IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS and ARKANSAS UNITED et al. **PLAINTIFFS**

v. **CASE NO. 60CV-21-3138**

JOHN THURSTON, in his official capacity As the Secretary of State of Arkansas; And SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities As members of the Arkansas State Board of Election Commissioners, **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT

Come Now Defendants, in their official capacities, by and through Attorney General Leslie Rutledge and Assistant Attorney General Michael A. Mosley, and for their Brief in Support of Motion to Dismiss Amended Complaint for Injunctive Relief and Declaratory Judgment herein state and allege:

I. INTRODUCTION

During the 93rd General Assembly, the Legislature passed, *inter alia*, four acts involving election mechanics: Act 736, Act 973, Act 249, and Act 728. Act 736 added a single word—application—to Ark. Code Ann. § 7-5-404. The Act requires that signatures on a voter registration application be "similar" to a voter's signature on an

absentee ballot application. Act 973 moved the deadline for voters to turn in absentee ballots one business day back, from the Monday before the election to the Friday before the election. Act 249 amended Amendment 51 of the Arkansas Constitution to remove the provision allowing a voter to obtain a provisional ballot if he or she fills out a sworn statement indicating that he or she is a registered voter, where the individual lacks photo identification. Finally, Act 728 prohibits loitering within 100 feet of a place where voting is occurring, except it permits persons to be within the 100 foot zone if they are entering or leaving a building in that zone for a lawful purpose.[1]

Plaintiffs—organizations and/or associations and individuals—bring suit against Defendants in their official capacities, i.e., the State of Arkansas, challenging the four acts. The Plaintiffs initially filed suit, and the Defendants moved to dismiss the Complaint. Plaintiffs have now amended the Complaint. The Amendment adds individual Plaintiffs rather than just the organization and/or associations. *See Amended Complaint*, ¶¶ 17-21. The Amendment also adds various allegations regarding Arkansas United in paragraphs fifteen and sixteen, which were not present in the original complaint. *Amended Complaint*, ¶¶ 15-16. Otherwise, the Amended Complaint is not materially different from the original Complaint. Moreover, the Amended Complaint does not cure the deficiencies with Plaintiffs' claims as Defendants discussed at length in the original Motion to Dismiss and herein. The

[1] Plaintiffs' characterization of the Acts via catchphrases such as "Voter Support Ban" should be disregarded where such language appears nowhere in the Acts or their titles.

original Motion to Dismiss and Brief in Support, are incorporated by reference herein as if repeated word for word pursuant to Ark. R. Civ. P. 10(c).

Plaintiffs claim, *inter alia*, that the Acts violate their members' voting rights under the Arkansas Constitution. Plaintiffs allege violations of the Equal Protection Clause found in the Arkansas Constitution at Article 2, § 3, and the "Right of Suffrage" provisions found at Article 3, § 2. Plaintiffs also challenge Act 249 and claim that it fails to "effectively amend" Amendment 51 of the Arkansas Constitution, based on the standard set forth in Amendment 51, Section 19 for such amendments. *Amended Complaint* ¶¶ 161-164.

Plaintiffs erroneously claim that strict scrutiny applies because, as stated, they allege the right to vote without impairment, contained in Article 3, Section 2 of the Arkansas Constitution, is implicated by the four challenged Acts. However, as will be discussed herein, the four Acts do not impair or impede the right to vote itself at all; rather, the Acts involve election mechanics only. Thus, strict scrutiny does not apply, although, assuming *arguendo* a more rigorous standard did apply, the challenged Acts would survive any such review. Nevertheless, the standards that apply here are as follows: whether the Acts are "clearly incompatible" with the Arkansas Constitution and rational-basis review.

Because all four Acts pass the applicable standards of review, they are constitutionally valid. Further, and independently, the Defendants are entitled to sovereign immunity. Consequently, this Court should dismiss the Amended Complaint.

II. BACKGROUND

The United States Constitution vests States with "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Elections in the United States have "always been a decentralized activity," with elections administered by local officials and election rules set by state legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *cf.* U.S. Const. art. I, sec. 2, cl. 1. These voting rules must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (noting that election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in person on Election Day: the first laws authorizing absentee voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote by absentee ballot. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938). Today, while all States permit some form of absentee voting, States continue to balance the interests in promoting

voting and preventing fraud in a variety of ways, with different States adopting different rules governing when, how, and where voters may vote.[2]

In striking this balance, Arkansas lawmakers have provided voters a variety of ways to safely and securely cast a ballot. These include early in-person voting, in-person voting on Election Day, and absentee voting. Ark. Code Ann. § 7-5-418 (early voting); *id.* § 7-5-102 (Election Day); *id.* § 7-5-401 *et seq.* (absentee voting).

