COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 20-CI-00471

DAVID WARD, ET AL. ***PLAINTIFF,***

v.

DEFENDANTS.

MICHAEL ADAMS, ET AL.

Filed Electronically

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Comes the Defendant, Michael Adams, in his official capacity as Secretary of State of the Commonwealth of Kentucky ("the Secretary"), by and through counsel, and hereby states as follows in support of his Opposition to Plaintiffs' Motion for Summary Judgment:

INTRODUCTION AND SUMMARY

The Secretary defers to the recitation of facts and arguments submitted by the Attorney General, but writes separately solely to address Plaintiffs' gratuitous allegations regarding the voter photo identification law, Senate Bill 2 ("SB 2"). SB 2 never really had anything to do with this suit. Plaintiffs' supposed concerns now have been rendered moot.

Bipartisan partnership has once again produced an agreement that changes the manner of election during a state of emergency ("the Agreement") and will enable Kentuckians to vote safely and as conveniently as possible. *See* Letter from Michael G. Adams, Secretary of State, to Governor Andy Beshear (Aug. 14, 2020), attached as Exhibit A; see also Exec. Order 2020-688 (Aug. 14, 2020) attached as Exhibit B. The Agreement rests on three focal points. One, no-excuse

early voting will be available to allow voters who can vote in-person to do so without being subjected to long lines on Election Day (which will also reduce lines on Election Day). Two, expanded – but not unlimited – absentee voting will permit any voter who subjectively fears the risks (to themselves, or those with whom they come into contact) of in-person voting – due to COVID-19, or comorbidities, for example – to vote absentee. Three, SB 2, the Photo ID bill, in implementation for November, will exempt voters who cannot produce necessary documentation due to fear of coronavirus, the pandemic's closure of governmental offices, or the voters' inability to get a photocopy of their photo ID. Had Plaintiffs not been so quick and eager to sue they would have seen that there will be no impediment to voting. As set forth above, Kentuckians will have more options this November on how, where and when to vote than in previous elections.

Of significance here is the photo ID requirement in SB 2 which went into effect July 15, 2020. The constitutionality of this bill is not at issue in this case. Indeed, Plaintiffs have explicitly asked this Court to refrain from considering the validity of the bill.[1] The only complaint that Plaintiffs make in regard to SB 2 is that they allege that the bill inadvertently prevents *not them personally* but "a substantial number of otherwise qualified voters" who would have been able to vote prior to the enactment of SB 2. Complaint ¶ 91.

Summary judgment must be denied because Plaintiffs have adduced no facts whatsoever to support their vague and speculative arguments regarding SB 2, and those allegations are now moot. In addition, because Plaintiffs lack standing, and there is no actual case or controversy, this Court lacks subject matter jurisdiction – a prerequisite at any stage of the suit – and must dismiss it. Finally, even if the Court reaches the merits of SB 2, which it should not, the statute is clearly constitutional under precedent of the Supreme Court of the United States.

[1] Plaintiffs' Joint Memorandum in Support of Motion for Summary Judgment, at 39.

ARGUMENT

I. THE RECORD DOES NOT DISCLOSE AN ACTUAL AND JUSTICIABLE CONTROVERSY AS TO THE PHOTO ID REQUIREMENT IN SENATE BILL 2.

The United States Supreme Court, interpreting the United States Constitution, has identified a series of limitations on judicial power, the "justiciability doctrines." *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 192-93 (2018). The Kentucky Supreme Court, after comparing the similarities and differences between the United States and Kentucky Constitutions, reiterated that Kentucky's Constitution also has a justiciability requirement. *Id*. at 194-96. Of the five major justiciability doctrines, three apply here: standing, the prohibition of advisory opinions and now, given the Agreement, mootness. *See id.* at 193. Failure to satisfy any one of these requirements strips the Court of jurisdiction and requires dismissal.

A. This Court lacks subject matter jurisdiction because Plaintiffs lack standing.

"No matter the type of constitutional challenge brought, the person(s) bringing the challenge must first demonstrate standing in order for the challenge to be justiciable." *Commonwealth v. Bredhold*, 599 S.W.3d 409, 416 (Ky. 2020) (citing *Sexton*, 566 S.W.3d at 196). In *Sexton*, the Kentucky Supreme Court held "as a matter of first impression that the existence of a plaintiff's standing is a *constitutional requirement* to prosecute any action in the courts of this Commonwealth, adopting the United States Supreme Court's test for standing as espoused in *Lujan v. Defenders of Wildlife*." 566 S.W.3d 185, 196 (2018). (emphasis added). In *Lujan*, the U.S. Supreme Court stated:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third,

> it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.

