UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

WILLIAM MORGAN, ELIZABETH NORDEN, DAVID VAUGHT, DORIS, DAVENPORT, ANDREA RAILA, JACKSON PALLER, and the COMMITTEE FOR THE ILLINOIS DEMOCRACY AMENDMENT, an Unincorporated political association,	)	
Plaintiffs,	)	20-cv-02189 Honorable Judge Charles R. Norgle, Sr.
JESSE WHITE, in his official capacity As Illinois Secretary of State, DEVON REID, in his official capacity as the Evanston City Clerk, KAREN A. YARBROUGH, in her official capacity as Cook County Clerk, and WILLIAM J. CARDIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAGUE, CASSASNDRA B. WATSON, WILLIAM R. HAINE, IAN K. LINNABARY, CHARLES W. SCHOLZ, WILLIAM M. MCGUFFAGE, In their official capacities as Board Members for the Illinois State Board of Elections,	)	Magistrate Judge M. David Weisman
Defendants.	)	

DEFENDANT DEVON REID'S MOTION TO DISMISS

Defendant, DEVON REID, in his official capacity as the Clerk of the City of Evanston, by his attorney KELLEY A. GANDURSKI, Corporation Counsel, and through, Nicholas E. Cummings, Deputy City Attorney, and one of her assistants, Alexandra B. Ruggie, Assistant City Attorney, moves this Honorable Court to dismiss the Plaintiffs' Amended Verified Complaint against Defendant Reid pursuant to Rule 12(b)(6). In support thereof, Reid states as follows:

INTRODUCTION

On April 7, 2020, Plaintiffs filed their Complaint. Dkt. 1. Plaintiffs' filed their Amended Verified Complaint on April 27, 2020. Dkt. 26. Plaintiffs sued a variety of entities, including the Evanston City Clerk, Devon Reid (hereafter "Reid"), in his official capacity. Notably, Reid is the only municipal clerk named in Plaintiffs' lawsuit, even though Plaintiffs allege that this is an issue that will affect the entire State of Illinois. Plaintiffs allege violations of their First Amendment rights and request that Reid accept electronic signatures for a referendum petition. Plaintiffs' request is misplaced. Reid is entitled to qualified immunity. Additionally, the Illinois Constitution and the Illinois Election Code control Reid's ability to allow for electronic signatures and therefore, Plaintiffs' lack standing regarding their claim against Reid. Plaintiffs' Complaint also fails to state a cause of action against Reid. Plaintiffs allege that their First Amendment Rights were violated when the Illinois Governor entered an executive order to shelter in-place. Dkt. 26. Specifically, Plaintiffs allege that they are unable to collect signatures for a ballot referendum because of the Governor's executive order. Looking at the totality of Plaintiffs' Amended Complaint, it is completely devoid of any allegations that Reid violated their rights and should therefore be dismissed. Lastly, Plaintiffs' Amended Complaint should be dismissed because Reid is sued in his official capacity, yet Plaintiffs fail to allege a *Monell* claim that the City of Evanston has a policy or custom or violating Plaintiffs' rights.

Plaintiffs' Amended Complaint against Reid should be dismissed pursuant to Rule 12(b)(6) because: 1) Reid is entitled to qualified immunity; 2) Plaintiffs' claim is not ripe; 3) Plaintiffs fail to state a cause of action against Reid, and 4) Plaintiffs do not bring a *Monell* claim against the City, even though they named the Evanston City Clerk in his official capacity.

STANDARD OF REVIEW

In reviewing the sufficiency of a complaint, a district court must accept all *well-plead* facts as true and draw all *permissible* inferences in favor of the plaintiff. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 334 (7th Cir. 2012) (emphasis added). The Federal Rules of Civil Procedure require a complaint provide the defendant with "fair notice of what the…claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Supreme Court has described this standard as requiring a complaint to "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) (quoting *Twombly*, 550 U.S. at 570). A complaint falls short of the plausibility standard where plaintiff "pleads facts that are 'merely consistent with' a defendant's liability . . ." *Twombly*, 550 U.S. at 557. A plaintiff is not required to make "detailed factual allegations," but there must be more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (citations omitted). However, "legal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth," *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (citing *Iqbal*, 556 U.S. at 678), nor should a court **"strain to find inferences favorable to plaintiffs" or accept unreasonable inferences.** *Caldwell v. City of Elwood, Ind.*, 959 F.2d 670, 673 (7th Cir. 1992).

