IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL DEPARTMENT

KATIE ROBERTS, *et al.*,
Plaintiffs

vs.

FRED SHERMAN, *et al.*,
Defendants

Case No. 22 CV 3913
Division 2

MEMORANDUM DECISION
(Dismissing the Petition)

On August 22, 2022, the parties appeared before the Court by video conferencing for a status conference and to review the propriety of provisional remedies. The Court also addressed a defense motion to dismiss to which the plaintiffs had filed their opposition. The Court took the matters under advisement for a written decision.

An unverified petition for temporary injunction[1] was filed on August 5, 2022. The prayer for relief indicates plaintiffs wish to indefinitely enjoin defendants from destroying all of the data and other related information from the 2020 elections. That would be,

> [I]ncluding but not limited to, ballots, cast vote records, project back up database, tabulator tapes, ballot images, external drives, voter registration rolls, voting systems, software data, chain of custody, and video drop box surveillance. Additionally, preserve all book keeping records for all election related finances, grants, etc.

Since they indicated the statutory destruction date would be in early September, only a few days away, the Court set an early status conference to review the propriety for provisional remedies and, possibly, set a schedule for the litigation. At the hearing, plaintiffs more fully articulated the positions and purposes of their petition. There is no request made or basis shown to justify doing anything with the data or to otherwise access that information if preserved.

[1] Doc. 1.

MOTION TO DISMISS

Defendants have not answered but jointly filed a response to the petition which the Court views as a motion to dismiss.[2] The plaintiffs also take that view as they have filed a declaration in opposition to the motion to dismiss.[3] So, the Court also addressed that motion.

The motion to dismiss raises two issues for the Court's consideration. The first issue is standing. The second is the failure to state a claim or more specifically failure to allege sufficient grounds for injunctive relief. Those issues are closely related.

At the close of the hearing, the Court advised the parties of the likely decision that would be entered. Since time is of the essence and the potential destruction of the records is imminent, the Court sought to give the parties advance warning of the decision so that they could prepare to take a timely appeal before that destruction date occurred and seek relief in the Appellate Court if they were of the opinion that this Court had erred. That preliminary decision, however, was not final until the filing of this memorandum. The Court took the matter under advisement to further consider plaintiffs' statements and allegations. The Court's initial impression has not changed.

LEGAL STANDARDS

The standard applicable to a motion to dismiss requires the Court to credit all the well pleaded facts of the non-moving party, without crediting conclusory allegations.[4] Courts cannot resolve or determine disputed issues of fact on a motion to dismiss for failure to state a claim upon which relief can be granted.[5] If the court determines that the facts and inferences drawn from the petition state a claim—"not only on the theory espoused by the plaintiffs, but on any possible

[2] Doc. 11.
[3] Doc. 12.
[4] *Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, 29 Kan. App. 2d 318, 319, 26 P.3d 1284, 1286 (2001) (citing *Grindsted Prods., Inc. v. Kan. Corp. Comm'n*, 262 Kan. 294, 302 03, 937 P.2d 1, 7 (1997)).
[5] *Colombel v. Milan*, 24 Kan. App. 2d 728, 729, 952 P.2d 941 (1998) (citations omitted).

theory the court can divine"—the motion must be denied.[6]

The Court has employed a liberal standard for reviewing the pleading of these plaintiffs proceeding as self-represented non-lawyers. However, even the self-represented are held to the same legal standards as represented litigants.[7]

In this case, the only remedy sought by the plaintiffs is an injunction prohibiting the defendants indefinitely from destroying the 2020 election records as addressed by statute.

Also, standing is a part of subject matter jurisdiction[8] and may be raised at any time.[9]

STANDING

In order to have standing, a party must have a sufficient stake in the outcome of a justiciable controversy by showing that she has or is likely to suffer a cognizable injury or damage and that there is a causal connection between such injury or damage and the challenged conduct. In other words, it must be particularized and affect the claiming parties in a personal and individual way.[10]

Plaintiffs stated at the hearing that they had drafted the pleading by themselves. Yet, they also stated that the were "representative" of a larger group of concerned citizens. The Court does not consider this to be a purported class action and likely could not find or conclude that they are adequate class representatives, particularly without assistance of counsel for the absent class. As they repeated at the hearing, they are not lawyers. Only attorneys at law may represent the claims of others in Court. As the defendants have cited, a party to a lawsuit may not assert the rights of others.

