IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

DAVID LIBRACE, et al. **PLAINTIFFS**

V. **No. 4:16-CV-57-BSM-JTR**

HONORABLE MARK MARTIN
in his Official Capacity as
Secretary of State for the State of Arkansas, et al. **DEFENDANTS**

DEFENDANT HONORABLE MARK MARTIN'S
HEARING BRIEF

Comes Now, Defendant, Honorable Mark Martin, ("Defendant Secretary"), in his official capacity as Arkansas Secretary of State, for his Hearing Brief, and states:. The Court should deny Plaintiffs any of the relief they seek.

Plaintiff is not an attorney, but is *pro se.* He apparently purports to represent the voters of the United States of America, and himself. The Complaint alleges various purported violations of the U.S. Constitution, and specifically the "natural born citizen" requirement for candidates for President of the United States of America, none of which are cognizable against Defendant Secretary, in any of his official capacity. There are numerous other deficiencies in Plaintiff's Complaint, requiring the Court to enter judgment in favor of Defendant Secretary of State in all capacities in which he is sued. Fed. R. Civ. P. 12(b); Fed. R. Civ. P. 12(c).

I. The Court lacks subject matter jurisdiction, as such, dismissal is appropriate pursuant to Fed. R. Civ. P. 12(b)(1).

The Court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). There is no valid case or controversy *involving Defendant Secretary in his various capacities on the facts alleged by Plaintiffs.* Federal judicial power is limited to "cases or controversies" by Article III of the United States Constitution. *Hargis v. Access Capital Funding, LLC,* 674 F.3rd 783, 790 (8th Cir. 2012). Plaintiffs have failed to state a claim upon which relief can be granted, and have not alleged, much less proven any injury *resulting from the actions of Defendant Secretary in his various capacities.* There is no current controversy. Plaintiffs do not have standing to challenge Defendant Secretary's actions *in his official capacity*. Plaintiffs have not alleged any facts to support the requirements for standing. *Constitution Party v. Nelson*, 639 F.3d 417, 420-421 (8th Cir. S.D. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Dismissal of Plaintiffs' Complaint is appropriate. Fed R. Civ. P. 12(b)(1). It is Plaintiffs' exclusive burden to show that they have met the burden of proof on every element of standing; here, they have failed to do so. *Hargis*, *id.*, at 790-91.

II. The Court lacks personal jurisdiction, as such, dismissal is appropriate pursuant to Fed. R. Civ. P. 12(b)(2).

Plaintiffs' allegations do not claim any actual or threatened injury *by this Defendant against Plaintiff.* Plaintiffs' allegations purport to concern Defendant Secretary's *exercise* of his official duties – i.e., certifying two U.S. Senators to the seventy-five County Boards of Election Commissioners in November of 2015 as candidates for President of the United States on the

Republican Party Primary Election ballot. But the facts do not support this theory of liability. The injuries alleged by Plaintiffs are not traceable to the conduct of Defendant Secretary. Plaintiffs make no showing that a favorable decision on the merits against Defendant Secretary will redress the purported injury that Plaintiffs allege. As a result the Court lacks personal jurisdiction over Defendant Secretary in his capacity as Secretary of State. Furthermore, Plaintiff does not allege – in a concrete manner - any failure of Defendant Secretary to perform official duties in a lawful matter. Thus Complaint should be dismissed for lack of standing. Fed. R. Civ. P. 12(b)(2).

Federal judicial power is limited to "cases or controversies" by Article III of the United States Constitution. *Hargis,* id. Plaintiff has failed to state a claim upon which relief can be granted, and have not alleged, much less proven any injury *resulting from the actions of Defendant Secretary.* There is no current controversy. Plaintiff does not have standing to challenge Defendant Secretary's actions. Plaintiff has not alleged any facts to support the requirements for standing against Defendant Secretary in his various capacities. *Constitution Party v. Nelson*, 639 F.3d 417, 420-421 (8th Cir. S.D. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Dismissal of Plaintiff's Complaint is appropriate. Fed R. Civ. P. 12(b)(2).

III. Plaintiffs have failed to state a claim for which they are entitled to relief. Plaintiff's Complaint is also clearly inadequate as a matter of law. As a result of the Complaint's deficiencies and the fact that there are no disputed facts, Defendant Secretary is entitled to dismissal under Fed. R. Civ. P. 12(b)(6), and entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c).

