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

GET LOUD ARKANSAS, et al., Plaintiffs, *v.* JOHN THURSTON, et al., Defendants.	Civil Action Case No. 5:24-cv-05121-TLB

CONSOLIDATED OPPOSITION BRIEF TO THE MOTIONS TO DISMISS OF THE BENTON COUNTY CLERK AND PULASKI COUNTY CLERK

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INTRODUCTION

In April 2024, the Arkansas State Board of Election Commissioners ("SBEC") adopted an emergency rule requiring that mail voter registration applications be signed with a handwritten or "wet" signature. The rule requires county clerks—the officials responsible for enforcing voter registration requirements in Arkansas—to reject mail voter registration applications made with an electronic signature. All 75 of Arkansas's county clerks are required to enforce this rule and reject voter registration applications that lack a wet signature.

Plaintiffs Get Loud Arkansas ("GLA"), Vote.org ("VDO"), Nikki Pastor, and Blake Loper brought this lawsuit against the individual members of the SBEC, as well as the county clerks of Benton, Pulaski, and Washington Counties—Arkansas's three largest counties. The complaint alleges that enforcement of the wet signature rule violates the materiality provision of the Civil Rights Act of 1964 because the "wetness" of a signature is immaterial to determining whether a person is qualified to vote under Arkansas law. *See* Compl. ¶¶ 85–91. As relevant here, enforcement of the rule prevents GLA and VDO from using online tools they developed to help Arkansans register to vote. Plaintiffs seek prospective relief against such enforcement.

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Two defendants—the SBEC and the Washington County Clerk—have chosen to answer the complaint. *See* ECF Nos. 37, 44. However, the two remaining defendants—Benton County Clerk Betsy Harrell and Pulaski County Clerk Terri Hollingsworth—have moved to dismiss themselves from the case. *See* ECF Nos. 39, 40 (Harrell); ECF No. 41 (Hollingsworth). They do not seek to dismiss the complaint as a whole, nor do they suggest that Plaintiffs have not plausibly alleged the elements of a materiality provision claim. Instead, they argue that they are not proper defendants because the complaint does not allege that any resident of their counties has been prevented from registering to vote because of the wet signature rule. But that argument ignores settled precedent: In cases seeking prospective relief, the "proper defendants are the officials

whose role it is to administer and enforce the [rule].” *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011). As county clerks, Harrell and Hollingsworth are tasked by the Arkansas Constitution with enforcing the wet signature rule and such enforcement impedes GLA’s and VDO’s voter registration activities within Benton and Pulaski Counties. Harrell and Hollingsworth are therefore proper defendants in this case and their motions to dismiss should be denied.

BACKGROUND

I. Amendment 51 designates county clerks—including Harrell and Hollingsworth—as the officials responsible for administering voter registration in Arkansas.

The voter registration process in Arkansas is governed by Amendment 51 to the Arkansas Constitution. *See Martin v. Kohls*, 444 S.W.3d 844, 850 (Ark. 2014). Amendment 51 designates each county clerk as the “Permanent Registrar” of the county, Ark. Const. amend. 51, § 2(b), and makes them responsible for supervising voter registration in that county. Among other duties, the permanent registrar “shall register qualified applicants” if a voter registration application is “legible and complete.” *Id.* § 9(c)(1); *see also id.* § 9(c)(3)(A). Determining whether an application is “complete” requires the permanent registrar to assess whether the application includes the necessary “signature or mark made under penalty of perjury” affirming “that the applicant meets each requirement for voter registration” in Arkansas. *Id.* § 6(a)(3)(F). “If information required by the permanent registrar”—such as the signature or mark— “is missing from the voter registration application, the permanent registrar shall contact the applicant to obtain the missing information.” *Id.* § 9(d). And “[i]f the applicant lacks one (1) or more of the qualifications required by law of voters in this state, the permanent registrar shall not register the applicant.” *Id.* § 9(f). Simply put, in Arkansas, “a person is not registered until the county clerk receives and acknowledges his or her voter registration application.” *Mays v. Cole*, 289 S.W.3d 1, 5 (Ark. 2008); *see also Roberts v.*

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Priest, 975 S.W.2d 850, 855 (Ark. 1998) (explaining a person is not a "legal voter" in Arkansas under Amendment 51 until their application is accepted by the permanent registrar).

