

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION**

**JANET C. BAKER, SUSAN INMAN, and
OLLY NEAL**

PLAINTIFFS

V.

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas**

DEFENDANT

**BRIEF IN SUPPORT OF PLAINTIFF’S RESPONSE IN OPPOSITION
TO DEFENDANT’S MOTION TO DISMISS**

INTRODUCTION

Arkansas is on the front lines of the battle with the COVID-19 pandemic. Scientific models show the pandemic will only get worse in Arkansas this Fall. The 2020 elections are fast approaching, and time is running out to prepare sufficiently for how people will vote safely during the pandemic. When the pandemic had just started this Spring—and conditions were far better in Arkansas—Governor Asa Hutchinson issued executive orders allowing for no-excuse absentee ballot voting during special elections held in May. *See* Complaint, ¶¶ 13-15. Governor Hutchinson specifically suspended provisions of Arkansas Code Annotated § 7-5-402 that require electors to be “unavoidably absent or unable to attend an election due to illness or physical disability.” *Id.* The Executive Orders allowed “all eligible qualified electors currently entitled to vote in the . . . election [to] request the appropriate absentee ballots from their county of residence.” *Id.* Apparently, the Governor believed that he needed to suspend existing law to allow for people to vote absentee because of COVID-19. Now, the pandemic is far worse in

Arkansas, and while state officials suggest COVID-19 may be a valid excuse for voting absentee under the current law, no state official has provided certainty on this issue to Arkansas voters.

Plaintiffs filed this action seeking a declaration of their rights to vote, which are affected by a question of construction under Ark. Code Ann. § 7-5-401, *et seq.* Defendant suggests this action is moot, but does not argue that point in his Motion to Dismiss beyond stating that “[i]t appears” that the action is moot because of the Defendant’s “statement on social media relating to absentee voting.” Defendant’s Brief in Support of Motion to Dismiss, p. 2. If in fact Defendant is stating that fear of COVID-19 is a valid excuse to be “unavoidably absent” and thus vote by absentee ballot under Ark. Code Ann. § 7-5-401, *et seq.*, then Defendant is admitting that claim in Plaintiff’s complaint, and Plaintiff is entitled partial judgment on the pleadings on that claim, and this action should continue on Plaintiffs’ additional claims.

Plaintiffs also seek declaratory judgment that, under Arkansas law as interpreted by the Arkansas Supreme Court, qualified electors may receive and vote by absentee ballot for any reason at all – in the 2020 election and subsequent elections. In addition to being fearful of COVID-19, Plaintiff Susan Inman wants to vote absentee and believes she will be unavoidably absent during the 2020 election and in future elections because she would like more time to deliberate on the candidates and issues on the ballot. For Plaintiff Olly Neal, although he is fearful of COVID-19 and would prefer to vote at home, he would risk his health and potentially his life to vote in person for the 2020 elections if he is not provided certainty that he can vote absentee. For these reasons, Plaintiffs seek a declaration of their fundamental right to vote and how that right is affected by a question of construction under Ark. Code Ann. § 7-5-401, *et seq.*

Defendant’s motion to dismiss lacks merit. Plaintiffs properly filed this action against Defendant, the Secretary of State, in accordance with *Martin v. Kohls*, 2014 Ark. 427, which

held that a plaintiff need not join all 75 county clerks to an action such as this. The Secretary of State is the elected official with the ultimate responsibility for all election laws and procedures in Arkansas. The State Board of Election Commissioners consists of a seven member board with the Secretary of State serving as Chairperson. The duties of the Board of Election Commissioners are limited to education, training and the investigation of election misconduct. It has no authority over absentee voting. Plaintiffs' requests for relief in their complaint are also proper under the law because Plaintiffs seek only injunctive and declaratory relief. Plaintiffs do not seek to increase the state's financial obligations, but rather to act in accordance with the law and to ensure that every registered Arkansas voter has the opportunity to vote safely in the November election. For these reasons, and for the reasons stated in their complaint and below, Plaintiffs request the Court deny Defendant's motion to dismiss.

BACKGROUND

Plaintiffs filed this action on June 23, 2020, seeking a preliminary and permanent injunction, and declaratory judgment relief against Defendant John Thurston in his official capacity as the Secretary of State of Arkansas and Chair of the State Board of Election Commissioners. Plaintiffs seek declaratory judgment on three issues: (1) that current Arkansas law allows fear of COVID-19 as a valid excuse for being "unavoidably absent" for the purposes of voting by absentee ballot; (2) that current Arkansas law allows voters to use any and all reasons or excuses whatsoever for the purpose of being "unavoidably absent" and voting by absentee ballot; and (3) alternatively, that if the Arkansas Code does not allow any excuse to suffice for voting absentee, then the law is an unconstitutional infringement of Plaintiffs' rights to vote under article three, section two the Arkansas Constitution.

Plaintiffs in this action are registered voters in Arkansas and include: (1) Janet C.