Dismissal for failure to state a congnizable claim under Fed. R. Civ. P. 12(b)(6) and 8(a) is also appropriate. Plaintiff's Complaint fails to make factual allegations that "raise a right to relief above the speculative level" against Defendant Secretary. *Hager v. Arkansas Department of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). A complaint must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Courts must not presume the truth of legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 289 (1986). Complaints based on "labels and conclusions, and a formulaic recitation of the elements of a cause of action" should be dismissed. *Twombly*, 550 U.S. at 555; *Hager*, 735 F.3d at 1013. Absent specific and factual allegations, a complaint that fails to raise a right to relief above a speculative level must be dismissed. *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). Plaintiff's Complaint fails on its face to meet the pleading standard required of all litigants.

IV. Dismissal is also appropriate for Plaintiff's failure to join a necessary party.

Dismissal is also proper under Rule 12(b)(7) for failure to join the seventy-five County Clerks as a parties, as is required by Rule 19 of the Federal Rules of Civil Procedure. Plaintiffs are precluded from obtaining any relief by their failure to include necessary parties, that is,

County Clerks who are responsible for placing names of candidates on their respective ballots. Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 19. The absence of County Clerks prevents the Court from granting complete relief to the existing parties where Defendant Secretary is prohibited by the Arkansas Constitution (separation of powers doctrine) from protecting the interests of County Clerks. *Fort Yates Pub. Sch. Dist. v. Murphy*, 786 F.3d 662, 671 (8th Cir. 2015); Ark. Const. Art. 4, §§ 1 and 2; Ark. Const. Art. 7, § 19; Ark. Const. Am. 41.

V. The Eleventh Amendment shields Defendant Secretary from suit. Consequently, the suit should be dismissed.

The Eleventh Amendment to the U.S. Constitution bars Plaintiff's suit against the Secretary of State in his Official Capacity. There is no dispute. An "unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); see also Amendment XI. Suits against state officials – in their official capacities - are barred by the Eleventh Amendment "when 'the state is the real, substantial party in interest.'" *Pennhurst* at 101 (citations omitted). Official capacity suits are prohibited. U.S. Const. Amendment XI.

Federal courts must examine every claim in a case to see if the Eleventh Amendment bars the court's jurisdiction. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). Claims alleging violations of state law by state officials in their official capacity are claims against the State, and thus protected by the Eleventh Amendment. *Id.*, see also *Printz v. United States*, 521 U.S. 898, 930-931 (1997), *Treleven v. University of Minn.*, 73 F.3d 816, 818 (8th Cir.

1996). Furthermore, state-law claims brought into federal court under pendent jurisdiction do not override the Eleventh Amendment. *Id.*

The state is the "real party in interest when the judgment is sought from the public treasury," or when the judgment would "interfere with public administration, or when the judgment would restrain or compel state action." *U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 939 (8th Cir. 2001). On the face of the instant Complaint, there is no basis in fact, and no basis in law, for Defendant Secretary to remain a party Defendant in this matter.

VI. Qualified Immunity shields Defendant Secretary from suit in his official capacity. Consequently, the suit should be dismissed.

In his official capacity, Defendant Secretary is entitled to qualified immunity for the claims against him. *Sisney v. Reisch,* 674 F.3d 839, 844 (8th Cir. 2012), see also *Curtiss v. Benson*, 583 Fed.Appx. 598 (8th Cir. 2014). Qualified immunity is an immunity from suit, and shields officials from "harassment, distraction, and liability when they act reasonably." *Pearson v. Callahan,* 555 U.S. 223, 231 (2009). Qualified immunity allows for "reasonable but mistaken judgments," and "protects all but the plainly incompetent or those who knowingly violate the law." *Nord v. Walsh Cnty.*, 757 F.3d 734, 739 (8th Cir. 2014) citing *Stanton v. Sims*, 134 S.Ct. 3, 5 (2013) (per curiam). Plaintiff has made no showing – legally or factually – why Defendant Secretary should not be protected by Qualified Immunity.

As shown on the face of the Complaint, Defendant Secretary acted objectively reasonably in following the dictates of Arkansas law when certifying the names of the two U.S.

