IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM MORGAN, *et al*.	)	
	)	
Plaintiffs,	)	20-cv-2189
	)	
v.	)	Judge Rebecca R. Pallmeyer
	)	Emergency Judge
JESSE WHITE, in his official capacity as Illinois Secretary of State, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW FILED IN SUPPORT OF THE FED. R. CIV. P. 12(b)(1) AND 12(b)(6) MOTION TO DISMISS THE COMPLAINT FILED BY DEFENDANT COOK COUNTY CLERK

Defendant Karen A. Yarbrough, Cook County Clerk, in her official capacity, by and through her counsel, Kimberly M. Foxx, State's Attorney of Cook County, through her assistant, Jessica M. Scheller, hereby submits the following Memorandum of Law filed in support of her Fed. R. Civ. P. 12(b)(1) and (b)(6) Motion to Dismiss Plaintiffs' Verified Complaint for Emergency Declaratory and Injunctive Relief ("Complaint"):

INTRODUCTION

Plaintiffs' claims against the County Clerk must and should fail, as the Plaintiffs' filings concede the County Clerk's sole role in the Article VII referendum process is to place any Article VII initiative referendum questions on the ballot after certification. (Dkt. 1, ¶ 12). As Plaintiffs acknowledge in their Complaint, certification is completed by the clerks of the county municipalities. *Id.* Plaintiffs do not allege that the County Clerk has failed or refused to place a certified (or uncertified) Article VII initiative referendum on the ballot. *Id.* Their active grievances or claims relate exclusively to the certification process; (Dkt. 1, *generally*), a process in which the County Clerk has no part. *Id.* Therefore the County Clerk asks this Court to find that she has

neither a role in the certification process or in this lawsuit.

BACKGROUND FACTS & PROCEDURAL HISTORY

Plaintiffs, a group of Illinois registered voters, seek to circulate an initiative petition for a constitutional amendment to the Illinois Democracy Amendment pursuant to Article XIV, Section 3 of the Illinois Constitution. On April 7, 2020, Plaintiffs filed their Complaint [Docket No. 1] against Cook County Clerk Karen A. Yarbrough ("County Clerk"), Secretary of State Jesse White, Evanston City Clerk Devon Reid, as well as the individual Board Members of the Illinois State Board of Elections. In response to the COVID-19 pandemic and the Governor's shelter-in-place orders, Plaintiffs seek to enjoin or modify the Illinois petition collection requirements for initiative referendums to be placed on the November 3, 2020 general election ballot. However, the County Clerk plays no role in the referendum process and Plaintiffs concede that the County Clerk's sole role in this process is merely to place any Article VII initiative referendum questions certified by the clerks of suburban Cook County municipalities on the ballot. (Dkt. 1, ¶ 12).

Plaintiffs seek an order, among other things, requiring Defendants to allow for petitions to be submitted electronically via an online form, that the May 3 deadline be extended to August 3, 2020, and that the signature requirement be reduced by 50%. (Dkt. 1 at ¶ B, Prayer for Relief). Plaintiffs also seek costs and attorneys' fees against Defendants. (*Id.* at ¶E).

Nevertheless, Plaintiffs fail to state a claim against the County Clerk because the Clerk has no role in the referendum process and cannot provide the relief Plaintiffs seek. Accordingly, because no justiciable controversy exists as to the County Clerk, this Court lacks subject matter jurisdiction and should dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) and also because it fails to state a claim under Rule 12(b)(6).

ARGUMENT

I. Legal Standard.

Defendant brings this motion to dismiss under Federal Rule 12(b)(1) and (b)(6). "Rule 12(b)(1) requires dismissal of claims over which the federal court lacks subject-matter jurisdiction. Jurisdiction is the 'power to decide' and must be conferred upon the federal courts." *United States ex rel. Sheet Metal Workers Int'l Ass'n, Local Union No. 20 v. Horning Invs., LLC*, No. 12 CV 830, 2013 U.S. Dist. LEXIS 141449, *6 (S. Dist. Ind. October 1, 2013), *citing In re Chicago, R.I. & P.R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). The burden is on the plaintiff to prove, by a preponderance of the evidence, that subject-matter jurisdiction exists for his or her claims. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003).

The purpose of a 12(b)(6) motion is to test the legal sufficiency of a pleading by accepting all the complaint's factual allegations as true. *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 675 (7th Cir. 2001). Dismissal under Rule 12(b)(6) is proper where the petitioner can prove no set of facts that would entitle him to relief. *Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000). When considering a Rule 12(b)(6) motion to dismiss, courts construe the allegations in plaintiff's complaint "in the light most favorable to [the plaintiff], accepting all well-pleaded facts as true, and drawing all reasonable inferences in favor of [the plaintiff]." *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013), *citing Citadel Group Ltd. v. Washington Regional Medical Ctr.*, 692 F.3d 580, 591 (7th Cir. 2012).

Finally, dismissal is proper "if the complaint fails to set forth sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic v. Twombley*, 550 U. S. 544, 555 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer

possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but has not 'show[n]' – 'that the pleader is entitled to relief." *Id.* at 1950. Furthermore, although complaints need not allege factual details or legal arguments, "litigants may plead themselves out of court by alleging facts that defeat recovery" or by "alleging facts showing there is no viable claim." *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005).

II. Plaintiffs' Complaint Presents No Justiciable Controversy.

Plaintiffs ask this Court to prematurely enjoin and modify the Illinois petition requirements for initiative referendums, before the filing deadline for any such petitions. Further, Plaintiffs do not allege that they were blocked from filing petitions electronically or from obtaining signatures electronically. Thus, Plaintiffs' demand for declaratory and injunctive relief is simply not ripe for adjudication and does not present a justiciable controversy.