III. STANDARD OF REVIEW

A. Motion to Dismiss Standard

A court considering a motion to dismiss must treat the facts alleged in the complaint as true and view them in the light most favorable to the non-movant, i.e., the Plaintiffs. *Banks v. Jones*, 2019 Ark. 204, at *2, 575 S.W.3d 111, 114. However, a Plaintiff's conclusions of law are not deemed true in assessing a motion to dismiss. *Id.* Arkansas is a fact-pleading state, and conclusory statements are insufficient under the Arkansas Rules of Civil Procedure to withstand a motion to dismiss. *Williams v. McCoy*, 2018 Ark. 17, at *2, 535 S.W.3d 266, 268.

To survive a motion to dismiss, a complaint must allege facts that, if proved, would establish "[e]very fact and element essential to the cause of action[.]" *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 590, 510 S.W.2d 555, 560 (1974). Importantly, on a Rule 12(b)(6) motion, "[o]nly the facts are treated as true,

[2] *See* Nat'l Conf. of State Legislatures, *Absentee & Mail Voting Policies in Effect for the 2020 Election* (updated Nov. 9, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx.

not the plaintiff's theories, speculation, or statutory interpretation." *Dockery v. Morgan*, 2011 Ark. 94, at *6, 380 S.W.3d 377, 382; *Wallis v. Ford Motor Co.*, 362 Ark. 317, 325, 208 S.W.3d 153, 159 (2005).

Moreover, a plaintiff may not file a complaint that is factually insufficient with the hopes of obtaining discovery to ascertain whether a cause of action exists. *Treat v. Kruetzer*, 290 Ark. 532, 534, 720 S.W.2d 716, 717 (1986). In *Treat*, the Plaintiff filed a factually insufficient complaint, but claimed that she was entitled to take the Defendant's deposition because she complied with federal notice pleading. *Id.* at 533, 720 S.W.2d at 717 (citing *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975)). The Arkansas Supreme Court disagreed, and reiterated that Arkansas is a fact-pleading jurisdiction, whereas federal law requires only notice pleading. *Id.* at 533, 720 S.W.2d at 717 (citing *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981)). The Court said: "[w]e find no error in the refusal to require discovery where the complaint is, on its face, fatally deficient . . . ." *Treat*, 290 Ark. at 533, 720 S.W.2d at 717. The Arkansas Rules of Civil Procedure and the Arkansas Supreme Court's interpretation of those rules still require fact pleading. *Williams*, 2018 Ark. 17, at *2, 535 S.W.3d at 268; *see* Ark. R. Civ. P. 8(a) & 12(b)(6).

In this case, Plaintiffs fail to allege facts that would entitle them to any relief. Rather, they rely on legal conclusions, theories, and speculation that the Court cannot assume true in ruling on the instant motion. *Dockery*, 2011 Ark. at *6, 380 S.W.3d at 382. As discussed herein, the questions presented by the Amended Complaint are pure questions of law regarding the validity of the four challenged Acts. Plaintiffs

have now propounded written discovery to Defendants. The discovery is not relevant to the claims made, is not reasonably calculated to lead to the discovery of admissible evidence, and is not proportional to the needs of this case because, as stated, the case merely presents legal questions for the Court. Ark. R. Civ. P. 26(b)(1). As the Arkansas Supreme Court has made clear, a plaintiff may not file a complaint devoid of sufficient facts in hopes that discovery will permit them to maintain their claim(s). *Treat*, 290 Ark. at 533, 720 S.W.2d at 717. Separately, the Defendants are moving the Court to stay discovery until a ruling on the instant motion or, in the alternative, seeking a protective order pursuant to Ark. R. Civ. P. 26(c).

B. Standard to Challenge a Statute

"[A]n act of the Legislature is presumed constitutional and should be so resolved unless it is clearly incompatible with the constitution, and any doubt must be resolved in favor of constitutionality." *Martin v. Haas*, 2018 Ark. 283, *9, 556 S.W.3d 509, 515. "Furthermore, public policy is for the General Assembly to establish, not the courts." *Id.* (citing *McCutchen v. City of Fort Smith*, 2012 Ark. 452, at 15, 425 S.W.3d 671, 681). "'[Arkansas courts] are, of course, not concerned with the wisdom or policy of the legislation, as this is a question solely for the General Assembly. [Courts] may consider only the power of the General Assembly to enact the legislation.'" *Martin*, 2018 Ark. 283 at *9, 556 S.W.3d at 515 (quoting *Adams v. Whittaker*, 210 Ark. 298, 300, 195 S.W.2d 634, 635 (1946)).

IV. DISCUSSION

A. Plaintiffs lack standing as to all of their claims.

Plaintiffs lack standing for two independent reasons. First, Plaintiffs, including the new individual Plaintiffs, have not alleged facts demonstrating that they have been injured and cannot show that the four Acts will irreparably injure them. The organization and/or association Plaintiffs still lack standing for the reasons stated in the original Motion to Dismiss. Neither entity is a "person" to whom the Acts apply, and neither has adequately alleged associational standing. Second, even if Plaintiffs could make a showing of injury, any such injury cannot be fairly traced to the conduct of the Defendants. Thus, all Plaintiffs lack standing.