Senators to the seventy-five County Boards of Election Commissioners. Consequently, Defendant Secretary is entitled to invoke Qualified Immunity for claims made against him, because the allegations all relate to actions Defendant Secretary took as part of his executive and administrative functions as the Chief Election official, Secretary of State, and nothing more. *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

Plaintiffs have not shown that Defendant Secretary violated any *clearly established* federal law, as he must in order to prevail. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Complaint does not state a violation of a federally protected right by Defendant Secretary, i.e., Plaintiffs fail in the first part of the qualified immunity analysis. *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007). Defendant Secretary cannot be held liable for following a valid state statute. Defendant Secretary did not transgress any "bright line" federal law prohibition – and Plaintiff points to none. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992); *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005); *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004).

It is Plaintiffs' burden to show that Defendant Secretary violated clearly established federal law, by citation to a specific statute, and a judicial interpretation identical to, or closely analogous to, the factual allegations made in the Complaint. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see Saucier v. Katz*, 533 U.S. at 201 (must look at qualified immunity "in light of the specific context of the case, not as a broad general proposition"). This Plaintiffs have not done.

Plaintiffs' case should be dismissed for failure to state a claim (FRCP 12(b)(6)). *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004); *Williams v. Ala. State Univ.*, 102 F.3d

1179, 1182 (11th Cir. 1997). Discovery in this case should not occur because Plaintiff has failed to allege a violation of clearly established law by this Defendant. *Harlow v. Fitzgerald*, 457 U.S. at 818. Whether there are disputed issues of material fact is irrelevant: interpreting the *facts* in the light most favorable to Plaintiffs, there is no dispute that Plaintiffs have failed to allege a violation of clearly established law *by this Defendant*; dismissal on qualified immunity grounds is an additional basis to protect Secretary Martin's immunity from suit. *Anderson v. Creighton*, 483 U.S. at 646 n.6; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

VII. Plaintiffs have failed to demonstrate that they or any of them were deprived of any Constitutional or statutory rights. There is no particularized harm caused by Defendant Secretary. Consequently, the suit should be dismissed.

At best, Plaintiff claims to have "rights" that were not clearly established at the time of the alleged deprivation. "A clearly established right is a right sufficiently clear 'that every reasonable official would [understand] that what he is doing violates that right.'" *Solomon v. Petray*, No. 5:10CV05163 LH, 2013 WL 210894, at 4 (W.D. Ark. Jan. 18, 2013) citing *Reichle v. Howards,* 132 S.Ct. 2088, 2093 (2012). Rights allegedly violated must be "defined in a particularized manner, as opposed to broad generalizations" so that a reasonable official would understand them. *Reichle v. Howards,* 132 S.Ct. 2088, 2094, see *Sisney v. Reisch*, 674 F.3d at 845. Plaintiffs have made absolutely no such showing, here.

Plaintiffs have not established that Defendant Secretary acted in accordance with an unconstitutional governmental policy or custom, or used his authority in an unconstitutional

manner. *Nix v. Norman*, 879 F.2d at 433, See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Plaintiffs have not made any showing of the violation of a constitutional or statutory right caused by Defendant Secretary in his official capacity. The Complaint should be dismissed against Defendant Secretary.

VIII. Section 1983 prohibits a lawsuit for purported violations of state law, against state officials where Arkansas law grants its officials sovereign immunity.

Plaintiffs fail to cite to an unambiguously created federal right that they seek to enforce under Section 1983. Absent a citation to federal law, with an enforcement remedy intended by Congress to be the exclusive means of enforcement, Plaintiffs' Complaint must fail. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 120-121 (2005). If Plaintiffs rely upon Arkansas law, they are mistaken. Under Arkansas law, the state cannot be sued except by its own consent, and sovereign immunity is jurisdictional immunity from suit. *Short v. Westwark Community College*, 347 Ark. 497, 504 (2002). A "suit against a public official in his or her official capacity is essentially a suit against that official's agency." *Smith v. Daniel*, 2014 Ark. 519, 6 (2014). Defendant Secretary is immune from suit under Section 1983 for any purported violation of Arkansas law. Ark. Const. Art. 5, § 20; *see* Ark. Code Ann. § 16-106-401. Any allegations of violations of state law involving Defendant Secretary are likewise prohibited by Qualified Immunity, as set forth above.

