

**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, 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.

DEFENDANTS' STATEMENT OF MATERIAL FACTS

For their statement of undisputed material facts, Defendants state as follows:

1. The claims brought by individual Plaintiffs Robert Allen, Aelica I. Orsi, Marshall Wayne Sutterfield, and Myra H. Tackett have all been dismissed. Doc. 48 (Allen); Docs. 88, 89 (Orsi); Docs 90, 91 (Sutterfield); Docs. 99, 100 (Tackett).
2. Plaintiff John McNee has not had an absentee ballot rejected. Doc 42 (2d Am. Compl.) ¶ 11.
3. Plaintiffs allege that individual Plaintiff Shirley Faye Fields submitted an absentee ballot in November 2020 that was not counted because she omitted her signature. Doc. 42 (2d. Am. Compl.) ¶ 14.
4. Plaintiffs allege that individual Plaintiff Mary J. McNamer submitted an absentee ballot in November 2020 that was not counted because she wrote down the wrong zip code. Doc. 42 (2d Am. Compl.) ¶ 15.

5. Plaintiffs allege that individual Plaintiff Marnette Wendi Pennington submitted an absentee ballot in November 2020 that was not counted because she omitted her street address. Doc. 42 (2d Am. Compl.) ¶ 16.

6. The organizational Plaintiff in this case is League of Women Voters of Arkansas (LWVAR), which is a 501(c)(4) corporate entity. Ex. 5 (Mock Dep.) at 96.

7. LWVAR is different from the local League of Women Voters organizations in Arkansas, which are not the Plaintiff in this case. Ex. 5 (Mock Dep.) at 17, 87, 100.

8. LWVAR was not involved in statewide outreach concerning how to fill out absentee ballots. Ex. 5 (Mock Dep.) at 19.

9. LWVAR has not conducted trainings on election law or voting rights. Ex. 5 (Mock Dep.) at 30, 39.

10. LWVAR has not produced any documents concerning Arkansas's absentee-ballot verification requirement. Ex. 5 (Mock Dep.) at 25.

11. LWVAR is unable to identify any expense that it had to make as a result of Arkansas's absentee-ballot verification requirement. Ex. 5 (Mock Dep.) at 67-74.

12. LWVAR is unable to provide a measure of how much effort it put into social media concerning absentee balloting. Ex. 5 (Mock Dep.) at 93-94.

13. LWVAR has consistently posted information about election-related deadlines on social media since 2014. Ex. 5 (Mock Dep.) at 32-33.

14. LWVAR primarily engages in social media posts to make people aware of documents that were available through other entities. Ex. 5 (Mock Dep.) at 21, 92-93.

15. No LWVAR member has had an absentee ballot rejected. Ex. 5 (Mock Dep.) at 81.

16. None of the individual Plaintiffs are members of LWVAR. Ex. 5 (Mock Dep.) at 83.

17. No Plaintiff remaining in this case has had an absentee ballot rejected for a noncomparing signature. Doc. 42 (2d Am. Compl.) ¶¶ 11, 14, 15, 16.

18. No Plaintiff remaining in this case has had an absentee ballot rejected for a missing or noncomparing name. Doc. 42 (2d Am. Compl.) ¶¶ 11, 14, 15, 16.

19. No Plaintiff remaining in this case has had an absentee ballot rejected for a missing or noncomparing birth date. Doc. 42 (2d Am. Compl.) ¶¶ 11, 14, 15, 16.

20. Election officials are required to attend training and be tested by the State Board within twelve months before an election. Ex. 1 (Shults Decl.) ¶¶ 7-23, decl. ex. A, decl. ex. B at bates 83321-23; Ark. Code Ann. 7-4-107(b)(2)(C)(i), 7-4-109(e)(1).

21. By law, election officials are required to conduct the election consistent with the State Board's training. Ex. 3 (Shults Dep.) at 27, 57-58; Ark. Code Ann. 7-4-107(a)(2).

22. The State Board trains county election commissioners on processing absentee ballots. Ex. 1 (Shults Decl.) decl. ex. A at bates 83193-238, decl. ex. B at bates 83378-91.

23. The State Board's training provides county election commissioners with guidance on objective considerations in conducting a uniform assessment of signatures, names, addresses, and birth dates submitted with absentee ballots. Ex. 1 (Shults Decl.) ¶¶ 7-23, decl. ex. A at bates 83208-38.

24. For signature comparisons, these objective features include spacing; type or style of writing; speed of writing; size and proportions of words and letters; spelling; slant of writing; curves, loops, and cross-points; presence or absence of pen lifts; and beginning and ending

strokes; and different writing utensils. Ex. 1 (Shults Decl.) at ¶¶ 14-23, decl. A at bates 83212-222, decl. ex. B at bates 83381.

25. There is a strong presumption that a ballot will be counted, and an objective, articulable basis for overcoming that presumption is necessary. Election officials are to document in writing the reasons why a signature is found to not compare. Ex. 3 (Shults Dep.) at 51, 63, 69-70, 72, 76-77, 84, 85-86, 90, 91-92, 160; Ex.1 (Shults Decl.) ¶ 15, decl. ex A at bates 83212, 83226.

26. Signatures are not required to “match” in a sense that implies a facsimile. Ex. 3 (Shults Dep.) at 33-34, 111-13.

27. In accordance with the State Board’s training, a signature on a voter statement should be found not comparable to a signature on an absentee-ballot application only if the quantity and severity of the distinctions, taken together, provide overwhelming evidence to support an abiding conviction that the signatures were not created by the same person. Ex. 1 (Shults Decl.) ¶ 15, decl. ex. A at bates 83212, 83226, decl. ex. B at 83381.