II. The SBEC's wet signature rule requires county clerks—including Harrell and Hollingsworth—to reject mail voter registration applications with electronic signatures.

While permanent registrars are tasked with enforcing voter registration rules in Arkansas, the constitution grants SBEC the authority to make rules and regulations "to secure uniform and efficient procedures in the administration of" Arkansas's voter registration laws "throughout the State." Ark. Const. amend. 51, § 5(e)(1); *see also Faubus v. Fields*, 388 S.W.2d 558, 559 (Ark. 1965) ("The Amendment empowers the State Board of Election Commissioners to adopt rules and regulations, consistent with the Amendment, for the administration of the registration system.").

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In late April 2024, the SBEC exercised this authority to adopt an emergency rule prohibiting county clerks from accepting voter registration applications lacking a wet signature. *See* Compl. ¶¶ 56–61. The wet signature rule redefines the term "Signature or Mark" in Amendment 51 to mean "a handwritten wet signature or handwritten wet mark made . . . with a pen or other writing device that is physically moved across the form and that forms the applicant's signature or mark on the paper form." Compl. ¶ 58. The rule further defines the "[r]equirements" to "accept [r]egistration [a]pplication [f]orms," (*i.e.*, a mail voter registration form).[1] Under the rule, a permanent registrar may only accept a mail voter registration form that is "executed with a Signature or Mark" as defined in the wet signature rule. Compl. ¶ 60. And the SBEC may

[1] "Rule Regarding Voter Registration," Arkansas State Board of Election Commissioners (effective May 4, 2024), available at static.ark.org/eeuploads/elections/Final_Rule_Regarding_Voter_Registration_Final_1.pdf. While "the court generally must ignore materials outside the pleadings, [] it may consider some materials that are part of the public record." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (cleaned up). Formal state agency materials are such public records. *E.g.*, *Thomas v. Polk Cnty., Minnesota*, No. 15-CV-4479 (DWF/SER), 2016 WL 861328, at *2 n.5 (D. Minn. Jan. 12, 2016) (collecting authority).

investigate and sanction county clerks who fail to adhere to its rules. Ark. Code §§ 7-1-109, 7-4-101(f)(9), 7-4-120. County clerks—including Harrell and Hollingsworth—therefore must enforce the wet signature rule.

III. Enforcement of the wet signature rule harms GLA and VDO.

Founded in 2021, GLA works to promote civic engagement in Arkansas. Compl. ¶ 11. After pursuing a voter registration strategy based on distribution of paper applications, GLA quickly realized the limitations of this approach and committed significant resources to developing an online tool that allowed Arkansans to complete and sign a voter registration application on their phone, tablet, or computer. *Id.* ¶ 12. GLA launched this online tool in January 2024, and immediately found success helping hundreds of Arkansans register to vote. *Id.* ¶¶ 12, 38–41. Similarly, VDO is a nationwide organization that also develops online voter registration tools that it offers to voters in states across the country. *Id.* ¶ 15. One of the most effective features of its online tools is the e-sign function, which allows applicants to upload an image of their handwritten signature into VDO's web application and have their completed voter registration application sent to the appropriate officials. *Id.* ¶ 17. Both organizations wish to offer their tools to voters in Arkansas, including in Benton and Pulaski Counties—the two largest counties in the state. *Id.* ¶¶ 11–14, 16–17.[2]

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[2] According to data from the U.S. Census Bureau's 2020 census, Benton and Pulaski Counties are the two most populous counties in Arkansas, and Pulaski County is Arkansas's most racially and ethnically diverse, with a diversity index of 62.8 percent, while Benton County has a diversity index of 50.7 percent. *Arkansas Population Topped 3 Million in 2020*, U.S. Census Bureau (Aug. 25, 2021), available at https://www.census.gov/library/stories/state-by-state/arkansas-population-change-between-census-decade.html. Benton County has the second highest share of residents under the age of 18 in the state. *Id.* And "[a]lthough a Rule 12(b)(6) analysis is typically confined to the four corners of the complaint, the Court may also consider matters within the public record." *Harris v. City of Bradley, Arkansas*, No. 4:19-CV-4145, 2020 WL 733890, at *2 n.1 (W.D. Ark. Feb. 13, 2020) (taking judicial notice of 2010 Census Bureau data and citing *Porous Media Corp.*, 186 F.3d at 1079).