504 U.S. 555, 560-61 (1992) (internal citations omitted). The party who invokes jurisdiction has the burden to establish these three elements. *Id*. at 561. The requirement of justiciability is so important that "all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable." Sexton, 566 S.W.3d at 192 (emphasis in original).

Just this year, the Kentucky Supreme Court again addressed the issue of constitutional standing in *Overstreet v. Mayberry*, __ S.W.3d __, 2020 Ky. LEXIS 225 (Ky. 2020). As in *Lujan*, the court stated that to establish standing, a plaintiff must demonstrate: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was caused by the defendant; and (3) that the injury is redressable by a ruling in favor of the plaintiff. *Id*. at *5-6. "A litigant must satisfy all prongs of the standing inquiry to invoke a court's jurisdiction in a constitutional challenge." *Bredhold*, 599 S.W.3d at 417. Here, this Court need only consider whether Plaintiffs meet the first prong, the injury requirement:

> [A]n injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. For an injury to be "particularized," it must affect the plaintiff in a personal and individual way. This means the plaintiff "personally has suffered some actual or threatened injury." For an injury to be concrete, it must "actually exist."

Overstreet, 2020 Ky. LEXIS 225 at *11-12.

As evidenced by the pleadings, Plaintiffs have not even attempted to show that they have a concrete and particularized injury regarding SB 2; Plaintiffs make no allegation that any particular plaintiff has been or will be affected by SB 2 in their personal capacity. Instead, they make general allegations about the metaphysical "voters," "victims" or "persons" who may be

troubled by SB 2's implementation in the pandemic. That is not sufficient to confer individual standing. Nor is it sufficient to support an assertion of standing in a "*representational* or *derivative* capacity on behalf of . . . the Commonwealth." *Overstreet*, 2020 Ky. LEXIS 225 at *21. "[I]n order to claim 'the interests of other, the litigants themselves still must have suffered an injury in fact, thus giving' them 'a sufficiently concrete interest in the outcome of the issue in dispute.'" *Id.* (quoting *Thole v. U.S. Bank N.A.,* 140 S. Ct. 1615, 1620 (2020)). Because the pleadings are devoid of any allegation of a concrete and particularized injury in regard to the photo ID law, this Court lacks subject jurisdiction over this matter.

B. This Court is prohibited from issuing advisory opinions.

"Constitutional challenges to statutes generally fall within one of two categories: a facial challenge or an as-applied challenge. In order to declare a statute unconstitutional on its face, a court must find that the law is unconstitutional in all its applications." *Bredhold*, 599 S.W.3d at 415 (citing *Commonwealth v. Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018); *Sabri v. United States*, 541 U.S. 600, 609 (2004)). The Kentucky Supreme Court has noted that, "[i]t is a well-established principle that '[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Harris v. Commonwealth*, 338 S.W.3d 222, 229 (Ky. 2011) (quoting *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). "On the other hand, in order to declare a statute unconstitutional as applied, a court must find the law unconstitutional as applied to the challenger's particular circumstances." *Bredhold*, 599 S.W.3d at 416 (citing *United States v. Salerno*, 481 U.S. 739, 745 n.3 (1987)). Plaintiffs have failed to plead, much less prevent evidence to support summary judgment, regarding either a facial or an as-applied challenge.

The Kentucky Supreme Court has emphasized that "courts do not function to give advisory opinions, even on important public issues, unless there is an actual case in controversy.'" *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 78 (Ky. 2018) (citing *Newkirk v. Commonwealth*, 505 S.W.3d 770, 774 (Ky. 2016)); *see also Associated Indus. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) ("Within the context of federal law, it is understood that Article III of the United States Constitution permits only adjudication of actual cases and controversies.") (internal citations omitted). In *Associated Indus. v. Commonwealth*, the Kentucky Supreme Court held that "Franklin Circuit Court lacked jurisdiction to decide the constitutionality of statutory provisions . . . since no real controversy existed as presented by the pleadings." 912 S.W.2d at 951 (citing *Revis v. Daugherty*, 287 S.W. 28 (Ky. 1926); *Commonwealth v. Winchester Water Works Co.*, 197 S.W.2d 771 (Ky. 1946)).

