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60CV-21-3138
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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**

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REPLY TO RESPONSE TO 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 Reply to Response to Motion to Dismiss Amended Complaint for Injunctive Relief and Declaratory Judgment herein state and allege:

I. INTRODUCTION

Plaintiffs, organizations and/or associations and individuals, brought suit against Defendants in their official capacities, i.e., the State of Arkansas, challenging four acts of the 93rd General Assembly: Act 736, Act 973, Act 249, and Act 728. Defendants moved to dismiss the Amended Complaint and the Plaintiffs have now

responded. Plaintiffs' Response fails to overcome Defendants' entitlement to dismissal as Plaintiffs have failed to state facts upon which relief can be granted. Ark. R. Civ. P. 12(b)(6). The Motion to Dismiss the Amended Complaint and Brief in Support are incorporated by reference herein as if repeated word for word pursuant to Ark. R. Civ. P. 10(c).

II. DISCUSSION

A. Standard to Challenge the Acts

Defendants have argued that rational-basis review applies and that the Acts are presumed constitutional and can only be found unconstitutional if they are "clearly incompatible" with the Arkansas Constitution. "[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. However, despite Plaintiffs' assertion otherwise on page 26 of their Response, Defendants clearly argued that the Acts would survive even a more rigorous standard assuming *arguendo* they burdened the right to vote. *Defendants' Brief in Support of Motion to Dismiss Amended Complaint*, pp. 3, 16.

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Plaintiffs erroneously argue strict scrutiny applies. The Plaintiffs cite *Davidson v. Rhea*, 221 Ark. 885, 256, S.W.2d 744 (1953) among other cases for that proposition. *Davidson* actually supports the *Defendants'* argument. There, the Arkansas Supreme Court said:

> The constitutional convention and the legislature are equally the representatives of the people, and the written constitution marks only

> the degree of restraint which, to promote stable government, the people impose upon themselves; but whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. The legislature, just as completely as a constitutional convention, represents the will of the people in all matters left open by the constitution. *Com. v. Reeder*, 171 Pa. 505, 33 A. 67, 33 L.R.A. 141. Unless, therefore, the legislature is inhibited from enacting the law we are considering, it is as much the will of the people as though expressed in the constitution. **Let us ask, therefore, what provision is there in the constitution inhibiting the lawmaking power from providing when, how, and under what regulations and conditions the elector may exercise the right of suffrage? The constitution has not, as we have seen, prescribed any conditions or rules governing the exercise of the right; nor has it inhibited the legislature from prescribing such rules, regulations, and conditions as it might deem proper and for the public interests**. The lawmaking power has taken the elector at the point where the constitution has left him, and has provided when, in what manner, and under what restrictions he may exercise the right of suffrage […]

Davidson, 221 Ark. at 889, 256 S.W.2d at 746 (adopting the reasoning from *Chamberlain v. Wood*, 15 S.D. 216, 88 N.W. 109 (1901) (emphasis added)). Indeed, in *Davidson*, a write-in candidate for a mayoral race challenged the constitutionality of Act 105 of 1935, which prohibited write-in ballots in municipal elections in cities of the first class. *Id.* at 886-87, 256 S.W.2d at 744-45. Specifically, like Plaintiffs here, the Appellant in *Davidson* challenged the Act under Article 3, Section 1 of the Arkansas Constitution. The Court held the Act was constitutional and did not violate Article 3, Section 1.

Thus, despite Plaintiffs' contention to the contrary, *Davidson* does not stand for the proposition that the "right to have one's ballot counted free from arbitrary interference" is a fundamental right requiring strict scrutiny. Plaintiffs' citation to *Henderson v. Gladish* likewise does not support Plaintiffs' proposition. 198 Ark. 217,

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128 S.W.2d 257 (1939). *Henderson* was a poll tax case where a statute required receipt of payment of the poll tax to be written in pen and ink. In that case, some receipts were written in pencil. The Arkansas Supreme Court did find that, even if written in pencil, the receipts were valid, but never held that strict scrutiny applies in a case like the case before the Court and never held that a fundamental right was implicated. *Id.* Plaintiffs' pinpoint citation to *Henderson* does not support their assertion on page 25 of Plaintiffs' Response. Moreover, Plaintiffs do not allege sufficient facts to demonstrate any true burden imposed *by the Acts* in this case, much less a severe burden. If any burden exists, it is a self-imposed burden that is not severe and not caused by the Acts in question.