In *Martin*, the Arkansas Supreme Court said: "[t]he general rule is that one must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law." 2018 Ark. 283 at *8, 556 S.W.3d at 515. There, appellee Haas was an individual suing over Act 633 of 2017, which concerned, *inter alia*, voter identification. *Id.* at *1, 556 S.W.3d at 511. The Court said:

> Here, appellee is a person affected by Act 633. He will be required to show compliant identification or sign the voter-verification affidavit, and the evidence presented at the hearing established that he is within the class of persons affected by the statute; therefore, he has standing to challenge the Act's constitutionality.

Id. at *8, 556 S.W.3d at 515. The Court has also said: "for equity to act, there must be proof of (1) irreparable harm and (2) no adequate remedy at law." *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 302, 954 S.W.2d 221, 224 (1997). Here,

Plaintiffs seek only equitable relief from the Court. But, as stated, Plaintiffs have not alleged irreparable injury or the threat thereof by the four Acts. *Id*.

Regarding standing, the United States Supreme Court has said that to demonstrate 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). A plaintiff bears the burden of establishing each element. *Id*. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (internal citation omitted).

Neither League of Women Voters ("LOWV") nor Arkansas United is a "person" affected by the four Acts they challenge. They cannot vote as organizations and are not in a class of persons affected by the Acts. Thus, those Plaintiffs lack standing. Furthermore, all Plaintiffs lack standing because speculative, abstract injuries cannot confer standing, and Plaintiffs' allegations rest entirely on speculation. *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016). Additionally, a statute must be enforced against a plaintiff before he or she may challenge its constitutionality. While pre-enforcement review is available in some contexts, that is true only where "threatened enforcement [is] sufficiently imminent"; that is, where a "credible threat" exists that the provision at issue will be enforced against the plaintiff. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159-60 (2014).

LOWV and Arkansas United also lack associational standing. Federal cases have discussed and defined when "associational standing" exists. In order to demonstrate associational standing, a plaintiff association must show that their "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *American Farm Bur. Fed. v. U.S. Environmental Protection Agency*, 836 F.3d 963, 968 (8th Cir. 2016). The United States Supreme Court has repeatedly "required plaintiff-organizations to make specific allegations establishing *at least one* identified member had suffered or would suffer harm" to support a claim of associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added).

In paragraph 12 of the Complaint, LOWV alleges that it is a nonpartisan, nonprofit membership organization that "encourages informed and active participation in the political process as part of its mission." It purports to bring "this suit on behalf of its members across Arkansas, many of whom will find it more difficult, if not impossible, to cast their ballots and participate in the democratic process if the Challenged Provisions stand." In paragraph 13 of the Complaint, Arkansas United alleges its mission is to promote and provide services to Arkansas's immigrant population, including promoting civic engagement and democratic participation. It claims membership of more than 800 individuals in the State of Arkansas.

LOWV also alleges that in order to achieve its mission, "the League devotes substantial time, effort, and resources to helping Arkansas voters ensure their in-person and absentee ballots are properly cast and counted." *Amended Complaint*, ¶ 13. Their claims, coupled with that allegation, are circular. The four laws at issue do not impair the franchise; rather, they involve election mechanics. If LOWV's mission is to assist persons voting both in-person and absentee, then it only need follow the laws at issue in providing such assistance. The four Acts do not injure LOWV. Rather, at most the four laws simply require LOWV to make minor adjustments in effecting its mission. LOWV complains that the Acts will require re-training of its members and volunteers. *Amended Complaint*, ¶ 14. Even assuming *arguendo*, that were true, it does not amount to a claim of irreparable harm and it does not give LOWV standing here.

Next, Arkansas United speculates that it will be required to divert scarce resources away from other policy priorities, because of the challenged Acts. As discussed herein, Plaintiffs have mischaracterized the plain language of the challenged Acts and their fears are speculative. Such speculative future injury fails to confer standing on Arkansas United as an entity. *Braitberg*, 836 F.3d at 930. Moreover, Arkansas United cannot plausibly allege that the challenged Acts themselves will necessitate Arkansas United to divert its efforts away from whatever its other priorities happen to be. Indeed, how do the challenged Acts, according to their plain language instead of the Plaintiffs' unreasonable characterization of the Acts' language, prevent Arkansas United from "encouraging voters to vote" at polling

locations unless such conduct amounts to unlawful electioneering or loitering? The allegations in paragraphs fifteen and sixteen simply make no sense: voters present at a polling location almost certainly do not need anyone's encouragement to vote as that is why the voters are presumably there in the first place. The organization/association Plaintiffs have not and cannot articulate a resource-diversion injury that is "fairly traceable to the challenged action of the defendant," and both lack associational and organizational standing. *Bernbeck v. Gale*, 829 F.3d 643, 646 (8th Cir. 2016) (internal quotation omitted).

