *prospective* relief. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 76 (1996); *see Ex parte Young*, 209 U.S. 123 (1908). Further, at "the pleading stage, the burden remains on the plaintiffs to clearly allege facts that demonstrate each element of standing, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and

"[s]tanding must 'persist throughout all stages of litigation.'" *Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1161 (8th Cir. 2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

Whatever Plaintiffs' standing with respect to the November 2020 election, they certainly now lack it altogether. The Amended Complaint contains *no allegation* of any injury for any future election. That is because they *cannot* plausibly allege a future injury. First, the individual Plaintiffs do not allege that they will vote in a future election—let alone vote absentee. *See* Amd. Compl., DE 11 at ¶¶ 9-11. Plaintiffs are explicit that any future desire to vote by absentee ballot will "depend[] on [their] medical condition" at that time. *See id.* at ¶¶ 9-10. Whether through medical intervention or natural recovery, Plaintiffs could enjoy improved health and wish to vote in person. More important, even if Plaintiffs wish to vote absentee in the future, they may not meet the statutory qualifications at that time. *See* Ark. Code Ann. 7-5-402 (permitting absentee voting only for those who are "unavoidably absent" or "unable to attend the polls on election day because of illness or physical disability"). The provisions of Executive Order 20-44,[1] which extended absentee voting to those concerned about COVID-19, *does not apply* to future elections, and there is no indication that any new order will be forthcoming. In fact, even assuming that Plaintiffs will vote again, there is no indication that the COVID-19 pandemic will persist through the next election, thus depriving Plaintiffs' claims of the major factor motivating absentee voting in the November 2020 election.

Second, Plaintiffs may not vote absentee in the future on still other, independent grounds. Plaintiff Orsi "prefers to vote in person." Amd. Compl. at ¶ 11. Plaintiffs Allen and McNee were unaware when they applied for absentee ballots that a ballot could be rejected if the signa-

[1] https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-44.pdf

ture on the verification sheet does not compare to the signature on the absentee-ballot application. *Id.* at ¶¶ 9-10. Given their newfound knowledge and their alleged difficulty of signing their name consistently, they may choose to vote in person in future elections. *See id.* (Plaintiffs might vote absentee in a future election "if [they] had some assurance [their] ballot would not be rejected"). The individual Plaintiffs have not alleged any future injury because they cannot plausibly do so.

The Amended Complaint also makes *no allegation* concerning the League of Women Voters and any future election. Plaintiffs allege the League's standing based on resource diversion *exclusively* "for the November general election." *Id.* at ¶ 8. There is no allegation that the League will need to divert resources for any future election. *See id.* Again, that is because Plaintiffs *cannot* plausibly allege a future injury. As above, there is no indication that the COVID-19 pandemic will persist through the next election, and in any case there is no reason to believe that another executive order will be forthcoming to expand the class of persons who may vote absentee. Therefore, Plaintiffs have no reason to believe that the major impetus for the large numbers of absentee voters in the November 2020 election will recur in any future election. Hence, Plaintiffs cannot plausibly allege a future resource-diversion injury.

As these many considerations show, whether any Plaintiffs suffer a future injury is entirely speculative. A Plaintiffs' potential injury depends on a series of contingencies—each of which is unlikely and purely speculative.[2] To show standing, a plaintiff must plausibly allege "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual

[2] Any unalleged claims that might accrue in the future are not yet ripe. "The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Parrish v. Dayton*, 761 F.3d 873, 875-76 (8th Cir. 2014) (quotations and citations omitted).

or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted). But Plaintiffs have *no allegation* of future injury, to say nothing of plausibly alleging an injury that is both "concrete" and "imminent." *Id.* So the Court should dismiss Plaintiffs' Amended Complaint for want of a plausible injury-in-fact.