IX. Plaintiff makes no showing of proximate cause between his alleged harm and any action or inaction by Defendant Secretary. Consequently, the suit should be dismissed.

Plaintiffs have failed to show that Defendant Secretary proximately caused their purported violation of their rights. The purported link between Defendant Secretary's purported conduct (or failures to act) is simply too remote, tenuous, and speculative of a connection to hold Defendant Secretary liable for actions he took solely in his official capacity as Secretary of State. *Martinez v. California*, 444 U.S. 277, 284-85 (1980). Plaintiff makes no showing that Defendant Martin, acting under color of state law, caused the deprivation of any federally protected right actionable by these Plaintiffs under these circumstances. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

X. Plaintiff Librace cannot present this suit as a class action when the requirements for class certification have not been met. Furthermore, as a pro se litigant and a pauper, he cannot represent petitioners in their alleged complaints legally or effectively. Consequently, this suit should be dismissed.

Plaintiff David Librace has filed this complaint as a *pro se litigant in forma pauperis* in hopes of creating a class action lawsuit and manufacturing standing for this lawsuit. Plaintiff fails in this endeavor. Fed. R. Civ. P. 23.

While class actions provide an avenue to likeminded plaintiffs with similar claims to file together, this is not the case in this lawsuit. "Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' " *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) When appropriate class actions save the resources of both the courts and the parties litigating the issues in an economical fashion under Rule 23; there is no

economy here.

For a class to be created, a named Plaintiff must meet all the requirements set forth in Federal Rule of Civil Procedure 23. As of the date of the hearing, Plaintiff Librace does not meet these requirements. Plaintiff Librace has not demonstrated that the class allegedly being harmed is so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiff has not demonstrated that there are questions of law or fact common to the class alleging being harmed. Fed. R. Civ. P. 23(a)(2). Plaintiff has not demonstrated that the claims or defenses of representative parties are typical of the claims and defenses of the class. Fed. R. Civ. P. 23(a)(3) Plaintiff has not demonstrated that David Librace, as the representative party, will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Plaintiff has not retained counsel that would need to be appointed in accordance with Fed. R. Civ. P. 23(g), since Librace has failed to meet every requirement under the rule. Librace, *pro se in forma pauperis* has not done any work in identifying or investigating potential claims in the action Fed. R. Civ. P. 23(g)(1)(A)(i). Librace *pro se in forma pauperis*, is not a licensed attorney with experience in handling class actions, other complex litigation, and types of claims asserted in the action. Fed. R. Civ. P. 23(g)(1)(A)(ii). Librace *pro se in forma pauperis*, lacks the requisite knowledge of the applicable law. Fed. R. Civ. P. 23(g)(1)(A)(iii). Librace *pro se in forma pauperis*, lacks the requisite resources that counsel ought to commit to representing a class in a class action lawsuit. Fed. R. Civ. P. 23(g)(1)(A)(iv).

Plaintiff Librace has failed to meet each and every requirement under Rule 23 of the Federal Rules of Civil Procedure, and consequently, a class cannot be formed. Librace's status as

pro se and as a *pauper* further complicates certification. The Nebraska District Court already ruled on a purported class action by a *pro se* litigant. In *Jonak v. John Hancock Mut. Life Ins. Co.*, 629 F. Supp. 90 (D. Neb. 1985), class certification was denied to a purported class of farmers in a suit brought by *pro se* litigants. The complaint "did not adequately allege the prerequisites to use of the class action required by Rule 23 of the Federal Rules of Civil Procedure," and furthermore, the Court could not find "that the plaintiffs, acting pro se, [could] fairly and adequately protect the interests of the class." *Jonak v. John Hancock Mut. Life Ins. Co.*, 629 F. Supp. 90, 92-93 (D. Neb. 1985) This "class action" is nothing more than another attempt by Plaintiff Librace to manufacture standing, and sue on a claim already fully litigated.