Furthermore, in many paragraphs of the Amended Complaint, the Plaintiffs cite statistics regarding black voter turnout and claim that the Acts at issue will allegedly exacerbate such voter turnout *Amended Complaint*, pp. 14-15. It is unclear if any member of either Plaintiff Organization is similar to Haas in the *Martin* case. As a result, it is not possible for the Court to know whether the Plaintiffs' members ever will be affected by the challenged acts in any way whatsoever. *Mo. Protection & Advocacy Services, Inc. v.* Carnahan, 499 F.3d 803, 810 (8th Cir. 2007). Furthermore, the description by LOWV and Arkansas United of their organizations fails to inform the Court or the Defendants if "the interests at stake are germane to" the purposes or mission of either association. Neither purports to be an organization working to ensure Black voters are not disenfranchised, yet they purport to bring this suit on behalf of such voters. It is also unclear if the individual Plaintiffs belong to a suspect class and, thus, whether they are in a class of persons who will allegedly be affected by the Acts to the extent the Plaintiffs allege. Thus, Plaintiffs' citation to statistics

regarding black voter turnout are immaterial to *Plaintiffs'* claims. The Defendants deny the Plaintiffs' bare allegations that the Acts will impair or in any way interfere with the right to vote. Nevertheless, for the reasons stated herein, Plaintiffs lack standing. On this independent basis, the Complaint should be dismissed.

Plaintiffs also lack standing because the acts they challenge involve county boards and county election officials, not the State Board of Election Commissioners ("SBEC") or the Secretary of State. The county boards have sole statutory authority to "[e]nsure compliance with all legal requirements relating to the conduct of elections." Ark. Code Ann. § 7-4-107(a)(1); *see id*. §7-5-414(c) and §7-5-416 (processing, counting, and canvassing of absentee ballots under the supervision of the county board of election commissioners). Indeed, Act 736, for instance, amends Ark. Code Ann. § 7-5-416, regarding actions to be taken specifically by *county* election officials.

Plaintiffs also cannot succeed on their claims because they have not demonstrated the Defendants caused or will cause any injury alleged. As a result, Plaintiffs do not have standing against these Defendants. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253-58 (11th Cir. 2020). Even the Secretary of State's position as the "chief election officer of the state" with "general supervision and administration of the election laws" does not make any purported injury caused by the county boards' future actions traceable to the Secretary of State or SBEC. *Id*. at 1253; *see also Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181 (11th Cir. Dec. 21, 2020). Plaintiffs ignore the "settled principle that it must be *the effect of the court's judgment on the defendant*—not an absent third

party—that redresses the plaintiff's injury." *Jacobson*, 974 F.3d at 1254 (internal citation omitted). Because a judgment against the State of Arkansas, the Secretary of State, or SBEC would not have any effect on the county election officials who actually administer elections, Plaintiffs do not have standing against these Defendants and the Amended Complaint must be dismissed.

B. Plaintiffs have failed to name necessary and interested parties.

For the same reason Plaintiffs lack standing—that any alleged harm is not fairly traceable to the SBEC or Secretary of State—Plaintiffs have also failed to name necessary, indispensable, and interested parties. Each county election board and its officials *at least* are necessary parties under Fed. R. Civ. P. 19 and "interested parties" under the Declaratory Judgment Act, on the grounds that they have an "interest which would be affected by the [declaratory relief]." Ark. Code Ann. § 16-111-111(a).

Arkansas law defines an indispensable party as one without whom complete relief cannot be accorded. Ark. R. Civ. P. 19(a). Here, Plaintiffs cannot have the acts at issue declared unconstitutional without the inclusion of all necessary parties to include the counties that will implement the acts at issue. Additionally, Arkansas law defines a necessary party as one who has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest. *Id.* Undoubtedly, the counties who in the first instance administer elections, have an interest in this case. Additionally, Plaintiffs—who seek declaratory relief on page 37 of their Complaint—have failed to comply with the requirements of the Arkansas Declaratory Judgment Act by omitting

county election boards and officials as parties. A portion of the Arkansas Declaratory Judgment Act states:

> The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Ark. Code Ann. § 16-111-106. Further, Ark. Code Ann. § 16-111-111 states in part:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In *Davis v. McKinley*, the Arkansas Court of Appeals found that a trial court could properly refuse to render a declaratory judgment where an interested party had not been named and, thus, the issuance of a declaratory judgment could not terminate the controversy at issue. 104 Ark. App. 105, 107, 289 S.W.3d 479, 480 (2008); *see also Johnson v. Robbins*, 223 Ark. 150, 264 S.W.2d 640 (1954) (reversing trial court's failure to dismiss a declaratory judgment action where interested party not named). For these reasons alone, the Amended Complaint must be dismissed.

C. The appropriate level of review to assess the challenged acts is rational basis and the laws at issue are constitutional.

Assuming *arguendo*, the Court were to find Plaintiffs have standing and have named all indispensable and interested parties, the Defendants will address the merits. For Plaintiffs to prevail, they would be required to show any of the four acts are "clearly incompatible" with the Arkansas Constitution "and any doubt must be resolved in favor of constitutionality." *Martin v. Haas*, 2018 Ark. 283, at *9, 556

S.W.3d 509, 515. That is the appropriate standard for this Court to assess the Plaintiffs' claims here.