Enforcement of the wet signature rule—including in Pulaski and Benton Counties—severely harms the efforts of both GLA and VDO to register voters in Arkansas. *Id.* ¶¶ 73, 82. For example, after taking its tool offline for several weeks, GLA was forced to redesign the tool to account for the prohibition on the use of electronic signatures, rendering it far less effective. *Id.* ¶¶ 75–77. And because it may not rely on the tool to achieve its voter registration goals, GLA has also been forced to divert its limited staff and financial resources towards less efficient means of registering voters, at the expense of its other programming, including its get-out-the-vote campaign and efforts to assist individuals who may have been incorrectly purged from the voter rolls. Compl. ¶¶ 78–81. Similarly, enforcement of the wet signature rule has impaired VDO's efforts, prohibiting it from offering the e-sign function—one of its most effective features used in its tools offered in other states, *id.* ¶ 17—to applicants in Arkansas. *Id.* ¶ 82. Consequently, Pulaski and Benton Counties' enforcement of the wet signature rule impedes VDO's voter registration activities and impairs its ability to accomplish its mission by forcing it to rely on less effective means of assisting voters to register. *Id.* ¶¶ 83–84.

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LEGAL STANDARD

"Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *McDonough v. Anoka Cnty.*, 799 F.3d 931, 945 (8th Cir. 2015) (quoting Fed R. Civ. P. 8(a)(2)). "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "When evaluating a motion to dismiss, [courts] accept as true all factual allegations in the

complaint and draw all reasonable inferences in favor of the nonmoving party." *Id.* (citing *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850 (8th Cir. 2012) (per curiam)).

To survive a motion to dismiss for lack of standing under Rule 12(b)(1), plaintiffs "must allege sufficient facts to support a reasonable inference that they can satisfy the elements of standing." *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021) (citation omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). A complaint thus need only provide factual allegations establishing "(1) that the plaintiff suffered an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury." *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 997 (8th Cir. 2022) (citing *Lujan*, 504 U.S. at 560-61), *cert. denied sub nom. The Sch. of the Ozarks, Inc. v. Biden*, 143 S. Ct. 2638 (2023).

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ARGUMENT

I. Plaintiffs have standing to sue Harrell and Hollingsworth because they enforce the wet signature rule, harming GLA and VDO.

Harrell and Hollingsworth, in their official capacities as the clerks of the two largest counties in Arkansas—Benton and Pulaski Counties—are proper defendants in this action because they are responsible for enforcing the wet signature rule. Compl. ¶¶ 57–60; *see also* Ark. Const. amend. 51, §§ 2(b), 9(f). Neither clerk contests that Arkansas law tasks them with this duty, nor do they dispute that Plaintiffs GLA's and VDO's online tools help voters in Benton and Pulaski Counties sign their application forms digitally, or that the tools are functionless as long as county clerks in Arkansas are required to enforce the wet signature rule. The clerks neglect these

undisputed facts in challenging Plaintiffs' standing and make no attempt in their briefs to address GLA's and VDO's ongoing injuries. Because GLA and VDO have established all elements of standing, Compl. ¶¶ 73–84, the Court should deny the motions to dismiss.

A. GLA and VDO have plausibly alleged ongoing injuries within Benton and Pulaski Counties.

Harrell and Hollingsworth do not deny that Plaintiffs have suffered injury, and for good reason. Because of the wet signature rule, GLA can no longer offer Arkansans—including residents of Benton and Pulaski Counties—an online tool with the option to complete and sign a voter registration application. *Id.* ¶¶ 73–77. Likewise, VDO cannot activate its e-sign function for its online tool for Arkansans in Benton or Pulaski Counties either. *Id.* ¶ 82. As a result, these organizations will not be able to register as many voters in Arkansas as they otherwise would have with their online tools. *Id.* ¶¶ 77, 82. The wet signature rule thus "directly affect[s] and interfere[s] with [their] core . . . activities," *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024), and forces GLA and VDO to divert resources from other critical programs to support more resource intensive and less efficient means of assisting voters to register using paper applications. Compl. ¶¶ 78–81. That alone satisfies the injury-in-fact requirement—after all, "[g]overnment regulations that . . . forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements." *All. for Hippocratic Med.*, 602 U.S. at 382.[3]