Plaintiffs also cite *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), and Justice Hart's Concurrence in *McDaniel v. Spencer*, 2015 Ark. 94, 457 S.W.3d 641 (Hart, J. concurring in part), for their proposition that a fundamental right is implicated by the Acts in this case and that strict scrutiny applies. The *Jegley* case is not apposite here and, respectfully, Justice Hart's concurrence is not precedential. If *McDaniel* has any application, it demonstrates that Acts like those challenged here receive rational-basis review as against an equal protection challenge. The Court said: "The equal-protection clause permits classifications that have a rational basis and are reasonably related to a legitimate government purpose." 2015 Ark. 94, at *9-10, 457 S.W.3d 641, 650. Thus, in this case where Plaintiffs do attempt equal protection challenges, rational-basis review clearly applies.

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The *Jegley* case is simply not applicable. There, the Arkansas Supreme Court found a right of privacy existed in the Arkansas Constitution. It has nothing to do with the right to vote and does not indicate that Plaintiffs' alleged rights here are fundamental or have been infringed by the challenged Acts based on the facts they have pled. 349 Ark. at 632-33, 80 S.W.3d at 350. Indeed, Plaintiffs' Response is slim on properly pled facts; a substantial percentage of the assertions in the Response are legal conclusions and theories *couched* as facts. The Court cannot assume such conclusions and theories as true in ruling on the instant motion. *Ark. State Claims Comm'n v. Duit Constr. Co.*, 2014 Ark. 432, at 8, 445 S.W.3d 496, 503.

Rather, as stated in Defendants' opening brief, rational-basis applies because the Acts at issue do not impact the right to vote. *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 807-09 (1969). The Plaintiffs' reliance on *O'Brien v. Skinner*, 414 U.S. 524 (1974), is misplaced. There, a statute made it impossible for inmates to vote in any manner whatsoever. In any event, the Plurality Opinion in *O'Brien* did *not* employ strict scrutiny and did not abrogate *McDonald*'s use of the rational-basis test where a voter still has some means to vote. In fact, three Justices' Concurrence made clear the distinction between *O'Brien* and *McDonald* and said:

> Because of the relatively trivial inconvenience encountered by a voter unable to vote by absentee ballot when other means of exercising the right to vote are available, the Court properly rejected appellants' contention that strict scrutiny of the statutory classifications was required.

414 U.S. at 532 (Marshall, J. Douglas, J. Brennan, J., concurring) (discussing *McDonald*). In that regard, *O'Brien* severely undercuts the Individual Plaintiffs'

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claims here.[1] Arkansas provides multiple avenues for voters to vote. Ark. Code Ann. § 7-5-418 (early voting); *id.* § 7-5-102 (Election Day); *id.* § 7-5-401 *et seq.* (absentee voting). Thus, *O'Brien* has no application in this case, particularly where the alleged burdens on Plaintiffs are self-imposed. For instance, Plaintiffs' cynicism about the Postal Service is feigned, particularly where voters have at least 45 days to obtain an absentee ballot. If Plaintiffs desire to wait until the last minute to request an absentee ballot, fill it out, and return it, that is a burden they have placed upon themselves. Additionally, Plaintiffs appear to refuse to even try—months before the next primary elections—to obtain an identification from the State, which as they concede, is provided for free.

Assuming *arguendo* that the Acts created any burden on Plaintiffs' right to vote, which is denied, strict scrutiny still would not apply, a fact of which Plaintiffs are clearly aware given their citation, in footnote 7 of their Response, to *Burdick v. Takushi*, 504 U.S. 428 (1992) and their reliance, on page 30, on *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See Response*, pp. 26, fn.7, 30 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). However, unless a "severe burden" on the right to vote

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[1] As stated in Defendants' opening brief, the association/organization Plaintiffs cannot vote and none of the challenged Acts affect them and, thus, they lack standing. Furthermore, the Counties are indispensable and interested parties in this litigation and their lack of joinder dictates dismissal. *See Jacobsen v. Florida Sec. of State*, 974 F.3d 1236, 1241-42 (11th Cir. 2020). Furthermore, all Plaintiffs lack standing because, as shown in Defendants' opening brief and herein, Plaintiffs have not suffered a burden on the right to vote given the many avenues Arkansas provides for voters to vote. Rather, Plaintiffs' alleged harm is "conjectural" or "hypothetical" and, thus, all Plaintiffs lack standing. *Gill v. Whitford*, 138 S.Ct. 1916, 1921 (2018). Plaintiffs have not sufficiently alleged an "actual," "imminent" threat of harm via facts in this case and lack standing. *Id.*