Likewise, the constitutionality of the photo-ID requirement in Senate Bill 2 cannot in any way be construed to be at issue here. Apparently, Plaintiffs threw in a claim about SB 2 because the kitchen sink was unavailable. In fact, the Plaintiffs themselves have asked the Court to *refrain* from "void[ing] Chapter 89 as unconstitutional because the Court may reach the question of the constitutional validity of statutes only when all other means of resolving the issue have been tried and failed."[2] Plaintiffs have thus made explicit that they do not wish to challenge the validity of the photo ID law facially. They state that the controversy at issue here "arises from unprecedented circumstances and the short time available for qualified voters to comply with the new requirement rather than from inherent problems with the [photo ID] law itself."[3] Accordingly, no facial challenge to SB 2 exists. Plaintiffs have also failed to offer any evidence that suggests the photo

[2] *Id.*

[3] *Id.*

ID law would be unconstitutional as applied to any of the Plaintiffs' particular circumstances. *See Bredhold*, 599 S.W.3d at 415. They only argue that "a vote on the victims' rights amendment . . . would be arbitrary in violation of [the Constitution]" under the circumstances imposed by the photo ID law.[4] But they make no allegations, let alone offer proof, regarding any Plaintiff having or not having photo identification. They note that offices that issue photo identification were closed for a while during the early part of the pandemic. But those offices are now open. And the Agreement waives applicability of SB 2 explicitly for those who cannot obtain identification due to office closure, back log or other issues related to the pandemic, including the voter's subjective fear. Exhibit A at ¶ 10. The pleadings thus show that no real controversy exists as to SB 2. Any determination by this Court about the validity of the photo ID law would thus be speculative and would constitute an advisory opinion on a hypothetical issue – dicta about the wisdom of a policy choice by the General Assembly. That is beyond the purview, indeed beyond the jurisdiction of this Court. *See Associated Indus.*, 912 S.W.2d at 951.

C. The Agreement renders moot any allegations Plaintiffs may have had about the implementation of SB 2 during the pandemic.

A case becomes moot when there is "a change in circumstances 'which vitiates the underlying viability of the action.'" *Commonwealth v. Terrell*, 464 S.W.3d 495, 498 (Ky. 2015) (quoting *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994)). "In such an action, a judgment . . . cannot have any practical legal effect upon a then existing controversy." *Id*. at 498-99 (quoting *Benton v. Clay*, 497 S.W. 1041, 1042 (Ky. 1921)). Here, Plaintiffs confess that their main concern with SB 2 is that, due to the limited office hours of the Circuit Clerks, "[t]here simply is not enough time for persons to obtain the documentation required by the photo-ID law."[5] Based

[4] *Id.*

[5] Plaintiffs' Joint Memorandum in Support of Motion for Summary Judgment, at 36-38.

on this premise, Plaintiffs contend that an election to vote on the proposed amendments will not be "free and equal" under Section 6 of the Kentucky Constitution "'if a substantial number or percentage of qualified electors are deprived of their right to vote.'"[6] Recognizing the unique challenges of the pandemic, however, the Secretary and Governor have decided that voters will not have to comply with SB 2 this November if they are unable to do so or subjectively fear it would pose a risk to their health. The State Board of Elections has promulgated regulations to so provide. Exhibit C.

The Agreement clarifies that the words "Disability or illness" in KRS 117.228(1)(c)(8)(e) will be interpreted to include "inability to procure photographic proof of identification due to office closure or temporary work stoppage or backlog of issuing authorities of such photographic proof of identification as caused by the COVID-19 pandemic" or "possessing of a health condition or vulnerability that the voter believes subjects the voter to unacceptable risk of harm from the novel coronavirus, including unacceptable risk of transmission of the virus from the voter to others." *See* Exhibit A at ¶ 10. Also, the phrase "Inability to obtain . . . documents needed to show proof of identification," KRS 117.228(1)(c)(8.)(b), will be interpreted to include "inability to provide a copy of proof of identification by the voter." *See id*. at ¶ 11. This clarification will allow impacted voters to apply for an absentee ballot through the secure online portal or by mail, email, fax, or in-person visit to their county clerk without submitting a copy of a photo ID. Plaintiffs' hypothetical worries about other voters therefore have been addressed. Thus, even if this Court had been presented with an actual and justiciable controversy, which it was not, that case or controversy is no longer justiciable due to mootness. Consequently, the Court must refrain from exercising its jurisdiction over this matter and dismiss this portion of the Complaint with prejudice.

