No. CV-22-190

In The Supreme Court of Arkansas

JOHN THURSTON, ET AL.,
Appellants,

v.

LEAGUE OF WOMEN VOTERS OF ARKANSAS, ET AL.
Appellees.

On Appeal from the Circuit Court of Pulaski County (No. 60CV-21-3138)

MOTION BY THE HONEST ELECTIONS PROJECT FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

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**pro hac vice admission pending*

The Honest Elections Project ("HEP"), by undersigned counsel, seeks permission under Arkansas Supreme Court Rule 4-6 to file an *amicus curiae* brief in support of the Appellants.

1. HEP is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, HEP defends fair, reasonable, commonsense measures that voters put in place to protect the integrity of the voting process.

2. In furthering its mission, HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. Challenges to duly enacted election procedures—such as the one here—can damage the integrity and perceived legitimacy of election results. After all, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

3. HEP has a significant interest in this case, as it implicates the Arkansas General Assembly's preeminent role in setting the rules for elections. HEP has read the briefs submitted by the parties, and the *amicus curiae* brief is necessary to address the following issues:

   a. Appellees present a novel theory that the laws challenged in this litigation violate a free-wheeling right to vote that is enshrined in

Article 3, Section 2 (the "Free Elections Clause") of the Arkansas Constitution. But the historical context of the English Bill of Rights, the English common law, and the American founding and cases applying the Clause and similar clauses in other states confirm that it was meant to empower, not restrict, the General Assembly's ability to ensure free and fair elections for all Arkansans. Moreover, even if the Clause were designed as a bulwark against election-administration rules, the laws pass constitutional muster in all instances because the State has a compelling interest in preventing voter fraud and promoting election integrity.

b. Appellees also claim that one of the laws—the one that prohibits anyone from loitering within 100 feet of a polling place without a lawful purpose—violates Article 2, Sections 4 and 6 (the "Speech and Assembly Clauses") of the Arkansas Constitution. However, this Court has held that the Speech and Assembly Clauses are co-extensive with the First Amendment of the U.S. Constitution. And under well-established First Amendment precedent, content-neutral restrictions on polling place activities survive constitutional scrutiny.

4. Under Rule 4-6, HEP respectfully requests permission to appear as *amicus curiae* in this action to provide its perspective regarding the aforementioned issues.

HEP does not seek to enlarge the issues beyond those raised by the pleadings of the parties and the judgment of the circuit court below.

5. Proposed *amicus curiae* submits its proposed Amicus Brief, which is supportive of Appellants' position, along with the filing of this Motion.

WHEREFORE, proposed Amicus Curiae respectfully requests that this Court grant its Motion for Leave to File an amicus curiae brief in support of Appellants, and prays for all other relief that is just and appropriate.

Respectfully submitted,

September 20, 2023

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CERTIFICATE OF SERVICE

I certify that on September 20, 2023, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will serve all counsel of record.

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LEAGUE OF WOMEN VOTERS OF ARKANSAS, ET AL.
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Honorable Wendell Griffin, retired

BRIEF OF *AMICUS CURIAE* THE HONEST ELECTIONS PROJECT IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Honest Elections Project ("HEP"), is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, HEP defends fair, reasonable, commonsense measures that voters put in place to protect the integrity of the voting process.

In furthering its mission, HEP supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. Challenges to duly enacted election procedures—such as the challenge here—can damage the integrity and perceived legitimacy of election results. After all, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

HEP has a significant interest in this case, as it implicates the General Assembly's preeminent role in setting the rules for elections.

SUMMARY OF THE ARGUMENT

In 2021, the Arkansas General Assembly passed three commonsense measures addressing mail-in voting. Act 736 requires county clerks to verify the signature on an absentee-ballot application by using a person's voter registration. Act 973 moves back the deadline for in-person ballot delivery one business day (from the Monday before Election Day to the preceding Friday). And Act 249 requires that voters who do not provide photo identification when casting an absentee ballot do so by noon on the Monday following Election Day. Appellees challenge the validity of these laws on the ground that they violate several provisions of the Arkansas Constitution, and the circuit court below agreed with their novel claims.

Of particular concern is Appellees' theory that these laws violate a free-wheeling right to vote that is supposedly enshrined in Article 3, Section 2 (the "Free Elections Clause") of the Arkansas Constitution. But the historical context and past judicial application of that Clause confirm that it was meant to empower, not restrict, the General Assembly's ability to ensure free and fair elections for all Arkansans. Moreover, even if the Clause were designed as a bulwark against election-administration rules, the laws pass constitutional muster because the State has a compelling interest in preventing voter fraud and promoting election integrity.