has been alleged with sufficient facts—and here it has not—rational-basis review should apply. *Republican Party of Pennsylvania v. Cortes*, 218 F.Supp.3d 396, 408 (E.D. Pa. 2016) ("Where the right to vote is not burdened by a State's regulation on the election process, however, the state need only provide a rational basis for the statute.") (citing *Donatelli v. Mitchell* 2 F.3d 508, 514 & n.10)); *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("When a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'")); *see* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 331 (2007) (explaining that review "in nonsevere-burden cases," such as in the case at bar, is "something like rational basis review").

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Even assuming *arguendo* Plaintiffs have alleged a "severe" burden with sufficient facts (and they have not), the *Anderson/Burdick* framework would be the most proper test for the appropriate standard of review. The Arkansas Supreme Court has clearly embraced *Anderson/Burdick* as the law in this State where a severe burden is sufficiently alleged via facts. *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 359-60 (1994). In *Hill*, the Court said:

> The proper standard for resolving the assessment of the State's interest and the burden on supporters has since been described "as a more flexible standard" dependent on the severity of the burden. *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992). However, not every burden on the right to vote is subject to strict scrutiny or requires a compelling state interest to justify it. *Id.*

Id.

The *Anderson/Burdick* framework flows from two seminal Supreme Court cases, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Typically, that framework is used to resolve claims that a State's ballot-access laws, as a general matter, violate the First and Fourteenth Amendments. *See, e.g.*, *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687, 691, 701 (8th Cir. 2011) (applying *Anderson/Burdick* and rejecting general challenge to North Dakota's ballot-access requirements, despite their "substantial burden," because they were "necessary to serve compelling state interests"); *Green Party of Arkansas (GPAR) v. Martin*, 649 F.3d 675, 677, 686-87 (8th Cir. 2011) (upholding Arkansas's requirements for new political parties because "the burdens imposed" were "significantly outweighed by Arkansas's important regulatory interests").

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The United States Supreme Court has long recognized that "States possess a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1," and local officials. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Moreover, while voting is fundamental to our political system, "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (quotation marks omitted). To the contrary, because elections are ultimately about choosing winners and losers, "[a]ttributing to [elections] a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* at 438; *see also Storer v. Brown*, 415 U.S. 724, 735 (1974).

As a result, courts apply a sliding-scale analysis to determine the constitutionality of voting laws. *See Burdick*, 504 U.S. at 432 (criticizing "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"). To "discern the level of scrutiny required" under this analysis—and thus the nature of the interest a State needs in order to justify an election regulation—courts must "analyze the burdens imposed" by that regulation. *GPAR*, 649 F.3d at 681. Where a State's election regime "imposes only modest burdens," the State's "important regulatory interests" in managing "election procedures" suffice to justify that regime.[2] *Wash. State Grange*, 552 U.S. at 452 (quotation marks omitted). Indeed, "[s]tates certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

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Alternatively, a more exacting standard—requiring a compelling interest and tailoring—applies only to *severely* burdensome requirements. *See GPAR*, 649 F.3d at 680. Hence, the Defendants "need not assert a compelling interest" unless Plaintiffs first establish that the challenged Acts impose a ***severe burden*** on Plaintiffs' rights. *Wash. State Grange*, 552 U.S. at 458. Here, wherever this case

[2] As argued in Defendants' Brief in Support of Motion to Dismiss Amended Complaint, the Acts at issue here at most involve election mechanics, i.e., election procedures. They do not affect the right to vote. As noted by the United States Supreme Court, Arkansas has "important regulatory interests" in managing such procedures. *Wash. State Grange*, 552 U.S. at 452; *see also McDonald*, 394 U.S. at 807-08.

lands on *Anderson/Burdick*'s sliding scale, Plaintiffs' claims fail. Indeed, Plaintiffs do not allege, via well-pled facts, any *severe* burden on their right to vote *because of* the Acts at issue. Indeed, in *GPAR*, the Green Party complained about, *inter alia*, costs associated with hiring individuals to collect signatures. This is similar to Plaintiffs' alleged burdens in this case where Plaintiffs allege, *inter alia*, they will be required to travel to obtain an identification because of the elimination of the affidavit provision to obtain a provisional ballot. The Eighth Circuit said:

> Although the Green Party may incur some costs because of its choice to hire individuals to collect signatures, the ballot access scheme does not impose severe burdens on the Green Party and Arkansas need not collapse every barrier to ballot access.