XI. Plaintiffs have abused the pauper process..

Under 28 U.S.C. § 1915(e)(2)(B), a court must dismiss a complaint filed *in forma pauperis* at any time if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. *See Martin-Trigona v. Stewart*, 691 F.2d 856 (8th Cir. 1982). A claim is frivolous if it "describ[es] fantastic or delusional scenarios," the factual contentions are "clearly baseless," or there is no rational basis in law. *Neitzke v. Williams*, 490 U.S. 319, 327-29 (1989). Such a complaint may be dismissed before service of process and without leave to amend. *Christiansen v. Clarke*, 147 F.3d 655, 658 (8th Cir. 1998).

Although pro se complaints are to be liberally construed, "they still must allege sufficient facts to support the claims advanced." *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004). Additionally, district courts are courts of limited jurisdiction, and the plaintiff bears the burden of establishing federal subject matter jurisdiction. *United States v. Afremov*, 611 F.3d 970, 975 (8th Cir. 2010). Under 28 U.S.C. §§ 1331 and 1332, district courts have subject matter jurisdiction over actions involving either questions of federal law or actions between diverse parties. *See* 28 U.S.C. §§ 1331, 1332; see also *Williams v. City of Marston*, Case No. 1:10-CV-00081-LMB, 2012 WL 830408, at *6 (E.D. Mo. March 12, 2012). Title 28 U.S.C. § 1343 also grants district courts jurisdiction over cases involving civil rights violations. *See* 28 U.S.C. § 1343; see also *Harley v. Oliver*, 404 F. Supp. 450, 453 (W.D. Ark. 1975).

If at any time a district court determines subject matter jurisdiction is absent, the only power it has left is to dismiss the case, even if the parties have not raised the jurisdictional defect. *Carlsbad Tech., Inc. v. HIF Bio, Inc.,* 556 U.S. 635, 639 (2009).

To prevent abuse under 28 USCS § 1915, subsection (e)(2) grants District Courts the power to dismiss claims that are deemed *frivolous* or claims for money damages against defendants who are immune from suit. A Complaint is frivolous when the petitioner makes no rational argument in law or facts to support his claim for relief. *Smith-Bey v. Hospital Adm'r*, 841 F.2d 751, 757 (7th Cir. 1988). Defendant Secretary asks for dismissal with prejudice, because the Complaint is "indisputably absent [of] any factual or legal basis for the asserted wrong." *Smith-Bey*, 841 F.2d at 758. Plaintiff's Complaint is full of unsupported and spurious allegations.

XII. Pro se litigants must follow the same rules attorneys must follow as to court filings and

proceedings. Plaintiff Librace has not done so, he does not get a pass this time.

Librace has filed this suit *pro se* and *in forma pauperis*. Pro se litigants are given leeway under two narrow exceptions: for the interpretation of pleadings and for incarcerated litigants. *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013). Courts are "willing to apply the relevant legal principle even when the complaint has failed to name it." *Id. (citing Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003)).

However, Pro se litigants are still required to "allege sufficient facts in their complaints to support a claim." *Id.* at 246 (*see Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 802 (8th Cir. 2006). Pro se litigants must also follow the Federal Rules of Civil Procedure. *Lindstedt v. City of Granby*, 238 F.3d 933, 937 (8th Cir. 2000); *Harmon Autoglass Intellectual Prop., LLC v. Leiferman*, 428 B.R. 850, 854 (B.A.P. 8th Cir. 2010). The Court will not supply additional facts or construct a legal theory for Plaintiff that assumes facts that have not been pleaded. *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004).

Wherefore, and for the foregoing reasons, Defendant Secretary of State Mark Martin, in his official capacity, prays that this Court grant Defendant the relief he seeks herein; that the Court deny Plaintiffs any of the relief they seek; that the Court dismiss the Plaintiffs' Complaint; that the Court deny Plaintiff any reimbursement of attorney fees, costs, or expenses; that the Court deny Plaintiffs any further relief Plaintiffs seek; and that the Court grant Defendant such additional relief to which he may be entitled under the circumstances.

Dated this 29th day of February, 2016.

Respectfully submitted,

HONORABLE MARK MARTIN
SECRETARY OF STATE
In his Personal and Official Capacities,
Defendant

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CERTIFICATE OF SERVICE

I do hereby certify that on the date set forth below, I have served a copy of the foregoing in person, in open court, to all parties of record.

Dated this 29th day of February, 2016.

_____
AJ Kelly