C. Plaintiffs' cannot plausibly plead causation or redressability.

"[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015); *see id.* at 958 ("The redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute."). The causation and redressability elements are not met here because Defendants have no authority to enforce new absentee-voting procedures. *See Ark. State Bd. of Election Comm'rs. v. Pulaski Cty. Election Comm'n*, 437 S.W.3d 80, 89-90 (2014); *see also* Def.'s Br., DE 28 at 18-20. True, the county boards must "exercise [their] duties consistent with the training and materials provided by the State Board," Ark. Code Ann. 7-4-107(a)(2), but its "power to prescribe rules and issue directives" about election laws "says nothing about whether [it] 'possess[es] authority to *enforce* the complained-of provision.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1257 (11th Cir. 2020) (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1299 (11th Cir. 2019) (quoting *Dig. Recognition Network, Inc.*, 803 F.3d at 958)) (emphasis in *Jacobson*). So Plaintiffs cannot plausibly plead causation or redressability.

Plaintiffs also cannot plausibly plead redressability on other grounds. First, Plaintiffs' response does not dispute, and therefore concedes, that the strict chain of custody necessary for keeping an absentee ballot secure would require the individual Plaintiffs to appear *in person* at

the ballot-processing location to cure a deficient ballot. But, given that the entire basis for Plaintiffs' voting absentee is to *avoid in-person contact*, such an opportunity does nothing to remedy their purported injury. It is therefore not redressable by a favorable decision.

Second, even if the League had plausibly asserted a future resource-diversion injury, it still would lack a redressable injury for reasons similar to those set forth in this Court's order denying Plaintiffs' motion for a preliminary injunction. DE 34 at 9. The Court found that a "preliminary injunction before the election" would not "prevent any diversion of resources" because "news reports about injunction-mandated changes to the signature requirements would cause voters to still seek absentee ballot guidance from [the League]," and "only the substance of that guidance that would change if Defendants were required to direct county election officials to begin early canvassing and give notice and an opportunity to cure absentee ballots." *Id.* The passing of the November 2020 election does not change that reasoning. So even if Plaintiffs had alleged that the League would divert resources for future elections, that allocation of resources would not be affected by any relief this Court might award. Plaintiffs' requested relief therefore would not provide them with effective relief, and their purported injury is not redressable by a favorable decision.[3]

II. Sovereign immunity bars Plaintiffs' claims.

Plaintiffs' claims are also barred by sovereign immunity. "[A] suit may fail, as one against the sovereign, . . . if the relief requested cannot be granted by merely ordering the cessa-

[3] Plaintiffs' response does not address, and so waives any opposition to, Defendant's observation that the League lacks organizational standing to assert a voting-related due-process claim because the League does not itself have the right to vote. *See Johnson v. Bredesen*, No. 3:07-0372, 2007 WL 1387330, at * 1 (M.D. Tenn. 2007) (finding that since an organization may not exercise a right to vote, it has no standing to assert a due-process claim concerning the alleged loss of a right to vote).

tion of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949). Even if Defendants had some enforcement authority, sovereign immunity would bar Plaintiffs' suit because it seeks to compel them to take affirmative action in their official capacities. An injunction to create a new absentee-ballot cure process violates sovereign immunity because it "would require [Defendant]'s official affirmative action [and] affect the public administration of government agencies." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (citing *Oregon v. Hitchcock*, 202 U.S. 60 (1906)). But sovereign immunity bars such claims.

Plaintiffs' reliance on *McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018), to avoid sovereign immunity is puzzling, to say the least. The plaintiffs there invoked the *Ex parte Young* exception to sue the Director of the Missouri Department of Corrections—the state official who is expressly directed to act by the challenged statute. *See id.* at 949 (citing Mo. Ann. Stat. 546.740 (providing that "the director of the department of corrections shall invite . . . at least eight reputable citizens, to be selected by him," to observe an execution)). *McDaniel* held that the *Ex parte Young* exception allowed the suit only because the plaintiffs plausibly alleged that *the named defendant* "ha[d] authority to implement the Missouri statute." *Id.* at 952. But here, on the other hand, Defendants expressly were "not given the authority to *create* . . . election procedures." *Ark. State Bd. of Election Comm'rs*, 437 S.W.3d at 89. And only the county boards would have authority to implement any new procedure. *See* Ark. Code Ann. 7-4-107(a)(1) (county boards have authority to "[e]nsure compliance with all legal requirements relating to the conduct of elections"). Therefore, Plaintiffs' claims must fail.