GPAR, 649 F.3d at 683. The Acts in this case do not infringe upon the right to vote and any alleged burden identified by the Plaintiffs is a self-imposed burden.

Additionally, Plaintiffs are incorrect that this Court cannot rule as a matter of law on the instant motion and, further, are incorrect that the State must prove, via a factual record, its interest in election integrity. Plaintiffs claim *Gilmore v. County of Douglas*, 406 F.3d 935 (8th Cir. 2005), should not be considered by the Court because it is not a "voting" case. However, it is a case discussing rational-basis review by our United States Circuit Court of Appeals and Plaintiffs themselves selectively use "non-voting" cases for various propositions in their Response, which belies their criticism of *Gilmore*'s impact here. Indeed, their sole case—*Jegley v. Picado*—that they cite to

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argue strict scrutiny applies is likewise a non-voting case.[3] By Plaintiffs' logic, *Jegley* should be wholly disregarded by the Court.

In *Gilmore*, the Eighth Circuit said:

> We have thus explained that because all that must be shown is "any reasonably conceivable state of facts that could provide a rational basis for the classification, it is not necessary to wait for further factual development" in order to conduct a rational basis review on a motion to dismiss.

Id. at 937. As stated, because Plaintiffs have not pled facts alleging a "severe burden" on their right to vote, rational-basis review applies and *Gilmore* instructs that no factual development is necessary where, like here, conceivable bases exist justifying the Acts at issue. *See also GPAR*, 649 F.3d 675, 685 (8th Cir. 2011)

However, even when *Anderson/Burdick*'s sliding scale is applied, each Act is constitutional. The State has a compelling governmental interest in the integrity of its elections and that interest is well enshrined in the law, and is a pure issue of law. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "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

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[3] Plaintiffs cite other non-voting cases for various propositions in their Response, which again undermines their attempt to have this Court disregard *Gilmore*. *See Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 3500 (2001) (statute criminalizing insults against teachers); *Orrell v. City of Hot Springs*, 311 Ark. 301, 844 S.W.2d 310 (1992) (sexually-oriented business ordinance); *Stamas v. County of Madera*, 2010 WL 2556560 (E.D. Cal June 21, 2010) (unreported) (claim involving easement), all cases relied on by Plaintiffs.

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). As discussed in Defendants' opening brief and below, the Amended Complaint must be dismissed.

B. <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.

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Most of the language in these two subsections pre-dated Act 736. The only change is that the clerk now checks the ballot application and the registration *application* for similarity, not a match. In fact, Plaintiffs' continued misreading of Act 736, which does not require signatures to "match," dooms their Amended Complaint from the outset as it would require this Court to impermissibly add a word to the Act that is not present. The Arkansas Supreme Court has repeatedly said:

> In construing statutes, this court will not add words to a statute to convey a meaning that is not there. Furthermore, we will not read into a statute a provision not put there by the General Assembly.

Our Community, Our Dollars v. Bullock, 2014 Ark. 457, at *18, 452 S.W.3d 552, 563. Signatures must only be similar, not match. Plaintiffs' refusal to acknowledge this and their addition of the word "match" to the Act must be disregarded per *Bullock*.

Moreover, Plaintiffs have cited no instances of voters' ballots being rejected under the statutes as they existed prior to Act 736. So, again, their fears are speculative and feigned. Ensuring similarity in signatures is a legitimate way to ensure election integrity, of which the State has a compelling governmental interest as already shown above and in Defendants' opening brief. Specifically, the Act is another way to ensure a voter is who he or she claims to be, something our Constitution now requires per, at least, Amendment 99 to the Arkansas Constitution. The Act is consistent with, not clearly incompatible with, the Constitution. Additionally, the Act passes rational-basis review and the *Anderson*/*Burdick* test if the Court found it necessary to assess the Act under either standard of review given the circumstances of this case. The Act does not create a severe burden on the right to vote and Plaintiffs do not allege it does. Thus, whether the Court employs rational-basis review or *Anderson*/*Burdick*'s sliding scale, the Act is constitutional and the Amended Complaint must be dismissed.

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C. Act 249 is constitutional.

Plaintiffs perch their hopes of challenging Act 249 on a misreading of *Martin v. Haas* and reliance on *Martin v. Kohls*, which was abrogated by *Haas* and Amendment 99 to the Arkansas Constitution. Effectively, *Haas* found the entirety of Act 633 of 2017 constitutional, not simply because it included the affidavit provision.