In addition to the mail-in voting reforms, Appellees challenge a fourth measure passed by the General Assembly in 2021. They claim that Act 728—which

prohibits anyone from loitering within 100 feet of a polling place without a lawful purpose—violates Article 2, Sections 4 and 6 (the "Speech and Assembly Clauses") of the Arkansas Constitution. This Court has held, however, that the Speech and Assembly Clauses are co-extensive with the First Amendment of the U.S. Constitution. And under well-established First Amendment rules, content-neutral restrictions on polling-place activities survive constitutional scrutiny.

Because the circuit court erred by accepting Appellees' far-fetched views on the Arkansas Constitution, this Court should reverse and vacate the decision below.

ARGUMENT*

I. THE CHALLENGED LAWS DO NOT VIOLATE THE FREE ELECTIONS CLAUSE OF THE ARKANSAS CONSTITUTION.

The Free Elections Clause of the Arkansas Constitution provides that "[e]lections shall be free and equal" and protects "the free exercise of the right of suffrage." The circuit court held that the Free Elections Clause safeguards a generalized right to suffrage and that election-integrity measures thus run afoul of that provision. (RP 1581). As Appellants point out, the circuit court's conclusion was erroneous under this Court's precedents. *See* Appellants' Br. at 23-24.

Beyond Appellants' analysis, historical context and case law confirm that the Free Elections Clause does not guarantee a generalized right to vote that empowers courts to second-guess the General Assembly's protections for orderly elections. Moreover, regardless of whether the Free Elections Clause requires strict scrutiny or rational-basis review, the circuit court failed to recognize that the State has a

* No counsel for any party authored this brief in whole or in part. No party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief or otherwise collaborated in preparing or submitting the brief. No persons or entities other than *amicus curiae*, its members, or its counsel contributed money to the brief or collaborated in preparing it. ASCR 4-6(c).

compelling interest in promoting election integrity and preventing voter fraud. Accordingly, the circuit court's decision should be reversed.

A. Historical context and case law make clear that the challenged laws are not subject to a generalized right to vote under the Free Elections Clause.

"[F]ounding era provisions, constitutional structure, and historical practice" are key to interpreting election regulations. *Moore v. Harper,* 143 S. Ct. 2065, 2082 (2023). Free-elections clauses are rooted in the English Bill of Rights, which declared that "election of members of Parliament ought to be free." The English Bill of Rights, art. VIII (1689). The British Crown had routinely interfered with parliamentary elections by disenfranchising the "free inhabitants" of the towns and cities. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 267 (2021). The English Bill of Rights was adopted in response to those abuses and was designed to constrain the Crown's unilateral authority to disenfranchise the electors for members of Parliament. *Id.* at 288.

English common law also prohibited voter intimidation and undue influence in elections. Blackstone affirmed that "elections should be absolutely free"—a guarantee designed to "strongly prohibit[]" all "undue influences upon the electors." 1 Blackstone, *Commentaries on the Laws of England* 172. English common law was especially concerned with actions of "executive magistrate[s]" who could "employ[]

the force, treasure, and offices of the society, to corrupt the representatives, or openly pre-engage the electors, and prescribe what manner of persons shall be chosen." *Id.* To avoid intimidation by force, English law required that "[a]s soon therefore as the time and place of election … are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not return till one day after the poll is ended." *Id.* "Riots," which could intimidate voters, "likewise [were] frequently determined to make an election void." *Id.* And to avoid any undue influence from bribery, "[i]f any officer of the excise, customs, stamps, or certain branches of the revenue, presumes to intermeddle in elections, by persuading any voter or dissuading him, he forfeit[ed] and [was] disabled to hold any office." *Id.*

After American independence from British rule, States adopted analogous free-elections clauses to guard against *executive* abuses over election administration. There is no evidence that those guarantees ever applied to *legislative* actions. Twelve States have clauses with language like Arkansas's Free Elections Clause: Arizona, Delaware, Kentucky, Illinois, Indiana, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, and Wyoming.[1] Many others have variations on

[1] Ariz. Const. art. II, § 21; Del. Const. art. I, § 3; Ill. Const. art. III, § 3; Ind. Const. art. 2, § 1; Ky. Const. § 6; Okla. Const. art. III, § 5; Ore. Const. art. II, § 1;

that language guaranteeing that "[a]ll elections shall be free and open," Mont. Const. art. II, §13, or that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," Utah Const. art. I, § 17.

History confirms two important features of these clauses. First, the clauses protect qualified voters engaged *in the act of voting*. Some States, such as New Hampshire, made that explicit: "All elections ought to be free, and every inhabitant of the State having the proper qualifications has equal right to elect and be elected into office." N.H. Const. art. XI (1792). Second, the clauses are primarily a grant of authority to state legislatures, not courts. That makes sense, as the U.S. Constitution puts States in charge of setting voter qualifications for congressional elections, U.S. Const. art. I, §2, and charges State Legislatures with regulating the "Times, Places, and Manner" of federal elections, *id.* § 4. Courts have thus historically deferred to legislative enactments under these clauses, recognizing the judiciary's limited role in the conduct of elections.