Qualified immunity is properly raised in a Rule 12(b)(6) motion because qualified immunity should be resolved as soon as possible, which is sometimes at the pleadings stage. *Serrano v. Guevara*, 315 F. Supp. 3d 1026, 1034 (N.D. Ill. 2018) (citing *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 915–16 (7th Cir. 2015)). The entitlement to qualified immunity "is an

immunity from suit rather than a mere defense to liability," and, as such, should be decided at the earliest possible stage in the litigation. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985)); *see also Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009).

ARGUMENT

I. REID IS ENTITLED TO QUALIFIED IMMUNITY.

Plaintiffs allege that Reid must accept election petitions electronically otherwise their rights guaranteed by the U.S. Constitution will be violated. Dkt. 26. This acceptance of an electronic petition serves as the basis for most, if not all, of Plaintiffs' claims against Reid. Reid, however, is entitled to qualified immunity because Reid cannot act contrary to clearly established law based on the specific facts confronting him and the information he currently possesses.

The doctrine of qualified immunity protects government officials performing discretionary functions from liability to the extent that their conduct "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S. Ct. 3034 (1987); *see also McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010) (citing *Pearson*, 555 U.S. at 231, 129 S. Ct. at 815). Essentially, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1098 (1986); *see also Hughes v. Meyer*, 880 F.2d 967, 970 (7th Cir. 1989). "In determining qualified immunity, a court asks two questions: (1) whether the facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right and (2) whether that constitutional right was clearly established at the time of the alleged violation." *Hernandez v. Sheahan*, 711 F.3d 816, 817 (7th Cir. 2013) (citing *Pearson*, 555 U.S. at 232). Courts may exercise discretion in deciding which question to address first. *Id*.

Whether an [employee] has qualified immunity is a question of law for the judge to decide. *See Whitt v. Smith*, 832 F.2d 451, 453 (7th Cir. 1987).

Plaintiffs invoke their constitutional rights to the First Amendment freedom to petition and freedom of speech. Plaintiffs, however, "may not escape the doctrine of qualified immunity by alleging a violation of a clearly established, but very broad constitutional right." *Bakalis v. Golembeski*, 35 F.3d 318, 323 (7th Cir. 1994). Instead, in determining whether a constitutional right was clearly established, the analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001); *see also Alicea v. Thomas*, 815 F.3d 283, 291 (7th Cir. 2016) (The "clearly established" inquiry requires examining the right "in a particularized sense, rather than at a high level of generality."). "'[T]he crucial question [is] whether the official acted reasonably in the *particular circumstances* that he or she faced." *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018) (quoting *Kemp v. Liebel*, 877 F.3d 346, 351 (alterations in original) (emphasis added) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2023 (2014)). "'To be clearly established at the time of the challenged conduct, the right's contours must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right....'" *Reed*, 906 F.3d at 547 (quoting *Kemp*, 877 F.3d at 351 (alteration in original) (quoting *Gustafson v. Adkins*, 803 F.3d 883, 891 (7th Cir. 2015)). In other words, it must be clear to a reasonable [employee] that his conduct was unlawful in the situation he confronted. *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008). This determination requires the Court to "consider the [employee]'s actions in light of all the particular circumstances the [employee] faced at the time and then compare them with the then-existing law." *Ulichny v. Merton Cmty. Sch. Dist.*, 249 F.3d 686, 701 (7th Cir. 2001). "Ultimately, the question for qualified immunity 'is whether the

