

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

BONNIE HEATHER MILLER, ROBERT
WILLIAM ALLEN, ADELLA DOZIER
GRAY, and ARKANSAS VOTERS FIRST,

Plaintiffs,

v.

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

Defendant.

Case No. 5:20-cv-05070-pkh

Hon. Paul K. Holmes, III

**PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS**

INTRODUCTION

Arkansans have a fundamental right guaranteed by their Constitution to adopt constitutional amendments through ballot initiatives. Plaintiffs have a fundamental right guaranteed by the First and Fourteenth Amendments of the U.S. Constitution to advocate for such initiatives. On May 25, 2020, this Court granted, in part, Plaintiffs' motion for preliminary injunction. In the current COVID-19 pandemic, this Court has found that Plaintiffs have standing and Arkansas law is unduly burdening Plaintiffs' rights. Thus, Plaintiffs have stated a valid claim upon which relief can be granted and respectfully urge the Court to deny Defendant's Motion to Dismiss.

BACKGROUND

On April 20, 2020, Plaintiffs Bonnie Miller, Robert Allen, Adella Gray, and Arkansas Voters First ("AVF") filed a complaint against Defendant Secretary of State John Thurston

alleging that Arkansas's continued enforcement of its signature gathering laws governing citizen initiated ballot initiatives—including requiring “wet” signatures, in-person witnesses, and notarization of petitions—during the COVID-19 pandemic interfered with Plaintiffs' ability to circulate and sign AVF's petition, which constitute “core political speech” and expression for which First Amendment's protections are “at its zenith.” Comp., ECF No. 2; *see also Meyer v. Grant*, 486 U.S. 414, 422 (1988). Two days later, on April 22, 2020, Plaintiffs filed a motion seeking a preliminary injunction to enjoin enforcement of the provisions of the law that burden their First Amendment rights. Pls. Mot. Preliminary Injunction, ECF No. 5.

Defendant Thurston filed a motion in opposition to Plaintiffs' motion for a preliminary injunction on May 4, 2020, alleging, among other things, that Plaintiffs requested relief should be denied because Plaintiffs' lacked standing and because Plaintiffs' invoked the wrong legal standard. Def. Br. Opp. Preliminary Injunction., ECF No. 31. On May 12, 2020, Defendant Thurston filed a motion to dismiss, realleging many of the same claims raised in Defendant's Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction. Defendant alleged: (1) that Plaintiffs' lack standing because their injury is not fairly traceable to Defendant Thurston and is self-inflicted, and (2) that Plaintiffs incorrectly invoked the *Anderson-Burdick* standard rather than rational basis review. Def. Mot. Dismiss Br., ECF No. 36.

This Court conducted a hearing over video conference on the issue of preliminary relief on May 19, 2020. On May 25, 2020, this Court granted in part Plaintiffs' Motion for a Preliminary Injunction, finding that Plaintiffs' had sufficiently pleaded the facts necessary to demonstrate standing and were likely to succeed on the merits of parts of their claim. Op. at 4-5, ECF No. 41.

STANDARD OF REVIEW

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint need only “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted). While the complaint must allege “more than a sheer possibility that a defendant has acted unlawfully,” it need not set out “detailed and factual allegations.” *Id.* Rather, the pleadings simply must “allow [the] court to draw the reasonable inference that the plaintiff is entitled to relief.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (internal quotation marks omitted); *see also Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010). In the course of this evaluation, “inferences are to be drawn in favor of the non-moving party.” *Id.*

ARGUMENT

I. Plaintiffs Have Standing to Bring Their Claims

In order to meet the requirements for standing, Plaintiffs must demonstrate they have suffered an injury-in-fact that is (1) concrete and particularized; (2) fairly traceable to Defendant’s challenged conduct; and (3) able to be redressed by a favorable judgment. *In re SuperValu, Inc.*, 870 F.3d 763, 768 (8th Cir. 2017) (relying on *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)). Because this inquiry occurs in the context of a motion to dismiss, it is sufficient for Plaintiffs to rest on general factual allegations, because “on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.” *Wieland v. U.S. Dep’t of Health & Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (quoting *Lujan*, 504 U.S. at 561).

In its Opinion and Order on Plaintiffs’ Motion for a Preliminary Injunction, this Court found that Plaintiffs have alleged sufficient facts to meet this standard. Op. at 4-5, ECF No. 41 (noting that “Plaintiffs have alleged a concrete, particularized, and imminent injury in fact...at the

pleading stage of a lawsuit, this is certainly enough.”). Plaintiffs therefore respectfully request that the Court deny Defendant’s Motion to Dismiss based on Plaintiffs’ lack of standing, consistent with the Court’s Opinion and Order.

II. Plaintiffs Have Stated a Valid Claim Under the First Amendment

Plaintiffs’ claims should be assessed under the *Anderson-Burdick* framework to determine what level of scrutiny to apply. Under *Anderson-Burdick*, the Court must first weigh “‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Ignoring binding, contrary precedent, Defendant argues that the Court should apply rational basis review. Def. Mot. Dismiss Br., ECF No. 36. Defendant raised this same argument in his filings opposing Plaintiffs’ request for preliminary relief. Def. Br. Opp. Preliminary Injunction., ECF No. 31. In its Opinion and Order granting in part Plaintiffs’ Motion for a Preliminary injunction, however, this Court rejected Defendant’s argument and recognized that the *Anderson-Burdick* framework applied to Plaintiffs’ claims. Op. at 6, ECF No. 41. The Court also found that Plaintiffs were likely to succeed on the merits of their challenge to Arkansas’s witness and notarization requirements, *id.* at 15 (“With respect to having a petitioner sign a petition in the presence of a canvasser, and having a canvasser swear or declare under penalty of perjury to the Secretary of State that the signature was made in his or her presence, the State’s interest in preventing fraud is [] protected in less burdensome fashion by other State law”).

Given this Court's determination that Plaintiffs have sufficiently demonstrated that they are likely to succeed on their merits on at least some part of their claim, there is no doubt that they have stated a valid claim upon which relief can be granted.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request Defendant's Motion to Dismiss be denied.

Dated May 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher Lamar, certify that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the NexGen system which shall send notice to all counsel of record.

/s/ Christopher Lamar
Christopher Lamar

Counsel for Plaintiffs