Consistent with that historical backdrop, Arkansas's first constitution declared that "all elections shall be free and equal." Ark. Const. art. II, § 5 (1836). The State

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Pa. Const. art. I, § 5; S.D. Const. art. VII, § 1; Tenn. Const. art. I, § 5; Wash. Const. art. I, § 19; Wyo. Const. art. I, § 27.

removed the provision from its post-Civil War constitution in 1868. But when Arkansas adopted its current constitution in 1874, the Clause clarified that it referred to voter qualifications: "Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, *except for the commission of a felony, upon lawful conviction thereof*." Ark. Const. art. 3, § 2 (emphasis added). The clause thus narrowly constrained the General Assembly's ability to disqualify otherwise qualified voters; it did not limit the General Assembly's ability to ensure open and honest elections.

Accordingly, this Court narrowly reads the Free Elections Clause as a protection against "fraud and [voter] intimidation." *Patton v. Coates*, 41 Ark. 111, 126 (1883). In *Patton*, the Court held that the Clause empowers the General Assembly to proscribe efforts intended to "override honest votes" or intimidate voters "from the exercise of free will." *Id.* at 124; *accord Jones v. Glidewell*, 53 Ark. 161, 171, 13 S.W. 723, 725-26 (1890) (upholding the secret ballot). Under the Clause, for example, the Court has voided elections where the voters have received insufficient notice, as was required by State law. *See Phillips v. Mathews*, 203 Ark. 100, 102, 155 S.W.2d 716, 718 (1941); *Phillips v. Rothrock*, 194 Ark. 945, 960, 110 S.W.2d 26, 34 (1937). And in *Swanberg v. Tart*, 300 Ark. 304, 308, 778 S.W.2d 931,

933 (1989), this Court emphasized that the rules the General Assembly prescribed for absentee voting are mandatory and should be closely followed.

The Court has thus taken a modest view of its role in implementing the Free Elections Clause. This is consistent with how other state courts have applied their free-elections clauses. As the Supreme Court of Virginia acknowledged, the "great majority" of state courts have held that "courts may hear election contests only when power is given them by statute," as "[t]he entire subject matter is political," and the "power to deal with it is vested in the General Assembly alone." *Cundiff v. Jeter*, 2 S.E.2d 436, 439–40 (Va. 1939) (collecting cases). *See also Emery v. Hennessy*, 162 N.E. 835, 838 (Ill. 1928) ("When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed.").

In sum, history shows the limited role of Arkansas's Free Elections Clause. Like those of other States, the Clause's primary purpose is to enable the General Assembly to set rules regarding voter qualifications. A free and equal election in Arkansas has long been understood to be one in which only qualified voters can vote, in accordance with rules and processes the legislature establishes. Likewise, the Free Elections Clause was designed to protect voters from violence, intimidation, and undue influence at the polls—but, to be effective, those guarantees have traditionally required legislation. To that end, this Court has consistently deferred to the will of the General Assembly in setting election rules.

The fact that the circuit court ignored this historical context and practice and instead concluded that the Free Elections Clause grants the judiciary free reign to invalidate the General Assembly's finely wrought election regulations is reversible error.

B. Even if the challenged laws were subject to the Free Elections Clause, the State has a compelling interest in promoting election integrity and preventing voter fraud.

Even if the Free Elections Clause did empower the circuit court to scrutinize the laws challenged here, Appellants aptly point out that those laws should be evaluated under rational-basis review consistent with this Court's precedent. Appellants' Br. at 25, *and see McDaniel v. Spencer*, 2015 Ark. 94, 9–10, 457 S.W.3d 641, 650 (applying rational basis in the initiative-and-referendum context); *accord Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 197 (2008) (noting that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process"). Appellants are right that the circuit court's applying strict scrutiny was clearly erroneous of its own right. The gravity of that error is multiplied by the circuit court's mistaken assertion that—regardless of the proper standard of review—the State has *no interest* in preventing fraud or preserving voter integrity.

On this issue, the manner in which federal and state courts have analyzed the validity of election regulations—such as those at issue here—under the U.S.

Constitution is instructive. As the U.S. Supreme Court has noted, "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). When analyzing an alleged burden on the right to vote from a challenged law, therefore, the well-established *Anderson/Burdick* framework applies. *See id.*; *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under *Anderson/Burdick*, "election laws generally are not subject to strict scrutiny, even though voting rights are fundamental under the Constitution." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016); *see also Burdick*, 504 U.S. at 433. In reviewing a reasonable, nondiscriminatory restriction on voting rights such as the laws challenged here, the restriction is justified by a state's "important regulatory interests." *Lee*, 843 F.3d at 606 (quoting *Burdick*, 504 U.S. at 434).