state of the law at the time that [the Defendant] acted gave [him] reasonable notice that [his] actions violated the Constitution." *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011). "As long as an employee 'of reasonable competence could disagree on [the] issue, immunity should be recognized.'" *Purtell*, 527 F.3d at 621. Plaintiffs bear the burden demonstrating the violation of a clearly established right." *Purtell*, 527 F.3d at 621. The only act that Reid is allowed to perform under the Illinois Election Code is to accept petitions. Reid has no discretion in how petitions are circulated, nor does the Illinois Election Code allow Reid to mandate such electronic circulation. In addition, until the Illinois State Election Code or the provisions of the Illinois Constitution that require the petition ballots be accompanied by an affidavit and be filed in person, are found to be unconstitutional or are amended, Reid cannot accept the petition ballots electronically. Reid has no choice but to continue to follow the Illinois Election Code and Illinois Constitution until one or both are found to be unconstitutional or are amended. At that time and only at that time, if Reid then refused to accept the electronic petitions, would Plaintiffs' rights be violated. As the law stands now however, Reid is entitled to qualified immunity and Plaintiffs' complaint should be dismissed.

II. PLAINTIFFS DO NOT HAVE STANDING AS THIS ACTION IS NOT RIPE AGAINST REID.

The Amended Complaint does not allege that a single plaintiff has, in fact, suffered any actual injury as it pertains to Reid. "[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has 'a personal stake in the outcome,' distinct from a 'generally available grievance about government." *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018). In order to have standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct.

1540, 1547 (2016). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where, as here, a case is at the pleading stage, the plaintiff must 'clearly…allege facts demonstrating' each element." *Id*. (citation omitted).

a. Plaintiffs' fail to allege an injury in fact as it pertains to Reid.

Plaintiffs' claims against Reid "are too speculative to create a concrete dispute." *Construction and General Laborer's Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1127 (7th Cir. 2019). Plaintiffs assert Illinois statutory and constitutional requirements stifle their First Amendment right to petition by requiring physical signatures and an affidavit. Dkt 26. Plaintiffs' entire Complaint is devoid of any allegations specifically pertaining to Reid, other than Paragraph 38 where Plaintiffs express their desire to file a petition with Reid. *Id*. Paragraph 38 does not allege any action or inaction by Reid. *Id*. Instead it is merely a recitation of Plaintiffs' failure to have obtained the necessary signatures in a timely fashion and speculation that now they will be unable to do so.

In *General Laborer's Union*, the municipality passed an ordinance banning signs located in the public right of way. *General Laborer's Union*, 915 F. 3d at 1126. The Union sued, alleging the ordinance would restrict their First Amendment rights in the event they protested in the future and wanted to use an inflatable rat. *Id*. The court held their claim regarding the possible protests was too speculative and while the potential to utilize an inflatable rat was interesting, the situation had yet to present itself and was therefore not ripe before the court. *Id*. at 1127.

Here, as in *General Laborer's Union*, Plaintiffs' allegations about petitions are too speculative. First and foremost, only Plaintiff Paller speculates that he wishes to submit a petition in the City of Evanston. Dkt. 1, ¶ 38. Plaintiff Paller, however, does not allege that he has been

unable to do so or that he has even tried. Dkt. 26. In fact, Plaintiff Paller alleges that he is not required to submit the signatures to the City Clerk until August 3, 2020. Dkt. 26, ¶ 38. The Governor's "shelter-in-place" Order is set to expire on May 30, 2020, leaving Plaintiffs with several months to collect signatures. Plaintiffs, therefore, cannot and have not alleged an imminent threat or injury as it pertains to Reid.

b. No Injury is Traceable to Reid.

Plaintiffs purported injury is an inability to file petitions with signatures obtained electronically. Plaintiffs cite to Section 28 of the Illinois Election Code, which requires that petition sheets include a sworn and notarized affidavit of the petition circulator that he personally witnessed the signatures of all signers of the petition. Additionally, Plaintiffs cite the Illinois Constitution, which requires that the paper initiative petition pages must be bound and filed in one book with the appropriate officer. *See* Article VII or Article XIV of the Illinois Constitution. Irrespective of these allegations, Plaintiffs filed this suit against Reid, who does not have authority to unilaterally decide to accept electronic ballot petitions, in violation of established State law. It is therefore entirely unknown how any purported violation of the Plaintiffs rights could be attributed to Reid.