As stated in the introduction, Plaintiffs claim that strict scrutiny applies because, they allege, the right to vote without impairment, contained in Article 3, Section 2 of the Arkansas Constitution, is implicated by the four challenged Acts. Plaintiffs are incorrect, which rests largely on their mischaracterization of the Acts themselves. And their sweeping labels and conclusions are insufficient to implicate that provision of the Constitution. None of the four challenged Acts infringes on the "right of suffrage." Thus, at most—in addition to the "clearly incompatible" standard—rational-basis review applies. *See McDaniel v. Spencer*, 2015 Ark. 94, at *9-10, 457 S.W.3d 641, 650. Nevertheless, all of the four challenged Acts would survive even a more rigorous standard if the Court deemed it necessary. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Indeed, in *Purcell*, the Court said:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id.

The availability of a provisional ballot upon showing identification by the Monday following an election, the requirement that a person's identity is verified (Act 736 and Act 249), the prohibition on persons *unlawfully* entering the 100 foot zone at

the polls (Act 728), and the requirement that voters return absentee ballots in person a single business day before they were previously due (Act 973), do not implicate the *right to vote*. Rather, at most, the laws at issue involve election mechanics, and do not involve the right to vote itself. The United States Supreme Court has clearly made a distinction between laws like the Acts challenged here and laws that actually implicate the right to vote. The Court reasoned in *McDonald v. Bd. of Election Com'rs of Chicago*:

> [T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise . . . .

394 U.S. 802, 807-08 (1969).

As a result, the Supreme Court employed rational-basis review and said:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal.

Id. at 809. The Court further reasoned:

> Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications *will be set aside only if no grounds can be conceived to justify them*.

Id (emphasis added). Thus, even a hypothetical reason the Court or parties can conceive of will justify a law subject to rational-basis review.

In *McDaniel v. Spencer*, the Arkansas Supreme Court said regarding an equal-protection challenge:

> Equal protection does not require that persons be dealt with identically; it requires only that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment be not so disparate as to be arbitrary.

2015 Ark. 94, at *9-10, 457 S.W.3d 641, 650.

Because the Plaintiffs' challenges to the Acts in question—specifically their challenges under the "right to suffrage" provision of the Constitution and Equal Protection Clause—do not implicate the "right to vote," they should receive rational-basis review. The Acts are constitutional and not "clearly incompatible" with the Constitution. Finally, Plaintiffs' challenge to Act 249 is governed by the standard set forth in Amendment 51, as discussed by the Arkansas Supreme Court in *Martin*, 2018 Ark. 283, at *3-5, 556 S.W.3d at 512-13. That is, whether the Act is germane to and consistent with the purposes of Amendment 51.

1. <u>Act 736 is constitutional</u>

Plaintiffs challenge Act 736 which amended, *inter alia*, Ark. Code Ann. § 7-5-404(a)(1)(A). The subsection now states:

> Applications for absentee ballots must be signed by the applicant and verified by the county clerk by checking the voter's name, address, date of birth, and signature from the voter registration application unless the application is sent by electronic means.

The Act also amended Ark. Code Ann. § 7-5-404(a)(2)(A), which now reads:

> If the signatures on the absentee ballot application and the voter registration application record are not similar, the county clerk shall not provide an absentee ballot to the voter.

Most of the language in these two provisions pre-existed Act 736. The only addition or change is the word "application." So, if a signature on an application for an absentee ballot and a signature on a voter registration *application* are not "similar" the individual will be denied an absentee ballot. Under other existing provisions of that statute, specifically subsection (a)(2)(B), if an absentee ballot is not provided due to the lack of similarity of signatures, the voter is given notice of the rejection and the opportunity to resubmit the request. The voter may also update his or her voter registration, and the signature on the application would only need to be "similar" to the updated registration signature. The signatures must be "similar," not identical, notwithstanding Plaintiffs' mischaracterization of the Act.

Such is a legitimate way to ensure the integrity of the election in a broader sense and to avoid fraud. It does not preclude an individual from voting in person if he or she otherwise establishes his or her identity and, thus does not impair, interfere with, or impede the right to vote. Thus, the Act does not violate the Constitution because a rational basis exists—preventing voter fraud—and the Complaint should be dismissed as to Act 736.

Plaintiffs also claim Act 736 violates equal protection by making allegedly unlawful distinctions among voters. Again, rational-basis review applies because the Act does not infringe upon the right to vote; rather, it merely involves election mechanics. Here, any putative voter who submits an application for an absentee ballot is demonstrably not similarly situated to an individual voting in person. And, because the putative voter who wishes to cast an absentee ballot is not present at the

polls, the legitimate and compelling governmental interest in avoiding voter fraud justifies the Act. "Voting fraud is a serious problem in U.S. elections . . . , and it is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *see also* Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* (University of Arkansas Press 2011). Thus, the Act does not violate the Equal Protection Clause.

Finally, Plaintiffs claim that the Act violates Article 3, § 1 because it allegedly adds qualifications for voters not found in the Constitution. Plaintiffs ignore the entirety of Article 3, § 1. Section (b)(1) states:

> In addition to the qualifications under subsection (a) of this section, the General Assembly shall provide by law that a voter shall:
> (A) Present valid photographic identification before receiving a ballot to vote in person; and
> (B) Enclose a copy of valid photographic identification with his or her ballot when voting by absentee ballot.