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[3] Moreover, "[w]hen a statute is challenged by a party who is a target or object of the statute's prohibitions, 'there is ordinarily little question that the [statute] has caused him injury.'" *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n,* 113 F.3d 129, 131 (8th Cir. 1997)). And, here, the wet signature rule was specifically adopted to ban the sorts of tools that GLA and VDO wish to offer, injuring both organizations. *See* Compl. ¶¶ 42–61.

B. Plaintiffs' ongoing injuries are caused in part by Harrell and Hollingsworth and would be redressed by an injunction against them.

The clerks insist that they are not proper defendants because they did not reject any of the Plaintiffs' voter registration applications, focusing solely on the individual Plaintiffs and ignoring the other ongoing and future injuries that are directly traceable to each Defendant. As explained above, neither clerk disputes that they are tasked with enforcing the wet signature rule, that the rule has rendered critical aspects of GLA's and VDO's online tools functionless, or that an injunction preventing the rule's enforcement would allow GLA and VDO to use the digital signature functions of their online tools in the two most populous counties in Arkansas: Benton and Pulaski Counties. *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 784–85 (W.D. Ark. 2021) ("If an injunction against the county [clerks] would provide at least partial redress to the alleged injury, it stands to reason that they are appropriate defendants for such a suit.") Plaintiffs' factual allegations—and Arkansas law itself—plainly connects the county clerks to the injuries caused by the wet signature rule and the relief that an injunction will bring.

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But the clerks do not grapple with any of these allegations even as they advance theories contrary to settled law. It is irrelevant, for instance, that the clerks have not explicitly announced that they will comply with the wet signature rule, ECF No. 41 at 5–6, because Arkansas law requires them to do so, Ark. Const. amend. 51, § 9(f). So, too, does the text of the wet signature rule itself.[4] And when Plaintiffs seek prospective injunctive relief—as they do here—the "proper defendants are the officials whose role it is to administer and enforce the [rule]." *281 Care Comm.*, 638 F.3d at 631 (finding "county attorneys" were proper defendants because they were "the parties primarily responsible for enforcing" the challenged statute); *see also Bio Gen, LLC v. Sanders*,

[4] *Supra* note 1.

690 F. Supp. 3d 927, 936 (E.D. Ark. 2023) (explaining the "proper vehicle" for seeking "prospective, non-monetary relief" is "an action against the state officials responsible for the enforcement of the law"); *United States v. Missouri*, 660 F. Supp. 3d 791, 799 (W.D. Mo. 2023) (similar). "[T]he alleged injury is fairly traceable to potential enforcement of the [wet signature rule] by the [county clerks], and a favorable decision will likely redress the injury." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023); *see also People First of Ala. v. Merrill*, 487 F. Supp. 3d 1237, 1244 n.4 (N.D. Ala. 2020) ("Because the county election officials enforce the [challenged laws], the plaintiffs' alleged injuries are traceable to and redressable by those officials.").[5]

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In sum, the Benton County Clerk and the Pulaski County Clerk are appropriate defendants, and an injunction prohibiting enforcement of the wet signature rule would redress both GLA's and VDO's injuries.

C. Rule 19 is irrelevant to whether the Pulaski County Clerk is a proper defendant.

The Pulaski County Clerk passingly suggests that Rule 19(a) provides an alternative basis for dismissing her from the case because, in her view, she is not a "necessary party" to the case. ECF No. 41 at 6–8. But that argument misunderstands the purpose of Rule 19, which is to join parties *absent* from a case. *See generally* Fed. R. Civ. P. 19(a). Specifically, Rule 19 permits courts to *join* a party not already named in the action when, "in that person's absence, the court cannot