III. Plaintiffs' claims fail to grapple with *Richardson*'s persuasive reasoning.

Plaintiffs' response attempts to dismiss the one court-of-appeals decision perhaps most pertinent to this case, without facing up to its persuasive reasoning. In *Richardson v. Texas Sec'y of State*, the Fifth Circuit stayed a district court's injunction of Texas's absentee-ballot signature-verification procedure that gave no notice or opportunity to cure deficiencies. No. 20-50774, — F.3d —, 2020 WL 6127721, at *18 (5th Cir. Oct. 19, 2020). The court first rejected the plaintiffs' procedural-due-process argument, finding that "the plaintiffs have alleged no cognizable liberty or property interest that could serve to make out" such a claim. *Id.* at *8; *see id.* at *6-7 (distinguishing a fundamental right from a liberty interest). Although Plaintiffs here concede that "there is no constitutional right to vote by absentee ballot," like the plaintiffs in *Richardson* they argue that a liberty interest arises "once the state creates an absentee voting regime." DE 35 at 17; *see Richardson*, 2020 WL 6127721, at *7.

But *Richardson* points out that "state-created liberty interests are limited to particular sorts of freedom from restraint." *Id.* at *7 (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). As in *Richardson*, Plaintiffs here "cite no circuit precedent suggesting that state-created liberty interests exist outside the context of bodily confinement." *Id.* That is because there is no such precedent. *Cf. Org. for Black Struggle v. Ashcroft*, No. 2:20-CV-04184-BCW, 2020 WL 6325722, at *9 (W.D. Mo. Oct. 9, 2020) (holding that "the right to vote by mail is not a liberty interest to which procedural due process protections apply").

Richardson next rejected the district court's holding that Texas's signature-verification procedures imposes a severe burden on the right to vote. It repudiated the lower court's reasoning that "voters who have their ballots rejected due to a perceived signature mismatch" face "complete disenfranchisement" because they "are provided untimely notice of rejection and no meaningful opportunity to cure." *Id.* at *11 (quoting *Richardson v. Texas Sec'y of State*, No.

SA-19-CV-00963-OLG, 2020 WL 5367216, at *33 (W.D. Tex. Sept. 8, 2020). As the Fifth Circuit explained, the district court's "theory" stemmed, in part, from the "fundamental error[]" of "mistakenly focus[ing] only on the burden to the plaintiffs—instead of voters as a whole." *Id.* Such an approach would cause the merits analysis to collapse into the standing analysis. *Id.* at *11 n.33. The court also rejected the district court's decision that Texas must provide a signature-verification process that provided "no risk of uncorrectable rejection," observing that "the Constitution does not demand such a toothless approach to stymying voter fraud." *Id.* at *12 (quoting *Richardson*, 2020 WL 5367216, at *33 n.41).

The worst Plaintiffs can say about *Richardson*'s persuasive reasoning is that it follows Justice Scalia's opinion in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), instead of what they refer to as "the *Crawford* plurality." DE 35 at 26. But the *Crawford* opinions of Justice Stevens and Justice Scalia were each joined by two other justices, meaning that they enjoy equal support. *See Crawford*, 553 U.S. at 184 (Stevens, J., announcing the judgment of the Court, joined by Roberts, C.J., and Kennedy, J.); *Id.* at 204 (Scalia, J., concurring in the judgment, joined by Thomas, J., and Alito, J.). Both opinions found no severe burden even where a requirement might result in a person being excluded from voting. *Id.* at 203 (op. of Stevens, J.) (concluding that the law imposed "only a limited burden on voters' rights"); *id.* at 204 (Scalia, J., concurring in the judgment) (agreeing that "the burden at issue is minimal and justified"). Likewise, here, regardless of which approach is taken, any burden posed by the signature-verification requirement is not severe and survives *Anderson-Burdick* scrutiny.

CONCLUSION

In light of Plaintiffs' inability to plausibly allege their claims, Defendants respectfully request that the Court grant their motion to dismiss.

Respectfully submitted,

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