. . .

> (d)(e) A provisional ballot under subdivision (d)(1) shall be counted only if the voter subsequently certifies the provisional ballot *in a manner provided by law*.

Ark. Const. art. 3, § 1. These provisions were approved by voters in the 2018 election and became Amendment 99 to the Arkansas Constitution. Thus, Plaintiffs' citation to *Martin v. Kohls*, 2014 Ark. 427, 444 S.W.3d 844 is unhelpful because that decision predates Amendment 99.

As amended, the Constitution now clearly establishes that the General Assembly can provide by law ways in which voters may submit provisional ballots. Thus, the Act is not "clearly incompatible" with the provisions of the Constitution

regarding qualifications of voters. It does not add any additional criteria for a voter to exercise his or her right to vote; it merely implements other provisions of Article 3, § 1. The Plaintiffs' claims against Act 736 must be dismissed.

2. <u>Act 249 is constitutional</u>.

Act 249 amended Amendment 51, § 13(b)(4) and (5), which concerns what is known as "fail-safe voting and verification of voter registration." In *Martin*, Haas challenged Act 633 of 2017. 2018 Ark. 283, at *3-5, 556 S.W.3d at 512-13. The Arkansas Supreme Court discussed the amendment to Amendment 51 in *Martin* by Act 633. *Id*. Act 633 amended Amendment 51 to provide a comprehensive voter verification and identification law under the Arkansas Constitution. Relevant to this case, it included provisions requiring that persons voting provide verification of their voter registration in the form of a document or identification card showing the person's name and photograph; it provided two ways a voter could cast a provisional ballot where the voter did not have compliant identification on Election Day; and it required absentee voters to enclose a copy of compliant identification with their ballot. 2018 Ark. 283, at *3-5, 556 S.W.3d at 512-13.

In this case, Plaintiffs challenge Act 249, which amended Amendment 51, to eliminate the "sworn statement" provision created by Act 633. That provision was one of two ways a voter could cast a provisional ballot where the voter lacked photo identification on Election Day. However, Act 249 did *not* remove the provision in Amendment 51 from Act 633, that a voter may still cast a provisional ballot if the voter returns to the "county board of election commissioners or the county clerk" by

noon on the Monday following the election and presents a document or identification card. . . ." That provision is now found at Amendment 51, § 13(b)(4)(A).

Consequently, Amendment 51, as amended by Act 249, still permits a voter without identification on Election Day to cast a provisional ballot and gives the voter six days to return with compliant identification. Such identification is issued by the State of Arkansas for free, as Plaintiffs concede in the Amended Complaint. If a voter returns in that period with compliant identification, their ballot will be counted. This is consistent with the provisions of Article 3, § 1 cited above, as amended by Amendment 99, which give the General Assembly the power to provide by law when a provisional ballot may be counted. Thus, it is not "clearly incompatible" with the Constitution.

Again, this amendment involves the integrity of the vote and the prevention of voter fraud. "Voting fraud is a serious problem in U.S. elections . . . , and it is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004); *See also* Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* (University of Arkansas Press 2011). Further, "the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake." *Tully v. Okeson*, 977 F.3d 608, 611 (6th Cir. 2020) (citing *McDonald*, 394 U.S. at 807)). Plaintiffs' citation to statistics simply does not matter. The question is whether a rational basis exists justifying the amendment, and even a "conceivable" or hypothetical rational basis suffices to save

such a law. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488-89 (1955); *Arkansas Dept. of Correction v. Bailey,* 368 Ark. 518, 532, 247 S.W.3d 851 (2007) ("When a fundamental right is not implicated, the State need only show that the statute's registration requirements are rationally related to a legitimate governmental purpose."); *Winters v. State*, 301 Ark. 127, 131-32, 782 S.W.2d 566, 568-69 (1990). Here, election integrity and prevention of fraud are rational bases that serve to justify the law.

Furthermore, the standard the Arkansas Supreme Court found appropriate for legislative amendments to Amendment 51 was whether an act—there, Act 633 of 2017—is "germane to the purposes of Amendment 51." *Martin*, 2018 Ark. 283, at *9-10, 556 S.W.3d at 515-16. As Plaintiffs concede in this case, the Supreme Court in *Martin* found Act 633 of 2017 germane to the purposes of Amendment 51. Thus, it is necessarily true that Act 249 is germane to the purposes of Amendment 51. Amendment 51 states:

> The purpose of this amendment is to establish a system of permanent personal registration as a means of determining that all who cast ballots in general, special and primary elections, in this State are legally qualified to vote in such elections, in accordance with the Constitution of Arkansas and the Constitution of the United States.