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[6] *Id.*; *see also Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 784 (2019).
[7] *Mangiaracina v. Gutierrez*, 11 Kan.App.2d 594, 594-96, 730 P.2d 1109 (1986).
[8] *FV-I, Inc. for Morgan Stanley Mortgage Capital Holdings, LLC v. Kallevig*, 306 Kan. 204, Syl. ¶ 1, 392 P.3d 1248 (2017); see also *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014).
[9] K.S.A., 60-212(h)(3).
[10] *FV-I, Inc. for Morgan Stanley Mortgage Capital Holdings, LLC v. Kallevig*, 306 Kan. 204, Syl. ¶ 4, 392 P.3d 1248 (2017).

Considering the unsworn allegations of the petition, supplemented by the declaration in opposition to the motion to dismiss, the plaintiffs fail to show a particularized personal harm.

FAILURE TO STATE A CLAIM

K.S.A. 25-2708(b) says,

> The county election officer shall preserve all county, city, school district and township ballots for six months and all state and national ballots for 22 months. At the expiration of such time, the county election officer shall destroy them without previously opening any of the envelopes, in the presence of two electors of approved integrity and good repute, members of the two leading political parties. Such electors shall be designated by the board of county commissioners. If the election of any officer or any question submitted at such time is being contested, the ballots shall not be destroyed until such contest is finally decided. In all cases of contested elections, either of the parties contesting shall have the right to have such ballots opened and to have all errors of the judges in counting the ballots corrected by the court or body trying such contest. Such ballots shall be opened in open court or in an open session of such body and the presence of the officer having the custody thereof.

That statutory "shall" with regard to the election records is directory and not mandatory. There does not appear to be a consequence of failing to comply. The defendants appear to concede that it is not mandatory. Counsel for the defendants advised that they may not be destroyed at the 22-month mark because counsel understand (agreeing with the plaintiffs) that the Sheriff is conducting an investigation, and the records may be needed by a Legislative Post Audit on election security of which they are aware.

K.S.A. 25-2709, regarding some other election records, grants discretionary authorization to destroy in most cases after two years, but some are to be kept for five years, some for twenty years.

The plaintiffs did not allege, and the Court was not advised orally concerning any ongoing election contest or challenge. The purpose of this action appears at best to be, although the Court

is speculating, to obtain material to support a challenge to the use of electronic balloting systems generally.

The plaintiffs have made no sufficient showing as to why they waited until the 21st month to file their petition to enjoin the destruction directed for the 22nd month following the election. The 22-month provision has been in the statute since L. 1988, ch. 122, § 1, long before the 2020 elections.

Obtaining information and engaging in the public debate over election processing going forward appear to be laudable non-partisan goals. It also appears that these plaintiffs, through their research, already have a great deal of background information on how the election systems work. It has not been made clear to the Court how or why a court action like this gets any more useful information. It seems instead the prayer for an injunction of indefinite length and purpose is only to keep a vague notion alive to undermine the finality of the 2020 elections. There is no actual contest at hand, and the plaintiff would have no right to do anything with the material.

That said, if there is a flaw in the election process, undercovering it and correcting it going forward is a worthy non-partisan project in the best interests of the public. It has simply not been made clear to the Court how the indefinite retention of certain election year data is necessary to address that goal.

This does not appear to be an issue with vote tabulation. It appears to be an issue with the integrity of the voting process itself. Any analysis of the actual voter records, *i.e.*, those records which could potentially be subject to destruction after 22 months, is related to a retrospective analysis of the election and how those votes were tabulated. The parties do not have standing for such a retrospective analysis, as the time for challenging the 2020 election has elapsed.