III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST REID.

Plaintiffs' Amended Complaint makes plain, the action allegedly infringing their rights is the Executive Order of the state's governor. Dkt. 26, ¶¶ 29-31. Interestingly, Plaintiffs cite "the health crisis" as a factor making it impossible to collect signatures. *Id*. There are no facts alleged in Plaintiffs' Amended Complaint showing any action by Reid limiting Plaintiffs' Constitutional Rights. Reid is not the state actor enacting the challenged legislation and is only responsible for following it. In this case, the two regulations cited by Plaintiffs are the Illinois Election Code requiring petitions—if used—to be

filed with the City Clerk, 10 ILCS 5/28-7, and the Governor's Executive Order. Dkt. 1, ¶¶ 34-35. Reid is not responsible for either regulation.

Plaintiffs only mention of Reid or the City of Evanston is in Paragraph 38, noting that "[f]or the Evanston local initiative referendum to qualify, Plaintiff Paller must submit 2,800 signatures to the Evanston City Clerk by August 3, 2020." Dkt. 26, ¶ 38. Plaintiffs' Amended Complaint leaves Reid in the dark regarding what claim is against him and the foundation for said claim resulting in pleading deficient in facts sufficient to place Reid on notice.

Plaintiffs allege that they are unable to file petitions, but Reid has no authority or role under state law with respect to the collection of signatures, and Plaintiffs do not allege as such. There is no evidence Plaintiffs have (or can) put forth showing Reid is preventing Plaintiffs from collecting petitions signed by a number of qualified electors pursuant to the Illinois Election Code. The only role Reid as City Clerk of the City of Evanston plays in the process pursuant to Illinois Election law, the Illinois Municipal Code and the Evanston City Code is to allow the petitions to be filed. *See* 10 ILCS 5/28-7; 65 ILCS 5/3.1-35-90; and Evanston City Code § 1-7-2. Plaintiffs do not argue—nor can they demonstrate— that Reid's office will not accept petitions signed by a number of qualified electors.

IV. REID IS NOT A PROPER DEFENDANT BECAUSE PLAINTIFFS DO NOT PROPERLY ALLEGE AN OFFICIAL CAPACITY CLAIM.

Included among the defendants in Plaintiff's Amended Complaint is Devon Reid, Evanston City Clerk, who Plaintiffs purport to sue in his official capacity. Dkt. 26, ¶ 11. A lawsuit against an individual in their official capacity is not a lawsuit against the individual, but rather is a lawsuit against the governmental entity of which the individual is an agent. *Schlicher v. Bd. of Fire & Police Comm'rs of Vill. of Westmont*, 363 Ill. App. 3d 869, 883, 845 N.E.2d 55, 67 (2d Dist. 2006) (citing *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3106 (1985)); *see also Office of Lake Cty. State's Attorney v. Human Rights Comm'n*, 235 Ill. App. 3d 1036,

1042, 601 N.E.2d 1294, 1298 (2d Dist. 1992). In other words, an official capacity lawsuit is to be treated as a lawsuit against the governmental entity. *Graham*, 473 U.S. at 165–66, 105 S. Ct. at 3105; *see also Lake Cty. State's Attorney*, 235 Ill. App. 3d at 1042, 601 N.E.2d at 1298 (official capacity lawsuit is no different from a lawsuit against the governmental entity itself). However, Plaintiffs fail to allege that the City of Evanston or Reid, in his official capacity, have a policy which violates their rights. The City of Evanston can only be held liable under Section 1983 when it is alleged that the government's policy or custom inflicts a constitutional injury to Plaintiffs. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978). Plaintiffs have made no such claim here and therefore made no valid claim against either the City of Evanston or Reid, in his official capacity.

CONCLUSION

Defendant, DEVON REID, in his official capacity as Clerk of the City of Evanston, for all of the foregoing reasons, respectfully requests this Honorable Court dismiss Plaintiffs' Amended Verified Complaint with prejudice and any other relief this Court deems appropriate.

Respectfully submitted,

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