Further, since voting by absentee ballot is not a fundamental right, challenges to absentee-voting laws like those here are not subject to strict scrutiny. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-09 (1969). In *McDonald*, for example, the Supreme Court held that an Illinois statute denying inmates mail-in ballots did not violate their right to vote. *Id*. at 807. Because the statute burdened only their *asserted* right to an absentee ballot and because the inmates presented no evidence that they could not vote another way, *id*. at 807-08, they had not shown that the state "in fact absolutely prohibited [them] from voting." *Id*. at 808 n.7.

Other federal courts follow this same approach. In *Griffin v. Roupas*, the Seventh Circuit upheld a district court's motion to dismiss a claim on behalf of "working mothers who contend[ed] that[,] because it [was] a hardship for them to vote in person on election day, the United States Constitution require[d] Illinois to allow them to vote by absentee ballot." 385 F.3d 1128, 1129 (7th Cir. 2004). Rejecting that claim, the Seventh Circuit noted that they had "claim[ed] a blanket right … to vote by absentee ballot," or in other words, "absentee voting at will." *Id.* at 1130. After noting the problems that unregulated and unlimited voting by mail would cause, the court declined to find that the Illinois law violated their right to vote. *Id*. at 1130-33. In particular, the court discussed how regulating absentee voting reduces the danger of vote fraud, invalidly cast ballots, voter mistakes and errors, and deprivation of information that may surface late in elections. *Id.*

When COVID-19 emerged, plaintiffs throughout the United States cited the pandemic as a reason to expand, as a constitutional matter, vote-by-mail access via judicial fiat. They were nearly universally unsuccessful. *See , e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 U.S. Dist. LEXIS 86996 at *9 n.2. (N.D. Ga. May 14, 2020). Appellees' position here presumes the same principle that courts have rejected nationwide: that the right to vote and the right to vote in a particular manner are one and the same. But no federal court has recognized that the right to

vote translates into a roving right to least-regulated absentee voting. *See Mays v. Thurston*, No. 4:20-cv-341 (JM), 2020 U.S. Dist. LEXIS 54498 at *4-5 (E.D. Ark. Mar. 30, 2020).

For instance, in *Texas Democratic Party v. Abbott*, the Fifth Circuit stayed a district court order granting a preliminary injunction requiring state officials to distribute mail-in ballots to any eligible voter who wanted one. In so doing, the Fifth Circuit held that "[t]he Constitution is not 'offended simply because some' groups 'find voting more convenient than' do the plaintiffs because of a state's mail-in ballot rules." 961 F.3d at 405 (quoting *McDonald*, 394 U.S. at 810). That was so even though "voting in person 'may be extremely difficult, if not practically impossible,' because of circumstances beyond the state's control." *Id.* (quoting *McDonald*, 394 U.S. at 810). Critically, the Fifth Circuit indicated that the principles guiding its analysis would apply in the statutory context—in that case, the Voting Rights Act. *See id*. at 404 n.32 ("And here, unlike in *Veasey* [*v. Abbott*—a challenge to a Texas voter ID law under the Voting Rights Act], the *state* has not placed any obstacles on the plaintiffs' ability to vote in person." (emphasis in original)). Judge Ho's concurrence further emphasized this point. *See id.*, 961 F.3d at 444-45 (noting that "[f]or courts to intervene, a voter must show that *the state* 'has in fact precluded [voters] from voting'") (emphasis and brackets in original) (quoting *McDonald*, 394 U.S. at 808 & n.7)).

Before the COVID-19 pandemic, other exigencies were similarly unable to expand the right to vote in the manner Appellees plead here. In the wake of Hurricane Katrina, the Eastern District of Louisiana dismissed a request to extend the deadline for counting absentee ballots. *Ass'n of Cmtys. for Reform Now v. Blanco*, No. 2:06-cv-611, Order at 1-2 (E.D. La April 21, 2006) (ECF No. 58). The court found that the alleged harms "do not rise to the level of a constitutional or Voting Rights Act violations," *id*. at 3, and noted further the irony in the allegation that "a step taken by the State, apparently to allow as many displaced voters as possible the ability to request and receive an absentee ballot … is now being challenged as having the exact opposite effect." *Id*. For this reason, the court found the claim that the State's "efforts will 'disenfranchise' minority voters" [to be] disingenuous," and dismissed it. *Id*. at 5.