Baker, who stated that, because of an autoimmune disorder and fear of contracting COVID-19, she would like to vote absentee and would not vote in person if she could not vote by absentee ballot; (2) Susan Inman, who stated that she is healthy, she does not want to risk getting COVID-19 by voting in person in 2020, and that she wants to vote absentee in 2020 and subsequent elections because she wants to stay at home and have more time to consider the candidates and issues on the ballot; and (3) Olly Neal, who stated that he has autoimmune disorders, that he would prefer to vote absentee to avoid contracting COVID-19, but that if he could not vote via absentee ballot, he would still vote in person.

After Plaintiffs filed this action, Defendant Thurston issued a statement on June 25, 2020, apparently – but not clearly – stating that registered voters may vote absentee because of COVID-19. Thurston stated: “It is my opinion and belief, that our current laws are sufficient to allow the registered voters of Arkansas the choice of going to their local polling location or requesting an absentee ballot from their local County Clerk.”¹ Thurston also stated that “[his] office continues to work with county officials to prepare polling locations” and is “anticipating and preparing for an increase in Absentee Ballot requests due to the COVID-19 virus.”²

Doyle Webb and Representative Doug House filed their Motion for Intervention on June 29, 2020. On July 2, 2020, Governor Asa Hutchinson, a Republican, and Defendant Thurston, also a Republican, both indicated that they believed current laws allow the ability to vote with an absentee ballot due to the pandemic.³ Neither Defendant Thurston nor Governor Hutchinson have taken any official action beyond their statements to affirm that registered voters in Arkansas

¹ <https://www.fox16.com/news/local-news/statement-from-arkansas-secretary-of-state-john-thurston-in-absentee-ballots-in-november-because-of-covid-19/>

² *Id.*

³ <https://www.thv11.com/article/news/health/coronavirus/absentee-ballot-voting-arkansas-coronavirus/91-6c512d44-80f8-45d2-9bfa-d516e84977b6>

may use fear of COVID-19, or any other excuse, as a valid excuse for being unavoidably absent and voting by absentee ballot. Defendant Thurston and Governor Hutchinson’s statements did not address the other claims in Plaintiffs’ complaint. Notably, Doyle Webb appeared at the same press conference as Defendant Thurston and Governor Hutchinson on July 2, 2020, and was reported as saying “he supports the governor’s announcement and encouraged voters to request absentee ballots if they fear going to the polls.”⁴ Also, on July 2, 2020, Defendant Thurston, through his counsel, the Office of the Attorney General, filed his motion to dismiss.

STANDARD OF REVIEW

Arkansas Rule of Civil Procedure 8(a) states: “A pleading which sets forth a claim for relief . . . shall contain [] a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim . . . and that the pleader is entitled to relief.” Moreover, “all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed.” *Baptist Health v. Murphy*, 2010 Ark. 358, 373 S.W.3d 269; *see also* Ark. R. Civ. P. 8(f) (“All pleadings shall be liberally construed so as to do substantial justice.”). In reviewing the complaint under this fact-pleading standard, the Court treats the facts alleged in the complaint as true and views them in the light most favorable to Plaintiffs. *Richardson v. Madden*, 2012 Ark. App. 120, at *3. The complaint should be drafted “to give a party fair notice of the claims and the grounds upon which it is based.” *Id.*

ARGUMENT

I. Plaintiffs Filed this Action Against the Proper Party Under Arkansas Law

In *Martin v. Kohls*, 2014 Ark. 427, the Arkansas Supreme Court held that plaintiffs in a declaratory judgment action regarding voting and election laws were not required to join the county election commissioners or county clerks. 2014 Ark. 427, 444 S.W.3d at 849. The

⁴ <https://www.arkansasonline.com/news/2020/jul/03/virus-ok-as-excuse-for-voting-absentee/?news-arkansas>

Supreme Court stated that plaintiffs in *Martin v. Kohls* properly filed their action against the Secretary of State Mark Martin and, in that case, the State Board of Election Commissioners. *Id.* The Court stated that the Secretary of State and the State Board of Election Commissioners had positions of authority to train and direct the county clerks and the county election commissioners across the state. *Id.* at 850. The State Board of Election Commissioners has not authority over absentee voting in Arkansas. The duties of the Board of Election Commissioners are limited to education, training and the investigation of election misconduct. Ark. Code Ann. § 7-4-101.

Here, Plaintiffs filed this action against Secretary of State John Thurston in his official capacity, and plaintiffs' complaint properly alleges and identifies John Thurston in his official capacity as the Chair of the Arkansas State Board of Election Commissioners. Complaint, ¶ 27; see also Ark. Code Ann. § 7-4-101(b). In his official capacity as the Secretary of State, John Thurston is also the Chief Election Officer of the state of Arkansas, and he has, under such authority, used his position to direct, train, and work with local election officials to prepare for in-person voting and absentee voting during the pandemic. His office is ultimately responsible for the conduct and certification of all elections. Secretary of Thurston has admitted that he is working with county officials to navigate and prepare for the issues of absentee voting this election. In his statement on June 25, Defendant Thurston stated: "While my office continues to work with county officials to prepare polling locations, we are also anticipating and preparing for an increase in Absentee Ballot requests due to the COVID-19 virus."⁵