Ark. Const. amend. 51, § 1. Act 249 simply removes the conceivable occurrence that someone could utilize the sworn statement to commit voter fraud. Again, as stated, even a hypothetical or conceivable basis justifying a law will pass muster under the rational-basis test. The entirety of Act 633 of 2017 was found constitutional in *Martin*. The Court said:

> In our view, providing a system of verifying that a person attempting to cast a ballot is registered to vote is relevant and pertinent, or has a close relationship, to an amendment establishing a system of voter registration. We hold that verifying voter registration as set out in Act 633 is germane to Amendment 51.

Martin, 2018 Ark. 283, at *11, 556 S.W.3d at 516. The Court also found Act 633 was consistent with the purpose of Amendment 51. *Id*. at *12, 556 S.W.3d at 517. Therefore, because Act 249 only omits one provision of Act 633, which has already been found constitutional, it is necessarily true that Act 249 is likewise germane to and consistent with the purposes of Amendment 51. It does not infringe on the right to vote at all. It involves ensuring the integrity of elections and ensuring persons voting are eligible to vote. Plaintiffs' claim against Act 249 must be dismissed.

The new allegations of alleged harm by the individual Plaintiffs do not change this result. For instance, Plaintiff Dunlap states she does not plan to renew her driver's license. *Amended Complaint*, ¶ 17. Even if true, that does not preclude her from obtaining an identification card for free well before the next election. She cannot show harm, irreparable or otherwise. Plaintiff Kaplan alleges he moved here in 2019 from Texas and wants to rely on the former affidavit provision of Act 249 to cast a provisional ballot. *Amended Complaint*, ¶ 18. He recounts his alleged use of the affidavit provision in the past election. He claims—without explanation—that burdens will exist in obtaining an identification card or other acceptable form of identification. *Id*. Again, it is currently July of 2021 and he has ample time to obtain a proper form of identification to cast a ballot with, as do all of the Plaintiffs. Their unwillingness to do so simply has no bearing on the constitutional validity of Act 249

and such a self-imposed alleged burden is unreasonable. The Act is constitutional and the Amended Complaint should be dismissed.

3. <u>Act 728 is constitutional</u>.

Act 728 of the 93rd General Assembly provides that "A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place ***except for a person entering or leaving a building where voting is taking place for lawful purposes***." (emphasis added). Moreover, Act 728 sought to amend the law concerning electioneering and law concerning penalties for misdemeanor offenses related to voting. Electioneering is defined as "display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot." Ark. Code Ann. §7-1-103(a)(C)(i). Given the plain and unambiguous language of Act 728 in conjunction with the Right to Suffrage Clause, Equal Protection Clause, and Right to Speech and Assembly Clauses of the Arkansas Constitution, the Plaintiffs' challenge to Act 728 must fail.

Article 3, § 2 of the Arkansas Constitution, referred to as the Free and Equal Elections Provision, holds that "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 . . . .*" Ark. Const., art. III, § 2 (emphasis added). Here, Plaintiffs allege that Act 728 directly "impair[s] and forfeit[s]" the voting rights of their organization and its members. Specifically, Plaintiffs allege in their Amended Complaint that Act 728 bars voters

from obtaining basic sustenance and therefore forces voters to choose between leaving the line and their health and safety.

The Act only limits any *unlawful* act within the one hundred foot (100') zone.[3] Nothing prohibits anyone from leaving an ice chest with water in that zone. The Act does not prevent a person assisting a disabled person within that zone. The Act does not prevent a parent from bringing a child with them to vote in that zone.

Furthermore, Plaintiffs plainly mischaracterize the Act. For instance, Plaintiff Kaplan claims that he requires assistance from his daughter or another family member to vote in person at a polling location. *Amended Complaint*, ¶ 18. Nothing in Act 728 would preclude Plaintiff Kaplan from bringing his daughter or other family member with him, given the Act's plain and unambiguous language. Plaintiffs' attempt to distort a clear statute should not be countenanced by the Court. What is unlawful is simple: electioneering within the 100 foot zone or loitering there. Nowhere in the language of the act is any organization or individual, such as the Plaintiffs, barred from providing sustenance 100 feet from the "primary exterior entrance to a building, where voting is taking place. . . ." § 7-1-103(a)(23). Further, Act 728 does not prevent any organization or individual, such as the Plaintiffs, from leaving coolers full of water or snacks within 100 feet of the "primary exterior entrance to a building, where voting is taking place. . . ." *Id.*

[3] The United States Supreme Court has already ruled that the 100 foot zone serves a compelling governmental interest of protecting the fundamental right to vote without intimidation and to prevent fraud. *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

Additionally, Plaintiffs' argument fails logically. In their complaint, Plaintiffs mention that in 2020, voters in Pulaski County endured wait times as long as four hours; given that queue, lines undoubtedly stretched more than 100 feet from the "primary exterior entrance," allowing organizations and individuals such as the Plaintiffs to engage in the very conduct they claim is unduly burdened by Act 728. The Act does not violate Article 3, Section 2, of the Arkansas Constitution.