Like their federal brethren, state courts have also narrowly construed state constitutional provisions used to challenge vote-by-mail regulations. In *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), for instance, the Tennessee Supreme Court rejected a state constitutional challenge to election procedures premised on COVID-19-related difficulties because those procedures placed only "a moderate burden" on voting rights, if at all, and "the State's interests in the efficacy and integrity of the election process [were] sufficient to justify" them, especially in the context of absentee and mail voting. *Id.* at 405. And in *In re State*, the Texas Supreme Court

narrowly construed Texas's absentee-voting justifications and held that lack of immunity to COVID-19 is not itself a "physical condition" that renders a voter eligible to vote by mail under Texas law. 602 S.W.3d 549, 560 (Tex. 2020).

Federal and state precedents weigh against the circuit court's conclusions here. Eligible citizens have a right to *vote*, not the right to vote *in a particular manner*. As in the above-cited cases, the laws that Appellees challenge are justified by Arkansas's interests in preventing voter fraud and in protecting voter confidence in the electoral process. It is accepted that "[v]oting fraud is a serious problem in U.S. elections generally … and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31. Accordingly, as the U.S. Supreme Court recently explained, a "State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). So, the State here had wide berth to act on its "interest in protecting the integrity, fairness, and efficiency of their ballots and election processes" by passing commonsense ballot-security measures that would increase Arkansans' confidence. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

The foregoing analysis is straightforward and unassailable. The laws at issue here do not burden the right to vote. Instead, they make voting easier by allowing the State's electorate to vote by mail as long as they comply with straightforward, commonsensical, non-intrusive safeguards. Simple to satisfy, these safeguards are

critical to vouchsafe the legitimacy and orderly administration of the State's elections. In other words, "this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote." *Raffensperger*, 2020 U.S. Dist. LEXIS 86996 *9 n.2 (N.D. Ga. May 14, 2020).

II. THE STATE'S POLLING-PLACE REFORMS DO NOT VIOLATE THE SPEECH AND ASSSEMBLY CLAUSES OF THE ARKANSAS CONSTITUTION.

Beyond its flawed approach to the Free Elections Clause, the circuit court also erred in holding that the General Assembly's polling-place reforms violate the Speech and Assembly Clauses of Article 2 of the Arkansas Constitution. As Appellants point out, the Speech and Assembly Clauses are co-extensive with federal First Amendment protections. Appellants' Br. at 32-33. *See also Kelley v. Johnson*, 2016 Ark. 268, at 25, 496 S.W.3d 346, 362 ("Article 2, Section 6 … is Arkansas's equivalent to the First Amendment."). Under well-established First Amendment precedent, the law at issue here withstands constitutional scrutiny.

Act 728 applies to activities in a specific location: the 100-foot zone outside a polling place. It thus implicates the familiar "forum based approach for assessing restrictions that the government seeks to place on the use of its property." *Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 678 (1992). Under this approach, there are three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. "A polling

place … qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is 'a special enclave, subject to greater restriction.'" *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (quoting *ISKCON*, 505 U. S. at 680).

In a nonpublic forum such as a polling location, the government has wide authority to craft rules limiting speech. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Accordingly, courts use a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U. S. 788, 799-800 (1985). With that in mind, the Supreme Court has long recognized that government may impose both neutral and content-based restrictions on speech in nonpublic forums, including restrictions that exclude

political advocates and forms of political advocacy. *See Greer v. Spock*, 424 U.S. 828, 831-33 (1976); *Lehman v. Shaker Heights*, 418 U. S. 298, 303-04 (1974).

As *Burson v. Freeman* makes clear, polling-place restrictions (such as the ones at issue here) are permissible nonpublic-forum regulations. 504 U.S. 191 (1992). In *Burson*, the Court considered a Tennessee law imposing a 100-foot campaign-free zone around polling-place entrances. *Id.* at 193-94. Under the Tennessee law—which was more restrictive than Arkansas's buffer-zone provision—no person could solicit votes, distribute campaign materials, or display political materials within the restricted zone. *Id.* The Court found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. *Id.* at 211. Concurring, Justice Scalia argued that the less rigorous "reasonableness" standard of review should apply, and found the law to be "at least reasonable" in light of the plurality's analysis. *Id.* at 216.

The *Burson* Court emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. *Id.* at 200-04. Against that historical backdrop, the Court upheld Tennessee's determination, supported by overwhelming consensus among the States and "common sense," that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote. *Id.* at 200, 206-08. As the Court explained, Tennessee "decided that [the] last 15 seconds before

its citizens enter the polling place should be their own, as free from interference as possible." *Id.* at 210. And that was not "an unconstitutional choice." *Id.*

Other courts follow *Burson*'s analysis and conclusions. For example, in *United Food & Commercial Workers Local 1099 v. City of Sidney*, the Sixth Circuit reviewed a First Amendment challenge to a law restricting the collection of petition signatures within 100 feet of a polling location. 364 F.3d 738 (6th Cir. 2004). The court first addressed the bar on soliciting on a public sidewalk within the 100-foot zone. Applying *Burson*, it concluded that "a state may require persons soliciting signatures to stand 100 feet from the entrances to polling places without running afoul of the Constitution." *Id.* at 748. It then considered whether it was lawful to prohibit the solicitation of signatures on private property *outside* the 100-foot zone (e.g., parking lots and walkways leading to polling places). The court concluded that those areas were nonpublic forums, and upheld the restriction as a reasonable, viewpoint-neutral measure. *Id.* at 750-51.