[5] Unsurprisingly, in past cases challenging voter registration requirements, federal courts in Arkansas have granted prospective injunctive relief against county clerks. *See, e.g.*, *Meyers v. Jackson*, 390 F. Supp. 37, 44 (E.D. Ark. 1975) (enjoining Pulaski County Clerk, as well as a class of other clerks serving as permanent registrars, from enforcing durational residency requirement); *Walker v. Jackson*, 391 F. Supp. 1395, 1403 (E.D. Ark. 1975) (similar for rule requiring women to register under husband's surname); *Smith v. Climer*, 341 F. Supp. 123 (E.D. Ark. 1972) (similar for previous durational residency requirement).

accord complete relief among existing parties." *Id.* at 19(a)(1)(A); *see also id.* at 19(a)(1)(B) (similar). Hollingsworth is not an absent party here—she has been properly named and served with the complaint. *See* ECF No. 26. Accordingly, her argument is "inapplicable because Federal Rule of Civil Procedure 19 . . . appl[ies] to situations where a party is not already named in an action." *Walker v. Watson*, No. 6:20-CV-6114, 2022 WL 1690160, at *3 (W.D. Ark. May 26, 2022).

Hollingsworth's reference to *Martin v. Kohls* does not help her either. There, the Secretary of State argued that the plaintiffs in that case could not obtain prospective relief because they had not named "all the necessary parties," and had "fail[ed] to name the county clerks and county election commissioners." 444 S.W.3d 844, 849–50 (Ark. 2014). The Arkansas Supreme Court rejected that argument in recognition of the fact that the SBEC commissioners, "in their positions of authority, train and direct the county clerks and the county election commissioners across this state." *Id.* That ruling simply means the plaintiffs in *Martin* successfully named at least one defendant against whom they could retain *some* relief. The case says nothing about *dismissing* properly named parties against whom the plaintiffs may obtain relief. As explained, county clerks in Arkansas are directly responsible for implementing the state's voter registration rules, *see* Ark. Const. amend. 51, §§ 2(b), 9, and thus proper defendants. Rule 19 has no bearing on that fact.[6]

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II. Plaintiffs have stated a claim for relief against both Harrell and Hollingsworth.

While the county clerks challenge Plaintiffs' standing to sue them, their motions also suggest that Plaintiffs have failed to state a claim under the materiality provision of the Civil Rights Act. But neither clerk actually disputes that Plaintiffs have alleged the elements of such a claim,

[6] Rule 19 permits dismissal of a party in only once instance: where "a joined party objects to venue and the joinder would make venue improper." Fed. R. Civ. P. 19(a)(3). Hollingsworth is not a "joined" party, as she was originally named in the complaint. Moreover, her motion for dismissal does not dispute that venue is proper. *See* ECF No. 41. Rule 19 provides no basis for her dismissal.

including that the wet signature is not "material" in determining a voter's qualifications to vote in Arkansas. *See* Compl. ¶¶ 85–91. Instead, overlapping with their standing arguments, they contend Plaintiffs have not plausibly alleged a claim as to each Defendant. Harrell, for example, argues that the complaint fails to state "a claim for violation of the materiality provision of the Civil Rights Act of 1964 by Separate Defendant Betsy Harrell." ECF No. 40 at 3. Similarly, Hollingsworth says that "Plaintiffs have not alleged any specific acts of misconduct or wrongdoing on the part of Defendant Hollingsworth." ECF No. 41 at 5.

Those arguments misunderstand the nature of the relief sought in the complaint. Plaintiffs do not seek relief for past actions committed by Harrell and Hollingsworth. They seek an injunction to prevent county clerks from enforcing the wet signature rule *in the future*. *See* Compl. at 24–25. That is precisely "the sort of prospective relief that can be sought in federal court" against officials responsible for enforcing "an ongoing and continuous violation of federal law." *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016) (cleaned up). Plaintiffs have thus stated a claim for violation of the materiality provision and alleged an "injury that will be remedied by the relief sought" against Harrell and Hollingsworth. *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006).

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CONCLUSION

For the foregoing reasons, this Court should deny the Motions to Dismiss filed by the Benton County Clerk and Pulaski County Clerk.

Dated: July 16, 2024

Respectfully submitted,

/s/ Uzoma N. Nkwonta

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 16th day of July, 2024, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
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