It is the "obligat[ion] [of this Court] to consider [its] jurisdiction at any stage of the proceedings," *Wisconsin v. Ho–Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008) (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 883 (7th Cir. 2005)), and "ripeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008); *see also Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 538 (7th Cir. 2006).

Ripeness is predicated on the "central perception ... that courts should not render decisions absent a genuine need to resolve a real dispute," *Lehn v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004) (quoting 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3532.1, at 114 (2d ed.1984)), and "[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Id.* (quoting

Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir.1992)). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) (emphasis added) (quotations omitted); *MedImmune, Inc. v. Genentech, Inc*., 127 S.Ct. 764, 771 (2007).

Further, injunctive and declaratory judgment remedies are discretionary. *Nat'l Health Fed'n v. Weinberger*, 518 F.2d 711, 712 (7th Cir. 1975) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Premature adjudication caused by meddling in abstract disagreements or interfering in agency decision-making should be avoided, as it wastes judicial resources. *Abbott*, 387 U.S. at 148-49. Courts grant such remedies only when the controversy is ripe for judicial resolution. *Alcan Aluminium Ltd. v. Dep't of Revenue of State of Or.*, 724 F.2d 1294, 1299 (7th Cir. 1984) (citing *Abbott*, 387 U.S. at 148).

Here, there is no actual conflict or dispute between the parties, including the County Clerk, as Plaintiffs' rights have not been constrained in any way. Further, Plaintiffs' First Amendment, Equal Protection, and Due Process rights have not been violated because there is no allegation that Defendants, including the County Clerk, have enforced the Illinois petition requirements against Plaintiffs. As it stands, Plaintiffs allege that if the petition requirements as they exist now were to be enforced as written, they would allegedly burden and violate Plaintiffs' constitutional rights. Clearly, this claim is not currently ripe for adjudication.

Further, there is no federal constitutional mandate on a state to permit referendums on its ballot. *See Protect Marriage Illinois, et al. v. Orr, et al.*, 463 F.3d 604, 606 (7th Cir. 2006). In *Protect Marriage*, Plaintiffs claimed the requirements for getting an advisory question on the

Illinois ballot were so onerous that they violated freedom of speech, equal protection, and due process. While *Protect Marriage* dealt with advisory questions and not referendums, the Seventh Circuit's findings are instructive in this case. Specifically, the Court held that the ballot is not a traditional public forum for the expression of ideas and opinions to which reasonable access must be given to people who want to engage in political and other protected expression. *Id.* And the Court recognized that a state has the right to impose requirements and limit the content on the ballot. *Id.* As in *Protect Marriage*, Plaintiffs in the instant case have no federal constitutional right to a referendum and Illinois has the right to regulate and limit referendums. Thus, Plaintiffs' Complaint is ripe for dismissal.

III. Plaintiffs' Complaint Fails to State a Cause of Action Against the County Clerk.

The Complaint against the County Clerk should be dismissed because there is no misconduct or wrongdoing alleged against the County Clerk and the Clerk does not have the authority to effectuate any of the relief sought by Plaintiffs. In fact, Plaintiffs concede that the County Clerk does not certify referendums but rather, only place referendums on the ballot that have been certified by the clerks of suburban municipalities. (Dkt. 1, ¶12). Clearly, by Plaintiffs' own admission, the County Clerk has no role in this referendum process. The County Clerk is not authorized to accept filings of petitions for constitutional amendments. *See* Article XIV, Section 3 of 1970 Illinois Constitution. It is not authorized to accept filings of initiative referendums or to certify such referendums. *See* Illinois Municipal Code, 65 ILCS 5/1 – 1 – 1; Illinois Election Code, 10 LCS 5/28 – 1 et seq. Nor is it empowered to enforce and administer Illinois election laws with respect to the filing of referendums. Plaintiffs have failed to allege any wrongdoing or misconduct by the County Clerk. In addition, the County Clerk cannot offer any of the relief contained in Plaintiffs' Prayer for Relief. The County Clerk does not enforce Illinois petition collection

requirements therefore it cannot be enjoined from enforcing such requirements. If this Court were to order that petitions may be submitted electronically, those petitions would not be submitted to the County Clerk. Finally, the County Clerk does not have the power or authority to move the deadline by which petitions must be filed or to reduce the number of signatures required. Since clearly no misconduct or wrongdoing is alleged against the County Clerk and the Clerk does not have the authority to effectuate any of the relief sought by Plaintiffs, the Complaint against the County Clerk should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims are not ripe and no justiciable controversy exists. Plaintiffs' constitutional rights, to the extent they exist, have not been constrained in any way as the Illinois petition requirements have not yet been enforced. Additionally, Cook County Clerk Karen Yarbrough was named in the Complaint but clearly committed no wrongdoing, is not involved in the petition process, and cannot effectuate the relief Plaintiffs seek. As such, Plaintiffs' Complaint should be dismissed in its entirety.

WHEREFORE Respondent Karen A. Yarbrough, Cook County Clerk, in her official capacity, respectfully requests that this Court dismiss Plaintiffs' Complaint against her, with prejudice, pursuant to FED R. CIV. P. 12 (b)(1) and (b)(6).

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

/s/ *Jessica M. Scheller*
Jessica M. Scheller
Silvia Mercado Masters
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-6934
jessica.scheller@cookcountyil.gov

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 16, 2020, she caused to be filed through the Court's CM/ECF system the foregoing document, a copy of which will be electronically mailed to the parties of record.

s/ Jessica M. Scheller