These authorities make clear that the regulation of polling places and their immediate surroundings does not violate speech and assembly rights enshrined in the First Amendment. If content-centric and viewpoint-neutral restrictions such as those in *Burson* and *United Foods* pass constitutional muster, then the General Assembly's neutral reforms do as well. The circuit court's conclusion that the prohibition on non-speech activities (e.g., handing out food and water) infringes on

freedom of expression is thus incorrect. This Court should reject Appellees' invitation to misapply First Amendment jurisprudence and should correct the circuit court's error.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the circuit court's decision.

September 20, 2023 Respectfully submitted,

/s/ Brett D. Watson
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mforero@holtzmanvogel.com
**pro hac vice admission pending*

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on September 20, 2023, I electronically filed this document with the Clerk using the eFlex electronic-filing system, which will serve all counsel of record.

/s/ Brett D. Watson
Brett D. Watson (Bar No. 2002182)

CERTIFICATE OF COMPLIANCE

I certify that that the brief complies with Administrative Order No. 19's requirements concerning confidential information; that the brief complies with Administrative Order No. 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites; and that the brief complies with the word-count limitation in ASCR Rule 4-6(g). Excluding the cover, table of contents, table of authorities, certificate of service, and certificate of compliance, the brief contains 4,388 words.

/s/ Brett D. Watson
Brett D. Watson (Bar No. 2002182)

CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.,* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS, *et al.,* APPELLEES

SWORN MOTION TO PERMIT MATEO FORERO-MORENA
TO APPEAR AND PRACTICE PRO HAC VICE

Attorney Mateo Forero-Morena, submits this motion to appear and practice in this action *pro hac vice* on behalf of the Honest Elections Project:

1. I, Mateo Forero-Morena, am an attorney licensed to practice law in the District of Columbia (Bar No. 90002605), the State of Alabama (Bar No. 1319A00G), and the State of Maryland (Bar No. 2003050009). I am with the law firm of Holtzman Vogel Baran Torchinsky & Josefiak, PLLC. My office address is 2300 N Street NW, Suite 643, Washington, DC 20037. My telephone number is (202) 737-8808, and my fax number is (540) 341-8809. My email address is mforero@holtzmanvogel.com.

2. In addition to my Bar licensure, I am an attorney admitted to practice in the following courts: the courts of the State of Alabama; the courts of the State of

Maryland; the courts of the District of Columbia; the U.S. Court of Appeals for the District of Columbia Circuit; the U.S. Court of Appeals for the Eleventh Circuit; the U.S. District Court for the District of Columbia, the U.S. District Court for the District of Maryland; and the U.S. District Court for the Northern District of Alabama. I am an active member in good standing in each of these courts.

3. The District of Columbia allows Arkansas attorneys to seek permission to participate in the proceedings of cases pending in its courts.

4. I have paid the $200 filing fee for pro hac vice admission to the Clerk of the Arkansas Supreme Court, proof of which is attached hereto as Exhibit A.

5. In this proceeding, I will be associated with Arkansas licensed attorney Brett D. Watson (Ark. Bar No. 2002182). Mr. Watson practices at the law firm of Brett D. Watson, Attorney at Law, PLLC, P.O. Box 707, Searcy, Arkansas 72145-0707, Phone (501) 281-2468, watson@bdwpllc.com.

6. In the two years preceding the filing of this motion, I have not participated, served as counsel, sought leave to appear, or appeared pro hac vice in any case in the courts of the State of Arkansas.

7. I have not been the subject of disciplinary action by the bar or court of the District of Columbia, or any other jurisdiction.

8. I have not been denied admission, including admission *pro hac vice*, to the courts of any state or to any federal court.

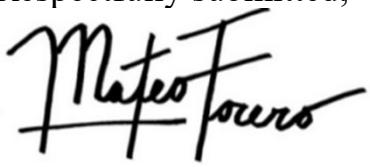
9. I am familiar with the Arkansas Supreme Court Rules of Professional Conduct governing the conduct of members of the Bar of Arkansas and will at all times abide by and comply with the same so long as this proceeding is pending and I have not withdrawn as counsel herein.

10. An affidavit from Brett D. Watson recommending that I be granted permission to participate in this action is attached to this motion as Exhibit B.