Article 2, § 3 of the Arkansas Constitution, (the Equal Protection Clause), states that "[t]he equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition" Ark. Const. art. II, § 3. The act does not treat similarly situated individuals differently and applies the provision at issue to anyone. It has a rational basis in that it prevents attempts to thwart other electioneering restrictions and prohibits loitering in the 100-foot zone. All of that to say, it further protects the integrity of elections and serves to provide a safe venue for voters to vote without fear of intimidation. Thus, it must survive review.

Finally, Plaintiffs claim a "free speech" violation relative to this new Act in paragraphs 179-181 of the Amended Complaint in a conclusory manner. Plaintiffs in no way develop this claim. And, as stated, the United States Supreme Court has already found that the 100-foot zone passes strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Here, the act is content neutral and, again, should receive rational-basis review which, as discussed above, it passes. But, assuming *arguendo*,

the Court were to disagree and find the act was requiring to pass strict scrutiny, the United States Supreme Court decision in *Burson* is binding and justifies the Act here. The Amended Complaint should be dismissed as to Act 728.

4. Act 973 is constitutional.

Act 973 amended Ark. Code Ann. § 7-5-404(a)(3)(A) to provide that absentee ballots dropped off in person at the office of a county clerk must be received by the clerk "no later than the time the county clerk's office regularly closes on the Friday before election day." Arkansas is one of only eight States that issue absentee ballots to voters more than 45 days before an election.[4] So the Act moved the deadline to submit absentee ballots in person one business day back, yet voters may still receive an absentee ballot 45 days before an election. Effectively, Plaintiffs believe it is unconstitutional to require *anything* of a voter. And, despite Plaintiffs' cynicism about the United States Postal Service, given the amount of time Arkansas allows before an election for a voter to receive an absentee ballot, there is more than ample time for anyone with an absentee ballot to mail it to the county election officials.

Indeed, the new individual Plaintiffs confirm their cynicism about the mail, but their allegations fail to show an alleged threat of irreparable harm justifying this Court to act in equity. For instance, Plaintiff Rust claims that in the 2020 general election, he dropped his ballot off on the Saturday before the election. *Amended*

[4] "Voting Outside the Polling Place, Table 7: When States Mail Out Absentee Ballots," *National Conference of State Legislatures* (Sept. 21, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-7-when-states-mail-out-absentee-ballots.aspx.

Complaint, ¶ 20. So, the new deadline is not simply a business day back from the former deadline for Plaintiff Rust, but simply one calendar day. Asking the Court to act in equity in this case where he clearly is claiming an alleged self-imposed burden will impair his right to vote is not warranted and the Act is constitutional.

Act 973 should also receive rational-basis review because it in no way infringes the right to vote. As stated, even a conceivable rationale for its enactment will justify it. Here, allowing counties an additional day before Election Day to receive absentee ballots will promote organization and avoid counties' being inundated with absentee ballots closer to the election. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, 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.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). That is a conceivable rational basis for the Act and it, thus, passes rational-basis review. Additionally, the Act is not "clearly incompatible" with the Arkansas Constitution. Thus, the Amended Complaint regarding Act 973 should be dismissed.

D. The Defendants are entitled to sovereign immunity.

A claim against a State official in his or her official capacity is tantamount to a claim against the State itself. *Harris v. Hutchinson*, 2020 Ark. 3, *7, 591 S.W.3d 778, 782-83. The Arkansas Constitution "unequivocally" states: "[t]he State of

Arkansas shall never be made defendant in any of her courts." *Harris*, 2020 Ark. at *4, 591 S.W.3d at 781 (quoting Ark. Const., art. 5, § 20).

"If a judgment in favor of a plaintiff would operate to control the action of the State or subject it to liability, the suit is one against the State and is barred by the doctrine of sovereign immunity." *Id*. The Court must inquire as to whether the relief requested by the Plaintiffs will serve to control the actions of the State *or* subject it to liability.

The Arkansas Supreme Court has held that an action was barred by sovereign immunity, even if it would not require the expenditure of money by a State Agency, because the relief, if granted, would control the actions of the State. *Ark. Dept. of Eviron. Qual. v. Al-Madhoun*, 374 Ark. 28, 32-33, 285 S.W.3d 654, 658-59 (2008). While an exception exists for immunity where a Plaintiff shows the State has acted ultra vires, arbitrarily, capriciously, or in bad faith and only seeks injunctive relief, Plaintiffs here cannot make and have not made that showing. As detailed above, the acts in question are constitutional and are, thus, not ultra vires or illegal. Thus, no injunction should issue and the State—the Defendants in their official capacities—retain sovereign immunity.

V. CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

WHEREFORE, Defendants respectfully request the Court dismiss the Complaint and for all other just and proper relief to which they are entitled.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: *Michael A. Mosley*
Michael A. Mosley
Ark Bar No. 2002099
Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-1019
Fax: (501) 682-2591
Email: michael.mosley@arkansasag.gov

CERTIFICATE OF SERVICE

I, Michael A. Mosley, hereby certify that I served the Clerk of Court with the foregoing on this the 20th day of July, 2021, via the e-flex electronic filing system, which shall send notice to all Counsel of Record.

Michael A. Mosley
Michael A. Mosley