Moreover, in his official capacity as Secretary of State, the Chief Election Officer of Arkansas, and the Chair of the State Board of Election Commissioners, Defendant Thurston has distributed publicly his interpretation of Arkansas law on qualified electors' abilities to vote

⁵ Statement from Arkansas Secretary of State John Thurston, Ark. Sec. of State, (June 25, 2020) available at <https://content.govdelivery.com/accounts/ARSOS/bulletins/292b06c>

absentee, presumably informing the public so they know how they may vote in the upcoming election. It violates any sense of reasonableness, equity, and the spirit of the law for Defendant Thurston to take this mantle of election guidance and official action for the public yet claim to this Court that he is not the proper Defendant. Also, in his July 2, 2020, press conference Governor Hutchinson emphasized Defendant Thurston's interpretation of Arkansas Code Annotated, § 7-5-401, *et seq.*, holding out to the public the official nature and apparent implications of such interpretation.⁶ Defendant Thurston also appeared at this press conference in his official capacity and gave guidance and advice to the public on how to apply for an absentee ballot and vote absentee, including the ability of the public to get an absentee ballot application from the Secretary of State's office.⁷ The Defendant asks that The Court dismiss this matter because the Secretary of State has stated publically that COVID-19 is a legitimate excuse. If the Defendant as he contends, has the power to render this case moot by a public statement then how can he argue that he is not the proper Defendant?

Plaintiffs properly filed this action against the Secretary of State John Thurston who is, in his official capacity, the Chief Election Officer of Arkansas and the Chair of the State Board of Election Commissioners. He is the proper defendant. The Court should deny Defendant's motion to dismiss on this issue.

II. Plaintiffs' Requested Relief Is Not Barred by Sovereign Immunity

The Supreme Court of Arkansas has consistently held that injunctive relief is available in declaratory-judgment actions. *See Martin v. Haas*, 556 S.W.3d 509, 514 (Ark. 2018). When an action asserts that state law violates qualified voters' constitutional right to vote and seeks

⁶ Governor Asa Hutchinson, "LIVE: Governor Hutchinson Provides COVID-19 Update," at minute mark 1:08 – 2:10, (July 2, 2020), <https://www.youtube.com/watch?v=WLAgapRYFo>

⁷ *Id.* at 5:45.

declaratory and injunctive relief, not money damages, it “is not subject to the asserted sovereign-immunity defense.” *Id.* at 515. The defense of sovereign immunity is inapplicable in a lawsuit seeking only declaratory or injunctive relief. *Id.*

In *Martin v. Haas*, qualified voters sought declaratory judgment relief, requesting a declaration of their fundamental right to vote in light of state statutes regarding voter identification that affected that right. *Id.* The Court held that such an action was proper and that the sovereign immunity defense did not apply.

This case is consistent with *Martin v. Haas*. Plaintiffs seek declaratory judgment relief, requesting a declaration of their fundamental right to vote in light of Arkansas Code Annotated section 7-5-401, *et seq.* and the Arkansas constitution. For this reason, Defendant’s asserted defense of sovereign immunity and their motion for dismiss should be denied.

Defendant argues that some relief sought by Plaintiffs would increase the state’s financial obligations. In the cases cited by Defendant, the relief sought would have required the state to expend resources to the plaintiffs that the state was not already obligated to expend. For example, in *Banks v. Jones*, the plaintiff sought reinstatement to a job and thus the financial benefits of that job, and the Supreme Court ruled sovereign immunity barred such a claim. Unlike in *Banks v. Jones*, plaintiffs here do not request monetary relief; rather, plaintiffs request injunctive relief to declare their constitutional rights under state statute and ensure their fundamental right to vote during the pandemic and in future elections via absentee ballot.

Further, Plaintiffs’ separate requests for relief regarding the Defendant providing pre-paid postage of absentee ballots to and from voters who apply to vote absentee does not ask the Court to increase the state’s obligations; rather, these requests ask the Court to prevent the state from unconstitutionally imposing a poll-tax on voters who exercise their fundamental right to vote

when they vote by absentee ballot—especially, but not limited to, during the pandemic in the 2020 election. Defendant has received funding from the CARES Act. Plaintiffs are not asking the state to increase its obligations, but instead are requesting the state to use this existing funding to prevent an unconstitutional poll-tax on Arkansas voters in the form of paying postage on absentee ballots.

Accordingly, Defendant’s sovereign-immunity defense does not apply, and the Court should deny Defendant’s motion to dismiss.

CONCLUSION

Plaintiffs have brought this action against the proper party, and the sovereign-immunity defense does not apply to this case. Therefore, Defendant Thurston’s motion to dismiss should be denied with prejudice.

Respectfully submitted,

David A. Couch
1501 N. University Ave., Suite 228
Little Rock, AR 72207

By: /s/ David A. Couch
David Couch, Bar No. 8533

CapRock Law Firm, PLLC
407 President Clinton Ave., Suite 201
Little Rock, AR 72201
(501) 940-8510
preston@caprocklaw.com

By: /s/ Preston Tull Eldridge
Preston Tull Eldridge, Bar No. 2014231

Counsel for Plaintiffs