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[6] *Johnson v. May*, 203 S.W. 2d 37, 38-39 (Ky. App. 1947)).

II. THE PHOTO ID BILL IS CONSTITUTIONAL AS A MATTER OF LAW

Even if this Court considers the validity of SB 2, which it should not and need not reach, implementation of a photo ID requirement is constitutional under both the federal and state constitutions. The United States Supreme Court has upheld the constitutionality of state voter photo identification statues. In so doing, the Court has consistently recognized there is a legitimate state interest in deterring voter fraud and promoting public confidence in elections, for surely the right to vote includes the right to vote in an election where "safeguards exist to deter [and] detect fraud [and] to confirm the identity of voters." *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 197 (2008); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (noting that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" and noting that the state has a "compelling interest in preventing voter fraud"). The Court has also found that even in a pandemic, the state "has an important regulatory interest in combatting fraud." *Little v. Reclaim Idaho*, 2020 U.S. LEXIS 3585 *4 (July 30, 2020). Kentucky's photo ID requirement can easily be justified on the same grounds, as it acts as a prophylactic measure to prevent voter fraud and increase confidence in the electoral process and results.

In *Crawford*, the Supreme Court confirmed the state's legitimate interests as a matter of law when it sustained Indiana's voter ID law without record evidence "of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. *Crawford* elevated the state's interest in preventing voter fraud to the status of legislative fact, which lower courts are bound to respect. *See, e.g., Armour v. Indianapolis*, 566 U.S. 673, 680 (2012). Thus, states may be proactive and implement election laws that seek to prophylactically prevent voter fraud. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures, we think, should be permitted

to respond to potential deficiencies in the electoral process with foresight rather than reactively.").[7] *Crawford* also found that the statute did not impose "excessively burdensome requirements on any class of voters." *Id*., 553 U.S. at 202. Rather, the voter identification law applied to all voters and fulfilled the important government interest of deterring and detecting voter fraud, participating in a nationwide effort to improve and modernize election procedures, and safeguarding voter confidence. *Id*. at 202-03. The same holds true here. Kentucky's photo ID requirement is neutral and non-discriminatory. And like Indiana's it is undisputedly constitutional.

The Secretary recognizes that particularly in a time of pandemic it is important to make "voting more available to some groups who cannot easily get to the polls." *McDonald v. Bd. of Election Commissioners of Chicago*, 394 U.S. 802, 807-08 (1969). Those who believe their age or disability/illness prevents them from voting in person or obtaining a copy of their photo ID are the exact types of individuals whom the Secretary and Governor have acted to protect through the Agreement. Kentucky has a "compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Dem. Central Comm*., 489 U.S. 214, 231 (1989). The Agreement balances the need to protect at-risk voters with the need to conduct an election that is perceived as fair and free of fraud (by leaving SB 2 otherwise intact). Accordingly, the generous voting privileges extended ensure the "free and equal" November elections desired by Plaintiffs and required by the Kentucky Constitution.

Kentucky courts have "continually resolved any doubt in favor of constitutionality rather than unconstitutionality" because "the propriety, wisdom and expediency of statutory enactments are exclusively legislative matters." *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963).

[7] As of today, thirty-five states have implemented laws that require voters to present some form of photographic identification before they are able to cast a ballot. *See* Underhill, *Voter Identification Requirements: Voter ID Laws*, National Conference of State Legislatures (July 9, 2020), https://bit.ly/2PuzU8x.

For example, in *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915), the plaintiff urged the court to require the clerk to provide more ballots in situations where the statutory number appeared to be insufficient. However, the court declined, noting that doing so "would operate to materially change the statute" and the court lacked the power to alter or amend it. *Id*. This Court similarly should defer to the Secretary, as the General Assembly has given him and the Governor authority to decide the alteration of existing procedures and promulgation of new ones as circumstances in a state of emergency dictate. That process has resulted in an Agreement that addresses Plaintiffs' concerns about SB 2.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court abstain from opining about SB 2. This Court lacks jurisdiction because there is no actual controversy, Plaintiffs lack standing and their speculative concerns are now moot. Summary judgment therefore should be denied and the Complaint dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was filed with the above Court electronically, via Kentucky Courtnet 2.0 e-Filing system, and sent to the following via U.S. Mail or electronic service this 26th day of August, 2020 to all users who have registered in this action; and a true and correct copy was mailed via USPS to the following:

Hon. Andrew Beshear
In his official capacity as the Governor of Kentucky
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