WHEREFORE, movant Mateo Forero-Morena respectfully requests that he be granted permission to appear and practice in this action *pro hac vice* on behalf of the Honest Elections Project, and for all other just and proper relief.

DATED this 20th day of September 2023.

Respectfully submitted,



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/s/ Brett D. Watson
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Counsel for Honest Elections Project

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM

On this day, **Mateo Forero-Norena** did appear before me, the undersigned Notary Public and executed the foregoing Motion of his own free will and volition, and for the purposes stated therein.

Subscribed and sworn before me the undersigned Notary Public, within and for the above Count and State, this 20th day of September, 2023.

SHARON MICHELLE NORWOOD
NOTARY PUBLIC
REG. #7857702
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES SEPTEMBER 30, 2024

Sharon Michelle Norwood
NOTARY PUBLIC, State of Virginia

My Commission Expires: September 30, 2024
My Commission Number: 7857702

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023 I electronically filed the foregoing using the Court's electronic filing system, which shall send notifications of such filing to all counsel of record.

/s/ Brett D. Watson
Brett D. Watson

Office of the Clerk
Arkansas Supreme Court
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

PROOF OF PAYMENT OF NON-RESIDENT ATTORNEY FEE

Pursuant to Rule XIV of the Arkansas Rules Governing Admission to the Bar, payment in the amount of $200.00 was made to the Clerk of the Supreme Court on September 18, 2023, on behalf of Mateo Forero-Norena for the purpose of securing permission to proceed as counsel of record *pro hac vice* in the case pending before the Supreme Court of Arkansas styled Thurston et al. v. LWV; CV-22-190.

In Testimony Whereof, I hereunto set my hand as Clerk and affix the seal of Said Court this the 18th day of September, 2023.

KYLE E. BURTON

(CLERK)

By Michelle Weise

Receipt No.: PHV_3297

Exhibit A

CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.,* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, *et al.,* APPELLEES

AFFIDAVIT OF BRETT D. WATSON

The undersigned, Brett D. Watson, after having been first duly sworn, states as follows, to wit:

1. I am a member in good standing of the Bar of Arkansas (Bar No. 2002182), and I am counsel for the Honest Elections Project in this proceeding.

2 I recommend that Mateo Forero-Morena be granted permission to participate in this proceeding for the reasons set forth in the Sworn Motion to Permit Mateo Forero-Morena to Appear and Practice *Pro Hac Vice*.

Exhibit B

FURTHER AFFIANT SAYETH NOT.

Brett D. Watson
Date: September 20, 2023

ACKNOWLEDGMENT

STATE OF ARKANSAS)
)
COUNTY OF WHITE)

Subscribed and sworn before me, the undersigned Notary Public, within and for the above County and State, this 20th day of September 2023.

NOTARY PUBLIC

My Commission Expires:

8.17.32

ALISHA PEARROW
MY COMMISSION # 12720145
EXPIRES: August 17, 2032
White County

CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.,* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS
OF ARKANSAS, *et al.,* APPELLEES

SWORN MOTION TO PERMIT JASON B. TORCHINSKY
TO APPEAR AND PRACTICE PRO HAC VICE

Attorney Jason Brett Torchinsky, submits this motion to appear and practice in this action *pro hac vice* on behalf of the Honest Elections Project:

1. I, Jason Brett Torchinsky, am an attorney licensed to practice law in the District of Columbia (Bar No. 976033), and the Commonwealth of Virginia (Bar No. 47481). I am with the law firm of Holtzman Vogel Baran Torchinsky & Josefiak, PLLC. My office address is 2300 N Street NW, Suite 643, Washington, DC 20037. My telephone number is (202) 737-8808, and my fax number is (540) 341-8809. My email address is jtorchinsky@holtzmanvogel.com.

2. In addition to my Bar licensure, I am an attorney admitted to practice in the following courts: the courts of the District of Columbia; the courts of the Commonwealth of Virginia; the U.S. Court of Appeals for the District of Columbia

Circuit; the U.S. Court of Appeals for the Second Circuit; the U.S. Court of Appeals for the Fourth Circuit; the U.S. Court of Appeals for the Fifth Circuit; the U.S. Court of Appeals for the Sixth Circuit; the U.S. Court of Appeals for the Eighth Circuit; the U.S. Court of Appeals for the Ninth Circuit; the U.S. Court of Appeals for the Eleventh Circuit; the U.S. District Court for the District of Columbia; the U.S. District Court for the Eastern District of Virginia; the U.S. District Court for the Western District of Virginia; the U.S. District Court for the Eastern District of Michigan; the U.S. District Court for the Western District of Michigan; the U.S. District Court for the Eastern District of Arkansas; the U.S. District Court for the Eastern District of Wisconsin; and the U.S. District Court for Colorado. I am an active member in good standing in each of these courts.