Yet, the sum of Plaintiffs' argument is that the inclusion of the affidavit provision in Act 633 is the only reason the Act was found constitutional by the Arkansas Supreme Court in *Haas*. *Response*, pp. 31, 33. However, Plaintiffs then quote *Haas* where the Supreme 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*. *Haas*, 2018 Ark. 283, at *11, 556 S.W.3d 509, 516 (emphasis added); *Response*, p. 33. Clearly, Act 249's omission of the affidavit provision, but retention of the identification provision, still serves the purpose of verifying that a person attempting to vote is registered to vote. It simply removes the conceivable occurrence a person could fraudulently use the affidavit provision. Finally, Article 3, § 1 of the Arkansas Constitution, as amended by Amendment 99, now gives the General Assembly the power to provide by law when a provisional ballot may be counted. Act 249 did just that, it provided by law when a provisional ballot may be counted. The Act is consistent with, not incompatible with, the Arkansas Constitution as amended. Plaintiffs' claims regarding Act 249 must be dismissed.

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D. Act 728 is constitutional.

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). Plaintiffs' arguments regarding Act 728 involve Plaintiffs adding words that are not

present in the Act, which is prohibited in construing a statute. *Bullock*, 2014 Ark. 457, at *18, 452 S.W.3d at 563.

The Act does not, by its plain and unambiguous language, prohibit persons from providing snacks or water to voters in line. It does not prohibit the Organization Plaintiffs from leaving ice chests with snacks and water within the 100 foot zone. And, it does not prohibit persons bringing others with them for comfort such as a relative or, in the case of a person with a disability, a caretaker. Plaintiffs' attempt to graft language onto the Act should fail. *Id.* Moreover, Plaintiffs can hardly argue the right to vote includes a right to receive water and snacks; it does not. The Act is not clearly incompatible with the Arkansas Constitution and further serves simply to prevent voter intimidation within the 100 foot zone.

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E. 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.

[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.

The Act survives review under the rational-basis test or *Anderson*/*Burdick*. It does not severely burden the right to vote, particularly considering how early in Arkansas a voter can obtain an absentee ballot. Thus, any conceivable reason for its passage will justify it. As stated in Defendants' opening brief, 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)). Because, in the least, a conceivable basis justifies the Act and because it is not "clearly incompatible" with the Constitution, Plaintiffs' challenge to the Act must fail.

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F. Act 728 does not violate Plaintiffs' free speech or expression rights.

"Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citation omitted) (emphasis in original)). Act 728 is content-neutral and does not implicate the right to speech or expression at all. Here, only by mischaracterizing the plain and unambiguous language of the Act, can Plaintiffs argue a violation of the right to speech or expression found in the Arkansas Constitution. Again, Plaintiffs graft language onto

the Act that simply is not present. They argue: "Act 728 prohibits Plaintiffs from handing water to voters who are waiting in line and within 100 feet of the polling place." *Response*, p. 39. Nowhere does the Act mention handing out water to anyone; the Act prohibits loitering in the 100 foot zone and further supports the prohibition on electioneering in that zone the United States Supreme Court has already found passes strict scrutiny. *Burson v. Freeman*, 504 U.S. 191 (1992).

The Act is content-neutral, and does not serve to restrict *lawful* expressive activity by its plain language; as stated, it does not restrict *any* speech or expression by its plain and unambiguous language. Unless the Plaintiffs want to engage in electioneering within the 100 foot zone, which is lawfully prohibited, or loiter in that zone, they have not violated the Act. That is the result of an analysis of the *actual* language in the Act, not Plaintiffs' strained interpretation of it. Plaintiffs do not deny preventing voter intimidation is a legitimate or even compelling governmental interest. Yet, despite Plaintiffs' bare statement to the contrary, the Defendants *do* deny the Act is designed to curtail constitutionally protected activity. Plaintiffs have simply engaged in writing their own Act to argue their speech claim; they have not discussed the actual language of Act 728 and their claim against it must fail.

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CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendants' opening brief, the Amended 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,

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CERTIFICATE OF SERVICE

I, Michael A. Mosley, hereby certify that I served the Clerk of Court with the foregoing on this the 23rd day of August, 2021, via the e-flex electronic filing system, which shall send notice to all Counsel of Record.

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Michael A. Mosley
Michael A. Mosley