Relief relating to the destruction of records is moot, as regardless of whether the records

are destroyed or not, those records do not appear to be subject to scrutiny or contest by these plaintiffs. However, to the extent that the plaintiffs are concerned with election integrity going forward, *i.e.*, prospectively, plaintiffs might have standing to ensure that elections in November 2022 and onward are carried out fairly and freely. Again, this issue does not relate to any records destruction of the 2020 results. And no actual harm to be corrected or remedied is alleged.

To sustain a claim for injunctive relief, the plaintiffs must be able to prove the following elements,

> [F]ive factors are necessary for issuing a temporary injunction: (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse to the public interest.[11]

Here there is no likelihood of prevailing on the merits because there is no reasonable probability of suffering irreparable harm. The election is over and no longer subject to be contested except in the political arena and public opinion. There is no statutory contest available at this time and no contest currently underway. If the Sheriff needs records longer than their scheduled destruction date, these plaintiffs are not the proper parties to bring an action on behalf of the Sheriff. Likewise, if the Legislative Post Audit needs these records, the representatives involved in that audit can make the request on their own. Apparently, the County will agree to hold off destruction if there is a legitimate need. That legitimate need has not been shown, argued or alleged by these plaintiffs. Finally, the state public interest established as the public policy of the State through legislation is to destroy the election records 22 months after the election. Granting the relief would be adverse, contrary to the public policy which the Court equates with the general public interest. "A mere

[11] *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012)

apprehension or a possibility of wrong and injury ordinarily is not enough to warrant the granting of an injunction."[12] A mandatory injunction is an extraordinary remedy.

Plaintiffs are not entitled to injunctive relief regarding the records destruction claimed.

PROVISIONAL REMEDIES DENIED

A provisional remedy would require at least a verified pleading.[13] This was not. Without a provisional remedy, the case could not be fully litigated, *e.g.*, allowing opportunity for an amended pleading, an Answer by the defendants, or, more importantly, any time for discovery, before the rapidly approaching statutory destruction date is upon us. After the destruction, the requested relief would be impossible and appear to be a moot issue. So, in order to give the self-represented plaintiffs an opportunity to preserve their position during the course of litigation, the Court considered the entry of a provisional or temporary remedy. There is, however, no basis for such relief. With the failure of a provisional remedy, the Court has attempted to expedite a decision in order to allow the plaintiffs opportunity to seek review and a stay of the impending destruction in the Appellate Courts.

Defendants indicated that they would hold the records beyond the statutorily directed destruction date if there was an ongoing election challenge, an active law enforcement agency investigation, or a legislative post audit. They could still volunteer to do so. In the event of an actual verified factual claim of injury, harm and damage, which this case is not, a Court's view might be different. Nevertheless, under this pleading, the Court does not see a basis to mandate such retention.

The Court adopts and incorporates the arguments and citations of law from the defendants' motion to dismiss.

[12] *Clawson v. Garrison*, 3 Kan.App.2d 188, 195-96, 592 P.2d 117 (1979).
[13] K.S.A. 60-902.

CONCLUSIONS AND ORDERS

It is, therefore, determined that plaintiffs lack standing to bring this lawsuit. They have not alleged sufficient harm or injury, or the probability of cognizable injury or harm if the relief is not granted or evidenced in the records for which they seek some court-mandated retention. They have asked for nothing more than an indefinite retention of the 2020 election records contrary to the statutory directive for destruction. The remedy that the ultimately seek may be available elsewhere other than this litigation.

The case is DISMISSED.

This is the decision and judgment of the Court. No other Journal Entry will be required.

IT IS SO ORDERED.

Dated this 24th day of August 2022.

/s/ James F. Vano
JAMES F. VANO
District Judge, Division 2

NOTICE OF SERVICE

Copies of the above and foregoing have been sent electronically by the court to counsel and/or self-represented litigants at the e-mail address(es) provided by them as of record in the JIMS this date of filing.