3. The District of Columbia allows Arkansas attorneys to seek permission to participate in the proceedings of cases pending in its courts.

4. I have paid the $200 filing fee for pro hac vice admission to the Clerk of the Arkansas Supreme Court, proof of which is attached hereto as Exhibit A.

5. In this proceeding, I will be associated with Arkansas licensed attorney Brett D. Watson (Ark. Bar No. 2002182). Mr. Watson practices at the law firm of Brett D. Watson, Attorney at Law, PLLC, P.O. Box 707 Searcy, Arkansas 72145-0707, Phone (501) 281-2468, watson@bdwpllc.com.

6. In the two years preceding the filing of this motion, I have not

participated, served as counsel, sought leave to appear, or appeared pro hac vice in any case in the courts of the State of Arkansas.

7. I have not been the subject of disciplinary action by the bar or court of the District of Columbia, or any other jurisdiction.

8. I have not been denied admission, including admission *pro hac vice*, to the courts of any state or to any federal court.

9. I am familiar with the Arkansas Supreme Court Rules of Professional Conduct governing the conduct of members of the Bar of Arkansas and will at all times abide by and comply with the same so long as this proceeding is pending and I have not withdrawn as counsel herein.

10. An affidavit from Brett D. Watson recommending that I be granted permission to participate in this action is attached to this motion as Exhibit B.

WHEREFORE, movant Jason Brett Torchinsky respectfully requests that he be granted permission to appear and practice in this action *pro hac vice* on behalf of the Honest Elections Project, and for all other just and proper relief.

DATED this 20th day of September 2023.

Respectfully submitted,

Jason Brett Torchinsky
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW, Suite 643
Washington, DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com

/s/ Brett D. Watson
Brett D. Watson (Ark. Bar No. 2002182)
BRETT D. WATSON, ATTORNEY AT LAW, PLLC
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Searcy, Arkansas 72145-0707
(501) 281-2468 Telephone
watson@bdwpllc.com

Counsel for Honest Elections Project

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM

On this day, **Jason Brett Torchinsky** did appear before me, the undersigned Notary Public and executed the foregoing Motion of his own free will and volition, and for the purposes stated therein.

Subscribed and sworn before me the undersigned Notary Public, within and for the above Count and State, this 20th day of September 2023.

SHARON MICHELLE NORWOOD
NOTARY PUBLIC
REG. #7857702
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES SEPTEMBER 30, 2024

Sharon Michelle Norwood
NOTARY PUBLIC, State of Virginia

My Commission Expires: September 30, 2024
My Commission Number: 7857702

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023 I electronically filed the foregoing using the Court's electronic filing system, which shall send notifications of such filing to all counsel of record.

/s/ Brett D. Watson
Brett D. Watson

Office of the Clerk
Arkansas Supreme Court
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

PROOF OF PAYMENT OF NON-RESIDENT ATTORNEY FEE

Pursuant to Rule XIV of the Arkansas Rules Governing Admission to the Bar, payment in the amount of $200.00 was made to the Clerk of the Supreme Court on September 18, 2023, on behalf of Jason B. Torchinsky for the purpose of securing permission to proceed as counsel of record *pro hac vice* in the case pending before the Supreme Court of Arkansas styled Thurston et al. v. LWV; CV-22-190.

In Testimony Whereof, I hereunto set my hand as Clerk and affix the seal of Said Court this the 18th day of September, 2023.

KYLE E. BURTON

(CLERK)

By Michelle Weise

Receipt No.: PHV_3298

Exhibit A

CV-22-190

IN THE SUPREME COURT OF ARKANSAS

JOHN THURSTON, *et al.,* APPELLANTS

v.

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, *et al.,* APPELLEES

AFFIDAVIT OF BRETT D. WATSON

The undersigned, Brett D. Watson, after having been first duly sworn, states as follows, to wit:

1. I am a member in good standing of the Bar of Arkansas (Bar No. 2002182), and I am counsel for the Honest Elections Project in this proceeding.

2 I recommend that Jason Brett Torchinsky be granted permission to participate in this proceeding for the reasons set forth in the Sworn Motion to Permit Jason Brett Torchinsky to Appear and Practice *Pro Hac Vice*.

Exhibit B

FURTHER AFFIANT SAYETH NOT.

Brett D. Watson
Date: September 20, 2023

ACKNOWLEDGMENT

STATE OF ARKANSAS)
)
COUNTY OF WHITE)

Subscribed and sworn before me, the undersigned Notary Public, within and for the above County and State, this 20th day of September 2023.

NOTARY PUBLIC

My Commission Expires:
8.17.32

ALISHA PEARROW
MY COMMISSION # 12720145
EXPIRES: August 17, 2032
White County