28. Casting a ballot in Arkansas is not difficult, and the steps required are similar to those required in the rest of the United States. Ex. 2 (Brunell Rpt.) ¶ 22.

29. The introduction of absentee and early voting in Arkansas over the past 30 years has made it easier to cast a ballot. Ex. 2 (Brunell Rpt.) ¶¶ 23-25.

30. Absentee voting begins no later than 46 days before Election Day. Ex. 1 (Shults Decl.) decl. ex. B at bates 83337.

31. Voters who receive absentee ballots are provided with a voter statement, several sections of which contains a separate notice that it must be completed for the ballot to be counted. Ex. 1 (Shults Decl.) ¶¶ 30-34, decl. ex. A at bates 83205.

32. Unlike many other States, Arkansas does not require that a voter statement is notarized or witnessed by any person. Ex. 2 (Brunell Rpt.) ¶ 23; *see* Ex. 1 (Shults Decl) decl. ex. A at bates 83226.

33. The initial canvassing of absentee ballots is conducted by absentee ballot clerks appointed by county election commissioners. Absentee ballot clerks work in teams of two and, if both absentee ballot clerks agree that the ballot is eligible to be counted, no further process is required. Ex. 1 (Shults Decl.) decl. ex. B at bates 83379.

34. An absentee ballot clerk may not reject an absentee ballot due to a noncomparable signature, name, birth date, or address, but must set any questioned ballots aside for another round of review by the county board of election commissioners. Ex. 1 (Shults Decl.) decl ex. A at bates 83192, decl. ex. B at bates 83382, 83387-88

35. Election officials provide prompt written notice to any voter whose absentee ballot is not counted. Ex. 1 (Shults Decl.) ¶ 47.

36. Election officials must securely maintain absentee ballots and voter statements, which are subject to a strict chain of custody, and they can be processed only in the presence of at least two election officials. Ex. 1 (Shults Decl.) ¶ 53, decl. ex. A at bates 83188-89, decl. ex. B at bates 83434-36.

37. The two weeks before Election Day and the following week are extremely busy for county clerks, county boards, and other election officers. Ex. 1 (Shults Decl.) ¶¶ 57a-q, 58; *see also, e.g., id.* decl. ex. B at bates 83354-60, 83402-04, 83411.

38. Whether voting in person or by absentee, voters must provide their signature, name, address, and birth date. Ex. 1 (Shults Decl.) ¶ 55, decl. ex. A at bates 83170; Ex. 2 (Brunell Rpt.) ¶ 26.

39. Arkansas has a noted history of absentee-ballot fraud. Ex. 2 (Brunell Rpt.) ¶¶ 36-37d.

40. Requiring a signature, name, address, and birth date from a voter applying for an absentee ballot and again when that voter submits the ballot serves to verify that the person submitting the ballot is who they claim to be—the same person who applied for the ballot. Ex. 2 (Brunell Rpt.) ¶¶ 26, 33, 35.

41. In addition to being less able to produce a comparable signature, a person casting a fraudulent ballot will be less likely to know another person's name, address, and birth date. Ex. 2 (Brunell Rpt.) ¶ 33.

42. The presence of an address that doesn't compare raises the question of whether the person who submitted the ballot knows whether they are registered to vote. Ex. 3 (Shults Dep.) at 151.

43. Using the current date instead of a birth date could be a way to conceal fraud. Ex. 3 (Shults Dep.) at 154.

44. Public confidence in the integrity of the electoral process, and especially in absentee voting, cannot exist without antifraud measures to safeguard the integrity of the ballot box. Ex. 2 (Brunell Rpt.) ¶¶ 2a, 16.

45. Without antifraud measures, fewer people may go to the effort of voting. Ex. 2 (Brunell Rpt.) ¶ 16; Ex. 4 (Brunell Dep.) at 27.

46. Arkansas's rejection rate for noncomparing signatures over the previous two election cycles has been a fraction of one percent—0.165 % in 2018 and 0.137 % in 2020. Ex. 2 (Brunell Rpt.) ¶¶ 2f, 29, 30.

47. Over the previous two election cycles, Arkansas has rejected fewer absentee ballots on average than other U.S. states due to noncomparing signatures. Ex. 2 (Brunell Rpt.) ¶¶ 2f, 29-32.

48. Arkansas has relatively low rejection rates for signature comparison even without a signature-cure process. Ex. 4 (Brunell Dep.) at 19-20.

49. Not every voting reform leads to more votes being counted. Ex. 2 (Brunell Rpt.) ¶¶ 2c, 18; Ex. 4 (Brunell Dep.) at 63.

50. Instituting a cure process for signature comparison in Arkansas could increase the number of rejected ballots due to the well-recognized fact that people behave more carelessly when they have an “insurance policy” against the consequences of their carelessness. Ex. 4 (Brunell Dep.) at 55-60.

51. Thirty-seven States conduct signature verification on absentee or mail-in ballots. Ex. 2 (Brunell Rpt.) ¶ 27 & n.1.

52. The U.S. Election Assistance Commission’s “Federal Form,” which, by law, contains only information necessary to a voter’s eligibility, requires a voter’s signature, name, address, and birth date. Ex. 2 (Brunell Rpt.) ¶ 34.

53. A person’s signature, name, address, and birth date are relevant to determining voter eligibility. Ex. 4 (Brunell Dep.) at 21-22.

Therefore, Defendants respectfully request that the Court grant summary judgment in their favor.

Submitted: January 10, 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

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